

Better Regulation and Post-Legislative Scrutiny in the European Union

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Abstract

This article analyses the manner in which the EU's Better Regulation Agenda impacts pre-legislative and post-legislative scrutiny by national parliaments, as two important dimensions of their function of democratic control over EU decision making. To this end, the article critically assesses the institutional arrangements and procedures foreseen under the Commission's 2015 Better Regulation package and examines the 2017 review of the Better Regulation Agenda, which is a fresh push towards its enhancement. The article is structured as follows. After an overview of the legal grounding and evolution of better regulation in EU law, the analysis surveys the implications for parliaments of the Juncker Commission's package of reforms, which are laid out in a Communication and implemented through a set of guidelines, a refurbished toolbox for practitioners, a revised Regulatory Fitness and Performance Programme (REFIT), and an Interinstitutional Agreement on Better Lawmaking adopted in 2016. On this basis, the article discusses post-legislative scrutiny of EU legislation on its own merits as well as from the perspective of its relationship with pre-legislative scrutiny. The latter is important since it is the most efficient way for parliaments to influence the contents of EU policies. The article concludes that the Better Regulation Agenda maintains the status quo in domestic parliamentary participation in EU affairs and misses the opportunity to fortify the latter's European embeddedness.

Keywords: parliaments, post-legislative scrutiny, better regulation, European Union, legislation, regulation, democracy.

A Introduction

After the European Parliament (EP) election of May 2014, Jean-Claude Juncker formulated ten priorities under the label of 'Agenda for Jobs, Growth, Fairness and Democratic Change' in order to underpin his candidacy for European Commission presidency. Central to his plan of reviving the economy and bringing the

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European Union (EU) closer to the citizens is the Better Regulation Agenda.¹ This Agenda, which seeks to address concerns about the effectiveness and democratic nature of EU lawmaking, was entrusted to the First Vice-President of the Commission, Frans Timmermans.² In line with previous initiatives in this domain,³ the Agenda's main objective is to improve the overall quality of EU legislation by making policy on the basis of scientific knowledge and insight gained through stakeholder consultation, by reducing red tape and bureaucratic requirements for economic activity (e.g. rules on the submission of information, labelling, monitoring, reporting), and by ridding the EU statute books of legislation that is unnecessary, overlapping, overly burdensome, excessive, obsolete, or ill-considered.⁴ There are therefore three stages of Better Regulation: pre-legislative (before the onset of the EU legislative procedure), legislative (while an EU legislative proposal is being negotiated), and post-legislative (once a piece of EU legislation has been enacted). All of this is aimed at making it easier not only for large corporations but even more so for small and medium-sized enterprises and entrepreneurs to conduct business more profitably.

Yet the Better Regulation Agenda carries significant repercussions not only for economic actors but also for political institutions, including legislatures. If observed through the lens of the principal-agent model, policy evaluation and impact assessment processes at the EU level have the capacity to modify the incentives of political actors, impose constraints on them, and thus to some extent shape the relationship between the European Commission (Commission), acting as the regulatory agent, and the Member States and their parliaments, acting as regulatory principals.⁵ The ontology and methodology of the Commission's legislative agenda are indeed of paramount importance for both input and output

- 1 See helpful general analyses in: S. Garben & I. Govaere (Eds.), *The EU Better Regulation Agenda: A Critical Assessment*, Oxford, Hart Publishing, 2018; M. Dawson, 'Better Regulation and the Future of EU Regulatory Law and Politics', *Common Market Law Review*, Vol. 53, No. 5, 2016, pp. 1209-1236; Special Issue on the Better Regulation Package, *European Journal of Risk Regulation*, Vol. 6, No. 3, 2015; M.J. Pedersen, 'Qui Exanimis Nascitur? Can "Better Regulation" in the European Union Really Be a Servant of Technocracy?', *European Journal of Risk Regulation*, Vol. 8, No. 2, 2017, pp. 387-402; A. Bunea & R. Ibenskas, 'Unveiling Patterns of Contestation over Better Regulation Reforms in the European Union', *Public Administration*, Vol. 95, No. 3, 2017, pp. 589-604; C.M. Radaelli, 'Halfway through the Better Regulation Strategy of the Juncker Commission: What Does the Evidence Say?', *Journal of Common Market Studies*, Vol. 56, No. S1, 2018, pp. 85-95.
- 2 L. Schrefler, A. Renda & J. Pelkman, 'What Can the Better Regulation Commissioner Do for the EU?', *CEPS Commentary*, 29 September 2014.
- 3 See in this respect: C.M. Radaelli, 'Whither Better Regulation for the Lisbon Agenda?', *Journal of European Public Policy*, Vol. 14, No. 2, 2007, pp. 190-207.
- 4 See more on the development of some of these elements in: A.E. Kellermann, et al., (Eds.), *Improving the Quality of Legislation in Europe*, The Hague, Kluwer Law International, 1998.
- 5 G. Luchetta, 'Impact Assessment and the Policy Cycle in the EU', *European Journal of Risk Regulation*, Vol. 3, No. 4, 2012, p. 563.

legitimacy of the EU.⁶ The manner in which the Commission crafts its policies, assesses their prospective impact, evaluates their added value, and ensures their compliance with the founding principles of the EU are some of the key ingredients of the process whereby regulatory approaches are translated into legislative proposals that the Commission sends to the EU legislature – the EP and the Council – for adoption. Precisely because the Commission enjoys pre-eminence when it comes to initiating EU legislation, it has a ‘special responsibility’ to regulate better.⁷ This in turn raises the problem of oversight over the Commission’s respect for its own better regulation requirements – such as whether it conducts impact assessments and whether it conducts them satisfactorily,⁸ as well as whether its post-legislative evaluations adequately respond to the citizens’ concerns.⁹

The pre-legislative dimension of EU lawmaking is of great pertinence for national parliaments. Since *ex ante* involvement is the most efficient way to influence the contents of EU policies, the Commission’s Annual Work Programmes serve as a starting point for most NPs when they decide their annual scrutiny strategies.¹⁰ As concerns the legislative dimension of EU lawmaking as such, NPs are excluded from this process, but literature shows that they keep a watchful eye over it by means of political control over the executive and through a plethora of more or less formalized relations with EU institutions.¹¹

