

# The European Union's New Better Regulation Agenda

Citation for published version (APA):

Eliantonio, M., & Spendzharova, A. (2017). The European Union's New Better Regulation Agenda: Between Procedures and Politics. *European Journal of Law Reform*, 19(1-2), 3-15.  
<https://doi.org/10.5553/EJLR/138723702017019102001>

**Document status and date:**

Published: 01/01/2017

**DOI:**

[10.5553/EJLR/138723702017019102001](https://doi.org/10.5553/EJLR/138723702017019102001)

**Document Version:**

Publisher's PDF, also known as Version of record

**Document license:**

Taverne

**Please check the document version of this publication:**

- A submitted manuscript is the version of the article upon submission and before peer-review. There can be important differences between the submitted version and the official published version of record. People interested in the research are advised to contact the author for the final version of the publication, or visit the DOI to the publisher's website.
- The final author version and the galley proof are versions of the publication after peer review.
- The final published version features the final layout of the paper including the volume, issue and page numbers.

[Link to publication](#)

**General rights**

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal.

If the publication is distributed under the terms of Article 25fa of the Dutch Copyright Act, indicated by the "Taverne" license above, please follow below link for the End User Agreement:

[www.umlib.nl/taverne-license](http://www.umlib.nl/taverne-license)

**Take down policy**

If you believe that this document breaches copyright please contact us at:

[repository@maastrichtuniversity.nl](mailto:repository@maastrichtuniversity.nl)

providing details and we will investigate your claim.

## EDITORIAL

# The European Union's New "Better Regulation" Agenda: Between Procedures and Politics

## Introduction to the Special Issue\*

*Mariolina Eliantonio & Aneta Spendzharova\*\**

### A Introduction

In May 2015, the European Commission unveiled its new "Better Regulation" program,<sup>1</sup> designed to ensure that European Union (EU) laws and policies are prepared, implemented and reviewed in an open and transparent manner, informed by evidence and supported by business and citizens. It demonstrates persistent attention to transparency in the preparation of laws, responsiveness to stakeholders and the public and reliance on evidence-based policy-making. It also shows consideration for subsidiarity concerns in the context of the subsidiarity and proportionality reviews in the Netherlands in 2013 and the United Kingdom (UK) in 2014, and the impending withdrawal of the UK from the EU.<sup>2</sup>

\* The special issue editors are grateful to the Centre for European Research in Maastricht (CERiM), the Stichting Universiteitsfonds Limburg (SWOL) and the Research Stimulation Fund of the Faculty of Arts and Social Sciences at Maastricht University for their financial support to convene a research workshop on "The 'Better Regulation' Agenda: Achievements and Challenges Ahead," held on 3-4 December 2015 in the Brussels Campus of Maastricht University. We would like to thank the workshop participants for their excellent and insightful contributions. We thank Christine Neuhold and Sophie Vanhoonacker for their valuable comments on the project and encouragement.

\*\* Mariolina Eliantonio is Associate Professor of European Administrative Law at Maastricht University. Aneta Spendzharova is Assistant Professor of Political Science at Maastricht University.

1 The rationale, aims and supporting documents of the "Better Regulation" package are available at: <[https://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how\\_en#need](https://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how_en#need)>.

2 Government of the Netherlands, 'European where necessary, national where possible', 21 June 2013, available at: <<https://www.government.nl/latest/news/2013/06/21/european-where-necessary-national-where-possible>>; Government of the UK, 'Review of the balance of competences between the United Kingdom and the European Union – subsidiarity and proportionality report', 27 March 2014, available at: <<https://www.gov.uk/government/consultations/subsidiarity-and-proportionality-review-of-the-balance-of-competences>>.

“Better Regulation” has been extensively studied before, both at the European and national levels.<sup>3</sup> Specifically regarding the EU legal system, Radaelli described the initial “Better Regulation” package as a new type of meta-regulation, which enabled policy-makers to combine diverse policy objectives in different areas.<sup>4</sup> Furthermore, during the Barroso Commission, the Open Method of Coordination (OMC) received particular attention in the “Better Regulation” framework as a more flexible approach to policy-making in order to reach the Lisbon agenda priorities of “jobs and growth.”<sup>5</sup> Moreover, a growing body of EU governance literature explored whether non-hierarchical governance modes such as experimentalist governance<sup>6</sup> and reflexive governance<sup>7</sup> supported by the “Better Regulation” package were better suited to organizing collective action than hierarchical state-centered governance modes.

