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REVIEW

'Responsible Regulation' instead of 'Better Regulation' – is the European Commission's better regulation proposal fit for future?

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Abstract

The article provides a critical analysis of the European Commission's 'Communication on Better Regulation' which was published on 29 April 2021. The article (and Communication) is set in the context of the now nearly two decades old 'Better Regulation' agenda that focused on "reducing regulatory burdens" on industry and the more recent commitment to a European Green Deal launched in 2019. The piece explores whether the 'better regulation' proposed in the Communication is really a step forward to actually better regulation. This leads to questioning whether the commitments in the Communication are not best seen as a continuation of the better regulation process where better regulation was interpreted to mean less regulation.

'Responsible Regulation' instead of 'Better Regulation' – is the European Commission's better regulation proposal fit for future?

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1 Introduction

'Better Regulation' is an attractive-sounding term that is difficult to argue with at first sight.¹ However, as with all framing choices, it is essential to look into what is explicitly stated in the formal policy documents, how this is interpreted by decision-makers, what motivations are behind the use of chosen terms, and ultimately the impact of those framing choices.

This article provides a critical analysis of the European Commission's 'Communication on Better Regulation: Joining forces to make better laws'² which was published on 29 April 2021. The article (and Communication) is set in the context of the now nearly two decades old 'Better Regulation' agenda that focused on "reducing regulatory burdens" on industry and the more recent commitment to a European Green Deal³ launched as the top priority of the von der Leyen Commission in 2019.

We explore whether the 'better regulation' proposed in the Communication is really a step forward to actually better regulation – defined here as regulation that helps address challenges to humankind, that is timely, effective, efficient, fair and proportionate, that is participatory and transparent, that is duly evidence-based and reflects the complexity of reality and the multiplicity of stakeholders affected, while also being future-oriented.

We ask whether the commitments in the Communication are not best seen as a continuation of the better regulation process where the earlier Juncker Commission interpreted better regulation to mean *less* regulation⁴ and hence arguably part of the long-term ideological process of deregulation in no small part inspired by the United Kingdom and the United States and in turn reflecting a central demand of the oil and tobacco industries for much of the 20th century, often aided by market-fundamentalist think tanks.⁵

2 The objective of the 'one-in, one-out' principle

The 'one-in, one-out' principle, explicitly included in von der Leyen's mission letters to Commissioners, stated that "*Every legislative proposal creating new burdens should relieve people and businesses of an*

equivalent existing burden at EU level in the same policy area."⁶

The 'principle' was reworded as an 'approach' in the Better Regulation Communication: "*The 'one in, one out' approach involves offsetting new burdens resulting from the Commission's legislative proposals by equivalently reducing existing burdens in the same policy area.*"⁷ The one-in, one-out approach is the core focus of the better regulation toolkit presented in the Communication under chapter 5 'New instruments for further simplification and burden reduction'. The commitment to this has been confirmed in the European Commission's 2022 Work Programme⁸ (CWP) and annexes⁹ on 19 October 2021 and is being operationalised in 2022.

The Commission will apply the 'one-in, one-out approach' to ensure that additional burdens – looked at from the perspective of burdens on business and administrations – are not increased by new legislation.

Focusing on maintaining no increase in 'burdens' and potentially constraining what can be done with new legislation is not the way to develop legislation. Instead, the approach contradicts the rationale for what constitute good regulation, according to which each law should be drafted and passed on its own merits. The form and scope should not be constrained by maintaining today's 'level of burden'. Defining the status quo as the practical ideal 'burden' to keep to would be an artificial constraint. All impacts, positive and negative — on the economy, society and the planet — need to be considered when ascertaining what measures are needed for a legislative proposal to make it fit for purpose and hence designed in accordance with the need to address the challenges society faces.

While fundamentally flawed, the approach seems to have shifted away from the initial understanding of 'one in one out' meaning 'one new law requires one taken away at the same time' as initially understood. The principle focuses rather on no net 'burdens' for any given area. New 'burdens' will be balanced by reducing burdens from other legislation in the same area.

There is also a commitment to not 'mechanically apply' the one-in, one-out approach and there is some

¹ The author thanks Laura Hildt, Francesca Carlsson and Tatiana Santos, EEB.

² European Commission, 2021a.

³ European Commission, 2019a.

⁴ Schömann, 2021.

⁵ NEF and EEB, 2021.

⁶ von der Leyen, 2019.

⁷ European Commission, 2021a, pp. 9-12.

⁸ European Commission, 2021b.

⁹ European Commission, 2021c.

flexibility in application (i.e. the ‘burdens’ from legislation passed this year can be reduced next year if an opportunity for reducing burdens emerges). This makes the approach less constraining than the first interpretation. However, it does not change the fundamental issue that political considerations – of wishing to comfort business that there will be no net additional ‘burdens’ from the European Green Deal – trumps actual better regulation principles (that laws should be decided each on their own merits rather than being constrained by outside factors), ironically in the Better Regulation Communication itself.

