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‘BETTER REGULATION PROGRAMME’ IN THE EUROPEAN UNION: PROS AND CONS

Abstract

The aim of this paper is to present the concept of Better Regulation (BetReg), in particular its implementation mechanisms in light of the latest documents of EU bodies and its application in the European Union legislative procedures. It will illustrate both viable aspects and shortcomings of this initiative. The authors argue that the better regulation postulate has a horizontal nature. It is an initiative that brings tangible and noticeable effects; however, it must be applied as an EU legislative standard for the whole EU law: not only for that being designed or amended but also for assessing the existing law in all EU law-making institutions and countries implementing European legislation. A question is raised whether BetReg has a real impact on legislative practice or whether it remains predominantly a postulate. The hypothesis is that BetReg is already a mature project and may significantly improve the legislative environment in the EU. It should be noted that the paper covers only a fraction of the problems, the comprehensive examination of which would allow verification of the hypothesis.

KEYWORDS

law-making, better regulation, impact assessment, European law, good legislation, European Commission, effectiveness of law

SŁOWA KLUCZOWE

stanowienie prawa, lepsze stanowienie prawa, ocena skutków, prawo europejskie, dobre prawodawstwo, Komisja Europejska, skuteczność prawa

I. INTRODUCTION

Considering the law-making process in the EU, not only a wide range of entities participating in it and varying political influence exerted but also each country's dynamic national context must be considered when assessing BetReg successes and failures to date. Additionally, the usual lack of sufficient data and time needed to examine specific solutions comprehensively makes BetReg a challenging initiative.

In the literature on the subject, the following BetReg goals have been distinguished: (1) to improve the quality of EU legislation; (2) to reduce the quantity of EU legislation; (3) to increase public participation in the legislative process; (4) to promote science-based governance; and (5) to enforce the subsidiarity and proportionality principles.¹ Therefore, the main objectives of BetReg are to improve EU legislation (rationales nos 1–2) and to refine the drafting process (rationales nos 3–5).

At the same time, it is a challenge to point out BetReg's practical effects. The broadly understood EU law-making process (i.e. the Commission shaping legislative solutions, the European Parliament and the Council adopting new and introducing changes to the existing law) is based on the already developed instruments and mechanisms. More and more documents of various kinds specify the scope of the policy, methods and objectives of its implementation. With the current volume of existing and emerging legislation and its (substantive, territorial, and temporal) application levels, it is impossible to assess BetReg holistically; this relates to its effectiveness and overall impact on the quality of legislation and law adopted under the objectives of this initiative.

¹ Sacha Garben and Inge Govaere, 'The Multi-faceted Nature of Better Regulation' in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Bloomsbury Publishing 2018) 9.

BetReg has been known for quite some time, although under various manifestations. At the same time, the Better Regulation Agenda is not a static institution but a recurring phenomenon that develops dynamically over time, making it a challenging subject of study. It is in many ways a ‘moving target’: a fluid phenomenon that adapts to evolving political circumstances and powers.²

With the development of its integration processes, the EU has become a ‘regulatory state’ which, with its relatively small budget and without executive apparatus, engages primarily in regulatory activity, which translates later into national law.³ On the one hand, regulations should, among other things, lead to balanced and expected protection of fundamental rights, such as the right to privacy, the protection of bigger goals, e.g. consumer and competition protection, while on the other hand, they should leave room for further innovation. As for future-proof legislation, initiatives such as BetReg are deemed necessary. However, they must be subjected to constant examination and improvement – their development should never end.⁴ This is (and will be) particularly apparent in widely discussed legislation, such as the Digital Services Act,⁵ the Digital Markets Act,⁶ and the Artificial Intelligence Act,⁷ where possible deviation from prescriptive legislation may be required towards increased guidance, delegated acts, or technical standardization.⁸

II. GENERAL PRINCIPLES OF BETTER REGULATION

The paper interchangeably uses terms such as BetReg package, BetReg programme, BetReg policies or BetReg agenda. Each of these has a meaning behind

² *ibid* 3.

³ Giandoemnico Majone, ‘The Regulatory State and its Legitimacy Problems’ (1999) 22(1) *West European Politics* 1.

⁴ See exemplary recommendations towards the ‘Embracing the resilience agenda’ in Andrea Renda, *Assessment of Current Initiatives of the European Commission on Better Regulation* (EU Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs, Brussels 2022) 26 <<http://www.europarl.europa.eu/supporting-analyses>> accessed 21 October 2023.

⁵ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) [2022] OJ L277/1.

⁶ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L265/1.

⁷ European Commission, ‘The proposal for a regulation of the European Parliament and of the Council on laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain Union legislative acts’ COM (2021) 206 final.

⁸ Renda *Assessment* (n 4) 43.

