

Informing the EU legislator through impact assessments

Draft version

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Abstract

The EU impact assessment (IA) procedure, established in 2002 by the European Commission, can be studied as a microcosm of EU governance and even as a discursive space for the development of constitutional norms. The way IA is used by the three Institutions in the EU co-decision procedure sheds light on thorny constitutional issues such as the institutional balance and subsidiarity. From this perspective the recent strengthening of the inter-institutional dimension of IA through the Inter-Institutional Common Approach to Impact Assessment is analysed. This paper also presents some preliminary results from case studies on the use of IA by the European Parliament and Council Working Parties, aiming to unveil what it means in practice to “inform the legislator” through IA - one of the leading ideas behind EU IA. It will be argued that many of the problems with the IA procedure as it currently stands can be traced back directly to fundamental disagreement between the main actors on the nature of the EU regulatory process.

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Introduction

Norms of various origins and legal status govern the European legislative process. The latest addition to this set is the requirement to perform impact assessment (IA) of major legislative and policy proposals. In 2002 an impact assessment procedure was introduced by the European Commission following recommendations from the Mandelkern group on better regulation² as a “general purpose impact analysis tool” meant to “integrate, reinforce, streamline and replace” all existing practices in the field of ex ante evaluation.³ The European Commission’s impact assessment procedure⁴ comes down to a series of key analyses to be conducted at the bureaucratic level. They are: problem identification, definition of the objectives, development of the main policy options, impact analysis, comparison of the options in the light of their impact and an outline for policy monitoring and evaluation.⁵ These analyses should be started as early on in the policy process as possible, so before the proposal is published or even prepared. Stakeholder consultation and collection of expertise are integrated in the IA process in the sense that they should inform the assessment. An IA report⁶, published together with the proposal, serves to summarise the results, highlighting the trade-offs between the impacts associated with these policy options. During 2003 this project functioned as a pilot, from 2004 onwards it matured gradually and in 2005 it became fully operational covering all proposals in the Commission’s Legislative and Work Programme.⁷

Initially this procedure did not raise the interest of many stakeholders and commentators, which is rather surprising, given the fact that the American equivalent - regulatory impact analysis - has always given rise to much controversy.⁸ But this has changed now that the IA procedure has grown out of its pilot phase and is taken to the next level of institutionalisation as evidenced by the presentation of new Impact Assessment Guidelines⁹ by the European Commission in June 2005 and the adoption of an Inter-Institutional Common Approach to Impact Assessment by the three Institutions in

² The Mandelkern Group was composed of Member State experts on better regulation and chaired by Dieudonné Mandelkern, a French government official. It was set up by Ministers of Public Administration, in November 2000 to provide recommendations for a strategy to improve the European regulatory environment. The Mandelkern report was presented to the Laeken European Council in November 2001.

³ European Commission, Communication on better lawmaking, COM(2002) 275 final of 5 June 2002.

⁴ In this paper I will refer to ‘impact assessment at the EU level’ as ‘EU IA’. Although it is true that the procedure was initiated and developed by the European Commission, there has been a rapid expansion of the procedure to the European Parliament and the Council and there is at least a formal agreement between the three Institutions that their use of IA is based on the same principles and ground rules. Therefore I believe it is warranted to speak of ‘EU IA’.

⁵ European Commission, Impact Assessment Guidelines, SEC(2005) 791, 15 June 2006 with an update on 15 March 2006.

⁶ Often simply referred to as the ‘impact assessment’ even if in fact the term ‘impact assessment’ covers the whole process and not just the report.

⁷ European Commission, Communication “Better regulation for Growth and Jobs in the European Union” COM(2005)97 of 16 March 2005.

⁸ Eg. Amartya Sen, ‘The Discipline of Cost-Benefit Analysis’, *Journal of Legal Studies*, 29/2 (2000), 931-52 at 37-38.

⁹ European Commission, Impact Assessment Guidelines, SEC(2005) 791 of 15 June 2005.

November 2005. This latter document contains a further elaboration of the pre-existing idea that the European Parliament and the Council should not only use Commission IAs but also produce their own.

These days there is a heated debate and a fast-growing body of literature, addressing mostly the performance of EU IA and the nature of the regulatory reform it is fostering.¹⁰ A problematic aspect of this approach to the topic is that it presupposes consensus on the goals of EU IA from which then benchmarks can be derived. However in spite of the ongoing institutionalisation of the procedure, fundamental confusion and disagreement regarding the role and status which impact assessment can and should have in the European legislative process persist. As the showpiece of the 'Better Regulation' programme EU IA is meant to address both problems of competitiveness and constitutional legitimacy and it is supposed to do that in a variety of ways: by improving and simplifying the regulatory environment, ensuring the consistency between Community policies, enhancing communication with the citizen and changing the legislative culture within the European Commission. However the disagreement concerns not so much the substantive goals of IA, such as 'deregulation', 'achieving the greatest net benefits for society' or 'ensuring the sustainability of policies' but rather its function or goal in the policy process.

In the latter context the goal of IA serving as "an aid to decision-making, not a substitute for political judgement"¹¹ is often invoked in policy documents on EU IA. This is a problematic concept, because it presupposes a certain concept of the relationship between 'decision-making' and 'political judgement' which is left implicit however. With the latest developments emphasising so much the inter-institutional dimension of IA in mind I assume in this paper that it should be taken to refer to the whole chain of political decision-making leading to the adoption of legislation rather than just to the political decision-making within the College of Commissioners.¹² The goal can then be paraphrased as 'informing the legislator'. But what does 'informing the legislator' through the use of impact assessment actually mean on both a practical and a conceptual level? In this paper I explore this question further while simultaneously raising the stakes behind it by submitting that better regulation policy and the impact assessment regime in particular have the potential to play an active role in *shaping* EU governance structures.

