

# **EUROPEAN COMMISSION**

CONFERENCE ON

## **IMPACT ASSESSMENT IN THE EUROPEAN UNION: INNOVATIONS, QUALITY, AND GOOD REGULATORY GOVERNANCE**

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### **CONFERENCE BACKGROUND REPORT**

(FINAL)

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## **1. INTRODUCTION: THE COMMISSION'S APPROACH TO IMPACT ASSESSMENT**

During the last ten years or so, the European Union (EU) and its Member States have experimented with new approaches of policy making with the aim of improving the quality of legislation and making governance more transparent, responsive, and accountable. Regulation is the policy type where most progress has been made.

The EU has developed regulatory, rather than distributive and re-distributive policies (Majone 1996). Accordingly, the management of regulation has become a priority of European institutions, as shown by the initiatives of the Commission, the European Parliament, and the Council for 'better regulation'.

'Better regulation' is a concept that covers a broad range of activities, such as impact assessment, consultation, access to regulation, supporting structures in charge of regulatory quality, implementation, and ex-post evaluation of regulatory tools and institutions. The process of enlargement has highlighted the importance of 'better regulation'. Not only is enlargement a process of massive transfer of single market legislation, it is also a unique exercise in the diffusion of tools and institutions of regulatory management (Sigma 2001).

One key aspect of regulatory management is the stage of policy formulation, design, and assessment of proposed legislation. This is where innovations<sup>1</sup> in terms of methodologies, approaches, and regulatory culture have been introduced on a large scale. The aim in this process of innovation is not simply to make the policy-making process more efficient, but to change the very nature of governance.

The idea is that better governance at the stage of policy formulation is crucial. Rules adopted without regard to issues such as proper consultation, the burden imposed on the economy, the impact on citizen's welfare often do more harm than good. And they may jeopardise policy legitimacy. Rules adopted without transparency, consultation,

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<sup>1</sup> Originally developed by Anglo-Saxon countries and then diffused through the OECD members (OECD 1997).

and specification of the methods used to assess (ex-ante) their impact raise issues about technocratic governance and regulatory capture.

This report focuses on the main innovation at the stage of policy formulation, that is, impact assessment (IA), also known as Regulatory Impact Analysis (RIA). Impact assessment draws on the following elements:

- An approach to governance based on a transparent, accountable process of formulation of rules, with special emphasis on consultation, the use of empirical evidence in the preparation of legislation, and standards for the validation of natural and social science.
- Specific methodologies for the analysis of different regulatory options, such as full cost-benefit analysis, value-sensitive methods (i.e., multi-criteria analysis), risk-risk analysis.
- An explicit commitment to ex-ante, step-by-step examination of the possible implications of proposed regulation and ex-post monitoring and review of regulations.

The potential of impact assessment is great, and it is not surprising to observe a proliferation in the number of countries that make active use of this approach. In June 2002, the European Commission has re-designed its own system of impact assessment in the context of its action plan on regulation (Commission 2002a; 2002b), thus adding an important EU dimension to this topic.

The new integrated system of impact assessment introduced by the European Commission in 2002 draws on at least a decade of experience in 'better law-making'. The early stages of impact assessment, characterised by the so-called fiche d'impact on proposed directives, created the basis for more sophisticated methodologies and more accurate and systematic approaches. The second half of the 1990s witnessed a proliferation of pilot projects and new methodologies, especially in the areas of compliance cost assessment and better regulatory environment for the business community. Instruments and projects such as business test panels, the business impact

assessment pilot project, and the best procedure have gained prominence in the process of policy formulation. The Commission has also developed experience in the areas of health impact assessment and environmental assessment.

At the same time, the Commission has introduced instruments to manage regulation ex-post, with the aim of creating an integrated management of regulatory policies over their entire life-cycle. Fig.1 portrays the main instruments and programmes used ex-ante and ex-post. These initiatives have provided considerable experience. However, the new integrated system introduced in 2002 is qualitatively different in several respects:

- To begin with, whereas previous initiatives targeted one category of stakeholders, such as the business community, the new approach refers to a broad range of stakeholders.
- Secondly, whereas the previous experiments and pilot projects produced results that were difficult to transfer across different Directorates-General (DGs) and different policy areas, the new approach is based on a single template applicable to all policy proposals and managed by a network of specialists from different DGs and the General Secretariat of the Commission.
- Thirdly, although previous experience was essentially, although not always, limited to the Commission, the new IA has potential for integrating the European Parliament and the Council as users of the assessments of the Commission. The potential for streamlined inter-institutional relations in the EU policy process is increased by the adoption of a single template for impact assessment.
- Fourthly, the new emphasis on the analysis of impact is also the result of EU institutions becoming increasingly more focused and more alert on the issues arising out of 'better regulation'. As shown by fig.2, political-institutional attention has increased throughout the 1990s, with Member States, employers' associations, and EU institutions pushing for more systematic approaches to the empirical analysis of costs and benefits of proposed EU legislation.

Following a common practice, the Commission's integrated impact assessment consists of two stages, that is, preliminary assessment and (for major proposals) extended assessment. The preliminary assessment provides a concise analysis of the problem, the alternative policy options (including the option of preserving the status quo), and the sectors affected. It also establishes whether a more extensive analysis of options is needed. On the basis of the preliminary assessment, the Commission decides which proposals need an extended impact assessment (Commission 2002a:7). The Commission announces this decision in its Annual Policy Strategy or, at the latest, in its Work Programme for the forthcoming year.

In the past, companies (UNICE, 1995), national research institutes (see the TMC Asser Institute Report, Kellerman et al. 1998) and think tanks (EPC 2001; Pelkmans, Labory, Majone 2000) complained that the quality of IA varied too much from one DG to another. Another point raised by several commentators in the past was that the Commission had considerable experience with single sector-types of assessment, but needed to coordinate them in an overall strategy of regulatory management (Radaelli 1999). The new integrated system addresses these concerns. It replaces (and integrates into a new tool) all previous requirements for business impact analysis, environmental assessment, compliance cost assessment for SMEs, gender assessment, and trade assessment (Commission 2002a:3). Of course, the methodologies and scope of the various types of assessment will vary according to the substantive policies examined. Proportionality is a guiding principle. It makes sense to invest in deeper analyses only when the importance of the proposals under scrutiny justifies it (Commission 2002a:8).

The Commission has also made the necessary organisational steps to perform impact assessment. The 2002 Communication establishes that impact assessment will be the responsibility of the Directorate General in charge, but (as mentioned above) in the context of an organisational network. The latter includes the Secretariat General (with major responsibility for the coordination of the overall support structure for impact assessment) and the 'most concerned DGs' (Commission 2002a:8).

Most fundamentally, the new system integrates the three dimensions of:

- Economic assessment,
- social assessment, and
- environmental assessment

There are three implications arising out of the integration of these three dimensions. Firstly, although IA is a direct result of the better regulation drive, the link to the sustainable development strategy<sup>2</sup> is equally important. One delicate issue of incorporating the dimension of sustainable development into the IA strategy is about possible trade-off among three pillars, that is, environmental protection, economic growth, and social policy. Consequently, IA becomes a tool to identify and discuss openly the major trade-offs in the formulation of EU policy. This is why integrated IA is also about raising the right questions and illustrating the major trade-offs (Commission 2002a). The choice of a technique, such as cost-benefit analysis, should not be an implicit political choice, but the broad approach of sustainable development suggests that all techniques (such as cost-benefit analysis) be considered in terms of whether they provide a balanced assessment of economic, social, and environmental policy goals. This is a fundamental point when one examines the legitimacy of IA – a point to which we will turn in Section 5 of this report.

Legitimacy brings in the question of how technical or political is the Commission's IA. This is the second implication of the integrated system. IA is an instrument supporting the political role of the Commission in the EU policy process. The commitment to perform IA has been taken up by the Commission in the framework of its right of initiative - and the obligation it has to forward European integration. The novel aspect is that the process of preparation of regulatory choices is made much more transparent. Arguments in favour of (or against) different policy options or choices of regulatory instruments are already investigated - and discussed with society in consultation processes – before the College adopts a certain proposal. In this sense the Commission's role is political. It is not the role of a technical agency checking costs and benefits.