The post-legislative dimension of EU lawmaking is essential,¹² because changes in the socioeconomic and political circumstances that have inspired the enactment of EU legislation require the latter to be reassessed for its continued ‘fitness’ to regulate the matter at hand in an optimal and legitimate manner. If EU legislative or rule-making intervention has become redundant or otherwise ‘unfit’ for purpose, this can represent an undue encroachment or limitation of the legislative prerogative of NPs, at least in the fields of non-exclusive EU competence. Since NPs represent a significant link between the EU, the Member States,

6 See a discussion thereof in: F.W. Scharpf, ‘Legitimacy in the Multilevel European polity’, *European Political Science Review*, Vol. 1, No. 2, 2009, pp. 173-204; D. Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution*, Oxford, Oxford University Press, 2009, at p. 285 *et seq.*; K.-O. Lindgren & T. Persson, ‘Input and Output Legitimacy: Synergy or Trade-Off? Empirical Evidence from an EU Survey’, *Journal of European Public Policy*, Vol. 17, No. 4, 2010, pp. 449-467.

7 European Commission, *Better Regulation – Simply Explained*, Luxembourg, Office for Official Publications of the European Communities, 2006, at p. 3.

8 A. Alemanno, ‘The Better Regulation Initiative at the Judicial Gate: A Trojan Horse within the Commission’s Walls or the Way Forward?’, *European Law Journal*, Vol. 15, No. 3, 2009, p. 383.

9 S. van Voorst & P. Zwaan, ‘The (Non-)Use of Ex Post Legislative Evaluations by the European Commission’, *Journal of European Public Policy*, Vol. 26, No. 3, 2019, pp. 366-385.

10 C. Fasone & D. Fromage, ‘National Parliaments and the EU Commission’s Agenda: Limits and Recent Developments of a Difficult Partnership’, in Cristina Fasone et al. (Eds.), ‘Parliaments, Public Opinion and Parliamentary Elections in Europe’, *EUI Working Paper MWP 2015/18*, pp. 31-44.

11 See various country reports in: C. Heffttler, et al. (Eds.), *The Palgrave Handbook of National Parliaments and the European Union*, Basingstoke, Palgrave Macmillan, 2015.

12 L. Senden, ‘Soft Post-Legislative Rulemaking: A Time for More Stringent Control’, *European Law Journal*, Vol. 19, No. 1, 2013, pp. 57-75.

the citizens, and business actors particularly in the post-crisis period,¹³ the question arises of the impact of the Better Regulation Agenda on their involvement in EU affairs. The Commission's quest for greater leadership in EU lawmaking goes hand in hand with the Lisbon Treaty's provision requiring from NPs to actively contribute to the good functioning of the EU.¹⁴ Indeed, how can the EU function 'well', if it does not regulate 'well'?

This article analyses the Commission's 2015 Better Regulation package with a view to determining its implications for NPs' prerogatives in EU policymaking. The examination begins with the argument that the legal basis for including NPs in better regulation exists in the Treaties (B). The article continues with a brief overview of the evolution of Better Regulation in the EU (C). This will pave the way for a discussion of the Juncker Commission's 2015 Better Regulation Agenda (D), which consists of a package of reforms laid out in a Communication and implemented through a new set of Guidelines, a refurbished Toolbox for practitioners, a revised Regulatory Fitness and Performance Programme (REFIT), and an Interinstitutional Agreement on Better Regulation. This is complemented by an assessment of the 2017 review of the Better Regulation Agenda, the establishment of a Subsidiarity Task force, and their practical implications (E). Finally, the article concludes that the Better Regulation Agenda maintains the status quo in the NPs' participation in EU affairs and misses the opportunity to fortify their European embeddedness (F).¹⁵

B Legal Basis for National Parliamentary Input in Better Regulation

In the post-Lisbon Treaty European Union, the primary tasks of NPs at the EU level relate to subsidiarity monitoring via the Early Warning Mechanism.¹⁶ While instrumental to greater actorness and attentiveness of NPs to incoming draft EU legislation,¹⁷ this procedure promotes a narrow and negative input by domestic

13 J.H.H. Weiler, 'In the Face of Crisis: Input Legitimacy, Output Legitimacy and the Political Messianism of European Integration', *Journal of European Integration*, Vol. 34, No. 7, 2012, p. 837.

14 Art. 12 TEU. See further: D. Jancic, 'The Legacy of an Evolving Polity: Democracy, National Identity, and the Good Functioning of the EU', in D. Jancic, (Ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, Oxford University Press, 2017, pp. 1-21.

15 R. Haythornthwaite, 'Better Regulation in Europe', in S. Weatherill (Ed.), *Better Regulation*, Oxford, Hart Publishing, 2007, p. 19, at 26.

16 See the latest literature on this in: K. Granat, *The Principle of Subsidiarity and Its Enforcement in the EU Legal Order*, Oxford, Hart Publishing, 2018; A.J. Cornell & M. Goldoni (Eds.), *National and Regional Parliaments in the EU-Legislative Procedure Post-Lisbon: The Impact of the Early Warning Mechanism*, Oxford, Hart Publishing, 2017.

17 See one way of conceptualising this in: P. Kiiver, 'The Early-Warning System for the Principle of Subsidiarity: The National Parliament as a Conseil d'État for Europe', *European Law Review*, Vol. 36, No. 1, 2011, pp. 98-108.

legislatures in EU lawmaking.¹⁸ Although NPs receive consultation documents from the Commission – such as green and white papers, communications, annual policy strategies, work programmes, and other instruments of legislative planning – the Early Warning Mechanism does not permit the issuance of reasoned opinions on these documents.¹⁹ NPs may only react to them within the non-binding, informal Political Dialogue called the Barroso Initiative, which was initiated in 2006.²⁰

The Better Regulation Agenda provides a possibility to mitigate the discrepancy between the availability of information and the capacity to utilize it to make pronouncements on the quality, feasibility, and plausibility of EU legislative proposals before their adoption as well as of EU legislation after the proposals have been adopted. In this respect, the Agenda affords scope for a broadening of the pre-legislative cooperation between EU institutions and NPs, while concomitantly opening up new opportunities for enhancing post-legislative scrutiny of EU legislation. The legal basis for these two avenues of the development of parliamentary scrutiny can be found in the Protocols pertaining to NPs attached to, and having the same legal effect as, the Treaties.

