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EU REFIT machinery 'cutting red tape' at the cost of the *acquis communautaire*

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Policy implications

The increasing politicisation of the better regulation agenda, including REFIT, the latest initiative in this context, has led to the introduction of a rhetoric according to which any piece of legislation is deemed an obstacle to growth, competitiveness and employment, as well as particularly burdensome for SMEs. Quite apart from the criticism that can be levelled at its expensive, time-consuming, qualitatively questionable and still predominantly one-

sided evaluation process, REFIT has become a real threat to the social *acquis communautaire*.

The main concerns – repeatedly expressed by the ETUC, but also by the European Parliament and the European Economic and Social Committee – relate to the recurrent shortcomings of impact assessments in social and environmental matters and to the lack of democratic legitimacy of the whole machinery. To date the criticism has had scant impact on the process. Will the Juncker Commission adopt a more impartial and enlightened approach to REFIT? Will social and environmental issues be seen as mattering? The answer is far from certain.

Introduction

To judge from the European Commission's 2014-2015 work programme, the quality management of European legislation has become this body's paramount task. With the 'Regulatory Fitness and Performance Programme' – dubbed REFIT – launched at the end of 2012 and beginning of 2013, the Barroso II Commission, followed by the Juncker Commission, set out to address not only administrative but also regulatory burdens across the whole of the EU *acquis communautaire*. This new initiative followed on from – and replaced – the earlier aims of simplification and qualitative improvement of EU law accompanied by the removal of administrative and regulatory costs that were damaging to competitiveness. In the context of this latest initiative, legislation *per se* has become suspicious, automatically triggering the implementation of a broad set of impact assessments by experts and committees; social and environmental impact issues have been so far been particularly ill-treated by this machinery. Will the Juncker Commission adopt a more balanced approach to REFIT? Will social and environmental issues finally be properly assessed? Nothing could be less certain.

the late 1990s. At the time of the Amsterdam Treaty, and with the declared aim of minimising any burden for the EU, national governments, local authorities, economic actors and citizens, it was stated that the EU Commission, as regulatory body and guardian of the law, had the duty 'to maintain in full the *acquis communautaire* and build on it with a view to considering to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community' (European Union 1997: 8).

Since the Lisbon European Council in 2000 there has been a gradual shift towards establishing a direct link between the regulatory environment and competitiveness, growth, jobs, and SMEs. This gave rise to the 'better regulation' strategy for the conduct of which the Commission was responsible on the basis of reiterated mandates from the European Council. Since 2009

Where does REFIT come from?

The quality of European law and its improvement has been at the heart of the European Commission's various initiatives since

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the Treaty has dropped all reference to the obligation 'to maintain in full the *acquis communautaire*' (new Article 3 TEU). Between 2010 and 2014 the Commission moved up a gear whereby 'Better regulation became smart regulation' (Communication of 2010: 2) in order to mainstream the impact assessment system to cover the whole policy cycle (from the design of legislation to its implementation, enforcement, evaluation and revision) so as to 'achieve the ambitious objectives for smart, sustainable and inclusive growth set out by the Europe 2020 Strategy' (Communication of 2010: 11). There is a new focus, furthermore, on SMEs, following the Small Business Act for Europe of 2008 (that applies to all independent companies which have fewer than 250 employees, i.e. 99% of all European businesses) in which the Commission 'permanently anchored the 'Think Small First' principle in policy making and regulation, leading to the semantic change introduced in 2011 in the Communication on 'Minimising regulatory burden for SMEs – Adapting EU' according to which not only will legislation be simplified but steps will be taken to exempt micro-enterprises from regulation and lighter regulatory regimes for SMEs will be set up.

More recently, building on a broader approach to policy evaluation conducted through the 'fitness checks' since 2010, the Commission has launched a new programme, the Regulatory Fitness and Performance Programme (REFIT – Communications of 2013 and 2014). This initiative extends the Commission's approach of simplification and reduction of the regulatory and administrative burdens to the entire *acquis communautaire* including the implementation of EU law at the national and sub-national level, and also to substantial new legislation, including amendments submitted by the European Parliament and the Council, as well as to non-legislative acts.

What is 2015 REFIT all about?