3 Reducing the wrong ‘burdens’ and limiting responsibility

The rationale for the ‘one-in, one-out approach’ is clear: avoid ‘burdening’ industry and administrations. There is a logic here when seen through the narrow lens of short-term interests of business and practical realities of administrations. However, better regulation misuses the word ‘burdens’. If one looks at burdens from legislation whose objective is to ensure products free from toxic chemicals, promote pollution reduction, avoid biodiversity loss, and mitigate climate change – the real ‘burden’ that needs to be reduced here is the burden of economic activities and production and consumption, on health, on the climate, on the planet. These, in turn, lead to burdens on society, people, and often the economy itself. Better regulation talks of ‘cumulative impacts’ from the various environmental and social protections on business and administrations but fails to focus on the cumulative impacts on health and environment and how this is pushing towards resource scarcity, to ecosystem tipping points and health crises.

The capture of the word ‘burdens’ in ‘better regulation’ for narrow economic and administrative burdens is another framing strategy success for those concerned, but a failure for what better regulation should actually do. The ‘burdens to business’ talked about here are really ‘responsibilities’. Is requiring a company to treat waste water flowing into a river, or to pay for its waste to be safely disposed in a sanitary landfill or to replace harmful substances with clean chemicals a ‘burden’ upon industry – or a ‘responsibility’, to be seen as part of its license to operate?

The true burden of failing to regulate businesses falls on the damaged environment and on society, which must bear the costs. These are named as mere ‘externalities’ to the firm involved of such destruction and its eventual repair. The word ‘externalities’ is often misunderstood as ‘academic’ which hardly encourages action and is therefore a framing failure. Furthermore, if and where policy-makers ensure that the polluter pays principle is applied, then this should not be seen as a ‘burden’ to be avoided, but as a duty

or responsibility to be embraced. Forward-looking companies should lobby for a level playing field of high responsibility. That would help future-proof their operations and investments.

Of course, not all ‘burdens’ put on companies are ‘responsibilities’. One could put in place ineffective legal requirements that create costs without driving positive change, or lead to costs beyond what is necessary to address the environmental and health burdens. One could, for example, legislate for plant closure to avoid emissions, but there could exist much less costly ways of achieving emissions reductions. The choice of what measures are appropriate should reflect an assessment of effective, efficient, fair means of meeting objectives within the context of competencies, rights and roles.

4 The Green ‘Oath’: Do No (Significant) Harm

The European Green Deal embraced a green oath, to “*do no harm*”. Section 2.2.5 states, “*All EU actions and policies should pull together to help the EU achieve a successful and just transition towards a sustainable future*”, and “[t]he Commission will improve the way its better regulation guidelines and supporting tools address sustainability and innovation issues. The objective is to ensure that all Green Deal initiatives achieve their objectives in the most effective and least burdensome way and all other EU initiatives live up to a green oath to ‘do no harm’.”¹⁰

The green oath is in the Better Regulation Communication, but adjusted to become “*do no significant harm*”. The addition of the word ‘significant’ is unhelpful, first as ‘insignificant harm’ doesn’t really make sense – as arguably ‘harm’ cannot be ‘insignificant’ – and second it can open debate on what is ‘significant’, erode the principle and waste important political time and capital better focused on how to achieve the commitment for a “*successful and just transition towards a sustainable future*.”

The Commission’s Communication states that the Commission will: “*Mainstream the United Nations’ sustainable development goals (SDGs) to help ensure that every legislative proposal contributes to the 2030 sustainable development agenda; and ensure that the ‘do no significant harm’ principle is applied across all policies in line with the European Green Deal oath*”.¹¹

This has a positive point – there is a commitment to mainstream the SDGs which will be “*included throughout evaluations and impact assessments*”¹² for all Impact Assessments (IAs) to look at contribution to SDGs.

¹⁰ European Commission, 2019a, p. 19.

¹¹ European Commission, 2021a, p. 1.

¹² European Commission, 2021a, p. 13.

However, the SDGs are a means to ensure that the ‘do no significant harm’ principle is applied across all policies in line with the European Green Deal oath.¹³ No more ink is spent on the green oath in the Communication. This raises questions as to how strongly this principle will be respected in practice – certainly the integration of SDGs in IAs is on its own not enough to ensure that there will be no significant harm.