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<sup>2</sup> As defined in COM(2001) 264 final, i.e., the Commission's proposal to the Gothenburg European Council, 2001. SDS is a broad, long-term vision that dovetails economically, socially, and ecologically sustainable development.

Thirdly, the integrated approach to economic, social policy, and environmental policy issues is linked to the wider political goals of EU governance. It is to this issue that we now turn.

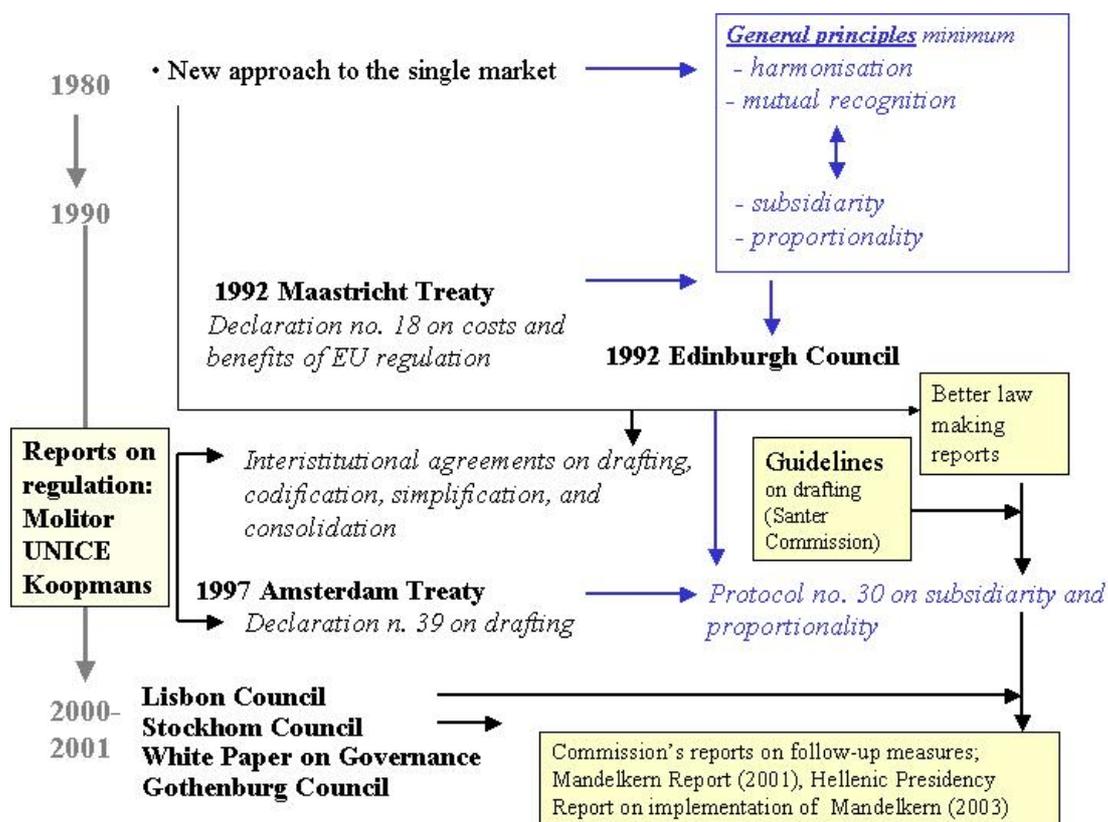
**Figure 1: Impact assessment in the EU: projects initiated in the 1990s**

Year	Projects	Actors	Innovations and changes
<b>Analysis of proposed regulation (<i>ex ante</i>)</b>			
1986	Business Impact Assessment System (BIAs)	Commission: <ul style="list-style-type: none"> <li>• 1986-89, SMEs task force</li> <li>• since 1989, DG XXIII, later DG ENTR</li> </ul>	<ul style="list-style-type: none"> <li>• 1991: reform of BIA</li> <li>• 2000-2002: pilot project on BIA</li> </ul>
1998	Business Test Panel (BTP)	Commission: <ul style="list-style-type: none"> <li>• DGXV, later DG single market</li> </ul> Member States: <ul style="list-style-type: none"> <li>• Initiatives for the systematic consultation of firms in several MS</li> </ul>	<ul style="list-style-type: none"> <li>• 1998 pilot project on BTP</li> <li>• 2002-3 European BTP (pan-European and representative)</li> </ul>
Late 1990s	Health impact assessment (HIA)	Commission: <ul style="list-style-type: none"> <li>• DGSANCO</li> </ul> Member States: <ul style="list-style-type: none"> <li>• Guides to HIA</li> </ul> WHO Europe's European Centre for Health Policy	<ul style="list-style-type: none"> <li>• 1998: checklist for health impact screening (NL), HIA in the UK</li> <li>• May 2000: Commission's communication on health strategy (COM285final)</li> <li>• Dec.2001: Commission's guide to HIA</li> </ul>
1985 directive on EIA, amended in 1997	Environmental impact assessment (EIA)	Commission: <ul style="list-style-type: none"> <li>• DG Environment</li> </ul> Member States and non-EU governments, UNECE: <ul style="list-style-type: none"> <li>• 1991 Convention on EIA in a trans-boundary context</li> <li>• 2003 Kiev protocol on strategic environmental assessment</li> </ul>	<ul style="list-style-type: none"> <li>• 1998: Aarhus Convention</li> <li>• 1999: Transposition of the 1997 amended directive</li> <li>• 2003: directive 2003-35</li> </ul>
1996	Gender impact assessment (GIA)	Commission: <ul style="list-style-type: none"> <li>• DG Employment and Social Affairs</li> </ul> Member states, OECD, ILO: <ul style="list-style-type: none"> <li>• Guides to impact assessments and training packages</li> </ul>	<ul style="list-style-type: none"> <li>• 1996 Communication on mainstreaming</li> <li>• 1997 Commission's GIA</li> <li>• Guide to gender impact assessment</li> </ul>
<b>Economic analysis of existing regulation (<i>ex post</i>)</b>			
1996	Simplification of Legislation on the Internal Market (SLIM)	Commission: <ul style="list-style-type: none"> <li>• DGXV, later DG single market</li> <li>• Consultative Committee on the internal market</li> </ul> Member States: <ul style="list-style-type: none"> <li>• Small working groups with regulators and firms</li> </ul>	Some steps of the project <ul style="list-style-type: none"> <li>• May 1996</li> <li>• January 1997</li> <li>• March 1998</li> <li>• January 1999</li> <li>• 2001</li> </ul>
<b>Coordinated programmes</b>			

1997	Business Environment Simplification Task Force (BEST)	Commission: <ul style="list-style-type: none"> <li>• DG ENTR</li> </ul>	<ul style="list-style-type: none"> <li>• “BEST procedure 2001” workshops on the diffusion of best practice</li> </ul>
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Source: Adapted (and up-dated with HIA, GIA and EIA) from Sabrina Cavatorto in Radaelli (2001).

**Figure 2: How political attention on better regulation has increased since the 1990s**



Source: Adapted from Sabrina Cavatorto in Radaelli (2001)

It is useful to cast the new system of impact assessment in the wider political goals of European integration in order to understand what is ‘new’ about this instrument and why it is called ‘integrated’. Let us look at how IA relates to governance, competitiveness, and sustainable development.

The relationship between IA and ‘good governance’ as a main target of political integration in Europe is crucial. Indeed, the Commission’s impact assessment is an instrument of the wider strategy designed in the White Paper on Governance (fig.2). It is integrated with the wider objectives of better law-making and better-regulation. The point has been made on several occasions by the Council since 1992 (and most recently in the 2001 Mandelkern group’s report) and by the Commission in the annual reports on better law-making. Most importantly, the Commission presented its Communication on impact assessment (Commission 2002a) in June 2002 together with its plan for better regulation (Commission 2002b) and a consultative document

on minimum standards for consultation (Commission 2002c; the standards were finalised in December 2002). The ‘better regulation plan’ of the Commission provides both broad guidance and momentum for IA. Minimum standards for consultation, at the same time, put IA in the context of a culture of systematic consultation and accountability. Contrast this with the experience of some countries in which IA is either used as ‘internal tool’ of policy-making, with limited commitments in terms of consultation, or simply lacks momentum because it is disconnected from major reforms plans.

