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Is 'better regulation' possible? Formal and substantive quality in the impact assessments in education and culture of the European Commission

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1. Introduction

This article explores the extent to which regulatory impact assessments, or “impact assessments” (IAs), have contributed to evidence-based policy-making and democratic governance in the European Union (EU). After the de-regulatory period of the 1980s and 1990s, the last decade has seen a marked increase in interest on how to produce “better regulation” at national and international levels. The number of countries that assess the costs and benefits of new regulations almost doubled from 1998 to 2008 in the OECD area (OECD 2009), and the literature on IAs has also grown significantly in this period (Fritzsche et al. 2012; Radaelli and Meuwese 2010).

Against this backdrop, this paper has two aims, related to policy analysis and to policy sociology respectively. First, to explore the *policy model behind* the Commission’s IAs, and the tensions and assumptions it generates for the production of IAs. Second, to explore the substantive *content*, an aspect that has been so far been largely missing in the IA debate. While the model employed by the Commission is important to understand what the IAs reviewed are set out to do, their content is important in order to understand how the Commission is doing it. The final contribution is methodological: the paper makes a case for moving away from the dominance of scorecards as the primary way to assess the quality of IAs. The analysis is based on a detailed study of six IAs in the areas of education, culture, youth and citizenship in the period 2002-2007.

The paper proceeds in five stages. Section two introduces the better regulation agenda and IAs in the EU. This is followed by a review of the literature on public policy decision-making models and a description of the methodology adopted in the study in sections three and four. Section five presents findings, which are discussed in section six.

2. Better regulation and Impact assessments in the EU

2.1 Better regulation

The drive to implement “better regulation” and IAs can be seen as a part of a wider move towards the ‘evaluative State’, which aims to bring greater rationalisation to policy. In the EU, the “better regulation” agenda was established in 2002, following the publication of the EU’s White Paper on European Governance (European Commission 2001). The EU defines its better regulation strategy as a range of initiatives to improve the regulatory environment by better evaluating the likely economic, social and environmental impacts of laws and regulations. The European Commission (henceforth the ‘Commission’) argues that there is “abundant evidence that better regulation can boost productivity and employment significantly, thus contributing to Europe’s growth and jobs agenda” (European Commission 2011:1).

The move towards better regulation is also portrayed as having profound implications in the way policy-making comes about. According to the Commission:

“Stakeholder consultations and impact assessments are now essential parts of the policy making process. They have increased transparency and accountability, and promoted evidence-based policy making”. European Commission (2010:2).

The Commission’s better regulation agenda is based on concrete action lines, which have translated into the simplification of regulations, the reduction of administrative burdens and, above all, the use of IAs to examine the impacts of future policy to aid decision-making. Major EU legislative, budgetary and policy-defining initiatives must undergo an IA before they are adopted (ECA 2010). This paper concentrates on IAs for expenditure programmes in education, culture, youth and citizenship, areas subject to the so-called “co-decision procedure” and the principle of parity (article 294 of the Treaty of the Functioning of the European Union). Within the Commission, each directorate general (DG) is responsible for preparing its IAs. In 2003, the Commission, European Parliament and Council committed to an inter-institutional agreement on better regulation which stipulates that since the European Parliament and the Council can, and often do,

propose substantial amendments to Commission's proposals, such amendments can be subject to IAs too. This underlines the importance placed on IAs. Throughout I refer interchangeably to the EU and Commission IA model, as an inter-institutional common approach to IAs adopted in 2005 established that the European institutions will follow a common approach in the preparation of IAs.