In a nutshell, REFIT is the latest stage of the Commission's initial 'better regulation' (or 'better law-making') agenda that in 2009 became the 'smart regulation' agenda, thus bringing together in a single programme (1) simplification of the EU *acquis communautaire*, (2) impact assessment of new EU legislative and non-legislative acts as well as (3) the reduction of administrative and regulatory burdens (so-called 'red tape'). The 2015 EU Commission's new work programme issued on 18 December 2014 (and which, it was announced, would be revised in spring 2015) focuses almost exclusively on REFIT actions (European Commission 2014a): consolidation of three Directives in the area of information and consultation of workers including the general Framework Directive and Directives on collective redundancies and on transfers of undertakings; evaluation of the Framework Directive and 23 related directives on occupational health and safety; evaluation of the Directives on part-time work and on fixed-term work and on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship. What is more, the codification of seven Company Law Directives into one instrument is foreseen for the purpose of increasing transparency and readability, while the evaluation of legislation regarding equal treatment in social security is also addressed, albeit without a timetable as of yet.

Additionally planned are 80 withdrawals or amendments of pending proposals. Of particular interest is the case of the revision of the Directive on the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding. The Commission states that, if no agreement has been reached in six months, it will proceed to withdraw the current proposal and to replace it with a new initiative. However, as the European Parliament has rightly pointed out, 'scrapping legislative proposals because Member States fail to take responsibility and seek consensus should not effectively give one of the co-legislators a veto function by means of stalling' (European Parliament 2015: 3).

At the request of the European Parliament, both the Impact Assessment Guidelines of 2009 and the Interinstitutional Agreement (IIA) on better law-making of 2003 will undergo revision (European Parliament 2014). These two important documents enable the Commission to, on the one hand, define the methodology for carrying out impact assessments and, on the other, establish the rules of cooperation among the Commission, Council and European Parliament in relation to better regulation.

With regard to revision of the IIA, the European Parliament (2014) has expressed some precise concerns and demands for revision intended to take account of the new legislative environment created by the Lisbon Treaty and, in particular, to give the IIA a legal basis and a binding nature as required by Article 295 TFEU. For the time being, the Commission communication contains one laconic reference to the IIA text itself indicating that it will be reviewed at the beginning of the new term of office.

Additionally, the reappointment of the much contested 'High Level Group (HLG) to reduce administrative costs' gives cause for serious concern in terms of quality of good governance, transparency and objectivity in delivering consultancy. The final report delivered in 2014 has, in particular, been much criticised and a dissident position has been published by four members of the HLG who felt manipulated by the chairman (HLG Dissident opinion, 2014).

How does REFIT work?

For the purpose of simplifying legislation, specific mechanisms developed in the framework of the 'better' and the 'smart' regulation strategies have been revisited and extended to implement the REFIT: impact assessments (IA); ex post evaluation; cost and benefit analysis; and stakeholder consultation.

Impact assessment system

The impact assessment (IA) system, the aim of which is to analyse the economic, social and environmental impact of legislative proposals, as well as the IA guidelines of 2009, is to be reviewed on the basis of a study carried out in 2013 by external consultancies and of the outcome of a public consultation carried out between July and September 2013. The 'study' turned out to consist of general guidance on when and how to perform cost-benefit analyses, and of a general framework designed 'to advise an ideal desk officer of the European Commission on how to complete a

quantitative cost-benefit analysis as part of the Impact Assessment exercise' so as to identify, quantify and monetise costs and benefits in an ex ante impact assessment (Renda *et al.* 2013: 1). Although 'the study neither prefigures the content of the revised Guidelines nor commits the European Commission' (Commission 2013a: 1), the omnipresence of these consultancies in the field of better regulation makes it difficult to believe that their findings will not substantially influence the revision of the guidelines. The general drift of the study's findings is that applying cost-benefit analysis is more challenging when conducted at the EU level than at national level, as the 'multi-institution, multi-level nature of EU policymaking makes it very difficult to reach a sufficient level of accuracy in the analysis of certain costs and benefits and meaningless when it comes to monetising impacts such as respect of fundamental rights' (Renda *et al.* 2013: 202-204). Interestingly, no serious effort appears to have been made, in the context of the study, to remedy the loopholes already identified in previous exercises, notably the inappropriateness of the method in the field of health and safety (Vogel 2010: 19-32).

Measuring benefits? And what about *necessary* burdens?