Policies of Better Regulation originated from the Reagan and Thatcher governments in the early 1980s, whose small government agendas concerned a tendency to ratchet up the obligations and costs on businesses associated with regulation, while there were hardly any countervailing mechanisms to curb the urge to increase regulatory burdens. Early policies on both sides of the Atlantic set the objectives of lifting regulatory obligations and deregulation, but the language and ethos changed over time.⁹

Since the 1990s, attempts have been made to develop ‘better regulation’.¹⁰ This is about ensuring that the law meets business and social needs and does not introduce bureaucratic regulations that cost more than they bring profit.

Recently, among the vital ongoing trends in the EU are, inter alia: a transition from the use of cost-benefit analysis towards multi-criteria analysis; a move from pure evidence-based towards evidence-informed and foresight-based policies; the completion of the policy cycle with the introduction of, for instance, ex-post evaluations and fitness checks; the emergence of a regulatory oversight body; the growing role of the European Parliament in the better regulation domain; and the slow and partial development of the better regulation agenda in Member States.¹¹

Therefore, the paper poses a research question of whether the ongoing implementation of the BetReg initiative is solely a manifestation of image changes or an active instrument in the EU legislative practice. The flurry of recent activity in the EU over BetReg has important constitutional implications, particularly for the Union’s institutional balance.¹²

The BetReg programme has been successfully developed through different programmes, instruments, and mechanisms. Although it is a comprehensive and heterogeneous programme, a continuous process of adding new instruments leads to the inflation of solutions. This results in a peculiar paradox. The BetReg agenda, which is based on non-binding (such as communications, guidelines, or staff-working documents) or semi-binding (inter-institutional agreements) instruments, is to indicate how the European Commission is going to prepare its proposals, including the consultation process and the impact assessment. To illustrate, the BetReg package contains the Better Regulation Guidelines (BRG), the

⁹ Colin Scott, ‘Integrating Regulatory Governance and Better Regulation as Reflexive Governance’ in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Bloomsbury Publishing 2018) 13.

¹⁰ For more information on the evolution of the EU’s BetReg agenda, see Helen Xanthaki, ‘Improving the Quality of EU Legislation Limits and Opportunities?’ in Sacha Garben and Inge Govaere (eds), *The EU Better Regulation Agenda: A Critical Assessment* (Bloomsbury Publishing 2018) 40, 40–44.

¹¹ *Renda Assessment* (n 4) 5.

¹² Mark Dawson, ‘Better Regulation and the Future of EU Regulatory Law and Politics’ (2016) 53(5) *Common Market Law Review* 1209.

Regulatory Fitness and Performance Programme Platform (REFIT Platform),¹³ the structure of the Regulatory Scrutiny Board (RSB),¹⁴ the draft of the Interinstitutional Agreement on Better Law-Making (IAB)¹⁵ and Better Regulation 'Toolbox' (BRT)¹⁶. These communications and staff working documents accompany the general paper: Better Regulation for Better Results.¹⁷ An important step was the development of a new instrument: Regulatory Fitness and Performance Programme (REFIT),¹⁸ established in 2012 to simplify EU law and reduce regulation costs while still obtaining benefits. The Commission is strengthening REFIT by offering more possibilities for stakeholders and EU countries to contribute.¹⁹ The EU's approach to regulatory policy has been refined over the years as subsequent Commissions attempt to improve the existing framework by amending various solutions included in the better regulation agenda. Consequently, the Commission published a Communication on Better Regulation in April 2021,²⁰ new Better Regulation Guidelines, and an updated Better Regulation Toolbox in 2023²¹. The Commission also established the Regulatory Scrutiny Board, an independent group of Commission officials and experts from outside the Commission. Its role

¹³ The REFIT Platform allows national authorities, citizens, and other stakeholders to get involved in improving EU legislation. They can make suggestions on how to reduce the regulatory and administrative burdens of EU laws, which are then analysed by the REFIT Platform and the Commission; see <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly_en> accessed 22 October 2023.

¹⁴ See more about the Members of the Regulatory Scrutiny Board at <https://ec.europa.eu/info/law/law-making-process/regulatory-scrutiny-board/members-regulatory-scrutiny-board-0_en> accessed 23 October 2023.

¹⁵ 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) OJ L123/1; see <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32016Q0512%2801%29>> accessed 21 October 2023.

¹⁶ For more see European Commission, 'Better Regulation: Guidelines and Toolbox' <https://ec.europa.eu/info/better-regulation-toolbox_en> accessed 23 October 2023.

¹⁷ European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Better Regulation for Better Results – An EU Agenda' COM (2015) 215 final.

¹⁸ More information about REFIT is available at <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-and-less-costly/refit-platform_en> accessed 23 October 2023.

