Better Regulation as Soft Law

Claudio M. Radaelli (School of Transnational Governance, EUI, and UCL)
Gaia Taffoni (School of Transnational Governance, EUI)

Abstract

Better regulation is an agenda aiming at managing legislation across the different stages of the policy cycle. At the EU level, this agenda for reform has been handled as soft law with communications, reports, principles, and toolboxes. The ambiguity of the concept has created a policy arena where the EU institutions jockey for positions on the control of the law-making process. We then turn to the Member States. For their better regulation policies, they have chosen a combination of soft and hard instruments and different degrees of formalization. Tellingly, this variation shows the different views and assumptions on the efficiency of soft law as well as of the role played by legal and administrative traditions.

Word count: 7860

1 Introduction: Better Regulation and EU Law

This chapter deals with the 'better regulation' agenda of the European Union (EU) as soft law. The topic of 'better regulation' (over the years this term has been tweaked with variations around the themes of better law-making and smart regulation) has been firmly on the agenda of the EU since the early 2000s. Its early steps date back to the 1990s. Hence, we are talking of a long-standing element of the soft law activities of the EU. The connection between 'better regulation' and EU law is clear, since the former is a set of practices and standards about how to produce and manage law across the policy cycle. Thus, essentially, better regulation is about how to make high quality legislation. As we shall see, this statement comes with qualifications. Better regulation has been criticized as EU de-regulation, harmful to the goals of social and environmental policies (Garben 2018; Schömann 2015; Van den Abeele 2015). But, no matter how we appraise it normatively, the point about the connection with EU law stands: better regulation is an agenda to reform and change EU law across different policy areas and stages of the policy cycles. It is a set of rules about EU law-making – later we will in fact talk about its meta-regulatory properties.

Before we get into the subject matter of this chapter, we need to clarify that to make a statement about the quality of a rule (and say how it should get 'better') is not a straightforward, easy step. Even the deceivingly trivial question of what a regulatory burden really is reveals ambiguity and complexity (Lodge and Wegrich 2012: chapter 1). Hence, what is the problem that better regulation is supposed to address? Regulation means protection from risks, but it also means rules that in some cases are overwhelming and stifle economic activity and entrepreneurship. In the words of Bruce Doern, the reform design underlying better regulation should address both red tapes and red flags (Doern 2007). To do that, we need a fine tooth-comb that allows us to establish the quality of a given rule.

Yet – here is the thing – regulatory quality depends on the paradigms or conceptual lenses we adopt. For a politician, quality may well mean sufficient levels of consensus around a rule. For an economist, it may mean efficiency. For a bureaucrat, good rules come out of routines and legitimate procedures.
In short, quality depends on the 'theory hat' one wears (Baldwin and Cave 1999; Gunningham at al. 1999) and the seat one takes at the law-making table (be it the seat of a politician, a civil society organization, or an expert). Some theoretical paradigms suggest that regulation is the public interest response to market externalities. Other theories argue that capture and interest group politics shape the system of rules we have at a given time in a given place (Lodge and Wegrich 2012: chapter 2). Consequently, all normative statements about existing regulation need to be clear about the theoretical lenses and presuppositions adopted. Without this clarity upfront, better regulation remains undetermined so to speak.

In this undetermined policy space, politics takes advantage of semantic ambiguity. When international organizations or governments decide to reduce the stock of rules and commit regulators to cost ceilings or regulatory budgets in the name of high-quality regulation, we are witnessing an argument is terms of quantity – a de-regulatory argument. When the argument is not about the number of rules but whether they match certain benchmarks or criteria we are closer to the domain of quality. When someone says that beyond a certain *quantity* the legal system becomes a maze impossible to implement, enforce and adjudicate, one is making the argument that too many rules deteriorate the *quality* of the system.

The European Union (EU) is not alone in having adopted (and promoted in its Member States) the discourse and policies of 'better regulation' (from now onwards without the

quotation marks). Indeed, the same language, activities and tools appear on the agenda of the World Bank (2010) and the Organization for Economic Cooperation and Development (OECD 1995; 2012).

For the authors of this chapter, the presence of better regulation is an empirical manifestation of an agenda that can be examined without making prior normative assumptions. As we shall see, the EU has adopted soft law to promote this agenda – hence the fit with the volume. To be clear: for us, the fact that an institution defines its regulatory reform policy as better regulation does not necessarily mean that it meets the previously mentioned academic benchmarks, or, is better for European law or for anyone. Neither do we presuppose coherence in what the EU has done with better regulation. Indeed, there are fierce criticisms of better regulation (Kysar 2010; Garben and Govaere 2018). And the EU has pursued quality and quantity objectives at different times, with some contradictions (Radaelli 2021). Objectively, the EU better regulation policy is one possible set of visions, discourses and tools about regulatory reform and the governance of EU legislation.

To wrap up and carry on, better regulation is a governance agenda for the reform of law-making. As such, it provides discourse as well activities and tools to manage regulation across the policy cycle. In the EU and its Member States, its stated aims have been to improve on the transparency and quality of law-making, to appraise with evidence-based tools both the stock and the flow of regulation, to simplify, to reduce burdens, and to create regulatory oversight bodies. The specific policy instruments adopted by the European Commission and the Member States have not always been the same, but stakeholders consultation, impact assessment, more recently legislative evaluation, and variations on the theme of regulatory offsetting and the cull of administrative burdens are still pivotal.

