



Contestation and Controversies in EU Impact Assessment

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Messages in the jar



- Impact assessment as terrain where policy actors define who does what in the EU policy process
- Transparency in the early stage of policy formulation – a result of IA being institutionalized - has brought about more explicit confrontations between the Commission and other actors
- Who wants what from IA as process and document: contestation reveals expectations
- Today we are not making the assumption that contestation means that the IAs of the Commission are bad, flawed, or anything else. For us, it is simply a way to explore the politics of policy formulation

Important differences

- Controversies/contestation on the Commission's proposal does not necessarily involve the IA. Although it is the IA that contains the logic, arguments and evidence behind the proposal....
- Another difference: Contestation or Controversies on the IA features specifically / controversies on the use of IA

Europe versus USA: these are two different systems

CONTROVERSY

Who raises concerns....?

- Stakeholders, federation of business, large companies
- RegWatchEurope
- Impact Assessment Institute
- Ceps and ERF indirectly contribute to the debate. Ceps also carries out IA studies for EP and Commission
- Social and environmental NGOs, research institutes in this field (ETUI)
- The European Parliament does not 'contest' but it often presents critical readings of the Impact Assessments of the European Commission
- USA in the context of TTIP was critical of the EU IA
- Academics? Of course...😊



Giacomo Balla
Velocità astratta e **rumore**

What is contested?

In principle, all components of the IA are up for grabs when it comes to contestation:

- 1) Problem definition
- 2) Choice of options
- 3) Consultation bias
- 4) Manipulation of cost-benefit criteria
- 5) Data transparency and replicability
- 6) Methods and discounting techniques

... but also the use of IA to get in the way of agreements negotiated by social partners, the non-production of IA in the domain of economic governance, the withdrawal of proposals without presenting the IA work done until the decision to withdraw

The battle of Poitiers



Examples of controversies surrounding EU IA

- Subsidiarity and proportionality
- Lack of IA
- Transparency
- Costs
- Withdrawal of proposals without showing the IA work done until withdrawal
- Consumer protection is important, but does the Commission (chooses to ignore) how the regulated markets work?
- Model replicability, ways in which data are presented and made available
- Switch from [risk-based approach to hazard-based approach](#) not supported by IA: this is a change of policy design (ex: pesticides directive)

In the USA: [the missing stakeholder](#) (Farina and Newhart): this problem is likely to affect the EU too

EP and Council are reluctant to perform IA of their substantive amendments

- ***Revision of medical devices directive***: shift to hazard-based principle
- Because there are no clear rules on the IA of substantive amendments introduced by Council and EP these changes of design cause controversies. EP are not supported by IA when they make changes. Industry and NGOs react with classic lobbying^(*)
- Situation should improve with the implementation of the inter institutional agreement on better lawmaking

^(*) See what happened with Eurometaux and Eurofer

<https://www.eurometaux.eu/media/1427/feb14emeuroferpositionmedicaldevices.pdf>



Goya – Two men eating the soup

This is often seen as a painting symbolizing stupidity and futility

Subsidiarity and proportionality analysis

Tricky bits – subsidiarity is a legal thing but it can be dealt with in problem definition

- Sound evidence and arguments should support this analysis, yet it's easy to be drawn into pro-forma statements
- Are the impacts assessed in the IA the best indicator of proportionality?

Example Narrow-gauge tractors

Balancing control of emissions, support to innovation, and proportionality towards small and medium enterprises.

The example is also a case of defensive R&D: a good deal of the R&D budget goes into compliance if the standard for narrow gauge tractors is set at the level of big trucks.

Also, if the cost of engine goes up, the farmers who own tractors delay innovation and keep the old tractor on duty



Lack of IA because..... We have to act quickly under pressure from Terrorism?

“The proposal lacks an Impact Assessment. As mentioned in an implementation appraisal published by EPRS, "the revision of the Directive was initially included in the Commission Work Programme 2016 (Annex I, item 17). Following the terrorist attacks in Paris on 13 November 2015, the publication of the Commission proposal was brought forward..." together with the Implementing Regulation on deactivation standards”

European Parliament, EPRS Control of the acquisition and possession of weapons (Revision of Firearms Directive)

No ex-ante impact assessment was issued

Directive 91/477 on control of the acquisition and possession of weapons¹

WHY WE LOOK AT THIS CASE

In this case the Commission seems to argue that urgency, consultation, and external evaluation / studies are functional equivalents of an IA. But this was never endorsed by RSB and it is not in the guidelines.

