Impact Assessment and the Policy Cycle in the EU

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With the Communication on Smart Regulation issued in October 2010, the European Commission tried to foster a better management of the whole policy cycle. According to that Communication, amending policy proposals must be preceded by an ex-post assessment of the current situation, allowing "closing the policy cycle". This paper tries to answer the question whether the EU Impact Assessments System is fit to steer and close the policy cycle, and what is the relation between ex-ante IA and ex-post evaluation "on the ground" so far. This is done via a macro and micro analysis, based on scorecard approach and three case studies, comparing the EU IA system performance with a theoretical benchmark derived from the EU policy document and process. The paper concludes that the EU Impact Assessment system, as it is currently designed and implemented, is not yet fit to steer and close the policy cycle. To achieve this goal, all the analytical and empirical layers of the policy cycle should be fully dealt with since the ex-ante phase.

I. Introduction

With the Communication on Smart Regulation issued in October 2010,[1] the European Commission tried to foster *ex-post* evaluation of EU legislation, aiming at "closing the policy cycle", that is connecting *ex-ante* and *ex-post* evaluation in a meaningful continuum. This Communication is the latest step of the Smart Regulation strategy, which has been promoted as an overarching goal by the European Commission since 2002. Constantly throughout the years, and through a series of different approaches and communications, Impact Assessment (IA) has been picked as the main tool of this strategy, aimed at achieving better lawmaking and simplification.

Smart Regulation, or, as it was formerly known until 2010, Better Regulation, is an EU overarching regulatory policy which was born in the U.S., and then exported, via the UK, to the EU from 1986 onwards.[2] From a theoretical perspective, Better Regulation is a strategy aimed at managing the lifecycle of law, from lawmaking to enforcement. Such a strategy may pursue four main ambitions:[3]

1) to increase the role of evidence in lawmaking;
2) to improve consultation of affected stakeholders;
3) to increase competitiveness by drafting and implementing better, *i.e.* more efficient, regulation;
4) to increase the legitimacy of the regulatory agency.

As already recalled, the October 2010 Communication[4] focuses on closing the policy cycle. As it can be inferred from the EU lawmaking process and the Communication itself, the "smartly-regulated" policy cycle is composed of the following elements:

1) stock-taking exercise, that is *ex-post* evaluation of the existing legislative framework;
2) public consultation;
3) *ex-ante* IA;
4) draft of the proposal;

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1 Communication from the Commission: "Smart Regulation in the European Union". COM(2010)543

2 Andrea Renda, *Impact Assessment in the EU – The State of the Art, The Art of the State* (Brussels: Centre for European Policy Studies, 2006)

3 Claudio Radaelli and Anne Meuwese, "Better Regulation in Europe: Between Public Management and Regulatory Reform", 87 *Public Administration* 2009, pp. 639 *et sqq*.

4 Communication on Smart Regulation, *supra* note 1.

https://doi.org/10.1017/S1867299X00002476 Published online by Cambridge University Press

5) legislative procedure;
6) transposition and implementation;[5]
7) enforcement.[6]

Better Regulation strategies are implemented via several tools, such as IA, simplification programmes, methodologies for choosing alternative regulatory methods, public consultation, risk-based enforcement, *ex-post* evaluation, and organisational adjustments.[7] Among these tools, the European Commission picked the IA as the most important, also as a meta-tool to promote other instruments.

The scope of the EU IA system is very broad when compared to that of *e.g.* the US or EU Member States.[8] According to the European Commission Guidelines, the following acts must undergo IA:

> *all legislative proposals of the Commission's Legislative and Work Programme (CLWP)* [...] *all non-CLWP legislative proposals which have clearly identifiable economic, social and environmental impacts* [...] *and* [...] *non-legislative initiatives* [...] *which define future policies*.[9]

IAs are carried out by the lead Directorate General (DG), which is responsible for the act. Therein, the policy unit competent for the relevant policy area drafts the IA. Several DGs, especially those producing a large number of IAs, created a unit responsible for the supervision of all IAs, and issued more detailed internal guidelines.[10] The Secretariat-General of the European Commission (SG) also provides support for IA drafting. From the start, an Impact Assessment Steering Group must be set up, where all the DGs with a stake in the proposal have a seat, including the SG. The steering group is the forum where other Commission services can monitor and influence the IA.

Once an IA is finalised, it is submitted to the Impact Assessment Board (IAB), an oversight body established in 2007 pertaining to the SG.[11] The IAB may recommend minor or major changes. If major changes are recommended, the draft IA must be resubmitted to the IAB. If the draft IA turns out to be still unsatisfactory, the IAB issues a second negative opinion. In any case, the College of Commissioners can decide to adopt the IA and the related act, although "in principle a positive opinion from the IAB is needed before a proposal can be put forward for Commission decision."[12]

EU IAs must appraise three kinds of impacts: economic, social, and environmental. This obligation is mostly fulfilled, although the economic impacts are analysed more extensively.[13] In the whole set of IAs carried out from 2003 to 2009, economic impacts were assessed in 90% of the cases; social impacts in 59% of the cases; and environmental impacts in 85% of the cases.[14] Besides, EU IAs must be carried out according to the principle of proportionate analysis: the depth and scope of the analysis must be functional to the significance of the impacts, the political relevance of the act, and the stage of political development.[15]

According to the European Commission IA Guidelines,[16] policy options should be evaluated based on three criteria: effectiveness, efficiency, and coherence. No hierarchy is provided among these three criteria. Quantitative analysis, if provided, should underpin the choice of the policy option, but there is no obligation to select the preferred option based on quantified costs and benefits. On paper, quantification and monetisation is required, except in the

5 Transposition refers to the incorporation of a EU norm in the national/local *acquis*. Implementation refers to the application of the EU norm, or the national/local norm transposing it, by national/local public administrations.

6 Enforcement refers to prosecution of violations of EU norms, or national/local transposition norms, both *vis-à-vis* the Member States and third parties.

7 Mandelkern Group on Better Regulation, "Final report", 13th November 2001, available on the Internet at: <http://ec.europa.eu/governance/better_regulation/documents/mandelkern_report.pdf> (last accessed on 29 October 2012); Organisation for Economic Co-operation and Development, *Regulatory Policy in OECD Countries: from Intervention to Regulatory Governance*, (Paris: OECD Publishing, 2002).

8 European Court of Auditors (ECA), Impact Assessment in the EU Institutions: Do They Support Decision-Making?, 2010, at p. 9.

9 European Commission Impact Assessment Guidelines, SEC(2009)92, at p.6. The Commission Legislative Working Programme (CLWP) is a document providing an overview of the most important legislative initiatives which the European Commission plans to put forward in the following year(s). In practice, the CLWP is not a compulsory reference anymore. The decision whether non-CLWP proposals should undergo an IA is taken upon agreement between the SG and the competent DG.

10 The Evaluation Partnership, "Evaluation of the Commission's Impact Assessment System Final Report", 2007, available on the Internet at <http://ec.europa.eu/governance/impact/key_docs/docs/tep_eias_final_report_executive_summary_en.pdf> (last accessed on 29 October 2012), at p. 60.

11 Commission Staff Working Paper, Impact Assessment Board Report for 2010, SEC(2011)126

12 Communication on Smart Regulation, *supra* note 1, at p. 6.

13 ECA, Impact Assessment in the EU Institutions, *supra* note 8, at p. 36.

14 Source: CEPS EU IA Database. *Infra* note 19.

15 Communication on Smart Regulation, *supra* note 1, at pp. 13–17.

16 EU IA Guidelines, *supra* note 9, at pp. 45–49.

https://doi.org/10.1017/S1867299X00002476 Published online by Cambridge University Press

cases in which it is not feasible.[17] In practice, the IA Guidelines and the IAB allow European Commission officers to choose between a qualitative and quantitative analysis. The reason why this leeway is offered is that IAs concern primary legislation rather than technical secondary legislation and, as a consequence, full monetisation and quantification is less often practicable.[18]

This paper tries to answer the question whether the EU IA system is fit to steer and close the policy cycle. First, Section II frames the discussion about IA as a tool to govern political agency relationships and describes the agency relationships in the EU lawmaking process. Section III describes a theoretical construction of the EU policy cycle, and then the EU IA system is empirically compared against this theoretical benchmark in Section IV by:

1) analysing data from a database of EU IAs created by the Centre of European Policy Studies, where all EU IAs from 2003 to 2009 are scored according to 202 items;[19]
2) assessing three case studies in which IAs have been followed by an *ex-post* evaluation, to understand to what extent *ex-ante* and *ex-post* analyses are and can be consistent, and how the design of IAs could be made consistent with the other phases of the policy cycle.