According to the European Commission the 'better regulation' strategy has shifted political attention from evaluation to IAs (Johnson 2007), as politicians are more interested in getting information for their own future regulations than in obtaining information on the achievements or failures of programmes adopted by their predecessors. IAs have also received much attention in the political science literature (Hertin et al. 2007; Radaeli 2007a; Radaelli and Meuwese 2010), and to a lesser extent sectoral policy literature (Adelle et al. 2006; Blacklund 2009). Yet so far, the burgeoning literature on the development of evidence-based education policy has paid surprisingly little attention to IAs (OECD 2007; Levin 2004). EU-related educational research has, similarly, so far concentrated its attention on other aspects, such as the ways in which the EU has created its own "polity" in education and culture (Grek and Ozga 2010; Souto-Otero 2011; Souto-Otero et al. 2008) and on the history and performance of its programmes (Ertl and Yu 2009), paying little attention to the analytical process supporting the decisions to establish education programmes. This paper aims to fill this gap in the education literature, while extracting more general implications for the analysis of IAs.

2.2 Impact assessments and their role in the EU policy-making process

The Commission (2009:5) defines Impact assessments (IA) as "a set of logical steps to be followed when you prepare policy proposals. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts". The purpose of IAs is to support, not to

substitute, policy decisions (European Commission 2002e; 2009). Besides a process, IAs can be a document. IAs as documents are the main focus of this article. The logic of IAs is threefold (Radaelli and De Francesco 2010). First is the logic of *evidence-based policy-making*. Following Majone (1989:48) the production of evidence is understood as the process through which a selection is made from the available stock of information and introduced at a specific point in an argument, to persuade the mind that a given factual proposition is true or false. 'Evidence' therefore is not dependent only on the content of the information, although this is an important aspect, but also on its deployment into an argument, its fit with it and with an audience.

While the relationship between IAs and evidence-based policy-making is complex ('evidence-based policy-making' can be conceived as the presentation to policy-makers of data on 'what works', while IAs suggest how pre-determined courses of action are likely to have an impact) in practice both are closely linked. Thus, the Commission (2010) argues that IAs have promoted evidence-based policy-making as they support policy-making with empirical information, gathered through techniques such as logical framework analysis and cost-benefit analysis (European Commission 2002a). Most of the IAs analysed for this article include a section on lessons learnt from previous programmes in the areas covered: they aim to provide evidence on what worked in order to assess the likely impacts of predetermined courses of action. The evaluation of the Commission's Impact Assessment system reinforces this idea, suggesting that IA proposals are to be based on evidence on what works, and on what needs should be addressed (Evaluation Partnership 2007). While individual IAs may or may not be 'evidence-based' as an instrument they aim to bridge the gap between research and policy-making, 'forcing' public administration officials to gather evidence for policy-making (Radaelli 2007a:931). Thus 'the primary attraction of IA is that it makes government and regulatory agencies more evidence-based and more accountable' (Radaelli and Meuwese 2010:140).

The second logic refers to *democratic governance*. This acknowledges that IAs are not simply internal procedures to improve policy-decisions. During the IA process civil society and other stakeholders are consulted, so that diffuse interests can influence policy. The IA process is not exclusively guided by economic considerations, which are the main focus in EU ex-ante evaluations. “Impact assessments are policy-driven” (European Commission 2002d:3), thus potential benefits that cannot be quantified still play an important role, and extensive consultation with stakeholders according to a set of standards is required, potentially reducing the legitimacy concerns associated with much ‘evidence-based’ policy making (cf. Biesta 2007). IAs can be used to provide opportunities for a plurality of actors to interact in the policy-making process, become policy co-producers, make this process more diffuse and accountable (cf. Eriksson 2012). In this respect, the logic of IAs can be related to Habermasian (1996) discourses on *procedural* rationality, and his notion of idealised governance structures as well as to notions of civic republican governance. In practice, such models face challenges related to their idealised vision of politics and the public arena, also palpable in the IA process. Political deals are not made in the public in the process of IA construction (Radaelli and De Francesco 2010), public consultations and the search for agreement can take more time than the policy-process allows (Kagan 2001). Moreover, issues of conflict and power are largely removed from the analysis in favour of consensus and rationally motivated/ presented agreements (Flyvbjerg 1998).

A third logic is the logic of *delegation*, whereby the political decision-makers aim to keep control of the bureaucracies to which they have delegated competencies. The Commission stresses the importance of the first two logics mentioned above, which are thus those examined in this paper.