What do you think?

Better Regulation - Procedural Aspects

Art. 17 of the Firearms Directive requires the Commission to '**submit a report ... on the situation resulting from the application of this Directive, accompanied, if appropriate, by proposals**' by **28 July 2015**. The Directive does not provide further instructions on the evaluation criteria to be used for drawing up such a report. This requirement can be considered as a 'review clause'.* In 2014, the European Commission launched a 12 month external evaluation covering the following **evaluation criteria**: effectiveness, efficiency, consistency, relevance and EU added value. These five criteria correspond to those included in the chapter on Evaluation in the [Better Regulation Guidelines](#) of 19 May 2015. A novelty introduced by the Guidelines concerns the requirement for the Commission to issue an accompanying **Staff Working Document** in order to present and - where necessary - complement the findings of the external evaluation. In the case of the the proposed revision of the Firearms Directive, a [report](#) by the European Commission, summarising and complementing the findings of the [REFIT](#) evaluation, was published together with the [proposal of November 2015](#).

Source: EPRS briefing notes, EP

No ex-ante impact assessment was issued for this proposal, the above-mentioned Commission report (and the [external evaluation](#) of the Directive) being presented as the evidence-base to inform decision-makers. This constitutes an exception to the general rule - provided for under the Better Regulation Guidelines - that Commission proposals - particularly those which figure in the annual Work Programme - should be accompanied by an impact assessment. Even if one could expect that, in line with the 'evaluate first' principle applied by the Commission **, the evaluation would have constituted a sizeable part of the impact assessment (e.g. the section on problem definition and the baseline scenario), it would seem reasonable to expect some forward-looking analysis of the various options considered and their likely impacts. **Stakeholder consultation** was undertaken for the [external evaluation](#) and through meetings with Member States and interested private parties; no additional consultations on the topic have been planned by the Commission.

In its [Better Regulation Package](#) of 19 May 2015, the Commission announced its intention to gather stakeholder feedback on its proposals for a period of (at least) 8 weeks following their publication.*** It appears that after the adoption of its internal Better Regulation Guidelines in May 2015, the Commission has set up a mechanism for receiving feedback on its published proposals via the dedicated portal [Give Your Feedback](#). It is expected that the feedback from stakeholders gathered in that context will be made available via the internet and summarized by the Commission in a Staff Working Document which will be formally transmitted to the European Parliament and to the Council. Stakeholders can send their comments until 1 February 2016.

Transparency

- Transparency of the basic assumptions made when presenting cost estimates
- Transparency on the underlying studies, datasets and reports used to reach the conclusions in the IA

Consumer protection versus protecting the efficiency of regulated markets

EP briefing on

The review of national wholesale roaming markets and the Roaming Regulation

amounted to €0.6 billion. On 30 April 2016, the latest reduction in charges became applicable throughout the EU. The next step in the process is the planned abolition of all retail roaming surcharges as of 15 June 2017. Yet, to achieve this goal several questions remain open, in particular as regards the status of wholesale roaming markets.

Indeed, despite amendments to the Roaming Regulation, the current state of the EU telecoms market is fragmented and several adjustments are needed before a roaming-free policy can be fully implemented. While the abolition of retail surcharges up to a fair use limit would allow customers to replicate their domestic mobile usage patterns across the EU, the appropriate level of wholesale roaming caps needs to be found and possible mitigating measures adopted for mobile operators inter alia to recover costs. As the recent public consultation on national wholesale roaming markets has shown, finding a balanced solution remains complex. Customers from home and visited markets, mobile operators, NRAs and stakeholders have various conflicting interests. In particular, divisions exist between small and large operators, and between Member States depending on whether they have higher inbound than outbound roaming traffic. Last but not least is the need to reconcile the protection of consumer interests with operators' abilities to remain competitive and sustainable.

Withdrawal of proposals

- Can the Commission withdraw Without publishing the impact assessment?