¹⁰ Eg. Andrea Renda, *Impact Assessment in the EU. The State of the Art and the Art of the State* (Brussels: Centre for European Policy Studies, 2006), London, European Policy Forum, F. Vibert, 'The Itch to Regulate: Confirmation Bias and the European Commission's New System of Impact Assessment', (London 2005), David Wilkinson et al., 'For Better or for Worse? The EU's 'Better Regulation' Agenda and the Environment', (2005).

¹¹ European Commission, 'Communication from the Commission on Impact Assessment', COM(2002) 276 final, at 3.

¹² This is confirmed by the wording - eg. "a global strategy for better lawmaking throughout the entire EU legislative process"- in European Commission, 'Better Regulation for Growth and Jobs in the European Union', Communication from the Commission to the Council and the European Parliament, SEC(2005) 175 at 4.

Regulating the EU legislator?

The first problem when thinking of impact assessment as an information tool for 'the legislator' is that there is no such clearly demarcated entity in the EU. Compared to national constitutional systems regulatory authority at the EU level is particularly scattered, layered and fragile. The European legislator consists of many co-actors¹³, is restrained in its competences by the principle of conferred powers and the subsidiarity principle, has to abide by a limited list of objectives found in the Treaty and needs to choose between a number of complicated legislative procedures. On the nature of the European lawmaking process, disagreement is the main mode of the debate, corresponding to the familiar disagreement on the nature of the integration process. Furthermore, checks and balances in the EU legislative process are somewhat of an oddity from the point of view of comparative public law. The complex structure of the institutional balance between the three institutions involved in lawmaking culminates in the peculiar role of the Commission which as an independent institution has the sole right of initiative in order to counterbalance the risks majority voting in the European Parliament and Council poses for the smaller countries.¹⁴

Now where does IA come in? One hypothesis is that the introduction of IA as a tool that precedes the proposals and then travels with it through the legislative process changes some of the conditions within which the institutional balance had been functioning so far. It would be a mistake to ignore the "pivotal position of [IA] [which] stems from the fact that it provides standards for the whole process of policy formulation, by showing how consultation, the socio-economic costs and benefits, and the major trade-offs in policy choice have been taken into account in the assessment of regulatory proposals"¹⁵. Even within a narrow conception of what constitutional law scholarship should study (allocation of state power) IA is a relevant topic as it is part of the legislative process and has consequences for the position of the legislator, either as a fetter on its discretion or as a means of holding (a part of) the legislature accountable. But if one is prepared to look at the EU constitution through a lens shaped by regulation theory, attempting to uncover a "variety in constitutional norms, perhaps extending beyond traditional constitutional discourse to encompass those structures which effectively steer those exercising public power towards such principles as efficiency or environmental protection"¹⁶ IA becomes a potential constitutional source.

¹³ Ernst M.H. Hirsch Ballin and Linda A.J. Senden, *Co-Actorship in the Development of European Law-Making* (The Hague: T.M.C. Asser Press, 2005).

¹⁴ John Temple Lang, 'Checks and Balances in the European Union: The Institutional Structure and the 'Community Method'', *European Public Law*, 12/1 (2006), 127-54.

¹⁵ Claudio M. Radaelli, 'Diffusion without Convergence: How Political Context Shapes the Adoption of Regulatory Impact Assessment', *Journal of European Public Policy*, 12/5 (2005), 924-43 at 925.

¹⁶ Colin Scott, 'Regulating Constitutions', in Christine Parker et al. (eds.), *Regulating Law* (Oxford: Oxford University Press, 2004), 226-45.

Inter-institutionalising IA

Whether or not IA will come to function as an important source and force in the legislative process will at least in part depend on the status of the IA reports in the legislative process. This section takes a look at the rules which stipulate how IA should be handled among the institutions and who is responsible and accountable for which elements of the procedure.

The Inter-Institutional Agreement on Better Lawmaking of 2003 already contained a commitment to carry out IA by all three Institutions, but in the case of the European Parliament and the Council still in a non-committal way: “[w]here the codecision procedure applies, the European Parliament and Council may, on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage.”¹⁷ The agreement then goes on to state that as soon as possible and after an assessment of their respective experiences by the Institutions the establishment of a common methodology would be considered. In November 2005 the ‘Common Approach to Impact Assessment’ has been concluded by The High Level Technical Group, an inter-institutional coordination body comprised of senior officials from the three Institutions. This document amounts to a renewal by the European Parliament and the Council of their commitment to carry out IAs on substantive amendments and to use Commission IAs in their legislative deliberations. It does not contain a substantive common methodology however but instead sets out some traffic rules and some principles of EU IA. These include:

- Integrated and balanced coverage of potential impacts (social, economic & environmental)
- Coverage of short and long term costs and benefits (where possible)
- Subsidiarity and proportionality
- Monitoring and evaluation
- Rigorous comprehensive and based on accurate, objective and complete information
- Principle of proportionate analysis (“[t]he impact assessment’s depth and scope will be determined by the likely impacts of the proposed action”¹⁸)
- Consideration of a range of legislative and non-legislative options (Commission only)
- Transparency (all IAs are to be published on websites)
- Consultation for IAs (“where reasonably possible and without causing undue delay in the legislative process”)
- Cooperation (Institutions inform each other of ongoing IA work)

¹⁷ European Parliament, Council and Commission, Inter-Institutional Agreement on Better Lawmaking, OJ 2003 C-321 at 1.