Before proceeding further it should be noted that the IAs reviewed were produced at a particular (early) point in time after the adoption of IAs by the Commission and that several changes have occurred since, such as the creation of the formally independent

Commissions IA board, established in 2006 to issue opinions on the quality of Impact Assessments conducted by the DGs with the aim of ensuring their quality. The IA Board, today composed by nine Director-level officers from different DGs in their personal capacity who report to the president of the Commission directly, might request improvements to the proposed IAs. Discussions are underway regarding the ways in which EU institutions (in particular the Parliament) should relate to IAs, which may have an impact on the political economy of EU decision-making and the IA process in particular.

3. Better regulation, impact assessments and decision-making models

What is the policy model behind the Commission's IAs? The question is important because it enables us to explore the limitations, assumptions and strengths of the processes through which new EU programmes and policies are designed. This section reviews briefly five alternative models: rational, incremental, administrative, mixed-scanning and garbage can. The rational, or synoptic, model of decision-making (Arrow 1951) is based on six steps for decision-making: 1- problems are identified, 2- goals are established, 3- all the possible alternatives are generated, 4- the likely consequences of each alternative are examined, 5- the best alternative is selected, 6- the decision is implemented and evaluated. The model assumes clear goals, complete information and cognitive capacity to analyse the problem. It assumes that values and facts, and means and ends can be clearly separated. There is also often an assumption that values can be specified and ranked to evaluate alternatives.

According to the 'incremental model' (Lindblom 1959), designed as a reaction to the rational model, decision-makers focus on those policies that differ incrementally from existing policies, rather than attempting to have a comprehensive evaluation of all possible alternatives. Only a small set of alternatives and outcomes are considered, and for these only a small number of "important" consequences are evaluated. According to

the model small policy changes are often superior to radical ones almost in a pro-inertial way. There are continuous ends-means and means-ends adjustments, which make problems manageable. The model rejects the possibility of adopting “the right decision”. Instead, there is a “never-ending series of attacks” on the issues that policies try to address.

In the ‘administrative model’ (Simon 1947; 1993), the quest for the rational “the best” is abandoned in favour of a “satisfying strategy”: the selection of a satisfactory solution. The model acknowledges that decision-makers are faced with limited information, cognitive limitations and a finite amount of time to take decisions. A “bounded rationality” operates. Instead of synoptically assigning numerical indices to decisions to rank them, decision-makers perform a more basic evaluation: satisfactory/ not satisfactory. There is a sequential process of search, until a satisfactory level of utility is reached. Then, the search is curtailed (“that will do”). Normally the first identified satisfactory alternative is selected. The search takes into consideration the environment, as the satisficing person operates with a rationality that is practically feasible within an organisation, not one that aims for utility maximisation (Brown 2004).

Etzioni (1967) proposed ‘mixed-scanning’ as an alternative to the rationalist and incrementalist models. For Etzioni, the rationalist model imposes too many burdens on decision-makers; it assumes they can know all that there is to know when making a decision. On the other hand, incrementalism does not take into account that decision-makers must refer to broader guidelines when evaluating their small steps, to assess whether the current lines of action are adequate. The mixed-scanning model involves two sets of judgements: grand a-priori choices about an organization’s goals and policies and ‘small, experimental decisions based on in-depth examination of a focused subset of facts and choices’ (Etzioni 1989:124). Organisations operate through trial and error, and

because of this organisations must be ready to reverse their decisions. Mixed-scanning is thus “humble decision-making”.

Cohen et al. (1972) and Kingdon's (1984) ‘garbage can’ model does not start with a problem and end with a solution. Instead, it looks at how the interactions between three different but interrelated streams “problem”, “policy” (policy solutions “float” looking for problems) and “political” (related to events such as elections) affect the inclusion of particular issues into the political agenda. Problems and solutions are contingent, as they change when policy actors change. Policy entrepreneurs connect at least two of the streams to take advantage of windows of opportunities for policy decisions. The garbage can model warns against overemphasising the rationality and linearity of agenda setting, but gravitates around government officials, and gives little weight to political differences.