First, the National Parliaments Protocol seeks to encourage their greater involvement in EU activities and enables them to express views not only on draft EU legislation but also ‘on other matters which may be of particular interest to them’.²¹ This provision goes to both pre-legislative and post-legislative limbs of Better Regulation. In terms of pre-legislative scrutiny, improved impact assessment methods pursued by the Commission fall neatly within this category, because NPs have a distinct interest in having an insight into the data, scientific evidence, processes of data collection, and the credibility and neutrality of the authors of the studies that underlie impact assessments. This is all the more so because virtually all NPs in the EU have focused on *ex ante* scrutiny and have installed domestic procedures of *ex ante* scrutiny that would enable them to react upstream and as early as possible in the EU legislative procedure.²² The said provision could also be interpreted as encompassing EU delegated and implementing

18 This state of affairs has been supported by some authors, see: F. Fabbrini & K. Granat, ‘“Yellow Card, but No Foul”: The Role of the National Parliaments under the Subsidiarity Protocol and the Commission Proposal for an EU Regulation on the Right to Strike’, *Common Market Law Review*, Vol. 50, No. 1, 2013, pp. 115-144. Yet it has been criticized by others, see: M. Goldoni, ‘Reconstructing the Early Warning System on Subsidiarity: The Case for Political Judgment’, *European Law Review*, Vol. 39, No. 5, 2014, pp. 647-663.

19 Art. 1 of Protocol no. 1 on the role of national parliaments in the European Union (National Parliaments Protocol) in conjunction with Art. 6 of Protocol no. 2 on the application of the principles of subsidiarity and proportionality (Subsidiarity Protocol).

20 D. Jančić, ‘The Game of Cards: National Parliaments in the EU and the Future of the Early Warning Mechanism and the Political Dialogue’, *Common Market Law Review*, Vol. 52, No. 4, 2015, pp. 939-976.

21 Recital 2 thereof.

22 See note 11 *supra*.

acts, concerning which NPs have suffered a significant degree of exclusion.²³ In terms of post-legislative scrutiny, parliaments are pivotal players in transposing EU directives into national legal orders, and these processes carry challenges of their own – such as complexity, salience, administrative capacity, and political conflict over the legislative outcomes.²⁴ Empirical research shows indeed that transposition of directives is not a formality but that it leaves room for political contestation.²⁵ In relation to this, the Better Regulation Agenda places additional emphasis on the post-legislative phase in the EU both in terms of the implementation of EU legislation and in terms of questioning its necessity and adequacy.²⁶ This in turn may enable NPs to scrutinize enacted EU legislation from new perspectives that go beyond implementation towards assessing their desirability and added value in achieving the targeted policy goals.

Second, the Subsidiarity Protocol obliges the Commission to ‘consult widely’, unless the latter considers that circumstances of exceptional urgency mandate against consultation and gives reasons for deciding so.²⁷ Further, all draft legislative acts forwarded to NPs shall be justified not only with regard to subsidiarity but also with regard to proportionality,²⁸ which requires the content and form of EU action not to exceed what is necessary to achieve the objectives of the Treaties.²⁹ Both the content (*e.g.* what policy path ought to be taken) and form of draft EU legislation (*e.g.* whether a directive or a regulation ought to be used) are the object of the Better Regulation Agenda and as such are inherently relevant for national parliamentary scrutiny of EU decision making. Moreover, there are a number of parameters that the Commission should provide in the form of a detailed statement attached to each draft EU legislative act to enable NPs to appraise their compliance with the principle of subsidiarity. This state-

23 Arts. 290 and 291 TFEU. These types of EU legal acts have frequently been the object of complaints by NPs due to their exclusion from the early warning mechanism, while difficulties remain as to how practically to organize scrutiny of these acts due to their sheer volume. See more in: G. Barrett, ‘Mind the Gap! The Implications of Comitology and the Open Method of Coordination for National Parliaments’, in D. Jancic (Ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, Oxford University Press, 2017, pp. 97-111.

24 See different assessments in: N. Dörrenbächer, *et al.*, ‘National Parliaments and Transposition of EU Law: A Matter of Coalition Conflict’, *Journal of Common Market Studies*, Vol. 53, No. 5, 2015, pp. 1010-1026; D. Finke & T. Dannwolf, ‘Who Let the Dogs Out? The Effect of Parliamentary Scrutiny on Compliance with EU Law’, *Journal of European Public Policy*, Vol. 22, No. 8, 2015, pp. 1127-1147; C. Sprungk, ‘Legislative Transposition of Directives: Exploring the Other Role of National Parliaments in the European Union’, *Journal of Common Market Studies*, Vol. 51, No. 2, 2013, pp. 298-315.

25 R. Zbiral, ‘Comparing the Intensity of Scrutiny for “Domestic” and Implementing Bills: Does Transposition of EU Law Reduce Political Contestation in National Parliaments?’, *Journal of European Public Policy*, Vol. 24, No. 7, 2017, pp. 969-988.

26 See similarly: C. Sprungk, ‘How Policy-Shaping Might (Not) Affect Policy-Taking: The Case of National Parliaments in the European Union’, *Journal of European Integration*, Vol. 33, No. 3, 2011, pp. 323-340, at 328.

27 Art. 2 thereof.

28 Art. 5 of the Subsidiarity Protocol.

29 Art. 5(4) TEU.

ment should include the proposal's financial impact, implications for domestic implementation in case of directives, qualitative and quantitative indicators that corroborate the conclusion that EU action is needed in order to achieve Treaty objectives, and an assessment demonstrating that any financial or administrative burdens that EU action may pose *inter alia* to 'economic operators and citizens' are kept at a minimum and are commensurate to these objectives.