It is also unfortunate that coherence with the European Green Deal (in what follows: EGD) is not presented as a clear and explicit objective in the Better Regulation Communication. The text states, “[t]he European Green Deal committed the Commission to improve the way in which better regulation addresses and supports sustainability”¹⁴. There is a promise to improve better regulation, but no explicit statement that better regulation should be fully EGD compatible. This has subsequently been clarified by statements by Vice President Šefčovič in public fora, including in the Better Regulation conference of 2 December 2021¹⁵, where he also stated, “[w]e will seek to achieve burden reduction by savings in the same policy area. But this will never be at the expense of our environmental, social or socio-economic standards”¹⁶ – which is a commitment to non-regression.

Had the original green oath, the adjusted “Do No Significant Harm principle” and EGD been given more emphasis in the Communication and in public fora, and had there been more focus on the need for improved environmental and social standards, it would have given greater confidence. There is still time to rectify this.

5 Commitment to evidence-based policy-making

There is a commitment in the Better Regulation Communication to focus more on costs and benefits – so there is scope for the benefits of action to feature. But there is no statement of commitment to carry out cost of policy inaction studies – i.e. studies looking at the burden society and the planet would face without policy action or delays to policy action (presented in a mix of qualitative, quantitative and monetary terms)¹⁷. So naturally attention will focus on the costs of the legislation, rather than the costs to society or the planet of not promoting sufficient legislative progress. It is important to understand the scale of the problem and the share of the solution that the legislative

proposal options represent. Would policy-makers really be content to discuss policy options that range from addressing only ten, twenty, thirty percent of the problem and leave the rest for future administrations and the burdens to existing generations? If and where a fraction is really the best they can do, then there should be a convincing roadmap for how the rest will be addressed. Policy making and better regulation should be about public responsibility.

Furthermore, from experience with developing impact assessments, it has proven easier to find data on, or development calculations of, short term economic costs rather than wider and long-term benefits to health and nature. This is not surprising as the economic costs generally concern a lesser number of “actors” affected and often relate to a relatively homogenous or at least not fundamentally dissimilar set of players with clearer pathways from measures to cost impacts, while the impacts on health and nature relate to a much wider set of people and complex ecosystems and interactions. The causal links between a specific action/rule and the longer-term societal harm are thus often less well captured by assessments. For example, the EU’s Industrial Emissions Directive (IED) that was assessed within the Fit for Future Platform and will be reviewed in 2022, makes legislative demands on 50,000 installations in Europe, but the emissions of multiple air and water-borne pollutants from these affect over 500 million Europeans and others across borders, both now and into the future (given persistence of some pollutants). In addition, the emissions create pollution pressures on over 27000 Natura 2000 sites, wider ecosystems not only in Europe but across the planet. So, unless specific effort is allocated to redress this imbalance of representing economic costs relative to health and environmental burdens, we can expect a data bias, and hence the results will not reflect our complex reality. Currently, the process does not fully live up to its promise of comprehensive evidence-based policy-making and insufficient effort is spent discussing what results cover, what has been excluded but is pertinent to the question being asked, what the expected impacts of this exclusions is, and hence how the results should be interpreted. The conclusions and the meaning may change with the wider contextualization of what is known and included in the assessment, known but unassessed, and (currently) unknown but of potential importance.

6 Future proof?

The Communication committed to: “Integrating strategic foresight into policymaking will see to it that existing and new EU legislation is fit for the future”.¹⁸ This is a positive commitment. The open question, of

¹³ European Commission, 2021a, p.1.

¹⁴ European Commission, 2021a, p.16.

¹⁵ European Commission, 2021f.

¹⁶ European Commission, 2021g.

¹⁷ A search of the Better Regulation Communication shows no recommendation of use of cost of policy inaction studies. Environment Ministers, as early as 2004, “drew attention to the need for more analysis of the ‘costs of inaction’ (COI) on key environmental challenges”, OECD, 2004.

¹⁸ European Commission, 2021a, p. 2.

course, is in which way is it fit for the future? If it were to suggest that regulation be fit for future generations and embrace inter-generational justice, this would be highly welcome. There is, however, no commitment to next generations, though “fit-for-future” is mentioned several times, notably in the contact of the Fit for Future Platform, that receives substantial space in the Communication – Section 5.2 is focused on this.¹⁹ The platform, however, aims “*to help establish where legislation is no longer fit for purpose, imposes unnecessary burdens, requires further-going intervention to attain the envisaged objectives or can be simplified.*”²⁰ The focus is again on burden reduction and simplification – with a focus on burdens to business and administrations.

The commitment to reducing burdens on individuals has not been restated, and there is no mention of burdens on nature.

