

The New European Better Regulation Agenda

Changes and Potential for Improving the U.S. Rulemaking Process

European Better Regulation Package

On May 19, 2015, the European Commission published a new agenda¹ for improving the Union's rulemaking process. Through the "Better Regulation Package"² the Commission established a set of policy changes that seek to improve transparency and participation within the EU's regulatory process and the quality of new and existing legislation. These changes may be useful for other countries, including the U.S., in their efforts to improve regulatory governance.

These recent changes may be particularly useful for the U.S. as it negotiates a trade and investment agreement with Europe, because, as noted by Susan E. Dudley and Kai Wegrich, "procedural differences in how regulations are analyzed, developed, and enforced must be understood if regulatory cooperation is to be achieved."³ This *Insight* presents the changes introduced by the Europeans and highlights possible actions for improving the U.S. rulemaking process.

The Commission's new "Better regulation for better results" agenda outlines measures to strengthen the institutions, broaden the scope of better regulation tools, and increase the level of transparency and participation of the EU regulatory system. In doing so, the Commission builds upon previous regulatory reforms in order to restore confidence by seeking "rules that do their job to meet our common objectives – no more, no less."

¹ European Commission. Press Release Database. May 19, 2015. http://europa.eu/rapid/press-release_IP-15-4988_en.htm (accessed August 08, 2015).

² European Commission. Better Regulation: Key documents. May 19, 2015. http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm (accessed August 08, 2015).

³ Dudley, Susan E. , and Kai Wegrich. "Achieving Regulatory Policy Objectives: An Overview and Comparison of U.S. and EU Procedures." Washington D.C.: The George Washington University Regulatory Studies Center, March 2015, 3-4. http://regulatorystudies.columbian.gwu.edu/sites/regulatorystudies.columbian.gwu.edu/files/downloads/Dudley%20Wegrich_US-EU_RegOverview_20150506_Rev.pdf.

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Source: European Commission. Better Regulation Agenda: Enhancing Transparency and Scrutiny for Better EU Law-Making [Infographic]. May 19, 2015. http://ec.europa.eu/smart-regulation/images/br_infographic.png (accessed August 6, 2015).

A Focus on Reducing Existing Regulatory Burdens

The Commission's program for simplification and regulatory burden reduction is the Regulatory Fitness and Performance Programme (REFIT). Launched in 2012, it "requires a joint effort between the European Parliament, the European Council, the European Commission, Member

States and stakeholders.”⁴ By the adoption of the Agenda, the REFIT launched 164 initiatives to revise existing regulations.⁵

In order to improve stakeholders’ and national representatives’ participation in the process of simplification and regulatory burden reduction, the Agenda created a new REFIT platform. The platform aims to “advise the Commission on initiatives to reduce regulatory burdens of EU law.”⁶ Two groups are part of the platform: a government group comprising 28 member state experts and a group of 20 stakeholders representing the private sector, social and civil society organizations, and the Economic and Social Committee and the Committee of the Regions.⁷ The stakeholder group is selected through an open call and is expected to have its first meeting in November 2015. The platform will: i) gather proposals for burden reduction, ii) assess those proposals, iii) send them to the Commission, and iv) respond to and publish each proposal.⁸ The platform mandate runs through October 2019.

The REFIT platform aims to collect more input from the public while providing a constant dialogue between national governments and stakeholders. This initiative may boost efforts to reduce burdensome regulations. The U.S. government is also interested in reducing regulatory burdens⁹ and could benefit from an initiative that increases stakeholder input along with clear requirements for assuring that proposals from the public follow a continuous, transparent and open process.

Greater scrutiny of new and existing regulations

On July 1, 2015, a new independent Regulatory Scrutiny Board replaced the Impact Assessment Board “to strengthen the existing system of quality control of impact assessments and to apply

⁴ European Commission. REFIT – making EU law lighter, simpler and less costly. August 04, 2015. http://ec.europa.eu/smart-regulation/refit/index_en.htm (accessed August 2015).

⁵ European Commission. Regulatory Fitness and Performance Programme (REFIT): State of Play and Outlook “REFIT Scoreboard”. Commission Staff Working Document, Strasbourg: European Commission, 2015. http://ec.europa.eu/smart-regulation/better_regulation/documents/swd_2015_110_en.pdf.

⁶ European Commission. REFIT – making EU law lighter, simpler and less costly. August 04, 2015. http://ec.europa.eu/smart-regulation/refit/index_en.htm (accessed August 2015).