Finally, section V briefly concludes.

II. Impact assessment in a principal-agent perspective

1. A theoretical framework

In this paper IA is constructed as an institution[20] which aims at shaping behaviours of political actors, by modifying their incentives, and allowing governance of relations among these actors. Therefore, IA is a meta-norm imposing constraints on political actors. In this construction, based on approaches which can be found in both the law & economics and political science literature,[21] analysing principal-agent relationships and transaction costs stemming from these relationships is key to understand the role of IA. IA can be seen as a mechanism to govern agency relationships among political actors, structuring political relationships, and reducing the cost of negotiation and monitoring.

IA, or a similar institution, is usually mandated when the power to draft primary legislation (as in the EU) or to enact secondary legislation (as in the US) is delegated to a third party. In this relationship, the principal is the legislator, whilst the European Commission or the Federal Agencies are the drafting agents. The choice to delegate law drafting can be analysed within the framework of transaction cost analysis, as a "make-or-buy" decision.[22] Rational political actors may decide to delegate if, from their perspective, the benefits of delegation are higher than costs. In this context, costs mainly consist of:

1) monitoring costs;
2) the risk that the delegated body pursues different goals;
3) the impossibility to reward constituencies or stakeholders via lawmaking.[23]

Benefits mainly consist of:

1) the possibility to use specialised assets, *i.e.* the knowledge of the drafting body;

17 IA Guidelines, *supra* note 9, at p. 48.

18 Claudio Radaelli, Lorenzo Allio, Andrea Renda and Lorna Schrefler, "How to learn from the international experience: Impact Assessment in the Netherlands. Final Report", 2010, available on the Internet at <http://www.eerstekamer.nl/behandeling/20100527/how_to_learn_from_the/f=/vifklgll6miz.pdf> (last accessed on 29 October 2012), at pp. 93–95.

19 The database was created by the Centre for European Policy Studies, under the supervision of Dr. Andrea Renda. The database is currently unpublished, on file with the author. Data are partly reported in Andrea Renda, *Law and Economics in the RIA World*, (Cambridge: Intersentia, 2011). The methodology is similar to that described in Caroline Cecot, Robert Hahn, Andrea Renda and Lorna Schrefler, "An evaluation of the quality of impact assessment in the European Union with lessons for the US and the EU", 2 *Regulatory Governance* (2008), pp. 405 *et sqq*.

20 The term "institution" refers to North's definition of institutions as "humanly devised constraints". Cf. Douglas North, *Institutions, institutional change and economic performance*, (Cambridge: Cambridge University Press, 1990).

21 *I.a.*, I refer to Adler and Posner, Radaelli, Renda. Cf. Matthew Adler and Eric Posner, "Rethinking Cost-Benefit Analysis", 109 *The Yale Law Journal* (1999), pp. 165 *et sqq.*; Matthew Adler and Eric Posner, "Implementing Cost-Benefit Analysis when Preferences are Distorted", 29 *Journal of Legal Studies* (2000), pp. 1105 *et sqq.*; Radaelli *et al.* Impact Assessment in the Netherlands, *supra* note 18; Renda, *Law and Economics in the RIA World*, *supra* note 19. This approach builds also upon the "transaction- cost politics", cf. the seminal contribution of Williamson and Dixit, such as: Oliver Williamson, "Public and Private Bureaucracies: A Transaction Cost Economics Perspective", 15 *Journal of Law and Economics* (1999), pp. 306 *et sqq.;* and Avinash Dixit, *The Making of Economic Policy*, (Cambridge, MIT Press, 1996).

22 David Epstein and Sharyn O'Halloran, *Delegating Powers. A transaction cost politics approach to policy making under separate power*, (Cambridge: Cambridge University Press, 1999).

23 This is not a cost for the society, but only for the delegating body.

https://doi.org/10.1017/S1867299X00002476 Published online by Cambridge University Press

2) political relief, that is the opportunity to eventually switch responsibility, accountability, and therefore any political stigma.

In this view, IA is an institution aimed at reducing transaction costs and at governing the dialogue between the principal(s), that is the elected legislator, and the drafting agent, that is the non-elected agency. It reduces information asymmetry between the principal and the agent by disclosing information.[24] IA also reduces the costs of monitoring by making goals and expected outcomes of regulation more evident. Eventually, it enhances the coherence of the political system, ensuring both that delegated norms pursue the goals they are intended to pursue, and that single norms are coherent with the goals set by the main political actors.

Majone also adopts a principal-agent approach, but reaches a somehow different conclusion. According to him, the principal-agent model is not fit to explain the choice to delegate the drafting of primary legislation to the European Commission as the agent. He considers delegation in this context as a tool to enhance the credibility of Member States' commitment towards EU integration, rather than to reduce transaction costs. The European Commission would then be the fiduciary rather than the agent of the Member States.[25] This can be held true when it comes to the power of agenda-setting, which is exclusive "property" of the Commission. Nevertheless, when it comes to lawmaking, Member States retain, through the Council of the European Union, the last say on the legislative text which the Commission has been delegated to draft; therefore the principal-agent relationship can be considered as best suited to describe this delegation mechanism.

Among the possible approaches, throughout this paper, IA is considered a coherence-enhancing tool, rather than as pro-efficiency.[26] Hereinafter, coherence has a double meaning: internal coherence, that is coherence between each policy and its objective; and external coherence, that is coherence between each policy and the wider political context. In these meanings, coherence is a wider concept than efficiency. If cost-minimisation, *i.e* efficiency, is one of the objectives of the political system, IA can enhance its achievement. Nevertheless, a political system may use IA to coherently pursue any chosen objective.

Mainstream analysis considers IA as a tool for efficient policy-making, which increases the net welfare of the community.[27] Nevertheless, this is more theory than reality, especially in the EU. The European Commission acknowledges that IAs "increased transparency and accountability, and promoted evidence-based policy making", and "improved the quality of legislation", with no reference to efficiency or the maximisation of any welfare criterion.[28] Indeed, Jabko argues that the EU regulatory state is not based on the pursuit of any efficiency criterion, but rather on practical coherence.[29] In any case, even if efficiency were the ultimate goal of an IA system, any effect would hardly be measurable.[30] As Coglianese points out, any empirical analysis would have to compare net benefits of the decision taken within an IA system with an impossible counterfactual, which would be a decision taken without the help of economic analysis.[31] Empirical research in this respect is very underdeveloped.[32]

In conclusion, the importance of IA does not reside in ensuring that regulation maximises net benefits, or any other measure of efficiency. IA benefits stem from the governance of complex relationships among political actors and stakeholders, triggering political coherence. Although disagreement can arise on this construction of the IA system, this argument can be at least accepted *a fortiori*: even if the IA sys-

24 Cf Adler and Posner, *supra* note 21.

25 Giandomenico Majone, "Nonmajoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach", 157 *Journal of Institutions and Theoretical Economics* 2001, pp. 57 *et sqq.;* "Two Logics of Delegation: Agency and Fiduciary Relations in EU Governance", 2 *European Union Politics* 2001, pp. 103 *et sqq.*

26 Renda, *Law and Economics in the RIA World*, *supra* note 19; Thomas McGarity, "A Cost-Benefit State", 50 *Administrative Law Review* 1998, pp. 7 *et sqq.*

27 *I.a.* Kenneth Arrow *et al.*, "Is there a role for Cost-Benefit Analysis in Environmental, Health and Safety Regulation", 272 *Science* 1996, pp. 221 *et sqq.*

28 Communication on Smart Regulation, *supra* note 1, at pp. 2–3.

29 Nicolas Jabko, "The political foundations of the European regulatory state", in Jacint Jordana and David Levi-Faur (eds) *The Politics of Regulation* (Cheltenham: Edward Elgar Publishing, 2004).