¹⁹ For a comprehensive and critical analysis of the instruments presented here see Éric Van den Abeele, "'Better Regulation': A Bureaucratic Simplification with a Political Agenda", Working Paper April 2015 <<https://www.etui.org/content/download/20728/173892/file/15+W-P+2015+04+Better+Regulation+EN+Web+version.pdf>> accessed 20 July 2019.

²⁰ For more see European Commission, 'Questions and Answers on the Better Regulation Communication' <https://ec.europa.eu/commission/presscorner/detail/en/qanda_21_1902> accessed 21 October 2023.

²¹ Commission Staff Working Document, 'Better Regulation Guidelines' SWD (2021) 305 final; see <https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en> accessed 23 October 2023.

is to check the quality of all impact assessments and significant evaluations that inform EU decision-making.²² The Committee of the Regions, involved in the law improvement process as the body that gives opinions on EU legislative proposals, launched an increasingly important pilot project on a regional hubs network to collect local and regional data on policy implementation in the EU using questionnaires (RegHub).²³

The Communication ‘Better Regulation: Joining Forces to Make Better Laws’ announced that the Commission would ‘strengthen the burden reduction effort further through a “one in, one out” [OIOO] approach whereby, when introducing new burdens, we systematically and proactively seek to reduce burdens imposed by existing legislation’.²⁴ The OIOO approach will complement the REFIT programme by helping the European Commission pay special attention to cumulative costs for individuals and businesses in a given policy area and covering new initiatives. The OIOO approach presented by the Commission is still somewhat vague. However, the following features are already defined: for every new legislative industry generating administrative burdens, the Commission services must identify one or more provisions to be modified or repealed to offset the cost increase.²⁵

The instruments provided for by the better regulation agenda address all elements of the EU policy, beginning with legislative negotiations between the Parliament and the Council, and ending with transposition and implementation by Member States and the Commission.²⁶ Therefore, achieving ‘better regulation’ is not the sole responsibility of the European Commission; it is a joint endeavour of the European Parliament, the Council, and Member States, as each has roles and responsibilities to fulfil.

The programme is intended to simplify the law and make it more user-friendly, but the proliferation of its structure makes it simultaneously more and more opaque and complex. The problems of efficiency, effectiveness, and usefulness,

²² Regulatory Scrutiny Board <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/impact-assessments_en> accessed 21 October 2023.

²³ European Commission, European Committee of the Regions, ‘Network of Regional Hubs: Assessing EU Law from the Ground’ <<https://cor.europa.eu/en/our-work/Pages/network-of-regional-hubs.aspx>> accessed 23 October 2023.

²⁴ European Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Better Regulation: Joining Forces to Make Better Laws’ COM (2021) 219 final, para 5 (note added); on OIOO see also Andrea Renda and others, *Feasibility Study: Introducing ‘One-In-One-Out’ in the European Commission* (Final Report for the German Government, Centre for European Policy Studies 2019) <<https://www.ceps.eu/ceps-publications/feasibility-study-introducing-one-in-one-out-in-the-european-commission>> accessed 21 October 2023.

²⁵ Renda *Assessment* (n 4) 20.

²⁶ Robert Grzeszczak, ‘Making Sure European Laws are Fit for Purpose – the Better Regulation Principles in the European Union’ (2019) 1(6) Proceedings of the International Scientific Conference ‘Social Changes in the Global World’ 465, 466.

as well as making the law subject to evaluation and evidence-based legislative initiatives, have become the subject of the EU agenda for improving legal regulations. The European Commission captures the heart of good law: 'Legislation is not an end to itself – it is a means to deliver tangible benefits for EU's citizens and address the common challenges Europe faces. Well-targeted, evidence-based and simply written regulation is more likely to be properly implemented and achieve its goals on the ground, whether these are economic, societal or environmental'.²⁷ It is even claimed that better regulation should be perceived as the meta-regulation which 'is a fluid and rapidly changing discourse that enables political leaders to address changing priorities in their regulatory reform agenda'.²⁸

To properly understand the application of the BetReg programme, its potential for improving the law, and the limitations that result from the specificity of a legal system to which it applies, it is necessary to pay attention to the model according to which EU law is developed.

III. THE MODEL OF LAW-MAKING IN THE EUROPEAN UNION

The EU has developed its original decision-making regime, which, as B de Witte notes, involves the engagement of various EU bodies, often beyond the control of Member States (this applies especially to the European Commission and the European Parliament), and resorting to majority voting in the Council and the EU controlled by the states.²⁹

European law is created as a result of the interaction between private and public entities, EU institutions and Member States, and specialist (expert) groups, leading to what is known as European governance. A distinguishing feature of EU legislation is the tendency for the continuous increase in the law-making activity of the administration, which creates particular legal subsystems.