⁷ These two Committees are consultative bodies of the European Union decision making process. The Economic and Social Committee assembles representatives from economic and social interest groups and the Committee of the Regions gathers regional and local representatives.

⁸ European Commission. Call For Expressions of Interest for the Selection of Experts for the Stakeholder Group of the “REFIT Platform.” Brussels: Secretariat-General, 2015. http://ec.europa.eu/smart-regulation/better_regulation/documents/20150624_refit_platform.pdf.

⁹ Executive Order 13563, Section 6. <https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

similar checks to major retrospective evaluations and fitness checks.”¹⁰ The new Board oversees and supports the impact assessments and evaluations of specific interventions and policy areas. The Board’s opinions play an important role in EU regulatory process; in fact, “a positive opinion is in principle needed from the Board for an initiative accompanied by an impact assessment to proceed.” Seven full-time members compose the Board, which is attached to the Secretariat-General. As noted by the Commission, “compared to the Impact Assessment Board, the Regulatory Scrutiny Board functions will be widened to include major retrospective evaluation and fitness checks of existing Union policies and legislation. Its composition and capacity will also be strengthened.”¹¹

Oversight bodies are an important part of the regulatory policy because they act as “engines of reform.”¹² The newly created independent Board reminds us of the importance of having a mechanism for ensuring quality and supporting regulatory policy. Creating institutions with more independence and technical capacity may constitute a valuable model for other countries that are improving their regulatory reform policies such as Colombia.¹³

Transparency and consultation

To improve transparency and participation in the rulemaking process, the new package recommends taking advantage of internet-based consultation and other consultation methods (open or targeted) and tools (written, questionnaires, meetings, hearings, among others). Also, new kinds of rules enter into the scope of the consultation requirements, such as delegated and implementing acts. Consultation of initiatives with impact assessments, evaluations, fitness checks and green papers in general is internet based and open for a minimum of 12 weeks.¹⁴

¹⁰ European Commission. “Decision of the President of the European Commission on the establishment of an independent Regulatory Scrutiny Board.” Decision of the President of the European Commission, Strasbourg, 2015. http://ec.europa.eu/smart-regulation/better_regulation/documents/c_2015_3263_en.pdf.

¹¹ European Commission. “Regulatory Scrutiny Board: Mission, tasks and staff.” Communication to the Commission, Strasbourg, 2015, 2. http://ec.europa.eu/smart-regulation/better_regulation/documents/c_2015_3262_en.pdf.

¹² OECD. Oversight Bodies for Regulatory Reform. Background Document, Tunis: OECD, 2007. <http://www.oecd.org/mena/governance/38403668.pdf>.

¹³ On October 2, 2014 the National Council on Economic and Social Policy (CONPES), highest authority for national government planning, approved the policy document “*Mejora normativa: análisis de impacto*”. This CONPES document established the creation of an institutional mechanism for the coordination of the initiatives of regulatory reform in Colombia. In the coming years, this institution is expected to incorporate oversight responsibilities.

¹⁴ European Commission. Better Regulation Guidelines: Guidelines on Stakeholder Consultation. May 19, 2015. http://ec.europa.eu/smart-regulation/guidelines/docs/swd_br_guidelines_en.pdf (accessed August 11, 2015).

Among other things, the Guidelines on stakeholder consultation define the obligation to provide opportunity for feedback at various stages of rulemaking, including: Roadmaps, which are documents that briefly describe the rationale for and main components of initiatives, evaluations and fitness checks; Inception Impact Assessments, which are more detailed documents elaborated when an impact assessment is planned; and draft delegated and implementing acts. The timeframe for consultation for draft delegated and implementing acts is 4 weeks.¹⁵ In addition, comments and suggestions on European regulations can be sent via the “Lighten the load – Have your say” online system,¹⁶ which complements the consultation process.

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Enhancing public consultation and stakeholder feedback is one of the key objectives of the European policy changes. In the U.S., an open channel to comment on the stock of regulations could provide a valuable complement to the consultation process of regulations under development. This would be particularly important as reviewing the existing stock of regulations is currently a concern for the administration.¹⁷

Work with other European entities

Finally, as noted in the agenda, achieving the European objectives is only possible with the involvement of other EU level entities and the national governments. In part to respond to this concern, the Commission is proposing alongside its Agenda an Interinstitutional Agreement in order to involve other EU institutions.¹⁸ The Commission intends to expand the assessment requirements in this agreement to substantial amendments introduced to the legislative proposal.

