

RegWatchEurope

Joint Opinion on the European Commission's Communication

on Better Regulation: Joining forces to make better laws

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A) SUMMARY OPINION

I. Development of better regulation at the EU level

The European Commission has taken substantive steps towards cutting red tape and the consistent and comprehensive application of better regulation principles throughout the legislative cycle.

In 2015, the Commission adopted a **comprehensive package of reforms** covering the entire policy cycle. The aim was to increase openness and transparency in the EU decision-making process and improve the quality of new laws through better impact assessments and ex post-evaluations. In the wake of this reform package, the **Regulatory Scrutiny Board (RSB)** was introduced and has proven to be a major achievement. The board was given a significantly consequential role in checking the quality of impact assessments of new proposals, undertaking fitness checks and evaluating existing legislation. The REFIT platform, later the Fit for Future (F4F) Platform, is designed to identify and propose simplification measures for the existing stock of legislation and to further contribute to the Commission legislative process. The better regulation system of the Commission is considered (by the OECD, amongst other credible stakeholders) as an example of best practice and more generally one of the best systems in the world.

In April 2016, the Commission, the European Parliament and the Council adopted an **Interinstitutional Agreement** that defined various requirements for high-quality legislation for all three institutions, including the requirement for an impact assessment throughout the legislative cycle if significant impacts are likely.

II. Communication of April 2021: New features of better regulation

In its Communication of April 2021, the Commission introduced several amendments and additions regarding its better regulation approach. In this responding opinion, RWE focusses on aspects of the Communication most relevant to RWE's daily work, and some elements which also were identified in its paper "Further development of regulatory oversight at the EU level (July 2020)¹ :

¹"Further development of regulatory Oversight at EU level": <https://www.regwatcheurope.eu/?p=282>

1. A call for the European Parliament and the Council to systematically apply better regulation principles

The Commission reiterates the fact that high-quality legislation at EU level can only be achieved if all of the three institutions mandated to play a part in EU legislation live up to their responsibilities. This is in the context that, when it comes to the practical implementation of the Interinstitutional Agreement, the European Parliament has taken some steps, while the Council has so far failed to do so.

Key Message #1: RWE shares the belief that better regulation must be understood and practiced as a joint effort and thus strongly supports the Commission's request upon the co-legislators to deliver on their commitments regarding the Interinstitutional Agreement. In addition to this, RWE calls on the member states to step up their effort to make national impact assessments on Commission proposals and on their suggested amendments to Commission proposals.

2. A new instrument for monitoring regulatory burdens: 'One in, one out'

The Communication sets out further details of the Commission's 'one in, one out' rule. In the future, for every additional administrative burden the Commission will require at least equal compensation in the same policy field. With regard to adjustment costs, the Commission strives for a feasible and proportionate degree of transparency and quantification. Other measures to compensate adjustment costs will also be considered. The Commission further mentions that the 'one in, one out' approach will not be applied mechanically and that if there is political will to regulate but it is not possible to identify an offset in the same area, the Commission can decide to exempt the regulation from the 'one in, one out' approach.

Key Message #2: RWE recognises that the Commission's introduction of this 'one in, one out' rule shows the willingness and strong commitment of the Commission to further strengthen the burden reduction effort. RWE shares the opinion that the 'one in, one out' instrument should not be applied mechanically. RWE however questions if it will lead to tangible and noticeable results for businesses and citizens if it is limited to administrative burdens. RWE also has some concerns that benefits of regulation may be underestimated, as quantification of benefits is considerably more difficult than quantification of costs. Considering the possibility for exemption of regulation from the 'one in one out' approach, RWE suggests establishing clear criteria for these possible exemptions to ensure maximum transparency. Overall, RWE appreciates the Commission's intention to pilot and evaluate the 'one in, one out' approach.

3. Revised Mandate of the Regulatory Scrutiny Board

The Communication highlights the revised mandate of the RSB. The RSB is now entitled to scrutinise impact assessments and evaluations, including with a view to the ‘one in, one out’ rule, strategic foresight and appropriate consideration of the various effects of the COVID-19 crisis.

Key Message #3: RWE welcomes the revised mandate of the Regulatory Scrutiny Board and encourages the Commission to make further use of the RSB’s wealth of knowledge and experience. An example of this would be by mandating the RSB to scrutinise also the decision as to whether an impact assessment should be done or not.