Each of these decision-making models can be understood as a response to each of the stages of the rational model, which have left the model in a discredited position as a descriptor of how policy-making could be expected to operate: the garbage can model questions primarily the linearity of steps 1, 2 (rational problem definition and goal setting) and 6 (decision-evaluation); the incremental model calls into question step 3 of the rational model (alternative generation) to underline practical limits in the options that policy-makers analyse; the mixed scanning-model underlines the practical limits in step 4 (the analysis of the consequences of each alternative) and the administrative model questions step 5, underlining how the selection of alternatives takes place is not as exhaustive as the rational model suggests.

Different models of decision-making may be more appropriate to some circumstances than others (Tarter and Hoy 1998). The remainder of the paper explores, through documentary analysis, which model of decision-making dominates in the EU's IA process, and the associated consequences.

4. Methodology

The paper analyses six IAs produced by DG Education and Culture (DG EAC) of the European Commission, from 2002 (the year in which the EU framework for IAs was introduced) up to 2007, when the financial framework 2007-2013 was approved. While the number of IAs reviewed is limited, they cover the most important expenditure programmes up to 2013 in the areas of education, training, youth, culture and citizenship: E-Learning (2002), Lifelong Learning Programme (2004); Youth Programme (2004); Culture (2004); Citizens for Europe (2005); Erasmus Mundus I (2002). Each IA was reviewed to determine the quality and scope of the information contained (Harrington and Morgenstern 2004). The analysis also considered the EU IA guidelines, as they define the framework applicable to all EU IAs since 2002. The 2002 guidelines were used as the main point of reference. Mention of later guidelines is made as appropriate. The guidelines are fairly consistent between themselves: while recent versions refine specific aspects, their philosophy is similar throughout the period.

The analysis focused on three main elements: first, IAs' structure; second, their level of compliance with the IA Guidelines (using a pre-defined framework to check whether the IAs contained certain items). These initial two stages are linked to the 'scorecard approach' (Hahn and Dudley 2004), the most widely used approach to analyse IAs. Following Fritsch et al. (2012), the coding I took into account proportionality, the importance and nature of the IA proposal when assessing item presence/ non presence (i.e. a more detailed assessment of costs may be required for new programmes than on a managerial modification of an existing programme), to reduce biases. For similar reasons, instead of entering a 'No' value when an item was not calculated in an IA, a 'Yes' value was entered when the IA explained why a certain item was not addressed.

While useful 'scorecards' tend to be used to analyse the 'quality' of IAs in a relatively superficial way, checking for compliance with IA guidelines (Fritsch et al. 2012). I argue that this is an important, but incomplete and restrictive, conception of quality: *formal*

quality. Although 'the IA framework is all about procedure and avoids as far as possible referring to substance, all IAs deal with substance' (Radaelli and Meuwese 2010:144). Thus, a third element was introduced in the analysis: the actual ways of argumentation (*substantive* quality of the arguments) employed. This was assessed through an in-depth examination of the content of the IAs (Krippendorff 2004). Here, the aim was not to look for omissions with reference to the guidelines (Yes/ No), but for errors and pitfalls, such as the taking of a false logical path that destroys the validity of an argument (Majone 1980), in IAs.

The IA documents analysed provide the 'end-product' and do not detail the machinations that led to the decisions they embody. This poses challenges for a study that aims to relate modes of decision-making to IA documents. However, the intention is, first, to ascertain the policy model presented in the IA to, second, assess its fitness with the content of the IA documents reviewed. The reasoning behind this is that if a mismatch exists this may be explained not only with reference to 'poor implementation' -which is the mainstream concern in the 'scorecard' IA literature- but also with reference to the model adopted in the guidelines. Such conjunction can be argued relatively independently of which particular model may better explain the actual decisions that led to the IAs were made -indeed, providing a final answer on this point is beyond the ambitions of this article.