Following up on the White Paper on Governance (2000),<sup>8</sup> and the Interinstitutional Agreement on Better Law-Making (2003),<sup>9</sup> the renewed “Better Regulation” agenda (2015)<sup>10</sup> aims to diminish the negative unintended consequences of political bargaining in the Council and the EU legislative triangle and to deliver better policies in the EU legal order, ultimately reinforcing the trust of European citizens in the EU political processes and counteracting the perceived legitimacy crisis<sup>11</sup> for European integration. In order to achieve these overarching aims, the “Better Regulation” agenda shows a renewed attention towards evidence-based

- 3 See, for example, C. Radaelli, ‘Whither Better Regulation for the Lisbon Agenda’, *Journal of European Public Policy*, Vol. 14, No. 2, 2007, pp. 190-207; M. Kaeding, ‘In Search of Better Quality of EU Regulations for Prompt Transition: The Brussels Perspective’, *European Law Journal*, Vol. 14, No. 5, 2008, pp. 583-603; C. Radaelli & A. Meuwese, ‘Better Regulation in Europe: Between Public Management and Regulatory Reform’, *Public Administration*, Vol. 87, No. 3, 2009, pp. 639-654; C. Dunlop *et al.*, ‘The many uses of regulatory impact assessment: A meta-analysis of EU and UK cases’, *Regulation and Governance*, Vol. 6, 2012, pp. 23-45; A. Alemanno, ‘How Much Better Is Better Regulation? Assessing the Impact of the Better Regulation Package on the European Union – A Research Agenda’, *European Journal of Risk Regulation*, Vol. 6, No. 3, 2015, pp. 344-356; S. Tombs, ‘Making Better Regulation, Making Regulation Better?’, *Policy Studies*, Vol. 37, 2016, pp. 332-349.
- 4 Radaelli, 2007; see also C. Radaelli & F. de Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes*, Manchester, Manchester University Press, 2007.
- 5 S. Borrás & C. Radaelli, ‘The Politics of Governance Architectures: Creation, Change and Effects of the EU Lisbon Strategy’, *Journal of European Public Policy*, Vol. 18, No. 4, 2011, pp. 463-484.
- 6 C. Sabel & J. Zeitlin, *Experimentalist Governance in the European Union – Towards a new Architecture*, Oxford, Oxford University Press, 2010.
- 7 O. De Schutter & J. Lenoble, *Reflexive Governance – Redefining the Public Interest in a Pluralistic World*, Hart Publishing, 2010.
- 8 Commission Communication of 25 July 2001, COM(2001) 428 final (European governance – A white paper).
- 9 Interinstitutional agreement on better law-making [2003] OJ C 321, 31.12.2003, pp. 1-5.
- 10 Commission Communication of 19 May 2015, COM(2015) 215 final (Better regulation for better results – An EU Agenda).
- 11 K. Featherstone, ‘Jean Monnet and the “Democratic Deficit” in the European Union’, *Journal of Common Market Studies*, Vol. 32, 1994, pp. 149-170; A. Follesdal, ‘Survey Article: The Legitimacy Deficits of the European Union’, *The Journal of Political Philosophy*, Vol. 14, No. 4, 2006, pp. 441-468; A. Follesdal & S. Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’, *Journal of Common Market Studies*, Vol. 44, No. 3, 2006, pp. 533-562.

policy-making across the policy cycle. At the same time, the new "Better Regulation" agenda maintains the economic focus of the preceding package in terms of rigorous cost-benefit evaluation of the expected policy outcomes through impact assessment (IA), openness to market solutions and an emphasis on 'cutting red tape' for businesses.<sup>12</sup>

Alemanno has found a large degree of continuity, compared to the preceding "Better Regulation" package, in terms of intensive use of stakeholder consultation systems, IAs and regulatory review, especially through boosting the REFIT evaluation system.<sup>13</sup> The overall aim of the new package seems to be to optimize the use of existing systems and add a few new instruments. The question, however, remains whether, despite its lack of innovativeness vis-à-vis the previous package, the new "Better Regulation" agenda is able to function as the legitimacy-enhancing tool it aims to be. The "Better Regulation" agenda is also presented as a politically neutral initiative, aimed at optimizing policy-making procedures. Yet, concerns have been raised that "Better Regulation" might hide "fundamental political and regulatory choices behind a language of 'common sense'" and that "political preferences will be wrapped in the language of 'evidence-based' policy-making."<sup>14</sup>