30 An attempt to measure the effect of regulation, supposedly enhanced through RIA, on economic performarnce has been attempted via OECD Product Market Regulation indicators. Cf. Anita Wölfl, Isabelle Wanner, Tomasz Kozluk and Giuseppe Nicoletti "Ten Years of Product Market Reform in OECD Countries – Insights From a Revised PMR Indicator" *OECD Economics Department Working Papers No.695* 2009.

31 Cary Coglianese, "Empirical analysis and administrative law", 4 *University of Illinois Law Review* 2002, pp. 1111 *et sqq.*

32 Claudio Radaelli and Fabrizio De Francesco, "Regulatory Impact Assessment, Political Control and the Regulatory State", Paper delivered to the 4th General Conference of the European Consortium for Political Research, Pisa, 6 September 2007; Robert Hahn and PhilipTetlock, "Has Economic Analysis Improved Regulatory Decisions?", 22 *Journal of Economic Perspective* 2008, pp. 67 *et sqq.*

https://doi.org/10.1017/S1867299X00002476 Published online by Cambridge University Press

tem failed to increase efficiency, it would nevertheless promote policy coherence.

2. Agency relationships in the EU lawmaking process

In the EU, IAs are carried out by the European Commission on both non-binding acts and binding proposals. The European Commission is the only institution enjoying the right of initiative in the EU system in all but marginal cases.

In the legislative process, the European Commission can be considered the kernel of a web of agency relationships, both external and internal.[33] Based on the structure of the EU institutional architecture, of the European Commission, and on the functioning of the lawmaking process, five agency relationships have been identified, and are described below. They are categorized as either internal or external. As we will see below, the European Commission uses the IA as a tool to govern these agency relationships, both the external and the internal ones.

The two external agency relationships are:

1. **Agency relationship 1.** The European Commission is the agent of the Member States, which originally delegated some legislative powers to it. The Member States subsequently act as legislators, being part to the Council of the European Union. The European Commission is also the agent of the European Parliament in putting forward proposals.
2. **Agency relationship 2.** The European Commission is the agent of EU stakeholders. Although it faces no political accountability *strictu sensu*, since it is not an elected body, it is responsive to stakeholders' claims, both directly and through the mediation of national political bodies.

Legislative proposals are drafted by the competent policy units within each DG. They are subsequently endorsed by the DG at the top administrative and political level, *i.e.* by the Commissioner. Finally, legislative proposals are collectively approved by the College of Commissioners. In this context, two internal agency relationships arise:

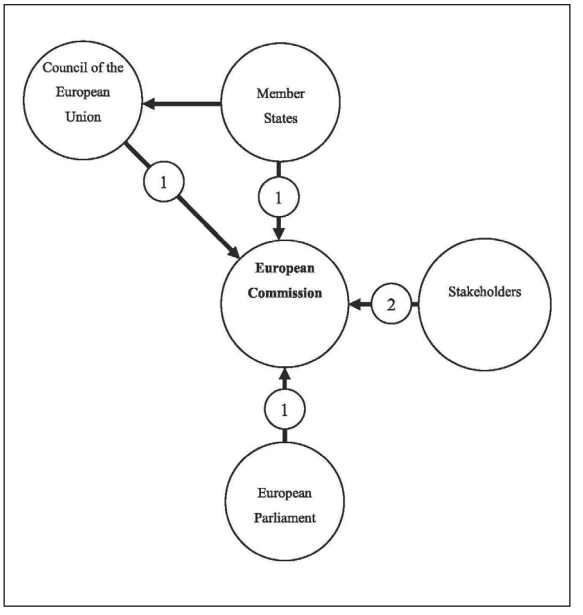


Figure 1 – The External Agency Relationships

3. **Agency relationship 3.** Policy officers are agents of the DG, *i.e.* of the apex of the hierarchy;
4. **Agency relationship 4.** The DGs are agents of the European Commission, whose apex is represented by the President of the Commission, assisted by the Secretariat-General.

Furthermore an agent-agent relationship is relevant in this framework:

5. **Agency relationship 5.** When competences of two or more DGs overlap, DGs use IAs to monitor and steer policy initiatives, by cooperating in the drafting and by participating in the Impact Assessment Steering Group.

As highlighted below in the Introduction, the EU IA system is built around these agency relationships: i) the legislators use the IA to obtain information about the Commission proposals; ii) the stakeholders participate to the IA via the consultation; iii) each DG monitors the policy officers in charge of drafting the proposal and the IA; iv) the President of the European Commission monitors each DG via the Secretariat-General; and v) when competences are shared, DGs monitor each other through the Impact Assessment Steering Group. After having described the theoretical context and the working of the EU IA system, next sections will be devoted to define the EU policy cycle and empirically assess whether the IA system is fit to steer and close it, according to the *desiderata* of the European Commission.

33 Claudio Radaelli and Anne Meuwese, "Hard Questions, Hard Solutions: proceduralisation through Impact Assessment in the EU", 33 *West European Politics* 2010, pp. 136 *et sqq.*; Radaelli *et al.* Impact Assessment in the Netherlands, *supra* note 21.

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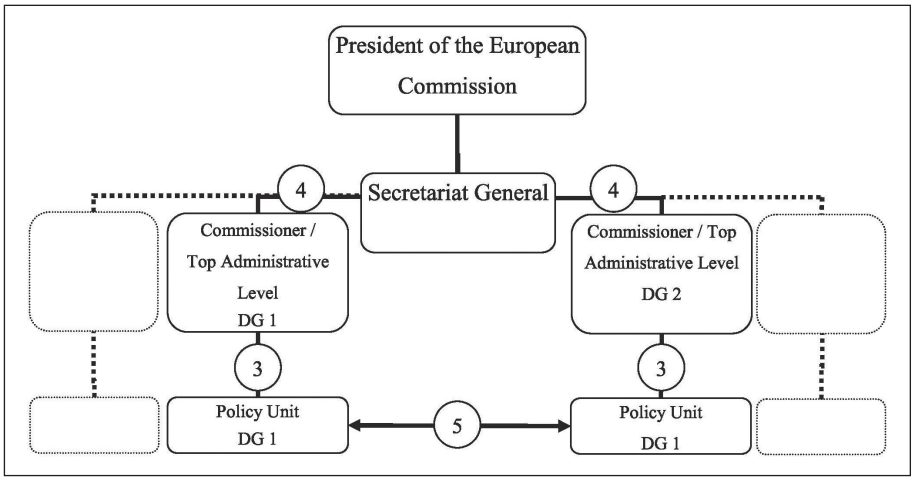


Figure 2 – The Internal Agency Relationships

main an empty box without the mechanisms to transform it into reality and to proceed with its verification. These mechanisms are:

4) the institutional setting for transposition, implementation and enforcement;
5) the provisions for monitoring and evaluation.

III. The relationship between IA and the policy cycle at the EU level

This paper aims at assessing whether the IA system is designed to steer and close the policy cycle. To answer this question, a construction of the EU "smartly-regulated" policy cycle is provided, and then the performance of the EU IA system is assessed at macro and micro level.

This construction of the policy cycle consists of two layers: the analytical and the empirical. The former answers the question "*what* is the policy expected to deliver?". The latter answers the question "*how* is the policy expected to deliver", focusing on the mechanisms and information necessary to ensure and verify its delivery. These layers constitute the underpinning structure on which the factual steps of the policy cycle, as described in the introduction, take place.

