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Perspectives on Better Regulation in the EU – Between Microscopes and Telescopes

For most people concerned with ensuring good governance, “Better Regulation” (BR) sounds like a nigh irresistible proposition. This is especially so when combined with a governmental pledge to be “big on big things, small on small things”.¹ Under different names, the core ideas behind BR have in fact been on the European agenda for several decades already. Initially, the recipes were formulated with relative ease, undergoing repeated refinements and adjustments over the years.² As always, however, the proof of the pudding remains entirely in the eating: what have been the achievements of the BR program? Still today, alas, it does not seem appropriate to unfold a “mission accomplished!” banner.

Definitions of the term “Better Regulation” have varied. The eponymous EU program is generally considered to boil down to a set of activities and instruments aiming to systematically appraise supranational policies and improve their workings. It comprises various processes, actors, tools and compacts, including legislative

- 1 J. C. Juncker, “The Juncker Commission: The Right Team to Deliver Change”, Brussels, 10 September 2014. Online at: http://europa.eu/rapid/press-release_SPEECH-14-585_en.htm.
- 2 See e.g. H. Xanthaki, “The Problem of Quality in EU Legislation: What on Earth is Really Wrong?”, (2001) 38 *Common Market Law Review*, pp. 651-676.

Internet resources, last date of access: May 16, 2019.

quality evaluations, consultations, and impact assessments.³ The self-proclaimed “last chance” Commission of Jean-Claude Juncker that took office in 2014 launched a single set of methodological templates for BR activities. It moreover decided to reconfigure the existing oversight body, rebranding it the Regulatory Scrutiny Board (RSB). Also, an inter-institutional agreement was concluded between the Commission, Parliament and Council in 2016 that saw them all sign up to the carrying out of evidence-based analyses of amendments proposed in the Union’s law-making process.⁴ One particular new initiative focused on “regulatory fitness and performance” (REFIT) checks, mapping opportunities for simplification and reduction of unnecessary costs.⁵ A mid-term review was published in 2017, followed by a report of the Court of Auditors. In the meanwhile, numerous scholars conducted their own inquiries into the subject-matter.⁶ With the completion of the Juncker Commission’s term of office now close at hand, the time seems ripe to draw up some final eulogies or obituaries.

In such studies, a crucial benchmark may be believed to lie in the (experienced quality of the) output. Allegedly however, with the choice for mechanisms such as impact assessment and ex-post consultation, which invite a wider feedback and participation, high public expectations were raised as well with regard to input and throughput legitimacy.⁷ Under REFIT, a specific ambition has been the identification of proposals in need of withdrawal, as an essential part of the promise to “cut red tape”. Correspondingly, no less than

3 C. Radaelli, “Halfway through the Better Regulation Strategy of the Juncker Commission: What Does the Evidence Say?”, (2018) 56 *Journal of Common Market Studies*, p. 85.

4 O.J. [2016] L 123/1.

5 European Commission, “Regulatory Fitness and Performance Programme – Scoreboard Summary”, 24 October 2017, p. 4.

6 See e.g. S. Garben and I. Govaere (eds.), “The EU Better Regulation Agenda – A Critical Assessment” (Oxford: Hart/Bloomsbury 2018).

7 A. Alemanno, “Better Regulation: Holding Martin Selmayr Accountable”, available on SSRN. See: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3251856.

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73 proposals were retracted in 2015 alone. Yet, due to the lack of preceding evidence-based analyses of their merits, this move caused an unexpectedly broad upset – amounting to a “false start” in the eyes of many commentators. The conceptual fuzziness of the REFIT agenda, simultaneously pursuing a set of highly diverse goals, also cast persistent doubts with regard to its scientific foundations.⁸

In quantitative terms, the operation has nevertheless borne some fruit. For instance, the number of Commission outputs at the end of 2018, compared to those in 2014, can be seen to accord with the “doing less more efficiently” paradigm.⁹ Commentators have equally lauded the novel emphasis on consultation, the effective reform of the RSB, and the introduction of ex post evaluations into the policy cycle. All the same, the question is left open whether the efforts resulted in an enduring, measurable increase in quality of the EU rules. In similar vein, the Commission has been said to disingenuously deploy causal plots, doomsday scenarios and narrative dramatization in its impact assessments, in order to garner consensus and support for the proposals it wishes to maintain.¹⁰

The current volume originates in an academic gathering where attempts were made to comprehensively take stock of the BR program, challenge vested assumptions, and advance the existing knowledge base. The four main chapters in this booklet contain a digest of two thematic and two sectoral seminar contributions, employing innovative telescopic techniques alongside microscopic ones. First, Helen Xanthaki outlines an original argument for determining the success of the BR program on the basis of its own principles and intentions. She identifies several shortcomings in this regard, and calls for greater compliance with the formulated

8 Radaelli (n. 2), p. 90.

9 S. Blockmans et al., *What Comes After the Last Chance Commission?* (Brussels: CEPS 2019), p. 15. The Commission did develop an obfuscating tendency to bundle proposals and label them as a single package. See: <https://www.politico.eu/article/commission-juncker-less-regulation-promise-falls-short/>.