²⁷ 'Introduction' in European Commission, 'Communication from the Commission. Better Regulation: Delivering Better Results for a Stronger Union' COM (2016) 615 final, 3 <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0615>> accessed 10 October 2023.

²⁸ Jędrzej Mańnicki, 'Good Governance through Better Regulation: Looking for the Impact Analysis Approach to the Proportionality Principle' in Robert Grzeszczak (ed), *Challenges of Good Governance in the European Union* (vol 5, Nomos 2016) 201, and quoted there Claudio M Radaelli, 'Whither Better Regulation for the Lisbon Agenda?' (2007) 14(2) *Journal of European Public Policy* 197.

²⁹ B de Witte, 'The European Union as an International Legal Experiment' in G de Búrca and JHH Weiler (eds), *The Worlds of European Constitutionalism* (Cambridge University Press 2011) 41.

The legislative model adopted in the EU, taking the ordinary and extraordinary legislative procedures as a point of reference, shares many features with the conception of negotiating the legal system, which assumes that such system is constituted by rules shaped on the basis of negotiating procedures intended to guarantee the influence of addressees of the law on the content of defined norms and to ensure a possible consensus on values.³⁰ It is a legalistic type, characterized, among other things, by the proceduralization of law-making processes, the institutional forms of influence of social groups on the content of law, the moderate decentralization of the actual legislative initiative, and the institutional scrutiny of the law-making process and governance of its results.³¹

In addition – as is the case with Member States' systems – EU legislation is secondary to decisions of political nature. The practice of the European Council meetings and conclusions reached there, i.e. political agreements that guide further legislative action in the EU, points to this aspect. This is a broader problem of the political initiation of top-down and bottom-up legislative procedures and mixed ('hybrid') procedures.³²

The EU legislation model exhibits several peculiarities, among other things, in terms of procedure, actors involved in creating and initiating a proposal for a law, in its subsequent shaping, and the procedural and judicial supervision of the law thus made.³³ The competencies of EU bodies and state authorities intertwine. In addition, the European law is made in line with a particular axiological dynamic and, to some extent, depending on the EU (exclusive, shared or complementary) competence and in highly fragmented areas of law (e.g. electoral or labour law).³⁴ It is crucial to consider these peculiarities of EU legislation, i.e. its hybridity, the intertwining joint (EU) and national interests pursued in separate institutional fora (Commission and European Parliament and both Councils). All of these factors highlight the difficulties in implementing the BetReg initiative.

A primary characteristic of the EU decision-making process is the fact that the existing legislation is subject to constant evaluation and revision.³⁵ Due to this,

³⁰ On the conception of negotiating the legal system see Wiesław Stańkiewicz, 'Stare i nowe modele legislacji' in Michał Araszkiewicz and others, *Dyskrecjonalność w prawie* (LexisNexis 2010) 195ff.

³¹ Robert Grzeszczak, 'Model procesu legislacyjnego w Unii Europejskiej' in Wojciech Brzozowski and Adam Krzywoń (eds), *Leges ab omnibus intellegi debent. Księga XV-lecia Rządowego Centrum Legislacji* (Wydawnictwo Sejmowe 2015) 69.

³² Jan Barcz and others, 'Praworządność a unijne fundusze (prawne i praktyczne aspekty interpretacji ustaleń Rady Europejskiej z 11.12.2020 r.)' (2021) 11 *Państwo i Prawo* 140; Giacinto D Cananea, 'The European Union's Mixed Administrative Proceedings' (2004) 68(1) *Law and Contemporary Problems* 197, 199 <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1303&context=lcp>> accessed 12 October 2023.

³³ Grzeszczak, 'Model procesu legislacyjnego' (n 31) 67.

³⁴ *ibid* 68.

³⁵ Giacomo Luchetta, 'Impact Assessment and the Policy Cycle in the EU' (2012) 3(4) *European Journal of Risk Regulation* 561, 561–62.

some directives and decisions are replaced with regulations, and numerous other acts are replaced with a single piece of legislation.³⁶ These tendencies appear to be additionally justified in light of the already adopted Better Regulation agenda.³⁷ Moreover, EU legislation is further developed by means of highly detailed sectoral packages, such as the recently published Clean Energy for all Europeans Package, the Banking Package, or the already adopted Clean Air Policy Package. This package method of providing proposals is a result of the implementation of legislative action plans, which constitute the most critical part of the Commission's political agenda.³⁸ The examples illustrate various forms of deficits in the broadly understood law-making procedures in the EU.

Additionally, it should be emphasized that the law created in the conditions mentioned above is affected by similar flaws to those in national legal systems, even though it is a non-state legal system. The phenomenon of legal inflation (overregulation) causes a legal crisis and occurs both in states and the EU. The problems of overregulation and poor quality of the law had already been known, and their severity increased as the processes were further developed and common in EU domains, such as economy, legal and human rights, were shaped.