The analytical layer consists of the logic underpinning the policy cycle, or, in other words, a "software" whose instructions indicate what a policy is supposed to achieve and how it is embedded in the wider political discourse. This layer of the EU policy cycle includes three analytical objects:

1) the objectives of the policy;
2) the relation between the policy and the overarching political goals;
3) the outcomes of the policy (or, in the *ex-ante* phase, the expected impacts).

The empirical layer is the "hardware" on which the analytical layer can run. Although the latter is the backbone of the policy cycle, any policy would require these mechanisms to be in place. These mechanisms require the availability of information on the *status quo*, the application of the policy, and the outcomes delivered, and therefore are called "empirical". When information is not yet (fully) available, the policymaker defines how data will be made available and collected alongside of these mechanisms.

Availability and accuracy of data is important for the policy cycle for at least three reasons.[34] First, it is one of the main drivers of quality of *ex-ante* and *ex-post* assessment, and of the whole policy cycle management. Secondly, lack of data increases the risk of capture by the most informed party, *i.e.* usually the addressees of the norm. Thirdly, lack of data and of a design of data collection mechanisms from the start of the policy cycle hinders its closing via *ex-post* assessment.

In a well-designed policy cycle, the analytical and empirical layers inform each other. Monitoring and evaluation, although naturally part of the *ex-post* assessment and of the empirical layer, needs to be considered since the *ex-ante* assessment. "The choice of which data to collect and the data collection method are not isolated decisions in the regulatory process, because they influence the whole process"[35]. Information is retrieved and/or collected purposely to measure the outcomes and the achievement of the

34 Scott Jacobs, *Current Trends in Regulatory Impact Analysis: The Challenges of Mainstreaming RIA into Policy-making,* (Washington, DC: Jacobs and Associates, 2006), pp. 31–32; The Evaluation Partnership, "Evaluation of the Commission Impact Assessment System", *supra* note 10, pp. 68–80; European Commission Communication on Smart Regulation, *supra* note 1, at p. 7.

35 Jacobs, Current Trends in RIA, *supra* note 34.

https://doi.org/10.1017/S1867299X00002476 Published online by Cambridge University Press

objectives, and at the same time definition and operationalisation of objectives is made keeping in mind, prospectively, which monitoring and evaluation tools and information are or can be available.

In the next section, each of the elements of the policy cycle will be analysed, providing the empirical assessment of how it has been treated so far in the EU IA system, both at micro and macro level.

IV. EU impact assessment and the policy cycle: An empirical assessment

1. Methodology and case selection

This section analyses the constituting elements of the analytical and empirical layers of the policy cycle and empirically asseses how EU IAs deal with them on two level: macro and micro.

The macro analysis looks at the EU IA system from an aggregate point of view. This analysis is based on data retrieved from the CEPS database.[36] This macro analysis, *i.e.* the analysis of the whole IA production via a scorecard approach, allows for a bird-eye view of the system. It can answer simple questions, that are Yes/No questions, on the whole set of IA production, and in this sense is a unique tool to analyse general trends in EU IAs without having to recur to any case-selection.[37]

The micro analysis aims at providing more specific information on how certain aspects have been dealt with in three case studies, discussing the positive and negative effects of a proper or improper management of the elements of the policy cycle.[38] The choice of case studies for the micro analysis tried to cover different typologies of acts:

1) a decision implementing an expenditure programme: the 7th Framework Programme on R&D, hereinafter "Decision on FP7";[39]
2) a non-binding communication on biodiversity, hereinafter "Communication on biodiversity";[40]
3) a general regulation on the tariffs for mobile roaming services, hereinafter "First" or "Second Roaming Regulation".[41]

Case studies were selected among those acts which underwent both IA and *ex-post* assessment, which are in limited numbers. Indeed, the IA system is relatively "young", as it was launched in 2003. One to two years are needed for approval by the legislators, and monitoring and evaluation can take place only some time after the act has been finalized. Therefore, the focus had to be on the earliest IAs, whose quality can be lower compared to more recent documents. Another limitation is that no IAs on directives can already be part of the sample, since implementation would take about two additional years. This affects the results of the empirical analysis, because it can be reasonably assumed that the management of the policy cycle is more complex for double-layered acts, such as directives.

This empirical analysis is not meant as an evaluation of the EU IA system. Indeed, the focus on closing the policy cycle is posterior to the most recent IA Guidelines. Nevertheless, such an analysis points out which policy cycle aspects are dealt properly in the IA system and which are not; and therefore it highlights where more attention and effort is needed. In this sense, it provides a tentative map of what would help to transform the IA system into a tool to manage and close the whole policy cycle.

2. Objectives

Agreement on goals is a pre-requisite of any transaction among principals and agents.[42] If goals are not clear, any institution aimed at managing princi-

36 See *supra* note 19.

37 Claire Dunlop Claudio Radaelli and Duncan Russell 'What's an Impact Assessment to do? Ideas, Instruments and the Capabilities-Expectations Gap' Paper presented and the ECPR Joint Sessions of Workshop Munster, Germany, 2010.

38 In this section, aspects of case studies have been reported only when relevant to support specific points of the analysis. In a longer version, on file with the author, the whole policy cycle of the case studies was analysed.

39 Decision No 1982/2006/EC of the European Parliament and of the Council concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007–2013), OJ 2006 L412/1.

40 Communication from the Commission: Halting the Loss of Biodiversity by 2010 – and Beyond. Sustaining ecosystem services for human well-being. COM(2006)216.

41 Regulation (EC) No 717/2007 of the European Parliament and of the Council on roaming on public mobile communications networks within the Community, OJ 2007 L171/32; Regulation (EC) No 544/2009 of the European Parliament and of the Council amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services, OJ 2009 L167/12.

42 Paul Milgrom and John Roberts, *Economia, Organizzazione e Management (Economics, Organisation and Management)*, (Bologna: Il Mulino, 1994), at p. 207.

https://doi.org/10.1017/S186729X00002476 Published online by Cambridge University Press

pal-agent relationships, such as IA, cannot fulfil its role.[43] At the same time, Majone notes that coherence among objectives and outcomes, what he calls "accountability by results", "cannot be enforced when the objectives are too vague or too broad". For these reasons, the clear definition of goals is essential for non-majoritarian institutions, such as the European Commission, to act legitimately.[44]

In this construction of the policy cycle objectives are the key aspect of the analytical layer. To go on with the sotfware metaphor, they are like the operating system of the policy cycle. Proper objectives meet the following requirements:[45]

1) are clear;
2) make clear how the outcomes of the norm contribute to the goals (outcome-objective relationship);
3) are embedded in the wider political context (objective-overall goals relationship);
4) are operationalised in a series of sub-targets which are measurable.

A proper definition of objectives also presupposes a hierarchy, what the European Commission defines as "general", "specific", and "operational" objectives.[46] General objectives are linked to Treaty-based goals, such as "integrating the Single Market for e-communications". Specific objectives refer to how the specific policy contributes to certain aspects of a Treaty-based goal, such as "reducing cross-border differences in roaming tariffs". Operational objectives are defined in terms of deliverables of the specific policies, such as "ensuring that roaming tariffs in each Member State are not 10 % higher than the EU average".

Policy objectives are not part of the *ex-ante* assessment in real terms: they are described in the IA, but they are not "assessed" or "compared". They logically precede the IA and they are not the outcome of any economic analysis.[47] They may be influenced by elements endogenous to the policy cycle, such as evidence stemming from an *ex-post* evaluation, or by elements which are exogenous to it, such as, an overarching goal or stakeholders' pressure.

Once the objectives are fixed, the other elements follow, such as the expected outcomes, and the monitoring and evaluation scheme. IAs can be considered the appropriate lawmaking procedure to manage the policy cycle because, in principles, all its elements can be written down in it, as already pointed out *in nuce* by the Mandelkern Group[48] and reaffirmed by the Communication on Smart Regulation.