10 C. Radaelli, C. Dunlop, O. Fritsch, “Narrating Impact Assessment in the European Union” (2013) 12 *European Political Science*, p. 500.

guidelines and tools. To her mind, the alternative only risks to alienate EU citizens further. Next, Stijn van Voorst and Ellen Mastenbroek present the outcomes of their research on ex-post legislative evaluation, exposing that the Commission tends to concentrate on evaluating directives and complex legislation. Moreover, it appears that evaluations by external evaluators are of higher quality than internal evaluations. Overall, they do believe that the Commission has upped its game over the years, and performs relatively well on this front. Hereafter, in a sectoral assessment of the environmental domain, Barbara Beijen zooms in on developments with regard to the many directives in the field concerned. In an earlier study, she found that several such instruments were poorly aligned with each other, that problem definitions were often ill-defined, that their scope was very extensive, and often heavily reliant on soft law. According to her, despite the grand ambitions that have been formulated, the improvements in recent years only seem marginal. Finally, Pieter Kuypers delivers his assessment of the BR agenda in the domain of public procurement. One of the goals here has been to make the rules more accessible. Kuypers notes, however, that the volume of legislation over the last decade has doubled, and became increasingly detailed instead. He proposes a reversion to simpler wording, as well as an outright decrease in legislation, also with an eye to avoiding gold-plating – the maligned practice of Member States going wholly or partially beyond EU requirements in their domestic implementation.

At the end of the seminar, it was argued that contemporary researchers have just begun to scratch the surface of BR policies and outputs, and obviously, the selected contributions provide plenty of food for further thought themselves. The concluding roundtable morphed into a flagging of cross-cutting issues that are yet to be addressed satisfactorily. For starters, one may wonder whether it is ultimately most advisable to resort to quantitative or rather to qualitative parameters when gauging the success of any regulatory improvement scheme. The ever-increasing complexity of modern society suggests

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an ever-fading feasibility of numerical reductions, with every new opening demanding the imposition of new constraints. Contrary to an established wisdom, “less” could thus never truly mean “more” here (notwithstanding that, preferably, the individual rules within an inevitable large quantity are themselves kept as compact as possible – as convincingly argued elsewhere in this volume).

Second, there was the well-received opinion from multiple panelists that Better Regulation boils down to a necessarily continuous PR exercise. In other words, because of its structural appeal in the eyes of the public-at-large, no government can reasonably go without it; small wonder then that the EU keeps bringing it up. One might add that if the underlying idea had been properly internalized, there would indeed no longer be any need to trumpet it so loud and often.

A third daring thesis pertained to the correct level of realization, whereby a BR program pushed predominantly “from the top” was considered bound to remain limited in effect. After all, its success will always stay critically dependent on a proper execution “further down the line”. Specifically in a polity that spans over two dozen countries with peculiar national idiosyncrasies and constitutional power divisions, this would appear to call for a principal realism and humility amongst the supranational nomenclature.

At the panel’s closing, it was advocated that the popular creed of “doing less more efficiently” might well constitute a dual impossibility: instead, one ought to focus either on becoming more efficient, or on trying to do less. Arguably, the aforementioned slogan invokes a classic dilemma, whereas it is simply utopian for an atypical organization like the EU to accomplish both at the same time.

On the whole, similar to the underlying seminar, this booklet offers but a snapshot of the current state of play, politically and academically. It hopes to enable readers to broaden their insights in a succinct fashion, inspecting the multifarious dimensions of the *problématique* from up close and afar. The timing of the publication coincides with the latest BR review of the Commission, completed in

the first half of 2019, so that the findings can be neatly juxtaposed. Despite the lofty intentions and the tentative achievements so far, it must be clear to the key stakeholders that there is still ample work left to be done. Whatever the future holds for EU governance, on the shoulders of Europe's governing class continues to rest, as one author in this volume puts it, a "mammoth task".