These are all important elements of EU policymaking that feature highly on the Better Regulation Agenda because they determine the political directions that the Union takes and which NPs are expected to control as democratically elected representatives of the national electorates. This is requisite because, as Weatherill rightly notes, better regulation 'rubs shoulders with some immensely sensitive choices about the trajectory of the mixed economy in the modern state and in the developing transnational European market'.³⁰ However, as the following headings demonstrate, NPs are newcomers in the evolving public consultation process furthered by the Better Regulation Agenda. Unlike that of stakeholders, their involvement therein has not been formalized, and they remain 'tucked away' within the Early Warning Mechanism, whose effectiveness, based on the three yellow cards thus far flagged, is questionable.

C Evolution of the EU Better Regulation Initiative

The expanding EU regulatory reach following the euro crisis has propelled the questions of democratic legitimacy and domestic parliamentary pre-emption to the centre stage of the European academic debate.³¹ The evolution of the EU's move towards regulating better has paid relatively scant attention to these concerns.

The Commission's 2001 White Paper on European Governance addresses better regulation and foresees a role for NPs in it. One segment of its call for a 'reinforced culture of consultation and dialogue' refers to a heightened participation of NPs and their European affairs committees in stimulating public debate on EU policies, thereby raising the awareness of EU citizens and enabling them to voice their preoccupations regarding European integration.³² Yet this communicative and public discourse function of parliaments is only one part of the puzzle. Reducing the overall opaqueness of EU lawmaking is not a straightforward, cost-free task. As Kelemen and Menon warn, satisfying the democratic demands for openness, transparency, and legal certainty in EU regulatory processes might

30 S. Weatherill, 'The Challenge of Better Regulation', in S. Weatherill (Ed.), *Better Regulation*, Oxford, Hart Publishing, 2007, p. 1, at 4.

31 G. Majone, 'From Regulatory State to a Democratic Default', *Journal of Common Market Studies*, Vol. 52, No. 6, 2014, p. 1221.

32 European Commission, 'European Governance – A White Paper', COM(2001) 428 of 25 July 2001, at pp. 16-17, 30 and 32.

necessitate a further formalization of regulatory procedures and could thus lead to more red tape.³³

In 2010, the Commission upgraded Better Regulation to Smart Regulation, whereby the entire policy cycle was streamlined – from the design of a piece of EU legislation, to its implementation, enforcement, evaluation, and revision.³⁴ Regulation as an activity was made the shared responsibility of all EU institutions and Member States, and efforts were put to prolong the period for stakeholder consultations from 8 to 12 weeks as of 2012.³⁵ This is in harmony with the Lisbon Treaty provision on participatory democracy, which obliges EU institutions to maintain a dialogue and hold public consultations and exchanges of views with citizens, representative associations, and the civil society.³⁶ In relation to this, NPs' subsidiarity monitoring was seen as contributing to 'a higher quality of EU legislation'.³⁷ The correct application of the principle of subsidiarity became to some extent conflated with better regulation. This is also visible from the Commission's annual reports on better lawmaking. Produced since 2001, these reports were renamed in 2007 to refer to subsidiarity and proportionality,³⁸ while better regulation as such became the object of so-called strategic reviews.³⁹

At the end of 2012, the Commission launched its REFIT programme in order to further facilitate the accomplishment of EU public policy goals on the basis of so-called fitness checks carried out since 2010.⁴⁰ This was to be attained through a regulatory mapping exercise in order to identify policy areas with the greatest potential for regulatory simplification and cost reduction. Nevertheless, while the REFIT mentions NPs as subsidiarity guardians, it does not include them within the 'national dedicated networks' whose input it deems fundamental for strengthening the evidence basis for EU policymaking.⁴¹ Despite this, in a follow-up REFIT document of 2014, the Commission distinguished between the role of NPs in policing subsidiarity from that of 'providing input to the Commission at an early stage of the policy-making cycle'.⁴² Yet no clarification was offered as to what this implied. While the Barroso Initiative already fulfils this purpose, this

33 D. Kelemen & A. Menon, 'The Politics of EC Regulation', in S. Weatherill (Ed.), *Better Regulation*, Oxford, Hart Publishing, 2007, p. 175, at 184.

34 European Commission, Communication 'Smart Regulation in the European Union', COM(2010) 543 of 8 October 2010, at p. 3.

35 *Ibid.*, at p. 10.

36 Art. 11 TEU. See further on this: A. Alemanno, 'Unpacking the Principle of Openness in EU Law: Transparency, Participation and Democracy', *European Law Review*, Vol. 39, No. 1, 2014, pp. 72-90.

37 European Commission, Communication 'Smart Regulation in the European Union', COM(2010) 543 of 8 October 2010, at p. 9.

38 See: http://ec.europa.eu/smart-regulation/better_regulation/reports_en.htm (last accessed 7 January 2019).

39 See the first such review in: European Commission, Communication 'A Strategic Review of Better Regulation in the European Union', COM(2006) 689 of 14 November 2006.

40 European Commission, Communication 'EU Regulatory Fitness', COM(2012) 746 of 12 December 2012, at p. 3.

41 *Ibid.*, at p. 11.

42 European Commission, Communication 'Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook', COM(2014) 368 of 18 June 2014, at p. 17.

differentiation shows that NPs may have an inherent stake in being more strongly associated with EU policy formulation processes.

Indeed, an OECD survey of better regulation approaches and practices in 15 EU Member States, which was carried out between 2008 and 2011, reveals that parliaments take a growing interest in better regulation processes and are 'increasingly present' in the institutional landscape of rulemaking in Europe regardless of the nature of a country's political system. Parliaments remain crucial factors in the production of legal rules, because proposals from the executive rarely become law 'without integrating the changes generated by parliamentary scrutiny'.⁴³

D Juncker Commission's Better Regulation Agenda: Keeping EU Law 'Fit for Purpose'

In its first Work Programme, that for 2015, the Juncker Commission envisaged only 23 initiatives, which is four times less than the previous years. This has been hailed as a 'cultural revolution' in the Commission.⁴⁴ The EU's legislative initiator undertook to build a 'closer partnership' with NPs so as to 'bring better implementation of existing policies and effectiveness of action on the ground'.⁴⁵ In an attempt to bring about the promised democratic change, the Commission adopted on 19 May 2015 a new Better Regulation package, whose key components are examined below to discern the role of NPs therein.⁴⁶