5. Regulatory impact assessments in EU education policy-making

5.1 IA structure and score-card analysis

This section reports on the findings of the analysis of the six IAs reviewed. This first part summarises the structure of the IAs, and presents the results of the scorecard analysis, whereas the following two subsections present more detailed information on the IA's substantive arguments. The structure of the IAs examined was fairly consistent across IAs and with the IA guidelines. A template of the standard structure of the reviewed IAs is

provided in Table 1. This suggests both the use of the guidelines and, given the number of repeated sub-sections across IAs and the consistent nature of the content in some of the sections, also a high degree of coordination between IAs teams at DG EAC -in particular in relation to the LLP, Culture and Youth in Action IAs, released on the same day.

[Table 1 Around here]

The EU presents IAs as part of a rational decision-making process in both the guidelines and, logically, also in the structure of the IA that implement them, which is at odds with the way in which policy-making operates (European Commission 2002d:2; 2002e:19-20; 2009) but consistent with its positivist approach to evaluation, identified by previous studies (Hoerner and Stephenson 2012).

The ordering of the sections was sometimes slightly different across IAs. The e-Learning report considered alternative delivery mechanisms/ policy options and risk assessment under a single section, where it also included an assessment of the different options; and the Erasmus Mundus IA included the risk assessment under the analysis of the policy options. But structural variations were limited. Even the length of the IAs was rather consistent, at around 35-40 pages plus annexes (except for e-learning and Erasmus Mundus, which were shorter), even though the financial commitment requested by the assessments varied very significantly (from a few hundred million to several billion in the case of the LLP).

Table 2 provides more detailed results on the scorecard analysis performed on a set of items selected because of their importance in the IA guidelines and in previous literature. The analysis suggests some improvement of 'formal quality' over time, mainly as a result of the poor performance of the 2002 e-Learning report.

[Table 2 around here]

Formal quality varied by individual item. Performance was better in relation to the items on 'definition of policy objectives' and 'assessment of impacts' than in 'problem definition', 'identification' and 'selection' of options. However, on the whole, the results are rather promising: most IA obtain a positive score for item presence on around two thirds of individual sub-items.

To address concerns with the formal nature of the above analysis (cf. section 4), the next two subsections cover in more detail the substantive quality of the arguments employed in the problem definition and establishment of policy objectives (the 'what is to be done?' part of IAs) and identification of options, assessment of impacts and examination of options (the 'how is to be done?' part of IAs) respectively. The aim of the following discussion is not to report exhaustively on the arguments of each IA, but to offer an illustration and assessment of the ways in which IAs have presented their arguments, and their pitfalls, in an argumentative analysis that can be contrasted to the results of the scorecard analysis presented. This reveals significantly higher shortcomings in the substantive quality of IAs than in their formal quality.

5.2 Solving problems or creating them?

The first two stages in the rational model are the rational definition of a problem, selected between a range of alternatives and the establishment of goals in relation to that problem (what to do?). The 'problem analysis' sections in the IAs should refer to problems and associated policy objectives as something 'unbiased': problems "should not be identified as a 'lack of something' or as a 'need for something' as this can bias the definition of objectives and the choice of policy instruments" (European Commission 2009:21). Policy problems have identifiable causes, which can be represented in problem trees. The guidelines also expect that IAs' describe the nature and scale of policy problems to be addressed, identify their drivers, the sectors and social groups primarily affected by the suggested interventions and justify interventions on the bases of market failures, equity concerns or dissonance

between the existing situation and EU objectives, all of which conforms to rational conceptions of policy-making.

The problem definition sections of the IA reviewed show mixed results by item, with IAs reflecting on the causes of the problem and groups affected but failing to quantify those and often not justifying public interventions. The approach adopted in the IAs was not to quantify the scale of potential problems to choose ‘the’ most pressing within the range of competences of the decision-maker, as the rational model would suggest, but to show that the problem addressed was important (a satisficing strategy). Moreover, the IAs show no reflection on ‘problematizations’, on how problems could be defined differently to the way in which they are presented, on how they are created, defined and redefined in policy proposals. In other words, there is little recognition that choice is exercised not only in the formulation of ‘solutions’ but also at the time of formulation of policy ‘problems’ and agenda setting –an aspect in relation to which garbage can models could offer valuable insights.