4. Changes in the Commission’s approach to consult with stakeholders

In its Communication, the Commission announces improved feedback to stakeholders regarding their contributions and a plan to combine two stages of consultation in the future. Up to now stakeholders are consulted both regarding roadmaps/inception impact assessments and, at a later stage, on the basis of a questionnaire. In the future the Commission plans to consult stakeholders only once by a ‘call for evidence’ on the basis of a description of the proposal.

Key Message #4: RWE appreciates the Commission’s commitment to more transparency on whether and how stakeholders’ contributions have been considered. However, RWE is concerned about the Commission plans to consult stakeholders only once on the basis of a description of the proposal. Domestic experiences show that stakeholders can provide the most useful output if they are consulted not only on the basis of a description, but also on the basis of a draft impact assessment that already presents concrete quantifications and underlying assumptions.

5. Introduction of the “digital-by-default”-principle.

In the Communication the Commission is introducing a new principle to ensure that legislation is future-proof and supports digital transformation. In the future all evaluations, consultations and impact assessments need to take the “digital-by-default”-principle into consideration.

Key Message #5: RWE welcomes the introduction of the “digital-by-default”-principle. This will ensure that EU legislation is future proof and supports digital transition. Furthermore, it will alleviate compliance and enforcement burdens.

6. Call on Member States to correctly apply and enforce EU-regulation

In the Communication the Commission reiterates its request to Member States to report when they choose to add elements that do not stem from EU legislation. Going forward, the Commission announces to carry out a stocktaking of its oversight and enforcement activities, to ensure that they remain fit for making EU law work in practice.

Key Message #6: RWE welcomes the Commission’s focus on enforcement and shares its perspective that Member States need to ensure that EU legislation is implemented without creating additional and thus unnecessary burdens for

businesses and citizens. However, RWE considers a reporting obligation for additional burdens only as a starting point and thus encourages the Commission to consider other and more sufficient solutions to ensure the correct application and enforcement of commonly agreed EU-regulation.

B) DETAILS

I. A call for then European Parliament and the Council to systematically apply better regulation principles

1. Commission's Communication

The Commission calls on the European Parliament and the Council to adhere to the commitments made in the Interinstitutional Agreement on Better Law-making issued in April 2016. In this Agreement, both co-legislators committed to the following: *"The European Parliament and the Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission's Proposal."*²

So far, the European Parliament has made some impact assessments regarding significant amendments³, while the conduct of impact assessments by the Council is still pending.

2. RWE Opinion

EU legislation applies to all addressees throughout the European Union and thus holds the potential of major impacts. All three institutions involved in EU legislation are thus requested to respect rules ensuring high quality of EU legislation. High-quality legislation does not only require application of better regulation principles on the first stage of the legislative cycle. It can only be achieved if the co-legislators also apply better regulation principles systematically. This includes ensuring that all significant amendments to a Commission's proposal are based on proper evidence and that their expected impacts are made transparent by adequate assessment. RWE thus fully supports the Commission's request to the European Parliament and the Council to fulfil their part in helping craft high-quality legislation.

RWE also stresses in this context that it is very important that member states step up their effort to make national impact assessments on Commission proposals. This will provide a more complete view on the impacts of EU legislation. This element is in addition to the point made by the Commission that Member States should provide the Commission with feedback on estimates of the benefits and costs associated with specific pieces of legislation after member states have implemented them.

² INTERINSTITUTIONAL AGREEMENT BETWEEN THE EUROPEAN PARLIAMENT, THE COUNCIL OF THE EUROPEAN UNION AND THE EUROPEAN COMMISSION ON BETTER LAW-MAKING - INTERINSTITUTIONAL AGREEMENT of 13 April 2016 on Better Law-Making, see section III., paragraph 15.

³ See Activity Report of the EPRS for July 2019 to December 2020 "European Parliament work in the fields of Impact Assessment and European Added Value", p. 13 section 2) Work on ex-ante impact Assessment.

Key Message #1: RWE shares the belief that better regulation must be understood and practiced as a joint effort and thus strongly supports the Commission's request upon the co-legislators to deliver on their commitments regarding the Interinstitutional Agreement. In addition to this, RWE calls on the member states to step up their effort to make national impact assessments on Commission proposals and on their suggested amendments to Commission proposals.