As mentioned, for lawyers and political scientists, better regulation is also an instance of meta-regulation, that is, a set of rules dedicated to how rules should be governed across their life cycle (Scott 2003; 2010; Radaelli 2010). Falling outside the Treaties, better regulation has always been handled by the EU in terms of communications, guidance, reports, and so on. Hence it is exclusively soft law – although the situation in the Member States is, as we shall see, quite different, presenting a combination of soft and hard law.

In the next section we examine better regulation from the policy and politics angles focusing on the EU level. Section 3 traces the history of better regulation as politics. Section 4 examines two central tools of better regulation: Impact Assessment (IA) and consultation at the Member State level (and the UK), highlighting their variation and the mix of hard and soft law. In the last section, we draw the main conclusions on better regulation demonstrating that this specific type of soft law has become the field where European institutions measure their power and member states express their domestic preferences.

2 Policy Arenas and Politics

If we consider the European Commission and more broadly the EU policy process, we find that better regulation has its own distinctive underlying assumptions about the problem(s) it is supposed to solve, actors, processes, inter-institutional agreements, and instruments. Consequently, we can call it a public policy. But, following Lowi (1972), for every policy there is a politics dimension or arena of power. Public policies determine their own political arenas with their distinctive issues, actors, and decision-making processes. The tension between policy and politics is our lens to examine this particular instance of soft law in the EU and its Member States.

Let us first focus on the EU level. Here, essentially, the *policy space* better regulation is a set of actors, instruments, decision-making processes, and institutions. As *politics*, it is the terrain where the Member States, the European Parliament and the Commission exploit the ambiguities we have seen in the Introduction to define who is in control of the law-making process in the EU (Radaelli 2018). Better regulation politics is particularly intense. We see this in the historical relationship between the Commission and the Member States. Should better regulation be an arena that allows the Member States and the European Parliament to control (or at least to demarcate) the power of the Commission on law-making, qualifying over time the Commission's Treaty-based right to initiate legislation? Impact assessment and consultation can be used to make the Commission more accountable to Member States and MEPs (and of course pressure groups)? Or, alternatively, does better regulation enhance the control of the bureaucracy on the life-cycle of EU legislation? This can happen in different ways:

- by making it more difficult to criticize the Commission's proposals supported by robust impact assessment and positive opinions of pressure groups gathered via consultation;
- by building over time the option (for the Commission) to exempt proposals from impact assessment or withdraw proposals without publishing an impact assessment;
- by leveraging consultation to create synergy on policy issues with some pressure groups;
- by asking the European Parliament and the Council to carry out impact assessments of their substantive amendments, thus proving that the amendments do not make legislation worse in comparison to the original proposal. EP and Council's impact assessment are foreseen in the interinstitutional agreement on better lawmaking of 2016 (OJ L 123, 12/5/2016);
- by asking Member States to report to the Commission on administrative burdens and compliance costs introduced at the stage of transposition and implementation; and
- finally by creating a more coherent and sound policy inside the Commission via the empowerment of the Secretariat General over the Directorates General.

In short, for some, better regulation is a policy arena to make the Commission's law-making more accountable and controllable, for others it is a tool to preserve and possibly expand the power of the Commission. It follows that even if this soft law as *policy* was considered irrelevant because Communications and guidelines are toothless (something we are not arguing, but we consider for the sake of presenting an extreme argument), as *politics* better regulation goes right to the core of who is in charge of the life cycle of legislation.

3 How Did We Get There?

To find a day 1 in EU better regulation we must go back to the Edinburgh European Council of 1992. There, the UK, with Germany, and the Netherlands articulated a concern shared with the business community about the quality of EU law-making and the need to simplify legislation. In those days there were also talks to create a body of 'guardians of the rules' (an independent review body) that would one day take the shape of a 'European Conseil d'Etat' (Radaelli 1999). The Member States played the first card.

No one was asking for hard law measures in this field. Yet the experience of a few leading Member States and above all OECD guidance, codified in a set of principles in 1995 (OECD 1995), showed a possible way forward: a set of commitments and principles taken by the Commission to improve on the quality of law-making, together with the adoption of procedural policy instruments, especially consultation and impact assessment of policy proposals.

The Commission did not immediately embrace wholesale the better regulation principles and tools. Rather, initially it responded with individual projects and task forces such as the Business Environment Simplification Task Force (BEST). The Commission experimented with some *ad hoc* projects for impact assessment (*fiches d'impact* were rare and not public), business consultation, rules of procedures, legislative drafting manuals and the generic commitment to openness (Radaelli 1999). The Directorates General (DGs) kept their autonomy when handling the checklists, and co-ordination across services remained low priority. Ex post policy evaluation remained limited to financial controls only.

After an almost a decade since Edinburgh, the politics of better regulation was still unresolved between the Commission and the Member States. And indeed it re-appeared neatly with the pressure on the Commission to respond to the resignation of the Santer Commission with the adoption of, among other things, a regulatory reform and governance agenda. The new call on the Commission appeared in the so-called Mandelkern report (Mandelkern Group on Better Regulation 2001) published in November 2001 – this group was staffed by high profile Member States delegates. This report specifically addressed the Commission, asking for a comprehensive policy on regulatory reform, including consultation, regulatory impact assessment, and the consideration of alternatives to traditional command and control regulation. Mandelkern went as far as to propose a deadline asking the Commission to 'propose by June 2002 a set of indicators of better regulation' (Mandelkern Group 2001, pp. iii and 59).

