

**HARD QUESTIONS, AND EQUALLY HARD
SOLUTIONS? PROCEDURALIZATION THROUGH
IMPACT ASSESSMENT IN THE EUROPEAN
UNION**

Claudio M. Radaelli (*) & Anne C.M. Meuwese (**)

(*) Professor of Political Science and Jean Monnet Chair,
Director, Centre for Regulatory Governance,
Rennes Drive, Amory Building - Politics Department,
University of Exeter, Exeter, EX4 4RJ Devon, UK.
E-mail: C.Radaelli@ex.ac.uk
<http://www.huss.ex.ac.uk/politics/staff/radaelli/index.php>

(**) Post-doc Marie Curie Fellow
University of Antwerp,
Department of Law, Antwerp, Belgium.
E-mail: Anne.Meuwese@ua.ac.be
<http://www.ua.ac.be/main.aspx?c=anne.meuwese&n=62890>

Paper delivered to the CONNEX workshop on

**GOVERNING THE EUROPEAN UNION:
POLICY INSTRUMENTS IN A MULTI-LEVEL POLITY**

Norwich, 28 and 29 May 2008
University of East Anglia – School of Political, Social and Inter-
national Studies

Conveners: Hussein Kassim and Patrick Le Galès

HARD QUESTIONS AND EQUALLY HARD SOLUTIONS? PROCEDURALISATION THROUGH IMPACT ASSESSMENT IN THE EUROPEAN UNION

Claudio M. Radaelli ¹ and Anne C. M. Meuwese

Abstract

Better Regulation has become a prominent item on the European Union (EU) agenda for growth and jobs in Europe. Conceptually, the rise of the Better Regulation movement is a manifestation of a trend towards meta-regulation based on procedure-oriented instruments, notably ex-ante impact assessment (or IA, impact assessment). This paper explains the choice for procedures as an option selected by policy-makers when there is fundamental disagreement on hard questions – in this case, about political control of the Commission. A process-based solution to the impasse explains the adoption of tools such as IA. But when the Commission, the European Parliament and the Council move from adoption to implementation of IA, the hard questions about who is in charge of the legislative process, what is the perimeter of the right of initiative of the Commission, and what is the proper role of institutional actors and pressure groups in the preparation of laws and non-legislative proposals re-surface. We argue that different outcomes are possible. At one extreme, IA becomes yet another territory for lobbying and conflicts between governments and the Commission, rather than providing a forum for technical analysis of proposals. At the other extreme, we find degeneration to tick-the-box exercises with no effect on policy choice. In between, however, there may be unintended learning. By engaging with impact assessment, the law-makers find solutions to the hard questions that had not been previously considered. In practice, we argue that there is a delicate balance between still un-answered hard questions and some episodes of success in getting the procedure right. We conclude by making some normative observations. One way forward, we conclude, is to realise that procedural solutions are as hard as the questions. Hence it is advisable to include them in the design of IA, the generation of administrative capacity, and the implicit theorisations (in the sense of Lascoumes & Le Gales, 2004).

Introduction

Better Regulation is a multi-faceted policy aimed at addressing a range of problems surrounding regulation. It is meta-policy that, in-

¹ Claudio Radaelli acknowledges the financial support of the Economic and Social Research Council, grant *RES-000-23-1284* on Regulatory Impact Assessment in Comparative Perspective

stead of looking at specific regulatory sectors or stages, takes a ‘whole-of-government’ approach to the life-cycle of regulation. Better Regulation, therefore, is concerned with the processes through which laws and delegated rule-making are formulated and assessed before a formal decision (by Parliament or a regulatory agency) is taken. Impact Assessment (IA) is the most popular form of ex-ante appraisal.

Better Regulation procedures do not stop here, though. In fact, Better Regulation has its own set of rules governing processes of enforcement, implementation, inspections. In the UK, the Hampton Review has triggered a re-consideration of the principles of implementation and inspection, pressing for the notion of risk-approaches to inspections (Hampton, 2005). Policy in this area has therefore been re-oriented following Hampton. Finally, the Better Regulation movement has generated rules and targets for the ex-post evaluation of regulation, regulatory instruments, and regulatory institutions – examples being targets for the elimination of red tape, simplification procedures, laws on how to get rid of laws that are no longer enforced.

How long has Better Regulation been around? The answer depends on whether we look at the underlying problems or at the solutions. Unsurprisingly, issues of regulatory quality have been around since long before the rise of Better Regulation (Lodge, 2008). Although eras of de-regulation and re-regulation have alternated depending on political winds and economic cycles (Dodds, 2006; Froud, Boden, Ogus, & Stubbs, 1998), the wider problems are persistent. Short-term thinking, lack of evidence-base in regulatory interventions and either too much or too little influence of stakeholders on the outcome, to name just a few. So what about the solutions?

At the EU-level, the strategy for a long time had been characterised by the adoption of different types of appraisals. In the 1990s the debate was eminently on policy evaluation (forms of evaluation, instruments of evaluation, and even “evaluating evaluation”). Nowadays the EU political debate is concerned with Better Regulation. The questions are similar. But Better Regulation is not just a label; it represents a qualitatively different solution from the hotch-potch of evaluation tools that were popular in the 1990s. Policy evaluation occurs ex-post. In the EU, it became popular on the wake

of French notions of control. Better regulation tends to incorporate ex-ante tools and relies more on management than on control. This ties in with the politico-administrative cultures of the countries that have championed it. The French have controlled the ideational dimension of policy evaluation (as ‘control’), the Dutch and the British are more comfortable with management and ex-ante, and therefore dominate the discourse on better regulation (Stame, 2008).