From the point of view of the macro-analysis, the EU IA system performs quite well in the proper definition of objectives. The definition of objectives is considered a key aspect by the European Commission IA Guidelines and their importance is stressed in several respects.[49] Relevance in the Guidelines corresponds to a good performance in the scorecard. As shown in Figure 3, the data extracted from the CEPS database shows that almost every IA defines some objectives, and the large bulk of IA defines specific objectives. Performance is poorer concerning operational objectives. This could be problematic because operational objectives are usually those that can be better measured; therefore, a lack of their definition in the IA can hinder any subsequent evaluation. Nevertheless, I shall remember that the database includes IAs on both binding and non-binding acts. For the latter, definition of operational objectives is often impossible or inappropriate. Limiting the analysis to binding acts, the CEPS database reports that the share of IAs defining operational objectives in the period 2003–2009 is 52.5 %, almost 9 % higher than in the whole sample, though still insufficient.

43 Anne Meuwese, *Impact Assessment in EU Lawmaking*, (The Hague: Kluwer Law International, 2008), at p. 35.

44 Giadomenico Majone, *Regulating Europe*, (London: Routledge, 1996), at p. 294; Lorna Schrefler, "The Usage of Scientific Knowledge by Independent Regulatory Agencies", 23 *Governance* 2010, pp. 309 *et sqq.*, at p. 310.

45 IA Guidelines, *supra* note 9.

46 *Ibid.* at p. 27.

47 Renda, *Law and Economics in the RIA World*, *supra* note 19, at p. 226.

48 In November 2000, Ministers of Public Administration established a high-level advisory group on better regulation, chaired by Dieudonné Mandelkern, and charged it with producing a report within a year. The Mandelkern Group was made up of representatives of the fifteen Member States. Officials from the Commissions Secretariat-General also attended.

49 IA Guidelines, *supra* note 9, pp. 26–28.

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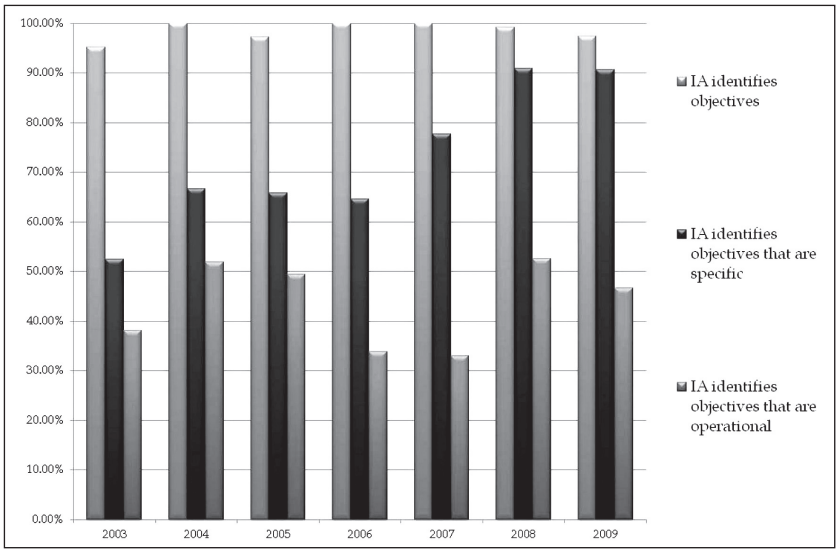


Figure 3 – Macro assessment: Objectives

Shifting to the level of micro-analysis, the case studies selected help shedding some more light. For instance, the IA on the Communication on Biodiversity provides an example of poor definition of objectives. The document fails to provide a clear structure and hierarchy of objectives, and this has been identified *ex-post* as a major driver of its failure.[50] The objectives are defined in very general terms, such as: "to reinforce EU action to halt the loss of biodiversity"; "to accelerate towards the recovery of habitats and natural systems"; and "to optimise the EU contribution towards significantly reducing the rate of biodiversity loss".[51] General objectives are not translated into either specific or operational ones. This hinders the understanding of the relation between the general objectives and the actions included the EU Action Plan for biodiversity, and of the relation between expected outcomes and *ex-ante* objectives. Since objectives are not defined properly, the management of every other phase of the policy cycle becomes very difficult.

3. The relation objectives – Overarching goals

Since, as it is argued in Section II, the main goal of the IA system is to promote coherence, the connection among objectives and overarching political goals becomes *naturaliter* important: "the extent to which individual legislative proposals contribute to *[long-term]* goals should become a key factor in future *ex-ante* IA".[52]

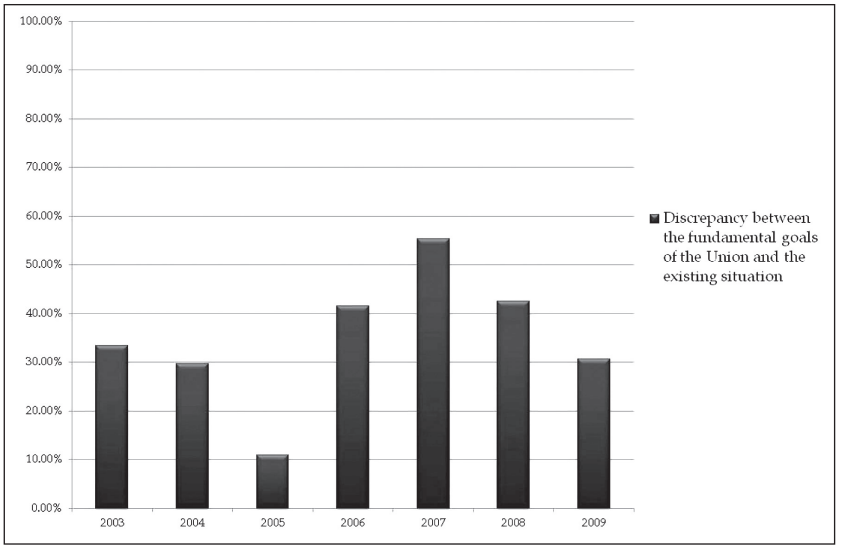


Figure 4 – Macro assessment: Objectives – Overarching Goals

The macro-analysis reported in Figure 4 shows the percentage of IAs in which the proposal is linked to a fundamental goal of the EU. The share is quite small, showing that there is room to improve the use of IAs as a tool for external coherence.

50 IUCN, IEEP, MRAG, UNEP-WCMC, "European Commission Biodiversity Knowledge Base, Assessment of the EU Biodiversity Action Plan as a tool for implementing biodiversity policy", pp. 9–16.

51 Commission staff working paper – Communication from the Commission: Halting the Loss of Biodiversity by 2010 – and Beyond. Sustaining ecosystem services for human well-being, Impact Assessment, SEC(2006)607/2, at p. 44.

52 Renda, *Law and Economics in the RIA World*, *supra* note 19 at p. 228.

https://doi.org/10.1017/S186729X00002476 Published online by Cambridge University Press

4. Outcomes – Expected impacts

Outcomes are what a policy must deliver to achieve its objectives. In the *ex-ante* phase, *i.e.* before they materialise, they are usually defined as expected impacts. As we will see below, their measurement is not without contention.

As in the principal-agent model upon which this construction is based outcomes/expected impacts are subordinated to objectives,[53] it is essential to measure as many impacts as possible among those related to the (operational) objectives. That way, the legislator has a clear picture not only of the policy objectives, but also of their potential achievement.

The consistency between the measurement of outcomes and the other elements of the analytical layer of the policy cycle is then more important than accuracy of measurement and full monetisation. The Communication on Smart Regulation states that quantification should be carried out when possible, with a feasibility constrain due to data availability.[54] Accordingly, the quest for monetary values is important, but not crucial. Monetisation can be carried out when it is meaningful from a policy cycle perspective, without it being the ultimate goal of the EU IA system. Given the relevance of objectives, cost-effectiveness would be the natural candidate criterion to assess impacts in the *ex-ante* phase.[55]

In addition to that, the relation between the specific policy and the overall political goals influences the choices about which outcomes/impacts should be measured. In particular, the *ex-ante* assessment might not focus on outcomes, outputs, and means to achieve them that have already been set in previous stages of the political discourse, to avoid being redundant. Rather, IA may contribute to the management of the policy cycle by demonstrating whether and how the draft legislation supports the achievement of the objectives by resorting to which agreed-upon means, without duplication of analysis.