The cost-benefit analysis, or standard cost model, imported from the United States and introduced in 2005, is well known as a method of moving towards deregulation (Van den Abeele 2010: 5; Vogel 2010: 13). One of the main criticisms is that this model leaves little room for the accurate measurement of the *benefits* of legislation, in particular in terms of legal certainty, but also in terms of securing better working conditions, of improving the working environment and of establishing a sustainable setting for occupational health and safety. Such concerns have been expressed by the Impact Assessment Board (IAB Report 2013: 4) in relation to the lack of assessment of the social and environmental impact of the legislation. Further, no definition is supplied of what is actually meant by a 'burdensome' piece of legislation or of how it might be possible to ascertain what might be an acceptable level of the 'necessary' costs to society – SMEs included – entailed by legislation. One is indeed led to wonder whether there is any sound evidence at all underlying the recurrent narrative according to which the EU produces legislation that is too burdensome, too costly and too complex (Dehousse and Rozenberg 2015).

What is certainly new is that the Commission calls into question – with cynical recourse to 'gold plating' – the possibility for member states to maintain or provide more and better national protection than the minimum EU rules or standards laid down in directives. Though this possibility is enshrined in the European Treaty, the Commission argues that 'member states should do away with situations that go beyond the Directives' minimum requirements' (Communication of 2009: 7). Likewise, the awkward and rather arbitrary extrapolation of data to other countries 'might not be suitable to the EU peculiar system of impact assessment, and of multi-level governance' (Renda *et al.* 2013: 50) for it 'can lead to a loss of accuracy' (Renda *et al.* 2013: 75). The remedies proposed remain weak: 'to refer to a country distribution list relative to administrative burdens' of 2005' (European Commission 2007) or to leave the desk officer to 'find appropriate parameters for extrapolation data only for some countries' and without much

guidance' (Renda *et al.* 2013: 171), yet without considering the particular features of different legal systems, implementation procedures or industry sectors and with company size as the only relevant benchmark. Interestingly, impact assessments do not seem to be applied to all EU new legal proposals; competition issues, in particular, would seem to lie outside the net.

What about assessing fundamental rights?

Further, the operational guidance introduced in 2011 to carry out impact assessment in respect of fundamental rights is perplexing for many reasons: alongside the broad leeway left for interpretation of fundamental rights – given the lack of reference to ILO core conventions or to the Council of Europe European Social Charter as channels for interpreting the rights set out in the EU Charter of fundamental rights – the request for a holistic approach to assessing economic, social and environmental impacts as a single category is also deeply worrying. The European Parliament has issued a call to address the 'gaps and loopholes in the application of (...) the respect for human rights' so as to allow for 'an automatic and gradual response to breaches of the rule of law and fundamental rights at both EU and Member State level'. The European Parliament further stresses that 'the Commission should ensure that all future legislation is subject to a fundamental rights check' (European Parliament 2015: 4).

Consultation: prerogative of social partners has vanished

Finally, a recurrent concern expressed by the ETUC (2014) is the non-respect of Treaty provisions requesting the specific consultation of labour and management in relation to legislation on social issues (Art. 154 (2)). The Commission has opened consultation at all stages to society as a whole, giving the same weight to the opinion of any individual with no particular expertise or knowledge of the issue at stake as to the social partners themselves. Further, in a 2014 resolution, the European Parliament (2014) emphasised the need for greater democratic legitimacy at an early stage of the policy-making process in order to remedy the lack of proper involvement of the European Parliament as one of the main actors of the EU legislative mechanism alongside the consultation of the Economic and Social Committee and the Committee of Regions, as well as the lack of proper involvement by the national parliaments.

Does REFIT live up to the expectations so far?

REFIT has been defined as a 'new bureaucracy in the service of competitiveness' (Van den Abeele 2014: 3). According to the numerous reports from the Commission, the IA Board, the HLG, the group of high-level national regulatory experts, to name but a few, REFIT is a success story and has already helped to save expenditure to the tune of billions of euros. If this might be true for some pieces of legislation, it is however difficult to generalise such a claim or even to trust the calculation, most of which is based on estimates that are beyond trace. Further, such estimates have so far not accurately addressed the social and environmental impacts on the basis of which one or other of

the legislative proposals might have successfully come through the different checks. In other words, the figures supplied should definitely be considered with the utmost caution. In addition, some of the choices made by the Commission to withdraw legislative proposals (such as the maternity leave directive proposal) or to not forward a joint request from the European sectoral social partners to the Council (hairdresser agreement) are the product of a form of 'censorship' insofar as they can be neither vindicated nor ruled out on the basis of an ex post evaluation or impact assessment. The European Parliament, it will be remembered, has warned 'that withdrawal of legislative files must meet objective criteria and be supported by a corresponding impact assessment, and that scrapping legislative proposals because Member States fail to take responsibility and seek consensus should not effectively give one of the co-legislators a veto function by means of stalling' (European Parliament 2015: 3). Further, the enormous costs of the REFIT machinery have not been divulged so far; nor have the real figures on which the 'estimated savings potential of around EUR 41 billion per annum' has been calculated (Final report, High level group on administrative burdens 2014: 3). The Commission, by riding on a rhetorical wave and hammering home its message that better regulation will result in huge savings and help enterprises to turn into more competitive businesses, raises expectations for which no valid figures are so far available; such expectations are likely to be disappointed and might well lead to a more general mistrust in EU law-making.