EU impact assessment is also connected to the strategies pursued by European institutions for participatory governance. During the preparation of the White Paper on Governance, the Commission established a working group (pilot Rainer Gerold) to make proposals for the democratisation of expertise and EU reference systems on experts’ advice and the use of science in the policy process. The report of this group (sometimes referred to as the Liberatore-Gerold report 2001) has spawned a debate on participatory governance and the democratisation of expertise (Grote and Gbikpi 2002; Radaelli 2003b). As IA (especially but not exclusively in the form of risk assessment) makes use of scientific evidence and experts’ advice, one should take into account the proposed standards for the use of science and expertise in the EU policy process. Thus, issues such as ‘socially robust peer review’ and the integration between lay and scientific knowledge (aired in the Liberatore-Gerold report) should be taken seriously in the discussion.

But IA is also an instrument to achieve the major goal set at Lisbon to make Europe ‘the most competitive knowledge-based economy in the world’ (fig,2). A better regulatory environment is statistically correlated to growth and competitiveness.

As mentioned, IA is finally integrated with the EU sustainable development strategy (launched at the Gothenburg European Council in June 2001) and the plans of the EU for social policy – including gender mainstreaming. This means that the nascent impact assessment system will also ‘control for’ social policy impacts and the impact on the environment. This is an improvement on several Member States’ practice, in which social policy (including gender) and environment are seldom fully integrated in

IA. It adds substantial flesh to the bones of ‘good governance’ designed in the 2001 White Paper.

To conclude, the EU approach to IA is integrated and oriented towards participatory governance. It is an essential component of the better regulation strategy of the EU. Finally, it is based on standards for consultation and the best possible use of scientific evidence in transparent policy processes.

## **2. WHAT IS THE PROBLEM? THE MOTIVATION FOR THE CONFERENCE**

The Commission has set very high standards for the development of impact assessment in the EU. The introduction of the new integrated impact assessment on an annual basis (further to the technical standards released in Spring 2003 by the Commission) could spawn a debate among EU institutions, domestic policy-makers, NGOs, academics, and think tanks.

Yet, so far at least, the engagement of academics, higher education institutions, and independent research institutes has been limited. The discussion of IA (both at the domestic and EU level) is still the exclusive domain of policy officers. Very few European post-graduate programmes provide integrated training and academic background. As for think tanks, there are some examples of involvement in IA debates (Carr, Ceps, European Policy Centre, the TMC Asser Institute, the MIPA consortium in Italy). However, it is fair to say that the involvement of think tanks has been more occasional than systematic.

Contrast this with the USA, where academics and think tanks are quite involved in the debate on IA. In Washington, two think tanks (that is, American Enterprise Institute and Brookings Institute) from different parts of the political spectrum have joined forces in a centre (the *Joint Center for Regulatory Studies*) that checks the quality of impact assessments performed by federal executive agencies. For example, Hahn and others (Hahn 1999; Hahn et al. 2000) have re-performed impact assessment on a data-

set of 48 federal regulations to discuss the quality of measurement and make proposals.

The involvement of think tanks and academics in the discussion is important in many respects. A robust network of academics, research institutes, and policy officers can deliver in the following directions:

- Universities and think tanks can provide sophisticated training, thus contributing to the quality of human capital available for IA.
- A more informed discussion, involving both Commission's experts, Member States' civil servants, academics and IA professionals can assist in raising critical issues on data, methodologies, and the broader issues of accountability and legitimacy of impact assessment. It can also help to keep 'intellectual momentum'. Some delicate issues (the implications for participatory governance, for example) require a fine intellectual balance across multiple trade-offs (illustrated by Radaelli 2003b): a network of academics and think tanks can deliver on this issue.
- The 'silence of academics' has not encouraged national research council boards to fund large research programmes on impact assessment. One can mention a middle-size ESRC grant (UK) awarded to an interdisciplinary team in the mid-1990s (Froud et al. 1998) and a grant of the Italian government for comparative research on IA (Radaelli 2001; 2003a). But there is not much else to report.
- In some countries, the public opinion, NGOs, unions, and sometimes even companies are not aware of the importance of impact assessment. At best, they are aware of the issues of red tape and compliance costs. But there is no public debate on the wider dimensions of IA, such as participatory governance and consultation. The active involvement of academics can raise the profile of impact assessment in the public debate.
- Finally, new policy tools gain legitimacy only when a large number of stakeholders emerge around them. Different actors may have different views on the quality of IA performed by the Commission, but the sheer fact that they raise issues, make points, push for higher standards is a fundamental catalyst of improvement.

As illustrated above, impact assessment in the Commission is not in its early days. With the technical guidelines proposed in 2003 the Commission has clarified what it wants from impact assessment. The question therefore is not to look around for academic input in general, but with the aim of building a sophisticated and specialised network of impact assessment professionals. In short, we need a focused debate.

In the remainder of this background report, three broad foci for the discussion are discussed. They relate to methodology, measurement and innovations in impact assessment, challenges of design and implementation in the Commission's integrated approach, and regulatory legitimacy – good regulatory governance. These are also the headings for the three main sessions of the conference.

### **3. METHODOLOGIES, MEASUREMENT, AND ECONOMIC ANALYSIS OF REGULATION**

This is a broad area covering the major problems that IA encounters when it hits the road of concrete usage in law-making processes. The academic discussion has made progress both in terms of analysis of compliance costs and in terms of measurement of benefits. There is always the issue, however, of how cutting-edge techniques can be made accessible to policy-makers working on specific regulatory proposals. Additionally, there is the problem of how scientific evidence is validated and how it is communicated to the general public – an issue that taps into the more general discussion of legitimacy, but is also of paramount importance in the Commission's strategy of 'good regulatory governance'.

At the level of techniques and methods, the problem is not the scarcity of tools. Indeed, there are several handbooks and reports on assessment techniques. The problem is the choice of one technique over another. When does multi-criteria perform better than cost-benefit analysis? When do stated preferences provide the data we are looking for? When do we need to monetise benefit? When is it better to quantify but not monetise instead? The academic literature provides general criteria of choice, but more a concrete discussion on the conditions under which one should look for one technique or tool instead of another is needed.

Although cost-benefit analysis is still the main technique discussed in the literature, real-world applications show an amazing variety of approaches. More socially inclusive methods have been used, such as consultation, focus groups, and participatory policy analysis. Yet there has been almost no systematic cross-country comparison of different techniques at work in individual cases.

The conference will address the issues of methodology both at the general level and by encouraging the comparison of real-world applications of methods. In continental Europe, for example, the majority of impact assessments do not go beyond static cost-benefit analysis (in most cases, indeed, it does not go any further than compliance cost assessment). Very rarely are issues of dynamic efficiency, competition, trade, and ‘deeper and wider cost-benefit’ analysis<sup>3</sup> taken into consideration.

Questions to be addressed by session one of the conference include:

- (a) What are the lessons from cutting-edge research in cost-benefit analysis?
- (b) Is it applicable to real-world systems of IA and to the Commission’s system in particular?
- (c) Do the methodologies used in EU countries fit with the notion of participatory and democratic governance?
- (d) How does one integrate the principles and methods of cost-benefit analysis with distributional issues, gender impact assessment, and sustainable development?

At the level of data, the big issues are data collection, compatibility, and availability of data. The problem is already visible in several Member States, but it presents additional challenges at the EU level, where, in the absence of standardised data, the Commission has to rely on national data collected in different ways and often for

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<sup>3</sup> See Hahn and Sunstein (2002), Hahn et al. (2000). On ex-post analysis of the accuracy of regulatory estimates in the USA see the study by Harrington, Morgenstern, and Nelson (2000).

different proposals. In the long-term, a robust network of academics and think tanks can assist the Commission in different directions. It could provide the following:

- Database of impact assessment data used in different EU countries.
- Good practice on how to generate data for items and goods that are not exchanged in the market. For example, a year of life (or clean water) does not have the same values in Spain, the UK, Estonia, and Finland (see below). How should EU-level IA proceed? By generating averages of these national values or, more sensibly, by looking at best practice and prototypes of EU-wide reference systems?
- More importantly perhaps, academics can perform the role of informal watchdogs by examining the quality of data used in domestic and EU systems, their reliability, and how they can be improved.