¹⁸ European Commission, 'Impact Assessment Guidelines', SEC(2005) 791 at 8.

These principles are hardly contentious. The same goes for the methodology to be used, despite the absence of a common methodology in the Common Approach. The European Commission's flexible approach to the choice of economic tools to use in an IA (quantification and even monetisation are desirable but only where suitable¹⁹) has gained rather wide acceptance except for among the dedicated fans of American-style IA. Its very flexibility makes it difficult to go against it.

The real problematic issues are questions such as "should Council and Parliament be allowed to ask the Commission to redo their IA?", "what to be done when an important proposal does not have an IA accompanying it?" or "how to make sure the IA has an impact but does not fetter the discretion of the legislative institutions too much?". These questions are addressed in the Common Approach, but not answered unambiguously. The obligation for the European Parliament and the Council to carry out IAs became subject to the qualification "when they consider this to be appropriate and necessary for the legislative process"²⁰. Besides, the decision of what constitutes a 'substantive' amendment remains for each respective Institution to determine as long as "[t]his decision [...] reflect[s] the shared and balanced commitment to impact assessment and to Better Lawmaking in general"²¹. Because the practice of EU IA outside the Commission is limited – until recently there was only one much advertised experiment with IA in Council²² and some exercises in the Parliament in which until recently did not explicitly go under the label of 'IA' (see below) – there is not much material to draw from when interpreting the ground rules on inter-institutional use of IA. A rough picture of the approaches by the two main legislative Institutions can be drawn though.

IA in the European Parliament

The European Parliament has always approached issues of regulatory reform from the perspective of its preoccupation with preserving its own legislative powers. In 2001 it asked the Commission not to finalise the Action Plan on better regulation until the consultation period for the White Paper on Governance would end (March 2002), because the choices that were to be made also touched upon the prerogatives of the Parliament²³. Although the European Parliament was very critical of the Action Plan on better regulation, it has gradually come to discover that parts of the better regulation strategy and especially impact assessment might have something to offer. The idea that "effective democratic

¹⁹ Ibid. at 37-38.

²⁰ Point 14.

²¹ Point 3.

²² The Dutch Presidency chose of the Commission's proposal for a Directive on batteries and accumulators for a pilot project on IA of substantive amendments.

²³ The written version of this request is laid down in the Kaufmann report on the White paper (adopted by the European Parliament on November 28) which uses very strong wording. Point 31.

accountability is only possible if Parliament has sufficient information on the consequences of legislation on social, economic and environmental aspects” is expressed in the ‘Doorn report’, which is an own-initiative report from the Parliament on the subject of impact assessment.²⁴ The report defines impact assessment as a “straightforward mapping out of the consequences on social, economic and environmental aspects, and also a mapping out of the policy alternatives that are available to the legislator in that scenario.”²⁵ Parliament cannot formally require the Commission to motivate legislative proposals better let alone force the Commission to exercise its right of initiative, so it hopes to be able to achieve this by making a little detour via IA. This ambivalence – is IA a threat to democracy or is it rather an extra means of control over the pre-legislative stage? – is typical for the current thinking about IA within the European Parliament.

As for the practice of IA in the Parliament impact assessments have been said to be “completely invisible” within the political process.²⁶ However there are signs of a change of mood, as illustrated by a comment in the report of the Environment Committee on the period 1999-2004 by then chairman Caroline Jackson: “Another very topical issue has been that of impact assessments and whether more use needs to be made of them, and subject to which underlying criteria and practical conditions.”²⁷ In fact the Environment Committee has been something of a pioneer when it comes to producing its own impact assessments of substantive amendments²⁸ as well as scrutinising Commission IAs²⁹ (the two modes of use of IA in Parliament). As early as 2004 it commissioned a study on the potential impacts of amendments tabled by one of its rapporteurs on the Fourth daughter directive on air quality. The committee concluded a framework contract with the Institute for European Environmental Policy (IEEP) in cooperation with Ecologic on regulatory policy assessments in the environmental area, with a view to improve legislative assistance to Members of the ENVI Committee.³⁰ Also, under the label of briefing notes a small series of reviews of Commission IAs are produced, which mainly serve as counterexpertise in legislative

²⁴ European Parliament, 'Report on Assessment of the Impact of Community Legislation and the Consultation Procedures', (2004) at 5.

²⁵ Ibid. at 6.

²⁶ Mr John Cridland was quoted as saying: “I also think that within the political process that then ensues impact assessments are completely invisible and both the Parliament and the Council need to get on board with this.” in the House of Lords, 'Ensuring Effective Regulation in the Eu. Report with Evidence', 9th Report of Session 2005-06, (2005) at 7 of the Minutes of Evidence.

²⁷ Activity Report of the 1999-2004 Committee on Environment, Public Health and Consumer Policy.

²⁸ Article 30 of the 2003 Inter-Institutional Agreement on Better Lawmaking, which states that the European Parliament may, where the codecision procedure applies “have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage”.

²⁹ Point 12 of the Common Approach. At the Conference on Impact Assessment organised by the European Commission on 20 March 2006 in Brussels the speaker from the European Parliament named Pesticides Regulation and the Thematic strategy on Marine Environment as dossiers in which possibly a request will be made to the Commission to complement its IAs.

³⁰ http://www.europarl.eu.int/comparl/envi/externalexpertise/default_en.htm (last accessed 27 March 2006).

deliberations.³¹ Furthermore the IMCO Committee commissioned an IA on the proposal for a directive on pre-packed products – perhaps the first parliamentary IA presented under that label – in an attempt to ‘show’ that the Commission had consulted selectively and that its proposal was too ‘deregulatory’. Finally the European Parliament has recently published calls for tender for new framework contracts on impact assessment studies.