This paper shows that IA can be used in different ways for Better Regulation strategies of various economic and political orientations. First, we explain the textbook case for IA, and remind the reader that IA real-world systems are different from the textbook versions. We then develop the main part of the paper. Specifically, we take the case of the EU to illustrate how, for all the theoretical sophistication available in IA design, the EU has adopted it as a second-best strategy towards politically intractable problems.

The argument is simple. Given a politically controversial issue of who has to exercise control on law-making in the EU (with the member states, the European Parliament and business lobbies pushing for more control and the Commission entrenched around the Treaty right to initiate legislation and all that follows), progress on fundamental reforms such as an Administrative Procedure Act for Europe, Treaty changes to the Commission’s right, and external oversight agencies (looking into the evidence used by the Commission to adopt proposals for legislation) is impossible. Theoretical work on IA in the US is clear on the fact that what is at stake with this instrument is the political control of the bureaucracy (Balla, 1998; M.D. McCubbins, Noll, & Weingast, 1987). Yet in Europe this notion has always been ditched in the formal discourse and the rhetoric surrounding Better Regulation. However, the substance of the debate is political control both in Brussels and in Washington. But this is too hot to handle.

In line with the argument put forward by Renaud Dehousse in his work on the open method of coordination (Dehousse, 2004)²,

² According to Dehousse (2004: 342), the Lisbon rhetoric on the open method of coordination is a meta-instrument chosen by governments to mask disagreement on substantive policy issues and institutional questions. This choice does not mean that the open method procedures will be necessarily ineffective, nor does it pre-determine a marginal role for the Commission (Dehousse 2004: 345).

when agreement on substantive issues of policy and institutional power is impossible, EU leaders turn to the second-best of adopting procedures (or meta-instruments, in his terminology). In turn, proceduralisation triggers three games. We label them the game of governance, the game of decisions, and the game of design. The wicked substantive questions, however, do not disappear, but re-surface camouflaged under conflicts around, over, and within the procedure. The way this type of conflict is handled is crucial. Conflict can destroy the credibility of procedures, and turn them into de-legitimised tick-the-box exercises. However, conflict may do just the opposite. It can produce un-intended learning by generating a re-formulation of preferences, new administrative capacity, and more generally more Lindblomian intelligence of partisan mutual adjustment (Liberatore, 1999; Lindblom, 1965). Learning can involve both the policy level and the institutions. The Commission can learn how to use IA to lock-in intra-organisational networks of policy formulation, and to make its proposals more credible. Thus, the overall balance of power does not necessarily favour the member states once we move from the adoption of IA to its implementation. Arguably, it is easier to learn (institutionally and in terms of policy improvement) from conflict in the safe, supposedly technical environment of procedures than on open, political, substantive terrains. In between the two black & white opposites is a full palette of colours. We therefore examine some of the emerging features of conflict via IA and its outcomes. In the final part we turn to normative analysis and formulate suggestions on how IA can become a useful component of the answer to the hard choices faced by the EU law-makers rather than an easy distraction from them.

The case for IA

Impact assessment (IA) covers a range of regulatory activities performed by regulators (departments, independent authorities, the European Commission). The core of IA is to assess the impact of proposed regulatory interventions on citizens, firms, non-profit organisations, the environment, and public administration.

The textbook case for IA might run as follows (OECD, 2002). IA supports decision-making processes with empirical information. It compares different options by looking at their predicted effects. Information on the possible impacts, how rules will be enforced, likely levels of compliance is gathered by using different methods, ranging from cost-benefit analysis to stakeholder consultation. It shows to the regulators the options which lowest costs and highest benefits for different groups in society and economic life. It enables governments and regulators to communicate the results of policy formulation by showing the criteria adopted to assess different options and how a decision was formulated, who was consulted, what type of evidence was collected and why. So the primary attraction of IA as a tool of better regulation is that it makes institutions smarter and more accountable.

But looking beyond this textbook case, there are also ‘classic misunderstandings’ surrounding IA. First of all, it is often thought that IA is another word for cost-benefit analysis (CBA) or vice versa. CBA is a component of IA in some countries, but even where the guidelines prescribe or recommend CBA, it is often at most the mentality and not the strict methodology that is taken from CBA . This is particularly true of the EU case, where the IA guidelines are much less geared towards CBA than the guidelines in force in the USA.

Second, IA is a process, not just a document. Furthermore, although the aim of IA is to help policy-makers to go about their regulatory tasks in a more systematic way, IA is not an algorithm which churns out solutions. Ideally, it is used to raise the right questions at the right stages in the policy-making processes with the right people. Finally IA is not necessarily a decision-making method; it is just one of the tools that supports the political process, next to other components of decision-making like pressure from interest groups, political discussion in the cabinet, white papers, evidence produced by committees of inquiry, etc.

These misunderstandings listed above did not just fall from the sky. They are rooted in the often one-sided rhetoric used when discussing IA and its implementation. Across Europe, we have not as yet seen a case of IA system that complies with the ‘textbook case’ presented above. Thus, it becomes useful to clarify whether we are discussing the case of IA or real-world implementation of IA

systems. Below we narrate a rather typical story of what often happens when politicians decide to adopt IA. Case selection is somewhat problematic, since we look at the EU alone. But we also contrast the EU with the member states in the next Section. Research on how different European countries have adopted and implemented IA is already available.³

The politics of adopting procedures

The member states and the EU: the major difference

Before we get into EU IA, it is useful to establish if there are major differences with the member states. We think there is a major difference with the several member states that have implementation problems, like Estonia, France, Greece, Italy, Spain. In both cases political factors play a role, but in different ways.