Attention and resources must not be diverted to measurement of non-verifiable outcomes/impacts. Non-verifiable statements bring no benefit to the drafting of the law or to the *ex-post* evaluation. On the contrary, they stress the external agency relationship no. 1, *i.e.* that between the European Commission and the legislators, by increasing the costs of monitoring, up to the point that they cannot be monitored at all.[56] In this sense, non-verifiable statements increase the irresponsibility of the drafter, who does not fear any risk of *ex-post* assessment of the outcomes, both because of the need to build challenging counterfactuals, such as a forecast about a marginal increase of GDP,[57] and because of the time hiatus between the analysis and its effects, such as when effects are estimated over an *e.g.* 30-year period. Accordingly, economic analysis may play a major role when analytical statements are verifiable, otherwise political decisions taken by the principals, *i.e.* the legislators, could usefully step up.

It is true that long-term and barely-verifiable impacts play an important role in several policy domains, *e.g.* for long-term environmental policies. If these impacts are not taken into consideration, such long-term policies could be hindered. Nevertheless, if impact analysis is well connected to the overarching policy goals, the role of non-verifiable statements becomes relatively minor. *E.g.*, in EU policymaking, major long-term goals, also for environmental policies, are decided at the top political level, that is the European Council, based on political reasons and with limited or no reference to detailed economic analysis. Then, if outcome/impact analysis is to be consistent with these goals, it can usefully highlight costs and benefits of the various options to achieve them, rather than re-assess their validity.

Finally, measurement is a costly activity; therefore it is imperative for the policymaker to reap benefits out of it,[58] that is, better lawmaking. Therefore, analysis of outcomes/impacts should be carried out with the aim to understand how to draft better legislative texts, rather than as a purpose in itself.

In a perfect world, IAs would measure all expected impacts of an act. In the real world, this is not the case. The Commission enjoys discretion in deciding what impacts should undergo measurement. Therefore, the discretion should be consciously recognized, and any choice with respect to impact measurement is to be consistent with the overall management of the policy cycle.

53 Cf. Section IV.2 *supra*.

54 Communication on Smart Regulation, *supra* note 1, at p. 7.

55 Anthony Ogus, *Costs and Cautionary tales*, (Oxford: Hart Publishing, 2006), at p. 290.

56 Milgrom and Roberts, *supra* note 42, at pp. 283–284; Gerritt De Geest, "Labor Law", in Aristides Hatzis (ed.), *Economic Analysis of Law: a European Perspective*, (Cheltenam: Edward Elgar, 2010).

57 In theory, increase of GDP can be measured. In practice, it is hardly ever possible to build any meaningful counterfactual in which the net impact of a single law on the growth of GDP can be verified *ex-post*.

58 Milgrom and Roberts, *supra* note 42, pp. 290–293;

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From the macro point of view, concerning outcomes and expected impacts, the EU IA system has both positive and negative sides. On the positive side, European Commission IA Guidelines are quite lax when coming to the choice among qualitative and quantitative assessment criteria. Accordingly, the EU IA system is not steered towards full monetisation.[59] As reported in Figure 5, the analysis of the whole set of EU IAs confirms the approach of the guidelines: full monetisation of costs is carried out in 28 % of the IAs, and full monetisation of benefits in 16 %, with an upward trend in the recent years.

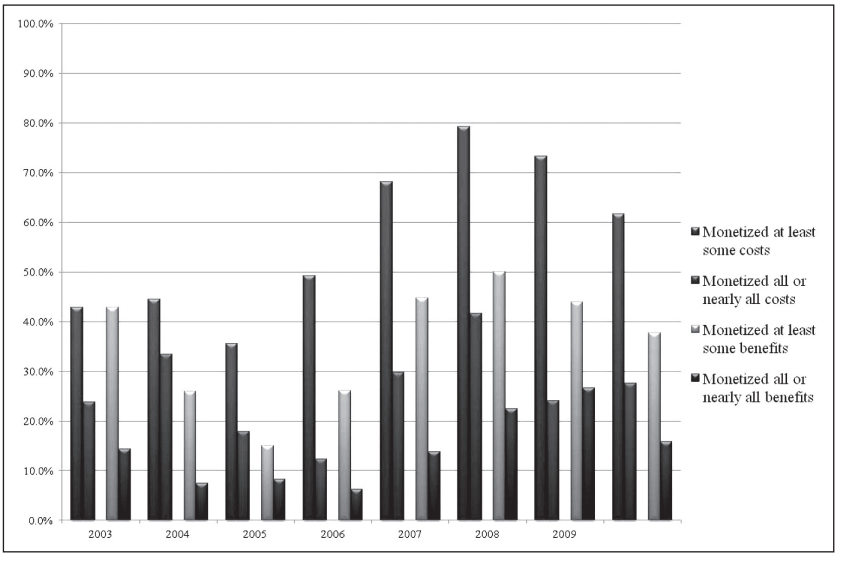


Figure 5 – Macro assessment: Monetisation of outcomes

On the negative side, the temptation to use IA as a tool for the Commission to win the support of the legislators, or better as a trump card in the political arena, leads to redundant measurement of either impacts already clearly embedded in general policy goals, or of non-verifiable impacts. The necessity to use IAs as a tool to "rally support for *[Commission's]* proposal" was even stressed in the first action plan for Better Regulation[60] and is exemplified by the micro-analysis of the following case study.

The analysis of impacts in the IA on the Decision on FP7 combines qualitative and quantitative elements. Impacts of each action are first described in qualitative and rather general terms, such as FP7 will "increase competition and drive up the quality of research proposals" or "more research will be carried out in Europe, and that research will generally be of higher quality".[61] Then, via an economic model, quantitative impacts on GDP, employment, and competitiveness by 2030 are quantified.

From the point of view of the management of the policy cycle, the decision to focus attention and consequently spend resources on the quantification of long-term economic indirect impacts can be questioned in at least three respects:

1) modelling these impacts bring few benefits to the quality of lawmaking. Most of the features of the proposal, namely the specific design of the programme, which is crucial in order to produce the desired outcomes in an effective way, are not influenced by this analysis. Among the manipulable features of the proposal, only the amount of funds available is an independent variable considered in the model, whose impact can therefore be measured via this approach;
2) forecasts about impacts up to 2030 on GDP, employment, and competitiveness risk to be non-verifiable statements. Indeed, these outcomes are barely taken into account in the ongoing monitoring and evaluation process, although it is focused on a large range of outcomes and impacts. The interim report on FP7 accordingly reads:

> [f]*urther questions arise about how to ensure that the undoubted achievements of science are translated into impacts – whether economic or social – that benefit society at large.* [...] [I]*t is far too soon to attempt any comprehensive assessment of the outcomes of impact of research which is still in progress from the very first calls of FP7.*[62]

59 IA Guidelines, *supra* note 9, pp. 45–48; for a critical assessment, cf. Renda, *Law and Economics in the RIA World*, *supra* note 19, at p. 228.

60 Communication from the Commission. Action plan "Simplifying and improving the regulatory environment" COM(2002)278, at p. 8.

61 Commission staff working paper – Annex to the Proposal for the Council and European Parliament decisions on the 7th Framework Programme (EC and Euratom) Main Report: Overall summary – Impact Assessment and Ex Ante Evaluation, SEC(2005)430, at pp. 7–8.

62 Expert Group on FP7, "Interim Evaluation of the Seventh Framework Programme", Brussels, 12/11/2010, at p.9.

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It is highly doubtful that such an assessment will possibly be carried out at any time that is compatible with the timing of the policy cycle.

3) the EU had already stated in its Lisbon Strategy that promotion of growth and a knowledge-based economy via an increase in R&D public expenditure should be pursued; therefore an extended analysis of this aspect brings little, if any, added value to the political discourse.