The most troublesome shortcomings are excessive legal regulations (legislative inflation) related to, among others, the expansion of administrative structures and growing instability of the law (however, not that noticeable as in the case of many states), bureaucracy, unclear division of competences, mixing of governmental and EU (community) methods, persistently non-transparent comitology procedures, overregulation or archaization, and unjustified (too high) costs of the law made due to lack of prior assessment of the burdens of a given regulation.³⁹

There is also an inconsistency of norms and their archaization, which in turn overburdens the addressees and results in enormous complexity of the law. The number of new laws of EU origin leads to the conviction that EU legislation is too bureaucratic.⁴⁰ Incidentally, however, bureaucracy is mentioned in relation to

³⁶ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17.

³⁷ 'Better Regulation for Better Results – An EU Agenda' COM (2015) 215 final (n 17).

³⁸ Jędrzej Mańnicki, 'From Integration to Fragmentation? The Late and Incorrect Transposition of the EU Directives' in Robert Grzeszczak (ed), *Renationalisation of the Integration Process in the Internal Market of the European Union* (vol 8, Nomos 2018) 16.

³⁹ On the development of initiatives to improve the law in the EU and their critical assessment see Adriaan Schout, 'EU Agencies after 25 Years: A Missed Opportunity to Enhance EU Governance' (Clingendael Policy Brief 2018); Adriaan Schout and Davide Bevacqua, 'EU Added Value – Fact-Based Policy or Politicised Facts?' (Clingendael Policy Brief 2018); Adriaan Schout and Christian Schwieter, 'Two Decades of Better Regulation in the EU Commission – Towards Evidence-Based Policymaking?' (Clingendael Policy Brief 2018) <<https://www.clingendael.org/publication/two-decades-better-regulation-eu-commission>> and <https://www.clingendael.org/sites/default/files/2018-12/PB_Better_regulation.pdf> accessed 23 October 2023.

⁴⁰ For Better Regulation in numbers over 2015–2016 see <<https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52016DC0615&from=PL>> accessed 23 October 2023; see

the areas that do not entirely fall within the competence of the EU but of Member States, such as taxation, labour law, social security (with the significant example of national pension systems), spatial planning, construction law and many others.⁴¹

IV. THE QUALITY AND EFFECTIVENESS OF LAW: GENERAL COMMENTS AND EXAMPLES

Traditionally, the quality of law is associated with the observance of law-making rules. Therefore, the legislative process, its content and effects on the addressees must all be evaluated. An excellent legal regulation is effective, i.e. good law delivers the intended result and achieves the intended positive objective or objectives. Law is, in principle, assessed cumulatively, usually from different perspectives, e.g. in terms of its effectiveness, applicability, efficiency, and usefulness.⁴² The regulatory and legislative quality also includes (starting with minor ultimate goals) plain and gender-neutral language, clarity, precision, unambiguity, and cost-effectiveness.⁴³

The ultimate goal of regulation is effectiveness, which is the extent to which regulators achieve their objective.⁴⁴ The evaluation of the effectiveness of a law, as an empirical feature, is related to statute law. In contrast, the application of the law is factual, the effectiveness of which results from the law.⁴⁵ Actions are prac-

also Eurobarometer 2017 in which 70% of businesses surveyed perceive EU legislation as increasing their paperwork and 67% as increasing administrative costs, <<http://www.europarl.europa.eu/news/en/headlines/priorities/eurobarometer-2017>> accessed 23 October 2023; for public perception see Thomas Raines, Matthew Goodwin and David Cutts, *The Future of Europe: Comparing Public and Elite Attitudes* (Research Paper, the Royal Institute of International Affairs 2017), a survey in which bureaucracy and red tape are perceived by the public as the biggest failure of the EU; see also the comments of Elisabeth Goldberg, “‘Better Regulation’: European Union Style” (M-RCBG Associate Working Paper No 98, Mossavar-Rahmani Center for Business and Government, Harvard Kennedy School 2018) 5 <https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/files/98_final2.pdf.pdf> accessed 11 October 2023.

⁴¹ Grzeszczak, ‘Making Sure’ (n 26) 466.

⁴² For more information see: Teresa Fitzpatrick, ‘Evaluating Legislation: An Alternative Approach for Evaluating EU Internal Market and Services Law’ (2012) 18(4) *Evaluation* 477; Peter Dahler-Larsen and Adiliah Boodhoo, ‘Evaluation Culture and Good Governance: Is There a Link?’ (2019) 25(3) *Evaluation* 277.

⁴³ See Figure 3.1. in Xanthaki (n 10) 29.