II. New instrument for monitoring regulatory burdens: 'One in, one out'

1. Commission's Communication

In September 2019, the Commission has committed to introducing a 'one in, one out' rule for new and amended legislation. The aim of introducing such an approach was to relieve both businesses and citizens from unnecessary burden⁴. The Commission's Communication now sets out the details of the rule. In general, only administrative burdens have to be offset by an equal amount of relief in the same policy area. Concerning adjustment costs, the Commission promises to make them transparent and to present them systematically in impact assessments to the extent this is feasible and proportionate. As regards these costs, the Commission commits to consider other measures to compensate them. The Commission further mentions that the 'one in, one out' approach will not be applied mechanically and that if there is political will to regulate but it is not possible to identify an offset in the same area, the Commission can decide to exempt the regulation from the 'one in, one out' approach.

2. RWE Opinion

RWE welcomes the introduction of an 'one in, one out' rule on regulatory burdens at EU level. The commitment to offset administrative burdens is a first step in the right direction. Albeit not aimed at a reduction of administrative burdens, the new 'one in, one out' rule is at least directed at limiting a further increase of administrative burden. However, RWE has serious doubts that the presented 'one in, one out' rule will deliver tangible results of relief for businesses and citizens. To achieve tangible results, RWE has recommended not to focus on administrative burden only but also to introduce a systematic approach for avoiding or lessening direct substantive compliance costs, be it one-off or recurring ones. This is due to the fact that substantive compliance costs are, in most cases, much more significant than administrative burdens.⁵ The now proposed limited approach, according to which other measures to compensate adjustment costs will be considered, does not meet the requirements of a systematic approach. Particularly with regard to the economic impacts of the pandemic, the need to relieve businesses and society from any unnecessary burden is greater than ever before. Previous experiences, including from Germany and the United Kingdom,

⁴ See press release "The von der Leyen Commission: for a Union that strives for more" Brussels, 10 September 2019

⁵ See Feasibility Study; Introducing 'one-in, one-out' in the European Commission, Final Report for the German Ministry for Economic Affairs and Energy, Presented by the Centre for European Policy Studies, Lead Author: Andrea Renda, Senior Research Fellow, CEPS, 5 December 2019, p. 12; <https://www.ceps.eu/wp-content/uploads/2019/12/Feasibility-Study.pdf>

show that a ‘one in, one out’ rule including also substantive compliance costs are perfectly compatible with an ambitious policy agenda⁶.

RWE is also uncomfortable with the statement by the Commission that harmonisation initiatives should automatically be classified as “outs”, as this could differ between and within policy areas as well as between member states.

RWE also stresses that benefits of regulation are not taken into account in full, as quantification of benefits is considerably more difficult than quantification of costs. The monetisation of environmental benefits or improvements in health or security, for example, are typically complex to quantify.

Considering the possibility for exemption of regulation from the ‘one in one out’ approach, RWE suggests establishing clear criteria for these possible exemptions to ensure maximum transparency. RWE shares the opinion, that the ‘one in, one out’ instrument should not be applied mechanically.

RWE notes that the Commission has introduced a new definition of “compliance costs”, describing this as administrative and adjustment costs, in contradiction to the terminology in the current toolbox of better regulation (see especially tool 59 – methods to assess costs and benefits). RWE asks for clarification as to whether the Commission actually intends to change the previous methodology and definitions.

Against this backdrop, RWE appreciates the Commission’s intention to take stock in 2023 how the ‘one in, one out’ approach has been applied and to review its implementation.

Key Message #2: RWE recognises that the Commission’s introduction of this ‘one in, one out’ rule shows the willingness and strong commitment of the Commission to further strengthen the burden reduction effort. RWE shares the opinion that the ‘one in, one out’ instrument should not be applied mechanically. RWE however questions if it will lead to tangible and noticeable results for businesses and citizens if it is limited to administrative burdens. RWE also has some concerns that benefits of regulation may be underestimated, as quantification of benefits is considerably more difficult than quantification of costs. Considering the possibility for exemption of regulation from the ‘one in one out’ approach, RWE suggests establishing clear criteria for these possible exemptions to ensure maximum transparency. Overall, RWE appreciates the Commission’s intention to pilot and evaluate the ‘one in, one out’ approach.

