



EDRi Briefing on Better Regulation

On 19 May 2015, European Commission First Vice-President Frans Timmermans presented the Better Regulation package, wherein the Commission committed to “deliver better rules for better results” and to design EU policies and laws that achieve their objectives at minimum cost. Most importantly, this package included the Commission’s [“Proposal for an Interinstitutional Agreement on Better Regulation”](#), which will replace the [2003 “Interinstitutional Agreement on better law-making.”](#)¹

The interinstitutional agreement was negotiated between the European Parliament, the Council of the European Union and the Commission up to 8 December 2015. On 15 December, the Council of the European Union [approved the provisional deal](#) reached between the three institutions.

While the efficiency of regulation is a worthwhile objective with a potential to increase public trust in the EU, this agreement raises several issues of concern. The first one, which has generated public interest and civil society opposition, relates to the potential it introduces for lowering protection standards and increasing corporate influence on legislation. The second one relates to regulation arising from non-legislative procedures. The third issue deals with the question of accountability and legitimacy of the Regulatory Scrutiny Board. Each will be examined in turn.

1. De-regulation and enhanced corporate influence

Since the announcement of the Commission’s proposal, various members of civil society have expressed interest and been actively involved in monitoring developments on the issue. [Better Regulation Watchdog](#), a group of European consumer, environmental, development, citizen and public health organisations and trade unions have raised concerns about the agenda put forth by the Commission. Their premise is that the proposal and related documents do not promote the interests of the European citizens, but aim instead to weaken or neglect essential regulations. Furthermore, the group finds that under the increasing pressure of a number of large business groups, the agenda is prioritising the corporate over the public interest, introducing avenues for business representatives to impact regulation. It would therefore work to strengthen the voice of the business lobby, already disproportionately strong in EU policy-making, and simultaneously reduce the influence held by citizens and civil society.

An example of the potential for increased corporate influence through Better Regulation arises from the increased incidence of stakeholder consultations throughout the regulatory process. The package introduces the possibility of holding consultations throughout the full cycle, including

¹ The package also includes documents such as [“Better Regulation for Better Results – An EU Agenda”](#), the Better Regulation [Guidelines for Commission officials](#), a [Toolbox](#) (including guidelines for Impact Assessment) as well as the Commission [Decision to establish an independent Regulatory Scrutiny Board](#).

after the Commission has submitted its proposals to the legislators. It could be argued that this opens the door for more lobbying activities.²

Here, a parallel could be drawn to the tendency towards so-called Regulatory Cooperation under several of the EU's recent or ongoing trade negotiations, such as TTIP.³ These agreements also introduce potential for corporate influence on policy-making and could, in conjunction with the Better Regulation agenda, result in a regulatory chill in the EU.

2. Lack of safeguards for fundamental rights under non-legislative measures

The agenda also entails problematic provisions and omissions on non-legislative regulatory procedures, such as "self-regulation" and co-regulation initiatives.

i. Proposal for an Interinstitutional Agreement on Better Regulation

Given that this provisional new Interinstitutional Agreement (IIA) would stand to supplant the existing IIA of 2003, it merits a comparative analysis. In the new proposal, one omission in particular gives reason for concern: whereas the 2003 IIA provided an important compliance check for non-legislative measures with the EU legal framework and with fundamental rights, the new proposal makes no reference to non-legislative measures. This is potentially problematic.

Point 18 of the 2003 IIA defines co-regulation as:

the mechanism whereby a Community legislative act entrusts the attainment of the objectives defined by the legislative authority to parties which are recognised in the field (such as economic operators, the social partners, non-governmental organisations, or associations)

Point 22 of the 2003 IIA defines self-regulation as:

the possibility for economic operators, the social partners, non-governmental organisations or associations to adopt amongst themselves and for themselves common guidelines at European level (particularly codes of practice or sectoral agreements)

It is crucial to note that under point 17 of the 2003 agreement, an important safeguard was introduced to ensure that fundamental rights will be upheld:

The Commission will ensure that any use of co-regulation or self-regulation is always consistent with Community law and that it meets the criteria of transparency (in particular

2 EGMONT Institute. *The Better Regulation Package: Creating Better Regulations, but for what kind of EU politics?* (October 2015), <http://www.egmontinstitute.be/wp-content/uploads/2015/10/Better-regulation-package1.pdf>

3 EDRI, TTIP and Digital Rights Booklet, https://edri.org/files/TTIP_and_DigitalRights_booklet_WEB.pdf

the publicising of agreements) and representativeness of the parties involved. It must also represent added value for the general interest. These mechanisms will not be applicable where fundamental rights or important political options are at stake or in situations where the rules must be applied in a uniform fashion in all Member States. They must ensure swift and flexible regulation which does not affect the principles of competition or the unity of the internal market. (emphasis added)

By contrast, the 2015 IIA makes no reference to non-legislative procedures and thereby also omits the aforementioned safeguard.⁴ Of course, it is worth remembering that this safeguard was also wilfully ignored by the EU institutions – giving an indication of how problematic and unreliable IIAs are as regulatory instruments.

However, along with the Interinstitutional Agreement, the Commission had included other texts in the Better Regulation which do, in one way or another, touch on the topic of non-legislative measures. Among them: an EU [agenda](#) for better regulation, better regulation [Guidelines](#) and a “[Toolbox](#)” to accompany the Guidelines.

ii. The Agenda for Better Regulation

Paragraph 3.1 of the Agenda reads:

“When considering policy solutions, we will consider both regulatory and well-designed non-regulatory means as well as improvements in the implementation and enforcement of existing legislation.”

Note 7 sends then back to the “[principles for better self- and co-regulation](#)” as set out by the Commission’s anaemic “[Community of Practice for better self- and co-regulation](#).”