The literature on the preceding "Better Regulation" package has raised important questions that are still relevant for the new framework. For example, is it still the case that "Better Regulation discourse is much more popular than Better Regulation activities?"<sup>15</sup> According to Torriti's analysis of 60 IAs across different policy sectors, IAs are frequently used to strategically justify a regulatory intervention to stakeholders and citizens.<sup>16</sup> Lofstedt has also found a strategic use of IAs as "lobbying tools" by different business and NGO interests, such as in the case of the REACH directive.<sup>17</sup> This raises a concern about the extent to which business actors are still able to significantly shape EU legislation despite the introduction of the new "Better Regulation" guidelines and tools. Additionally, Radaelli and Meuwese have identified deliberate opposition from member states to protect domestic interests and avoid costly domestic adjustments during the

12 C. Cecot *et al.*, 'An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the US and the EU', *Regulation & Governance*, Vol. 2, No. 4, 2008, pp. 405-424.

13 Alemanno, 2015.

14 K. Wegrich, 'Which Results? Better Regulation and Institutional Politics', *European Journal of Risk Regulation*, Vol. 6, No. 3, 2015, p. 371.

15 C. Radaelli, 'Diffusion Without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment', *Journal of European Public Policy*, Vol. 12, No. 5, 2007, p. 940.

16 J. Torriti, 'Impact Assessment in the EU: A Tool for Better Regulation, Less Regulation or Less Bad Regulation?', *Journal of Risk Research*, Vol. 10, No. 2, 2007, pp. 239-276; *See also* Dunlop *et al.*, 2012.

17 R.E. Lofstedt, 'The 'Plateau-ing' of the European Better Regulation Agenda: An Analysis of Activities Carried out by the Barroso Commission', *Journal of Risk Research*, Vol. 10, No. 4, 2007, pp. 423-447.

implementation of EU legislation.<sup>18</sup> Are member states still able to strategically oppose and undermine the implementation of EU legislation?

Highlighting another important trend, Radaelli has pointed out the growing politicization of the technocratic nature of the EU since the ratification of the Treaty of Maastricht, given the proliferation of working groups, standardization bodies and committees of experts in EU policy-making.<sup>19</sup> On the one hand, politicization is a sign that the output of EU policy-making is more visible for citizens<sup>20</sup> and, therefore, the EU is becoming more similar to national political systems. On the other hand, “the problem of controlling regulatory bureaucracies and policy experts will not be solved automatically as time goes by”<sup>21</sup> and regulatory bodies should take into account the presence of politicization in the policy process. Radaelli has stressed that “the conclusion is not that technocracy has disappeared in the EU, nor that depoliticization is feasible and desirable, but that expertise is operating in an increasingly politicized environment.”<sup>22</sup> Dawson takes the argument even further by suggesting that politicization may undermine the attempts to introduce more regulatory rationalization and vice versa.<sup>23</sup> The articles in this collection examine the relevance of these insights in the new EU “Better Regulation” package.

This special issue takes an interdisciplinary approach, bringing together legal and political science perspectives. Taking stock of the literature on “Better Regulation” and the latest policy developments, the collection examines the consequences of the new “Better Regulation” agenda for law and policy-making in the European Union, with the aim of answering one overarching research question: is there evidence of enduring politicization despite the emphasis on neutral evidence-based policy-making? Additionally, the papers analyze the causes and consequences of such politicization. Furthermore, the contributions identify how politicization and contestation limit the potential of the new “Better Regulation” package to live up to its five core principles: effectiveness, coherence, participation, openness and accountability.

In the following sections, the main findings of the articles contained in this special issue will be summarized in order to answer the overarching research question concerning the enduring politicization of the new “Better Regulation” package. The contributions investigate four central themes in the “Better Regulation” package, following the policy cycle:

- 18 Radaelli & Meuwese, 2009; C. Radaelli, ‘Measuring Regulatory Quality? No Thanks (but Why Not?)’, *European Journal of Risk Regulation*, Vol. 3, No. 1, 2012, pp. 108-112; A. Meuwese, ‘Regulatory Scrutiny in Transition’, *European Journal of Risk Regulation*, Vol. 6, No. 3, 2015, pp. 359-360.
- 19 C. Radaelli, ‘The Public Policy of the European Union: Whither Politics of Expertise?’, *Journal of European Public Policy*, Vol. 6, No. 5, 1999, p. 760.
- 20 A. Renda, ‘Too good to be true? A quick assessment of the European Commission’s new Better Regulation Package’, *CEPS Special Report No. 108/2015*, 2015, available at: <[https://www.ceps.eu/system/files/SR108AR\\_BetterRegulation.pdf](https://www.ceps.eu/system/files/SR108AR_BetterRegulation.pdf)>.
- 21 Radaelli, 1999, p. 771.
- 22 *Ibid.*
- 23 M. Dawson, ‘Better Regulation and the Future of EU Regulatory Law and Politics’, *Common Market Law Review*, Vol. 53, No. 5, 2016, p. 1213.

