

The EU Better Regulation Agenda

A Critical Assessment

Edited by
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The Multi-faceted Nature of Better Regulation

SACHA GARBEN* AND INGE GOVAERE**

A SEMI-PERMANENT YET DYNAMIC FEATURE OF EU LAW AND POLICY

THE EU BETTER Regulation Agenda has been around for quite some time, although it has known various different manifestations.¹ As Colin Scott sets out in Chapter 2, like many national governments around the world and supported by international organisations such as the Organisation for Economic Co-operation and Development (OECD), over the past few decades, the EU has consistently engaged in such regulatory review exercises, examining the quality and quantity of EU regulation, generally with a view to increasing the former and decreasing the latter. As it should therefore by now be considered a semi-permanent feature of the EU legal and political landscape, it merits an in-depth and comprehensive discussion, which is what the present book aims to offer. At the same time, the Better Regulation Agenda is not a static institution but instead a recurring phenomenon that develops dynamically over time, making it a challenging subject of study. It is in many ways a ‘moving target’: a fluid phenomenon that adapts itself to evolving political circumstances and to the powers that be. This finds illustration in the rather different interpretation and follow-up given to the Better Regulation Agenda by the current European Commission headed by President Juncker, as compared to the previous Barroso Commission. The latter could be argued to have followed a ‘self-flagellating’ line, to borrow Daniel Kelemen’s expression, who addresses this in Chapter 11, which largely gave

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¹ See earlier initiatives such as the Commission Staff Working Document, ‘Making Single Market Rules More Effective, Quality in Implementation and Enforcement’ SEC(1998) 903, 3–5, ‘Better Law-Making’ in the early 2000s: European Commission Communication, ‘European Governance: Better Law-Making’ COM (2002) 275 final; and ‘Smart Regulation’ in the late 2000s: European Commission Communication, ‘Smart Regulation in the European Union’ COM (2010) 543 final.

in to the perception in some Member States that the EU's rule-making was out of control and had to be reined in, therefore operating the Agenda to cut existing EU standards and to curb the adoption of new ones. However, the current Juncker Commission has instead demonstrated that a different interpretation of Better Regulation may very well lead to new legislative initiatives and thus to more regulation, rather than less, if this is warranted by the outcome of evaluation exercises and coincides with political priorities.² It thus seems that each political leadership will have its own specific agenda in relation to Better Regulation. Furthermore, while the European Commission is certainly the *chef de file* on the issue of Better Regulation in the EU, as the contributions in Part III of this volume also address, the Agenda equally impacts the other institutional actors, which may yet have a different interpretation, or version, of Better Regulation. For instance, as can be seen from María José Martínez Iglesias' discussion in Chapter 7, while generally subscribing to Better Regulation's objectives, the European Parliament has a rather different view from the Commission on some of the concrete requirements that it entails, or should entail, for the legislator, such as the obligation to conduct Impact Assessments and to take the Commission's assessment as a starting point in this regard. All this means that we have to be very careful, as our collected authors have endeavoured to be, in drawing any firm conclusions about the features and consequences of 'Better Regulation' in general, and to refer to its specific 'incarnations' where appropriate.

DEMOCRATIC AND CONSTITUTIONAL LEGITIMACY QUESTIONS

However, the fact that the content and direction of the Better Regulation Agenda is fundamentally influenced by the political authority in place does not mean that it is simply a policy tool that can be fully moulded and adapted by the governing power to its wishes. Over time, several features of Better Regulation have become entrenched in the EU institutional framework, its policy and its law. As such, it has started to 'live its own life' and operates—at least to a certain extent— independently from the political powers of the day. Autonomous institutions, such as the Regulatory Scrutiny Board discussed by Ben Smulders and Jean-Eric Paquet in Chapter 6, have been created. Whereas Xavier Groussot and Julian Nowag point out in Chapter 10 that Impact Assessments have become an important tool for the Court of Justice of the European Union (CJEU) to examine the validity of EU legislation, particularly on the grounds of subsidiarity and proportionality.

² For instance, in the context of the recently launched European Pillar of Social Rights, an important new legislative initiative to revise and strengthen Written Statement Directive 91/533 builds on the findings of an earlier REFIT evaluation. The proposal is to amend the Directive, introducing minimum standards applicable to every employment relationship and prohibiting the abuse of precarious workers. See European Commission, *REFIT Evaluation of the 'Written Statement Directive'*, SWD(2017) 205 final. The Commission has launched the first-phase consultation of the Social Partners required on the basis of Art 154 TFEU, C(2017) 2611.

In its growing independence from political authority in the EU through its institutionalisation and in its potential to actually limit the exercise of that authority, the Better Regulation Agenda inevitably raises questions about its democratic legitimacy. Certain of the Agenda's objectives are conducive to that legitimacy, such as its commitment to participatory government through public consultation and to transparency, but others are instead about curbing political discretion in pursuit of the 'regulatory paradigm' of evidence-based policy. If the Agenda were only a political instrument of the reigning powers, it could arguably directly derive its authority from those powers. Especially since the use of *Spitzenkandidaten* in European elections, it could be argued that the European Commission has stronger political legitimacy, and then so would a deliberate policy choice such as the Better Regulation Agenda—at least to the extent that the Commission applies it to its own activities.³ However, since the Agenda partially operates independently from the Commission's political level and because the Commission seeks to also apply it to the European Parliament and Council, as well as to national governments and parliaments, the Agenda needs a different, additional source of legitimacy.

This could potentially be found in the EU Treaties. Certain pointed provisions, such as those on EU environmental and social policy, refer to the need to take into account the 'potential benefits and costs of action or lack of action'⁴ and the need to 'avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.'⁵ Both the EU Better Regulation Agenda and the Regulatory Fitness and Performance Programme (REFIT) exercise⁶ which is part of it, could arguably be defended in reference to these stipulations in EU primary law itself, precisely in the areas where it has proven most controversial politically. But also applicable in a horizontal manner and, more generally stated, Article 5 of the Treaty on European Union (TEU) provides that EU action ('the use of Union competences') shall respect the principles of subsidiarity and proportionality. This further supports the constitutional mandate of the Better Regulation Agenda, which contains an explicit subsidiarity component in its Impact Assessment and could overall be conceived as a proportionality assessment of EU legislation: considering whether the measure in question is necessary, effective and whether no less 'restrictive' action is possible. Furthermore, Declaration 18 annexed to the Treaty of Lisbon explicitly provides for the option of repeal of legislation, particularly in view of

³ For a comprehensive discussion of the tension between the regulatory and political paradigms of Better Regulation, see M Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics' (2016) 53 *CMLR* 1209.

⁴ Article 191(3) TFEU stipulates that 'in preparing its policy on the environment, the Union shall take account of ... potential benefits and costs of action or lack of action'.

⁵ Article 153(2)(b) TFEU on social policy provides that the European Parliament and the Council may adopt, by means of directives, minimum requirements for gradual implementation: 'Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.'

⁶ European Commission Communication, 'EU Regulatory Fitness' COM (2012) 746 final.

subsidiarity and proportionality.⁷ This therefore endorses aspects of the Agenda by a ‘basic constitutional rule expressly entrenched in primary law after the Lisbon Treaty reforms’, as Robert Zbiral discusses in Chapter 5. Finally, the Better Regulation Agenda’s constitutional legitimacy could be supported by Article 2 TEU, which refers to the Rule of Law as one of the EU’s founding principles. As the Rule of Law demands a clear, enforceable regulatory framework in which individuals can ascertain what rights and obligations they have as well as dispose of means of enforcement thereof, the Better Regulation Agenda’s commitment to improve the quality and enforceability/enforcement of EU legislation can be seen to contribute to it.

At the same time, however, there are some constitutional arguments against certain aspects of the Better Regulation Agenda. For instance, the Agenda’s at times hostile stance towards higher national regulatory standards in areas of EU regulation, qualifying these as ‘gold-plating’ and generally discouraging them,⁸ is constitutionally questionable. It would seem that either such national provisions are incompatible with the harmonised EU standards (or other Treaty provisions)—in which case the problem is not ‘gold-plating’ but instead an infringement of EU law that can be taken up before the Court—or it concerns an issue that is not fully regulated by EU law—in which case the principle of conferral entails that the remaining regulatory capacity falls within the powers of the Member States. The ‘gold-plating’ critique is particularly problematic in areas such as the environment, consumer protection and social law, where the Treaty on the Functioning of the European Union (TFEU) explicitly lays down the principle of minimum harmonisation and thus recognises the Member States’ right to provide higher levels of protection, and where such higher national levels are instead to be encouraged from the perspective of the policy areas’ objectives.

⁷ This provides: ‘When the Treaties confer on the Union a competence shared with the Member States in a specific area, the Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence. The latter situation arises when the relevant EU institutions decide to repeal a legislative act, in particular better to ensure constant respect for the principles of subsidiarity and proportionality. The Council may, at the initiative of one or several of its members (representatives of Member States) and in accordance with Article 241 of the Treaty on the Functioning of the European Union, request the Commission to submit proposals for repealing a legislative act. The Conference welcomes the Commission’s declaration that it will devote particular attention to these requests.’

⁸ According to the European Commission: ‘Member States also often go beyond what is strictly required by EU legislation when they implement it at national level (‘gold-plating’). This may enhance the benefits but can also add unnecessary costs for businesses and public authorities which are mistakenly associated with EU legislation.’ It urges Member States to ‘avoid unjustified “gold-plating”’ and that Member States should be invited to explain the reasons for any such gold-plating. Commission Communication, ‘Better Regulation for Better Results—An EU Agenda’ COM (2015) 215 final. The European Parliament has adopted a different line, stating that ‘in the case of directives, it is the prerogative of the Member States to decide whether to adopt higher social, environmental and consumer protection standards at national level than those minimum standards of protection agreed upon at EU level, and welcomes any decision to do so; reaffirms that such higher standards must not be regarded as “gold-plating”’. European Parliament, *Report on Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook*, 24 June 2015, 2014/2150(INI), para 44.

The application of the Agenda to the Social Partners, as happened under the previous Commission, in the case of the Collective Agreement in the Hairdressing Sector⁹ similarly poses problems from the perspective of the TFEU, in particular as it is stated in Article 155 TFEU that: ‘Agreements concluded at Union level *shall* be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission’ (emphasis added). The mandatory language suggests that the Commission does not have a discretionary choice in submitting the proposal to the Council, whether or not it considers that the Agreement complies with the Better Regulation Agenda. While the General Court held in *UEAPME* that after the joint request of the Social Partners, the Commission ‘resumes control of the procedure and determines whether it is appropriate to submit a proposal to that effect to the Council’,¹⁰ the General Court (GC) referred in particular to the Commission’s responsibility to assess the representativeness of the organisations that have concluded the agreement.¹¹ Therefore, provided that the procedural conditions of valid social dialogue as set out in the Treaties are fulfilled, it is doubtful whether the agreement can be rejected on political grounds. Indeed, as the GC also held in *UEAPME*, in resuming control of the procedure, the Commission must act in conformity with the principles governing its action in social policy, in particular the obligation under Article 154(1) TFEU to promote the consultation of management and labour at the EU level and to take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.¹² To refuse proposing a successfully concluded agreement for adoption to the Council on political or ‘better regulation’ grounds does not sit easily with that obligation and adds (perhaps unnecessary) grist to the mill of those that accuse the Better Regulation Agenda of being inspired by deregulatory ideology.