If one were to attempt to explain IA by analysing the respective guidance documents circulating in member states, the resulting picture would be deceiving. From the letter of the text of the guidelines as well as their spirit, one would arrive at a rationalist picture with IA portrayed as an isolated exercise. One would get the impression that some EU countries do not engage in IA at all, whereas others have fully-fledged procedures in place. As is so often the case, the reality is more nuanced. There are only few legal and constitutional systems in Europe where IA works well and is well-embedded in the decision-making process leading up to regulatory interventions (whether they are formally laid down in legislation or not). In other countries the situation is best described as an adoption-

³ This literature is growing at a rapid pace. See Baldwin (2005) on why better regulation is not necessarily smart regulation, Radaelli (2005) on diffusion without convergence and smoke without fire in Better Regulation programmes, Jacob et al. (2008) on the implementation gap between guidelines and what goes on the ground on policy formulation. Wiener (2006) makes interesting remarks on IA as legal transplant from the US to Europe, and shows how the European cases differ amongst themselves.

implementation gap. In some countries there is no systematic assessment of regulatory proposals, but it would be difficult to tell by the text in the guidelines on impact assessment specifically or on legislative drafting more widely, which countries fall into this category. In order to explain this variation and move the development of IA systems forward in such a way that form fits function (and gets as close to the ‘textbook’ version as possible), we need to have a closer look at the political dynamics of IA.

As mentioned in the introduction, IA is a particularly attractive tool to implement as part of a Better Regulation strategy. For politicians the formal adoption of IA is an efficient solution (more benefits than costs), at least in the short term. But implementation is costly for the civil service, and also for the top political level in the medium and long term (Radaelli, De Francesco, & Troeger, 2008). Thus, there are several cases of adoption without real implementation in Europe. The overall European picture is one of diffusion of IA without convergence (Radaelli, 2005). In more than one member state, poor implementation is also the result of having tried to “plug and play” the textbook version of IA, supplemented by massive formal exhortations to use quantification as much as possible, onto administrative and law-making systems that follow a different logic. Most dangerously, several IA guidelines describe a highly idealised process, in which policy officers set the goals, then define the problem, look at the means available, and formulate options. It is as if IA could really start from time zero, with a sheet of paper totally blank in terms of politics and legacies. This simply does not work, as political science has repeatedly proven since the days of Lindblom’s theory of the policy process (Lindblom, 1959, 1965). The result is not a neat separation between evidence-based activities and politics, but either more political manipulation of IA or degradation of IA to “tick the box” exercise. Whatever the case is, the end result is poor implementation.

The politics of IA at the EU level is different. There is more consistent implementation than in the average member state. Radaelli and De Francesco insert the impact assessments of the European Commission in top cluster of cases with robust implementation and credible quality assurance measures, together with the UK and the Netherlands (Radaelli & De Francesco, 2007). The politics of IA in Brussels is characterised by the choice for proceduralisation

as an attempt to avoid hard questions of political control. Let us see why and how this happens.

Questions, procedural solutions and games

An important factor for the EU in moving towards Better Regulation was the growing level of political support: at present this is surprisingly high after a long period in which regulatory quality issues lingered at the margins of the debate (Pelkmans, Labory, & Majone, 2000).

Perhaps even more surprising is that the discovery of Better Regulation as a flagship policy has come from the financial corner. Europe's finance ministers have been most active, producing letters, championing the initiatives of consecutive presidencies and relentlessly promoting the Standard Cost Model as a common method for measuring administrative burdens (in the case of the former Dutch Finance Minister Zalm). However, these interventions from Ministers are nothing new. Since the Edinburgh summit in 1992, there has been consistent pressure from core member states⁴ on the European Commission to adopt rigorous Better Regulation instruments. Politically, the key issue was (and probably is today) political control of the Commission as bureaucracy. The official presentation of Better Regulation by the member states has always eschewed this connotation of control, preferring the language of win-win solutions like "improvement in law-making", "modernising the Commission", "streamlining policy formulation", and "enhancing administrative capacity".

The European Parliament has increased its power in law-making steadily. In this context, a core group of MEPs watched carefully the developments leading to the adoption of the first coherent Better Regulation plan of the Commission in 2002, presented jointly with a communication on IA (European Commission, 2002). For the EP, the key issue has always been whether IA makes the

⁴ The UK, the Netherlands and to some extent Denmark have been consistently engaged throughout the years. Others (e.g., France, Germany, Ireland, Italy, Poland, Portugal, and Sweden) have been quite active in some periods but not in others.

Commission more accountable to the MEPs or makes it more difficult to change the substance of the proposals.

The pressure groups have championed IA as a tool to limit the proliferation of legislation coming from Brussels and make regulation ‘smarter’. Their cause has been articulated by influential think tanks across Europe. Business-oriented think tanks have also pressed for external auditing and control on the quality of the IA produced by the Commission (Allio, Ballantine, & Hudig, 2004; Mather & Vibert, 2006).

Within the Commission, pressures for political control are refracted by a constellation of different interests. One goal is to use Better Regulation to embed in policy formulation the triad of sustainability, competitiveness, and social cohesion. Another (especially for the SecGen) is to coordinate different DGs by drawing on IA procedures. The Commission is not without agenda-setting power in its game. True, it is pressurised by governments and MEPs. But it is the SecGen that drafts the guidelines of IA – and details at the level of guidelines are crucial. Governments can only respond to the guidelines ex-post, once they have been finalised by the Commission. They did so on several instances, such as in the tormented process that led to the introduction of an Appendix to the IA guidelines on administrative burdens in 2005 – upon insistence of core member states.