As regards future generations, care should be taken in the choice of “discount rates” in impact assessments and wider governance processes. To illustrate this point – analysis of socio-economic costs and benefits by the European Chemicals Agency (ECHA) in their deliberations on authorisation of harmful chemicals have been known to set analysis timeframes to three decades, which, when combined with real discount rates of 4%²¹, can lead to the under-representation of health costs to existing and future generations. The practice of using constant significant discount rates can discount the future, giving a much lesser voice to future generations’ needs to be upgraded to ensure due voice is given. Without this voice, made possible by using a range of different, including non-linear discount rates and longer timescales, assessments will have an analysis bias and hence not be coherent with good regulation, and in cases likely to be simply incorrect, with due implications.

In the Fit for Future Platform itself, the ‘burdens & simplification’ focus is clear: “*The Fit for Future Platform is a high-level expert group that will help the Commission in its efforts to simplify EU laws and to reduce related unnecessary costs.*”²² It required repeated requests to confirm explicitly that the aim is to not encourage deregulation. While it was confirmed that the platform aims to be compatible with the EGD and the ‘Do No Significant Harm’ principle, the opportunity was missed - in the Communication - to argue that simplifying regulation (where simple leads to more effective legislation) and reducing ‘unnecessary’ burdens (i.e. reducing costs while achieving objectives), not only helps avoid cost, but also allows greater effectiveness, and hence the ability to pursue societal objectives more thoroughly. Had

better regulation been about saving costs and simplifying so that we can do more for society by setting stricter standards and targets, or more far reaching policy mixes of instruments and measures, then much of the concern around better regulation would dissipate. This is, however, not stated in the Better Regulation Communication, nor, so far, practice. Again, it is not too late for this to change as the process is ongoing.

7 A new focus on mega-trends, but which mega-trends?

The Communication also promised more future-proofing and looking at mega-trends – technological change, hyperconnectivity and the significant demographic trends.²³ But there is no mention of the mega trend of climate change associated sea-level rise, flooding, storm risks, ocean acidification or desertification, of biodiversity loss and our fishing down the food web leading to fish stock collapse, of health problems associated to pollution, of increasing fertility problems, IQ reduction and reprotoxic effects. The mega-trends explicitly mentioned are not environmental. If these mega-trends, at the core to the commitment to a European Green Deal, are not recognised in the Better Regulation Communication and process, what does that say about whether the Better regulation will be EGD-compatible?

8 Transparency

There is a commitment to more comprehensive assessments and more transparency²⁴ – which, in principle, is welcome, as is the commitment to easier public access to the evidence base. The engagement in consultations and efforts to engage stakeholder inputs is also positive as is historical progress with public consultations.²⁵ Unfortunately, there is no stated commitment to improve the transparency of decision-making as regards some key decision-making processes in Europe that remain opaque, with no insights possible on how countries vote (e.g. on harmful chemical market authorisations and restrictions that take place regularly throughout the year either allowing or restricting the use of the most harmful chemicals in Europe).

It is essential for public trust in, and accountability of, European and national institutions that transparency is strengthened systematically. Voters need to know what their ministers vote for – as is already the case in the European Parliament where votes are published, and many debates and votes are live-streamed and assessable to the public. Democracy and institutional legitimacy as strengthened by transparency.

¹⁹ European Commission, 2021a, pp. 12-13.

²⁰ European Commission, 2021a, p. 12.

²¹ ECHA, 2008, p. 102.

²² European Commission, 2021d.

²³ European Commission, 2021a, p.14.

²⁴ European Commission, 2021a, p.7.

²⁵ European Commission, 2019b.

9 Stakeholder engagement

The Communication explicitly recognises that “*active participation of stakeholders, including citizens, is essential – especially in times of uncertainty*”, and that to “*engage individuals, businesses and civil society, we [the European Commission] will raise awareness of our public consultations and make it easier to navigate and participate in them*”.²⁶

However, it is revealing that the first mention of stakeholders focuses on ‘red tape’ removal: “*The Commission will [...] Invite Member States, regions, and key stakeholders to help remove obstacles and red tape*”.²⁷ This is not the first priority for stakeholder engagement – deciding on our common future is.

Furthermore, there is no mention of youth in the text, and the only mention of next generations is: “*The recovery from the current crisis will see paradigm shifts in policymaking and investments on an unprecedented scale that will shape the world for the next generation*.²⁸”

It is essential that the youth perspective is better taken into account in Better Regulation processes so that the voices of the next generation(s) are heard and heeded. They deserve a fair future – with a viable climate to live in, rights to clean air, water and access to nature, with healthy, functioning, resilient ecosystems providing a life support system, and not a degraded planet. This complements the wider need to secure civil society space to help represent societal vision for the future of Europe and the future we need, and support the legitimacy of decision-making processes and the attractiveness and health of our democracies.

As regards the “*recovery*” above, it is understood that this refers to the Covid-19 crisis. There is also a need for a paradigm shift in policy-making and investments for the climate, biodiversity and pollution-health crises.