The Commission had its own internal problems in responding to this call. Some DGs were keen on the regulatory reform agenda, others far less. The Secretariat General saw in better regulation an opportunity to take a more central coordination role in policy formulation, and

started to like the idea of a single consultation procedure and a template for the appraisal of all proposals for directives and regulations.

The approach of the Commission to impact assessment then emerged in the years 2002-2005 (Allio 2008). It revolves around the economic, environmental and social dimensions of regulation. The three-fold articulation reflects the deal between the DGs oriented towards business and small and medium enterprises and the DGs more concerned about environmental and social standards. As magisterially narrated by Lorenzo Allio (2008), the emergence of this specific three-fold articulation of impact assessment had more to do with how to make a deal within this complex organization (the DGs in charge of enterprise, social affairs and environmental policy agreed on the impact assessment template) than with responding to the call (of the Member States, the European Parliament, and business) for transparency and accountability.

As for its organizational impact, regulatory reform in the Commission established 'a focus for strategic and operational management within the Secretariat General' (Radaelli and Meuwese 2010, p. 142), and a limitation of the silos mentality that prevailed until then. In the first decade of the 2000s, the Secretariat General mutated from a *primus inter pares* with loose coordination capacity to something like a cabinet office (Radaelli and Meuwese 2010). Among other things, this explains why in the first decade of the 2000s the profile of better regulation within the Secretariat General rose year-after-year, as did its capacity to steer the impact assessment working groups inside the Commission.

Thus, the rise of regulatory reform agendas as soft law reveals power dynamics between the Commission and the other institutions as well as dynamics *inside the Commission as complex organization*. For a short period of time, it looked like this bundle of soft law instruments (including minimum standards for consultation and impact assessment) could be accompanied by a slightly harder tool: regulatory indicators.

Here is the story. The then DG Enterprise and Industry and the Secretariat General kicked off the game by publishing a tender for a study on regulatory indicators in 2003. DG ENTR and the SECGEN wanted to keep control of the objectives of better regulation – and keep track of progress both at the EU level and in the Member States. After all, the quality of regulation is decided in a multi-level context: the EU produces policies that are then transposed and implemented by national bureaucracies and regulators. This attempt to harden the soft law

tools with indicators was arguably a political twist. Initially demanded by the Member States to control the Commission, in the early 2000s someone in the Commission might have reasoned that the design and implementation of regulatory indicators could have given the driver's seat to the SECGEN instead.

Some argued that, if adopted, regulatory indicators could have created a proper open method of coordination in this domain (Radaelli and De Francesco 2007; Tholoniat 2010; Zeitlin 2008). Open method of coordination is a classic in the toolbox of soft law modes of governance in the EU (see van Gerven and Stiller in this volume).

Typically, facilitated coordination includes shared objectives, guidelines, the sharing of best practice, multi-lateral discussions, peer review and an iterative process. Indicators are necessary to make the objectives concrete and to measure progress. In the years 2002-2005 the EU had guidelines, tools, a network of Directors and Experts of Better Regulation to host multi-lateral surveillance and peer review. What was missing was a set of indicators designed to support an open method of coordination (Radaelli and De Francesco 2007).

However, this element of a fully-fledged open method did not materialise. Around 2003-2004, the Commission lost the support of the UK and the Netherlands, two countries that were more interested in experimenting with tools for the reduction of administrative burdens (Radaelli 2020).

Two different visions came to clash: on the one hand the broad, governance-inspired vision of the Commission. On the other, there was the Dutch and British-led de-regulatory war on red tape (Gravey 2016). The project to adopt EU-wide regulatory indicators was abandoned – although during the same decade, outside the EU, the OECD consolidated its own system of indicators of regulatory governance (Radaelli 2020).

Institutions emerged as the second terrain of confrontation: who should be committed to the adoption and usage of the soft law instruments? Vertically, the tension was between the EU level and the responsibility of the Member States, and who should be accountable to whom. Horizontally, the tension involved the Commission and the other two major institutions. The better regulation agenda was supposed to bind the Council, the European Parliament and the Commission with the 2003 inter-institutional agreement on better regulation (OJC 321, 31/12/2003). This agreement was not implemented by the Council, and only in limited ways by the European Parliament. This signals that these two institutions were keen on tools such

as impact assessment to make the Commission accountable to them, but preferred to be free to think politically when making their way through EU legislative proposals, without the constraints imposed by impact assessments of their substantive amendments.

If anything, during the mid-2000s the national delegations pressed for more control on the Commission. They did so by asking for a regulatory oversight body that would check on how serious the Commission was with its own impact assessments. In the SECGEN and elsewhere there was no a priori opposition to a similar body (Radaelli 2020), given that centralized oversight of rulemaking would go hand in hand with centralized control of policy formulation (around the key role of the SECGEN). However, the Commission wanted this body staffed by its officers, whilst the Member States active on the better regulation agenda demanded an independent body. The result was a Commission-staffed Impact Assessment Board (IAB) - created in 2007.