To begin with, the Commission strives to further open up EU policymaking for public participation and therewith make the Union more transparent and accountable. This is to be done *inter alia* by continuing the aforesaid 12-week public consultations on the so-called 'roadmaps' and 'inception impact assessments' when drafting new EU legislation, but this time also when carrying out fitness checks of existing EU legislation. A further 8 weeks are given to citizens and stakeholders to react to legislative proposals and the accompanying impact assessments once they are published, and this period is to run in parallel with the Early Warning Mechanism.⁴⁷ The Better Regulation Guidelines specifically state that stakeholder consultations do not apply to opinions of NPs.⁴⁸ Conversely, the Better Regulation Toolbox, whose purpose is to provide practical instructions on

43 See: www.oecd.org/gov/regulatory-policy/44983092.pdf. See further in: A. Meuwese, *et al.*, 'The OECD Framework for Regulatory Policy Evaluation: An Initial Assessment', *European Journal of Risk Regulation*, No. 1, 2015, pp. 101-110.

44 H. Mahony, 'Tough Battle Expected on EU Law-Making Culture', *EUobserver*, 10 February 2015, see: <https://euobserver.com/institutional/127556> (last accessed 7 January 2019).

45 European Commission, Communication 'Commission Work Programme 2015 – A New Start', COM(2014) 910 of 16 December 2014, at p. 3.

46 See the previous situation in: L. Allio, 'Better Regulation and Impact Assessment in the European Commission', in C. Kirkpatrick & D. Parker (Eds.), *Regulatory Impact Assessment: Towards Better Regulation?*, Cheltenham, Edward Elgar Publishing, 2007, pp. 72-105.

47 European Commission, 'Better Regulation Toolbox' (2017), at p. 439.

48 European Commission, Staff Working Document 'Better Regulation Guidelines', SWD(2017) 350, at p. 68.

how to implement the Guidelines, does envisage contributions from public authorities, among which NPs, without providing any further information.⁴⁹ This mention *en passant* of national parliamentary input in public consultations refers to the Commission's informal inclusion, in May 2014 and outside the Better Regulation Agenda, of all NPs into the EU online system of automatic notifications about new roadmaps and public consultations, which 'enables national parliaments to actively contribute to the policy development process from its very beginning', should they elect to do so.⁵⁰ This is hence yet another faculty available to NPs to make their views known to the Commission, although the latter has not committed to giving them any particular effect.

The formal institutional position of NPs, however, remains intact and restricted to *ex ante* subsidiarity control of draft EU legislative acts.⁵¹ As the Commission points out, subsidiarity should be assessed at an early stage of the impact assessment process as 'a key consideration of the problem definition', which is aimed at describing and quantifying the relevance of both future and existing EU measures. The Toolbox thus specifically acknowledges that subsidiarity appraisals are of critical importance not only for proposing new EU initiatives but also for probing the added value of already-enacted EU measures through fitness checks.⁵² This is precarious because, by their nature, fitness checks are excluded from both the Early Warning Mechanism and the Political Dialogue, while potentially having a significant bearing on the social legitimacy of EU law and European integration in general. Furthermore, the Commission advises that subsidiarity compliance needs to be verified not only for legislative EU initiatives but also for non-legislative ones. The latter, however, are also excluded from the reasoned opinion procedure afforded by the Early Warning Mechanism and can only be scrutinized by NPs through the Political Dialogue, yet without being able to create any legal consequences for the Commission and the institutional machinery of comitology.

Furthermore, the REFIT Platform does not include national parliamentarians within its membership. Chaired by the Commission's First Vice-President, the Platform is composed of a 'government group', consisting of one high-level expert from the public administration of each Member State, and a 'stakeholder group', consisting of up to 20 experts, among which most are drawn from the business world, social partners, and civil society organizations, and two are representatives of the European Economic and Social Committee and the Committee of the Regions.⁵³ In this way, virtually all interested actors from the public and private sectors – except NPs – are included in this element of the Better Regulation process. This could be explained by the wish to depoliticize the fitness check process,

49 European Commission, 'Better Regulation Toolbox' (2017), at p. 387.

50 See Contribution of the LII COSAC, Rome, 30 November – 2 December 2014, point 2.3; Letter by Frans Timmermans, Reply to the Contribution of the LII COSAC, Ares(2015) 351711, 29 January 2015, at p. 3.

51 European Commission, Communication 'Better Regulation for Better Results – An EU Agenda', COM(2015) 215, at p. 5.

52 European Commission, 'Better Regulation Toolbox' (2017), at p. 26.

53 Art. 4 of the Commission Decision establishing the REFIT Platform, C(2015) 3261.

even though the risk of politicization remains high.⁵⁴ In my view, however, this process need not and should not be politically neutral, because the adequacy and continued desirability of EU policy is not a purely technocratic question but merits political attention.⁵⁵

These considerations thus demonstrate that the Commission makes a separation between consulting the public at large (e.g. citizens, business, and the civil society) and consulting institutions exercising public power. This can be explained in a twofold manner. On the one hand, putting NPs on an equal footing with organizations that do not have an electoral mandate might be regarded as a degradation of the status of domestic legislatures within the EU policymaking system. On the other hand, the existence of consultative arrangements in the Treaties (Early Warning Mechanism) and in political practice (the Political Dialogue) were deemed sufficient for national parliamentary pronouncement on EU policies. However, in light of the strong pressure that a large number of NPs are putting on the Commission for the latter to accept an ‘enhanced political dialogue’ in the form of a ‘green card’ for initiating or repealing EU legislation,⁵⁶ the Better Regulation Agenda appears as a missed opportunity to address these requests. It also indirectly speaks of the Commission’s wish to retain the reins of institutional power firmly in its own hands without too much interference by NPs.