- 1 regulatory streamlining and cleaning-up of EU legislation;
- 2 stakeholder consultations and impact assessment;
- 3 policy evaluation and regulatory fitness and performance checks;
- 4 alternative forms of regulation, implementation and enforcement.

## B Theme 1: Regulatory Streamlining and Cleaning-Up of EU Legislation

The new "Better Regulation" agenda gives a prominent role to a series of simplification initiatives in order to improve and streamline EU legislation. Most measures fall within the scope of changes to existing law, ranging from codification and recasting to repeal, review/sunset clauses and revision. The Commission has emphasized that pending legislation or legislative proposals will be withdrawn if found to be obsolete or if they are no longer in line with the EU policy objectives. As a result, there has been a visible decrease in the number of legislative acts prepared for adoption by the European Parliament and the Council under the ordinary legislative procedure. The total number declined from 159 in 2011 to 48 in 2015.<sup>24</sup> Furthermore, the Annual Work Programs of the Juncker Commission have become more streamlined: there were 100 new priority initiatives and packages in 2014 and only 23 new initiatives in both 2015 and 2016.<sup>25</sup>

The Commission has introduced a new Regulatory Scrutiny Board (RSB), which replaced the Impact Assessment Board. According to the Commission, the composition of the Board, including external members, will allow it to deliver impartial opinions on the basis of rigorous analysis. The new Board will have a strengthened role in the European policy process and a broader mandate to assess the quality of the IAs that inform decision-making. In 2016, the RSB issued opinions on 60 IAs and about two in five were negative the first time around.<sup>26</sup> Should the Commission decide to take action in the absence of an adequate supporting IA, it will have to explain why publically. In contrast to the common practice in the past, the Board will also check major policy evaluations and 'fitness checks' of existing legislation. In 2016, the Board formally considered 7 evaluations and read 15 more that were annexed to IAs, but it did not issue positive or negative summary ratings on evaluations.<sup>27</sup>

The current focus on streamlining and eliminating redundancies rests on the assumption that rational policy design is feasible and realistic. It is assumed that regulatory IAs will be helpful in identifying the most desirable policy options before the adoption of legislation. This conjecture, however, is challenged by recent work on polycentric governance systems which shows that when multiple actors are in charge of designing and implementing policy, there is, inevitably, some degree of incoherence, overlap and redundancy. For example, insights from the literature on policy design in financial sector regulation suggest that complex

24 Commission Communication of 14 September 2016, COM(2016) 615 final, pp. 3-4.

25 *Ibid.*

26 European Commission, 'Annual Report of the Regulatory Scrutiny Board 2016', available at: <[https://ec.europa.eu/info/sites/info/files/2016-rsb-report\\_en.pdf](https://ec.europa.eu/info/sites/info/files/2016-rsb-report_en.pdf)>, p. 7.

27 *Ibid.*

policy domains generate rule overlap and contradictions in functionally related areas.<sup>28</sup> As long as these overlaps and inconsistencies do not subvert the overall operation of the policy framework, they can create more responsiveness to stakeholders and resilience in the policy system if a particular solution fails. Furthermore, regulatory streamlining is not simply a technical matter. It involves making political choices, as repealing old laws and replacing them with new ones generates new adaptation and compliance costs for stakeholders. Furthermore, there are concerns about favoring a deregulation policy agenda, as shown by recent criticism that the REFIT review of nature legislation will undermine Europe's sophisticated and far-reaching environmental protection regulatory regime.<sup>29</sup> As Dawson has argued, "this goal of 'spreading regulatory best practice' sits in tension [...] with a more political way to reading the regulatory process," according to which, once a measure is proposed by the Commission, the Union's legislative institutions decide whether to adopt or amend it, in accordance with explicitly political criteria.<sup>30</sup>

Meuwese's contribution to the special issue maps the various ways in which a review of Commission IAs takes place, including by the RSB, the European Ombudsman, the European Court of Auditors and the Court of Justice of the European Union. As the author emphasizes, IAs are still one of the main tools to try and make the "Better Regulation" agenda live up to its five core principles: effectiveness, coherence, participation, openness and accountability. However, it is important to assess the direction in which IA as a tool is developing. Meuwese considers the evolution of IA from three distinct perspectives, each of which is present in the policy discourse: a "deregulation perspective," in which curtailing regulatory intervention is the main goal, a "technocratic perspective," which is mainly interested in improving the rationality of regulatory decision-making and a "participatory perspective," which wants to open up the law-making process with the ultimate aim of defying regulatory capture by "levelling the playing field."