Furthermore, while, as Ben Smulders and Jean-Eric Paquet point out in Chapter 6, it would be ill-informed to paint a picture of EU Better Regulation as an unequivocal drive towards deregulation in the interests of businesses, many scholars have argued that certain elements of the Agenda carry a risk of systematic bias against

⁹ This Agreement, aimed at improving the health and safety of workers in the hairdressing sector concluded by workers and employers, was publicly denounced by the European Commission as an example of bad regulation and was not put forward to the Council. See REFIT “Fit for Growth”: Examples How EU Law is Becoming Lighter, Simpler and Cheaper’, http://europa.eu/rapid/press-release_MEMO-13-833_en.htm. As Schindler notes, former Commission President Barroso polemically declared in a TV interview that Europe does need to regulate hairdressers’ ‘high heels’, even though the agreement primarily concerns the use of chemicals in the sector where workers are most at risk of work-related skin diseases. Interview by D Krause, *Tagesschau*, 2 October 2013, <https://www.tagesschau.de/ausland/interview130.html>, as reported by S Schindler, ‘The Social Chimera of the Economic and Monetary Union, Social Policy in the Context of European Economic Governance’, *LUP Student Papers* (2014), available at <https://lup.lub.lu.se/student-papers/search/publication/4460811>.

¹⁰ Case T-135/96 *UEAPME v Council of the European Union* ECLI:EU:T:1998:128, para 84.

¹¹ *ibid* paras 85–88 of the judgment.

¹² *ibid* para 85 of the judgment.

regulatory standards, particularly to pursue non-economic interests. One of the main methodologies used in Impact Assessment and Evaluations is cost-benefit analysis, which—as Andrea Renda explores at length in Chapter 4—poses a number of problems in terms of its reliance on certain doubtful economic assumptions and the quantification of non-quantifiable benefits. It was out of concern for the expected negative consequences of the EU Better Regulation Agenda in this sense that in 2015, more than 50 civil society groups joined forces in the setting up of a ‘Better Regulation watchdog’.¹³ Even if, as Robert Zbiral’s empirical analysis in Chapter 5 also shows, their fear of a grand repeal of the *acquis* has not come to pass, it may be a more difficult challenge to measure opportunity cost in terms of ‘initiatives not taken’. After all, the administrative resources spent on the various *ex ante* and *ex post* evaluation exercises, and the expected burdens and difficulties of passing an Impact Assessment, may have deterred certain Commission Directorates General from developing new proposals from the outset, which is most likely to have occurred in the non-economic policy areas. In any event, without coming to a final verdict on whether or not the Better Regulation Agenda ultimately leads to an economic bias in EU law and policy-making, it seems justified to be at least vigilant about the risk thereof. Such a bias would be problematic from a constitutional point of view: Article 7 TFEU implies a duty on the EU institutions to ensure ‘consistency between its policies and activities, taking all of its objectives into account’, which should be read in keeping with the broad range of objectives listed in Article 3 TEU, as well as several ‘mainstreaming’ provisions, suggesting that market-making policies should be conditioned by a number of non-market objectives, from social exclusion to environmental protection, non-discrimination and animal welfare.¹⁴ An application of Better Regulation that would systematically hold back the promotion of EU non-market objectives, whether through a flawed methodology or an express political commitment, would be hard to justify constitutionally.

THE VARIOUS NARRATIVES UNDERLYING THE EU BETTER REGULATION AGENDA

From the brief discussion above, it already clearly emerges that the EU Better Regulation Agenda has a very complex, multi-faceted nature. It has seen many incarnations over time, has many different features and furthermore seems to have many different objectives. This makes an assessment of its legitimacy, or of any other aspect, more difficult, as the answer will invariably depend on what precisely the Agenda’s aims and concrete elements in support thereof are. Yet, there is remarkably little conceptual consensus on these issues. As Sacha Garben explores

¹³ See www.betterregwatch.eu/about-us.

¹⁴ Dawson, above n 3, 1227.

in more detail in Chapter 12, at least five different rationales can be distinguished: (i) improving the quality of EU legislation; (ii) reducing the quantity of EU legislation; (iii) increasing public participation in the legislative process; (iv) promoting science-based governance; and (v) enforcing the subsidiarity and proportionality principles. It becomes clear from the various contributions to this book, and is systematically analysed in Chapter 12, that all these different rationales for/of Better Regulation have their (constitutional, democratic, substantive) merits, but also their inherent challenges, not in the least because many of them are, to a certain extent, contradictory and because they are sometimes based on unproven assumptions.

A clear distinction between the competing strands informing the EU Better Regulation Agenda provides a better basis to analyse and discuss the topic. Importantly, it provides us with guidance on how to tackle the legitimacy question. Every separate rationale necessitates its own justification in reference to its underlying ‘problem definition’, its feasibility and to the Treaties’ constitutional and democratic principles. To the extent that the Agenda would be about reducing the quantity of EU regulation in the interest of business, it would seem to be a political choice and thus need a clear democratic validation. To the extent that it would be about improving the quality of EU regulation, it expresses a commitment to the Rule of Law and thus its concrete features need to be assessed against that background. Reflexive and participatory governance are both about democracy in a non-representative, ‘throughput’¹⁵ sense, and thus need to be judged against that yardstick. On the other hand, technocratic, or science-based, governance is about output legitimacy or mitigating ‘raw political power’, as Ben Smulders and Jean-Eric Paquet put it in Chapter 6. Subsidiarity in turn encompasses federal concerns about national identity, autonomy and diversity. Apart from allowing each different aspect of Better Regulation to be judged against its own standard, this conceptual framework will also facilitate a better understanding of the trade-offs in the competing overarching interests involved in mediating the conflicting elements of the Agenda.

THE QUALITY OF THE BETTER REGULATION DEBATE

This book aims to contribute to an improved quality and integration of the public, political and academic debates on Better Regulation, which currently appear somewhat disparate and impoverished. More than perhaps EU regulation itself, the feverish *public* debate on (the need for) Better Regulation can be said to suffer from an inflated quantity of often deplorable quality. Outlandish, fact-free claims about the EU’s regulatory zeal have dominated tabloid headlines in

¹⁵ Term as used by V Schmidt, ‘Democracy and Legitimacy in the European Union Revisited: Input, Output and Throughput’ (2010) 21 *KFG Working Paper*, http://userpage.fu-berlin.de/kfgeu/kfgwp/wpseries/WorkingPaperKFG_21.pdf.

some Member States, which is likely to have had an important influence on public attitudes towards EU integration more generally and, as such, may—tragically—have some part in explaining the UK’s Brexit vote. Certain national political actors may see (short-term) political gain in condoning the largely unsubstantiated discourse of a rule-sick, power-hungry EU and to tag calls for national regulatory autonomy on the back of that discourse. But, in addition, the somewhat more reasonable *political* debate does not sufficiently engage with the complex, multi-faceted nature of the Better Regulation Agenda and its manifold objectives. For businesses and the right side of the political spectrum, Better Regulation should be about ‘bonfires of red tape’, and the EU can never do enough to quench this thirst, while for public interest organisations and ‘the left’, Better Regulation is seen as a neoliberal drive to dispose of important public interest rules and should be given as limited an interpretation as possible. Sharply contrasting with this polarised discussion, the EU institutions, on the other hand, seem to prefer a depoliticised approach, presenting Better Regulation as an objective policy that simply seeks to ensure that regulation is ‘rational’, based on scientific facts and methodology, but thereby risking glossing over the Agenda’s important political implications. *Academia* in turn has mostly focused on the technicalities of Better Regulation and its various aspects, often from a disciplinary perspective, without sufficiently integrating the important polemics that shape the Agenda and its perception, and leaving somewhat under-explored the way in which the Agenda relates to constitutional principles and the EU legal and political order as a whole.¹⁶

STRUCTURE OF THE BOOK

Part I of the book, including the present chapter, introduces the Better Regulation Agenda as it currently stands and how it has developed over the years. In particular, Colin Scott sets out the emergence of Better Regulation policies in the era of the neoliberal Reagan and Thatcher governments of the 1980s, and the subsequent emphasis on a need for EU legislation to demonstrate compliance with the doctrines of subsidiarity and proportionality. The chapter links better regulation and regulatory governance in a reflexive and iterative process of experience, review and enhancement. By providing insights into the Agenda’s historical roots and the current state of play, this first part of the book serves as a launchpad for the analysis of the specific elements of the Agenda as set out in Part II.

In Part II, the ins and outs of the Better Regulation Agenda authors are analysed in detail, to a certain extent from an inter-disciplinary perspective. Each chapter focuses on a specific element of the Better Regulation Agenda, subjecting it to an

¹⁶ There are, of course, notable exceptions, such as (non-exhaustively) Dawson (above n 3), the various contributions in the special issue of *European Public Law* on Better Regulation ((2011) 17 *European Public Law*) and S Weatherill, *Better Regulation* (Oxford, Hart Publishing, 2007).

in-depth and critical assessment, particularly reflecting on the limits and opportunities of these elements to achieving the Agenda's objectives. Helen Xanthaki presents the current picture of EU legislative quality, takes stock of the intricacies of legislating for the EU, and recommends conceptual reform in the task of EU legislating and transposition. Andrea Renda reviews current practices and the academic debate on cost-benefit analysis, and proposes a new framework for assessing the impacts of major policy interventions in the EU, oriented towards the overall coherence rather than the 'efficiency' of new policy interventions. Finally, Robert Zbiral explores the link between the Better Regulation Agenda and the deactivation of EU competences. The aim of Better Regulation is to constantly review the fitness of all EU measures, which may naturally result in the repeal of those measures that no longer meet the strict conditions, but his analysis indicates that the deactivation of EU competences is not treated as a viable option.

Part III of the book shifts the focus from the specific content of the Better Regulation Agenda to an institutional perspective. Each chapter discusses the role of a key institutional actor in the Better Regulation Agenda, usually by an author with unique practical insights into that role. Ben Smulders and Jean-Eric Paquet set out and explain the relevant aspects of the Better Regulation Agenda from the perspective of the European Commission, paying special attention to dispelling some of the persistent myths about its impact and intentions. María José Martínez Iglesias looks at the relevant aspects of Better Law-Making for the European Parliament, paying special attention to the actual practice of the institution, against the backdrop of the Interinstitutional Agreement on Better Law-Making and the positions defended by the Parliament in the negotiations. Jenő Czuczai gives a historical overview of Better Regulation, a summary of the new Interinstitutional Agreement and practical examples of better law-making in recent years from the perspective of the Council. Jan de Mulder addresses the role of Member States in the EU's Better Regulation Agenda's follow-up and implementation, using Belgium as a case study. Finally, Xavier Groussot and Julian Nowag address the role of the Better Regulation Agenda in form of legislative Impact Assessments in the CJEU's review on proportionality and subsidiarity, suggesting that it can provide an avenue for a positive feedback loop where 'better regulation' leads to 'better adjudication' and vice versa.