Case C-409/13. EU judges have limited the European Commission's right to withdraw legislation, raising doubts over its drive to cut red tape and its decision to axe the Circular Economy package of waste laws.

The European Court of Justice has set three conditions the executive must meet before it takes a pending bill off the table.

Institutional balance

Costs

- Recurring and one-off costs presented separately
- Recurring costs impose different burdens in comparison to one-off costs
- RegWatchEurope recommends to represent them separately.

Transparency on data [EPRS]

Conclusions

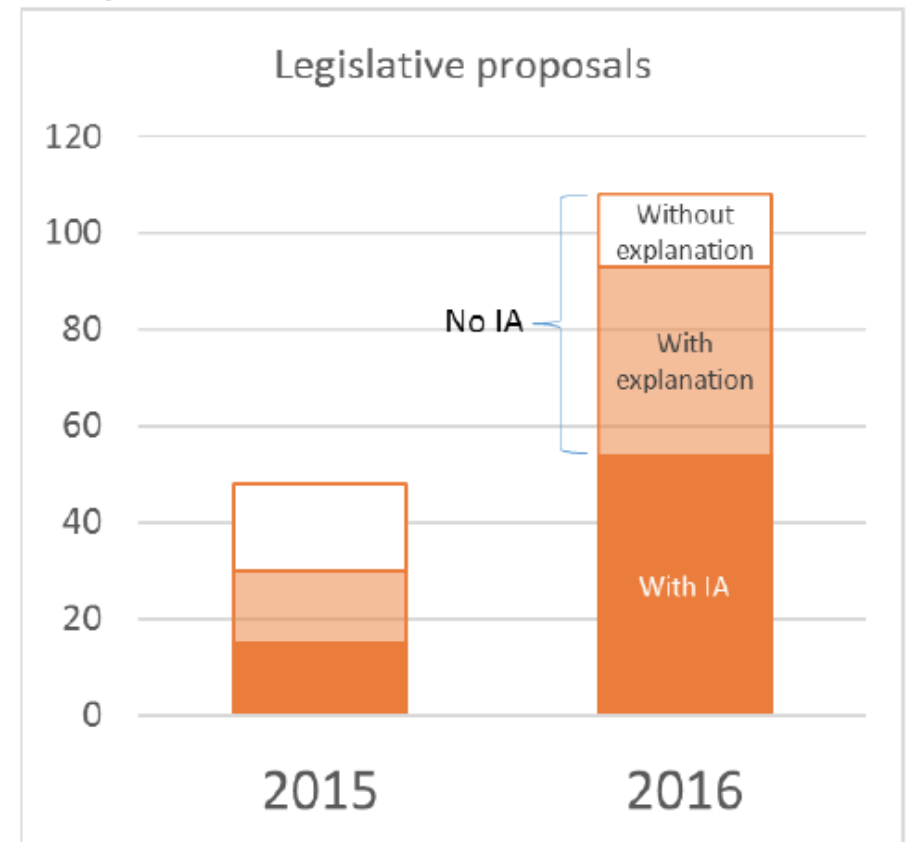
The Impact Assessment makes a convincing case for the need for action to overhaul the current Blue Card Directive. The IA is substantiated by sound and comprehensive research (in the form of 16 annexes) and external expertise, as well as wide consultation taking international immigration systems aiming to attract highly skilled workers into account. Although not all of the options presented appear viable, the European Commission makes a genuine attempt to identify solutions to the problem. The limited data, about which the Commission is transparent, suggests that the quantitative evidence used in the IA, in particular regarding the economic impacts, might merit further exploration. Finally, it would have been useful if the IA had provided a link to the external IA study that underpins the Commission's IA.

The New EU Blue Card Directive

Impact Assessment (SWD(2016) 193, SWD(2016) 194 (summary)) of a Commission proposal for a Directive of the European Parliament and of the Council on the conditions of entry and residence of third-country nationals for the purposes of highly skilled employment (COM(2016) 378 final)

Impact assessment institute: lack of IA without explanation

Analysis of instances of no IA



IAI: data transparency and modelling

Transparency of modelling and numerical analysis in IAs – three case studies



HDV CO2 - SWD(2014)160

- All data and sources available
- Full transparency of methodology and sources
- Full scrutiny enabled



Climate, Energy , Efficiency 2030 - SWD(2014)255

- Input data and raw out data not published
- Model algorithms unavailable
- Outside scrutiny not possible



Circular Economy SWD (2014) 207 & 259

- Input and output data made available.
- Model algorithms not available to stakeholders.
- Outside scrutiny possible, except on analytical algorithms.