The problem definition section in the IAs reviewed ranged from two to five pages, a striking uniformity given the different nature of the IAs. This uniformity reinforced the message that there is a ‘right’ way to produce policy through a set of predefined procedures to be universally applied, even though the types of problems identified in the IAs were certainly heterogeneous. While there is no coherent set of problems across IAs, these were often related to very general aspects of international economic competitiveness and labour market inclusion (European Commission 2004a), following the Lisbon Agenda. A second set of problems was simply self-referential, such as the problem of “losing momentum” if a EU programme is not adopted following an Action Plan or EU political declaration (European Commission 2002b; 2002c; 2004b; 2004c, 2005b), the problem of not “fully exploiting” the benefits of the approaches tested by previous EU programmes (European Commission 2004b:8) or the criticisms that the Commission would receive if a programme is not adopted:

“Many citizens only experience the Union as a distant and remote political and economic entity as reflected in the low turnouts for European elections. Recent opinion polls also show falling levels of support for European Union membership.(...) A promise has been given to citizens [...] that cannot go unanswered The Commission would be severely criticised in such circumstances” (European Commission 2005b:6).

This underlines the weight that institutional considerations carried for the Commission.

At worst, problem rationalisation and quantification were inaccurate. The e-Learning IA argued that most European Higher Education faced ‘a crisis’ where “the number of students is falling significantly as a result of demographic changes” (European Commission 2002b:3), without providing any figures and ignoring that the number of higher education students *increased* steadily in Europe before the IA: from 12.5 million in 1999 to 12.8 million in 2001 and 13.2 million in 2002 in the EU-15 (Eurostat Database 2001). The most striking admission in this respect is perhaps given in the lifelong learning programme IA, which states that it “assumes” (sic) that:

“...the needs listed under section 2 of this document are real and common throughout Europe. Sufficient evidence is provided by the various political statements and decisions made by Member States” (European Commission 2004a:21).

This is not particularly good practice. However, in reality, the most pressing problems cannot be identified because the data required for a ‘synoptic’ review of problems is not/ cannot be made available and because the importance of a problem is a value judgement -and no clear criteria for value judgements are provided in the IA guidelines. References to the needs of specific groups are made in the IAs, but in a restrictive and tokenistic way that had no bearing on the analysis.

Problem definition is followed by the identification of *policy objectives*, which showed highly positive results in Table 2. This formal assessment contrasts with the quality of the

substance of the IAs, as we shall see. In the Guidelines, measurement accompanies objectivity in the definition of objectives: from a proper identification and quantification of problems, coherent and 'SMART' (specific, measurable, achievable, realistic and time-dependent) global, specific and operational policy objectives should be derived, as the only way to provide "effective criteria for assessing the success or failure of the proposed policy options" (European Commission 2009:26). This is aligned to Fritsch et al. (2012) who see the establishment of 'operational objectives' as key element and a vital precondition for the effective monitoring of policy effectiveness.

All the reviewed IA presented a set of operational objectives. However, closer inspection reveals that their quality is insufficient for guiding policy evaluation, as also recognised in the evaluations of the programmes that followed the IAs. The LLP interim evaluation, for instance, reports that the number of operational objectives of the LLP is too large, that the majority of them overlap and that their logical links with higher level objectives are 'not straightforward' (PPMI 2011:45). It should be noted that making this kind of judgements requires in-depth knowledge of the programme and policy arena. This, again, raises questions regarding the validity of results of scorecard analyses that examine IAs across large numbers of policy areas to increase sample sizes and 'enhance' the statistical representativity of results –cf. also section 4 above.