The fourth and final part zooms out to provide a broader contextual, normative assessment of the Better Regulation Agenda. R Daniel Kelemen casts a sceptical eye, emphasising the Better Regulation Agenda's failures as a substantive reform agenda and as a public relations exercise. He argues that EU regulation remains characterised by a mode of governance labelled as 'Eurolegalism', and that Better Regulation fails substantively in its effort to change these core attributes of EU regulation because they are deeply rooted in the project of continent-wide market integration and in the EU's fragmented institutional structure. Better Regulation will also fail as a public relations exercise designed to combat criticisms that the EU suffers from onerous regulations that strangle businesses. Such critiques are ultimately grounded in Eurosceptic and sometimes anti-government ideologies,

and cannot be swayed even by successful reforms. Finally, Sacha Garben's chapter provides an 'Impact Assessment' of the EU Better Regulation Agenda, evaluating the validity of its implicit assumptions, its effectiveness, its costs and benefits and, more generally, its impact on the EU legal and political order in relation to already-existing asymmetries and democratic deficiencies in the integration process. This final part of the book therefore invites readers to reflect on the Agenda beyond its technical and specific features and implications, so that taken together, the four parts provide a comprehensive multi-dimensional analysis of a topic that is dynamic, complex and multi-faceted.

CONCLUSION

This edited volume aims to contribute to an increased quality of the debate on Better Regulation by: (i) attempting to provide a better conceptual understanding; (ii) promoting an integration of the academic, political and public discussions; (iii) exploring the topic in its manifold manifestations and from a variety of perspectives, with an honest attempt to address and weigh up both advantages and disadvantages, challenges and opportunities; and (iv) placing the analysis within the broader framework of European integration. This is of course a tall order, but is a necessary endeavour considering the importance of the issues which go to the core of the future of the European integration process, as several of our authors have pointed out. While it is difficult to establish with certainty the exact role that perceptions of EU regulation have played in the Brexit vote and continue to play in other strands of Euroscepticism, it shall be clear that, wrongly or rightly, many citizens perceive EU rule-making to be somehow deficient.¹⁷ For all the flaws and inherent limitations of the Better Regulation Agenda, it thus seems that the EU needs to address these pressures and perceptions. This book intends to provide the crucial actors and those who influence them directly or indirectly with some analytical tools to reflect and decide on how to best meet that challenge. In this, the diversity of the views expressed by our authors, which are at times in disagreement, should be seen as a particular strength, illustrating that while everybody agrees that 'Better Regulation' is—in principle—a good thing, no one agrees on what that actually means. As such, while at times criticising and at other times defending the status quo, the very diverse views of our collected authors are united in having been expressed in a genuine commitment to the good functioning of the EU legal and political order, keeping in mind—above all—the interests of its citizens.

¹⁷ As H Xanthaki notes, 'a depressing (or is it impressive?) 74 percent of Europeans believe that the EU generates too much red tape', citing Eurobarometer Question QA 16.4 on p 59: https://ec.europa.eu/public_opinion/archives/ec/eb79/eb79_anx_en.pdf. Of course, it is a different question what they would precisely consider to be such 'red tape' and whether they would still feel that way if it were better explained what the objectives and benefits of particular rules are.

An ‘Impact Assessment’ of EU Better Regulation

SACHA GARBEN*

INTRODUCTION

AS WILL HAVE become clear from the preceding chapters, Better Regulation is not a passing fad and is much more than an inconspicuous soft law policy initiative. Over the past few decades, it has become a semi-permanent feature of the EU legal and political landscape. It has become increasingly institutionalised by means of the creation of independent bodies such as the Regulatory Scrutiny Board, interinstitutional agreements and as an instrument of the judicial review of the Court of Justice of the European Union (CJEU). The EU legislative process is increasingly conditioned by it, through Better Regulation’s requirements of *ex ante* and *ex post* evaluation, the way it structures and informs the Commission’s exercise of its monopoly on legislative initiative, and in its application to the Parliament and Council in their capacity as the European Legislator. This raises an array of constitutional questions of how Better Regulation impacts on, inter alia, the ‘competence principles’ of conferral, subsidiarity, proportionality and national identity, the principle of legal certainty, democracy and the Rule of Law. As such, it is curious that in terms of general EU legal scholarship, Better Regulation is still somewhat overlooked¹ and seems to remain largely the purview of scholars of ‘regulation’. This is regrettable, because without an understanding of Better Regulation’s intricacies, one cannot fully understand the contemporary EU legislative process, and without an analysis of its position in (and impact on) the EU legal and political order, one cannot fully understand the merits and risks of Better Regulation.

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¹ There are, of course, notable exceptions, such as (non-exhaustively) M Dawson, ‘Better Regulation and the Future of EU Regulatory Law and Politics’ (2016) 53 *Common Market Law Review* 1209; the various contributions in the special issue on Better Regulation in (2011) 17 *European Public Law*; and S Weatherill, *Better Regulation* (Oxford, Hart Publishing, 2007).

Together with the other contributions to this book, this chapter hopes to provide some meaningful input into this research area. In particular, it aims to provide an improved conceptual understanding of the various aims underlying EU Better Regulation. It will become clear that while Better Regulation may be seeking to address certain important problems in EU decision-making, it operates on the basis of several unproven assumptions, it does not effectively deliver on many of its objectives because of its inherent limitations or because it has ignored better alternatives, and that while it may have certain benefits, its significant costs are often overlooked. In terms of its more general impact on the EU constitutional order, it will be argued that by displacing the EU legislative process at least to a certain extent, the EU Better Regulation Agenda as it currently stands carries the risk of aggravating two of the central legitimacy problems of the EU, namely the regulatory asymmetry that underlies European integration² and ‘covert integration’ or ‘harmonisation by stealth.’³ As such, this chapter subjects Better Regulation itself to a critical ‘Impact Assessment’⁴ by considering whether there is a clear definition of the problems it seeks to address and what the evidence is for the existence of these problems, whether Better Regulation more effectively responds to those problems than any alternative options, and what the costs, benefits and broader impacts are.

DEFINITION OF THE PROBLEM(S)

A general starting point in the analytical framework of Impact Assessments and evaluations is the clear definition of the problem(s) that the proposed or existing EU action aims to address. What is/are the problem(s) that EU Better Regulation seeks to solve? The EU Better Regulation Agenda itself does not contain a rigorous analysis of the problems and the underlying factors and behaviours (so-called ‘problem drivers’). This leaves us to deduce Better Regulation’s problem definitions from the Agenda’s various aspects and manifestations. It must have already become clear to the reader of this book that the Agenda is highly multi-faceted and

² Building on the work of Fritz Scharpf, such as ‘The Asymmetry of European Integration, or Why the EU Cannot be a “Social Market Economy”’ (2010) 8 *Socio-Economic Review* 211; ‘De-constitutionalisation and Majority Rules: A Democratic Vision for Europe’ in S Garben and I Govaere (eds), *The Division of Competences in the EU Legal Order: Reflections on the Past, the Present and the Future* (Oxford, Hart Publishing, 2017); and ‘After the Crash: A Perspective on Multilevel European Democracy’ (2015) 21(3) *European Law Journal* 384, 389.

³ See also S Garben, ‘Restating the Problem of Competence Creep, Tackling Harmonization by Stealth and Reinstating the Legislator’ in Garben and Govaere, above n 2; S Garben, ‘Competence Creep Revisited’ *Journal of Common Market Studies* (forthcoming, 2018).

⁴ According to the Impact Assessment Guidelines: ‘IAs must set out the logical reasoning that links the problem (including subsidiarity issues), its underlying drivers, the objectives and a range of policy options to tackle the problem. They must present the likely impacts of the options, who will be affected by them and how.’ See http://ec.europa.eu/smart-regulation/guidelines/ug_chap3_en.htm.

complex, and seems to pursue a range of objectives that are loosely collected in the mixed bag of 'Better Regulation'. From this, we can distill at least five different assumed problem definitions.

Poor Legislative Quality

A first objective of EU Better Regulation is the improvement of the quality of EU legislation, as was discussed by Helen Xanthaki in Chapter 3. The Interinstitutional Agreement on Better Law-Making of 2016 states under 'common commitments and objectives' that the Institutions 'agree to promote simplicity, clarity and consistency in the drafting of Union legislation'. According to the Interinstitutional Style Guide 2015,⁵ EU acts must be clear, simple, precise, concise and with homogeneous content. They must be formulated appropriately for their intended audience, terminology must be consistent, the title of the act must give a full indication of the subject matter and the legal basis, and the main objectives must be clearly identified. It is hard to object to these stipulations. Clear, accessible and enforceable rules are central requirements of the Rule of Law. But, unfortunately, as anyone who has ever handled EU legislation will probably confirm, the quality of EU legislation in this sense often leaves something to be desired, which thus clearly poses a problem.

A first often-encountered problem is that of contradictory provisions in, and between different pieces of, EU legislation. As an example, we could mention the Temporary Agency Work Directive 2008/104/EC, which in most of its provisions provides protection for temporary agency workers against this precarious form of employment. As such, it is a labour law directive, adopted on the basis of Article 153 of the Treaty on the Functioning of the European Union (TFEU), which sets minimum standards of protection for workers across the Member States. But at the same time, the Directive contains in its Article 4 a rather ambiguous provision that encourages the use of this precarious form of employment and seems to impose a ceiling of protection that Member States can provide for temporary agency workers ('prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented'), which if interpreted literally would not only be inconsistent with the Directive overall but also with its legal basis. The CJEU has resolved this contradiction in its *AKT* judgment by denying Article 4 its direct effect.⁶ However, while

⁵ <http://publications.europa.eu/code/en/en-000500.htm>.

⁶ Case C-533/13 *Auto- ja Kuljetusalan Työntekijäliitto AKT ry v Öljytuote ry and Shell Aviation Finland Oy* ECLI:EU:C:2015:173.

consistent with the Directive's legal basis and overall objectives, this interpretation is not clear from the provision's wording. This means that legally, the problem is resolved, but one needs to consult the law as well as the case law to know what the meaning of the law really is.

A second persistent problem is that EU legislation often contains undefined crucial notions and concepts. As these notions may determine the very nature of the right or obligation in question, such legal uncertainty is highly undesirable for everyone concerned. For instance, in Regulation 261/2004 concerning air passenger rights, no definition is given as to what constitutes 'delays' and what constitutes 'cancellations', which matters because for the latter, monetary compensation is provided (in Article 7), while for the former, it is not. Nor does the Regulation contain any precise description as to what 'extraordinary circumstances' are, even though this absolves the airlines of having to pay any compensation at all. Again, it has fallen to the CJEU to give the necessary clarifications, but this means that individuals and companies need to consult both the case law as well as the law to know what their rights and obligations are.⁷ Furthermore, because judgments are by their nature situation-specific, it is difficult to obtain any firm guidance on how the rules are supposed to apply in slightly different circumstances. This necessitates further litigation and results in a dense body of case law, making the legal situation even more unclear and complex.

Another often-encountered problem with EU legislation is that it can consist of a complex mix of general rules accompanied by long lists of exceptions, exceptions to exceptions, and further exceptions thereto. For instance, Article 5 of the Working Time Directive 2003/88/EC provides that all workers have the right to a minimum weekly rest period of 24 consecutive hours per seven days. Article 16 provides a derogation to this, in that Member States may provide a reference period of 14 days to calculate whether on average 24 hours rest was given per seven-day period. Article 17 in turn provides a derogation to the limit of this exception, allowing a longer reference period, for activities where continuity of service is required. In Article 19, a limit to that derogation to the limit of the original derogation to the initial rule is provided, stipulating that the reference period shall not exceed six months. The following paragraph of that same article provides an exception to its own first paragraph allowing Member States to lay down a reference period of up to 12 months.