⁶ See Feasibility Study; Introducing ‘one-in, one-out’ in the European Commission, Final Report for the German Ministry for Economic Affairs and Energy, Presented by the Centre for European Policy Studies, Lead Author: Andrea Renda, Senior Research Fellow, CEPS, 5 December 2019, p. 101

III. Revised Mandate of the Regulatory Scrutiny Board

1. Commission's Communication

In April 2020, the Commission revised the mandate of the Regulatory Scrutiny Board (RSB). This revision mandates the RSB to scrutinise impact assessments and evaluations e.g. with a view to the 'one in, one out' rule, strategic foresight and appropriate consideration of the various effects of the COVID-19 crisis. Furthermore, the Commission allowed the RSB explicitly to contact third parties in order to make the work of the RSB better known and to discuss better regulation issues in general.

2. RWE Opinion

RWE welcomes the RSB's amended mandate as the RSB has proven itself a major driving force towards high-quality impact assessments and ex post-evaluations. RWE considers also that the RSB's capabilities go even beyond the additional tasks included in the revised mandate. The remaining limitations prevent the RSB from realising its full potential. RWE proposes to strengthen the institutional set-up of the RSB and recommends closing scrutiny gaps in the RSB mandate. The Vice President's exclusive right to decide whether to carry out an impact assessment is a case in point. RWE believes that the RSB should be able to scrutinise the decision on whether an impact assessment might be necessary. RWE proposes that the RSB be given discretionary powers in this regard. Furthermore, RWE knows from domestic experience that exchanging with stakeholders regarding concrete draft impact assessments does not put independence at risk but instead strengthens the quality and evidence base of the assessments. RWE thus proposes to allow the RSB also to contact stakeholders concerning concrete draft impact assessments in order to compare the Commission's assessments to stakeholders' practical experiences e.g. in case of concerns regarding the plausibility of assessments during the scrutiny process.

Key Message #3: RWE welcomes the revised mandate of the Regulatory Scrutiny Board and encourages the Commission to make further use of the RSB's wealth of knowledge and experience. An example of this would be mandating the RSB to scrutinise also the decision as to whether an impact assessment should be done or not.

IV. Changes in the Commission's approach to consult with stakeholders

1. Commission's Communication

In April 2019, the Commission presented the results of the stocktaking process regarding the changes introduced by the better regulation package from 2015. This stocktaking process was based on a publicly accessible questionnaire. Responding stakeholders indicated that they had difficulties in coping with the consultation approach, as it was demanding and did not make use of the full potential of their contributions. In reaction, the Commission plans to improve their feedback to stakeholders on how their contributions have been considered.

Also, as a reaction to the stocktaking process, the Commission will stop consulting on roadmaps, inception impact assessments and questionnaires separately. Instead, the Commission will combine both consultation stages in a 'call for evidence' and consult stakeholders on the basis of a description of the policy proposal in future.

2. RWE opinion

RWE appreciates the Commission's commitment to more transparency as to whether, and how, stakeholders' contributions at the consultation stage have been considered. Such feedback is of particular importance for stakeholders as it will show them that their concerns matter, and it will be a driver for more engagement and well-substantiated contributions.

As regards the streamlining of hitherto two steps of consultation to only one, RWE regrets this decision. RWE considers the involvement of stakeholders at every relevant stage of the legislative cycle of particular importance, be it the consultation on roadmaps/inception impact assessments, draft impact assessments or ex post-evaluations. This is due to the fact that stakeholders' practical experiences are a major prerequisite for high-quality legislation as they provide practical experiences and solutions for identified problems and are therefore key to avoid unnecessary burdens on those affected. Furthermore, RWE knows from domestic experience that any consultation at any stage can only deliver useful information if the consulted documents include all necessary information. This means that the information about the intended proposal has to be concrete enough to enable stakeholders to compare it with their practical experiences. This includes also a draft assessment of the expected impacts. The Communication does not reveal further details regarding the extent of assessments and information delivered as a basis for the 'call for evidence' to stakeholders. However, given RWE's experiences with the high level of restraint that the Commission has shown when it came to consult stakeholders on the basis of draft impact assessments, RWE is concerned that the amended consultation strategy will not deliver the information required. At the very least, this approach requires a significant upgrade regarding the lucidity and robustness of the analysis as well as the transparency of the presented impacts.