Much later, in 2015, the IAB turned into a Regulatory Scrutiny Board (RSB) with three members from the Commission and three temporary agents recruited externally, and a chair from the Commission ranked at the level of Director General. The 2020 decision of the Commission (European Commission 2020) emphasized that the RSB does not take political instructions (on the Board's impact, see Senninger and Blom-Hansen 2020) and amplified its mandate to the scrutiny of foresight – a crucial element of the Next Generation plan of the EU for recovery and resiliency.

In the same decade (the 2010s), the EP increased its capacity to critically appraise the impact assessments and ex-post legislative evaluations of the Commission – with a substantial strengthening of its research service (EPRS) (Radaelli 2018). In 2015 the Commission re-calibrated better regulation (European Commission 2015), always keeping the line firmly on soft law instruments – indeed the key instrument for launching the agenda was a Communication. The 2015 re-launch included the goal of closing the policy cycle with legislative evaluations made necessary before work on new impact assessments could start. There was also more investment in consultations at different stages of the lawmaking process. Guidance on impact assessment and ex-post legislative evaluation improved, with a proper toolbox introduced in 2015 and then re-adjusted in summer 2017. Since then, ex-post legislative evaluation was rare in the Commission, and not scrutinized by oversight bodies. Finally, as mentioned, the IAB turned into the stronger RSB, because among other things the RSB members were full-time (as opposed to the part-timers of the IAB).

In terms of inter-institutional political arena, the bone of contention was a new inter-institutional agreement negotiated in the second half of the 2010s. In the end the three major institutions finalized a new inter-institutional agreement on better law-making (OJ L 123, 12/5/2016). This agreement relaunched the 2003 agreement. Significantly, it adopts the language of *law-making* instead of better regulation, to indicate the ambition to streamline the evidence-base for the whole law-making process, from inception to the final agreement on the proposals. Other innovations in the last decade are yet again in the territory of soft law, with simplification carried out by a platform called REFIT – whose mandate was to check that the legislation in force was still fit for purpose.

In 2021 the Commission (2021) intervened on better regulation with the classic soft law tool of a Communication, this time adding foresight, a single portal for consultation, and references to environmental sustainability. Better regulation's importance in the Commission is evidenced by its presence in the working methods. The working methods include the presence of a mechanism of regulatory offsetting (Trnka and Thuerer 2019) called one-in-one-out. This offsetting principle affirms that any regulation introducing new burdens should relieve business and citizens of an equivalent burden existing in EU-level legislation in the same policy area.

Offsetting is yet another soft law instrument. But behind the policy instrument of one-in-one-out we find yet again the politics dimension. The Competitiveness Council demanded a commitment of the Commission to limit the growth of regulatory burdens with some mechanisms of regulatory offsetting. Yet the Commission resisted the idea not once, but twice (Radaelli 2021 for the detail of the story). To accept one-in-one-out was a way to accommodate the preferences of governments that had been instrumental in delivering support for von der Leyen - without accepting an explicit de-regulation target (Radaelli 2021).

Conceptually, after Covid-19, the suspension of the stability and growth pact, the green deal and the arrival of the recovery and resiliency facility, one-in-one-out should not be the compass of better regulation. This cannot be the major innovation that the European economy and citizens want from 'better law-making'. One-in-one-out is a narrow priority when compared with the political priorities of the moment. All the post-pandemic political

priorities of the EU institutions are geared towards delivering welfare, hence they are net benefits-oriented.

But what has all this activity brought about in the Member States? How is the bundle of soft law instruments of better regulation as developed at the supranational level mirrored at the national level?

4 The State of Play in the Member States

We now turn to the Member States level and the UK. It is impossible to examine both the politics and policy dimension for 27 Member States (and the UK), but we are interested in examining how better regulation has been established at the domestic level. Operationally, we trace the soft and hard law characteristics of regulatory reform by focusing on two pivotal policy instruments: Impact Assessment (from now on IA) and stakeholders consultation. We draw on information and OECD data (2018), as well as data from the European Research Council-funded project Protego, Procedural Tools for Effective Governance (http://protego-erc.eu/).

While the supranational level is dominated by soft law, in the Member States we find a combination of soft and hard. But that is not the whole story. What emerges from the overview of the distribution of both IA and consultation practices is that better regulation was adopted in different times and different ways, thus signaling a rather wide range of political choices made in the Member States. As will become clear in the remainder, the evidence on Member States points to a subtle difference – beyond the choice for soft or hard law. This difference lies in the high degree of formalization of the better regulation agenda of the Commission (and, for that matter, the OECD too). The Commission has adopted soft law in order to create a web of rules that govern every single feature of IA and consultation. The Member States are divided between those who have put down on formal guidance, page after page, and set in hard law the requirements for consultation and IA, and those who have a more informal style of consulting and appraising proposals for primary and secondary legislation. Some Member States in fact do not have a legal basis for consultation thus signaling a high degree of informality of consultation practices. Better regulation, we maintain, reflects domestic preferences and legal traditions rather than supranational models.

Our cross tabulation (Table 1) takes into account all the Member States (and the UK) and the EU as a stand-alone case. Specifically, we cross tabulated data on IA and consultation. One caveat applies to countries that do not have a legal basis for consultation at all, neither hard nor soft. For the purpose of providing a general overview, countries with no legal basis for consultation fall in the soft law clusters (these cases are underlined in the table).