A final problem, which does not relate so much to the quality of drafting as to the enforceability of the text as well as its overall coherence, thus impacting on legal certainty and uniform application of the law, is that much of EU law depends on the national level for its enforcement. In line with the principle of national procedural autonomy, Member States are primarily responsible for making EU rights

⁷ See Joined Cases C-402/07 and C-432/07 *Christopher Sturgeon, Gabriel Sturgeon and Alana Sturgeon v Condor Flugdienst GmbH and Stefan Böck and Cornelia Lepuschitz v Air France SA* ECLI:EU:C:2009:716; and Case C-549/07 *Friederike Wallentin-Hermann v Alitalia—Linee Aeree Italiane SpA* ECLI:EU:C:2008:771.

a reality for citizens, and the conditions will vary from Member State to Member State, making it easier or more difficult to procure rights from one country to the next. Even if we are seeing an increasing tendency to establish specific enforcement mechanisms at the EU level for this reason, the majority of the rules still at least partially depend on Member State enforcement within the specificities of national systems of remedies and judicial protection. These national variations are even more pronounced when the EU rules in question are laid down in the form of directives or Framework Directives, which are specifically intended to leave as much scope for the national level as possible in terms of implementation.

So, there are indeed some important problems with EU legislation, particularly from a perspective of the requirements of the Rule of Law. Apart from being problematic in itself, this also creates the conditions for 'judicial activism', as the CJEU has to mediate the contradictions, fill in the lacunae, and is thus invited to provide its own definitions and their interpretation, which can quickly lead to (accusations of) judicial legislation and thereby poses its own problems from a constitutional and democratic perspective.

(Perceived) Over-regulation

Second, corresponding to the 'roots' of Better Regulation in the Thatcher and Reagan era as explained by Colin Scott in Chapter 2, the Better Regulation Agenda is informed by a concern about the quantity of legislation and its impact on businesses, economic growth and competitiveness. Admittedly, this particular aspect of Better Regulation was more pronounced under the Barroso Presidency, and the current Commission has stressed that the Agenda is not about more or less regulation, but about better regulation.⁸ Nevertheless, this objective can still be detected in various aspects of how the Agenda continues to operate.⁹ This approach does not disqualify regulation as such and instead conditions it on being limited to what is 'necessary' and 'proportionate', but this still generates a certain deregulatory impulse. It implicitly adheres to an economically liberal analytical framework that considers 'no regulation/state intervention' to be the most desirable default situation and that demands high levels of justification for any change in that situation through the adoption of binding rules, usually limited to situations where 'the market' cannot provide the public goods in question. It has a tendency to conceptualise rules as 'burdens' that are assumed to be harmful for the creation, functioning and growth of businesses and, as such, the economy at large, and that therefore constantly need to be suspiciously scrutinised and justified. At the same time, this

⁸ European Commission Communication, 'Better Regulation for Better Results: An EU Agenda' COM (2015) 215 final; European Commission Staff Working Document of 19 May 2015, 'Better Regulation Guidelines' SWD (2015) 111 final.

⁹ See to this effect Dawson, above n 1.

partisan approach is bolstered by a more general, cross-spectrum concern about the EU's 'bureaucracy' and its perceived EU over-regulation: some figures show that 74 per cent of Europeans believe that the EU generates too much red tape.¹⁰

The difficulty with this particular problem definition is that it does not clearly distinguish between objective and subjective considerations, and between different underlying concerns with rules and 'over-regulation' that are lumped together in the problem definition and its current solution, but that may actually merit very different responses. Is the problem that, objectively speaking, there is too much (unnecessary) regulation? And is this negatively affecting Europe's economy? Who has determined this and on what basis? Or is the problem that there is a *perception* of over-regulation with European citizens and businesses? In that latter case, the question remains what precisely citizens and businesses would consider to be such 'red tape', and how this consideration is different from some people/businesses simply disagreeing with certain rules because it inconveniences them somehow, as is bound to happen in any system of government. The EU Better Regulation Agenda does not appear to make these nuanced distinctions, but instead hurls one and the same stone at the issue, hoping it will kill all birds at once. On the one hand, EU Better Regulation is, as R Daniel Kelemen discusses in Chapter 11, a public relations exercise. At the same time, it presents itself as an objective, fact- and evidence-based assessment that aims to fairly determine what rules are necessary and what rules are not, in order to address or prevent over-regulation.

While the public relations problems of the EU can be objectively established, the evidence supporting Better Regulation's implicit assumption that there is indeed a problem of (a tendency to produce) over-regulation in the EU system, and thus a need to assess every piece of legislation to try and prevent or address this, is less evident. The 2013 'Top 10' exercise,¹¹ in which small and medium-sized enterprises (SMEs) could identify the pieces of EU legislation that they found most 'burdensome' (or simply undesirable?) cannot be considered an example of the objective, evidence-based policy-making that Better Regulation itself tries to promote, and instead qualifies as evidence for 'perceived' over-regulation at best. One could argue that Better Regulation *itself* is about objectively establishing whether or not there is indeed a problem of over-regulation in the EU, through its Impact Assessments and evaluations that determine what rules are justified and what (parts) constitute(s) unnecessary red tape. But there is an element of path-dependency and self-fulfilling prophecy in such an undertaking: when an initiative of this scale is mounted to look for something, it is of course bound to find it. It would be highly unlikely that, after spending enormous administrative and financial resources on organising hundreds of evaluations and assessments, the

¹⁰ Eurobarometer Question QA 16.4 on p 59: http://ec.europa.eu/commfrontoffice/publicopinion/archives/eb/eb79/eb79_anx_en.pdf.

¹¹ COM (2013) 446, 18 June 2013.

conclusion would be that they simply proved that there was not a single instance of potential over-regulation and that therefore nothing was amended, repealed or withdrawn. And, furthermore, one could question how objective Better Regulation's assessments are from a methodological perspective. Cost-benefit analysis is one of the dominant elements of EU Better Regulation and, as Andrea Renda explored in Chapter 4, this carries a risk of bias through a range of its assumptions and because of its over-reliance on quantification. Furthermore, subsidiarity is operationalised in Impact Assessment in a default preference for 'non-regulatory alternatives', and the REFIT exercise has evaluated the *acquis* with the explicit aim to consider the repeal or amendment of regulation considered too burdensome for businesses.¹² This leaves the distinct impression that this second aim is not based on evidence of a real problem, but on evidence on perceptions of a problem and on political choices.¹³

Indeed, the narrative of an over-regulating EU stands in stark contrast to competing accounts of the EU's regulatory asymmetry, said to lead to an overall deregulatory bias in European integration.¹⁴ The EU's capacity to deregulate national standards, as also argued by Kelemen, is very strong. The EU has liberalised a range of sectors and integrates national legal systems directly through the free movement provisions and more indirectly through regulatory competition, as well as more recently through economic policy coordination. The CJEU's case law, which has constitutionalised the free movement provisions and has defined 'restrictions' to these freedoms exceedingly widely, plays a crucial role in this dynamic.¹⁵ Striking down national standards that do not pass the strict proportionality test significantly limits Member States' regulatory powers (negative integration). The EU in turn does not possess equal capacities to reregulate by setting European standards (positive integration). It can lack the competence to directly reregulate the issue, meaning that it has to rely on the internal market legal bases, which may not fully cover the issue and/or lead to an economic bias by demanding that the measure serves the functioning of the internal market.¹⁶ The EU legislator is subject to high consensus requirements that it has to fulfil

¹² Dawson, above n 1, 1225.

¹³ The fact that this aspect of Better Regulation would be a political choice of course in itself does not make it illegitimate. As also discussed in ch 1 to this book, especially since the use of *Spitzenkandidaten* in European elections, it could be argued that the European Commission has stronger political legitimacy, and then so would a deliberate policy choice such as the Better Regulation Agenda—at least to the extent that the Commission applies it to its own activities. However, as Mark Dawson discusses, EU Better Regulation does not clearly present itself as such: as a political commitment to reduce EU regulation in the interest of economic actors. Instead, it tends to present itself as the evidence-based, politically neutral policy that it itself purports to promote. See Dawson, above n 1.

¹⁴ Most authoritatively advocated by Scharpf, above n 2.

¹⁵ See S Garben, 'The Constitutional (Im)Balance between "the Market" and "the Social" in the European Union' (2017) 13 *European Constitutional Law Review* 23.

¹⁶ See G Davies, 'Democracy and Legitimacy in the Shadow of Purposive Competence' (2015) 21 *European Law Journal* 2.

in the context of a very diverse EU28, with national parliaments posing an additional hurdle. The effect of the case law on the bargaining conditions in the Council which favour the status quo makes it difficult for the legislator to deviate from that case law in practical terms.¹⁷ Moreover, a fundamental deviation is also difficult in legal terms, as the Court's interpretations of the internal market provisions are of constitutional nature. The legislative process is powerless in that case to alter the interpretation given by the CJEU; only a Treaty revision would suffice. This imbalance results in a regulatory gap, potentially eroding regulatory standards across Europe. Whether or not one accepts this account of European integration, it is clear that there is sufficient ground to challenge the implicit assumptions of EU Better Regulation concerning an over-regulating EU and that the Agenda would therefore need to be more convincingly justified in light of these counter-arguments.

Lack of Democratic Legitimacy

The EU is often said to suffer from a democratic deficit. This debate comprises a wide range of observations and claims.¹⁸ A first group is mainly concerned about a decrease in representative democracy, or 'input legitimacy', in that EU governance displaces the national legislative process. The European Institutions are seen as less democratically legitimate than their national 'equivalents' and, as such, whenever the EU legislates (or more generally acts) instead of the national level, this implies a loss of democratic control. A second group of claims about the EU's democratic deficit focuses on output legitimacy, positing that perhaps because of the preceding problems with input legitimacy, EU rules and policies are not in accordance with the preferences of the (majority of) European citizens. A third group is instead about participatory or deliberative democracy,¹⁹ and about what Schmidt has called 'throughput legitimacy', consisting of 'governance processes with the people, analyzed in terms of their efficacy, accountability, transparency, inclusiveness and openness to interest consultation'.²⁰ It is tied to the need for 'reflexive governance' as set out in further detail by Colin Scott in Chapter 2, which 'involves engagement with those affected by a regime, sometimes targeted at collecting the views of those affected, and sometimes oriented towards a more

¹⁷ See to this effect Scharpf, above n 2.

¹⁸ See for a comprehensive discussion A Føllesdal and S Hix, 'Why There is a Democratic Deficit in the EU: A Response to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533.

¹⁹ P Magette, 'European Governance and Civic Participation: Beyond Elitist Citizenship?' (2003) 51 *Political Studies*; B Kohler-Koch, 'Post-Maastricht Civil Society and Participatory Democracy' (2012) 34(7) *Journal of European Integration* 809.