IA in the Council of Ministers

The Council in the past has focussed more on the substantive policy goals to be reached through better regulation and impact assessment, most notably enhancing the competitiveness of European businesses. Impact assessment as a phenomenon is particularly alien to the highly politicised decision-making in Council, where “[c]ompromises will not be put at risk by evidence”³². However in the Conclusions of the November 2005 Competitiveness Council the Common Approach was welcomed and the Council committed itself to undertake to “embed it into Council work on impact assessment”. It also reaffirmed “its intention to carry out impact assessments on substantive Council amendments, to be determined by the appropriate Council preparatory bodies, to legislative proposals, with a view to developing best practice, in line with the commitment in the Inter-institutional Agreement on Better law-making, without prejudice to the legislator’s capacity to propose amendments.”³³

This commitment has materialised in the production by the Austrian presidency of internal guidance for Working Party chairs on how to deal with IA. ³⁴ This documents contains some traffic rules both on the use of Commission IAs and on the production of IAs on substantive amendments that at present do not exist for the Parliament. The document recommends to chairs of Working Parties to pose the following key question as the basis for the scrutiny of a Commission IA: does the IA “provide[] sufficient information to inform [...] positions and for well-informed debate on the proposal?”³⁵. But to the inevitable follow-up question of what should be done when the answer is ‘no’ the document does not provide any real answer (it comes down to informal negotiations with the Commission on whether further IA work could be done).

Not only the paper guidance, but also the practice of IA in Council differs from that in Parliament. The experiment initiated by the Dutch presidency to produce an IA on

³¹ E.g. Ian Skinner and Andrew Farmer, 'The Thematic Strategy on Air Pollution. Policy Brief for the EP Environment Committee', (2006). on the CAFÉ IA or Frans Oosterhuis, Hasse Goosen, and Andrew Farmer, 'Policy Brief for the EP Environment Committee. The Proposed Directive on the Protection of Groundwater against Pollution', (2003), the study the ENVI committee commissioned on the Groundwater Directive.

³² Graham Mather and Frank Vibert, 'Evaluating Better Regulation: Building the System', City Research Series, (2006) at 21.

³³ Council of Ministers, 'Conclusions of the Competitiveness Council of 28-29 November 2005', Press release, (2005) at points 17 & 18.

³⁴ 'Handling IAs in Council. Indicative guidance for Working Party Chairs', 2006.

³⁵ Point 14, at 6.

substantive amendments to the Directive on batteries and accumulators has been highly publicised, but stranded in the COREPER phase. A paper from the UK presidency on progress on impact assessment reports two more low-profile Council experiments, namely on the Potato Cyst Nematode Directive and the Forest Law Enforcement, Governance and Trade Regulation, as well as twelve instances of Commission IAs that have been put on the agenda of Working Parties.

One contentious institutional issue worth mentioning is the current absence of any obligation to conduct impact assessments of Third Pillar initiatives, sometimes perceived as creating institutional inequality by other actors. The review clause of the Common Approach suggests that in the context of the review of the document in two years time, “as appropriate, Council Impact Assessment on specific initiatives presented by one or more Member States concerning their economic, environmental and social aspects”³⁶ could be considered.

Informing, guiding, justifying...

Moving away again from the level of concrete institutionalisation of IA as a tool in EU regulatory processes and back to the concept of ‘informing the legislator through IA’ I would like to address a second problem. ‘Informing’ implies a very humble and neutral role, which is at odds with the roots of IA which can be found in the United States where this type of ex ante evaluation can even be crucial for the validity of a regulatory decision. But also in the EU context it is problematic, as becomes apparent in a statement from the first Commission Communication on IA, which speaks of using IA to “guide and justify the choice of the right instrument at the appropriate level of intensity of European action”³⁷. The same document then goes on to state that IA will also “provide the legislator with more accurate and better structured information on the positive and negative impacts, having regard to economic, social and environmental aspects. Thirdly, it will constitute a means of selecting, during the work programming phase, *those initiatives which are really necessary.*”³⁸

It is submitted that these functions are contradictory and illustrate well the tension inherent in the use of IA as an ‘information tool’. According to the 2002 Communication on Better Lawmaking EU IA needs to “guide”, to “justify”, to inform and to “select”. Below a typology of IA is presented which uses these four verbs as starting points and shows that they correspond to fundamentally different possible functions of IA which cannot easily be reconciled. More importantly which of these functions one attributes – explicitly or implicitly

³⁶ Point 19.

³⁷ European Commission, ‘European Governance: Better Lawmaking’, Communication from the Commission, COM(2002) 275 final at 3.

³⁸ Ibid. at 3-4. Italics in original document.

- to EU IA depends on one's conception of EU lawmaking and the appropriate constitutional roles of each of the actors in it.

'Speaking truth to power'

A possible function is to deliver a more objective analysis, which can 'speak truth to power'³⁹. Guidance provided to the legislator is of a strong kind and could even amount to dictating the content of decisions. For what is a legislator to do when faced with 'the truth'? An IA model built around this function is the closest to the intellectual roots of IA as a means of controlling rule-making power delegated to agencies.⁴⁰ However it is not an obvious choice for the EU IA system which is designed for use in the 'primary' legislative process and therefore needs to avoid substituting political decision-making. For when an IA is perceived as containing the objective truth, the only way it can justify a regulatory decision is when this decision follows the recommendations that the IA report inevitably contains, turning IA effectively into a 'decision-making tool'. And yet 'speaking truth to power' seems to be the function meant when IA is presented as "a means of selecting, during the work programming phase, *those initiatives which are really necessary*"⁴¹. Obviously the qualification 'during the work programming phase' has been added, but it is hard to see how IA can play fundamentally different roles in different stages of the legislative procedure.