Key Message #4: RWE appreciates the Commission's commitment to more transparency on whether and how stakeholders' contributions have been considered. However, RWE is concerned about the Commission plans to consult stakeholders only once on the basis of a description of the proposal. Domestic experiences show that stakeholders can provide the most useful output if they are consulted not only on the basis of a description, but also on the basis of a draft impact assessment that already presents concrete quantifications and underlying assumptions.

V. Introduction of the “digital-by-default”-principle

1. Commission’s Communication

In the Communication the Commission introduces a new principle to ensure that legislation is future proof and support the digital transformation. In the future, all evaluations, consultations and impact assessments need to take the “digital-by-default”-principle into consideration.

2. RWE opinion

RWE welcomes the introduction of the “digital-by-default”-principle. For European society to take full advantage of the digital transition and the opportunities it brings legislation needs to be ready for the technological developments and future proof. By applying the “digital-by-default”-principle digitalisation will be mainstreamed into all EU legislation, which also gives the opportunity to alleviate compliance and enforcement burdens.

National experience shows that legislation which is digital by default have reduced the burden on companies in connection with reporting and other administrative provisions, while making enforcement more efficient, allowing the use of machine-learning and other technologies.

Key Message #5: RWE welcomes the introduction of the “digital-by-default”-principle. This will ensure that EU legislation is future proof and supports digital transition. Furthermore, it will alleviate compliance and enforcement burdens.

VI. Call on Member States to correctly apply and enforce EU-regulation

1. Commission’s Communication

The current Commission considers effective application, implementation and enforcement of EU law as a top priority. So far, the Commission’s compliance checks verify how Member States translate EU legislation into national legislation. However, compliance checks cannot accurately identify all national provisions that go beyond what EU legislation requires. In many cases, national ‘gold plating’ creates additional administrative or regulatory burdens for businesses and citizens, with a particular impact on SMEs. In line with the Interinstitutional Agreement on Better Law-Making⁷, the Commission thus reiterates its request to Member States to report when they choose to add elements that do not stem from EU legislation. Going forward, the Commission announces to carry out a stocktaking of its oversight and enforcement activities, to ensure that they remain fit for making EU law work in practice.

⁷ INTERINSTITUTIONAL AGREEMENT BETWEEN THE EUROPEAN PARLIAMENT, THE COUNCIL OF THE EUROPEAN UNION AND THE EUROPEAN COMMISSION ON BETTER LAW-MAKING - INTERINSTITUTIONAL AGREEMENT of 13 April 2016 on Better Law-Making, See paragraph 43 of the Agreement.

2. RWE opinion

RWE welcomes the Commission's focus on enforcement and shares its perspective that Member States need to ensure that the commonly agreed rules are correctly applied and enforced, because non-enforcement bears costs for citizens and businesses. However, RWE is concerned, given the seriousness and gravity of this issue, that reiterating its request to Member States to report when they choose to add elements that do not stem from EU legislation and the suggested stocktaking exercise, will not be enough. RWE therefore encourages the Commission to consider other and more sufficient solutions to ensure EU-regulation is correctly applied and enforced in Member States.

Key Message #6: RWE welcomes the Commission's focus on enforcement and shares its perspective that Member States need to ensure that EU legislation is implemented without creating additional and thus unnecessary burdens for businesses and citizens. However, RWE considers a reporting obligation for additional burdens only as a starting point and thus encourages the Commission to consider other and more sufficient solutions to ensure the correct application and enforcement of commonly agreed EU-regulation.

What is the RegWatchEurope network?

RegWatchEurope is an informal network of independent national scrutiny and advisory bodies from across Europe, who have a significant role in scrutinising the impacts of legislation. We advise, support and challenge our respective governments on various better regulation aspects and the overall regulatory burden of legislation. The network consists of scrutiny and advisory bodies from the Czech Republic (Regulatory Impact Analysis Board, RIAB), Denmark (Danish Business Regulation Forum, DBRF), Finland (Finnish Council of Regulatory Impact Analysis, FCRIA), Germany (National Regulatory Control Council, NKR), the Netherlands (Advisory Board on Regulatory Burdens, ATR), Norway (Norwegian Better Regulation Council, NBRC), Sweden (Swedish Better Regulation Council, SBRC) and the United Kingdom (Regulatory Policy Committee, RPC). As a network, RegWatchEurope members collaborate to exchange experiences and best practice regarding better regulation and to represent the interests of independent scrutiny and advisory bodies at the European and international level.