A note should be added regarding the extent to which IAs increased democratic governance and active citizenship in the period covered. The limitations in this respect are exposed by the guidelines themselves. They requested that DGs (2002e):

"Consult interested parties and relevant experts. In order to be credible, impact assessment cannot be carried out behind "closed doors". Where appropriate, consult with interested parties and relevant experts." (European Commission 2002e:10, emphasis added)

Consultations are thus not presented simply as tools to increase the democratic potential or technical effectiveness of a policy, but also its credibility. In the IAs reviewed, consultation results –from large surveys and well as more individualised contacts with stakeholders- were only used to support the decisions made. Given how unrealistic this is, the implication is that consensus is fabricated rather than constructed through the process.

5.3 Policy options

Stages three, four and five of the rational model refer to the generation of an exhaustive list of alternatives (European Commission 2005a:23), the analysis of all their consequences and the selection of the best alternative (how to do it?). The incremental, mixed scanning and administrative models question each of these stages respectively. The scorecard presented in Table 2 reported mixed results regarding the definition of a list of alternative options (if one is relaxed regarding the rational requirement for the list to be ‘exhaustive’) and the selection of options (if one relaxes the rational requirement for ‘all the consequences to be examined for all options’), but good results in relation to the provision of some assessment of economic, social and environmental impacts.

The IA guidelines require officials to ‘think out of the box’ ‘identifying and screening a wide palette of options’ to increase quality and transparency (European Commission 2002e:10;2005a:23) before narrowing options to 3-4 for more in-depth analysis. IAs do not offer the ‘long list’ of options –if they exist- but normally four/ five options. Options were similar across IAs: (1) no programme; (2) continuation of the current programme (when applicable); (3) slight modification of the current programme; (4) integration with other programmes in the area; (5) (more or less) ‘new’ programme.

The IA guidelines clarify that the screening of options should be done on the basis of the impact of the different options. In line with the synoptic model, the selection of “the best” option will come from the analysis of alternatives and the study of all their impacts

(European Commission 2005a:26), since “The Impact Assessment must clearly and systematically present all the positive and negative impacts” (European Commission 2002e:10) of the different options. However, in the IAs reviewed the range of social, economic and environmental impacts are only assessed for the preferred option, and negative impacts are only specified for options other than the selected options –those are in all cases presented as win-wins. The Lifelong Learning Programme IA states nothing less than “from an economic point of view, the integrated programme is likely to affect positively all those involved in the productive process”, i.e., employers, individuals and the education sector as a whole (European Commission 2004a:10).

The guidelines suggest that causes and effects can be clearly identified and isolated (European Commission 2005a:17). Thus, according to the rational model, the IA should consider direct and indirect impacts, intended and unintended impacts, short-medium and long term time spans and should be expressed in economic, social and environmental terms, systematically identifying who (regions, gender, ethnic group) is affected and over what timescale the impacts will occur (European Commission 2005).

IA scorecard analyses have tended to report on the mention of economic, social and environmental impacts. This is also the case in Table 2, but the results hide the fact that the analysis is rudimentary and in relation to the preferred option only. Moreover, there is no acknowledgement of any potential trade-offs between objectives of economic growth, social equality and environmental sustainability.

The poor results regarding the quantification and monetization of the benefits of the options for the selection between alternatives could be expected. Such instruments, while favoured in the guidelines, do not suit the education policy field very well. Education programmes were often geared to experimentation, the implementation of pilot projects and the setting up of networks. The value of such activities is difficult to monetize, even under the most heroic assumptions. How should the performance of different options regarding ‘the strengthening

of civil society' sought by the Citizens for Europe programme be exactly quantified? Clearly there are important, if not insurmountable, issues here.