'Reason-giving for legislative decisions'

At the other side of the spectrum IA can help politicians to convince stakeholders and citizens of the virtues of the legislation or policy at hand. If one equates 'political decision-making' with 'power' this will be the most appropriate goal for EU IA. In this approach IA serves most and for all to 'justify' legislative and policy decisions and the extent to which the analysis has influenced or guided the decision is not clear.⁴² A document like that is not necessarily without value; the Article 253 of the EC Treaty even contains an explicit requirement to give reasons for legislative decisions⁴³. The questions remains however whether IA is the appropriate instrument for this, especially when the Explanatory Memorandum already has a justificatory function. Because of the higher level of ambition normally associated with IA, there is the risk that IAs aimed at mere 'justifying' could come

³⁹The famous catch phrase 'speaking truth to power' is the title of a book on policy analysis written by Aaron Wildavsky in 1979. The book describes the state of the art of the field of policy analysis in its early days and proposes how to establish policy analysis as a discipline in its own right. This should not be taken to mean that Wildavsky believes policy analysis amounts to 'speaking truth to power'. After mentioning the phrase for the first time in the introduction (p.1) he even adds between brackets the exclamation 'if only we had either!'. Indeed, he insists that policy analysis is about "relationships between people" (p. 17). A. Wildavsky, *Speaking truth to power: the art and craft of policy analysis*, Boston 1979, p. 1.

⁴⁰ Chicago, John M. Olin Law & Economics Working Papers 2nd series 119.

⁴¹ European Commission, 'Com(2002) 275 Final', at 4.

⁴² For those familiar with the NAO Evaluation of Regulatory Impact Assessments 2004-2005 in which 3 models were distinguished: this approach comes closer to the NAO's 'informative IA' than to the 'pro-forma IA'.

⁴³ "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."

to serve as “shields to allow decisions to be routinized, reasons for any findings to be produced with ease, and decision-makers to be both insulated from political pressures and lent authority for any particular exercise of power”⁴⁴. In more neutral words: using EU IA for ‘reason-giving’ could reduce it from an ‘information tool’ to a ‘communication tool’. It is thus for good reasons that the Common Approach states that “[t]he rigour, objectivity and comprehensive nature of the analysis should mean that the impact assessment is not a simple justification of the initiative or the substantive amendment”⁴⁵. However since the EU IA system contains many contradictory intentions and incentives we need to retain ‘reason-giving for legislative decisions’ in this typology.

‘Providing a forum for stakeholder input’

Thirdly, IA can provide a forum for stakeholder input. Here being an ‘aid to political decision-making’ means helping stakeholders to express their preferences in the legislative process. The IA report then runs the risk of being reduced to a document summarising the consultation, whereas the very idea behind IA is to do a lot more than that by providing at least some degree of objective, reproducible analysis. It is evident that an IA of this type cannot live up to the ambition of ‘informing the legislator’ in any sense that goes beyond the policy-making instruments that were already in place before the launch of the IA procedure. Yet, just like the previous type discussed, IA as ‘consultation plus’ cannot be excluded in advance as a possible function for EU IA, because a) it is sometimes proposed as an ideal types and b) can certainly be witnessed in practice now and then (see below).

There are two further possible functions that IA can have in the legislative process which are more convincing because they are more comprehensive and more refined. They are not necessarily contradictory, but emphasis different elements in the IA procedure and if really implemented, require different institutional designs.

‘Highlighting trade-offs’

Perhaps the best hope for EU to ‘inform’ political decision-making in such a way that ‘power’ can process it is for it to focus on ‘highlighting trade-offs’. This is indeed the very function emphasised in numerous Commission policy documents on IA, but which has turned out rather tricky to implement in practice. The first characteristic of this approach is that instead of claiming that the IA report contains ‘the truth’, several policy options and their impacts are ranked according to several decision-making criteria (multi-criteria analysis). It is then up to the decision-maker to decide which criterion he wants to use in order to select one option. Stakeholders will then at the very least be able to hold the

⁴⁴ R. Baldwin, *Rules and Government* (Oxford: Clarendon Press, 1995).

⁴⁵ Point 5.

decision-maker accountable for this decision and challenge both the arguments and the evidence on the basis of the IA. Not every decision would be directly justified by an IA, but on a macro level legitimacy would be enhanced by the presence of the IA regime. This approach comes closest to the direction the Institutions apparently want for EU IA when they declare in the Common Approach that “[c]areful consideration of the evidence presented in the impact assessment should allow the relevant institution to decide on whether to proceed with the proposal or amendment and/or to shape the proposal or amendment in the light of its potential impacts”.⁴⁶ But then again quasi-legal provisions of this kind determine only a small part of the practical functioning of EU IA. Besides, provisions in the same document, notably the ‘escape clause’ that IA must not “prejudice the legislator’s capacity to propose amendments” send a rather different message.

This function suffers from two problems. The first is particular to the way IA is set in the EU legislative process: what happens when the European Parliament or the Council want to use a different decision-making criterion than the Commission? The second problem is universal. This approach comes down to a compromise between the ‘truth to power’ approach and the ‘reason-giving’ approach, thereby running the risk of slipping into either. Can transparency ever be so strong that stakeholders will be able to distinguish between IAs that ‘select’, those that merely ‘justify’ and those that really ‘inform’ especially when it is – in the absence of any enforcement mechanisms – very easy to claim one thing and do the other?