Refitting EU information and consultation rights: an inconclusive exercise

The completed test case of the fitness check on information and consultation provides no echo of the claims of success. Launched in 2010 as a pilot exercise, a fitness check on an unsystematic selection of three directives related to information and consultation of workers was carried out until 2013. During these three years the general framework directive and the directives on collective redundancies and on transfer of undertakings were under scrutiny with the aim of identifying excessive burdens, overlaps, gaps or inconsistencies. A final report concluded that the directives are deemed 'generally relevant, effective, coherent and mutually reinforcing' and 'the benefits they generate are likely to outweigh the costs' (Commission 2013). Weaknesses have been spotted in relation to the fact that a significant part of the workforce is not covered by the provisions, due to the exclusion of SMEs and micro-enterprises, of public administration and of seafarers. This is clear evidence that SMEs should not be exempted from legislation, contrary to the conclusion drawn by the high-level group on administrative burdens. Back in 2013, the Commission stressed the need for a future consolidation of the three Directives, without going into much detail. A first consultation of the European social partners has started on 10 April 2015 and will last until 30 June 2015.

Refitting occupational health and safety

Another issue under REFIT is occupational health and safety, despite the fact that health and safety experts have demonstrated the inappropriateness of the methodology of the Standard Cost

Model for assessing the relevance of OHS legislation (Vogel and Van den Abeele 2010: 13-18). In a first 'validation' seminar of 2014 a large number of concerns were raised; concrete recommendations were proposed, their declared purpose being to 'design the future structure of the whole OHS *acquis*' (European Commission 2014b: 2) by streamlining provisions and reducing the number of individual directives; there was also a proposal for an 'extensive revision via one directive with the specific safety and health requirements of the present individual directives placed in annex' (European Commission 2014b: 5), despite the fact that trade unions and employer associations had made quite clear their reluctance to re-open and change the directives, as revealed in the discussion paper (European Commission 2014b: 12).

In both cases, the European Parliament (2014: 9) has stressed the need for strong and stable regulation in the areas of health and safety as well as information and consultation of workers, insofar as both fields do not 'hamper but rather contribute to growth', and are 'two important keys for strengthening productivity and competitiveness in the European economy.'

Conclusion

Whether or not REFIT is the expression of better governance – as claimed by the European Commission (2013: 1) – remains a highly contentious issue. No sound evidence in favour of the claim is to be found in the way the current review of the legislative *acquis communautaire* is being conducted, in particular where social and occupational health and safety legislation are concerned. Unilateral withdrawal by the Commission of items of pending legislation and scaling down of its own legislative activities; extending REFIT to non-legislative acts as well as to amendment of legislative proposals; generalisation of the standard cost model to the entire legal *acquis* irrespective of the weaknesses of the methodology and the concerns expressed by stakeholders and IA board; monopoly of the Commission in the choice of external consultancy firms as well as the question of governance, composition, selection of members and legitimacy in the formation of consultancy bodies like the high-level group on administrative burdens; all these observations and practices represent valid reasons to assess REFIT critically and to doubt the good will of the EU institutions in charge of the better regulation agenda.

Better regulation has been essentially reduced to systematically cutting red tape, with a clear bias in favour of SMEs, bringing economic interests to the fore while sidelining social and environmental concerns and considerations, all of which represents a clear infringement by the European Commission of Article 17 TEU according to which 'The Commission shall promote the general interest of the Union' (Van den Abeele 2014: 25).

We may wonder whether the Junker Commission will adopt a more balanced approach to the REFIT. The signs so far are not promising: the questionable choice of advisers and counsellors turning into the development of a 'government by experts' appears to represent a latent threat. The latest reappointment of the chairman of the

HLG as special adviser to the Commission is a massive affront and a breach in the credibility of the initiative as a whole: the single proposal to set a net target for reducing costs, the so called 'one-in-one-out' system, without consideration of the need for the legislation that should be preserved and not just dropped, reveals, on its own, the true goal of such advice, as well as the existence and nature of a hidden political agenda, namely, deregulation (HLG Dissident opinion 2014: 1; ETUC 2014) with the aim of promoting self-regulation and co-regulation, approaches which have been described by the European Parliament (2008: point 49; 2010: point 46) as absolutely inappropriate.