10 Misguiding Framing

In addition to the term ‘burden’, used forty-nine times in the Better Regulation Communication, the term ‘red tape’ is also used pejoratively to argue against laws and protections.²⁹ It is another unfortunate framing ‘success’ for the deregulation lobby, misrepresenting the intention of legislation, which should be there as a means to address societal challenges – a ‘protection’ rather than ‘burden’.

Similarly, the term ‘gold plating’³⁰ – an idiom to communicate perceptions of excessive burdens from excessive ambition – is used in the Communication:

“*the Commission highlighted that ‘gold plating’ often translates into additional regulatory or administrative burden for consumers and businesses*”.³¹ A lot of European legislation is set at a minimum common level with flexibility for Member States to promote stronger measures to ensure a clean and healthy environment in their countries – with this flexibility given to Member State to sign up to legislation that may otherwise lead to weakening their own domestic protections. Those countries doing more for their society are not ‘gold plating’, understood to mean excessive and unnecessary. They are doing their job of maintaining their level of social protections and/or advancing them for their citizens. It is ironic how arguments for ‘flexibility’ at one stage in the policy development process, become ‘gold plating’ later, and how easy it is to forget the intention behind the offer of flexibility. Minimum standards are a foundation, a floor, and should not be transformed into a ‘ceiling’ through arguments that anything above the minimum is ‘gold plating’.

These terms – ‘burdens’, ‘red tape’, and ‘gold plating’ – often intentionally misguide and distract from what is needed, namely responsibility, protection, and ambition. While there may, of course, be cases where simplification can be better, that legislation can hinder agency of companies and delay investment, and measures can, on occasion, be too demanding and costly, these issues are very often avoided in the existing decision-making processes and are certainly not a systemic problem. Past assessments have found that ‘simple is not always better’³². Here it has been argued that much of what is presented as ‘burdens’ are really ‘responsibilities’, and that ‘red-tape’ and ‘gold-plating’ are idioms, instrumentalised for the objectives of deregulation or regulatory chill³³, and not for progressive regulation truly fit for the future.

It is also unfortunate that the Communication on occasions frames people as “consumers”³⁴. People are much more than “consumers” and their interests are much broader than what they can “consume”.

11 More comprehensive and transparent impact assessments³⁵

Regarding IAs, there is an impressive supporting toolkit³⁶ and there is progress in the integration of SDGs and of fundamental rights. However, there remains the permanent challenge of data bias (as mentioned above) as well as limits to assessment methods and what is in the scope of assessment that can lead to method bias as well as scope bias.

²⁶ European Commission, 2021a, p. 2.

²⁷ European Commission, 2021a, p. 1.

²⁸ European Commission, 2021a, pp. 15.

²⁹ See Tew, 2019, in Brexit context, and Vidal, 2022, on Red-tape.

³⁰ For use of the idiom in Better Regulation context to argue for deregulation, see also European Commission, 2016.

³¹ European Commission, 2021a, p. 20.

³² IEEP, 2004.

³³ NEF and EEB, 2021.

³⁴ European Commission, 2021a, p. 20.

³⁵ European Commission, 2021a, p. 14.

A number of important issues are absent from the Communication and often not factored into impact assessments, including:

- feedback loops – e.g. climate change leading to methane emissions from thawed permafrost that in turn contributes reinforcing global warming; to acidification of oceans leading to pressures on ocean food webs);
- non-linear impacts – e.g. where impacts rise exponentially with pressures;
- tipping points – e.g. where agriculture land becomes unproductive when sea-level risk leads to soil salination, or where coastal areas become ‘dead zones’ when eutrophication events absorb all oxygen from the water; and
- compounding pressures, where multiple pressures together create a heightened risk – e.g. as seen by the ‘cocktail effect’ of chemicals on human and animal health, on bee resilience to multiple exposure of threats, and indeed human immune system ability to defend itself from Covid, when also under pollution and chemical stress.

Trade-offs between environmental benefits and impacts can, in principle, be addressed in good legislation (either within a law or package of laws). However, this requires asking the right questions, due assessment and political will. Earlier biofuels policies created major trade-offs through impacts on biodiversity, as illustrated by cases where rainforests were converted to fuel-crops³⁷. Without due consideration, biomass policies could create unacceptable trade-offs with air quality (from biomass burning), and may, if sustainability criteria are not sufficient, extract too much biomass from the ecosystem, eroding its ability to function, weaken its resilience, and reduce the flow of ecosystem services³⁸. Biomass use for energy production can also create opportunity costs where there are competing needs for wood for furniture, housing, chemical feedstocks. Similarly, with the projected growth in renewables, care will be needed in the siting of wind turbines in protected areas on land and sea to avoid conflicts for biodiversity concerns. This underlines the importance of impact assessments on the one hand and zoning tools, environmental impact assessments, strategic environmental assessment and permitting processes on the other. There should also be clear requirements for these in the legislation. Furthermore, trade-offs can be avoided with good planning, management and implementation of, and respect for, EU laws.