Arguably, the most important, though still rather modest, novelty for NPs is contained in the Interinstitutional Agreement on Better Regulation, which was adopted in April 2016.⁵⁷ While neither the 2003 Interinstitutional Agreement on Better Lawmaking nor the 2005 Interinstitutional Common Approach to Impact Assessment mention NPs, the 2016 agreement does.⁵⁸ It lays down that the Commission will conduct impact assessments of initiatives expected to have significant economic, environmental, or social consequences, during which process it will consult stakeholders.⁵⁹ The Regulatory Scrutiny Board, a body within the Commission Secretariat-General that replaces the Impact Assessment Board, will

54 Pedersen, 2017, p. 402.

55 See a further discussion of this aspect in: S. Smismans, ‘The Politicization of ex post Policy Evaluation in the EU’, *European Journal of Law Reform*, Vol. 19, Nos. 1-2, 2017, pp. 74-96.

56 See for instance: Contribution of the LIII COSAC, Riga, 31 May-2 June 2015, points 2.2, 2.4 and 2.9-2.12. See also: K. Boronska-Hryniewiecka, ‘From the Early Warning System to a “Green Card” for National Parliaments: Hindering or Accelerating EU Lawmaking?’, in D. Jancic (Ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, Oxford University Press, 2017, pp. 247-261.

57 Interinstitutional Agreement between the European Parliament, the Council of the European Union and the European Commission on Better Law-Making of 13 April 2016, [2016] OJ L123/1.

58 See more generally: A. Meuwese, ‘Interinstitutionalising EU Impact Assessment’, in S. Weatherill (Ed.), *Better Regulation*, Oxford, Hart Publishing, 2007, pp. 287-310.

59 Yet no indicators are foreseen as to what constitutes a ‘significant’ consequence. This gives the Commission additional political advantage, or even power, by leaving it considerable leeway to decide about the necessity of conducting impact assessments using the criteria over which there may be no consensus among the Member States.

then check the quality of these impact assessments.⁶⁰ Importantly, the final results of these impact assessments will be made available to NPs, the EP, and the Council and published at the time of the adoption of a given EU legislative proposal along with the opinion of the Regulatory Scrutiny Board.⁶¹ This provision has a twofold meaning. On the one hand, this agreement honours the role of NPs in scrutinizing the Commission's legislative planning, not least by potentially producing more complete and more exhaustive impact assessment reports than hitherto. On the other hand, it seems to sideline NPs to a certain extent because their reactions are only officially solicited once the impact assessment process has been completed, whereas the citizens, business, and their organizations are expressly invited to send their contributions during this process. The Better Regulation Toolbox illuminates this further; namely, it states that NPs perform subsidiarity control on the basis of explanatory memoranda appended to draft EU legislative proposals.⁶² These explanatory memoranda contain the results of the preparatory work done in the form of impact assessments and stakeholder consultations.⁶³ Yet this is somewhat unsatisfactory because it is at this very early and incipient stage of EU lawmaking that NPs are keen to have a greater say through the possibility of issuing 'green cards'.⁶⁴ The Commission, however, seems reluctant to formally extend its policy development process beyond the described margins.⁶⁵ This is visible from the fact that, while the Interinstitutional Agreement expressly provides for the consultation of stakeholders, it does not mention the Political Dialogue with NPs in any way, even though *ex ante* consultation is its primary purpose.

E Fine-Tuning Better Regulation and Its Practical Implications

In order to complete its Better Regulation Agenda, the Commission strengthened the input side of the policymaking cycle by launching the 'Contribute to Law-Making' website on 1 July 2016. This enables citizens and stakeholders to communicate their feedback on the Commission's early ideas. The results show that in the first year, a total of 225 roadmaps and inception impact assessments have been made available for public consultation, with some comments leading to changes in the legislative proposal or informing the EU legislature.⁶⁶

60 Commission Decision on the establishment of an independent Regulatory Scrutiny Board, C(2015) 3263. See further: C.M. Radaelli & F. De Francesco, *Regulatory Quality in Europe: Concepts, Measures and Policy Processes*, Manchester, Manchester University Press, 2011.

61 Point 13 of the Interinstitutional Agreement of 2016.

62 These memorandums have no legal effect and are not published in the Official Journal of the EU.

63 European Commission, 'Better Regulation Toolbox' (2017), at p. 287.

64 See note 56 above.

65 See for instance: 'Juncker Rejects UK Push for Independent Scrutiny of EU Laws', *EurActiv*, 26 September 2014, available at: <https://www.euractiv.com/section/uk-europe/news/juncker-rejects-uk-push-for-independent-scrutiny-of-eu-laws/855511/> (last accessed 7 January 2019).

66 European Commission, Communication 'Completing the Better Regulation Agenda: Better Solutions for Better Results', COM(2017) 651 of 24 October 2017, at pp. 6-7.

On the output side, the Commission maintains the ‘Lighten the Load’ portal, which enables citizens and stakeholders to participate in post-legislative scrutiny and provide suggestions on ways to simplify existing EU legislation and make it more cost-effective and efficient. These are then reviewed by the REFIT Platform and could be reflected in the recommendations it makes to the Commission. In addition to this, the Commission has committed to accompanying its impact assessments not only with projected cost savings but also with burden-reduction objectives, which should provide guidance to national authorities in implementing EU legislation. It also aims to provide Member States with implementation plans to increase coherence across the Union. Yet the Commission also holds that when it comes to its post-legislative evaluation, “legitimacy is provided by the fact that it actively involves stakeholders.”⁶⁷ Given the significance of the role of NPs in the post-legislative phase of EU decision making in terms of both enactment and democratic oversight over the national government, it is instructive to consult domestic parliamentarians about these evolving EU processes of post-legislative evaluation. This could be done along the lines of the pre-legislative ‘detailed statement’ on EU legislative proposals mentioned earlier under paragraph B.

In parallel to the refinements of the Better Regulation Agenda, Commission President Juncker established a ‘Task Force on Subsidiarity, Proportionality and Doing Less More Efficiently’ on 14 November 2017. The Task Force was chaired by the Commission’s First Vice-President, Frans Timmermans, and composed of three members from NPs nominated by COSAC (chairpersons of the European affairs committees from Estonia, Austria, and Bulgaria), and three members from the Committee of the Regions. During its work (January-July 2018), this Task Force focused on improving the application of these two principles, identifying areas where policies could be returned to the Member States, and enhancing the involvement of local and regional authorities in EU policymaking.⁶⁸ Since subsidiarity is an overarching motive of Better Regulation,⁶⁹ the proposals made by the Task Force may inform the future shaping of legislative scrutiny in the EU. Among them is the recommendation for the Commission to start using a model assessment grid to justify compliance with subsidiarity and proportionality more transparently.⁷⁰ However, rather than stimulate a public debate, such proposals risk further bureaucratizing EU policymaking.⁷¹

In political practice, furthermore, the Better Regulation Agenda does not seem to be very consequential to NPs’ scrutiny. Recent empirical insights compiled by COSAC in May 2017 demonstrate a significant degree of indifference or even resignation among the ranks of national parliamentary chambers.