Also, the same paragraph states that the Guidelines “will apply to the Commission’s work [and] will ensure that economic, social and environmental impacts continue to be considered alongside each other in all of the Commission’s analytical work together with fundamental rights.” We have seen, in relation to many privatised enforcement projects created by the European Commission – from CleanIT to the “CEO Coalition”, that the Commission frequently refuses to recognise the Commission’s work as the Commission’s work – so its activities fall (under such flaky analysis) outside the protection of any such “safeguards”.

iii. The Guidelines

The Guidelines contains four mentions (pp. 9, 17, 22, 37) of “non-legislative measures” as regards the impact assessment level, but it seems to be referring to non-legislative acts of the institutions.

⁴ Besides a mention saying the “Commission Work Programme will include major legislative and non-legislative proposals” - although it probably refers to instruments such as Communications. Cf. <http://www.statewatch.org/news/2015/dec/eu-council-better-law-making-political-agreement-15007-15.pdf>.

Self- and co-regulation measures are mentioned (p. 23) as regards the consideration of different “policy options” (see also Toolbox #15).

Fundamental rights are mentioned several times in the Guidelines as regards impact assessment and regulatory fitness, indicating they should, in principle, be taken into account in these processes.

The more worrisome wording contained in the guidelines is at p 41, in a paragraph on the monitoring of the application of policies:

“The Commission may decide that a “soft” policy instrument is preferable to a pure legislative approach (although these may be combined). This may include voluntary agreements or other forms of self-co-regulatory action which are described more fully in the tool on policy instruments.”

iv. The Toolbox

The Toolbox complements the guidelines and “presents a comprehensive array of additional guidance to assist practitioners in the application of Better Regulation.”

[Tool #15](#) refers to the “Choice of policy instruments.” According to the Commission’s toolbox, “a range of regulatory and non-regulatory instruments or combinations of instruments may be used to reach the objectives of the intervention,” including ‘soft regulation’, which should not “a priori be excluded from any policy area.” Soft regulation instruments include “recommendations, technical standards, “pure” voluntary bottom-up initiatives (self-regulation) [and] legislation-induced co-regulatory actions.”

Self-regulation⁵ is described as the development of codes of conduct or similar self-posed constraints enforced by businesses. The paragraph also reads that “pure self-regulation is uncommon and at the EU level it generally involves the Commission in instigating or facilitating the drawing up of the voluntary agreement.” In other words, the Commission recognises that “voluntary” measures are not truly based on volition, but that companies take action due to external pressure from governments and the Commission. This raises problems of accountability and respect for the rule of law, since companies do not have a binding obligation to respect human rights as countries do. Where are the Commission’s obligations under the EU Charter if they are bringing about particular activities which are, nominally, “voluntary” and implemented by private companies, outside the reach of the Charter?

Finally, tool #15 refers to a set of [principle and best practices on self- and co-regulation and mentions](#) the project “Better internet for kids” as a successful example. While the Commission

⁵ Co-regulation is defined as “a mechanism whereby the Union legislator entrusts the attainment of specific policy objectives set out in legislation or other policy documents to parties which are recognized in the field.”

has taken outstanding initiatives, such as the funding of the EU Kids Online initiative,⁶ there were serious flaws in the structure of the “Better internet for kids” project including, for example, the fact that Facebook was the chair of the “privacy” working group.⁷

[Tool #24](#) is on “Fundamental rights and human rights.” The introduction to the tool reads: “the need to ensure compliance and promotion of fundamental rights is not limited to legislative proposals but should be considered in all Commission acts and initiatives.” To ensure this compliance, the tool provides a “Fundamental rights check-list”, which is to be welcomed. However, emphasis should be put in its diligent application and enforcement. Also, it is worth mentioning the existence of [Tool #22](#), on “External trade and investment” – which provides guidance to assess the impact of new measures on existing international agreements – and [Tool #23](#) on “ICT assessment, the digital economy and society.”

3. Accountability Concerns

i. The Regulatory Scrutiny Board

The Commission Decision to establish an independent Regulatory Scrutiny Board as part of the Better Regulation package raises concerns about its accountability and legitimacy. The Board, established to oversee the impact assessment process, would be comprised of seven members: the Chair, three Commission officials, and three externally recruited “temporary agents”. The inclusion of external members lacks clear justification in the Commission’s proposal and the proposal remains vague on the question of how to assure the independence of these members. The proposal merely states under Article 4 that “the members of the Board and the supporting staff shall act independently and shall not seek or take instructions. They shall disclose any potential conflict of interest with respect to a particular report to the Chair”. Commissioners themselves have similar obligations that they have, on occasion, publicly acknowledged that they have not respected.⁸ This provision does not offer sufficient guarantees that they will effectively withstand lobbying pressures.⁹

6 London School of Economics, EU Kids Online, <http://www.lse.ac.uk/media%40lse/research/EUKidsOnline/Home.aspx>

7 See, for instance:

Guest Article for EDRI-gram: CEO Coalition To Make The Internet A Better Place For Kids, <http://mogis.info/blog/guest-article-for-edri-gram-ceo-coalition-to-make-the-internet-a-better-place-for-kids/>

EDRI, Creating a safer Internet for children – some solid progress,

<http://history.edri.org/edrigram/number10.11/safer-internet--progress>

8 <https://edri.org/commissioner-cecilia-malmstrom-accusing-violating-eu-law/>

9 EGMONT Institute. *The Better Regulation Package: Creating Better Regulations, but for what kind of EU politics?* (October 2015), <http://www.egmontinstitute.be/wp-content/uploads/2015/10/Better-regulation-package1.pdf>