Other pessimistic notes can be read between the lines not only when the Junker Commission states its intention to systematise impact assessments at each stage of the policy cycle and to conduct assessment of cumulative costs on the scale of an industry but also when it embarks all the EU institutions, national institutions and stakeholders on time-consuming, awkward and ill-defined consultation processes, or when it develops with such vigour a suspicious and erroneous narrative associating legislation with unnecessary administrative and regulatory costs that deter job creation and hinder business competitiveness. Better quality legislation is not *less* legislation; it is definitively not legislation or self-regulation on behalf of or in the interests of a particular group in society to the detriment of the existing *acquis communautaire*; and it is certainly not legislation that downgrades existing social and environmental standards and fails to comply with the Treaty requirements to 'work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment' (Art. 3 (2) TEU). Further, a 'better regulation' agenda and REFIT 'does not mean crude withdrawal but rather more regulation where needed and less where not' (European Parliament 2015: 3). A change of direction in the management of better EU regulation is necessary to preserve the 'traditional balance between efficiency, competitiveness and productivity on the one hand, and overall security, sustainable development and social cohesion in the broad sense, on the other (Van den Abeele 2009: 74).

List of references

Dehousse R. and Rozenberg O. (2015) There has been a substantial drop in EU legislative output since 2010. <http://blogs.lse.ac.uk/europpblog/2015/02/03/there-has-been-a-substantial-drop-in-eu-legislative-output-since-2010/>

European Commission (2013) Regulatory Fitness and Performance (REFIT): results and next steps, COM(2013) 685 final, 2 October 2013. http://ec.europa.eu/archives/commission_2010-2014/president/news/archives/2013/10/pdf/20131002-refit_en.pdf

European Commission (2013a) Impact Assessment Board report for 2013. http://ec.europa.eu/smart-regulation/impact/key_docs/docs/iab_report_2013_en.pdf

European Commission (2013b) 'Fitness check' on EU law in the area of Information and Consultation of Workers, Brussels, 26 July 2013, SWD(2013) 293 final. <http://ec.europa.eu/social/main.jsp?langId=en&catId=707&newsId=1942&furtherNews=yes>

European Commission (2014a) Commission work programme 2015. A new start, COM(2014) 910 final, 16 December 2014. http://ec.europa.eu/atwork/pdf/cwp_2015_withdrawals_en.pdf

European Commission (2014b) Regulatory Fitness and Performance Programme (REFIT): state of play and outlook, COM(2014) 368 final, 18 June 2014. http://ec.europa.eu/smart-regulation/docs/com2014_368_en.pdf

European Parliament (2014) Resolution of 4 February 2014 on EU Regulatory Fitness and Subsidiarity and Proportionality - 19th report on Better Lawmaking covering the year 2011. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0061+0+DOC+XML+V0//EN>

European Parliament (2015) Motion for a resolution on European Parliament's priorities for the Commission work programme 2015. <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+B8-2015-0034+0+DOC+PDF+V0//EN>

European Union (1997) Treaty of Amsterdam. http://europa.eu/eu-law/decision-making/treaties/pdf/treaty_of_amsterdam/treaty_of_amsterdam_en.pdf

ETUC (2014) ETUC Position on the recommendations of the High Level Group on Administrative Burdens, adopted at the ETUC Executive Committee on 21-22 October 2014. <http://www.etuc.org/documents/etuc-position-recommendations-high-level-group-administrative-burdens#.VNSxMMqK024>

Renda A., Schrefler L., Luchetta G. and Zavatta R. (2013) Assessing the costs and benefits of regulation. A CEPS – Economisti Associati Study for the European Commission. http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf

Van den Abeele E. (2010) The European Union's better regulation agenda, Report 112, Brussels, ETUI.

Van den Abeele E. (2014) The EU's REFIT strategy: a new bureaucracy in the service of competitiveness?, Working Paper 2014.05, Brussels, ETUI.

Vogel L. and Van den Abeele E. (2010) Better Regulation: a critical assessment, Report 113, Brussels, ETUI. <http://www.etui.org/Publications2/Reports/Better-regulation-a-critical-assessment>

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