67 *Ibid.*, at p. 11.

68 See in this respect: R. Zbíral, ‘Restoring Tasks from the European Union: A Bumpy Road to an Unclear Destination?’, *Common Market Law Review*, Vol. 52, No. 1, 2015, pp. 51-84.

69 O. Pimenova, ‘Subsidiarity as a “Regulation Principle” in the EU’, *The Theory and Practice of Legislation*, Vol. 4, No. 3, pp. 381-398, at 385.

70 Report of the Task Force, ‘Active Subsidiarity: A New Way of Working’, 10 July 2018, at p. 11.

71 D. Jancic, ‘Frans Timmermans’ Subsidiarity Proposals Do not Go Far Enough to Address the EU’s Democratic Deficit’ LSE EUROPP Blog, 26 July 2018.

In terms of pre-legislative involvement, only a minority of eight national parliamentary chambers considered that conducting impact assessments on legislative packages would help strengthen the EU's four freedoms of movement.⁷² At the same time, the French Senate has argued that the Commission's failure to submit an impact assessment along with its legislative proposal could be a ground for issuing a reasoned opinion within the Early Warning Mechanism.⁷³ This is confirmed by the experience of the first three yellow cards. For example, the most common objection within the third yellow card, which was raised concerning the revision of the Posting of Workers Directive, was the lack of substantiation or justification of the reasons for EU action,⁷⁴ and this can typically be supplied by means of compelling impact assessments. This signifies a less proactive and more reactive approach among NPs and means in turn that the Better Regulation Agenda has not yet found its full utility in domestic legislatures, despite the fact that subsidiarity compliance checks form part of the Commission's impact assessment process.

When it comes to post-legislative involvement, out of 37 national parliamentary chambers surveyed, no less than 33 did not carry out their own evaluations of the existing EU legislation, while only 4 chambers did (the French and Italian Senates and the Romanian and Belgian Chambers of Deputies).⁷⁵ Conversely, a majority of the responding chambers scrutinized the government's position on the Commission's evaluations of EU legislation. In relation to this, most chambers neither agreed nor disagreed on both whether the Commission's reports were sufficient to scrutinize the government concerning the implementation of EU law and whether the Commission's reports were detailed enough to enable such scrutiny. More than a half of the chambers (17 out of 34), however, would prefer to receive additional information beyond the Commission's implementation reports.

These forms of post-legislative EU scrutiny by NPs therefore take place indirectly and are not a developed practice among domestic parliamentarians. The attitudes transpiring from the abovementioned survey reveal a lack of awareness and passivity of NPs once the EU has adopted legislation. Tangible, too, is the irregular and haphazard nature of parliamentary action concerning the implementation of EU law. This is unsatisfactory, because EU legislation is crafted on the basis of an added value analysis and comparison with existing EU legislation. This apparent neglect for post-legislative engagement of NPs in EU affairs may be a corollary of excessive emphasis having been placed on *ex ante* subsidiarity monitoring as a new Lisbon Treaty mechanism of involvement which required adaptation. Yet the Commission's earnest pursuit of the Better Regulation Agenda

72 COSAC Secretariat, 27th Bi-Annual Report, 3 May 2017, at p. 21.

73 COSAC Secretariat, 24th Bi-Annual Report, 4 November 2015, at p. 22.

74 D. Jancic, 'EU Law's Grand Scheme on National Parliaments: The Third Yellow Card on Posted Workers and the Way Forward', in D. Jancic (Ed.), *National Parliaments after the Lisbon Treaty and the Euro Crisis: Resilience or Resignation?*, Oxford, Oxford University Press, 2017, pp. 299-312, at 305.

75 COSAC Secretariat, 27th Bi-Annual Report, 3 May 2017, at p. 14.

accentuates the need for parliaments to devote greater attention to their *ex post* scrutiny.

The foregoing observations show that NPs currently do not occupy a prominent but a fairly peripheral place in the Better Regulation Agenda. Although a stronger role for NPs in Better Regulation would not automatically translate into influence, it would be a small step towards a greater presence of NPs at the EU level. It is furthermore unlikely that the reforms presented above will remove the NPs' inherent limitations in the processes of shaping EU policy. Nor can the greater amount of information produced by the Commission in the pre-legislative and post-legislative phases be expected to significantly mitigate NPs' problems with the lack of transparency of EU decision making. The latter arises from the growing trend of agreeing EU legislation in informal trilogues, behind closed doors, and at first reading.⁷⁶ According to the estimates of the UK House of Commons European Scrutiny Committee, this 'fast-track' legislative procedure has resulted in the adoption of EU legislation in 33% of the cases in the period 1999-2004, rising sharply to 72% in the period 2004-2009, and to a staggering 81% from 2009 onward. This parliamentary chamber stresses that the unpredictable and secretive nature of first reading deals renders domestic scrutiny of EU affairs 'difficult, if not impossible'.⁷⁷ Moreover, the UK House of Lords EU Committee has argued in favour of allowing NPs to have a say also at later stages of the EU legislative procedure if a proposal under negotiation has undergone major amendments or has seen altogether new elements inserted.⁷⁸ This has also been noted in the literature through the proposal to establish a 'late card' or 'final check' system.⁷⁹ The Better Regulation Agenda does not deal with this democratically challenging aspect of EU decision making.