²⁰ V Schmidt, 'Democracy and Legitimacy in the European Union Revisited: Input, Output and "Throughput"' (2013) 61 *Political Studies* 2.

radical ambition to engage participants in thinking not only about solutions to pre-defined problems but also about the nature of the problems faced.²¹

EU Better Regulation 'sets out to ensure that decision-making is open and transparent and that citizens and stakeholders can contribute throughout the policy and law-making process.'²² As such, it can be considered a commitment to participatory, deliberative democracy, 'throughput legitimacy' and reflexive governance, thus apparently assuming that there is currently a lack thereof in EU decision-making. Indeed, scholars seem generally to be in agreement that there is a problem.²³ The complexity of the legislative process and the use of informal trilogues²⁴ are identified as important challenges, as well as 'lobbying' or skewed interest-representation.²⁵ The latter concern is explicitly recognised by the EU Better Regulation Guidelines, stating that the Commission has a duty to promote in its policy proposals the general public interest of the EU as opposed to special interests of particular Member States or groups of society.²⁶ However, it should also be noted that these problems are perhaps more persistent in some areas than in others. For instance, in the area of social law and policy, the Social Title of the TFEU provides important possibilities for self-regulation by the European Social Partners²⁷ and for the structured involvement (in so-called two-phase consultations) of these key stakeholders in the legislative process. As such, there is already a strong guarantee of participatory and reflexive governance in that area, meaning that the implicit problem definition of Better Regulation is unsubstantiated and unconvincing in this respect. In several other policy areas, however, this concern would seem to be a legitimate one.

²¹ C Brown and C Scott, 'Regulation, Public Law and Better Regulation' (2011) 17 *European Public Law* 467, 476–77.

²² https://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how_en#objectives.

²³ Although some influential scholars such as A Moravcsik have presented counter-arguments, pointing out that EU policy-making process is now more transparent than most domestic systems of government, that transparency and access to documents rules have made it far easier for citizens to obtain information about EU policy-making, and that the European Parliament and national parliaments have increased scrutiny powers, including as regards the latter through the Early Warning System. See A Moravcsik, 'In Defence of the "Democratic Deficit": Reassessing the Legitimacy of the European Union' (2002) 40 *Journal of Common Market Studies* 603.

²⁴ See, eg, C Lord, 'The Democratic Legitimacy of Codecision' (2013) 20 *Journal of European Public Policy* 1056, 1063; K Huber and M Shackleton, 'Codecision: A Practitioner's View from Inside the Parliament' (2013) 20 *Journal of European Public Policy* 1040; C Burns, 'Consensus and Compromise Become Ordinary—But at What Cost?' (2013) 20 *Journal of European Public Policy* 988.

²⁵ See, eg, S Saurugger, 'Interest Groups and Democracy in the European Union' (2008) 31 *West European Politics* 1274; W Streeck and P Schmitter, 'From National Corporatism to Transnational Pluralism: Organized Interests in the Single European Market' (1991) 19 *Politics and Society* 133.

²⁶ European Commission Staff Working Document, 'Better Regulation Guidelines', above n 8, 74.

²⁷ Article 155 TFEU provides: '1. Should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements. 2. Agreements concluded at Union level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 153, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission. The European Parliament shall be informed.'

Insufficient Respect for Subsidiarity and Proportionality

Furthermore, EU Better Regulation aims to enforce the principle of subsidiarity. The implicit problem definition is that the EU does not sufficiently respect this principle in its decision-making, which is indeed an often-heard accusation. As this principle first and foremost relates to the vertical division of competences between the EU and the Member States, it expresses a ‘Federal’ concern about over-centralisation and a lack of respect for the powers, and identities of the constituent jurisdictions. As such, it is closely related to the discussion on ‘competence creep’, following which it is argued that regardless of the principle of conferral, the EU encroaches on areas of national autonomy through an (overly) expansive interpretation and use of its powers.²⁸ The principle of subsidiarity was introduced in the Maastricht Treaty as a way to address these concerns, but has itself triggered criticism for being ineffective and insufficiently adhered to.²⁹ As a primarily political principle, it is difficult for the CJEU to rigorously apply, all the more because the legal bases in the Treaties are often formulated in a way that if their requirements are complied with (eg, contributing to the functioning of the internal market in the sense of Article 114 TFEU), it will be difficult to posit that the Member States are better placed to do this. As such, it is perhaps not surprising that the CJEU has yet to strike down an EU act for breach of subsidiarity. The political control of subsidiarity by national parliaments through the Early Warning System introduced by the Lisbon Treaty has arguably been more successful in this respect, with three ‘yellow cards’ issued to date.³⁰ Still, some national governments have felt the need to conduct ‘balance of competences’³¹ reviews or ‘subsidiarity exercises’,³² and a problem with ‘competence creep’ indeed remains. Regardless of the Lisbon Treaty’s stipulations of national autonomy, conferral, and classification of competences, it remains possible for the EU to act in virtually any policy area, on the basis of its broad, functional and non-legislative powers.³³

The principle of proportionality is a well-established general principle of EU law, which is applied ‘against’ the Member States (most notably in the context

²⁸ For discussion, see the various contributions in Garben and Govaere, above n 3.

²⁹ See G Davies, ‘Subsidiarity, the Wrong Idea, in the Wrong Place, at the Wrong Time’ (2006) 43 *Common Market Law Review* 63.

³⁰ For the so-called Monti II initiative on the right to strike and the internal market freedoms, for the European Public Prosecutor’s initiative and for the proposal to revise the Posting of Workers Directive.

³¹ The UK, before the referendum on the EU. See V Miller, ‘Repatriating EU Powers to Member States’ (2011) Standard Note SN/IA/6153, House of Commons Library.

³² The Netherlands. See the letter of (then) Minister of Foreign Affairs Frans Timmermans to the Dutch Tweede Kamer, and the accompanying document, identifying a range of specific EU measures that are considered at odds with subsidiarity: <https://www.rijksoverheid.nl/documenten/kamerstukken/2013/06/21/kamerbrief-inzake-uitkomsten-subsidiariteitsexercitie>.

³³ Garben, ‘Restating the Problem of Competence Creep’, above n 3; Garben, ‘Competence Creep Revisited’, above n 3.

of the free movement provisions, when Member States seek to justify national restrictions by reference to the general public interest) as well as the EU Institutions. While the CJEU, in its enforcement of proportionality, is noticeably stricter towards the national legislator compared to the European level, it has nevertheless on occasion also struck down EU legislation for a breach of proportionality.³⁴ In addition to such judicial review, the proportionality principle is also policed alongside the subsidiarity principle by national parliaments through the Early Warning System. A concern for proportionality is omnipresent in the Better Regulation Agenda. In many ways, Impact Assessments and evaluations could be conceptualised as overall proportionality tests of EU legislation. Apparently, therefore, EU Better Regulation implicitly assumes that there is a fundamental problem with the respect for the proportionality principle in the EU. However, it is not clear what the factual basis for that assumption would be. It would seem to be linked to the discussion on EU 'over-regulation', for which we have already established that there is little objective evidence above. While the implicit problem assumption as regards lack of respect for the subsidiarity principle can thus be accepted, as regards proportionality it cannot.

Lack of Evidence-Based Policy-Making

As Ben Smulders and Jean-Eric Paquet have argued in Chapter 6:

[A]n 'ethical' necessity for evidence-based policy-making [was] at the root of Better Regulation in 2002 which is still relevant in today's world—arguably even more so. Take, for example, the worrying questioning of agreed basic science on climate change and the lexicon of 'alternative facts' in the US.

Better regulation provides a framework to deliver evidence-based policy-making—providing relevant information to those who take political decisions.

Indeed, EU Better Regulation places emphasis on (preferably quantifiable) proof for postulated problems and to what extent the proposed or existing policy will address these. Impact Assessments and evaluations aim to provide a rational analytical framework for policy-making, in order to limit political discretion and to provide the decision-makers with a structured assessment to help them make informed decisions. Thus, an implicit problem definition of Better Regulation appears to be that left to its own devices (ie, without a Better Regulation Agenda), the EU legislative and decision-making process would be prone to regulate in an unscientific or irrational manner, responding to imaginary problems or opting for

³⁴ eg, Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* ECLI:EU:C:2014:238 concerning the data retention directive.

costly solutions instead of more effective and efficient alternatives, and ignoring certain important issues that actually need regulation.

Whether Better Regulation as it currently operates indeed guarantees evidence-based governance in this sense will be discussed below. At this stage, it may be pointed out that this very problem definition in itself seems to warrant some further evidence. What are the examples of unscientific law-making that Better Regulation is supposed to filter out? The hairdresser's collective agreement, a high-profile withdrawal of 'bad regulation' in the context of the Better Regulation Agenda,³⁵ can be fully defended on the basis of scientific evidence concerning the health and safety risks of workers in the sector. The olive oil regulation that the media widely cited as an example of the EU's rule-sickness³⁶ and that was hastily withdrawn in response to the media controversy could probably similarly be defended on evidence-based grounds of consumer protection (referring to the high incidence of fraud in olive oil serving) and public health (referring to the high incidence of expired oils served in restaurants in unlabelled containers). As Alberto Alemanno has pointed out,³⁷ no Impact Assessment had been conducted for this proposal, so it is difficult to establish whether it would have made a difference. But it seems likely that if data would indeed have proven the above consumer and health risks, the proposal would have passed the Impact Assessment and would have been tabled all the same, and would have encountered the identical level of media outcry in certain Member States. It is doubtful that being able to cite exact percentages about health risks and frauds would have appeased these reactions. It is equally doubtful that because of that hypothetical Impact Assessment, the Commission in that case would have decided to maintain the proposal.

Indeed, a more recent example also shows how evidence-based policy does nothing to dispel fact-free claims about over-regulation: the EU's alleged ban on Belgian *frites*. The issue is with acrylamide, a chemical that naturally forms in

³⁵ This Agreement, aimed at improving the health and safety of workers in the hairdressing sector concluded by workers and employers, was publicly denounced by the European Commission as an example of bad regulation and was not put forward to the Council. See "REFIT—Fit for Growth": Examples How EU Law is Becoming Lighter, Simpler and Cheaper', http://europa.eu/rapid/press-release_MEMO-13-833_en.htm. As Schindler notes, former Commission President Barroso polemically declared in a TV interview that Europe does need to regulate hairdressers' 'high heels', even though the agreement primarily concerns the use of chemicals in the sector where workers are most at risk of work related skin disease. Interview by D Krause, *Tagesschau* (2 October 2013), <https://www.tagesschau.de/ausland/interview130.html>, as reported by S. Schindler, 'The Social Chimera of the Economic and Monetary Union: Social Policy in the Context of European Economic Governance' (2014) *LUP Student Papers*, available at <https://lup.lub.lu.se/student-papers/search/publication/4460811>.

³⁶ See, eg, J Ramsden, 'Dishes of Olive Oil to Be Banned from Restaurants? The EU's Gone Mad' *The Guardian* (22 May 2013), <https://www.theguardian.com/lifeandstyle/wordofmouth/2013/may/22/dishes-olive-oil-banned-restaurants-eu>.