Potential for U.S. Reforms

The European Commission’s new agenda aims to improve its rulemaking process by increasing the scope and quality of regulatory assessments, expanding transparency and consultation, and seeking to work with other European entities. Some of the particularly interesting initiatives that could be applied in the U.S. context relate to ex post review of regulations’ impacts. These reforms are explained below.

¹⁵ Ibid.

¹⁶ European Commission. Lighten the load – Have your say. 2015. http://ec.europa.eu/priorities/democratic-change/better-regulation/feedback/index_en.htm (accessed August 11, 2015).

¹⁷ The White House. *Retrospective Review of Regulations*. <https://www.whitehouse.gov/omb/oir/regulation-reform> (accessed August 13, 2015).

¹⁸ According with the Commission, the finalization of the agreement is expected to take place at the end of 2015.

1. Increase input from stakeholders

One potential reform is to increase the input from stakeholders on the impacts of existing regulations through a well-established platform that formalizes a constant dialogue between federal government, states, and stakeholders.

The U.S. has underlined the importance of reducing unjustified regulatory burdens. Executive Order (E.O.) 12866 “Regulatory Planning and Review”, E.O. 13563 “Improving Regulation and Regulatory Review” and E.O. 13610 of “Identifying and Reducing Regulatory Burdens” formalized the objective of reducing those burdens while achieving social and economic benefits through regulatory means. Particularly, these executive orders established, among other requirements, that agencies have to make particular efforts to conduct review of existing regulatory requirements and paperwork for ensuring their effectiveness and minimize burdens. For example, E.O. 13563 establishes that agencies “shall consider how best to promote retrospective analysis of rules that may be outmoded, ineffective, insufficient, or excessively burdensome.”

Establishing an “ongoing dialogue” between the executive government, states and stakeholders can improve retrospective review and burden reduction efforts while including a regional perspective.

In terms of public participation in the retrospective review efforts for reducing regulatory burdens, according to E.O. 13610, agencies should consider suggestions from citizens and stakeholders in the process of determining which rules are subject to retrospective review. As noted in §2, “members of the public, including those directly and indirectly affected

by regulations, as well as State, local, and tribal governments, have important information about the actual effects of existing regulations... agencies shall invite, on a regular basis (to be determined by the agency head in consultation with the Office of Information and Regulatory Affairs (OIRA)), public suggestions about regulations in need of retrospective review and about appropriate modifications to such regulations.”

Even though there is an instruction to include public suggestions in the identification of retrospective reviews, institutionalization of such participation would bring legitimacy and more participation to the process. Establishing an “ongoing dialogue” between the executive government, states and stakeholders can improve the retrospective review and burden reduction efforts while including a regional perspective. An entity such as the REFIT platform in the U.S. could strengthen the consultation process, solicit suggestions for ex post review from different sectors and different levels of government and be a filter of such initiatives.

2. Submit comments on stock of existing rules

A second reform option is to provide a program to comment on the stock of regulations to complement the consultation process.

Transparency and public participation are important components of the U.S. rulemaking process. Since 1946, the Administrative Procedure Act has required agencies to notify and provide opportunity to participate in the rulemaking process. In 2002, the eRulemaking Program was created to facilitate electronic participation in the regulatory process. Through Regulations.gov, the online site managed by the Program, “comments are accepted on documents such as Federal Register Notices or Proposed Rules. Additionally, some agencies allow you to comment on another person or organizations’ comment.” An equivalent platform does not appear to exist across agencies to collect and share public suggestions on reducing existing regulatory burdens.

As noted before, creating an open online window for public suggestions to improve the effectiveness and burden reduction of existing regulation, such as the European “Lighten the load – Have your say” Program or the UK red tape challenge,¹⁹ may bring positive results to the U.S. regulatory system because it would bring new ideas for ex post review based on the experience of citizens and businesses, and offer continuous opportunities for participation.

¹⁹ The U.K.’s red tape challenge is an interactive campaign that works “upon the experience and ideas of those who deal with regulation day-in, day-out by collecting online comments to help... cut red tape.” This challenge led a consultation from 2011 to 2013 publishing regulations by themes (sectors, industries or horizontal). Citizens were asked to comment on those regulations providing input for deciding if those regulations should be “scrapped” or maintained. The challenge covered 21,000 rules and by January 2014, 800 regulations were abolished or simplified, saving the private sector £1.5bn. See: <http://www.redtapechallenge.cabinetoffice.gov.uk/home/index/>.