‘Structuring the discourse’

The last option is possibly even trickier but also more promising. EU IA could also ‘guide’ the legislative process in a procedural way, by structuring the legislative discourse. The obligation to take into account the information from IAs could be construed in such a way as to provide incentives for non-strategic arguing thereby contributing to a proceduralisation of the lawmaking process. This approach of course is vulnerable to all the familiar criticisms of the literature on deliberative democracy. However, if IA has one inherent strength it is that it is non-hierarchical by its very nature. An advantage for EU IA could be that this function is less static by being less dependent on one excellent original impact assessment. To illustrate, it has emerged from interviews with national civil servants who go to Council Working Parties that they are mainly interested in carrying out IA because it provides arguments. Without getting into the question of whether deliberation is viable decision-making mode for the Council, I would like to point out that in order to keep all parties on board of the IA ship it may be necessary to ensure that EU IA is centrally about arguing, whilst heavy procedural

⁴⁶ Point 6.

rules – which admittedly are currently nonexistent – would have to ensure a non-hierarchical structure.

Discursive constitutional space

Normative discourse on regulatory legitimacy - or: constitutional discourse through a regulatory lens - always refers to “the same evaluative criteria: expertise, proceduralization, subsidiarity”.⁴⁷ An impact assessment system determines for an important part the relative importance of these criteria in legislative decision-making. And through the concrete process of carrying out an IA these criteria are operationalised. Regardless of which function is ascribed to IA (see above) this also makes IA a microcosm for EU governance. Forcing decision-makers to make explicit their reasoning and the limitation of it and having the results there for anyone to scrutinise, at the very least sheds light on the functioning of EU governance in practice, even if obviously IA cannot be equated with the decision-making itself. To what extent and in what way IA can shape EU governance, does depend on its purpose, or in other words: on what is meant by ‘informing the legislator’. Below three examples are presented showing how a constitutional issue is highlighted or even magnified through either the application of IA or the debate on its design.

The debate on external review

From time to time the question of whether Commission IAs should be subject to external review by independent (economics) experts returns to the debate on the future development of the EU IA system. Lobby groups are usually in favour on the grounds that such a review could be “an alternative way of getting market expertise into the analysis”⁴⁸. The European Parliament has also repeatedly expressed a preference for some kind of independent review on a structural basis. In the explanatory statement Doorn in his reports pleads in favour of an independent institution that can monitor “the implementation of an impact assessment” which would allegedly prevent impact assessment from being “turned into an instrument for opposing undesired legislation in an undemocratic manner”⁴⁹. The idea that the IA procedure should undergo a mandatory peer review process is repeated in the McCarthy report, a more recent report on better regulation focussing on the internal market legislation.⁵⁰ The argument can be summarised as follows: the Commission is a stakeholder in the process and therefore

⁴⁷ Giandomenico Majone, 'Regulatory Legitimacy in the United States and the European Union', in Robert Howse and Kalypso Nicolaidis (eds.), *The Federal Vision. Legitimacy and Levels of Governance in the United States and the European Union* (Oxford: Oxford University Press, 2001), 252-75 at 271.

⁴⁸ European Policy Forum, 'Reducing the Regulatory Burden: The Arrival of Meaningful Regulatory Impact Analysis', City Research Series, (London 2004) at 27.

⁴⁹ European Parliament, 'Report on Assessment of the Impact of Community Legislation and the Consultation Procedures', (2004).

⁵⁰ European Parliament, 'Report on the Implementation, Consequences and Impact of the Internal Market Legislation in Force', 23 March 2006.

by definition cannot be trusted to provide an objective analysis. Possible counterarguments are that it is too early in the development of the IA procedure for the addition of a review mechanism, that it would only create extra problems (“who reviews the reviewers?”) and that transparency is a sufficient control mechanism. The Commission has so far resisted systematic review of individual IAs although Vice-President Verheugen has expressed sympathy for the idea of “an independent Task Force running the shop as far as better regulation is concerned”⁵¹ and an independent review of the IA *system* is under way.

When discussing whether independent review should be part of the institutional design of EU it is important to remember that such review could take on many forms⁵². All I want to show with the case of the REACH impact assessment is how lack of agreement on who should review (and produce) impact assessments can reduce IA to a ‘forum for stakeholder input’. The original IA on REACH, a major proposal for a regulation on the registration of chemicals, as produced by the Commission was accepted by almost none of the stakeholders.⁵³ Several of them including a number of Member States then went on to produce their own assessments, the total amount exceeding forty. The Dutch presidency made an attempt to mediate between different assessments when it organised a workshop on the REACH impact assessments on 25-27 October 2004 for Council experts in order to “bring together the results of the studies already available and to consider the lessons to be drawn from them”⁵⁴. In the mean time stakeholders, in particular industry lobby groups had started negotiations with DG Environment and DG Enterprise to review the initial impact assessment. The result of this was a Memorandum of Understanding between CEFIC, UNICE, DG Environment and DG Enterprise containing the commitment to “provide a framework for the efficient undertaking of further investigations on business impacts of REACH”. To the REACH Working Group ‘Further Work on Impact Assessment’ that was subsequently established to oversee the further IA work for which KPMG was contracted, a broader group of stakeholders was invited (industry, trade unions, environmental and consumer NGO's). Some stakeholders felt that despite these efforts the process lacked legitimacy and some environmental NGOs even decided to withdraw their cooperation citing “major deficiencies in both the methodology and transparency of the process”⁵⁵ as their reasons. In the ‘truth to power’ approach such a negotiated revision of the Commission IA is problematic and possibly could have been prevented by external review of the original IA by

⁵¹ Gunther Verheugen, speech given at UK Presidency Better Regulation Conference, Edinburgh, 23 September 2005.