³⁷ A Alemanno, 'Stop Bashing the EU with Olive Oil' *EUtopia Law* (30 May 2013), <https://eutopi-alaw.com/2013/05/30/stop-bashing-the-eu-with-olive-oil/>.

starchy food products during high-temperature cooking, including frying, baking, roasting at +120°C and low moisture. Acrylamide is found in products such as potato crisps, fries, bread, biscuits and coffee. It was first detected in foods in April 2002, although it is likely that it has been present in food since cooking began. Acrylamide is furthermore present in tobacco smoke. On 4 June 2015, the European Food Safety Authority published its first full risk assessment of acrylamide in food. Experts reconfirmed previous evaluations that acrylamide in food potentially increases the risk of developing cancer for consumers in all age groups.³⁸ As a result, the Commission has proposed a new draft Regulation,³⁹ updating its existing measures in this area, suggesting, inter alia, that fries are cooked first before being fried. It is a highly politicised issue, with food activists arguing for stricter standards and the industry and some national governments (like Belgium) opposing any further binding or non-binding EU actions. Despite the scientific evidence, several media outlets have derided this proposal as another incident of ludicrous EU over-reach.⁴⁰

These examples do not prove that there is a structural problem with the evidence base of EU regulation, but rather that such evidence does nothing to dispel accusations of over-regulation and that such 'technical' proposals are perhaps particularly prone to misrepresentation in the media. In fact, the problem (if any) with the initiatives that have met with most 'bad regulation' accusations instead seems to be that they were (presented as) *too* scientific and were not politically savvy. Indeed, Better Regulation's implicit critique that EU decision-making would not be sufficiently evidence-based does not sit well with the many accounts over the years qualifying the EU as a 'regulatory state' very much characterised by science-driven governance, which allegedly serves to alleviate claims about its democratic deficit, since the merit of a regulatory approach is to insulate certain areas of decision-making from politics and instead to deliver sound output legitimacy in the form of evidence-based policy.⁴¹ To the extent that Better Regulation aims to guarantee evidence-based policy, it therefore seems to operate on the basis of a faulty, unproven problem definition.

³⁸ EFSA, 'Scientific Opinion on Acrylamide in Food' (2015) 13 *EFSA Journal* 4104.

³⁹ Proposal for a Commission regulation establishing mitigation measures and benchmark levels for the reduction of the presence of acrylamide in food, Ares (2017)2895100.

⁴⁰ See, eg, D Boffey, 'Chips are Down for Belgian Frites as EU Acts on "Unsafe Compound"' *The Guardian* (20 June 2017), <https://www.theguardian.com/world/2017/jun/20/chips-are-down-for-belgian-frites-as-eu-acts-on-chemical>.

⁴¹ M Everson and G Majone, 'Institutional Reform: Independent Agencies, Oversight, Coordination and Procedural Control' in O de Schutter et al, *Governance in the European Union* (Brussels, Office for Official Publications of the European Communities, 2001).

THE EFFECTIVENESS OF BETTER REGULATION IN SOLVING THE IDENTIFIED PROBLEM(S) COMPARED TO ALTERNATIVE POLICY OPTIONS

The second analytical step in our evaluation of Better Regulation is to consider to what extent it actually helps to address the problems that have been identified as underlying objectives of the Agenda, and whether it is likely to be more effective and efficient than alternative policy options (which include ‘no action’).

Improving Legislative Quality

It is impossible to exhaustively regulate the future, and legislation is almost invariably the product of negotiations and political compromise, so the problems of legislative quality set out previously can be expected to present themselves in all legal systems. However, they do tend to be more pronounced in the EU, due to a variety of causes that are all, ultimately, linked to its multi-lingual and multi-cultural nature. As R Daniel Kelemen explained in Chapter 11, the EU’s diversity implies relatively low levels of inter-Member State trust and thereby increases the need for a legalistic approach, where agreements are laid down in a clear, binding and enforceable way. He has called this ‘Eurolegalism’,⁴² a mode of governance that relies on detailed rules containing strict transparency and disclosure requirements, legalistic and adversarial approaches to regulatory enforcement and dispute resolution, slow, costly legal contestation, active judicial review of administrative action, and the empowerment of private actors to enforce legal norms. In principle, Eurolegalism should be conducive to ‘quality legislation’, as it demands clear, precise, coherent and enforceable rules. However, the same linguistic/cultural diversity and plurality of legal systems that pushes juridification as posited by Kelemen also makes it more difficult to reach the common understandings and unequivocal agreements that are necessary for this type of governance to function correctly. Furthermore, diversity combined with the high consensus requirements of the EU legislative process (in themselves the consequence of low inter-Member State trust) leads to compromises—the nemesis of quality legislative drafting—and makes it difficult to amend/update/repeal legislation as discussed by Robert Zbiral in Chapter 5, thus ‘locking in’ potentially low-quality rules. Finally, this diversity warrants respect for subsidiarity and national (procedural) autonomy, arguing for framework rules and directives, and to leave as many details of implementation up to the Member States, which does not work in favour of a coherent, comprehensive and enforceable legal act.

The slightly disconcerting upshot is that because of the EU’s diversity, we tend to end up with a need for more law, but which is likely to be of low quality.

⁴² RD Kelemen, *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Cambridge, MA, Harvard University Press, 2011).

Even more disheartening is the realisation that since diversity as the root cause of the problem—the 'problem driver' to use Better Regulation language—cannot realistically be resolved, Better Regulation is fighting an unwinnable battle, at least to the extent that it aims to drastically improve the quality of EU legislation rather than tinker at the margins. While the directions contained in the style guides amount to more than mere cosmetics, and Impact Assessments may provide some analytical structure to the legislative initiative which could ultimately translate in more coherent legislation, the fact remains that ultimately the adoption of legislation remains a political, democratic exercise, which will therefore inevitably result in ambiguities and contradictions, especially in the EU's pluralistic context. In the above-mentioned example of the Temporary Agency Work Directive, which was the hard-fought result of two decades of debate and negotiations,⁴³ Article 4 was the necessary concession to the political right to make its adoption possible. Similarly, in the example of the Passenger Rights Regulation, the decision to not provide compensation in cases of delay, although difficult to justify in light of equal treatment since the inconvenience suffered could be equal to that in cases of cancellations, was a deliberate political strategy of the Commission as a compromise towards the industry that strongly opposed the measure.⁴⁴ And the various derogations and exceptions of the Working Time Directive are clearly the result of compromises and negotiations between Member States, employers, trade unions and the EU. Non-derogatable rules would have been easier to apply, but are considered too rigid. However, too wide derogations would have been considered to undermine the goals of the Directive. The result is a complex system that works substantively to accommodate most concerns, except those of legal clarity. No style guide or Impact Assessment could realistically bring about much improvement in these cases.

These concerns apply with most force to the ordinary co-legislative process. What about other types of regulation—for instance, implementing or delegated measures—which are often more technical and less political in nature? On the one hand, political compromises may play a less important role in these areas, making it easier to agree on clear, substantive standards. On the other hand, the technical nature of these issues makes the regulation thereof inevitably complex and difficult to understand for the ordinary citizen. For example, limit values for substances only scientists have ever heard of will probably never be easy or appealing to explain. While it would perhaps not be impossible to try and draft some of these measures in a more user-friendly way—for instance, by clearly stating the overall benefits that the measure aims to achieve in the interests of citizens as Helen Xanthaki proposes in Chapter 3—this also risks making the exercise more political and thus undermining the 'regulatory' rationale of the measure and the procedure for its adoption.

⁴³ N Countouris and R Horton, 'The Temporary Agency Work Directive: Another Broken Promise?' (2009) 38 *Industrial Law Journal* 329.

⁴⁴ S Garben, 'Sky-High Controversy and High-Flying Claims? The Sturgeon Case Law in Light of Judicial Activism, Euroscepticism and Eurolegalism' (2013) 50 *Common Market Law Review* 15.

By being unable to tackle the ‘problem drivers,’ it seems that initiatives such as EU Better Regulation to improve the quality of EU rules are bound to disappoint. What are the alternatives? Considering the significant costs of EU Better Regulation as set out below and the limited benefits it can be expected to bring in terms of legislative quality, ‘no action’ may in fact be a viable option. Alternatively, and more ambitiously, it would seem that the best solution lies in improving citizens’ capacity to understand, and engage with, these inevitably imperfect texts. This calls for interpretative guidance by the European Commission (which indeed it already increasingly produces) in the form of Communications and Guidelines, as well as other communications tools. But it also relies, to perhaps an even greater extent, on the Member States taking responsibility in this regard. At the most fundamental level, investments should be made in civic education at all levels of society with an important component of ‘European literacy’, improving individuals’ understanding of how the EU works and the general framework of its body of rules. Member States should furthermore provide systematic and accessible information on how EU rules apply in their country by reference to the way in which EU Directives have been transposed into national law and what national actors/issues are specifically affected by EU Regulations. Finally, access to national courts is crucial, meaning that Member States would have to invest in their judicial systems, keeping any court fees to an absolute minimum, and ensuring that judicial proceedings are expedient and effective.

Tackling (Perceptions of) Over-regulation

As regards the objective to ‘combat criticisms that the EU produces too much red tape—inflexible, onerous regulations that strangle European businesses’, R Daniel Kelemen has argued in Chapter 11 that:

Better Regulation initiatives, no matter what their substantive impacts, will never reduce criticisms of excessive red tape from Brussels. Such critiques are ultimately grounded in Eurosceptic and sometimes anti-government ideologies, and cannot be swayed even by successful reforms. Those who believe that the European economy is being strangled by red tape from Brussels cannot be appeased by promises of ‘doing less, but doing it better’. On the contrary, they are likely to take such initiatives as an admission of guilt and a show of weakness, and to press ahead with their campaign against ‘Brussels’.

The crucial point is that the Better Regulation Agenda, by implicitly or explicitly formulating ‘EU over-regulation’ as a part of the problem definition that it is aimed at addressing, confirms these perceptions and thereby feeds the existence of the very problem that it intends to solve. It is thus a counterproductive policy.

As Kelemen explains, it would have been (and would still be) more effective to engage in a positive public relations exercise instead:

‘Rather than engaging in Maoist-style self-criticism about the shortcomings of EU regulation, the Commission should celebrate and claim credit for the strengths and benefits

of EU regulation ...To be sure, the EU has undertaken a number of initiatives in this spirit. To take just one prominent example in the field of passenger rights regulation, the EU has been aggressive in highlighting the benefits of EU regulations for individual citizens. As any air traveller in Europe will have noticed, with posters and notices on monitors in airport lobbies, the EU has worked to alert passengers of their EU passenger rights—including rights to compensation—which has been a more effective public relations exercise than all the Better Regulation initiatives put together. Such positive initiatives promise to do more to improve the image of EU regulation than any self-critical 'Better Regulation' programme ever could. The EU should press ahead with many more such initiatives.

Beyond the question of public perception, another issue altogether is whether, if tackling over-regulation itself is an explicit goal of the EU Better Regulation Agenda, it is (capable of) achieving this aim. Robert Zbiral's analysis in Chapter 5 has found that only a few proposals or existing pieces of legislation have been withdrawn following the application of the EU Better Regulation Agenda, and most of these qualify as the repeal of 'low-hanging fruit' of obsolete provisions or self-evident consolidations and recasts. While others would argue that Better Regulation 'victims' such as the hairdresser's agreement and initiatives on musculoskeletal disorders and carcinogens and mutagens in the workplace⁴⁵ are in themselves highly significant, in terms of sheer numbers it is indeed true that EU Better Regulation has not led to the Grand Repeal of the *acquis* that some hoped and others feared it would be. This can be explained by a variety of legal and political factors.