We start by looking at the two clusters of countries in which one instrument is established in hard law and the other in soft law. The majority of countries fall in the cluster where IA is set in hard law and consultation in soft law. Contrarily, it is uncommon to observe cases with a combination where consultation is set in hard law and IA in soft law, this is perhaps because consultation is the most informal tool of better regulation. This is specifically the case of the EU – not surprisingly as we have showed in the previous sections – but also of Ireland and UK.

The most-populated cluster is the one with countries where both IA and consultation are set in hard law. The table also highlights that only few countries have a soft legal basis for both IA and consultation. This last observation points immediately to a striking difference between the way Member States have established better regulation tools vis-à-vis the supranational agenda promoting better regulation as soft law. Member States have put down formal requirements and established hard legal acts for better regulation's tools.

Table 1. Hard and soft legal basis for IA and Consultation

	IA Hard Law	IA Soft Law
Consultation Soft Law	*Austria, Belgium, Croatia, Cyprus, Czech Republic, Denmark, France, Italy, Malta, Poland, Sweden*	*EU, Ireland, UK*
Consultation Hard Law	*Bulgaria, Estonia, Finland, Germany, Greece, Hungary, Lithuania, Netherlands, Portugal, Romania, Slovenia, Slovakia, Spain*	Latvia, Luxembourg

Source: Our elaboration of Protego data (underlined countries have no legal basis at all for consultation)

4.1 Stakeholders Consultation

When looking at the single tools, we find evidence suggesting a variety of choices made by the Member States. Let us start with stakeholders consultation (table 2) – like in the case of the EU in the previous section, we do not cover other types of consultation, such as consultation by parliamentary committees. We consider the dimension of publicity of the comments received and reporting on the consultation exercise. These aspects highlight a certain level of formality in the way governments and regulators carry out consultation. In fact, despite having hard or soft law, consultation procedures can be more or less detailed by setting a number of rules to be followed.

A first observation regards those countries that do not have a legal basis for consultation. Among those countries we find Denmark and Sweden. They do indeed have consultation traditions and practices, anchored in hearings and consultative committees for the preparation of new legislation. The absence of a formal procedure indicates the difference between the formalized and proceduralized approach of the Commission (where consultation guidance is highly formal, with dozens of rules written in the toolbox) and the informal, agile approach of Denmark and Sweden.

When we turn to whether comments are made public and the publication of a consultation report, we find that these two dimensions signal a certain formality of consultation, whether it is established by soft or hard law. Even when comments are not made public and a final report on consultation is not published, a systematic way to engage with stakeholders may still emerge. Yet again, Denmark signals the distance between informal practice and the formal approach. In Denmark there is high stakeholders' engagement, but the system relies on trust between government and external stakeholders, not on formal procedure (OECD 2010). In this sense, consultation mainly relies on informality even if some elements of formality exist, such as the online guide on procedures for the development of regulations (OECD 2010).

Informality does not seem to affect the level of transparency of the process. In the OECD Indicators of Regulatory Policy and Governance (iReg, Arndt et al. 2015) Denmark is different from Czech Republic even if in both countries there is no systematic reporting on consultation and comments are made public. The two countries in fact have very different scores in terms of iReg Transparency index. The Czech Republic is below the OECD 2018 average in terms of transparency, while Denmark is on the OECD average. A possible explanation lies in the fact that Denmark complements the lack of published consultation information and data with a strong informal engagement with stakeholders, whilst the Czech Republic does not.

Finally, looking at timing, consultation procedures have a long history only in a handful of countries, indicating that they (together with the Commission) were early pioneers. Here we cannot be sure that there is an effect of the Commission on the diffusion of consultation. If anything, existing research suggests that the major effect on the adoption of formal procedures of consultation comes from the OECD rather than the EU (De Francesco 2012).

Table 2: Consultation

Countries	Are comments made public?	A consultation report is published	Year in which the legal basis was introduced
Austria	No	No	/
Belgium	No	No	/
Bulgaria	Yes	Yes	2007
Croatia	Yes	Yes	2009
Cyprus	No-not systematic	Yes	2009
Czech Republic	No	No	1998
Denmark	No	No	/
Estonia	Yes	Yes	2011
European Union	Yes	Yes	/
Finland	Yes-the summary of comments	Yes	2010
France	No	No	/
Germany	Yes	Yes	1979, 2000
Greece	Yes	Yes	2012
Hungary	Yes	Yes	2010
Ireland	Yes	Yes	2009
Italy	No	No	2017
Latvia	No	Yes	2009
Lithuania	Yes	Yes	1996
Luxembourg	No	No	1978/79
Malta	Yes	Yes	2011
Netherlands	No	No	1994
Poland	No	Yes	2013
Portugal	Yes-a record	No	1976, 2009, 2015
Romania	Yes	Yes	2003
Slovakia	No	Yes	2016
Slovenia	Yes	Yes	1991 Constitution, 2003
Spain	Yes- a record	Yes	1997, 2015
Sweden	No	No	/
UK	Yes	Yes	2012

Source: Our elaboration of Protego and OECD 2018 data

4.2 Impact Assessment

A significant difference characterizes the scope and breadth of IA (table 3). In Ireland, Luxembourg and Malta IA on secondary legislation is either just a checklist (Luxembourg) or is performed only on major pieces of legislation (Ireland) or just on SMEs, as a test (Malta, where stakeholders consultation is a discretionary activity left to individual departments). IA has evolved over time: the revision of guidance is not an exception. Arguably, to revise the IA discipline is an indicator of vitality and good practice (for example, the EU-OECD Sigma initiative has recommended this to the Western Balkans, SIGMA 2020).