⁵² The options proposed in Mather and Vibert, 'Evaluating Better Regulation: Building the System', (Are the following: strengthen oversight capacity of Secretariat-General, a new unit reporting to Commission President, the Court of Auditors, a new independent agency and private informal review.

⁵³ As became clear during the workshop on impact assessment of REACH which the Commission organised on 21 November 2003.

⁵⁴ Netherlands Presidency of the EU, Conclusions and recommendations of Workshop on REACH Impact Assessments, held on 25th-27th of October in The Hague. 27th October 2004: The Hague, Netherlands.

⁵⁵ Statement from WWF and the European Environmental Bureau (EEB), 16 July 2004.

independent scientists and economists. In the 'structuring the discourse' approach it need not be problematic and even desirable when stakeholders start a debate on the basis of impact assessments and then review their preferences. However for lack of procedural rules ('what counts as an IA?', 'who has access to which information?') the REACH IA process did little more than helping stakeholders to express their political preferences. If it is true that the REACH case is when EU IA matured⁵⁶, then it has an uncertain future ahead of it.

The right of initiative

The policy roots of EU IA lie in the White Paper on Governance which was aimed at fostering institutional change without amending the Treaties and within the framework of the Community method.⁵⁷ The Commission has insisted that IA "should help the Commission to exercise its right of initiative and to promote the Community method by means of fully informed political decisions."⁵⁸ The IA procedure has been designed accordingly: the fact that it is the Commission's prerogative to draw up the IA report and postpone its publication until the proposal is ready. However the insistence that Commission IAs first and foremost serve to facilitate internal policy preparation is fundamentally at odds with the notion of Commission IAs as starting points for legislative debates within and between all three Institutions. The idea that more than one option is analysed in the IA process and the results published in the IA report is an interesting element of the procedure in this respect. Another possible challenge for an undisturbed exercise of the right of initiative is the decision to publish Roadmaps giving a first indication of the main areas to be assessed and the planning of impact assessment properly speaking together with the Work Programme as of 2005.⁵⁹

The implications IA can have for the exercise of the right of initiative is illustrated by the case of the Air Quality Thematic Strategy (CAFE). On the basis of one of the most comprehensive IAs ever produced by the Commission⁶⁰, a proposal was selected which ranked only second in terms of expected net benefits to society (mainly environmental). Consequently several MEPs and stakeholders argued that the Commission was not taking into account the results of IA. Clearly, but probably unconsciously they had a 'truth to power' function for IA in mind; a type of IA that points to the optimal policy which is defined as the policy delivering the highest net benefits to society. However in a 'highlighting trade-offs' model preferring a policy representing only the second highest level

⁵⁶ John Cridland said "I think impact assessments came of age with the REACH proposals on chemicals but, my word, it was a painful process" at a hearing, see House of Lords, 'Ensuring Effective Regulation in the Eu. Report with Evidence', (at 26.

⁵⁷ European Commission, 'White Paper on Governance', COM(2001) 428 final.

⁵⁸ European Commission, 'Impact Assessment: Next Steps. In Support of Competitiveness and Sustainable Development', Commission Staff Working Paper, SEC(2004)1377 at 3.

⁵⁹ Ibid. at 5.

⁶⁰ European Commission, Impact Assessment of the Communication on Thematic Strategy on Air Pollution and the Directive on "Ambient Air Quality and Cleaner Air for Europe", Commission staff working paper, SEC (2005) 1133.

of ambition for political reasons is perfectly acceptable and corresponds to a political exercise of the right of initiative. But in that case it would have helped convince the co-legislators and stakeholders that its use of IA was legitimate if the Commission has indicated why it chose this specific policy (which was, after all, ranked second according to the prevailing IA criterion). The same goes for the 'structuring the discourse' function, for which however the CAFE IA case can tentatively be seen as a silent victory. There is evidence that IA was used as the starting point for legislative discussions in each of the Institutions.⁶¹ And the contention over the legitimate use of IA in this case has at least forced some actors to go beyond repeating their arguments and articulate the presuppositions behind their preferences. Above all this case illustrates how the actors involved in the EU IA system are not ready to embrace one of the functions set out above as the core function of IA in the legislative process and develop the procedure accordingly.

The evidence base of EU legislation

Finally - as already suggested above - a link can be established between the policy preference to shift towards evidence-based decision-making and the legal obligation to *prove* the EU is competent (principle of attributed powers, Article 5(1) EC Treaty) and - in the case of shared competences - can do *better* (principle of subsidiarity, Article 5(2) EC Treaty). Because the subsidiarity principle is often interpreted as hinging essentially on the criterion of comparative efficiency and because of the centrality of the internal market in many Treaty provisions, it was always the case that the determination of competence in the EC context could depend on the outcome of economic analysis. However, now with the increasing institutionalisation of IA, we have a concrete tool to implement this further.⁶² Although the Court of Justice has tied its marginal review of compliance with the subsidiarity requirement to the duty to motivate, it has so far never mentioned impact assessment. Nor has the Court ever interpreted the reason-giving requirement of Article 253 in such a way as to oblige the Commission to enter into a dialogue with stakeholders, to consider the full costs and benefits of proposal or to engage in any other activity which is now incorporated in the IA procedure. But it is still early days for EU IA and in any case the hypothesis seems warranted that IA

⁶¹ ENVI news, Newsletter from the European Parliament Environment, Public Health and Food Safety Committee, 02/2006 confirms this for the European Parliament, a document from the UK presidency reports that in the Council working party on 24 October the CAFE IA has been discussed and at a seminar on EU Better Regulation entitled 'Assessing impact' at the University of Manchester, School of Law in January 2006 a Commission official stated that the IA has been used as the basis for discussion in the Competitiveness group of Commissioners.