⁴⁴ *ibid* 29.

⁴⁵ For more on the evaluation of effectiveness of law see Krzysztof Koźmiński and Mateusz Ciechowski, ‘Ocena skutków regulacji: instrument racjonalnej polityki prawa czy manipulacja projektodawcy?’ in Piotr Grzebyk (ed), *Prawo w epoce populizmu* (1st edn, Wydawnictwo Naukowe Scholar 2023) 219ff.

tical when they lead to the intended effect (objective), in this case, to improving the quality of the law. The evaluation of effectiveness, in simple terms, boils down to the review of the effects of legal regulations. At the same time, the efficiency of the law is assessed through the costs it generates, and the usefulness of the law is measured by looking at the amount of benefits offered by legal regulations. The principles of legal certainty and predictability, legality and proportionality are also paramount for claiming the legislation right.

Effectiveness, as a measure of legislation quality in achieving the desired objective, is a goal that the drafter must achieve with assistance. An excellent draft may be capable of producing the desired regulatory effects, but its poor implementation and incorrect judicial application may interfere with its actual results. Certainly, one has to accept the fact that the margin of incorrect implementation and judicial application is directly linked to the draft law quality. Still, an error in the draft may be attributed to a fault in the content of the pursued policy. Within the umbrella of efficacy, the drafter seeks effectiveness in legislation. The term 'effectiveness' is used widely but often without a definition: the EU calls for accountability, effectiveness, and proportionality to achieve better law-making, but the term is not defined at all.⁴⁶ Generally speaking, the essence when assessing the effects of regulations can be reduced to an analytical procedure that allows one 'to determine as precisely as possible all the consequences – both benefits and costs – of the planned state intervention in the form of a new legal act or its amendment'.⁴⁷

When evaluating regulations, it is possible to identify several different kinds of measures:

- (1) Evaluation measures, which focus chiefly on assessing current or new provisions against such criteria as costs imposed relative to expected or actual benefits.
- (2) Dialogic measures: processes that engage stakeholders in exchanges over such issues as appropriate instruments, targets or objectives within a regime.
- (3) Oversight measures: processes that involve those who make or apply rules undergoing oversight or supervision by others, for example, in a central government unit.
- (4) Information/communication measures: processes through which sharing information about a regime and other transparency measures contribute to better knowledge and involvement.

This method of categorizing different BetReg aspects may be coupled with an approach that looks at where innovative and reflexive approaches occur in the policy-making process.⁴⁸

⁴⁶ Xanthaki (n 10) 32.

⁴⁷ Koźmiński and Ciechomski (n 45) 220.

⁴⁸ Scott (n 9) 19.

In practice, most of the Commission's impact assessments compare policy options through scorecard approaches, in which options are ranked in terms of their ability to achieve specific objectives and based on a quality-quantitative evaluation of their associated costs.⁴⁹ Good transposition legislation is legislation that achieves effectiveness at two levels: the EU level and the national level. National drafters pursue the desired regulatory results introduced in the EU legislative text. Drafting transposition legislation is one of the most challenging legislative tasks because the drafter serves two masters: two sets of regulatory goals, two texts, two sets of legal concepts, two sets of standard and legal languages, and two drafting styles.⁵⁰

Therefore, what has been described above is an instrumental evaluation of the law. However, it must be recognized that most evaluations of legal effectiveness are based on the analysis of legal texts. Notably, law regulation can be assessed not only in terms of its effect but also in terms of its axiology, which defines how the criterion of values is incorporated in the evaluation of law.

At the same time, taking into account the specificity of law-making in the EU, the effectiveness of EU provisions can also be assessed from the perspective of a body applying the law, i.e. by deciding to what extent the regulation allows it to achieve the goal provided for by EU law, to what extent it must be supported, for example, by the process of pro-EU interpretation of national law, and how much the standard does not fulfil its purpose (e.g. due to the gaps), or whether there are remaining interpretative doubts. These doubts may be measured by a number of preliminary questions pending before the Court of Justice of the European Union in the context of a specific issue.

V. BETREG IN THE EU POLICY AND LEGISLATIVE PROCESSES

Better regulation brings some positive effects but cannot be described as a revolution in changing the quality of law. There are many reasons for that, especially those resulting from the specific nature of the EU law-making process, as it has already been mentioned. Better Regulation covers the whole EU policy-making cycle: planning, design, adoption, implementation, evaluation, and revision. All EU interventions – legislative or non-legislative, policy initiatives or spending programmes – aim to achieve specific objectives through one or several means, in line with the goals and responsibilities set by the EU Treaty.⁵¹

⁴⁹ Renda *Assessment* (n 4) 7.

⁵⁰ Xanthaki (n 10) 44.

