

# Improving the EU Policymaking Process: The Dos and the Don'ts

by Felice Simonelli and Nadina Iacob

On 29 April, the European Commission published a new Communication on better regulation aiming to improve the EU policymaking process.<sup>1</sup> The Communication will be followed by a revision of the Better Regulation Guidelines,<sup>2</sup> which are expected before autumn and will translate the Communication into practice.

The EU policymaking process is already recognised as one of the most advanced in the world.<sup>3</sup> Nevertheless, in a context of ever-evolving challenges

and disruptions, it is essential to stay ahead of the game and improve the way policies are developed in the EU. Does the new Communication go in the right direction?

## *Some good old news*

The new Communication includes much old news, thus confirming a trend that has become standard for this type of documents, which are often an ex-post systematisation of what the Commission has already tried to do, rather than the place for novel ideas or breaking news. That said, two pieces of good old news are worth mentioning: foresight-based law-making and mainstreaming the Sustainable Development Goals (SDGs) in the better regulation agenda.

Starting from strategic foresight, this promises to ensure a more forward-looking approach to better regulation. More foresight-based law-making

<sup>1</sup> European Commission, *Better Regulation: Joining Forces to Make Better Laws* (COM/2021/219), 29 April 2021, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0219>.

<sup>2</sup> European Commission, *Better Regulation Guidelines* (SWD/2017/350), 7 July 2017, <https://ec.europa.eu/info/sites/default/files/better-regulation-guidelines.pdf>.

<sup>3</sup> Organisation for Economic Co-operation and Development (OECD), *OECD Regulatory Policy Outlook 2018*, Paris, OECD Publishing, October 2018.

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can certainly strengthen the ability of the Commission to identify existing risks and future trends and take appropriate mitigating actions.<sup>4</sup> The new Communication explains that impact assessments (IAs), fitness checks and evaluations will account for major trends, while foresight-related questions could be included in public consultations and the Regulatory Scrutiny Board will examine the use of strategic foresight in the Commission's work.

The plan, therefore, is to give more salience to foresight in the entire policy cycle. This is no big news, as the Commission had already mandated the Regulatory Scrutiny Board to pay more attention to foresight since the beginning of 2020<sup>5</sup> and the need to embed foresight into EU policymaking was already discussed in the 2020 Strategic Foresight Report.<sup>6</sup> What is important is how this will be translated into practice in the Better Regulation Guidelines.

Rather than including separate foresight exercises in every IA, evaluation or consultation, the Commission should centralise foresight, for instance by identifying megatrends and prepare

<sup>4</sup> Andrea Renda and Felice Simonelli, *Study Supporting the Interim Evaluation of the Innovation Principle*, Luxembourg, Publications Office of the European Union, November 2019, <https://op.europa.eu/s/plDj>.

<sup>5</sup> European Commission Regulatory Scrutiny Board (RSB), *Annual Report 2020*, 25 May 2021, <https://europa.eu/!bH94CF>.

<sup>6</sup> European Commission, *2020 Strategic Foresight Report. Strategic Foresight – Charting the Course Towards a More Resilient Europe* (COM/2020/493), 9 September 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020DC0493>.

strategic foresight reports on an annual basis.<sup>7</sup> This exercise could contribute to defining medium- to long-term policy goals, thus ensuring a future-proof vision for the EU law-making process. It could also inform the evaluation studies and IAs of existing and new legislation, creating sufficient synergies across different policy areas.

Moving to the second piece of old news, the Commission intends to link IAs and evaluations to the SDGs, ensuring that EU legislation contributes to the United Nation's 2030 sustainable development agenda. The Commission made the same commitment back in 2016.<sup>8</sup> Nevertheless, the need to embed the SDGs in the regulatory process is now more urgent than ever, as the EU has already underachieved when it comes to the Europe 2020 Strategy<sup>9</sup> and no EU country is on track to achieving all SDGs on time.<sup>10</sup> Furthermore, the enhanced focus on sustainability

<sup>7</sup> Ibid.

<sup>8</sup> European Commission, *Next Steps for a Sustainable European Future. European Action for Sustainability* (COM/2016/739), 22 November 2016, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016DC0739>.

<sup>9</sup> William Becker et al., "Wrapping Up the Europe 2020 Strategy: A Multidimensional Indicator Analysis", in *Environmental and Sustainability Indicators*, Vol. 8 (December 2020), Article 100075, <https://doi.org/10.1016/j.indic.2020.100075>.