Meuwese observes a dominant position of the "technocratic perspective" on Better Regulation, but she also finds that none of the four actors considered (the RSB, the European Ombudsman, the European Court of Auditors and the Court of Justice of the European Union) appears to embrace a "deregulation perspective." The RSB can, at times, be strict when it comes to demanding that any "confirmation bias" in favor of EU regulatory intervention is effectively countered in the IA report. Finally, one may expect a championing of the "participatory perspective" on the part of the European Ombudsman. While this may very well develop in the future, Meuwese finds that the concrete interventions so far do not appear to confirm this expectation.

28 A. Spendzharova, 'Regulatory Cascading: Limitations of Policy Design in European Banking Structural Reforms', *Policy and Society*, Vol. 35, No. 3, 2016, pp. 227-237.

29 Renda, 2015, p. 2.

30 Dawson, 2016, p. 1216.

## C Theme 2: Stakeholder Consultations as a Tool of Fine-Tuning EU Legislation

In the "Better Regulation" package, the Commission pledges to listen more closely to citizens and stakeholders. The central aim is to be open to their feedback at every stage of the policy process – from the first idea, to when the Commission makes a proposal, through to the adoption of legislation and its evaluation. Building on the existing minimum standards for consultation, the Commission's new "Better Regulation Guidelines" aim to strengthen the commitment to consultations that "are of a high quality and transparent, reach all relevant stakeholders and target the evidence needed to make sound decisions."<sup>31</sup> Thus, the standard consultation process is extended to more types of EU legislation. The process is decentralized within the DGs responsible for the underlying policy initiative, but the Commission Secretariat plays a coordinating role in case the DG's consultation strategy is not deemed appropriate.

Among the achievements of the stakeholder consultation process, we could single out bringing together a wide range of policy options in the consultation documents as well as providing policy actors and analysts with unprecedented systematic insight into the policy positions and preferences of diverse stakeholders.<sup>32</sup>

At the same time, the collection of large amounts of data about stakeholder preferences does not directly translate into more streamlined and coherent policy proposals. A first cognitive challenge is to make sense of the large amount of collected data. Then, in most cases, policy-makers will need to reconcile these diverse preferences in coherent pieces of legislation. From this perspective, it is worth noting that the "Better Regulation" package says nothing about what policy-makers should do with the results of a consultation exercise. Furthermore, it appears that the paradigm of consultation has not changed since the old "Better Regulation" agenda, as consultations seem to be targeting individuals and groups with expertise and technical knowledge rather than those who are mostly affected by a certain policy initiative.<sup>33</sup> Finally, consultations could be "framed in such a way as to preclude certain outcomes." Taking certain aspects of an initiative away from the terms of reference in a consultation also removes them from the political discussion.<sup>34</sup>

As Spendzharova, Radulova and Surala show in their contribution to the special issue, public consultations provide rich evidence for the policy-making process, but they also contribute to the enduring politicization of regulatory decisions. Spendzharova *et al.* investigate the use of stakeholder consultations in the

31 European Commission, 'Guidelines on Stakeholder Consultation', available at: <[http://ec.europa.eu/smart-regulation/guidelines/ug\\_chap7\\_en.htm](http://ec.europa.eu/smart-regulation/guidelines/ug_chap7_en.htm)>.

32 Radaelli & Meuwese, 2009; A. Meuwese *et al.*, 'The OECD Framework for Regulatory Policy Evaluation: An Initial Assessment', *European Journal of Risk Regulation*, Vol. 6, No. 1, 2015, pp. 101-110.

33 Alemanno, 2015; F. Sarpi, 'Better for Whom?', *European Journal of Risk Regulation*, Vol. 6, No. 3, 2015, pp. 372-374.

