

David A. Frenkel

A current Anthology of Law

Edited by
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ISBN: 978-960-598-533-2

ATINER
2023



Athens Institute for Education and Research

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*A Current
Anthology of Law*

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First Published in Athens, Greece, by the
Athens Institute for Education and Research
ISBN: 978-960-598-533-2

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Printed and bound in Athens, Greece by ATINER
9 Chalkokondili Street
10677 Athens, Greece
www.atiner.gr

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The “One in, one out” Approach in the New Communication on Better Regulation: A Brief Reflection

Marta Picchi

On 29 April 2021, the European Commission adopted the Communication “Better regulation: Joining forces to make better laws” with the aim of further improving the legislative process of the European Union. After a brief introduction on the Communication’s contents, this paper focuses on the “one in, one out” approach that has been introduced as a criterion for evaluating public policies.

Keywords: *European Union; better regulation; “one in, one out” approach; evaluating public policies*

Introduction

After a brief introduction on the contents of the Communication *Better regulation: Joining forces to make better laws*¹, I will discuss the “one in, one out” approach that has been introduced as a criterion for evaluating public policies.

Thirty years ago, the European Union embarked on a process to improve the quality of regulation²: according to the Organisation for Economic Co-operation and Development (OECD), the Better regulation system created by the European Commission is one of the most advanced regulatory approaches in the world³.

In 2019, the European Commission started reflecting on the results progressively obtained; on 29 April 2021, the European Commission adopted the Communication *Better regulation: Joining forces to make better laws*, with the aim of further improving the European Union’s law-making process. In fact, to foster the recovery process in Europe, it has become more necessary than ever to legislate in the most effective way possible, while also working to make the laws of the European Union better adapted to tomorrow’s needs⁴.

The Contents of the New Communication

This Communication builds on previous experience, but also introduces new elements that consider the findings made by control bodies within the European Union, such as the European Court of Auditors, and external bodies such as the

¹Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 29 April 2021 on *Better regulation: Joining forces to make better laws*, COM (2021) 219 final.

²Radaelli (2021).

³OECD (2019b).

⁴Ten Brink (2022).

OECD. However, there has been no lack of criticism because, in view of some of the literature, this Communication has missed opportunities. For example, it does not indicate the ways in which *better regulation* can address the social impact of the *Green Deal* in such a way as to favour its legitimacy and acceptance by citizens.

The Communication identifies four main goals: First, there is a need for greater sharing of efforts by the other European institutions, member states and stakeholders. Indeed, the Parliament and the Council of the European Union did not fully follow up on the 2016 Interinstitutional Agreement¹. In addition, member states, given their essential role in the implementation phase on the national level, can provide useful information on the costs and benefits arising from the implementation of European Union legislative acts, which may be relevant with a view to subsequent improvement of European legislation².

The second goal is to improve communication with stakeholders and individual people. Effective policy-making requires people's involvement, because trust in the European Union can only be preserved through policies that consider and reflect their values and concerns.

To allow for greater involvement of individual, social partners and stakeholders, the European Commission deems it necessary to simplify the way in which they can contribute by participating in public consultations. Excessively long or technical questionnaires should be avoided. In addition, participants should then be informed about how their provided contributions were used at the time of policy-making.

However, the European Commission has decided to reduce the opportunities for participation both during the *ex-ante* evaluation of policies and during the *ex-post* evaluation of the effects of policy choices. This decision was justified as a solution aimed at encouraging participation while reducing the administrative burden on stakeholders in taking part in the consultations. This choice raises concerns because reducing occasions of stakeholder participation can lead to negative consequences: That is, it may result in stakeholders being less effective or capable of contributing to the law-making process.

The third goal is to ensure greater transparency. Transparency is essential in order to ensure that people can play an active role in the policy-making process and can hold the institutions of the European Union accountable for the decisions taken. The Communication proposes to establish, together with the Parliament and the Council of the European Union, a common legislative portal within which a single record is inserted through which all the contributions, the studies carried out, and the data collected for each legislative act can be easily found.

However, one problem is not addressed: Decision-makers must publicise the objective criteria, on the selection of empirical evidence that led to the decision. They appropriately distinguish between scientific evidence and data. But, instead, the evidence and data are derived from prospective methodologies or opinions provided by stakeholders.

The fourth goal is to improve the instruments to allow for greater simplification

¹Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission of 13 April 2016 *on Better Law-Making*.

²Golberg (2018).

and a reduction in administrative burdens linked to legislative activity. In particular, the European Commission provides for the improvement of some existing tools and the introduction of new ones, including the “*one-in, one-out*” approach. According to this approach, any new burdens introduced by a legislative act must be offset by the reduction of pre-existing burdens within the same area

The “One in, One out” Approach

The European Commission has drawn on the experience of some member states and third countries¹ with the clear intention of overcoming the frequent criticism made by Eurosceptics that the institutions of the European Union are responsible for introducing excessive bureaucratic burdens and regulatory overproduction.