Beyond techniques and data, a robust network of academics and think tanks can also contribute to the process of peer-review of the analysis contained in the EU IA. What is the problem here? The experience shows that US agencies have not always complied with mandatory peer-review. Lutter mentions cases in which agencies managed to withhold their own analysis from peer-review, even when the latter was compulsory (Lutter 2003:5). The problem is compounded by the fact that academic peer-review is fraught with difficulties, as shown by well-known examples of irreproducible research, and peer-reviewed publications with ‘fabricated’ data, both in economics and in the natural sciences. Given the peculiarities of the EU system, specifically the integration of economic, social, and environmental considerations, one has to think about peer-review creatively. For example, one may argue that traditional peer-review – no matter how one can cope with the deficiencies just mentioned – is not enough for the EU system. What is needed – the argument may conclude – is ‘extended’ or ‘socially robust’ peer-review along the lines of the Liberatore-Gerold report.

Basically, there are three options to improve on peer-review (Lutter 2003:7-8). The first option, put forward by Robert Hahn and his collaborators, and by Heather Ross

of Resources for the Future, on several occasions, is to separate regulatory analysis from rule-making (see also Lutter 1999). Turning to the EU, this would imply that the Commission delegates to an ad-hoc agency the task of performing IA -- of course retaining the right to make decisions based on this analysis. It is fair to say that this option has not gone beyond the level of abstract speculation. There is no country in the world that delegates IA to external bodies. This is due to practical matters, to the problems of separating assessment and management of analysis, and to reasons of accountability. The second option is to allow the analysis to be reviewed in court. This option cannot be considered in the case of the EU for various reasons, commencing with the fact the IA is normally a staff working paper of the DGs involved. The third option (put forward by Randall Lutter, now chief economist at FDA) is to have the analysis produced by the regulatory agency subject to external and independent peer-review. This option may have some mileage in the EU, but the question is whether one thinks of an informal mechanism of review, or a more formal and mandatory process. One proposal to discuss at the conference is the creation of an observatory (composed of independent experts) to assist the Commission in the validation of science and more generally on the overall quality of IA. One option we may wish to discuss is a small observatory of 5-10 people to assist the Commission in the methodological choices in particularly difficult IA exercises.

The questions for the conference on peer-review can then be illustrated as follows:

- (a) What are the best standards for review and evaluation of the analysis contained in EU impact assessments?
- (b) Who should perform peer-review? How (formal versus informal mechanisms)?
- (c) Most importantly, how should peer-reviewers be selected? By whom (Commission and European Parliament, Commission alone, etc)?
- (d) How can the autonomy and integrity of peer-reviewers be protected?
- (e) What are the standards for the external and independent validation of science used in IA (for example, replication of results)?
- (f) How can a possible EU observatory of experts assist the Commission and in which stages of IA?

(g) What can ‘socially robust peer-review’ mean in the context of the Commission’s IA?

#### **4. CHALLENGES OF DESIGN AND IMPLEMENTATION IN THE COMMISSION’S INTEGRATED APPROACH TO IMPACT ASSESSMENT**

The topic of design and implementation of the integrated IA leads us to the notion of quality. This Section presents three broad dimensions of quality. Then it turns to two common ways to measure the quality of IA, that is, indicators and tests. The next step will be to break down the monolithic notion of quality, showing how different stakeholders define it. Finally, this Section will consider specific issues of management capabilities – crucial for a successful implementation of the Commission’s approach.

##### ***4.1 Three broad dimensions of quality***

At the cost of over-simplification, one can distinguish among three broad dimensions of quality. These dimensions appear frequently in the literature produced by the OECD and the Commission.

- *Administrative systems*: This dimension taps the presence-absence of IA systems, focusing on the design of the impact assessment process and the main bodies involved therein. The quality of the administrative process is of course an indirect dimension of regulatory quality, since it measures inputs into the regulatory decision rather than the quality of the final regulations. However, the OECD and recently the European Commission have adopted this dimension because good processes are highly correlated with good decisions and regulatory quality. One great advantage of this dimension is that it identifies variables that governments can control, and can be easily measured.
- *Activities and outputs*: This dimension refers to actual quality-related outputs. It is appealing because activities and output provide

information on the level of effort made by governments to regulate and improve regulatory quality. One can think of variables such as the number of consultations, investment in IA, and use of alternative instruments. Recently, a number of governments and the OECD have stressed the importance of activities of ex-post evaluation of regulatory tools and institutions (Farrow and Copeland 2003). In Summer 2003, the OECD sent its members a questionnaire on this topic, with specific questions on IA (for example, whether the activity of the central unit in charge of IA is assessed independently on a regular basis or not).

- *Real world outcomes*: This is the most difficult dimension to tap and measure. It requires information on actual (that is, measured ex-post) regulatory impacts on social benefits -- information that is almost universally unavailable. It also requires information on whether the overall quality of the regulatory environment is a result of IA, or the effect of other causes. The quality of the regulatory environment can be gauged by indicators on the innovativeness of the economy, the speed of introducing new technologies, the level of investment in emerging sectors, and so forth.

In terms of the Commission's integrated approach, the design and measurement of quality IA presents several challenges.

- (a) Considering the three dimensions of integrated impact assessment (economic, social, and environmental), how can one approach the trade-offs between one dimension and the others?
- (b) What is the value of perceptions in measuring the quality of implementation of IA systems? Consider the perceptions of the regulated community. They are undoubtedly useful in the measurement of ex-post costs and the overall quality of the regulatory environment. The Commission made use of a large survey of firms in 2001 conducted for the single market scoreboard (Commission 2001b). However, perceptions are relative to implicit benchmarks that are not always clear. Perceptions of red tape burdens usually become worse when

the government launches initiatives to reduce red tape, even if the actual level of burden is improving, because the problem is higher profile and easier for businesses to identify<sup>4</sup>.

- (c) There is scholarly work on how to measure the quality of economic analysis and risk analysis in impact assessment. (Farrow and Copeland 2003; Hahn et al. 2000, Harrington, Morgenstern, and Nelson 2000, Harrington and Morgenstern 2003; Mihlar 1997. For a critical discussion of US indicators of risk regulation see Sunstein 2003). But what are the specific instruments to assess the quality of IA? Shall we look at indicators? Or tests? Or is quality relative to implicit benchmarks?

Roughly speaking, there are two approaches to the measurement of quality<sup>5</sup>. One is based on indicators targeting the three dimensions of quality illustrated above. Typically, an indicator is a number (a ratio with value between 0 and 1) that measures one specific condition or phenomenon. Indicators have to be checked in terms of validity, reliability, and other properties: one has to make sure that an indicator is really a valid and reliable measure of the phenomenon we are trying to capture<sup>6</sup>. A possible second approach is the one based on tests. Let us commence with indicators.

#### ***4.2 Measuring quality: Indicators***

Both the European Commission and the OECD are currently designing indicators of regulatory quality. To some extent, one could use a scorecard like the US Performance and Accountability Reporting Tool (Part)<sup>7</sup> to collect information to be recorded in indicators. Australia has some experience of monitoring indicators of quality of IA processes and central institutions (Argy and Johnson 2003). Table 1

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<sup>4</sup> I am grateful to Scott Jacobs, who made this point in our email correspondence on indicators of regulatory performance.

<sup>5</sup> The approaches are not mutually exclusive, as will become clear from the discussion in the remainder of this report.

<sup>6</sup> There is an interesting discussion of the properties of indicators in the literature on policy evaluation. See Shadish, Cook, and Leviton (1991).

<sup>7</sup> Described at <http://whitehouse/omb/budget/fy2004/pma.html>.

provides 9 indicators, some of which (but not all) are currently monitored in Australia. Thinking specifically of IA, one could design indicators starting from table 2. Table 2 follows the three dimensions of ‘administrative systems’, ‘activities and output’, and ‘real-world outcome’ and develops an approach to the construction of IA indicators.