34 Dawson, 2016, p. 1220.

Mariolina Eliantonio & Aneta Spendzharova

case of financial sector governance, particularly, the amended Markets in Financial Instruments Directive (MiFID II). They show that calibrating key provisions in the directive, such as those concerning knowledge and expertise, is not a simple exercise in rational problem definition and policy design. Investment firms, banks, training institutes, and public organizations have mobilized and actively sought to assert their views on the appropriate requirements for professional knowledge and experience in MiFID II. The authors found greater responsiveness to the concerns of financial industry actors about the economic costs of ‘red tape.’ Following the stakeholder consultation, the European Securities and Markets Authority (ESMA) opted for a minimum harmonization approach at the EU level. Still, the final version of ESMA’s guidelines is more demanding in terms of years of experience and the extent of training than was the case prior to 2008. ESMA also supported giving the respective national competent authorities sufficient remit to issue additional requirements in accordance with national laws and regulatory practices.

The 2015 “Better Regulation” package also aims to close the gap between EU institutions and citizens. Nevertheless, as Ranchordás shows in her contribution to the special issue, the lack of appeal of public consultations caused by their complex and technical character has prevented several stakeholders not only from speaking but also from being heard. Ranchordás’ article focuses on the EU public consultation on the regulatory environment of online platforms and the collaborative economy. She examines whether citizens were seriously regarded as evidence providers and how their knowledge that materialized in individual narratives could contribute to more legitimate and, therefore, better regulation. She argues that an evidence-based approach to regulation should also include citizen narratives as they can provide first-hand and diverse perspectives, which might not be considered in standard consultation questions. Citizen narratives can be particularly useful in complex and rapidly evolving fields where there is still little empirical evidence and where participants are likely to have diverse personal experiences.

Ranchordás finds that the current, rather technocratic approach to public consultations is not always accessible to most citizens or only focuses on a selected number of regulatory issues. She advises that, in order to encourage citizen participation in the consultations, the European Commission should allow for more room for learning from citizens’ experiences by favoring open-ended questions and additional room for comments. Citizen narratives can offer an additional evidence-based tool that promotes better regulation while addressing the problem of the technocratization of EU public consultations.

Furthermore, the consultation process and IA also bring up additional considerations about preserving the institutional balance at the EU level among the Commission, Parliament, Council, national parliaments and other advisory bodies. In particular, it can be questioned whether the principle of institutional balance is still adhered to with regards to the Commission’s key role in collecting feedback after the adoption of a proposal as well as its prerogative to carry out an IA after an amendment to a proposal is tabled and to assist the co-legislator in their IA activities. Moreover, advisory bodies and national parliaments have

somewhat reduced possibilities to provide input into EU decision-making, given the Commission's central role in managing the stakeholder consultation process. Taken to an extreme, this trend may mean that national parliaments and advisory bodies, such as the Economic and Social Committee and the Committee of the Regions, may be regarded as 'just another stakeholder.'

#### **D Theme 3: Ex post Policy Evaluation, Regulatory Fitness and Performance Checks**

The Commission has signaled a strong commitment to assessing the expected and actual impact of policies, legislation and other regulatory measures during all stages of the policy cycle – from agenda-setting and planning to implementation, evaluation and subsequent revision. The Commission has also emphasized the importance of evidence-based analysis to guide the evaluation process. It set up the REFIT platform explicitly in order to collect a broad spectrum of feedback on how to reduce the regulatory burden. The new version of the REFIT evaluation platform will enable EU policy-makers to conduct targeted and inclusive quantitative assessment of costs and benefits. As the Commission aims to deliver better regulation across different levels of governance, it stresses that REFIT should foster cooperation among the European institutions, member states and stakeholders in the framework of the "Regulatory Fitness Agenda."

Policy evaluation received less attention in the preceding "Better Regulation" package than IA. To compensate for this shortcoming, the current agenda extends the reach of policy evaluation from financial instruments to regulatory instruments. Moreover, a stronger emphasis on linking ex ante and ex post evaluation as well as stakeholder consultations and ex post evaluation in order to produce more coherent legislation has been observed.<sup>35</sup> The Commission also pledges to take a more targeted approach, focusing only on "the most serious sources of inefficiency and unnecessary burden."<sup>36</sup> Given the stronger experience with IAs in the Commission DGs, it is crucial to ensure developing matching levels of staff expertise in ex post evaluation. Currently, ex post evaluation is frequently outsourced to external parties.

This also prompts the question whether the different epistemic communities engaging in policy evaluation, such as economists, accountants, scholars of public policy and political science, share the same learning objectives and understanding of desirable policy goals and coherence. As we already noted in the stakeholder consultation theme, making sense of the collected input is a challenge. It is similarly challenging to interpret and learn from the input generated by ex ante evaluation, especially when it comes to connecting it to the findings of ex post evaluation to facilitate reflexive governance at the EU level.