⁵¹ Mańnicki, 'Good Governance' (n 28) 205; see also Luchetta (n 35) 561.

However, for the already mentioned reasons, the law-making process in the European Union does not rest solely in the hands of the European Commission that plays a vital role in the BetReg agenda, the effects of which may be changed and distorted during the work of the European Parliament and the Council. Against this backdrop, despite some attempts, the Council has yet to significantly step up its production of impact assessments or ex-post evaluations in support of the legislative process. As a result, the Commission's proposals are scrutinized along the way by the European Parliament. Still, as they are amended during the ordinary legislative procedure, their prospective impact needs to be updated to reflect the amendments tabled by the other institutions and those achieved during trilogies.⁵² The Commission is assessing the expected and actual impact of action at every stage of the decision-making process. Extensive planning and analysis are carried out before taking action, for instance, before proposing a new law or when evaluating how sound laws are performing. The Commission increases opportunities to contribute throughout the policy and law-making cycle.⁵³ Interested citizens and stakeholders can share their views on roadmaps and inception impact assessments, where the Commission outlines new ideas for policies and legislation or evaluations of existing policies and legislative proposals, once the Commission has agreed on them, draft acts that add or amend aspects of existing laws (delegated acts) or set out rules to make sure EU countries implement regulations in the same way (implementing actions).⁵⁴

Significant disparities can be seen in the final stages of negotiations in the legislative procedure when agreement between the European Parliament and the Council is most often reached without full consideration of the direct and indirect effects that compromise amendments to proposals the Commission may have. Therefore, the Parliament and the Council should conduct impact assessments of any substantive amendments they propose during the law-making process. The emphasis on coherence and effectiveness became even more visible after 2010 when the Commission announced its intention to complete the policy cycle for the first time by performing ex-post evaluations of existing legislation alongside the ex-ante assessment of new proposals. The 'evaluate first' rule, regularly applied by the Commission, often obliges services to perform ex-post evaluations 'back to back' with the ex-ante assessments of future legislation. From a methodologi-

⁵² Renda *Assessment* (n 4) 9.

⁵³ Andrea Renda, *Best Practices in Legislative and Regulatory Processes in a Constitutional Perspective: The Case of the European Union. In-depth Analysis* (European Parliament 2015) 5–30 <<https://data.europa.eu/doi/10.2861/003194>> accessed 21 October 2023.

⁵⁴ European Commission, 'Better Regulation: Why and How' <https://ec.europa.eu/info/law/law-making-process/planning-and-proposing-law/better-regulation-why-and-how_en> accessed 20 October 2023.

cal point of view, ex-post evaluations are based on five criteria, i.e. effectiveness, efficiency, relevance, coherence, and EU-added value.⁵⁵

VI. A FEW CONCLUSIONS RESULTING FROM PRACTICAL APPLICATION OF BETREG

Examples where better regulation considerations have led to more proportionate approaches are, e.g.: new, stricter, and more transparent type-approval requirements for motor vehicles, including enhanced monitoring and surveillance provisions, which were presented by the following revelations about the use of ‘defeat devices’ preventing adequate control of harmful emissions from passenger cars; greater decentralization of the handling of state aid; new and more straightforward maritime safety rules developed building on the recommendations of the fitness check carried out under REFIT; the Commission guidance aimed at supporting consumers, businesses and public authorities to engage confidently in the fast-moving collaborative economy.⁵⁶

Since 2018, the Commission’s activities have so far produced the following outcome: (1) Value Added Tax (VAT) for small and medium-sized enterprises (SMEs): compliance costs for SMEs are expected to be reduced under this initiative to EUR 56.1 billion per year from EUR 68 billion per year at present; (2) explosives precursors: a decrease of around 10% (between EUR 25 million and EUR 75 million per year) in the current costs for companies complying with the Regulation; (3) Fisheries Control Regulation: Member States’ authorities are expected to benefit from cost savings of EUR 157 million over five years; (4) single maritime window: the simplification elements are quantified at an estimated amount of EUR 22,015,025 million staff hours in the time period of 2020–2030, equivalent to a value of EUR 625–720 million for shipping operators; (5) service of documents: increase the speed of the cross-border service of documents; (6) decreasing the volume of default judgments by 10% in the EU would result in saving up to EUR 480 million per year, since citizens would have to spend less on judicial reliefs.⁵⁷

The menu of instruments in the hands of the European Commission has significantly expanded over the past two decades. Besides ex-ante assessments

⁵⁵ Renda Assessment (n 4) 8.

⁵⁶ See ‘Better Regulation: Delivering Better Results for a Stronger Union’ COM (2016) 615 final (n 27).