5. The institutional arrangements for transposition, implementation and enforcement

Having reviewed the analytical objects, we analyse now the empirical mechanisms of the policy cycle: implementation and enforcement, and monitoring and evaluation. Since norms are instruments to change constraints and incentives of actors "in the hope" of achieving the desired outcome, the policy cycle must include implementation and enforcement aspects.[63] Indeed, as the OECD highlights:

> *High quality regulation management systems* [...] *include the compliance and implementation dimensions.* [...] *Regulatory design and implementation need to proceed from an understanding of the factors that influence awareness, willingness (acceptance), capacity (ability) and actions of regulated groups to comply with the intended regulations.*[64]

The push for an EU Better Regulation strategy has come *i.a.* from problems in implementation and enforcement of EU law.[65] Transposition and implementation are important aspects of the EU policy cycle, more than in other legal systems, due to the multi-layered constitutional structure.[66] Indeed, the EU is unique because, even though its normative powers resemble those of a sovereign state, the vast majority of EU law is applied indirectly by other administrative bodies, *i.e.* national or local administrations.[67] On the contrary, enforcement is a problem common to the policy cycle of every legal system. These are the reasons why transposition, implementation, and enforcement are necessary elements of the EU policy cycle, more prominent than in the national contexts, and should accordingly be paid attention to in the *ex-ante* assessment.[68]

The attention paid by the EU IA system to transposition, implementation, and enforcement is quite lower compared to the objectives and outcomes, as acknowledged by the Communication on Smart Regulation. The European Court of Auditors noticed too that the attention to these aspects is poor and uneven. According to its report, "*[IAs]* do not, in all cases, give sufficient emphasis to implementation arrangements", and "a reference to implementation plan was provided in no more than approximately half of all reports reviewed".[69] The analysis of the enforcement costs is also deemed insufficient.

The micro-analysis of implementation aspects in the IA on the Communication on biodiversity shows that they are covered only marginally, and not as a self-standing issue, but within the analyses of impacts. Implementation and enforcement are referred to only in general terms, such as "national implementation choices will be crucial".[70] This is striking, since most of the actions are actually to be carried out by the Member States. In particular, the relation between the non-binding nature of the Communication and the need to ensure that its actions are implemented by the responsible actors remains under-analysed.

6. Monitoring and evaluation

Monitoring and evaluation are similar mechanisms, but refer to different moments of the policy cycle. Monitoring logically and temporally precedes evaluation, dealing with the organisational implementation of a policy, and its direct outputs.[71] Evaluation is defined as a "judgment of interventions according to their results and impacts, and the needs they aim

63 Ogus, *Costs and Cautionary tale, supra* note 53, at p. 283.

64 Stéphane Jacobzone, Chang-Wong Choi, Claire Miguet, "Indicators of regulatory management systems", 4 *OECD Working Papers on Public Governance* 2007, at p. 48.

65 Meuwese, *Impact Assessment in EU Lawmaking*, *supra* note 43, at p. 29.

66 Mandelkern Report, *Supra* note 7, pp. 65–72.

67 In force of art 4(3) of the Treaty on the European Union.

68 Communication on Smart Regulation, *supra* note 1, at p. 7; IA Guidelines, *supra* note 9, at pp. 43–44.

69 *Supra* note 8, at p. 41.

70 Impact Assessment on the Communication on Biodiversity, *supra* note 50, at p. 61.

71 Directorate General for Information Society and Media of the European Commission, "Evaluating Legislation and non-spending Interventions in the Area of Information Society and Media", 2011, available on the Internet at <http://ec.europa.eu/dgs/information_society/evaluation/studies/2009/manual_evaluating_legislation.pdf> (last accessed on 29 October 2012).

https://doi.org/10.1017/S1867299X00002476 Published online by Cambridge University Press

to satisfy"[72]. That is, policy effects are compared to policy objectives and *ex-ante* expectations, on the basis of empirical information.

Monitoring and evaluation are an integral part of the smartly-regulated policy cycle.[73] In particular, IAs and *ex-post* evaluation are complementary tools. The IA sets the benchmark against which any evaluation is to be carried out, by stating policy objectives and expected outcomes, and the institutional mechanisms for it. At the same time, *ex-post* evaluation benefits from the information provided in the IA and constitutes itself the basis upon which building the new IA in case of revision.[74] If monitoring and evaluation tools are designed since the *ex-ante* phase, all policy actors clearly know from the beginning what is going to be measured.

The EU has a wide experience in evaluating expenditure programmes, as required by Article 27.4 of the "Financial Regulation".[75] The same bold approach to the evaluation of general norm is still lacking. Indeed, the European Commission IA Guidelines have a short and general part on monitoring and evaluation provisions.[76] It is based on the techniques to evaluate expenditure programmes, which are then translated into hints to evaluate general norms. The lack of targeted guidance explains why some DGs created their own internal guidelines for the *ex-post* evaluation of legislation.[77]

The section on monitoring and evaluation is a mandatory element in the structure of IAs, and the macro-analysis shows that it is present in almost every IA, as shown in Figure 6. At the same time, the inclusion of indicators for monitoring, as suggested in Annex 13 to the Guidelines, is steadily increasing over time.

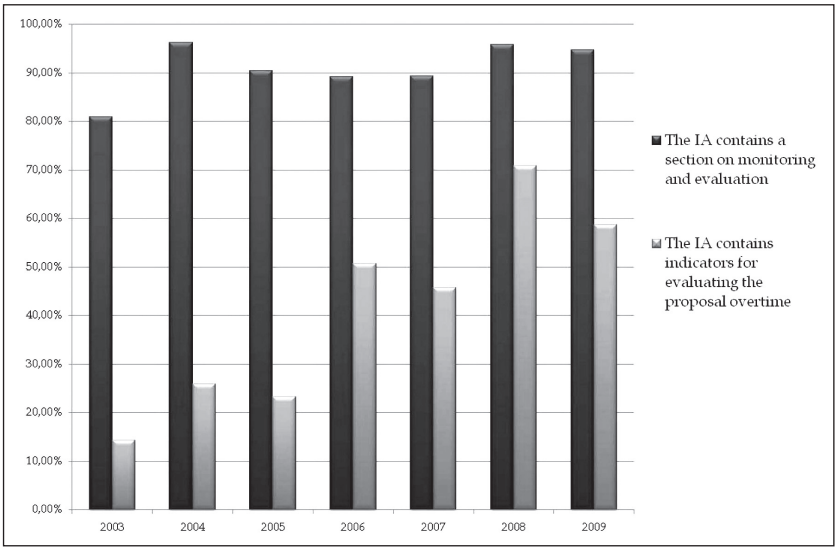


Figure 6 – Macro assessment: Monitoring and Evaluation

The macro assessment only tells whether the part of monitoring and evaluation is present in each IA, but cannot assess its quality, *i.e.* whether it was drafted properly, or only as a "tick-the-box" exercise. To perform such an assessment, we present two case-studies below.

The IA on the Communication on Biodiversity covers monitoring and evaluation aspects, providing for a set of headline indicators, which are then detailed in Annex 2 to the Communication. Nevertheless, the list of indicators does not include any target, nor any baseline measurement is foreseen. The absence of targets makes the use of indicators much less productive in terms of steering different actors. Furthermore, the absence of baseline indicators undermines the effort for evaluating the action plan.[78] Finally, it is not clear how indicators are related to the actions and the specific objectives.

The first and second roaming regulations show a good example of how legislators may push for the inclusion of detailed monitoring criteria in the leg-

72 Action plan "Simplifying and improving the regulatory environment", *supra* note 58, at p. 2.

73 Communication on Smart Regulation, *supra* note 1, at p. 4; EU IA Guidelines, *supra* note 9, at p. 49.

74 *Ibid.*, at pp. 3–4; Renda, *Law and Economics in the RIA World*, *supra* note 19.

75 Council Regulation No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities, OJ 2002 L248/1.

76 ECA, Impact Assessment in the EU Institutions, *supra* note 9, at p. 49.

77 DG INFSOC Evaluation Manual, *supra* note 69; Directorate General for Internal Market and Services of the European Commission, "Guide to Evaluating Legislation", 2008, available on the Internet at http://ec.europa.eu/dgs/internal_market/docs/evaluation/evaluation_guide.pdf (last accessed on 29 October 2012).