If the above issues are not better factored into IAs, we can only expect a methodologies bias in future

assessments – and these biases can be expected to systematically underestimate the benefits of policy action. As IAs are about the calculus of comparing costs with benefits, decisions are likely to lead towards low ambition, lower than what is needed to address the challenges facing society. Furthermore, many of the above are difficult to monetise, so all decision-makers looking at the final IAs should avoid focusing narrowly on the economic costs and benefits. This is only a fraction of the picture. They should take the time to understand the full implications of a proposed decision.

There are many mentions of the science base in the Communication – which is good and offers some hope. The question, however, is whether sufficient resources will be allocated to ensure that the scientific evidence of the benefits of action on climate, on biodiversity, the environmental, health and wellbeing are fully assessed, understood and integrated into the decision calculus. The word ‘proportionality’ is mentioned, usually in the context of ‘proportional laws’. The word should also be applied to the assessments and ensure there is sufficient funding to analyse solutions needed for the challenges facing humankind.

12 Broadening assessment to the Council and EP

The Communication “urge[s] the two institutions to document the effect of their amendments in terms of anticipated impacts”.³⁹ Here the Communication asks that EP and Council amendments look into the cost and benefits of their amendments. This is good at the level of principle in that amendments should be thought through from the perspective of positive and negative impacts. But at a practical level this risks tying the hands of the EP and Council and hence slowing legislative progress. This could in practice lead to ‘regulatory cooling’, and to delays in decision-making (as already been seen with many cases of environmental legislation submitted to the EU’s regulatory scrutiny board). Analysis with strict conditions and high ambitions (and a strong gate-keeper) can delay progress, which can be problematic when delaying legislative solutions leads to further, avoidable health and environmental impacts. The solution is not to skip or rush analysis, but to allocate due resources to enable timely decisions and to ensure transparent presentation of the implications of decisions – will it lead to legislation being better able to address the societal challenges or not? This applies to law-making as well as implementation decisions, such as permit procedures, which can range from being too short to too long, depending on the

³⁷ See European Parliament, 2015, and T&E, 2021. On trade-offs see also Camia et al., 2021 that explores trade-offs on woody biomass.

³⁸ Camia et al., 2021.

³⁹ European Commission, 2021a, p. 2.

implications of the formal and practical timeframes and effectiveness of deliberative processes.

The fact that in the public 2021 Better Regulation conference⁴⁰, the request was repeatedly made to focus on the cost-to-business implications of European Parliament and Council amendments, rather than whether the objectives of the legislation would be strengthened or weakened, underlines that the social and environmental benefits of legislation is often given insufficient attention and that there is a prime focus on economic costs. Where an amendment will lead to a weaker environmental or health or climate impact, then there will be an increased burden on people and planet. This should be made clear and transparent. Usually that does not need a complex analysis.

13 Summary

Better Regulation under the Ursula von der Leyen Commission is arguably somewhat better than under the Juncker Commission – particularly through the integration of SDGs, a commitment to foresight, and verbal statements committing to the do no significant harm principle and compliance with the EGD objectives. However, it is difficult to argue that it is not a continuation of the burden reduction and simplification mantra of its origins and manifestation under the last Commission. The European Green Deal was promised to be the ground-breaking transformative agenda, but the Better Regulation agenda risks being a brake, limiting the EGD's transformative potential.

The Better Regulation Communication underlines the primacy of focus on avoiding business and administrative burdens of EU laws. Little written mention is made of the objectives of the European Green Deal and addressing societal needs to tackle climate change, promote zero pollution to reduce health risks and burden on the planet, or biodiversity loss, which erodes our life-support system.

While it rightfully integrates the SDGs and puts an emphasis on scientific evidence, foresight, and transparency, and does talk of benefits of action, overall the Communication is worrying. It talks of administrative and business burdens but fails to talk of responsibility to avoid burdening citizen health, the planet and the resilience of our ecosystems that form our life insurance plan. The Communication is therefore a missed opportunity to commit to a positive transformative agenda with a better focus on regulation towards sustainability.

Unfortunately, the text risks slowing legislative progress towards addressing the multiple existential crises facing humanity of climate, biodiversity destruction and health impact from industrial

chemicals and wider toxic pollution. This and future generations deserve more from better regulation. In summary, the Better Regulation Communication can only be seen as trying to put a partial freeze on a positive transformative legislative agenda that people and the planet need. It feels like there are two forces in the European Commission – those that recognise and embrace transformative action, and those that are pulling the brakes out of fear of the costs to existing business of 'going too fast'.