⁶² Arguably Article 5 EC Treaty and Protocol on the application of the principles of subsidiarity and proportionality which the Treaty of Amsterdam added to the EC Treaty in 1997 together provide the constitutional basis for the IA procedure. In support of this argument it is worth noting that the reports delivered on the obligation for the Commission to report annually on the application of the principles of subsidiarity and proportionality to the European Council and the European Parliament in recent years have been published under the label of 'better lawmaking', since these issues are "intimately linked as the measures introduced to improve regulation should make for better compliance with the principles of subsidiarity and proportionality, and vice versa." European Commission, 'Report from the Commission "Better Lawmaking 2003" (11th Report)', COM(2003)770 final at 3.

can help strengthen the link between competence and evidence by moving away the justification of a Commission proposal from a narrow focus on finding a legal basis in the treaties.⁶³

A next question is whether we can take the argument one step further by submitting that in the future a regulation or directive without IA will be deemed to lack legal basis. There is no concrete evidence that the triangle 'evidence base, legal base, impact assessment' is becoming this strong but there are some indications that thinking within the Institutions and among stakeholders may develop in this direction. In fact the idea that a shift towards evidence-based decision-making should have consequences for the decision whether a proposal can become law goes back as far as the White Paper on Governance. It proposes that the Commission should "withdraw proposals where inter-institutional bargaining undermines the Treaty principles of subsidiarity and proportionality or the proposal's objectives."⁶⁴ A recent and firmer statement on to what extent the Commission plans to tie the use of IA to the basis for legislation in the future was made by Commissioner Verheugen at his examination by the European Union Committee of the House of Lords on 4 July 2005: "If in the co-decision process Parliament and/or Council produce amendments, changes which are not only just minor but real changes, then there should be an Impact Assessment. If it is not there the Commission will make it very clear that the Commission does not feel that there is a sound basis for a proper decision."⁶⁵ This is some firm language indeed. If the Commission will act up to this statement by Verheugen, this could mean the introduction of impact assessment to the ECJ. However putting the faith of an IA into judicial hands would sit uneasily with the idea that IA should serve as an 'aid not substitute to political-decision making'. Indeed 'judicialising' IA fits best with the type of IA that aims to 'speak truth to power', a type that the Commission is drawn to when it comes to keeping Council and Parliament from overregulating but is less keen on for internal decision-making purposes. Also an IA drawn up with the possibility of review by a court in the back of the mind of the author is more likely to be aimed at 'justifying' rather than 'guiding'. And this brings us back to the hypothesis that lack of clarity on the role of IA in the legislative process is caused by implicit ambiguity regarding its core function.

Taking a look at an example the practice of EU IA, which offers so far no direct evidence that IA is acquiring a strong legal relevance as of yet, one can see that the discourse in a telling way. When the Commission announced on 28 March 2006 a proposal for a regulation aimed at bringing down the costs of using mobile telephones abroad (roaming), lobby groups were quick to point out the absence of an IA: "If the Commission continues to

⁶³ European Policy Forum, 'Reducing the Regulatory Burden: The Arrival of Meaningful Regulatory Impact Analysis'.

⁶⁴ European Commission, 'White Paper on Governance', at 22.

⁶⁵ House of Lords, 'Ensuring Effective Regulation in the Eu. Report with Evidence', at 25 of the Minutes of Evidence.

pursue the idea of legislation, it should first carry out a full impact assessment. This kind of analysis is a requirement of the Commission's own internal process guidelines."⁶⁶ An impact assessment was produced by the Commission afterwards.⁶⁷ Now this course of action can still produce valuable results but it can also – especially if it happens on a regular basis – give stakeholders a reason to be skeptical about to what extent IA can ever 'guide' decision-making.

Conclusion

Although I am aware that a hint of normativity can not be avoided, the purpose of this paper is emphatically not to propose alternative benchmarks for evaluating EU IA. Its aim is to illustrate *potential* functions of IA as an instrument to 'inform the legislator'. The paper goes one step further by showing *potential* constitutional implications of different models of IA.

This is less modest than it seems. Firstly it is submitted that the battle over IA mirrors competing views on EU lawmaking and governance and could explain many of the difficulties with the implementation of IA in the EU policy process. By emphasising evidence-based decision-making on the one hand and primacy of the political level on the other an inherent tension is born and bound to come out at some point in the actual lawmaking process, as is shown by some of the illustrations presented. Arguments about political choices associated with legislative proposals can easily become intertwined with arguments about the legitimacy of the impact assessment, because there is so much confusion over what can be expected from the procedure. Secondly the paper seeks to draw attention to the fact that failure to recognise the constitutional significance of EU IA causes the debate to be conducted in misleading terms. Thus, arguments which are really about the constitutional roles of different legislative actors can be disguised as arguments about the design of IA. Similarly views on constitutional issues should be explicitly echoed in the debate on how to develop EU IA into a tool that can meaningfully 'inform the legislator'.

⁶⁶ GSM Association Press Release 2006, 'Further Roaming Regulation is Unnecessary and Potentially Damaging. GSMA calls for a full impact assessment of any EU-wide roaming legislation', http://www.gsmworld.com/news/press_2006/press06_22.shtml.

⁶⁷ European Commission, 'Impact assessment of policy options in relation to a Commission proposal for a regulation of the European Parliament and of the Council on roaming on public mobile networks within the Community, Commission staff working paper, SEC(2006) 925, 12 July 2006.

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