In some cases, IA was adopted with a soft legal basis first and only then hardened. In Hungary and Lithuania, for instance, soft legal bases were firstly adopted, and only later were the guidance hardened. By contrast, in Finland, France and Poland IA was firstly grounded in hard law, thus establishing a general mandatory duty, and then followed by specific guidance grounded in soft law.

The column on time reveals an interesting perspective on the presence of this specific better regulation tool before the advent of the international pressure for better regulation. Countries like Sweden had elements of IA before the international and EU agenda for better regulation was set. In the Netherlands IA was established by law in 1992, at the same time when the country was among those that indicated the need to simplify EU legislation. The vast majority of countries, however, adopted a legal basis – hard or soft– after the 1995 OECD Council Recommendations (OECD 1995) and the first emergence, in 2002-2005, of the EU approach (Allio 2008; De Francesco 2012).

A crucial element of better regulation agendas is the presence of a Regulatory Oversight Body (ROB). Regulatory oversight means among other things that there is a body in charge of keeping track of how consultation and IA are carried out. In some countries, the function of this body extends to returning to departments IAs that do not match the standards imposed by the government. Hence, whether the standards for IA and stakeholder's engagement are set in hard or soft law, the presence of a ROB suggests commitment to enforce the standards. If the ROB does not exist, the oversight and scrutiny functions of IA may still be carried out by a single department or by a unit in central government (such as a better regulation unit in the cabinet office). The political and administrative costs of implementing better regulation

from the adoption of IA guidance to its implementation, down to the presence of a strong central unit (independent *de jure* or *de facto*) tend to increase as implementation deepens, as shown by previous studies (De Francesco et al. 2012).

Two indicators in the Protego dataset illustrate whether the ROB publishes its opinion on IAs and the formal *de jure* independence of the body. Although what matters is the *de facto* independence, some governments make ROBs independent by design to increase the credibility of their commitment. Only few countries have set up an independent body that is composed of members coming from outside the administration. But – unsurprisingly perhaps – these Member States belong to the set that is most active in the debate on better regulation.

The ROB's opinions on the quality of IA are published only in Austria, Czech Republic, EU, France, Finland, Italy, Sweden, and the UK. In the Netherlands, the ROB does not issue a formal opinion for every case, but just on specific ones. Conversely, in Lithuania the main regulatory oversight body (the Office of the Government) provides its opinion only to the Prime Minister and the Chancellor of the Government. A final observation on the independence of the ROBs and the establishment of IA and consultation in hard law: a stronger and independent control over IAs is not automatically associated with hard-based IA and consultation (table 3, columns 1 and 3).

Table 3: Impact Assessment

Countries	Legal basis is grounded in soft or hard law	Year in which the legal basis was introduced and year(s) of major changes	Independent ROB	ROB publishes its opinion on IA
Austria	Hard and Soft	2013	No	Yes
Belgium	Hard	2013	No	No (not mandatory)
Bulgaria	Hard and Soft	2016,2017	ROB does not exist	ROB does not exist
Croatia	Soft and then Hard law	2012,2017	No	N
Cyprus	Hard and Soft	2016	No	N
Czech Republic	Hard and Soft	2011	Yes	Yes
Denmark	Hard	2005	ROB does not exist	ROB does not exist
Estonia	Hard and Soft law	2011,2012	ROB does not exist	ROB does not exist
European Union	Soft Law	2002, 2017 guidelines. Toolbox 2015 (currently under revision)	Yes but only half of the members are external. Chaired by a high-level officer of the Commission	Yes
Finland	Hard and Soft law	Hard 2015, Soft 2017, 2007 on IA	Yes	Yes

		and 2013 on legislative drafting		
France	Hard and Soft law	2015 hard law, 2017 soft law	No	Yes
Germany	Hard and Soft law	In the 1990s first attempts with the blue checklist on the quality of legislation. 2006, 2009 working manual on RIA, 1992, 2012 handbook on preparation of law	Yes	No
Greece	Hard and Soft law	2012 key legal text on IA, 2006 prime minister circular explaining IA	No	No
Hungary	Hard and Soft law	2011, 2016 regulation on IA, guidelines on different types of IA 2010	ROB does not exist	ROB does not exist
Ireland	Soft law	2009, 2016 revised guidelines	ROB does not exist	ROB does not exist
Italy	Hard Law	Introduced 1999, changes with primary legislation 2005, 2018 decree introduces IA on EU regulations	ROB does not exist – experts are recruited from outside the PA but the body sits within the department for legislative activity	ROS does not exist
Latvia	Soft Law	2009	ROB does not exist	ROB does not exist
Lithuania	Hard and Soft Law	2012 hard law, 2003 soft law	No	No
Luxembourg	Soft law	2011	ROB does not exist	ROB does not exist
Malta	Hard law (only SMEs test)	2011, 2015	ROB does not exist	ROB does not exist
Netherlands	Hard and Soft law	Hard law 1992/2017. Soft law 2011	Yes	No (annual report)
Poland	Hard and Soft law	2011, 2014. In 2015 guidelines as part of government legislative process are issued by the Ministry of Economy	ROB does not exist	Rob does not exist
Portugal	Hard and Soft law	2017	No	No
Romania	Hard law	2000, 2005, 2009	ROB does not exist	ROB does not exist
Slovakia	Hard and Soft law	2015, 2016	ROB does not exist	ROB does not exist
Slovenia	Hard and Soft law	2001, 2010, 2017	ROB does not exist	ROB does not exist
Spain	Hard and Soft law	1997, 2015, 2017	ROB does not exist	ROB does not exist
Sweden	Hard law and ordinances	1974, 2003, 2010	Yes	Yes
UK	Soft law	Guidelines 2017. Principles 2018, BR framework	Yes	Yes