The “*one-in, one-out*” approach emphasises the idea that regulation is an obstacle to economic development, rather than a necessary tool to guarantee citizens’ rights, and this supports ordoliberal ideologies. However, there is a risk of over-simplification leading to rigid application of the approach, hindering the achievement of the goals that are most often set by European Union lawmakers.

To limit criticism, flexibility criteria have been laid down. Indeed, the European Commission has specified that this approach will not be applied mechanically and will not lead to a lowering of the European Union’s high economic, social, and environmental standards, nor will it prevent the adoption of new initiatives that have a clear added value by effectively pursuing political priorities. In particular, in order to ensure the flexibility of the “*one-in, one-out*” approach, the European Commission provides that: I) if an ‘out’ cannot be identified in the same year’s work programme, it will be reported in the next year; II) if the proposed legislation that imposes costs (‘in’) is deemed to be necessary, but it is not possible to find an ‘out’ in the same area, the Commission can decide to take the ‘out’ from a different policy area; III) if there is political will to regulate, but it is not possible to identify an offset in the same area (for instance regulation in emerging policy areas where it is necessary to fill a regulatory gap), the Commission can decide to exempt the regulation from the ‘*one in, one out*’ approach.

Brief Reflections

At the end of 2019², the “*one in, one out*” approach was merely a political commitment, intended in some way to please some member states that had given the necessary support in the election of President von der Leyen. The Juncker Commission, conversely, had previously rejected the introduction of an accounting method with neutral effects in terms of regulatory and administrative obligations,

¹OECD (2019a).

²Communication from the President to the Commission of 1 December 2019 on *The Working Methods of the European Commission*, P (2019) 2.

preferring a “case by case” approach.

The introduction of the “*one in, one out*” approach at this time is under question questionable and, in some respects, paradoxical if we consider the numerous interventions that the European Commission had to carry out during the pandemic period and those contextual to the Communication itself. Moreover, this principle appears to be at odds with the fact that, in this period, the European institutions aim to provide well-being through net benefit-oriented policies¹. Instead, this principle seems to respond to the needs expressed by those who want more flexible and less stringent regulations to respond to the demand for innovation and progress in digitization, but also to the need to adapt quickly to competition from the United States and China.

Although other countries have introduced this approach, sometimes even more stringently, there is no empirical evidence that demonstrates the actual effectiveness. Above all, its introduction makes the legislative process even more complex, and is therefore liable to slow it down significantly².

This Communication has generated discontent among some member states. While reducing administrative burdens is a key objective, paying too much attention to costs means ruling out the possibility that the legislative act can find its justification, even when the expected benefits outweigh the costs. Criticisms have been directed towards the very logic of this approach, i.e. the idea that legislation generates unnecessary burdens and costs without considering the fact that the primary purpose of regulation is to protect people, such as economic operators, by ensuring legal certainty and by acting as a driver of integration; social progress; and support for the values of the European Union. Moreover, this new approach is presented as an adaptation of the Working Methods of the European Commission and serves as a genuine revolution because it allows stakeholders and powerful industrial lobbies to firstly challenge the merits of a legislative act on the grounds that it would increase the administrative burden on businesses.

In any case, the greatest difficulties will come precisely from the concrete application of this principle in identifying and distinguishing between burdens to be eliminated and those to be maintained and, consequently, difficulties in relations at the institutional level. The indeterminacy and flexibility of this approach will then contribute to the establishment of new bureaucratic structures tasked with the preventive calculation of “*in*” and “*out*” burdens. There will be further difficulties and possible slowdowns in the decision-making process in which it will be necessary to quantify not only quantitative but also qualitative burdens, considering the immediate ones, as well as the medium- and long-term ones.

Furthermore, the provision of adequate structures to carry out these activities will lead to a significant increase in the costs of *better regulation* which, among other things, will have increased significantly over time and, according to estimates by the European Commission itself, amount to between ten and thirty-seven million euros per year³.

¹Van den Abeele (2021) at 2.

²Simonelli & Iacob (2021).

³Commission Staff Working Document of 15 April 2019 on *Taking Stock of the Commission’s Better Regulation. Accompanying the document Communication from the Commission to the European*

It is also necessary to consider another need to be met. In fact, even in light of the pandemic period, the European Union must be able to assess the repercussions that new legislative acts may have in a context irreparably changed economically, socially, and in terms of health, and to enhance the long-term strategic prospects in such a way as not to find itself unprepared for future crisis scenarios that, in the current context, are certainly plausible.

Therefore, strategic and scientific planning becomes essential for adapting the European Union's policy-making to future needs and for ensuring that the political choices made are based on a long-term perspective, also considering the sustainable development goals. Consequently, strategic foresight becomes an integral part of the European *Commission's Better Regulation* programme.

In any case, because of the additional implementation difficulties, only practice will demonstrate how the European Commission has intended to implement the “one-in, one-out” approach, and make use of the flexibility criteria that are occur.

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