Stakeholders contestation: what is the impact we should be concerned with? Biofuels

- Farmers: impact on rural jobs, rural development, confidence in markets
- Oxfam: global impact
- Indonesia and Malaysia lobby EP directly
- Journalists: The Commission has based its policy on biofuels on public opinion preferences (source: Euroactiv)... so, what's the role for IA?

Social and environmental NGOs and think tanks: the case of ETUI

1. The Commission proposal on the circular economy: an unjustified withdrawal of the work programme

1.1. Background

The Commission's 2010 impact assessment revealed that, in 2010 alone, an estimated 400 000 people would die prematurely from air pollution in the EU (European Commission 2013e) and that almost two-thirds of the EU land area would be exposed to excess nutrients from air pollution. The damage to health would have a huge economic cost, added the IA, estimated at EUR 330940 billion (39% of EU GDP) (European Commission 2013f).

However, several months before the new College was installed, some of Europe's employers lobbied the Commission intensely, calling for the withdrawal of the "Clean Air Programme for Europe" (European Commission 2013c) and the redrafting of the proposed directive on the circular economy "as an economic piece of legislation rather than from a purely environmental perspective". The employers based their demands on the argument that the global macroeconomic cost of climate change policies was around 1% of GDP per year. They stressed that certain economic sectors could be hard hit and that the adoption of ineffective measures would increase this figure (Business Europe 2011).

IA does not penetrate into Economic governance

- As ETUI and others have observed, there isn't sufficient IA work in the field of economic governance
- The EU has built a new governance architecture in response to the crisis of the Euro, but this emerging architecture has not been impact assessed



3. Absence of an impact assessment on the economic governance review

3.1. Background

Although all Commission communications and all European Council and Council of the European Union conclusions underline the importance of an in-depth assessment of any substantive initiative, there was no impact assessment prior to the adoption of the six-pack and two-pack⁴².

IA to get in the way of agreements between social partners?

- Commission has refused to submit an agreement between social partners to Council saying it wanted to perform an IA
- The reason for the IA was to check on the costs to small and medium enterprises
- The case concerned health and safety of hairdressers (see next slide, ETUI report)

5. Consequences of the Commission's decision not to propose an initiative on legislation in the field of health and safety at work for hairdressers

5.1. Background

Under Article 155 TFEU⁴⁴, the social partners asked the Commission in 2012 to propose a directive implementing their agreement on health and safety rules applicable to hairdressing salons.

However, on 2 October 2013, under the REFIT programme, the Commission decided that it would not propose such an agreement during its 2009-2014 term of office. According to the Barroso II Commission, the relevance and European added value of this agreement needed first of all to be fully assessed.

In response to a parliamentary question from three Belgian MEPs in December 2014, the Commission stated that “an external cost-benefit study was finalised in July 2014. The Commission is currently drafting its own assessment, with due regard for the characteristics of the sector, where small

Lastly, if the Commission, in liaison with employers, had to submit all agreements negotiated between social partners to impact assessments, prior to their entry into force, this would result in their autonomy being negated. If the fruit of tough negotiations had to be screened by the Commission and its “high-level” expert groups, this would considerably harm social dialogue. The coming weeks and months will shed more light on the Commission’s intentions.

Meta-contestation? Other concerns....

- “IA does not challenge the regulators”
- “IA does not go out for notice and comment” (American observers say this quite often)
- “Impact assessments are not scrutinized properly because the RSB is not independent” (REGWatch Europe)
- RSB produces two negative opinions, yet the Commission goes ahead anyway: this reduces trust in the overall process of preparing a rigorous appraisal of the proposals of the Commission

So what?

Many have argued that IAs are perfunctory, that do not matter, that they are not used....

And yet, If there is contestation, surely it means that
Impact Assessments are not exactly irrelevant

Robert Delaunay Fenêtres ouvertes simultanément



*Thank
you*



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