		2018, Green Book on evaluation 2018		

Source: Our elaboration of Protego data and OECD 2018

5 Conclusions

To wrap up, EU-level better regulation is soft law and applies to EU lawmaking. It is a kind of meta-regulation, that is, rules about making rules (Radaelli 2010). The EU does not have the legal and political means to produce directives or regulations on how the Member States should go about regulatory reform – although the Commission (and the Regulatory Scrutiny Board) correctly insists on the fact that to succeed, better regulation ought to be a joint commitment of Member States and EU institutions. This choice for soft law chimes with everything we know about soft law being easier to adopt as well as more respectful of Member State sovereignty (for the literature see Saurugger and Terpan 2021).

Soft law has its peculiar properties when applied to better regulation. We demonstrated that this type of soft law, presented as win-win as well as positively accepted by the majority of Member States, has become the field where EU institutions measure their power to control the law-making process. The Council wants to deploy better regulation to make the Commission and the whole law-making process more intergovernmental. The Commission, on the other hand, tells Member States as well as accessing countries that better regulation is not only a set of guidance and recommendations, but also an integral part of the soft *acquis.* Inside the Commission, better regulation measures the power of the Secretariat General in relation to the DGs.

At the domestic level we observe significant differences, also because breadth and scope of IA and consultation vary considerably. IA in some countries covers only specific types of assessments and legislation (for example it may apply to primary but not secondary legislation, OECD 2018), in others IA goes deeper. The UK and EU Member States have chosen both soft and hard legal bases, with the UK championing the soft law approach. This is coherent with the Westminster model, where political commitment at the ministerial level is sufficient to embed ways of doing things in departmental *modus operandi*. We also observe a mix of formality (be it through either soft or hard law) and informality (in countries like Denmark and Sweden). This yet again confirms our knowledge of the administrative and law-

making process in these two countries, and the role of IA and consultation therein (Radaelli 2009).

Legal-administrative traditions and political priorities have left their mark on the establishment of better regulation in the Member States. It is telling that a country like Italy introduced IA with a law under the assumption, dominant in this country, that if law-making procedures are not embedded in formal legislation they will not bite. This finding contributes to the vast literature on the efficacy of soft law in specific policy fields (see Bekker 2014, Slominski 2012 on ambiguities, but also Trubek and Trubek 2005 on soft law as a producer of 'cheap talk'). The remarks on the UK and Italy may be generalized. Assumptions and prevailing views in government circles about the efficiency of soft law might not only explain the differences in legal bases of better regulation's tools, but also the processes of hardening or softening over time. This conjecture could be further explored thus making future contribution to the literature on soft law and the conditions that underpin the efficacy of better regulation as soft law and meta-regulation.

Acknowledgments and Note

We wish to acknowledge the support of the European Research Council, Project on Procedural Tools for Effective Governance grant number 694632. Website: protego-erc.eu. Protego data were collected in the period 2018-2019; they cover the EU-27, the UK and the EU as standalone case. The Protego data were gathered on the legal base in force in 2018 by a team of lawyers using purpose-built protocols.

References

Allio, L. (2008). The emergence of better regulation in the European Union. London, King's college. University of London. **PhD**.

Arndt, C., et al. (2015). Indicators of regulatory policy and governance: Design, methodology and key results, *OECD Regulatory Policy Working Papers no.1* Paris, OECD Publications.

Baldwin, R. and M. Cave (1999). *Understanding Regulation*. Oxford, Oxford University Press.

Bekker, S. (2014). EU Coordination of Welfare States after the Crisis: Further Interconnecting Soft and Hard Law, *International Review of Public Administration*, **19**(3): 296-307.

De Francesco, F. (2012). Diffusion of Regulatory Impact Analysis in OECD and EU Member States, *Comparative Political Studies* **45**(10): 1277-1305.

De Francesco, F. C.M. Radaelli and V. Tröger (2012). Implementing Regulatory Innovations in Europe. The Case of Impact Assessment. *Journal of European Public Policy* **19**(4): 491-511.

Doern, B. (2007). Red Tape-Red Flags: Regulation in the Innovation Age. Conference Board of Canada CIBC Scholar-in Residence Lecture http://www.brenderwriting.com/wp-content/uploads/2011/08/2007-SIR-Book_RedTapeRedFlags_web.pdf Ottawa.

European Parliament, Council of the European Union, The Commission of the European Union (2003). Interinstitutional Agreement on better law-making, *Official Journal C 321 , 31/12/2003 P. 0001 - 0005*

European Commission (2021). Communication, Better Regulation. Joining Forces to make better laws 29 April 2021.