⁵⁷ European Commission, ‘The European Union’s Efforts to Simplify Legislation: Annual Burden Survey 2018’ 18 <https://commission.europa.eu/system/files/2018-11/2018-annual-burden-survey_en_0.pdf> accessed 21 October 2023.

and ex-post evaluations, the Commission has launched new types of measurements, moving from an analysis of the flow of legislation towards comprehensive measures of the stock. The most notable instruments in this respect are: the baseline measurement of administrative burdens, launched in 2007 and covering 43 EU directives considered to be most burdensome for businesses, and culminated in a reported (though highly criticized) 33% reduction of administrative burdens in 2012; the consultation on the top 10 most demanding pieces of EU legislation for small and medium-sized enterprises conducted between October and December 2021; the launch of ‘fitness checks’ to review the *acquis* in specific policy sectors; and a limited number of ‘cumulative cost assessments’ that looked at how different EU rules affected the costs of market operators in specific industrial sectors. This trend includes the ‘one-in-one-out’ rule, i.e. a form of regulatory offsetting that has been piloted since the second half of 2021, which may lead the European Commission to establish a systematic link between the flow (i.e. new proposals) and the stock of EU legislation (i.e. existing legislation).⁵⁸ Drawing upon the conclusions from the Annual Burden Survey 2022, 52 recommendations are expected to lighten the overall administrative burden by EUR 7.3 billion (net count of EUR 4.469 million in and EUR 11.780 million out per year).⁵⁹

Alternative approaches to binding regulations are also used. This has resulted in a significant qualitative and quantitative change in how laws are drafted, both in form and manner. These alternative regulations are based on entrusting the task of achieving Treaty objectives to, for example, civil society partners or non-governmental organizations. This also applies to the so-called self-regulation, i.e. voluntary agreements concluded between authorities to solve specific problems.

To sum up, as a result of the actions taken, it has been proposed to remove about 2,000 legal acts. By 2018 alone, more than 8,000 pages of the Official Journal, representing more than 10% of the EU *acquis*, had been removed this way. Currently, the agenda focuses on better law-making on an ongoing basis rather than on removing archaic law (as this objective has already been achieved).⁶⁰

⁵⁸ Renda *Assessment* (n 4) 8.

⁵⁹ European Commission, ‘The European Union’s Action to Simplify Legislation: Annual Burden Survey 2022’ <https://commission.europa.eu/system/files/2023-09/ABS_20230912_0.pdf> accessed 22 October 2023.

⁶⁰ European Commission, ‘Evaluating Laws, Policies and Funding Programmes’ <https://ec.europa.eu/info/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws_en> accessed 12 October 2023.

VII. CONCLUSIONS AND CHALLENGES

The paper presents an overview of the concept of Better Regulation, particularly its implementation mechanisms, in light of the latest documents of EU bodies and the practical application of the European Union legislative procedures.

The main conclusion resulting from this analysis is that the BetReg initiative has both a symbolic aspect (the Union ‘signalling’ that certain values, like simplification, citizen participation, or subsidiarity and proportionality, do ‘matter’) and some practical impact.

Indeed, as the analysis indicates, improving the European Union legislative environment is gaining importance. However, like every success, it has many authors. Numerous entities want to join the programme, creating new commodities, structures, and instruments. The inflation of the proposed additional entities and initiatives is a danger. The principle of good law is already a recognizable standard (or element) of the law-making system in the EU.

Most Member States alert domestic stakeholders to consultations organized by the European Commission. However, only around one-third systematically use the European Commission’s analysis as input to their negotiating position. Additionally, the Commission often does not have information on how EU legislation works in Member States. EU Member States rely on the regulatory management tools used by the Commission more often during the negotiation phase than in the transposition phase. The exception is the use of the European Commission’s ex-post evaluations, which generally do not appear to be applied much by EU Member States.⁶¹ Identification of cross-cutting regulatory issues, coordination mechanisms, and inevitable unification of regulatory approaches at all levels of governance (both supranational and national) seem to demand further improvement. However, the hypothesis that BetReg is already a mature project and may significantly improve the legislative environment in the EU has been positively verified.

For most of the trends described above, from the more significant political salience to the focus on innovation, the involvement of other institutions and Member States still need to be completed. The Better Regulation agenda remains a challenge for the future, especially in light of technological advances and changes in the social and economic environment. Therefore, it is essential to ensure that the programme is upgraded. In addition, regarding the correct use of existing structures and solutions – given the often advocated new structures within BetReg and the fact that numerous instruments already accompany the programme without undermining their application value – the fundamental question arises whether

⁶¹ OECD, *Better Regulation Practices across the European Union 2022* (OECD Publishing, Paris 2022) 15 and 18 <<https://doi.org/10.1787/6e4b095d-en>> accessed 14 October 2023.

the increasing number of such structures will not undermine the credibility of the whole process, especially as greater coordination is already required.

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