<sup>10</sup> Markus Hametner and Mariia Kostetckaia, "Frontrunners and Laggards: How Fast Are the EU Member States Progressing Towards the Sustainable Development Goals?", in *Ecological Economics*, Vol. 177 (November 2020), Article 106775; Sustainable Development Solutions Network (SDSN) and Institute for European Environmental Policy (IEEP), *The 2020 Europe Sustainable Development Report. Meeting the Sustainable Development Goals in the Face of the COVID-19 Pandemic*, December 2020, <https://sdgindex.org/EU>.

would come at a crucial time to ensure that the regulatory process in the EU contributes to an inclusive and sustainable recovery.<sup>11</sup>

### *Stakeholder consultation, when simplification can harm effectiveness*

The Commission wants to make it easier for stakeholders to participate in consultation activities. The idea of concentrating all calls for evidence in one single portal certainly goes in the right direction. Similarly, the option to skip public consultations on very technical dossiers of little interest to the general public is a smart solution to avoid wasting time and taxpayer money. Any change in the consultation process, however, should not reduce its effectiveness and the ability of interested parties to truly contribute to law-making.

First, the new Communication proposes to combine the current four-week consultation on the roadmap/inception IA and the 12-week consultation supporting the preparation of an IA or evaluation. This approach undermines the rationale of the process. The roadmap/inception IA is produced at a very early stage in the policy cycle, when policy challenges and options are still rough drafts and Commission officials may truly benefit from new ideas from consulted stakeholders to better design the full-blown IA or evaluation.

<sup>11</sup> Costanze Fetting, "Impacts of the Covid-19 Pandemic on Sustainable Development and the SDGs in Europe", in *ESDN Reports*, July 2020, [https://www.esdn.eu/fileadmin/ESDN\\_Reports/ESDN\\_Report\\_July\\_2020.pdf](https://www.esdn.eu/fileadmin/ESDN_Reports/ESDN_Report_July_2020.pdf).

A combined consultation would instead impact the quality and usefulness of stakeholder feedback. If the new combined consultation starts when the roadmap/inception IA is published, stakeholders will likely be consulted on a rather immature analysis of the problem and very preliminary solutions. If, on the other hand, the new combined consultation starts when the Commission is already working on the IA or evaluation study, then the risk is that stakeholder feedback will arrive too late in the process. At that point, it is virtually impossible to add more policy options or re-scope the ongoing collection of evidence. This is a clear case when simplification harms effectiveness. Therefore, the Commission should keep the two consultation phases separate and avoid any overlap between them.<sup>12</sup>

Second, the new Communication proposes to consult stakeholders, where possible, only once when evaluating existing legislation and spending programmes, instead of having two separate consultations for the evaluation and the ensuing IA. Merging the public consultation for the evaluation with the one for the IA of new legislation may, however, reduce the effectiveness of the consultation process and *de facto* violate the "evaluate first" principle. Better planning (i.e.

<sup>12</sup> A 2019 report of the European Court of Auditors noted that not all roadmaps or inception IAs were published at least four weeks before the 12-week public consultation was launched, as required. European Court of Auditors, "Have Your Say!': Commission's Public Consultations Engage Citizens, But Fall Short of Outreach Activities", in *ECA Special Reports*, No. 14/2019 (18 September 2019), <https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=50895>.

ensuring that the evaluation process of existing legislation starts early enough and is properly completed before launching new policy initiatives in the same area), rather than shortcuts, is the best approach.

### *One-in-one-out, a winding road to implementation*

The proposal to introduce the one-in-one-out (OIOO) principle in the EU law-making process is the most controversial component of the new Communication. This principle implies repealing one existing piece of legislation for every new piece of legislation that is introduced. In addition, to keep regulatory costs under control, OIOO usually also means that the costs generated by the new legislation should not be higher than those linked to the repealed legislation. The OIOO approach was adopted, in different forms, by several countries around the world.<sup>13</sup>

Assessing the costs and benefits of regulation, ensuring that the overall benefits are higher than costs and cutting "red tape" are essential elements of a well-crafted better regulation agenda. There are several reasons to be sceptical about the OIOO approach to law-making, however. For instance, there is limited empirical evidence to show that the application of OIOO so far has generated the expected results.<sup>14</sup>

<sup>13</sup> Daniel Trnka and Yola Thuerer, "One-In, X-Out: Regulatory Offsetting in Selected OECD Countries", in *OECD Regulatory Policy Working Papers*, No. 11 (21 January 2019), <https://doi.org/10.1787/67d71764-en>.