Political control of the bureaucracy is a classic term in political science and public administration, but we need to decompose it into more specific issues to understand what is at stake in the Better Regulation saga. To be more precise, we argue that the core politics of IA in Brussels is generated by the following hard questions:

- Institutional power: who is in charge of the law-making process in the EU? The Community method is a fragile compromise with an ever-shifting centre of gravity. Attempts to “improve on”, “overcome”, “re-calibrate” the Community method have always proved political dynamite, as shown by the fierce defence of the method in the White Paper on Governance of the European Commission (Commission 2001, for an overview of the objective political decline of the method see Majone 2005)

- Intra-Organizational control: how does one stop the fragmentation of the Commission along the DGs and establish a focus for strategic and operational management within the Sec Gen? This manifestation of control is intra-organisational. The Sec Gen preference is to evolve from a sort of *primus inter pares* with loose coordination power to a UK-style cabinet office that effectively steers policy formulation. The DGs prefer to keep as much policy autonomy as possible. Crucial in this game is how much information flows between DGs and Sec Gen on the expected costs and benefits of policy formulation, what are the formal hurdles to overcome for ideas to become adopted, and what kind of evidence can hinder or speed up the movement of proposals up to the College of Commissioners. The game is often solved in terms of administrative capacity – that is, who is really on the ball and who is simply watching because of the lack of data and information.
- The overall purpose of the Lisbon strategy. The key-notion is obviously competitiveness. The hard question is how does one promote Schumpeterian innovation in a system dominated by treaties, directives, inter-governmental politics, budgetary control, indicators, and targets? How do we produce learning and innovation in a system dominated by the logic of monitoring? Finance Ministers, the President of the Commission, and pressure groups are all concerned with competitiveness. Yet we know from research on the open method of coordination that there is no single understanding of the best institutional set-up to achieve it (Dehousse, 2004). Varieties of capitalism still matter in Europe. Policy paradigms have not converged towards the social-market economy or neo-liberalism. Since there is no dominant paradigm and convergence on how to transform institutions to achieve competitiveness, this hard question leads to impasse.

Impasse, however, does not prevent policy-makers from making choices. These choices are not the equilibrium solutions of rational choice institutionalism, but rather second-best solutions that enable policy-makers to produce results and open up new venues for games.

When agreement on these hard questions cannot be found, some games that are traditionally popular with EU leaders resurface:

- The “design” game: instead of coping with substantive controversies over institutional power, policy-makers design new processes, guidelines, targets, and so on
- The “decisions” game: instead of open conflict and action, there is the possibility of making solemn decisions, leaving aside the issue of administrative capacity, neglecting strategic and operational management (Metcalf, 2003), and de-coupling decisions from action. We use ‘decision’ in the sense of Neil Brunsson, and contrast it with ‘action’.
- The “governance” game: since political control of policy formulation is a non-politically correct word, exercises in “governance architectures” look more acceptable. Especially if “governance” is couched in technical discussions of law-making that avoid specific choices in terms of hierarchy...The political drive here is the reasoning consecrated with the White Paper on Governance. So we are talking of “open governance”, “stakeholder governance”, and “getting the right people in the room” (or “consultation”).

Better regulation is a way of playing all these three games at once. Because the textbook case for IA (see above) is win-win, EU leaders – both national ministers and commissioners – have turned to this type of appraisal as an arena in which they think they can make progress. The rationalistic appeal of IA offers them an opportunity to bury the hard questions of EU governance for a while. On closer inspection, we are witnessing a classic case of inter-governmental politics, as exposed by inter-governmental bargaining and diplomacy studies: when agreement on content is not possible, we move on to agreement on procedure.

This phenomenon transposes well to the Better Regulation debate: when actors cannot agree on the substantive goals of EU regulation (the interpretation of most Treaty provisions is unclear in this regard) or on the ‘political flavour’ of Better Regulation (is it about deregulation in the end or is it not? The jury is still out), the

choice veers in the direction of procedures. Procedures do not force leaders to agree on the operational meaning of competitiveness, or whether the Sec Gen should get more administrative resources to control DGs. As Renaud Dehousse has explained, the whole turn towards the open method of coordination can be interpreted procedurally. Better Regulation is a meta-policy (Black, 2007; Radaelli, 2007). As such, it does not meddle with policy substance. Hence, it provides yet another path towards proceduralisation.

The argument in a nutshell

The argument can also be presented in a slightly different manner: the “high-level” questions are too difficult to answer, so only “lower-level” issues are raised. The catch here is that the development of Better Regulation policy occurs entirely outside of any specific Treaty provision⁵ and is therefore the realm of inter-institutional agreements and policy guidelines. This means that the process can work the other way around too: “low-level” questions can become “high-level” questions (those involving conflicting interests and ideas) because of the absence of a legal straightjacket surrounding the debate (Hummer, 2007). This latter phenomenon may explain (in part) why so much political activity is invested in designing guidelines, in adopting inter-institutional agreements and even in defining governance.

The EU is a political organization, as opposed to an action-driven organisation in the sense of organisational theory (Brunsson, 1989). This means among other things that, for the Commission, “decisions” count for more than action— since Brussels has limited control on how decisions are carried out and enforced on the ground (Boswell, 2008). The choice for IA is based on a very particular kind of agreement: the agreement to postpone disagreement. The adoption of an instrument is a kind of partial solution - a compromise. It is not a deal that matches all the preferences so that there is no fur-

⁵ With the qualification that the issue of better law-making emerged in Declarations (Maastricht) and Protocols (Amsterdam on subsidiarity and proportionality). A indirect legal basis for Better Regulation can also be found in art. 284TEC on consultation. ANNE PLEASE Check articles 6, 127, 152, 153, 174 and 175.

ther discussion. It is a very partial equilibrium instead. Not an homeostatic equilibrium, since it is open to evolution. In fact, the adoption of policy appraisal tools does not cancel disagreement on the hard questions.