This is not the place to discuss the proposal portrayed in Table 2 in detail. But an important set of ‘indicators of activity’ in Table 2 refers to the methodology used in IA. ‘Real-world’ impact is difficult to measure, as IA is only one component of the regulatory environment. In turn, the regulatory environment is only one of the variables affecting the overall dynamic efficiency of an economy. This is where multivariate analysis can help. To suggest one example, one could use factor analysis to build up indicators. Multivariate analysis enables us to calculate composite measures of regulatory quality. Thus far, however, governments have not produced multivariate analysis of indicators.

Regression analysis can control for a number of rival alternative hypotheses regarding independent variables. Setting aside problems of data collection, one can measure the dependent variable via linear regression and common estimation methods. Typically, regression designs look at the cost-effectiveness of regulation (one specific regulation or a sample of regulations in country A) as dependent variable and then include IA in the vector of possible explanatory (i.e., independent) variables (Farrow and Copeland 2003). Indicators of ‘due regulatory process’ (for example, consultation, transparent use of scientific expertise, etc.) are less suitable for regression analysis. They are often collected via interviews and qualitative case studies.

#### ***4.3 Measuring quality: Tests***

Harrington and Morgenstern (2003) have recently addressed the issue of evaluating the quality of impact assessment by making a distinction among three different tests, that is, ‘content tests’ ‘outcome tests’, and ‘function tests’.

Content tests, in turn, can be extensive or intensive. A content test is always performed ex-ante, on the data available at the time IA was produced. An example is the OMB control on the quality of IA prepared by federal executive agencies in the USA. In the UK, the Regulatory Impact Unit controls that impact analyses prepared by departments contain all the elements included in the UK Guide to good regulation<sup>8</sup>. One can also look at the presence or absence of economic analysis, for example whether assessments contain the discount rate, the baseline for costs and benefits, sensitivity analysis, and so on. In a simple content test of quality, the only thing that matters is whether a task (such as sensitivity analysis) is present or absent, not how it is performed.

Extensive content tests do not consider individual IAs, but samples of IAs. The best example of extensive testing is provided by Robert Hahn and associates (Hahn et al. 2000). In their analysis, the unit is an impact assessment. This type of analysis hinges on how one builds the sample. There are different views on this. Harrington and Morgenstern (2003:5), for example, make the point that all IAs are treated the same in Hahn's sample; hence there is no allowance (i.e., weighting) for their different economic importance. However, it is not easy to code IAs by degrees of importance in an objective manner.

Intensive content tests are concerned with the quality of IA content, not its simple existence (Harrington and Morgenstern 2003:5). Both the OMB and the UK Regulatory Impact Unit perform these tests. Not only do they control for the simple hurdles in the economic analysis performed (for example: use of discount rates, quantification of costs, etc), they also control for transparency, consultation, due process, and respect of bureaucratic procedures.

Outcome tests – Harrington and Morgenstern (2003:6-7) explain – are ex-post evaluations of quality of IAs. The literature on the ex-post evaluation of the effectiveness of environmental and social regulation is quite rich<sup>9</sup>, but – they add – there is not much in terms of evaluation of the difference between ex-ante estimation of costs and benefits (of proposed regulations) and the actual costs and benefits

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<sup>8</sup> Guide to 'better policy making' (<http://www.cabinet-office.gov.uk/regulation/scrutiny/ria-guidance.pdf>).

<sup>9</sup> The reference is to studies of pollution abatement, responses to welfare benefits, etc.

(measured ex-post). This is somewhat striking, as most OECD governments ask regulators to complete impact assessment with a section on ‘monitoring and evaluation’. The latter should contain information on the strategy the regulator intends to pursue to monitor costs and benefits ex-post. One recent example is the 2001 Italian directive on IA, which uses a specific instrument called ‘evaluation of the impact of regulation’ (VIR in the Italian acronym) for monitoring regulations ex-post. So, why do we know so little about the actual costs of regulations? Why do we check them ex-ante via IA and not ex-post via monitoring and evaluation? One answer is that it is easier to collect aggregate data on pollution abatement than to ask individual firms for specific costs incurred at the plant level and to check the accuracy of data provided by firms (Harrington and Morgenstern 2003). Add to this that regulators and central regulatory impact units have a preference for investing their constrained budget in new activities rather than in the collection of data on costs and benefits. Hence, to return to the Italian example of ex-post evaluation of the actual costs, VIR is contemplated by the law, but there is no example of application.

Costs and benefits are not the only categories of data to consider in outcome test. ‘Outcome’ can also be measured by collecting data on dynamic efficiency, distributional effects of regulation, the impact on innovation, and whether regulations were fully implemented or not (Harrington and Morgenstern 2003:8-9).

Finally, ‘function tests’ raise the question ‘does IA make a difference’? Does impact assessment result in better regulation? Does it ‘educate’ the actors in the regulatory process? Does it raise awareness of regulatory innovations? Econometric analyses of rule-making of the type described above are one way to answer the question, but measuring awareness and culture is always a tricky exercise.

#### ***4.4 Breaking down the concept of quality***

To conclude, there are different suggestions arising out of governmental programmes and the academic literature. They point towards indicators and typologies of tests. But also to different measures of quality for different IA stakeholders. There are different frameworks one can use to analyse quality.

Drawing on a classic study of decision-making in international politics, Graham Allison's Essence of Decision (1971), Farrow and Copeland (2003) argue that 'quality' can be interpreted in three different (yet not mutually exclusive) ways. One is the approach of rational economic analysis, centred on the efficiency of IA. But there is also the approach of the classic 'Weberian' civil servant, who sees quality as a matter of following proper and legitimate procedures in the regulatory process. For the politician, quality may well mean a third thing, such as responsiveness to pressure groups, the median voter, or even responsiveness to external pressure created by the EU, the International Monetary Fund, and so on.

The result is that one has to clarify the issue 'quality for whom' before one can measure it. Table 3 tries to make sense of these different suggestions. The table should be read by column. The logic of rational economic actors lends itself quite naturally to real-world indicators and function tests. In the end, a 'pure' economic test has to be a function test on whether the presence or absence of impact assessment stimulates growth, dynamic efficiency and other key macro-economic variables (controlling for other factors, of course). But the logic of economic analysis also makes room for checks on the predictive abilities of IA. Given that systems of impact assessment cost money and institutional fatigue (people have to be persuaded, and regulators have to spend time in collecting data) there is an economic logic in asking the question whether ex-ante estimates are accurate - or just a waste of time. Content tests on the quality of economic analysis contained (whether IA controls for competition and trade, for example) are also fully compatible with the logic of rational economic action.

Turning to the civil servant logic, Table 3 shows that this is most likely to be accompanied by indicators on activities-output, and content tests on whether all procedures were followed in the process. The political logic, instead, would most likely require indicators on specific activities affecting key groups providing support to politicians, such as consultation of small firms (assuming SMEs represent a support constituency for the politician), and indicators on administrative systems (a consultative body representing NGOs, if the politician draws support from them). Content tests following this political logic can be easily devised. Function tests would

deal with economic variables that affect the popularity of the incumbent. Individual and aggregate economic welfare may have an impact on the popularity of the incumbent. One can submit, therefore, that a politician willing to be re-elected will look at IA as a means to increase competitiveness, growth, and in turn her own popularity.

#### ***4.5 Institutional contexts and organisational capacity-building***

The challenge of different types of logics at work in the implementation of impact assessment systems is compounded by the role played by the institutional and administrative context in the diffusion of IA. In its original institutional context – that is the US context – impact assessment is produced by independent regulatory agencies monitored by the Office of Management and Budget via the Office of Information and Regulatory Affairs (OIRA). This is a regulatory context characterised by delegation of regulatory powers to non-majoritarian institutions. The institutional context is based on sector-level, specialised policy-making. IA is an instrument for discussions at the level of sectoral policy networks (environment, health and safety, food regulation, etc.). The legitimacy of the regulatory process is not based on parliamentary control over the government but on the credibility of executive agencies (Majone 1996). The administrative context is one in which agencies and OIRA are well-staffed in terms of professional economists. The dominant criterion is efficiency and the main logic is technical. Negotiation and standard operating procedures are not absent, but they are not overwhelming. Indeed, when negotiation among agencies, regulated firms, and committees in Congress has historically become the dominant logic, this has been seen as a pathology of the system – and referred to as ‘agency capture’.