<sup>14</sup> Robert Hahn and Andrea Renda, "Understanding Regulatory Innovation: The

In addition, OIOO places too much emphasis on costs and may promote deregulation.<sup>15</sup>

Focusing on regulatory costs seems to be far less of a priority in a historical moment when EU institutions are aiming to deliver welfare by introducing net-benefit oriented policies.<sup>16</sup> While one can debate whether or not to go for such a quantitative approach at the EU level, with this Communication "the die has been cast" and the EU OIOO will soon be in place. Therefore, it is worth focusing on three aspects that are likely to affect implementation and results: the type of regulatory costs covered, the envisaged exceptions and the timeline to introduce the system.

First, the system will not aim to repeal one piece of legislation when enacting a new one, nor will it offset the overall costs generated by new legislation. It will rather aim to remove existing administrative burdens when introducing new ones in the same policy area. Administrative burdens usually represent a small portion of the overall regulatory costs. This is a limitation that may water down the cost-cutting nature of the OIOO principle.

Political Economy of Removing Old Regulations Before Adding New Ones", in *SSEE Working Papers*, No. 17-02 (August 2017), <https://www.smithschool.ox.ac.uk/publications/wpapers/workingpaper17-02.pdf>.

<sup>15</sup> Andrea Renda, "One Step Forward, Two Steps Back? The New U.S. Regulatory Budgeting Rules in Light of the International Experience", in *Journal of Benefit-Cost Analysis*, Vol. 8, No. 3 (October 2017), p. 291-304.

<sup>16</sup> Claudio M. Radaelli, "The State of Play with the Better Regulation Strategy of the European Commission", in *STG Policy Briefs*, No. 2021/06 (April 2021), <https://hdl.handle.net/1814/70901>.



Second, the Commission will look at the cumulative costs of existing and new EU legislation in each policy area and compensate the administrative burdens introduced by a new legislative proposal with savings in the same policy area. Nevertheless, several exceptions will be possible: i) if an "out" cannot be identified in the same year, then it will be reported in the next year; ii) if an "out" cannot be identified in the same policy area, then it can be taken from a different policy area; iii) if an "out" cannot be identified in the same area, then the Commission could also decide to exempt the new piece of legislation from the OIOO system. The proposed exceptions may further dilute the ability of the EU OIOO system to keep regulatory costs under control.

Third, the overly ambitious timeline proposed in the Communication can affect the quality and effectiveness of the EU OIOO system itself. The Commission committed to piloting the EU OIOO system in the second half of 2021, and implement it already in the 2022 Commission Working Programme. Designing an OIOO system that applies to all pieces of legislation with options for "banking" and "trading" costs across years and between policy areas and with transparent rules to grant exemptions is not an easy task, however.

This may actually take much more time and effort than expected. Training policymakers to assimilate the OIOO philosophy and implement the new system, running a pilot and adjusting the system based on the pilot results may require more than six months. Moreover, the EU OIOO

approach sketched in the proposal requires measuring the cumulative costs of EU legislation for individuals and businesses in each policy area. Performing this assessment is a time-consuming exercise, which can by no means be completed by the end of 2021.

A more cautious approach would thus be advisable. A multi-year plan could be devised to gradually introduce, test and adjust the EU OIOO system, while limiting side effects, including administrative and enforcement costs stemming from the implementation of the OIOO system itself.

Ultimately, continuing to improve EU policymaking is essential to ensure that future policies are fit for the challenges ahead. With the new Communication, the Commission is taking many steps in the right direction. There is, however, still room for improvement. In this context, ensuring more foresight-based law-making and updating the better regulation agenda to mainstream SDGs are certainly two major improvements. In addition, several proposed changes have great potential to simplify the policymaking process and make it more transparent.

By contrast, the effectiveness of the stakeholder engagement process will be jeopardised if the Commission combines the different phases of the current consultation process, and/or merges the public consultations for the evaluation and IA of a given piece of legislation to be revised. This proposed simplification of the consultation process should be reconsidered. Finally, a more cautious, step-by-step approach to introducing the EU OIOO system is

certainly needed to contribute to reduce regulatory costs without harming the effectiveness of the EU policymaking process.

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