Indeed, the hard questions re-surface under apparently technical discussions. By doing this, they alter the partial equilibrium. The overall constellation of actors move on towards a different equilibrium. Implementation can produce an entirely different equilibrium. As mentioned, the Commission can learn through the implementation of IA lessons of policy coordination, increase its administrative capacity, and make its proposal more impermeable to attacks in the EP and the Council. Or the Council and the EP can eventually win the political control game. Or IA can simply degenerate into tick-the-box routines and disappear from the political radar. The important point is that adoption and implementation are two distinct power arenas, with a different logic and most likely different outcomes. Let us look at some conjectures based on our current research on IA at the European Commission.

The hard questions kick back

Although IA is all about procedure and as such does not refer to substance, all IAs deal with substance, since they are used to appraise the effects of proposals on a wide range of stakeholders. Some government officers may start challenging impact assessment at the technical level with the aim of establishing control on the formulation of proposals made by the Commission. Pressure groups have already specialised in the generation of counter-impact assessments to respond to the Commission's analysis of proposed legislation.

In addition, the assessment of legislative proposals⁶ is a component of the law-making process. The inter-institutional agreement on Better Regulation (2003) binds the Commission, the European Parliament and the Council to make use of IA. Conse-

⁶ The Commission scrutinises both legislative and non-legislative proposals, provided that they are contained in the annual legislative and work programme.

quently, the major IAs are discussed in Parliament and Council's working parties. On occasion, the Commission is invited to describe the criteria implicit in the appraisal of certain categories of costs and benefits, and how, according to Brussels, IA should "inform the legislator" (Meuwese, 2008). The very fact that IA is present throughout the decision-making process of the EU re-kindles the hard question of who controls the process. By changing the balance of power in relation to who can do what at which points in the law-making process, IA has potential for constitutional changes.

It is unlikely that these changes will not be noticed, and that IA will be incorporated smoothly within the EU constitutional settings. Indeed, constitutional politics around IA is already visible in several major controversies around legislative proposals. As shown by Meuwese (2008), the notion of informing the legislator is elusive: does this mean "speaking the truth to power" or "enabling the stakeholders to have a say in the policy process"? Will the Commission use evidence to pre-empt a genuine political debate in the European Parliament, or will Parliament and Council use IA as fire-alarm tool (M. D. McCubbins & Schwartz, 1984) to exercise more control on what the Commission proposes (Meuwese, 2008)?

Our fieldwork in Brussels seem to confirm that the hottest inter-institutional discussions revolve around the issue of what is the proper usage of IA in Parliament and Council. Some interviewees blame the Commission for presenting the IA behind legislative proposals as the (almost) ultimate evidence, thus constraining the options for MEPs – if they say no to a proposal, they are can be accused of having thrown away the baby of the "best evidence" with the bath water of the proposal. This is a very aggressive way to go about "speaking the truth to power". When this happens, MEPs have to respond by withdrawing legitimacy from IA.

Loss of credibility may also occur in another extreme case. Since the Commission performs IA on every item of the annual legislative and work programme, resources may not be targeted efficiently towards the items that can really benefit from an IA. It does not make much sense to carry out IA on recommendations, pilot projects, proposals involving human rights or foreign policy, or general framework documents such as strategies for European tourism and the like. Who knows how to approach the estimation of costs and benefits when proposals are not regulative, or are still too vague?

Degeneration in these cases means that IA becomes a routine, a tick-the-box exercise that neither the other EU institutions, nor the pressure groups take seriously. IAs may then become one of the default checks in the preparation of proposals, instead of evolving into the pivotal instrument to develop policy planning and smart thinking across the life-cycle of EU legislative and non-legislative items. Shortly, if one looks at these extreme cases, there is a risk of degeneration and loss of legitimacy. This would make it impossible to use appraisals in a balanced way. The credibility of IA would be heavily undermined.

There is however preliminary evidence that the future of IA may lie in between the extremes, where more optimistic outcomes are possible. Our interviews and case studies of IAs show that the practice of performing assessments has increased capacities for policy formulation in the DGs. All the major regulatory DGs have invested in human resources, expertise, and background studies. Their participation to IA working groups with officers from other DGs has created new networks for appraising policy proposals from different points of views and using different criteria. All major cross-cutting regulative proposals are impact assessed by groups comprising officers from DG Enterprise, DG Environment, DG Sanco, and the SecGen. The risk of thinking about policy formulation in silos has been reduced.

The SecGen itself has increased its synoptic understanding of what is being formulated, how proposals have cross-sectoral implications, and where the major hurdles may lie. Although on minor issues the SecGen does not have the expertise to discuss the substance of IA, in major cases it uses it to detect the early signs of the difficulties ahead. When proposals seem to contradict the regulative philosophy of the President, the SecGen can ask for more caution and more analysis by simply stating “we do not think that this idea will survive a thorough IA...”.

The presence of a control body, the Impact Assessment Board (IAB), has added its own incentives for rigorous assessment. The IAB reports to President Barroso. The Board includes the Deputy Sec Gen of the Commission, and four directors from the Directorates General for Economic and Financial Affairs, Enterprise and Industry, Employment and Social Affairs, and Environment. This body reviews the quality of evidence and the overall solidity of the

RIAs produced by the Commission. It can make negative comments or ask for more analysis. The IAB is chaired by the Deputy Secretary General – thus making a link between the mechanisms of control that flow through the Sec Gen and the IAB. Although the IAB is not the external independent agency on IA quality that some domestic policy-makers wanted (to increase control on the Commission) it would be wrong to portray it as a body that rubber-stamps whatever the Commission does. By contrast, its role is to provide a learning forum for top DG directors and the SecGen where a common understanding of what IA is and should be is being developed. The first annual report of the IAB suggests that the hypothesis of learning via IA should not be rejected, at least not yet (Commission, 2008).