In most EU countries – in this case including the UK – the institutional/administrative environment is quite different. IA is still a document for technical discussions at the level of sectoral policy networks, but, most importantly, it is a communication tool between the government and the parliament, and between government and citizens. The ‘regulator’ performing IA is not an executive federal agency, but a Minister reporting to the cabinet. Surprisingly enough, most independent regulators in Europe have not even been requested to perform impact assessment. Only in very recent years

have countries like the UK and Italy introduced IA as a duty of independent economic regulators.

The administrative context is one characterised by ‘generalists’ and civil servants trained in public law. Efficiency still comes second to formal respect of legitimate procedures in the list of criteria used by public administrations in countries like France, Germany, and Italy. Almost invariably, they ‘read’ IA in terms of formal (as opposed to substantial) legal logic and conformity to other rules and processes. Not only does the logic of negotiation dominate the behaviour of Ministers engaged in impact assessment, it also characterises the interactions between public administration and pressure groups, and between civil servants and politicians (with the Minister, for example, and her-his cabinets).

This does not necessarily mean that the diffusion of IA in continental Europe has been uniformly disappointing. But it means that hybrids, creative adaptations, and metamorphoses abound. Countries with corporatist institutional patterns (like Denmark) have re-interpreted impact assessment as yet another instrument of negotiation and social ‘concertation’ (Radaelli 2003 for details). This is why in some countries IA does not produce a final set of figures showing if the benefits justify the cost of the proposed regulation, but rather a set of partial estimates that are then used by policy-makers in a ‘mode’ that is more ‘negotiation’ than ‘technical analysis of options’. Add to this that in all EU continental countries and the UK IA has become both a technical document and a communication tool. The EU follows this trend. The Commission states explicitly that its new impact assessment is ‘an effective and valuable communication tool’ (Commission 2002:3).

Turning to the EU system, the conference will discuss the following questions:

- (a) To what extent does the EU approach the US institutional context of regulatory federalism?
- (b) To what extent do the EU institutional features provide constraints and opportunities for the design and implementation of the integrated impact assessment system?

- (c) What is the role of inter-organisational networks in the management of impact assessment at the EU level?
- (d) What is role of capacity issues in the implementation of the Commission's system? How can different perspectives (managerial, organisational, and cultural) shed light on these issues?

## **5. GOOD REGULATORY GOVERNANCE: MULTI-LEVEL GOVERNANCE, THEORIES OF THE POLICY PROCESS, AND LEGITIMACY**

The third session of the conference is dedicated to the topic of good regulatory governance. In this Section of the report, we will start with a remark on the meanings of good governance and then look at how it can be achieved by focusing on multi-level governance, the theories of the policy process, and legitimacy.

As mentioned, 'good regulation' means different things to different actors in the policy process. The expert, the politician, and the civil servant have different ideas and evaluative benchmarks of what is good quality impact assessment. These are ideal-types, because in reality one finds women and men working on impact assessment who share some of the characteristics of the expert, some features of the classic Weberian public officer, and also take into account political considerations. In the case of the Commission, one has to acknowledge its political role in the EU policy process. *The logic of the Commission cannot be confined to the classic Weberian logic. It is the logic of a political body with its own political agenda – a body which also shares some of the characteristics of the 'expert' and the 'classic civil servant'.* Having clarified this, ideal types are useful to demarcate the difference between one definition of quality and the other.

Not only is the notion of 'good regulation' quite different when we move from one ideal-typical stakeholder to another -- the criteria used to evaluate success also differ markedly. The politician uses consensus as main criterion, the ideal-typical civil servant conformity to rules, and the 'expert' efficiency. For the politician, success is evaluated in terms of the outcome of negotiations. The civil servant would define success in terms of following all legitimate processes and procedures. For the expert,

the evaluation of success is based on whether the ‘goals’ have been achieved (effectiveness) and whether resources have been used optimally (efficiency).

The logic of action is also different, as Allison (1971) showed. The bureaucrat follows the logic of standard operating procedures, the politician uses negotiation, and the expert draws on the logic of the social sciences.

Now, it is fair to say that IA provides more leverage to efficiency and empirical social sciences than to other criteria and logics. Indeed, the whole Better Regulation strategy of the Commission aims at de-bureaucratising the decision-making process. The long-term objective is to move away from a product-oriented approach, where the legislative or derived act in itself takes central stage to a problem- or process-based setting in which methods of intervention are subject to constant monitoring and revised in a process of institutional learning. Yet in real-world EU regulatory policy processes, the three criteria and logics interact continuously.

### ***5.1 Multi-level governance***

In the EU, good governance is intrinsically linked to multi-level governance. Good governance in this context is nothing but the challenge of coordination (and, when useful, competition) of IA systems that operate at two (domestic and EU) and often three (sub-national, national, and EU) levels-jurisdictions.

In itself, lack of coordination across levels of governance is not a problem. It depends on whether it stimulates healthy competition or dull emulation. The major problems, however, are at a more specific level of analysis. They are well illustrated in a recent paper by Sarpi (2003). He makes the point that in multi-level systems the notion of impact has to be widened to cover the impact of regulatory action taken by level  $L_1$  on levels  $L_2$ , and sometimes  $L_3$ .

Here is a simple illustration of dilemmas that have not been addressed so far. To begin with, we know that impact assessment does not perform well when distribution of costs and benefits is a serious issue. At the EU level, distributional conflicts are bound

to arise quite frequently. Most EU proposals for regulations penalise some sectors, or some types of firms, and advantage others. Certain sectors or certain types of firms are statistically more represented in some EU Member States than in others. This is why some governments like the UK have specific guidelines on how a government should monitor the evolution of proposals (and thus monitor EU IA) via domestic assessments<sup>10</sup>.

A number of questions arise, specifically:

- (a) What criteria and logic should be used in this process?
- (b) If a country like, say, France, predicts (via a French IA) concentrated losses for key French sectors arising out of a proposed EU regulation still at the stage of impact assessment, what is the best way to insert this aspect into the design of EU-level IA?
- (c) What happens to be boundaries between technical and political logic in this situation? Shouldn't political-negotiation issues be left for discussion in the Council? Or do we expect the Commission to become a broker of political positions disguised under the technical language of IA?
- (d) Textbook cost-benefit analysis would suggest the use of distributional weights. EU legal scholars would look at the principle of proportionality. However, this simply moves the problem one step forward without solving it. What kind of political process can best measure and assign weights and assess proportionality? In a sense, it is the same dilemma one encounters when national IAs affect regional interests. Some forms of compulsory 'distributional accounting' can be used to make explicit the range of regional interests affected by higher-level IAs (see Sarpi 2003). The Scottish executive envisages some forms of interaction with the UK government to make sure that concentrated losses and other distributional problems are visible and explicit in the formulation of UK regulations. This is of course easier at the level of institutional relations in the UK than in the context of an enlarging EU.

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<sup>10</sup> See the 'European regulation' checklist on the website of the cabinet office (<http://www.cabinet-office.gov.uk/regulation/Europe/eurodocs/EuroChecklist.pdf>).

Anyway, once distributional problems have been made explicit, they have to be brokered. This may bring the technical and political logic to a clash. Another tricky issue is about techniques and methods. Sarpi (2003) notes that different levels of governance may use different approaches to assessment. Indeed, some EU Member States rely on compliance cost assessment, others on checklists, and a few on full cost-benefit analysis. Here are some obvious questions to address:

- (a) What happens when different governments provide their own analysis of EU proposals with different methodological voices? Is this a recipe for cacophony? Of course, the Commission remains the sole body responsible for EU IA, but how should the suggestions and inputs provided by Member States be dealt with if there is no common methodology?
- (b) How can one avoid that political objections to proposals be disguised as objections to the methodology used in IA?
- (c) Is there any scope for minimum EU standards for the analysis of impact? Does harmonisation of techniques serve any purpose in this respect?
- (d) Different methods may also result from different values – Sarpi (2003) concludes. Look at the discount rate. One can guess that the Estonian or German discount rate on environmental ‘EU public goods’ can be very different from the British rate. This is due to the well-known fact that Estonian and German citizens have different preferences regarding the environment than the British citizens. How does one take this into account in the formulation of EU IA? What is the average discount rate? Shall one look at medium EU values and their variance instead of considering only one indicator? The problem applies to several hedonic prices and to the other issues, such as the value of life (Viscusi and Aldi 2003).