First of all, as Zbiral points out, for legislation, the same procedure that is followed for the adoption of an act is necessary for its repeal, which means that the high consensus requirements that make the adoption of EU legislation difficult equally make the repeal of successfully adopted legislation very hard. Second, there objectively is a high need to regulate in the EU, as R Daniel Kelemen also explained in his work on Eurolegalism and as is confirmed from a different perspective by the above-cited work of Scharpf. Because of the EU's market-making actions, in the form of liberalisation and integration, it deregulates pre-existing national governance structures and standards, and thus needs to replace them at the European level. Whether or not the EU succeeds in equivalent levels of reregulation remains an open question, but the need and pressure to do so is clear. And the very adoption of EU reregulation in the interest of market-making tends to lead to a need for further EU regulation. Especially where Member States have become excluded from regulating in the public interest such as health, consumer and environmental protection because of EU internal market measures that 'fully harmonise' a particular part of the market, it becomes necessary for the EU to take over the regulation of these interests in a proactive way, regulating emerging risks and newly developing situations on a rolling basis. If this is considered undesirable, the alternative would

⁴⁵ Discussed in further detail below.

be to reconsider the EU's market-making ambitions altogether. If there were a less ambitious interpretation of the internal market, and fewer instances of liberalisation, there would also be less need for reregulation at the EU level. However, it is highly doubtful that such an alternative would meet the approval of precisely those who currently advocate 'less regulation' most vehemently.

Increasing Democratic Legitimacy

Better Regulation's efforts to bolster the EU's deliberative and participative democratic credentials fit well with Schmidt's general finding that 'attention to the mechanisms of "throughput" legitimacy, that is, to the efficacy, accountability, openness and inclusiveness of the governance processes, has not only been increasing among scholars but has long been among the central ways in which EU-level institutional players have sought to counter claims about the poverty of input legitimacy and to reinforce claims to output legitimacy'.⁴⁶ The current EU Better Regulation Agenda indeed strengthens public consultation and stakeholder involvement commitments, such as by broadening the range of acts for which a full 12-week online consultation is required (including all proposals subject to Impact Assessment, fitness checks of existing legislation and Green Papers)⁴⁷ and giving a four-week consultation period for many delegated and implementing acts.⁴⁸

However, as Dawson has pointed out, some recurrent problems remain. First, consultations tend to involve the usual suspects of industry associations, EU-funded transnational non-governmental organisation (NGOs) and those with existing privileged access to the political process.⁴⁹ While they are open to all citizens, such genuine public participation does not seem to take place on a large scale, which may be due to the fact that the only people who know about the public consultation are those who are already in the know about the respective initiative in the first place. Too many consultations running in parallel may also result in lower participation rates of average citizens. As the main thrust of contributions is thus from the traditional interlocutors, the added value of the responses in terms of policy input is at times very limited, as the positions are predictable and usually along pre-determined political lines, of which the Commission is already well aware. Second, many consultations ask participants to comment on a defined set of questions set by the lead Directorate General and 'there thus remains significant scope simply to remove key aspects of a given initiative from the political table through how the terms of reference for consultation are defined'.⁵⁰ This risks

⁴⁶ Schmidt, above n 20, 3.

⁴⁷ Better Regulation Guidelines, above n 8, 52.

⁴⁸ *ibid* 77.

⁴⁹ Dawson, above n 1, 1219.

⁵⁰ *ibid* 1220.

amounting to a 'thin' notion of reflexive governance,⁵¹ where instead of policy being developed on the basis of constructive, open dialogue with the public and stakeholders, consultation is conceived as a narrowly framed window-dressing exercise. Third, there are no clear commitments as to what is done with the results of the consultations, further feeding that latter criticism.

Fourth, in highly politicised areas, there have been problems with 'stakeholder campaigns', where industry associations, NGOs and trade unions have encouraged members to send hundreds of almost identical contributions on the basis of a template. Apart from processing issues, this raises the more general problem of 'weighing' contributions in public consultations: does every reply carry equal weight or should the reply of an organisation representing more than 1,000 members count for more? And what do they count towards? Are the consultations to be seen and used as a gauge of public opinion, like a mini-referendum on the specific issue, or instead simply intended to receive policy input? This also links to a specific problem with public consultation in the area of social policy, where the Treaties accord a privileged role for the European Social Partners. They should first and foremost be consulted and included in the decision-making process through the two-stage consultation provided in the Social Policy Title. The added value of additional public consultation is not entirely clear in this case. Moreover, against the background of Better Regulation's commitment to reflexive and participatory governance, it is remarkable that one of the few high-profile Better Regulation actions has been the Commission's refusal to submit the collective agreement in the hairdressing sector for adoption to the Council.⁵² Finally, there is a clear tension between the idea of Better Regulation as a vehicle for more participatory, democratic decision-making on the one hand, and Better Regulation as a guarantee for evidence-based, efficient and effective governance on the other. What if the public consultation clearly shows a majority preference for a policy option that is not based on any sound facts? Which of Better Regulation's various aims takes precedence?

Apart from the fact that the way in which EU Better Regulation organises public consultation and stakeholder involvement is perhaps not fully effective, one could also question whether the Agenda is not misdirecting its efforts, spending disproportionate amounts of resources on public consultations with limited added value, while doing little to tackle the more problematic features of the current legislative process, such as trilogues. These informal negotiations taking place behind closed doors and foreclosing the normal interinstitutional debates and negotiations were applied to 80 per cent of legislation during the last European Parliament term of office.⁵³ The Interinstitutional Agreement on Better Law-Making does state that

⁵¹ Brown and Scott, above n 21.

⁵² For discussion of the legal implications, see ch 1 of this book.

⁵³ Opinion of the European Economic and Social Committee on the communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Better Regulation for Better Results: An EU Agenda' COM (2015) 215 final.

the ‘three Institutions will ensure the transparency of legislative procedures, on the basis of relevant legislation and case-law, including an appropriate handling of trilateral negotiations’, but neglects to indicate any further concrete measures in this regard and as such may be considered a rather hollow promise. The European Economic and Social Committee has called for trilogues to be reserved for particular emergencies and for the majority of legislation to be decided via the ordinary legislative procedure, considering that ‘only this will ensure full democratic legitimacy and participation.’⁵⁴ The Ombudsman has proposed that the Institutions make the following documentation and information publicly available: ‘trilogue dates, initial positions of the three institutions, general trilogue agendas, “four-column” documents, final compromise texts, trilogue notes that have been made public, lists of the political decision makers involved and as far as possible a list of other documents tabled during the negotiations. All of these should be made available on an easy-to-use and easy-to-understand joint database.’⁵⁵ It would seem that EU Better Regulation would need to invest more in these alternative types of action if it effectively wants to improve the EU’s throughput legitimacy.

Finally, there is another way in which EU Better Regulation could be said to fail on democratic legitimacy grounds. While some might argue that to the extent that Better Regulation seeks to limit EU action to what is necessary and proportionate, it serves ‘input’ or representative democracy by leaving as much space for the national legislative process as possible, other strands of the Better Regulation Agenda do not sit easily with such a narrative. For one thing, its rather hostile stance on ‘gold-plating’ in the form of national rules that ‘go beyond’ the standards set in EU rules goes against any idea that Better Regulation would foster democracy by empowering the national legislator.⁵⁶ Furthermore, as was mentioned in the previous paragraph, EU Better Regulation does nothing to address the EU-induced deregulation on the national level that triggers the need for EU reregulation. Moreover, as will be discussed in more detail in the following paragraph, EU Better Regulation does not aim to limit all EU action, but is instead mainly directed at EU legislation, while promoting other forms of European integration

⁵⁴ *ibid.*

⁵⁵ Decision of the European Ombudsman setting out proposals following her strategic inquiry OI/8/2015/JAS concerning the transparency of trilogues.

⁵⁶ According to the European Commission: ‘Member States also often go beyond what is strictly required by EU legislation when they implement it at national level (“gold plating”). This may enhance the benefits but can also add unnecessary costs for businesses and public authorities which are mistakenly associated with EU legislation.’ It urges Member States to ‘avoid unjustified “gold plating”’ and that Member States should be invited to explain the reasons for any such gold-plating; Commission Communication, above n 8. The European Parliament has adopted a different line, stating that ‘in the case of directives, it is the prerogative of the Member States to decide whether to adopt higher social, environmental and consumer protection standards at national level than those minimum standards of protection agreed upon at EU level, and welcomes any decision to do so; reaffirms that such higher standards must not be regarded as “gold plating”’. European Parliament, ‘Report on Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook’, 24 June 2015, 2014/2150(INI), para 44.

such as soft law processes. However, these pose a much greater democratic concern than EU legislation does.

Increasing Respect for Subsidiarity and Proportionality

It was mentioned above that there is a valid problem definition in that EU integration, especially in the area of Member State autonomy, is insufficiently contained, regardless of all the stipulations to the contrary in the Lisbon Treaty and despite the various mechanisms to enforce subsidiarity and proportionality, including through the Early Warning System. This problem of competence creep is most commonly associated with so-called 'indirect legislation', ie, legislation touching on policy areas in which the EU's direct competence is limited or even excluded, but which can be adopted on the basis of other Treaty provisions such as Article 114 TFEU on the internal market. On that point, the competence debate converges with the debate on Better Regulation. However, there is a range of other manifestations of the same problem: namely, negative integration through CJEU case law, international (trade) agreements, economic governance, soft law and parallel integration.⁵⁷ The main issue with competence creep, in all its various forms, is one of democratic legitimacy. All forms of competence creep, at least to a certain extent, displace the national legislative process, either through binding European or international norms, or through 'softer' European-level decision-making that constrains national regulatory autonomy. However, an often-overlooked point is that only competence creep in the form of indirect legislation can rely on an alternative form of democratic validation, in the form of the European legislative process, with the involvement of the European Parliament and all other checks and balances attached to it—imperfect as it may still be. Trade agreements, economic governance, soft law and parallel integration, on the other hand, displace not only the national but also the European legislator, to the benefit of executive or judicial decision-making, which poses much greater concerns in terms of input, throughput and output legitimacy.

The problem with the EU Better Regulation Agenda is that in the name of subsidiarity, it actually promotes and encourages these less democratic forms of European integration, especially soft law. As Dawson notes, in the Better Regulation Agenda 'there is a strong emphasis on conceptualizing subsidiarity in terms of a preference for the use of less harmonizing and hierarchical regulatory instruments'.⁵⁸ Furthermore, EU Better Regulation can be expected to have such an effect more indirectly, since policy-makers in the Commission may be tempted

⁵⁷ For a more extensive discussion of these issues, see S Garben, 'Competence Creep Revisited', above n 3.