To sum up then, the practice of IA has generated more capacity for policy formulation, reduced the habit of thinking about proposal in DG “compartments”, and increased the control of the SecGen on the overall process of policy formulation. Thus, although certainly no-one in the EU institutions and the member states has ever thought of engaging with IA only for the sake of learning, there may be a sort of un-intended learning as a result of the institutionalisation of this new policy instrument.

Better IA through hard choices

In this Section we explore the normative implications of our analysis. If we were to avoid the degenerating syndrome described by the extreme scenarios of total politicisation and total irrelevance, what should be done? Of course, there is no blueprint. From our previous discussion, however, we can identify three necessary conditions. Essentially, three variables are at stake:

- (1) Design of the architecture within which instruments operate;
- (2) Administrative capacity; and
- (3) Theories of the policy process, specifically in relation to the interplay between politics and evidence-based activities.

These variables are reminiscent of the games we have described above (i.e., the games of “design”, “decisions” and “governance”).

Indeed, any strategy for a successful adoption of meaningful IA has to stay close to the existing deep political dynamics lying behind the emergence of Better Regulation in the EU. The issue is how to get political leaders to incorporate the hard questions into the games. For each factor we make some suggestions below on how to tackle the respective challenges they represent. We spend more time on design, since this is the major issue, and hint at administrative capacity and theories of the policy process. Administrative capacity has already been examined by Schout and Jordan, whilst Radaelli has illustrated the implicit theorisations of IA guidelines – hence we do not need to spend too much time on these two issues (Radaelli, 2005; Schout & Jordan, 2007).

The challenge of design

IA should be seen as a set of choices. Any design of an IA system involves choices on various key points. It is the sum of those choices that makes IA a system and determines its ‘intensity’ in terms of the requirements involved and its ‘fit’ with the wider decision-making context. Below we present an overview of the relevant points before showing in a few examples the great variety in IA system design.

Table 1

Choices in IA design

Pivotal points in IA system design	Key questions
1. Scope of regulatory activities	Only (certain) legal acts with a clear regulatory orientation, comitology decisions, or also policies and even wide strategies?
2. Main assessor	Who assesses: the same person responsible for drafting the proposal, a specialised unit or an external agency?
3. Range of impacts	Which impacts to consider? Both costs and benefits? Financial costs only or wider economic, environmental and societal costs too? Should impacts consider distributive effects?
4. Range of options	Two basic approaches:

	<p>- using IA to gain insight in the costs associated with a certain proposal and subsequently using this information to bring down the costs (for certain groups in society) > cost-effectiveness</p> <p>- using IA as a means of selecting the regulatory intervention with the best balance between costs and benefits. For this it is necessary to assess different options and to pay equal attention to both costs and benefits.</p>
5. Quality assurance	<p>Hierarchy (a central “strong” unit) or checks and balances within a network?</p> <p>Using external pressure (e.g., stakeholders, pluralistic evaluation) or internal accountability?</p>
6. Underlying economic theory	<p>What is the theory that leads to think that regulation can be ‘bad’? Do the IA designers think that capture by private firms is a serious problem or not? Do they wish to regulate only when there is a clear market failure or when there is a need to secure key governmental aims?</p>

Although the possibilities are certainly not endless (e.g. no system would leave it up to non-governmental actors to decide whether there is a market failure which justifies regulation) several specifications are possible and are linked to different possible functions of IA. For example the use of IA as championed by the OECD, aimed at reducing uncertainty and enabling instrumental learning requires a fair amount of quantification. If we aim for participatory regulatory governance and reflexive social governance (Sanderson, 2002), the design of IA should put a premium on who participates in policy formulation.

The “design puzzle” includes the following questions:

- **Side effects of IA system on political system**
Do the designers seek to increase the control of the core executive (on regulating departments and agencies) or leave things as they are?
- **Long term goals of IA system**
Do the designers want to change the way policy-makers think about regulation or do they want to make sure that each proposed rule passes a cost-effectiveness test? The former approach stresses learning and the long-term effects of IA,

the second looks at the short-term impact of individual IAs on individual decisions.

An important building block in successful IA systems is quality assurance. Quality assurance breaks the self-referential tendency of most administrative innovations: they look great at the start, but after a while they are captured by administrative routine and tick-the-box attitudes. There are some questions to address here too. Quality assurance requires a decision between using hierarchy or using networks. If the choice is hierarchy, strong central units within the SecGen or the IAB should secure compliance from DGs. If the choice is the network, control will be gained by dense intra-institutional interaction within the Commission, starting from the IA inter-service groups, up to the level of the College of the Commissioners and the IAB. The idea of a network-based control is that there is no single actor “in control”, yet the whole system is “under control” (Majone, 1996).

In a final step the horizon of the “IA designer” should be widened from the organizational dimension to administrative law and constitutional choices. This is what many EU member states fail to do. Instead they carry on with the design of self-referential IA systems or the notion of “plug and play” IA without having created the governance infrastructure in which IA is supposed to operate. General rules on lawmaking at different constitutional levels, established notions and requirements of giving reasons and showing evidence, existing consultation procedures and provisions on transparency and access to the regulatory or legislative process all have to be aligned to facilitate the institutionalisation of IA (De Francesco, 2008). On top of that anyone responsible for introducing IA should consider how courts review (primary and secondary) legislation in their legal system and whether the introduction of IA is likely to make any difference in that regard. This takes us to very hard choices in terms of constitutional politics and, in the long term, how to retrofit the Treaties and delegation theory once IA is institutionalised. Although constitutional politics is a major issue in the US (Kagan, 2001; Rosenbloom, 2000), it has just appeared in the EU discussion (Meuwese, 2008).

The challenge of capacity

One encouraging feature arising out of our fieldwork in Brussels and other studies (The Evaluation Partnership, 2007) is that by engaging with IA the Commission's DGs are increasing their analytical base for policy formulation. Capacity also involves the development of evidence-based thinking within networks comprising several DGs and the SecGen.