Garben, S. (2018). An 'impact assessment' of EU better regulation. In Garben S. and I. Govaere (2018) (Eds.) *The EU Better Regulation Agenda: A Critical Perspective*. Oxford, Hart.

Garben S. and I. Govaere (2018) (Eds.) *The EU Better Regulation Agenda: A Critical Perspective*. Oxford, Hart.

Gravey, V. (2016). Does the European Union have a reverse gear? Environmental policy dismantling, 1992-2014. *School of Environmental Sciences*. Norwich, University of East Anglia. **PhD**.

Gunningham, N. and P. Gavrosky (1999). *Smart Regulation: Designing Environmental Policy*. Oxford, Oxford University Press.

Interinstitutional Agreement OJ L 123/2016 between the European Parliament, the Council of the European Union, and the European Commission on Better-Law Making (2016) *Official Journal,* L123, 12/5/2016.

Kysar, D. A. (2010). *Regulating from Nowhere: Environmental Law and the Search for Objectivity*. New Haven and London, Yale University Press.

Lodge, C.M. and Wegrich, K (2012) *Managing Regulation: Regulatory Analysis, Politics and Policy,* Palgrave Macmillan.

Lowi, T. J. (1972). Four systems of policy, politics, and choice, *Public Administration Review* **32**(July/August): 292-310.

Mandelkern Group on Better Regulation 2001. Final Report. Brussels.

OECD (1995). Recommendation of the Council of the OECD on improving the quality of government regulation. OECD Publications, Paris.

OECD (2010). Better Regulation in Europe. OECD Publications, Paris

OECD (2012). Recommendations and Guidelines on Regulatory Policy. OECD Publications, Paris.

OECD (2018). Better Regulation Practices Across the EU-28. OECD Publications, Paris.

Radaelli, C. M. (1999). Steering the Community regulatory system: the challenges ahead, *Public Administration* **77**(4): 855-871.

Radaelli, C.M. (2009) Desperately Seeking Regulatory Impact Assessment: Diary of a Reflective Researcher. *Evaluation* 15(1): 31-48.

Radaelli, C. M. (2010). Regulating Rule-Making via Impact Assessment, *Governance* **23**(1): 89-108.

Radaelli, C. M. (2018). Halfway Through the Better Regulation Strategy of the Juncker Commission: What Does the Evidence Say? JCMS: Journal of Common Market Studies **56**(S1): 85-95.

Radaelli, C. M. (2020). Regulatory Indicators in the European Union and the Organization for Economic Cooperation and Development: Performance Assessment, Organizational Processes, and Learning. *Public Policy and Administration* **35**(3): 227-246.

Radaelli, C.M. (2021). The state of play with the better regulation agenda of the European Commission, European University Institute, School of Transnational Governance, Policy Papers, April. No.06/2021.

Radaelli, C. M. and F. De Francesco (2007). *Regulatory Quality in Europe: Concepts, Measures, and Policy Processes*. Manchester, Manchester University Press.

Radaelli, C. M. and A. C. M. Meuwese (2010). Hard Questions, Hard Solutions: Proceduralisation through Impact Assessment in the EU, *West European Politics* **33**(1): 136-153.

Saurugger, S. and Terpan, F. (2021). Normative transformations in the European Union: on hardening and softening law, *West European Politics*, 44(1): 1-20.

Scott, C. (2003). Speaking Softly Without Big Sticks: Meta-Regulation and Public Sector Audit. *Law and Policy* **25**(3): 203-220.

Scott, C. (2010). Reflexive governance, regulation, and meta-regulation: Control or learning *Reflexive Governance: Redefining the Public Interest in a Pluralistic World*. J. Lenoble and O. De Schutter. Oxford, Hart**:** 43-66.

Schömann, I. (2015). EU REFIT machinery 'cutting red tape' at the cost of the acquis Communautaire. Brussels, ETUI Policy Brief.

Senninger, R. and J. Blom-Hansen (2020). Meet the critics: Analyzing the EU Commission's Regulatory Scrutiny Board through quantitative text analysis. *Regulation & Governance*, early view.

Sigma (2020). Regulatory Impact Assessment and EU Law Transposition in the Western Balkans. Sigma paper no.61. Paris.

Slominski, P. (2012). Ambiguities of Legalization and the EU's Strategy of Extraterritorial Border Control, European Foreign Affairs Review, **17**, 19.

Tholoniat, L. (2010). The Career of the Open Method of Coordination: Lessons from a 'Soft' EU Instrument. *West European Politics* **33**(1): 93 - 117.

Trnka, D. and Y. Thuerer (2019). One-In, X-Out: Regulatory offsetting in selected OECD countries. OECD Regulatory Policy Working Papers, No. 11, OECD Publishing, Paris.

Trubek, D.M. and Trubek, L.G. (2005). Hard and Soft Law in the Constuction of Social Europe: the Role of the Open Method of Co-ordination, *European Law Journal*, **11**(3):343-364.

Van den Abeele, E. (2015). Better regulation: A bureaucratic simplification with a political agenda. Brussels, ETUI working paper.

World Bank (2010). *Better Regulation for Growth: Regulatory Governance in Developing Countries*, Washington, World Bank.

Zeitlin, J. (2008). The Open Method of Co-ordination and the Governance of the Lisbon Strategy. *Journal of Common Market Studies* **46**(2): 436-450.