Ironically, even industry that has short term local wins by slowing regulatory progress, loses over time – through the loss and degradation of resources, price volatility, impact from climate change, and by missing the opportunity to innovate towards a sustainable future. Regulatory standards drive green innovation. The concern about short term 'burdens' that limit responsibilities, also mean that tomorrow's industry – the truly sustainable economy – will be delayed by supporting the incumbents. It is not in industry's long-term interest to promote deregulation or regulatory cooling, as an unsustainable future is not a viable option. Other countries realise this – as seen by leadership on electric buses in China and electric cars in the USA. Businesses who can and should recognise which side of history they wish to be on – i.e. those wishing to be front runners in the transition towards a sustainable one-planet economy – should argue for better regulation based on the sustainability first principle.

14 The Way forward

The Communication states that "*[t]he European Green Deal committed the Commission to improve the way in which better regulation addresses and supports sustainability*".⁴¹ The way forward is therefore open to positive change, if those responsible for better regulation listen to the evidence and arguments. So what is needed?

First, one needs to remember the point of regulation – to address challenges to humankind, that is effective, efficient and fair and proportionate, that is participatory and transparent, that is duly evidence based and reflecting the complexity of reality, the multiplicity of stakeholders affected, and is future-oriented. We need regulation that supports people's rights and inter-generational justice and gives them the future they need. All regulation can and should of course also be effective in meeting its objective(s), be efficient, timely, just, practicable and enforceable.

The 'timeliness' issue is critical, given how little time humanity has to address the multiple climate, environment and biodiversity crises. Often the excuse is made that 'we do not have sufficient information', but when it comes to the already well-known crises,

⁴⁰ European Commission, 2021f.

⁴¹ European Commission, 2021a, p. 16.

surely we already have enough information on the unacceptable implications of policy inaction. The precautionary principle is also valuable here – all responsible decision-makers, whether in government or in the private sector, should understand risks and take due precautionary measures. This is just good decision-making.

Second, it needs a solid evidence base and evaluation toolkit leading to balanced conclusions that reflect the real world. For this we need better integration of the environmental benefits, social implications, rights, and the system interconnection issues that have often been more weakly represented than economic cost. Tools need to be able to measure and represent the complexity, and if there are limitations in data and methods, then an assessment should be made on the likely biases and hence how the results should be seen in context.

The mega-trends should also reflect all key environmental mega-trends – from the climate crisis to biodiversity loss, to pollution and chemicals' impacts on people and ecosystems, to the ever-greater stresses caused by humanity's extractive economic model.

Third, we need continued commitment and strengthening of stakeholder engagement so that all perspectives and realities are represented. There are important needs to strengthen the youth voice – indeed this should be a moral imperative.

Fourth, transparency remains a core principle and must be strengthened where it is currently weak. Many processes remain where it is impossible to see how the decision was taken and there are no publicly available records on Member State votes, for example. Countries should be accountable to their electorate for their decisions. How else can democracy work? In times where non-democratic alternatives are threatening the democratic model, it is essential to strengthen the functioning, attractiveness and legitimacy of democracy.

Fifth, the one-in, one-out principle should be seen as a high-level statement of concern at costs and complexity – as a reminder that laws should be cost-effective and easily implementable. The one-in, one-out approach should not be used as a tool that undermines, intentionally or accidentally, the European Green Deal or compromises progress with the policies we need to address societal challenges and create the future we need. Furthermore, the originally stated objectives included reference to “*relieve people [...] of [...] existing burden[s]*”⁴². Due attention should be given on health and wellbeing burdens to individuals.

Sixth, the Fit-for-Future Platform's remit (and indeed the Better Regulation agenda itself) should be revised

in the future to ensure a broader focus on sustainability, and embrace the ambition for effective, implementable legislation that meets the societal needs – i.e. focus on sustainability first, with cost-effective implementable legislation as a mean to this end.

Seventh, we need each new policy or law to be decided on their own merits and not undermined by an artificial commitment to no net increase in ‘burdens’ to business, doubly so when remembering that most of the ‘burdens’ should be recognised and promoted as ‘responsibilities’. Furthermore, acting on these responsibilities may also be an opportunity for investment in safe products and clean production that should form the basis of business in the future and avoid liability or ‘stranded assets’ from products no longer allowable on the market or installations and infrastructures no longer supplying goods that society wants or needs.

Finally, and essentially, the Better Regulation process should distinguish between what are ‘burdens’ and what are ‘responsibilities’ and take as a core objective of identifying how the body of EU law can be fit-for-future – namely to set rules and create incentives to create the future we need, i.e. a carbon neutral, zero pollution world, with healthy resilient ecosystems, combined with social justice and respect of rights, and a sustainable one-planet economy. The terms ‘red tape’ and ‘gold plating’ similarly should be recognised for what they are and what they misrepresent.