One risk, however, is to confuse this type of inter-service IA work and the more political assessment that goes on at the level of inter-service consultation on proposals. The Commission does not publish IAs until the proposal is also published. At the final stages of discussion within the Commission, IAs can be re-tuned to reflect intra-organisational compromise on the proposal itself. This provides flexibility, and improve the linkage between "politics" and "analysis". But if it leads to consistent tweaking of IAs, it may create a loss of credibility.

Another risk is to increase capacity in the sense of performing more and more accurate studies, commissioning meta-analysis and systematic reviews, investing in cost-benefit analysis etc. for the sake of showing to the member states that the Commission is "rational", "analytical", and of course "evidence-based". If this investment in analysis is de-coupled from internal decision-making processes and analytical knowledge is not used in the Commission's decisions, the end result may only be a waste of tax-payers' money. Equally undesirable is a scenario in which "analysis" is pursued by the Commission and demanded by the member states only to create "paralysis" – this can be achieved by introducing an endless number of special tests and analytical requirements in the guidelines of the Commission.

So, what should be done then? Intelligent use can be made of prior experience with assessment and appraisal tools, e.g. in the area of environmental policy appraisal, cost-benefit analysis of public infrastructures, and policy evaluation. At an entirely different level, we can look at creating a new type of professional: incentives such as career promotion can be used to contribute to a professionalization of the Better Regulation community in Europe. Finally, consultants, think tanks, universities and training programmes in Europe should develop a curriculum for the new profession of the IA specialist. A

community of professionals that see themselves as experts in Better Regulation will in due course provide a stable professional group with shared standards. This community is the safest place to look for the development of minimum thresholds of what is “decent analysis of proposals”, relatively impermeable to political interference.

The challenge of theories

One of the main topics on the table in any discussion on IA is tools and models (such as the Standard Cost Model (SCM), benefit transfers and contingent evaluation). However, tools should be considered only after having addressed the questions of the design puzzle, as they are sensitive to the theory of the policy process they encapsulate. Indeed, instruments like IA contain implicit theorizations (Lascoumes & Le Gales, 2004).

Often, but not always the theory within the tools is rational synoptic. It starts out from a separation of means and ends. Goals have to be set in advance – this is the message of IA guidelines across Europe. All feasible options should be considered. IA should start with a politically blank sheet of paper in front of the officer developing a proposal. This is a funny manifestation of triumph of hope over experience. We know that this is not what policy formulation is about, yet guidelines insist that this may be the case and officers should behave accordingly.

But, in real life, means usually pre-determine ends. Furthermore, the pre-supposed “root-and-branch” analysis of all options is problematic in the face of bounded rationality. Some IA systems also have difficulty incorporating the fact that analytical closure is often not possible in IA processes, e.g. when sophisticated questions are considered by IA but they will only lead to more questions (Hertin, Pesch, & Jacob, 2007). Any idea of “bracketing politics away” ignores the accepted wisdom that policy formulation needs to be based on partisan mutual adjustment. And that the politics-administration category is a continuum, not a dichotomy.

Rational-synoptic illusions frustrate the lay-professional knowledge of the civil servants and produce hostility towards IA. We have better theories of the policy process and better understand-

ings of the interplay between lay, professional, and political knowledge in the social sciences (Owens, Rayner, & Bina, 2004; Sabatier & Weible, 2007; Weiss, 1987). Why shouldn't we make use of them in IA, then?

Concluding remarks

Although the case for IA is straightforward in theory, the experience with implementing the – still relatively successful – EU Better Regulation strategy shows that there are many pitfalls in practice. This paper has shown that the challenges of implementation and institutionalisation are different in the member states and the EU. In the case of the Commission, the question of political control has been ditched under a debate on procedures. Yet the hard questions buried at the adoption stage under a political compromise on procedure kick back at the implementation stage. One argument throughout this paper has been that adoption and implementation are two different arenas. The equilibrium reached at the adoption stage is not homeostatic. Implementation may well end up in a loss of credibility. Or it may trigger un-intended learning. The same evolutionary model applies to the institutions involved in the adoption and implementation arenas. If adoption is characterised by the pressure on the Commission, implementation may make the Commission a more confident actor in the law-making process.

Exactly *because* IA has a rationalistic appeal, its adoption gives the illusion of avoiding decisions on shifting competences, intra-institutional balance, and how to achieve competitiveness. Possible consequences of this “head in the sand” strategy include detrimental ones such as symbolic politics and “tick the box” mentality, but also more positive ones like “unintended learning”. Only by making both the “challenge of theories” and the “challenge of capacity” part of the “challenge of design”, politicians and civil servants – assuming they are working jointly – can possibly devise, adopt, and implement an IA system which fosters intended learning. This is contingent on the awareness that efficient IA solutions are inevitably as hard as the questions.