78 IUCN, IEEP, MRAG, UNEP-WCMC External Evaluation study, *supra* note 49, at p. 18.

https://doi.org/10.1017/S1867299X00002476 Published online by Cambridge University Press

islative act. The Commission's proposal for the first roaming regulation included a general requirement to monitor its outcome and outputs. The legislators went further, detailing in the legislative text itself the content of the subsequent evaluation.[79]

In the Second Roaming Regulation, the legislators went again further, and the legislative text eventually states that:

1) the monitoring report should be preceded by a public consultation;
2) the Commission should also monitor the quality and availability of services, the extent to which consumers have benefited from the outcomes of the regulation, and the degree of competition.[80]

This constitutes a good practice concerning the level of details of binding evaluation provisions. This is especially important since the legislators will be the addressees of the evaluation, therefore, as principals, they should instruct the agent as to the content of the evaluation process.

The mechanisms for monitoring and evaluation presuppose the availability of data, both *ex-ante* and *ex-post*. The European Commission Guidelines consider good data as essential to the IA, to define the problem at stake, and to analyse the baseline scenario and the prospected impacts.[81] Nevertheless, they do not go into more detail concerning methodologies for data collection and analysis. Indeed, this would hardly be possible given that availability of information, evidence, and data, is a problem idiosyncratic to each IA.

The European Court of Auditors confirms that availability of data is a key challenge for IAs.[82] It notices that the European Commission uses to resort to external studies for data gathering, whilst internal resources are under-exploited. According to the empirical assessment of the IA system carried out by an external contractor, the majority of European Commission officers interviewed reported that empirical information was often lacking or inappropriate, lowering the quality of IAs.[83] The most used data sources were consultation, external consultants, literature reviews or other sources internal to the European Commission. Member States were used as a source of information in less than 40% of the IAs, and *ex-post* evaluation in less than 30%. Available statistics, both at European and national level, were usually of limited help, due to the insufficient level of detail.

The Commission could create organisational arrangements and common databases which can support the attempt to mainstream evidence-based policy making. The usefulness of these tools has already been pointed out by several international experiences.[84] Otherwise, the Commission would risk to remain blind, both *ex-ante* and *ex-post*, because of paucity of available information. Below, we present one case in which data collection was not taken into account in the *ex-ante* phase, and a case in which it was.

The empirical layer of the policy cycle of the Communication on Biodiversity has been badly managed, as underlined in the 2010 external study.[85] A careful analysis of what data were or could be available was completely missed in the *ex-ante* phase. The European Commission carried out the identification of available data sources only in 2009. Many gaps were identified, both at the Commission and national level. For some actions, monitoring was eventually dropped because there was no possibility to identify relevant data. For some other informational needs, the Commission resorted to surveying Member States via a questionnaire. Its burdensomeness and limited relevance were questioned by the national officers, and, in many cases information was simply non-existing because no data collection had been foreseen.

On the contrary, the empirical layer of the policy cycle of the Roaming Regulations has been managed properly. This was possible because the Commission could rely on the established network of national regulatory authorities for e-communications. They already had in place mechanisms of market surveillance and close relationships with the industry operators.[86] The network of national authorities has been used as a source of information concerning outcomes, the achievement of objectives, and the level of compliance with the regulation. For the IA of the second roaming regulation, the network also provided the basis for an informed analysis of the *status quo.*

79 Article 11 of Regulation 717/2007, *supra* note 41.

80 Article 11 of Regulation 717/2007 as amended by Reg. 544/2009, *supra* note 41.

81 IA Guidelines, *supra* note 9, at p. 18.

82 ECA Impact Assessment in the EU Institutions, *supra* note 8, at pp. 39–40.

83 The Evaluation Partnership, "Evaluation of the Commission Impact Assessment System", *supra* note 10, pp. 79–80.

84 Jacobs, *Current Trends in RIA*, *supra* note 34, at p. 32.

85 IUCN, IEEP, MRAG, UNEP-WCMC External Evaluation study, *supra* note 49.

86 DG INFSOC Evaluation Manual, *supra* note 69.

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V. Conclusions

The main theoretical conclusions of this paper can be summarised as follows. First, a view of the IA as a tool for policy coherence has been proposed. The IA needs not to be conceived and designed as an instrument to promote efficiency in lawmaking, as it delivers large benefits also if only its procedural effects are taken into account. Mainly, IA governs political principal-agent relationships, thereby promoting coherence. This is even more important in the EU, where European institutions, Member States, and different parts of the European Commission co-operate in the lawmaking process in a unique and complex way. If designed and employed to govern political principal-agent relationships, IA becomes the key instrument to steer and close the policy cycle, that is the target fixed by the European Commission in its latest Communication on Smart Regulation.

Second, a construction of the policy cycle has been put forward. The policy cycle is composed of two main layers: the analytical and the empirical. The former answers the question "*what* is the policy expected to deliver?" and includes three analytical objects: objectives, relationship between policy objectives and overarching goals, and outcomes/expected impacts. The latter answers the question "*how* is the policy expected to deliver", focusing on the mechanisms and information necessary to ensure and verify its delivery: implementation and enforcement, and monitoring and evaluation.

Then, an empirical analysis of the EU IA system both at a macro and micro level has been performed. From the macro point of view, the EU IA system is attentive to the definition of objectives, although it could do more in terms of their operationalisation and of the linkage with overarching EU policies. The analysis of impacts is rather well-structured, although it is argued that it should be steered according to the needs of the policy cycle, rather than being used as a trump card in the political debate. A more careful analysis should definitely be devoted to enforcement, transposition, and implementation aspects. Progress has been made concerning the inclusion of monitoring and evaluation aspects in the IAs. The micro-analysis has supported these results, and also shown that when the empirical layer was not properly dealt with, the policymaker remained blind about the results of its actions, and was incapable of managing the policy cycle.

Policy conclusions can be drawn from the theoretical construction and empirical analysis carried out so far. The EU IA system came a long way since its foundation and it is generally appreciated as a tool that increased co-ordination, accountability, transparency, and openness. Nevertheless, as it is currently designed, it is not yet fit to steer and close the policy cycle, as envisaged in the Smart Regulation Communication. To achieve this goal, the analytical and empirical layers of the policy cycle should be wholly defined since the *ex-ante* phase, in all its elements. Therefore, in the IA more attention should be paid to external coherence of the policy, that is its linkage with overarching EU goals. Concerning internal coherence, the analysis of impacts should be linked to the stated objectives and to what can be monitored and evaluated *ex-post*, avoiding non-verifiable statements and waste of resources in assessment of impacts which either have not any beneficial effect on the lawmaking, or have already been assessed at a higher political level. Finally, the policy cycle can be closed only if transposition, implementation, and enforcements aspects become regular features of the *ex-ante* analysis. In this respect, classical law-and-economics tools, such as incentive analysis, can be useful in assessing whether and how Member States and other final addressees will react to the norm.[87] The design of monitoring and evaluation tools in the *ex-ante* phase should be more careful, or *ex-post* assessment will be hindered. Informational needs and institutional mechanisms allowing the Commission to collect data about policy outcomes should be already pre-set in the IA, and detailed provisions on monitoring should be included in the act itself.

All these suggestions do not amount to a revolution of the current IA system. It should be fine-tuned to the new objectives that the European Commission, in its apex, intends to pursue. To this aim, changes to the Guidelines could be proposed, to give a more balanced attention to the different aspects of the policy cycle which are to be included in the IA. At the same time, the IAB oversight could be re-focused on the aspects which have so far received less attention, but that in the new perspective become important. A fairly sound IA system has been built at the EU level, no doubt about that. Now it is time to use it to fully achieve the objectives of the Smart Regulation strategy and to ensure coherence of the overall policy cycle.

87 Renda, *Law and Economics in the RIA World*, *supra* note 19.

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