If all the above are done, it should be possible to avoid truly unnecessary costs and administrative burdens while fully embracing necessary responsibility at company and administration level, and address the societal challenges fairly and not leave current and future generations behind. We would then have better regulation and a break with the past ideological instrumentalization of better regulation that has held up progress in the EU, UK and US, and contributed to the multiple crisis facing humanity today.

Finally, at the next opportunity we should change the framing of ‘better regulation’ to ‘responsible regulation’ and encourage a new generation of laws that embrace ‘sustainability first’ and ensure a future the next generation needs. No one can disagree with more ‘responsible regulation’.

Bibliography

- Camia A., Giuntoli, J., Jonsson, R., Robert, N., Cazzaniga, N.E., Jasinevičius, G., Avitabile, V., Grassi, G., Barredo, J.I., Mubareka, S. (2021). The use of woody biomass for energy purposes in the EU, Luxembourg, doi:10.2760/831621,

⁴² von der Leyen, 2019.

- JRC122719. Available [here](#) (last access 8 February 2022).
- European Commission (2016). Gold-plating, 4th MEETING of the High Level Expert Group on Monitoring Simplification for Beneficiaries of ESI Funds. Accessible [here](#) (last access 8 February 2022).
- European Commission (2019a). Communication COM(2019) 640 final: The European Green Deal. Accessible [here](#) (last access 8 February 2022).
- European Commission (2019b). Better regulation: taking stock and sustaining our commitment, COM(2019) 178 final. Accessible [here](#) (last access 8 February 2022).
- European Commission (2021a). Better Regulation Communication. Accessible [here](#) (last access 8 February 2022).
- European Commission (2021b). Commission work programme 2022, COM(2021) 645 final. Accessible [here](#) (last access 8 February 2022).
- European Commission (2021c). Commission work programme 2022, COM(2021) 645 final, Annexes 1-5. Accessible [here](#) (last access 8 February 2022).
- European Commission (2021d). Fit for Future (F4F) Platform website. Accessible [here](#) (last access 8 February 2022).
- European Commission (2021e). Website: Better regulation: guidelines and toolbox. Accessible [here](#) (last access 8 February 2022).
- European Commission (2021f) Website: High-level conference on 'Joining forces for the next generation of Better Regulation' held on 2 December 2021. 2 December 2021. Accessible [here](#) (last access 1 March 2022).
- European Commission (2021g) Speech by Vice-President Šefčovič at the high-level conference on 'Joining forces for the next generation of Better Regulation' held on 2 December 2021. Accessible [here](#) (last access 1 March 2022).
- ECHA, (2008). Guidance on Socio-Economic Analysis – Restrictions. Accessible [here](#) (last access 8 February 2022).
- European Parliament (2015). EU biofuels policy Dealing with indirect land use change, Briefing, January 2015. Accessible [here](#) (last access 8 February 2022).
- IEEP (2004). Simple is better, effective regulation for a more competitive Europe: The 1996 IPPC Directive. Accessible [here](#) (last access 8 February 2022).
- Imogen Tew (2019). Chancellor announces 'Brexit red tape challenge' in FT Advisor, 30 September 2019. Accessible [here](#) (last access 8 February 2022).
- Isabelle Schömann (2021). Making EU regulation better for all, in Social Europe 3rd March 2021. Accessible [here](#) (last access 8 February 2022).
- NEF and EEB (2021). Reprotecting Europe: The European Green Deal vs the war on regulations. Accessible [here](#) (last access 8 February 2022).
- OECD (2004). Costs of Inaction on Environmental Policy Challenges: Summary Report. Accessible [here](#) (last access 8 February 2022).
- T&E (2021). 10 years of EU fuels policy increased EU's reliance on unsustainable biofuels, Briefing July 2021. Accessible [here](#) (Last Access 8 February 2022).
- Vidal (2022). This is what 'cutting red tape' gets you: rivers polluted without consequence. Accessible [here](#) (last access 8 February 2022).
- von der Leyen (2019). Mission letter to Valdis Dombrovskis, Executive Vice-President for An Economy that Works for People of 13 September 2019, accessible [here](#) (last access 8 February 2022).



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**NATUUR
& MILIEU**



elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

Three organisations currently share the organisational work of the network: Öko-Institut, Technische Hochschule Bingen (TH Bingen) and sofia, the Society for Institutional Analysis, located at the Darmstadt University of Applied Sciences. The person of contact is Prof. Dr. Roller at TH Bingen.

elni Review

The elni Review is an English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. elni encourages its members to submit articles to the elni Review (info@elni.org) in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review is published by Öko-Institut, TH Bingen and sofia.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: [elni.org](http://www.elni.org)

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

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