## ***5.2 Theories of the policy process and Bayesian learning***

Impact assessment was born in the context of ‘rational policy analysis’. There is nothing wrong with ‘rational’ approaches to policy analysis, of course. The trouble comes when policy-makers introduce IA in their own countries without answering the question of what type of policy process they have in mind. Often IA is imported by

technocrats and epistemic communities close to Ministers, as La Spina (2002) has well explained with reference to the Italian case. Importing IA without a model of the policy process or with an implicit model of technocratic rationality in mind is a common cause of disappointment later on the road to implementation of impact assessment. A technocratic model wherein impact assessment is a completely technical exercise is simply wrong and incomplete. There are several points of contact between technical logic and political-bureaucratic logics in the IA process. Think of the step of setting the goals of regulation – an initial step in most guides to better regulation. Who does this? The expert, the civil servant, or the politician? The reality is that, especially in continental Europe, the regulatory process is highly fragmented, with multiple points of contact between politics and administration, and between different logics and criteria.

Yet one cannot run the risk of simply throwing the baby away with the bath water and concluding that IA is useless because politics always trumps technical criteria. IA can improve, indeed, by endogeneising bounded rationality and the politics-administration continuum (as opposed to a model of radical separation of politics and administration). One possible way to re-frame impact assessment within a better theory of the policy process is to cast IA in terms of Bayesian learning. Let me spend a few words on this. The starting point is that all policies are collection of hypotheses about causal relationships: if the government does X, the economy and society will react by doing Y and we will reach the goal Z. IA is an ex-ante exercise, hence based on hypotheses formulated under conditions of uncertainty. In turn, uncertainty is of a subjective nature rather than being the frequency of observed events. In most cases of impact assessment, regulators would formulate subjective probabilities, as the events they are dealing with cannot be observed several times under the same experimental conditions.

One obvious way to reduce errors contained in hypotheses about reality is to make use of experience. Bayesian learning provides a methodology to learn from experience under conditions of uncertainty by using simple rules of coherence (Parmigiani 2002). Policy makers attribute subjective prior probabilities to events and then use experience to up-date their probabilities in a coherent way. Posterior probabilities are therefore informed by experience. A fundamental theorem in Bayesian statistics states

that when experience becomes considerable - and provided that actors use the principle coherence in adapting their prior probabilities - the value of initial attributions of probability to events (that is, prior probabilities) does not matter much - except in extreme cases when an individual attributes either zero or one probability to an event. Posterior probabilities converge when experience grows. IA can therefore be seen as a tool providing evidence and rules through which regulators learn coherently. Bayesian learning can supply a model in which different subjective opinions about uncertain events can be accommodated, provided that all actors (the expert, the civil servant, and the politician) accept to learn from evidence - by following certain rules of the game. There is considerable potential in terms of applying Bayesian learning not only to general theorisations, but also in concrete guides and handbooks for public officers. In this vein, it is useful to think of IA not as a one-shot activity, but as a process, starting from the definition of the problem and ending with the choice of a policy option, through which evidence and 'experience' are gathered step by step<sup>11</sup>.

### *5.3 Legitimacy*

As mentioned above, there are different criteria used by different actors to evaluate success. In the case of IA, for the civil servant 'success' means to complete an analysis of impact by following all the steps provided by the IA guide and, when they exist, by the laws disciplining the formulation of regulations. For the expert, 'success' means accurate policy analysis. However, in a theory of the policy process based on bounded rationality and uncertainty, the real 'success' of impact assessment is all about formulating the right questions rather than about providing final answers (Commission 2002a). Accurate analysis is obviously a cornerstone for the credibility of IA, but it should present the decision-makers with some important issues they have to address – rather than pretending that impact analysis 'silences' the debate by providing a 'scientific' solution to political problems.

If questions are at least as important as answers, then legitimacy is the best criterion to evaluate quality and success. Cross-national experience (early UK experience of compliance cost assessment, France and Germany in the 1990s; see Radaelli 2001)

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<sup>11</sup> I am grateful to Alex Surdej for his remarks on Bayesian learning.

shows that when IA is built around only one support constituency (such as the business community) the problems of legitimacy become insurmountable. The Italian case (La Spina 2002) is another example of legitimacy problems. As mentioned, IA was introduced in this country (under OECD pressure) by a small group of policy advisors and a motivated Minister. But neither the business community, nor the civil society and the academics were really interested in this new tool. The result was the momentum for IA has not yet fully materialised.

New policy instruments necessitate a robust network of actors. They gain legitimacy only when a large number of stakeholders emerge around them. By contrast, tools that interest only policy officers tend to float in a sort of limbo and eventually become useless. In this connection, one should look favourably at the development of networks of academics and private sector think-tanks that challenge the government's numbers. By doing so, they perform a sort of extended peer review and quality control of what institutions do (see Section 3 above).

There is plenty of work to be done in this direction. Randall Lutter, currently chief economist at the FDA, observed that 'independent review seems ubiquitous expect for the case of regulatory analysis' (Lutter 1999:43). A more general point: in terms of legitimacy, the presence of different IAs performed with different weights assigned to different values may be a good thing. NGOs may provide their own trade-social impact analysis of regulations, women's groups could deliver gender assessments, and other types of assessment could well co-exist. All this would increase the number of stakeholders making use of IA in the policy process. It would also increase political attention for instruments based on empirical policy analysis and steer the political debate towards the discussion of costs and benefits of proposed regulations – a good antidote to ideological discussions with no content. In this scenario, different actors would still conflict, of course. They would hold different views about how impact assessment should be used in the policy process. But they would accept IA as a main resource for the policy process. This would boost the institutionalisation of impact assessment.

On this issue, both in the EU and its Member States, IA is still a largely under-exploited opportunity. No 'pluralistic' approach to IA has emerged in Europe.

Academics, think tanks, non-profit organisations are usually at the ‘periphery’ of IA. At best NGOs are consulted. But they do not produce their own impact assessments, they do not challenge the government’s numbers, they do not release ‘gender assessments’ of proposed regulation. There is some unexploited potential out there.

But in order to play a game like IA, one has to accept the rules of procedural legitimacy. This means that NGOs and employers’ organisations, for example, would have no reason to expect preferential treatment in consultation or in the analysis of costs and benefits, as one aim of IA is to assess the impact of proposed regulations in terms of benefits and costs for the whole community. It also means that all actors should present empirical evidence at specific stages of the policy process and with detailed information on what kind of empirical evidence was gathered, how scientific opinions were collected and assessed, and how scientific and policy advice were created (and sponsored).

It is too early to say whether these characteristics apply also to the nascent EU system. For sure, the EU approach to impact assessment is potentially more pluralistic than the approach of several Member States because it draws explicitly on notions of participatory governance and on the idea of democratising expertise (as explained in Section 1 above).

To conclude on legitimacy, the successful implementation of instruments of regulatory governance such as IA can work both ways. It provides an opportunity for structured and non-episodic participation to NGOs and societal stakeholders, but it can also make social actors and the business community ‘better citizens’.

Questions for this session of the conference include:

- a) How can a robust network of academics and think tanks contribute to a more transparent process of impact assessment? Examples: peer reviews of IAs, independent observatories, establishing and monitoring standards.
- b) What are the implications in terms of regulatory accountability and legitimacy for the EU system of integrated impact assessment? Impact assessment at the EU level is integrated with the goal of sustainable development. It is also

informed by the notion of participatory governance outlined in the White Paper on Governance. What are the implications of these goals for accountability and legitimacy? How can IA contribute to good governance in the EU? How can this be monitored?

- c) What does quality mean in terms of process? Can we discuss quality as process? How?
- d) How can the Commission's integrated impact assessment cover 'user needs' via technical standards? What is the implication for future handbooks on impact assessment?