References

- Allio, L., Ballantine, B., & Hudig, D. (2004). *Achieving a new regulatory culture in the European Union: an action plan*. Brussels: European Policy Center.
- Balla, S. J. (1998). Administrative procedures and political control of the bureaucracy. *American Political Science Review*, 92(3), 663-673.
- Black, J. (2007). Tensions in the Regulatory State. *Public Law*, 58-73.
- Boswell, C. (2008). The Political Functions of Expert Knowledge: Knowledge and Legitimation in European Union Immigration Policy. *Journal of European Public Policy*, 15(4).
- Brunsson, N. (1989). *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations*. Chichester and New York: John Wiley and Sons.
- Commission. (2008). *Impact Assessment Board - Report for the Year 2007. SEC(2008)120*. Brussels, 30.1.2008.
- De Francesco, F. (2008). *Pre-requisites of adoption and patterns of diffusion: The case of regulatory impact analysis in European Union and OECD member states*. Paper presented at the Political Studies Association 58th annual conference, University of Swansea, 1-3 April 2008.
- Dehousse, R. (2004). La Méthode ouverte de coordination. Quand l'instrument tient lieu de politique In P. Lascoumes & P. Le Galès (Eds.), *Gouverner par les instruments* (pp. 331-356). Paris: Presses de Sciences-Po.
- Dodds, A. (2006). The core executive's approach to regulation: From 'better regulation' to 'risk-tolerant deregulation. *Social Policy and Administration*, 40(5, October), 526-542.
- European Commission. (2002). *Communication on Impact Assessment*. Luxembourg: Office for Official Publications of the European Communities.
- Froud, J., Boden, R., Ogun, A., & Stubbs, P. (1998). *Controlling the Regulators*. Basingstoke, Hampshire: Macmillan.
- Hampton, P. (2005). *Reducing administrative burdens: Effective inspection and enforcement*. London.
- Hertin, J., Pesch, U., & Jacob, K. (2007). The production and use of knowledge in Regulatory Impact Assessment - an empirical analysis, *ECPR General Conference Pisa, 6-8 September 2007*.
- Hummer, W. (2007). From 'Interinstitutional Agreements' to 'Interinstitutional Agencies/Offices'? *European Law Journal*, 13(1), 47-74.
- Kagan, E. (2001). Presidential administration. *Harvard Law Review*, 114, 2245-2385.
- Lascoumes, P., & Le Gales, P. (2004). L'action publique saisie par ses instruments. In P. Lascoumes & P. Le Gales (Eds.), *Gouverner par les instruments* (pp. 11-44). Paris: Sciences-Po Presses.
- Liberatore, A. (1999). *The Management of Uncertainty: Learning from Chernobyl*. Amsterdam: Gordon and Breach Publishers.
- Lindblom, C. E. (1959). The science of muddling through. *Public Administration*, 19, 78-88.

- Lindblom, C. E. (1965). *The Intelligence of Democracy*. New York: The Free Press.
- Lodge, M. (2008). Regulation, the Regulatory State and European Politics. *West European Politics*, 31(1), 280-301.
- Majone, G. D. (1996). *Regulating Europe*. London: Routledge.
- Mather, G., & Vibert, F. (2006). *Evaluating Better Regulation Building the System*. London: European Policy Forum.
- McCubbins, M. D., Noll, R. G., & Weingast, B. R. (1987). Administrative procedures as instruments of political control. *Journal of Law, Economics, and Organization*, 3(2), 243-277.
- McCubbins, M. D., & Schwartz, T. (1984). Congressional oversight overlooked: police patrols versus fire alarms. *American Journal of Political Science*, 28(1), 165-179.
- Metcalfe, L. (2003, 3 December 2003). *Regulatory Management and Governance*. Paper presented at the Impact Assessment in the European Union: Innovations, Quality and Good Regulatory Governance, Brussels.
- Meuwese, A. C. M. (2008). *Impact assessment in EU law-making*. Alphen aan den Rijn: KluwerLaw International.
- OECD. (2002). *Regulatory policies in OECD countries : from interventionism to regulatory governance*. Paris: OECD.
- Owens, S., Rayner, T., & Bina, O. (2004). New agendas for appraisal: reflections on theory, practice, and research. *Environmental and Planning A*, 36, 1943-1959.
- Pelkmans, J., Labory, S., & Majone, G. D. (2000). Better EU regulatory quality: Assessing current initiatives and new proposals. In G. Galli & J. Pelkmans (Eds.), *Regulatory Reform and Competitiveness in Europe, Volume 1: Horizontal Issues* (pp. 461-526). Cheltenham: Edward Elgar.
- Radaelli, C. M. (2005). Diffusion Without Convergence: How Political Context Shapes The Adoption Of Regulatory Impact Assessment. *Journal of European Public Policy*, 12(5), 924-943.
- Radaelli, C. M. (2007). Whither better regulation for the Lisbon agenda? *Journal of European Public Policy*, 14(2), 190-207.
- Radaelli, C. M., & De Francesco, F. (2007). *Regulatory Quality in Europe: Concepts, Measures, and Policy Processes*. Manchester: Manchester University Press.
- Radaelli, C. M., De Francesco, F., & Troeger, V. (2008). The implementation of RIA in Europe, *European Network for Better Regulation, Workshop on Regulatory Quality*. Centre for Regulatory Governance, University of Exeter.
- Rosenbloom, D. H. (2000). Retrofitting the administrative state to the constitution: Congress and the judiciary's twentieth century progress. *Public Administration Review*, 60, 39-46.
- Sabatier, P., & Weible, C. M. (2007). The advocacy coalition framework: Innovations and clarifications. In P. Sabatier (Ed.), *Theories of the Policy Process* (2nd ed., pp. 189-220). Boulder: Westview Press.

- Sanderson, I. (2002). Evaluation, policy learning and evidence-based policy making. *Public Administration*, 80(1), 1-22.
- Schout, A., & Jordan, A. (2007). What do 'new' modes of governance demand of public administrations? , *Paper Presented at the Connex Workshop on Governing the European Union: Policy Instruments un a multi-level polity*. Paris, 21 and 22 June 2007. Sciences Po Paris - Centre d'études Européennes.
- Stame, N. (2008). The European project, federalism and evaluation. *Evaluation*, 14(2), 117-140.
- The Evaluation Partnership. (2007). *Evaluation of the Commission's Impact Assessment System*. Brussels.
- Weiss, C. H. (1987). When politics and evaluation meet. In D. Palumbo (Ed.), *The Politics of Program Evaluation* (pp. 45-70). London: Sage.