A further methodological challenge is that not all policy issues lend themselves to the type of ex post evaluation commonly conducted by external policy

35 S. Smismans, 'Policy Evaluation in the EU: The Challenges of Linking Ex Ante and Ex Post Appraisal', *European Journal of Risk Regulation*, Vol. 6, No. 1, 2015, pp. 6-25.

36 Commission Communication of 19 May 2015, COM(2015) 215 final, p. 9.

Mariolina Eliantonio & Aneta Spendzharova

consultants. For example, it has been problematic to operationalize constitutional and fundamental rights questions present in EU legislation through benchmarks and indicators. Picking up a challenge we encountered in the theme on IAs, in policy evaluation too, one might think of difficulties for actors such as national parliaments and courts to meaningfully participate in the evaluation process, which seems to take place mainly within the executive branch of government.

The consequences of linking *ex ante* and *ex post* evaluation in the new “Better Regulation” package have been explored in Smismans’ contribution to this special issue. He analyzes the changes in evaluation from an *ex post* tool of financial accountability limited to expenditure programs, to an activity applicable throughout the policy cycle for all types of policy intervention. This change will inevitably bring about a degree of politicization in the evaluation process. This is because evaluation is aimed at feeding in political judgment calls on what the future objectives of EU policy-making should be. Smismans sees further evidence of a trend towards politicizing evaluation in that this process is now generally extended to regulatory intervention and not just expenditure policy. Thirdly, the current inter-institutional dimension of evaluation might contribute to politicizing the process, as it brings about a higher likelihood of blame-shifting and contestation. Finally, politicization is increased by the various means in which the new “Better Regulation” agenda enhances the participatory dimension of evaluation.

The challenges linked to collecting and analyzing information for evaluation purposes are explored in Stephenson’s article. In particular, he departs from the current challenge posed by the fact that the EU institutions need to develop staff expertise in *ex post* evaluation, which has in the past been largely outsourced to external parties. He then focuses on the role of the European Parliament by looking at the Parliament’s use of special reports produced by the European Court of Auditors and by examining the emerging role of the European Parliamentary Research Service in monitoring the outputs of the European Court of Auditors and other bodies engaged in audit and evaluation. Stephenson concludes with the observation that all scrutiny by MEPs is inherently political. However, while it is likely that *ex post* evaluations conducted by objective external stakeholders have the potential to become more quickly politicized, it is less likely that reports drafted in-house by the European Parliamentary Research Service will have a political agenda.

#### **E Theme 4: Alternative Forms of Regulation, Implementation and Enforcement**

The new “Better Regulation” agenda discusses the need to use both regulatory and well-designed non-regulatory means as well as to consider “improvements in the implementation and enforcement of existing legislation.”<sup>37</sup> It aims to continue the careful monitoring to ensure that EU directives are transposed in a

37 *Ibid.*, p. 6.

clear, correct and timely manner and that EU rules are properly implemented and enforced in all member states. This is desirable because it brings about legal certainty and allows citizens and businesses to benefit from the opportunities of the single market.

Just as in the first "Better Regulation" package, and in fact already since the White Paper on European Governance,<sup>38</sup> the Commission emphasizes the need to be responsive to the concerns of businesses and citizens when it comes to using a top-down policy tool, by complementing the latter with other types of regulatory instruments. This trend is partly driven by proportionality considerations, as in some instances, the Commission and other EU legislative bodies possess less information about the regulated policy area than the stakeholders. For example, the development of private standards was prominent in the first "Better Regulation" package and was enthusiastically endorsed by business actors, who saw this type of policy-making as a solution to the problems of too much regulation and 'red tape.'

However, as Verbruggen reports in his article, empirical evidence in relation to the old "Better Regulation" agenda lends itself to concluding that the Commission's ambition to encourage private regulation as a governance response to policy issues at EU level has not delivered the promised results. He suggests that EU interinstitutional politics and a lack of trust in industry self-regulatory capacity have contributed to the sidelining of private regulation in the new "Better Regulation" agenda.

The question is, of course, whether the 'failures' of the old "Better Regulation" program are repaired in the 2015 package. Verbruggen suggests that while the new agenda addresses some of the shortcomings of the old one, it still fails to deliver a clear guidance on how alternative forms of regulation ought to be integrated into EU law-making policies. In particular, he addresses the concern that co- and self-regulation are regarded as 'alternatives to' EU legislative action, thereby neglecting the possibility to design a mix of regulatory instruments in which private regulation complements EU legislation and concludes that while the "Better Regulation Toolbox" does currently mention the possibility to combine the full range of policy options, there is no guidance offered on how to combine different regulatory instruments. All in all, the contribution by Verbruggen shows a lack of overarching vision of the role of co- and self-regulation on the part of the EU institutions, despite their clear benefits. This might disincentivize private actors such as trade associations, NGOs and other public interest groups from engaging in those forms of regulation.