**Table 1: Regulatory performance indicators in Australia. Source: adapted from Argy and Johnson, who in turn draw on the Australian Guide to Regulatory Performance Indicators (1999).**

<i>Key Objective</i>	<i>Performance indicators</i>
To ensure that all new or revised regulations provide a net benefit on the community.	1. Proportion of regulations for which IA adequately addressed net benefit to the community.
To achieve essential regulatory objectives without unduly restricting business in the way in which these objectives are achieved.	2. Proportion of regulations for which impact assessment adequately justified the compliance burden on business. 3. Proportion of regulations which provide businesses and stakeholders with some appropriate flexibility (as defined) to determine the most cost-effective means of achieving regulatory objectives.
To ensure that regulatory decision-making processes are transparent and lead to fair outcomes.	4. Proportion of cases in which external review of decisions (as defined) led to a decision being reversed or overturned. 5. Proportion of regulatory agencies whose mechanisms for internal review of decisions meet government standards for complaints handling.
To ensure that information and details on regulation and how to comply with it are accessible and understood by business.	6. Proportion of regulatory agencies having communication strategies for regulation, or formal consultative channels for communicating information about regulation. Guidelines for this purpose should be documented.
To create a predictable regulatory environment so business can make decisions with some surety of future environment.	7. Proportion of regulatory agencies publishing an adequate (as defined) forward plan for introduction and review of regulation.
To ensure that consultation processes are accessible and responsive to business and the community.	8. Proportion of regulations for which IA included an adequate statement of consultation. 9. Proportion of regulatory agencies with organisational guidelines outlining consultation processes, procedures and standards. Guidelines for this purpose should be documented.

Source: compiled by the author, 2003.

**Table 2: Dimensions of IA quality and indicators**

<b>Administrative systems</b>
<p>Central body for quality control and monitoring of the IA process:                      Ad hoc agency, PM office, specific Department(s)                      IA at the pilot stage or fully developed                      Is IA applied to existing regulation?                      Broad programme of regulatory quality including IA                      If IA is selective and the government does not set the goal of analysing all new proposals but only major proposals, how is the selection made and by whom? Is IA commensurate with the size of the potential impact? (monetary threshold)                      Explicit standards for consultation in IA (date, reviewed in year...)                      Public administration committed to make IA results public when laws are published (if so, how)                      Regional IAs (yes or no). If yes: Coordination mechanisms between national and regional systems of impact assessment. For example, do national IA control for the potential costs of proposed regulation occurring to local authorities and regional administrations?<sup>12</sup>                      Do economic regulators (independent regulatory agencies) perform IA?                      Regulatory agenda                      Minister signature or certification                      Sanction system in case of not compliance with the IA process requirements (Mexico)                      Parliament oversight on IA</p>
<b>Activities and outputs</b>
<p>Activities                      Training programmes for IA (no. of trainees per year 2000-2001-2003, level of trainees: junior or senior, percentages)                      Guide to IA (revised every xxx years? Never revised?)                      Guide to economic analysis in the policy making process                      Guide to European Union impact assessment (or detailed Sections in the Guide to national impact assessment)                      IA checklist (included in Guide to IA? Stand-alone checklist? Similar to OECD checklist?)                      Information and indicators on data collection strategies                      Annual report on IA published by the government                      Implementation or compliance strategy                      Reviewing strategy</p>

Table continued on next page.

<sup>12</sup> Sarpi (2003:12) calls this ‘compulsory accounting’ and cites the experience of the Unfunded Mandates Reform Act in the USA.

**Table 2 (continued)**

<b>Outputs</b>
Percentage of new governmental proposals for regulation for which IA is performed.
Percentage of single MPs bills on which IA is performed
Percentage of existing legislation reviewed by IA
Percentage of new regulations issued by independent economic regulators analysed through IA
Percentage of IAs enclosed to the bill and sent to parliament before the bill is discussed
Percentage of IAs including a summary
Percentage of IAs published on the internet
Percentage of IAs published on official gazette
Percentage of economic regulators publishing a forward plan on the introduction and review of legislation
Same indicator for central governmental departments (such as transport, environment, industry, etc)
<b>Set of items on IA methodology</b>
<u>Percentage of total impact assessments in a year that contain the following:</u>
Justification of why public intervention is needed
Regulatory alternatives or options (how many <sup>13</sup> )
Identification of discount rate
Identification of baseline for costs
Identification of baseline for benefits
Identification of the main categories of costs and benefits
Description of costs and benefits that cannot be quantified or monetised <sup>14</sup>
Quantification of costs (firms and citizens/non-profit) <sup>15</sup>
Monetisation of costs (firms)
Monetisation of costs (citizens and non-profit)
Quantification of benefits (firms and citizens)
Monetisation of benefits (firms)
Monetisation of benefits (citizens and non-profit)
Full quantitative analysis of costs and benefits of alternatives <sup>16</sup>
Gender impact assessment
Impact on the labour market
Impact on environment (sustainable development check)
Qualitative analysis of the impact on public administration (cost and benefits)
Quantitative analysis of impact on P.A.
Sensitivity analysis
Distributional effects (if yes, how they are handled)
Controls for the expected level of compliance
Alternatives to cost-benefit analysis <sup>17</sup>
Identification of risks
Quantification of risks
Methodology for the analysis of risk
 And finally:
Percentage of economic analyses (contained in IAs) which have been peer-reviewed
Percentages of IA with 'socially robust' peer review (see the Liberator report Commission 2001c)
Percentage of IAs audited by bodies such as NAO in the UK (Nao 2001)

<sup>13</sup> It is important to check for the number of alternatives to traditional regulation considered in impact assessments. The NAO report (2001) argues that the range considered in British IAs is too limited.

<sup>14</sup> See OMB (2003)

<sup>15</sup> Firms and citizens, for example, no. of lives lost, no. of companies that will have to close down.

<sup>16</sup> Including the analysis of the 'status quo' option. Most European IAs perform a superficial and qualitative analysis of alternatives. They calculate costs and benefits only for the 'preferred' alternative.

<sup>17</sup> For example, multi-criteria analysis and cost effectiveness analysis.

### **Real world outcome**

Actual market impact (measured ex post) of regulations assessed via IA  
Aggregate costs and benefits of approved major regulations (as required by OMB 2003) → indicators of 'net benefits'  
Dynamic efficiency of impact assessments  
Impact on trade and market openness of regulations assessed via IA  
Impact on innovation of regulations assessed via IA  
Percentage of new regulations which meet clear defined standards for handling complaints  
Survey-based indicators of compliance costs, e.g., the OECD comparative study containing estimated based on survey responses (OECD 2001).  
Critical issues about IA raised by stakeholders (survey data, for example, but to be handled with care, as we explain in the text of this paper)  
Number of laws repealed (through ex-post IAs, codification, simplification) divided by the total stock of legislation x1000  
Rate of compliance with regulations (estimated in percent.)  
IA and multi-level governance:  
do national and sub-national IA use the same methodologies, for example cost-benefit analysis? Or do methodologies diverge?  
Indicators of 'distributional accounting', such as 'compulsory accounting' in the US (Sarpi 2003). If cost-benefit analysis is the common methodology, how many new regulations (in percent) address the issue of costs that are concentrated in one region and more generally for uneven distributions of costs and benefits across levels of government?<sup>18</sup>  
Results of benchmarking exercises across regions  
Results of standardisation exercises across regions

Source: compiled by the author, 2003.

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<sup>18</sup> Cost-benefit analysis does not perform well in terms of controlling for distributional problems, so one would expect that it is supplemented by other considerations in a context of multi-level governance.

**Table 3: Approaches to quality (indicators and tests) according to different logics**

	<b>Rational economic logic</b>	<b>‘Weberian’ logic</b>	<b>Political logic</b>
<b>Indicators</b>	Real-world indicators	Indicators on activities and output	Indicators on activities; indicators on administrative systems (for example presence of ‘task forces’ and consultative bodies with the mandate to check compliance costs for business)
<b>Tests</b>	Function tests  Outcome tests on the predictive ability of IAs  Content tests on the quality of economic analysis	Content tests on whether all procedures and steps in the IA process were followed by the regulator (tests on presence-absence)	Content tests on consultation of key groups providing support to the incumbent  Function tests on whether IA make an impact on economic variables statistically significant for the popularity of the incumbent

Source: compiled by author, 2003.

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