F Concluding Remarks

Legislation, regulation, and rulemaking are complex multidimensional processes that affect a multitude of actors – public and private sectors and citizens alike. Commission President Juncker's Better Regulation Agenda does justice to the need of reconciling the diversity of interests affected by EU legislative production with the good governance principles that aim to guarantee informed decision making as well as greater efficiency and accountability. The Commission does so by promoting extensive pre-legislative consultations with stakeholders and by endeavouring to increase regulatory quality at all stages of the life of EU legisla-

76 See the less negative impact of trilogues on the EP in: C. Roederer-Rynning & J. Greenwood, 'The Culture of Trilogues', *Journal of European Public Policy*, Vol. 22, No. 8, 2015, pp. 1148-1165.

77 HC 109-I, 'Reforming the European Scrutiny System in the House of Commons', 24th Report of Session 2013-2014 of 28 November 2013, paras. 72-73, at p. 26.

78 HL Paper 151, 'The Role of National Parliaments in the European Union', 9th Report of Session 2013-2014 of 24 March 2014, para. 101, at p. 31.

79 S. Garben, 'Confronting the Competence Conundrum: Democratising the European Union through an Expansion of Its Legislative Powers', *Oxford Journal of Legal Studies*, Vol. 35, No. 1, 2015, pp. 55-89, at 88.

tion.⁸⁰ From the perspective of public law, this carries the “promise of a more democratic form of decision-making over the development of regulatory regimes,”⁸¹ such as that of the EU.

Whether it is withdrawing stalled proposals,⁸² or repealing, codifying, or recasting existing legislation, the Commission exhibits determination in rebranding the EU legislative initiative while sharing the sense of ownership of the regulatory and legislative agendas with the wider public. Greater political inclusion, the ‘fit-for-purpose’ formula for EU lawmaking, and more ‘user-friendly’ legal rules represent the democratic added value of the Better Regulation Agenda.⁸³ Reaping the benefits of information technology in the digital age, the Commission is reaching out to the addressees of EU legislation directly, and this is a step forward in participatory democracy. However, there is also empirical evidence that a more assertive engagement in Better Regulation can strengthen the Commission itself.⁸⁴ So, where does this leave representative democracy, which, unlike participatory democracy, is premised on the existence of a democratic mandate for the enactment of binding legal rules?

Seemingly, little will change and the EU legislative apparatus will continue to operate as usual with NPs ensuring subsidiarity compliance of EU legislative proposals. However, it has been argued that the Better Regulation Agenda’s focus on legislative deflation reduces the significance of the Early Warning Mechanism.⁸⁵ In my opinion, this is only so from the perspective of fewer legislative proposals coming from the Commission. However, for those that do come, Better Regulation has the potential to enrich the basis for *ex ante* national parliamentary scrutiny in particular through the preparation and publication of very early legislative plans and ideas, while they are still at the contemplation and inception phases. It is nevertheless up to NPs themselves to seize this opportunity. On the contrary,

80 There are, however, a plethora of considerations that need to be addressed to take a fuller stock of the Better Regulation Agenda. See on this essays in Garben & Govaere, 2018; A. Renda, ‘Too Good to Be True? A Quick Assessment of the European Commission’s New Better Regulation Package’, *CEPS Special Report No. 108*, May 2015; W. Voermans, ‘Concern about the Quality of EU Legislation: What Kind of Problem, by What Kind of Standards?’, *Erasmus Law Review*, Vol. 2, No. 1, 2009, pp. 59-95.

81 C. Brown & C. Scott, ‘Regulation, Public Law, and Better Regulation’, *European Public Law*, Vol. 17, No. 3, 2011, pp. 467-484, at p. 469.

82 See to this effect: Court of Justice, Case C-409/13, *Council of the European Union v. European Commission*, judgment of 14 April 2015.

83 See a similar argument on the democracy benefits of Better Regulation in: P. Popelier, ‘Governance and Better Regulation: Dealing with the Legitimacy Paradox’, *European Public Law*, Vol. 17, No. 3, 2011, pp. 555-569.

84 C.M. Radaelli & A.C.M. Meuwese, ‘Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU’, *West European Politics*, Vol. 33, No. 1, 2010, pp. 136-153; E. Melloni, ‘Ten Years of European Impact Assessment: How It Works, for What and for Whom’, *World Political Science*, Vol. 9, No. 1, 2013, pp. 263-290; C.A. Dunlop & C.M. Radaelli, ‘Impact Assessment in the European Union: Lessons from a Research Project’, *European Journal of Risk Regulation*, No. 1, 2015, p. 33.

85 European Parliament, Study for the AFCE Committee, ‘The Role of National Parliaments in the EU after Lisbon: Potentialities and Challenges’ (Olivier Rozenberg), doc. no. PE 583.126, March 2017, at p. 26.

the robust revamp of *ex ante* stakeholder consultations,⁸⁶ combined with strengthened *ex post* evaluations of EU policies,⁸⁷ while concomitantly keeping parliaments at bay in the same process, casts the Juncker Commission's Better Regulation Agenda as less favourable to NPs than one would expect from the solemn announcement of a 'new partnership' with them.⁸⁸ But is this surprising? Parliaments typically do not possess the institutional capacity and expertise to carry out analyses and impact assessments in a way that the executive branch does. Nonetheless, as elected representatives, parliamentarians ought to have a strong voice not only on the adequacy and political implications of the outcomes of impact assessments and stakeholder consultations, which may shape the substance of EU legislation, but also on the added value of EU legislation that has already been enacted.⁸⁹ The Better Regulation Agenda does little in this regard. For this reason, NPs should not lose sight of these developments in order to preserve their already limited space on the EU lawmaking chart.

86 A. Meuwese, 'Embedding Consultation Procedures: Law or Institutionalization?', *European Public Law*, Vol. 17, No. 3, 2011, pp. 527-538.

87 S. Smismans, 'Policy Evaluation in the EU: The Challenges of Linking *Ex Ante* and *Ex Post* Appraisal', *European Journal of Risk Regulation*, No. 1, 2015, pp. 6-26.

88 J.-C. Juncker, Mission Letter to First Vice-President Frans Timmermans, 1 November 2014, at pp. 4 and 6, see: http://ec.europa.eu/archives/juncker-commission/docs/timmermans_en.pdf (accessed 7 January 2019). See also note 45 above.

89 See to this effect: J.B. Wiener, 'Better Regulation in Europe', *Current Legal Problems*, Vol. 59, No. 1, 2006, p. 449.