While co- and self-regulation undoubtedly have several advantages, they also present clear shortcomings. First, a potential blind spot of private standards is the possibility to ensure uniform implementation and rigorous enforcement. Private standards most commonly operate through voluntary compliance and reputational enforcement mechanisms. In financial sector governance, in particular, the 2008 global financial crisis revealed significant shortcomings of the 'deregulation' paradigm in the 1990s and 2000s and the inadequacy of private industry stan-

38 Commission Communication of 25 July 2001, COM(2001) 428 final.

Mariolina Eliantonio & Aneta Spendzharova

dards to bring about financial stability.<sup>39</sup> Furthermore, especially regarding co-regulation, there are serious legitimacy concerns. From this perspective, it can be observed that the “Better Regulation” agenda seems to encourage forms of regulation that escape traditional legal and political accountability mechanisms.

This topic is addressed in Eliantonio’s contribution, which examines the case study of the European standardization process. The legitimacy concerns linked to the European standardization process arise because the process operates arguably at the ‘edges’ of the *Meroni* doctrine,<sup>40</sup> as the workings of the European Standardization Organizations can hardly be considered a form of delegation of ‘non-discretionary’ powers, given the inherent political choices which are made therein. In this light, Eliantonio shows that participatory and *ex ante* control mechanisms in the process merely remain a paper reality, in light of the stakeholders’ and the Commission’s lack of sufficient expertise to keep up with the industry’s know-how. This situation exacerbates the need for judicial control, which, as Eliantonio shows, is currently underdeveloped, if not completely lacking. This important co-regulation mechanism is, therefore, seen to be currently operating outside the mandated constitutional boundaries.

## F Conclusions

Departing from an interdisciplinary approach which integrates legal and political science perspectives, this special issue aimed to shed light on one overarching research question: is there evidence of enduring politicization despite the emphasis on neutral evidence-based policy-making? The contributions to the special issue investigated four central themes in the EU’s new “Better Regulation” package, following the policy cycle: regulatory streamlining and cleaning-up of EU legislation; stakeholder consultations and IA; policy evaluation and regulatory fitness and performance checks; alternative forms of regulation, implementation and enforcement.

With the new “Better Regulation” agenda, the Commission has developed robust procedures to consult a broader set of stakeholders when preparing legislation, engage in systematic IAs in all policy areas and link policy evaluation to subsequent policy formulation. As the articles in this special issue have shown, however, politics frequently trumps procedures. To begin with, there are contradictions among some of the priorities of the “Better Regulation” package, particularly, between the aims to streamline, prioritize and rationalize policy-making and the ambition to ensure meaningful civil society consultation. Furthermore, greater responsiveness to stakeholders, optimized evidence collection and analy-

39 C. Woll, *The Power of Inaction: Bank Bailouts in Comparison*, Ithaca, NY, Cornell University Press, 2014; K.L. Young, ‘Transnational Regulatory Capture? An Empirical Examination of the Transnational Lobbying of the Basel Committee on Banking Supervision’, *Review of International Political Economy*, Vol. 19, No. 4, 2012, pp. 663-688; A.W. Chalmers, ‘Financial Industry Mobilization and Securities Markets Regulation in Europe’, *European Journal of Political Research*, Vol. 54, No. 3, 2015, pp. 482-501.

40 Case 9-56, *Meroni & Co, Industrie Metallurgiche SpA v. High Authority* [1958] ECR 133.

sis do not eliminate the need to make difficult political choices about the policy goals that the EU wants to achieve. "Better Regulation" has, therefore, implications for winners and losers when policy changes. All in all, we observe enduring politicization of policy-making despite the commitment to evidence-based policy-making, with tools and procedures having the potential to be used according to political logics. In conclusion, it can be stated that despite its seemingly neutral and apolitical overarching objectives, the "Better Regulation" agenda does not eliminate the need to make political choices across the policy cycle. At a time of political turmoil in the EU, it remains a significant challenge to reconcile business-friendly policy objectives such as 'cutting red tape' with making policy more responsive to the wishes of citizens and civil society and, at the same time, subject to a strict cost-benefit analysis.