⁵⁸ Dawson, above n 1, 1224.

to avoid having to engage in arduous Impact Assessments and being examined by the Regulatory Scrutiny Board by opting for a soft law initiative instead of a legislative one. It is open for debate whether soft law is more in line with the subsidiarity principle than legislation is. Especially compared to the most prescriptive forms of EU legislation, soft law obviously leaves much more room for manoeuvre at the national level in terms of how to achieve certain European-level goals and potentially even allows them to not comply with these non-binding norms, but one could ask how much such autonomy is worth if it nevertheless means being subjected by significant European-level pressures (including, in the case of economic governance, the possibility of financial sanctions). In any event, even if this is accepted to be so in a narrow sense, subsidiarity does not stand alone, but has to be considered hand-in-hand with the principle of democratic legitimacy, and, as stated, soft law is highly problematic from that perspective. While with EU Better Regulation the Commission seems to have departed from its original position on soft law in its White Paper on Governance,⁵⁹ where it stated that it should not be used when the Community Method is available, the European Parliament seems to remain committed to this view, and it is noteworthy that the Inter-Institutional Agreement indicates that ‘*recalling the importance which they attach to the Community method, the three Institutions agree to observe general principles of Union law, such as democratic legitimacy, subsidiarity and proportionality, and legal certainty. They further agree to promote simplicity, clarity and consistency in the drafting of Union legislation and to promote the utmost transparency of the legislative process*’ (emphasis added). Taken seriously, this would necessitate a revision of the Commission’s Impact Assessment approach as regards subsidiarity.

An alternative that would better serve both subsidiarity and democracy would be to subject all soft law initiatives to compulsory Impact Assessment. Currently, such Impact Assessment is foreseen for non-legislative initiatives which are expected to have significant economic, environmental or social impacts, but this does not seem to be adhered to. For instance, no such Impact Assessments are carried out for the annual country-specific recommendations (CSRs) issued in the context of the European Semester, the EU’s annual cycle of economic policy coordination. Of course, as will be elaborated below, Impact Assessments and evaluations come at a significant price, and there are many arguments against applying EU Better Regulation to the CSRs. However, there is no particular reason why those arguments would not equally hold true for legislation, which is systematically subjected to these requirements. The point is that EU Better Regulation does not have a sufficient justification for targeting legislation with any more force than other forms of European integration, and it would thus make sense to either question the application of Better Regulation altogether or to argue for equal application to all forms of EU action.

⁵⁹ European Commission, ‘European Governance—A White Paper’ COM (2001) 428 final.

Finally, as regards the principle of proportionality, it was argued above that although respect for this principle seems to be an overarching aim of EU Better Regulation, it is based on a faulty problem assumption, since there is little evidence that there is a fundamental tendency to disrespect this principle in the legislative process. Furthermore, the Court has been willing to strike down EU legislation that does breach proportionality, and the Early Warning System adds political control of this principle to the Member States' toolbox. To the extent that EU Better Regulation is about ensuring proportionality, it therefore seems a rather disproportionate and unnecessary exercise. The remaining part of this problem assumption seems to coincide with concerns about (perceived) EU over-regulation, the discussion of which has taken place above.

Promoting Evidence-Based Policy-Making

It was argued above that the objective of promoting evidence-based policy-making appeared to be based on a poor problem assumption: it is unlikely that the EU will adopt unscientific regulation as this goes against part of its core 'regulatory' rationale, and so it is unclear why the Better Regulation exercise would be necessary to further ensure this. It was also mentioned above that some of the 'bad regulation' scapegoats in fact concerned initiatives that could be considered too scientific (but perhaps not politically savvy) and, to the extent that some of those have been withdrawn in light of EU Better Regulation, it thus seems that the Agenda is applied to the contrary of its own objective to foster evidence-based decision-making.

It could be added that genuine evidence-based policy-making would also require a more proactive commitment to initiate new legislation or other forms of EU action as expediently and effectively as possible whenever new risks or problems emerge. However, EU Better Regulation does not seem particularly conducive to such an approach that would stimulate and encourage the adoption of more regulation, although it should be mentioned that the Interinstitutional Agreement states that 'the Commission will duly take account of the views expressed by the European Parliament and the Council at each stage of the dialogue, including their requests for initiatives'. Yet, overall, EU Better Regulation acts instead as a deterrent for such proactive policy-making and has at times explicitly obstructed it. For example, the REFIT exercise held back important legislation on muscular skeletal disorders, the scientific need for which was recognised by the Commission in 2007,⁶⁰ as well as updates for legislation on carcinogens and mutagens, for over a decade.⁶¹ Only after the European Parliament's Committee on Employment and

⁶⁰ See Second-Stage Consultation of the Social Partners on work-related musculoskeletal disorders.

⁶¹ European Commission, 'REFIT: State of Play and Outlook—Questions and Answers', http://europa.eu/rapid/press-release_MEMO-14-426_nl.htm, stating that as a result of REFIT, 'the Commission ... decided not to present a number of proposals on which it had already been working, for

Social Affairs in its opinion on REFIT ‘called on the Commission to increase the protection of workers; calls on the Commission, in particular, to present a proposal on muscular skeletal disorders and environmental tobacco smoke, and to make necessary updates to the list of carcinogens and mutagens’⁶² did the European Commission in 2017 finally move on some of these issues, in the form of a proposed Directive on carcinogens and mutagens.⁶³ For muscular skeletal disorders, it has refused to propose any new measures at this stage.⁶⁴

THE COSTS AND BENEFITS OF EU BETTER REGULATION

It is impossible—and beyond the scope of this chapter—to exhaustively assess all the actual costs and benefits of the EU Better Regulation Agenda, let alone to quantify them. But for completeness of the argument, some of the main possible costs and benefits will be briefly postulated here. These notions will be used in a broad sense, encompassing more general impacts on society and the EU legal and political order.

Costs of EU Better Regulation

The first cost is that related to the ‘bureaucracy of EU Better Regulation’, ie, the actual running of Impact Assessments, evaluations and other Better Regulation activities. These should comprise: (i) the labour costs of the EU civil servants spending significant amounts of time on these activities, both in the Commission Secretariat General as in the policy Directorates General, as well as in the Parliament and the Council; and (ii) the price of expert studies contracted out to consultancies in the context of these activities. These actual costs could, on the basis of the necessary information, be determined with some reasonable accuracy and can be expected to amount to millions of euros each year.

The second cost is a more difficult-to-measure opportunity cost, in the sense of other important activities not being pursued because of: (i) the time available to

example in the areas of occupational safety and health for hairdressers, musculoskeletal disorders, environmental tobacco smoke and carcinogens and mutagens’. See also Euractiv, ‘European Commission’s “Better Regulation” Has Killed 100,000, Say Unions’, 24 April 2015, <http://www.euractiv.com/sections/health-consumers/european-commissions-better-regulation-has-killed-150000-says-etuc-314030>.

⁶² European Parliament, Opinion of the Committee on Employment and Social Affairs on Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook 2014/2150(INI), 28 May 2015, para 16.

⁶³ See Commission proposal for a Directive amending Directive 2004/37/EC on the protection of workers from the risks related to exposure to carcinogens or mutagens at work, 2017/0004 (COD).

⁶⁴ European Commission Communication, ‘Safer and Healthier Work for All—Modernisation of the EU Occupational Safety and Health Legislation and Policy’ COM (2017) 12 final.

the EU civil service being taken up by running EU Better Regulation exercises; and (ii) the deterrent effect of the administrative and economic burdens of new initiatives having to pass Impact Assessments. While it will be difficult to ever determine what initiatives might have been developed—or developed more expediently—without EU Better Regulation and to assess what costs and benefits those hypothetical initiatives would have brought, the point here is to recognise these costs of EU Better Regulation at least in theory.

Even more difficult to measure or quantify, but not unimportant to recognise as a negative impact, are the findings that have emerged from the previous paragraphs that: (i) EU Better Regulation risks aggravating the deregulatory asymmetry of European integration (with corresponding negative consequences on important non-economic interests such as consumer, health and environmental protection, and on fundamental (social) rights); and (ii) EU Better Regulation aggravates the EU democratic deficit by targeting the EU legislative process, but instead doing nothing to limit—and instead promoting—less legitimate forms of EU integration, such as soft law.

Benefits of EU Better Regulation

If the Better Regulation Agenda was right in its problem definitions and would be effective at addressing them all, the expected benefits would be significant, albeit difficult to quantify. They would include: (i) an increased respect for the Rule of Law through better-quality legislation; (ii) increased economic performance by reduced regulatory burdens on businesses and by reduced administrative burdens on public authorities; (iii) increased democratic legitimacy through enhanced participatory and reflexive governance, which would also lead to more enforceable legislation and thus would positively affect the Rule of Law; and (iv) increased legitimacy of the European integration process in the eyes of citizens, businesses and Member States alike through more effective, rational and proportionate rule-making. This of course coincides with the political narrative that is supposed to 'sell' the EU Better Regulation Agenda.

Unfortunately, as the foregoing assessment has shown, EU Better Regulation does not deliver all of these benefits. This is partly because it is shooting at enemies that are not there (over-regulation, unscientific regulation), partly because it targets the henchmen but not the bosses (public consultation instead of trilogues, EU legislation instead of soft law), partly because it engages in battles in already-lost wars (quality of EU legislation) and partly because it engages in counterproductive strategy (public perceptions of over-regulation). Of course, it is likely to have delivered some benefits: perhaps the drafting of legislation has slightly improved because of the style guidelines, perhaps some legislative initiatives have been better conceived because of the analytical framework of Impact Assessment, perhaps some costly or intrusive initiatives have not seen the light of day because of Better Regulation's deterrent effect or because a better alternative was chosen in light of

the evidence-base, and perhaps its commitment to public consultation has somewhat improved the participatory image of the EU with informed citizens and certain interest organisations. But these benefits are likely to be marginal, especially compared to the aims, scope and costs of EU Better Regulation.

CONCLUSION

The present chapter has used the idea of subjecting Better Regulation to an Impact Assessment mainly as a rhetorical device. But it merits serious consideration. An official Impact Assessment (or *ex post* evaluation) of (each incarnation of) the EU Better Regulation Agenda itself would seem a good way to increase the legitimacy of a policy that is central to the legitimacy of European integration. Better Regulation generates an enormous administrative burden for the EU Institutions, has serious cost implications for the EU budget and can be expected to have certain negative constitutional, social and environmental impacts, if only because it throws up hurdles in the legislative process on which the protection of non-market interests depend more in the EU than the protection of market interests do. While on the basis of the foregoing analysis, it seems unlikely that the expected benefits—in terms of a clearer and simpler regulatory framework, more effective legislation and more throughput legitimacy through participatory governance—can be achieved to such a degree that they would outweigh the costs, a genuine Impact Assessment may obviously prove differently. The least that can be asked is for the very policy that trumpets evidence-based policy-making, proportionality and (cost-)effectiveness to be forced to live up to its own standards and thus: (i) to be clear about the evidence base for the postulated problems it tries to address and whether it is succeeding in doing so; (ii) to assess what the costs and the benefits and advantages and disadvantages are of the approach it takes at the expense of alternatives; and so (iii) to prove its own ‘added value’. And if such an exercise would confirm the findings on the basis of the assessment conducted in this chapter, namely that the EU Better Regulation Agenda is currently ‘unfit for purpose’, the necessary conclusions must be drawn and actions should be taken accordingly, which would probably entail a fundamental overhaul of EU Better Regulation in its objectives, scope and content. There really is no good reason not to conduct such an assessment in all seriousness. For if its methodology is sound, what does EU Better Regulation have to fear in being judged by its own standards?