However, some options were disregarded surprisingly hastily simply because they would cause a lack of credibility to the EU or were not consistent with declarations of a Commissioner (European Commission 2005b:6-7; European Commission 2004b:8-9). The treatment of non-selected options is superficial. The e-Learning IA, for example, deals with the four options it considers in approximately five lines, before selecting a preferred option (cf. also European Commission 2005b). It would seem that the IA process often compares 'a live horse with a number of dead horses' in relation to the selection of policy options (cf. Baldwin 2007). This not only the practice in education IAs it is something more widespread; the European Court of Auditors (2010) suggests that the Commission does not use IAs to decide whether or not to go ahead with a proposal: the decision to try to launch, discontinue or modify an initiative can be taken before the IA is finalized, or even started. The current status quo or power foces/ political circumstances, organisational strategic aims, trial and error processes of institutional learning, or satisficing selection strategies not referred to in the guidelines –rather than a painstaking assessment of all impacts- have significant weight in the selection of alternatives. In effect, the options eventually favoured by the IAs were largely incremental, except for the creation of new programmes. Thus, most changes referred to specific programme settings - in search of higher efficiency levels -, not to their policy instruments or goals (Hall 1993). Rather than a rational policy model that explains policy based on existing needs as the Guidelines defend, one of the main factors explaining policy at time 1 is policy at time 0.

In spite of the above shortcomings, the conclusions of the assessments are categorical: "without a programme, (...) from an economic viewpoint individual Member States would be in a less favourable position (...) From a social viewpoint, a number of problems would remain largely untackled (...) Moreover, disadvantaged categories of citizens that are

targeted by the programme might not be equally taken care of in all countries” (European Commission 2004a:11).

6. Discussion and conclusions: evidently legitimising policy?

This article has explored the insides of the “better regulation” movement, with a focus on the use of regulatory IAs in education, culture, youth and citizenship and a particular concern with the use of evidence and the potential to bring about democratic governance of IAs. IAs, the paper has argued, are a valuable sources of information on the ways in which the Commission portrays externally EU intervention. It is recognised that the EU IA system is more developed than equivalent systems in most EU countries. Yet, the IAs reviewed fall short of what is expected from them in increasing citizens’ input into policy-making due to the partisan use of consultation results. It is thus unsurprising that stakeholders see policy IA reports as a justification of the Commission’s proposals, rather than an independent assessment of its possible impacts (ECA 2010). IAs also fall short on what the guidelines expect from them, which closely follows the rational model of policy-making. Smith and May (1980) argued that the rational model aims to outline how policy-making should be, while the incremental and mix-scanning models are descriptive. A problem is that the Commission presents its guidelines as a prescription *and* description. The IA Guidelines and IA reports take elements of other decision-making models (incrementalism, mixed scanning), which seem more appropriate to describe and inform how policy-making operates, only marginally.

Much of what failed, it could be argued, was the application of the model, rather than the model itself. Results may be different in other policy areas, which is a task for future research. The larger question, however, is whether the application of the model is feasible and whether striving towards it is the most helpful exercise –or even a satisficing one. To be sure, part of the distance between reality and guidelines has to do with lack of knowledge and time (Torriti 2010). IAs may provide a ‘learning instrument’. The results reported are based on an analysis of the first set of IAs produced by the Commission in education and culture, when the system was in its very early stages. Institutional learning processes can

take decades. Fritsch et al. (2012:11), suggest that learning in relation to IA has taken place in the EU in the much shorter period 2005-2010, and improved the capacity of the Commission to assess likely programme impacts (Radaelli and Meuwese 2010).

Yet, even future IAs will be unable to make up for the fact that they are based on a model of policy-making that we know is not realistic. Furthermore, Majone's (1989) point –often overlooked in the IA literature- that in order to be persuasive evidence needs to be chosen with a particular audience in mind is relevant here. For individual DGs the main audience is busy policy-makers who need to support their proposals -and now top officials in the IA Board. Arguments in IAs need to be as simple, familiar or at least intuitive as possible in order to appeal at first glance and to non-experts. This is at odds with comprehensiveness and overwhelming synoptic analysis. The idea of “better regulation” refers to something that is not just better but ‘too good’ to be implemented. Rather than having a model that is adapted to how the policy-cycle works and facilitates its quality, DGs may have to spend their time and energy trying to rationalise decisions ‘ex-post’, providing limited added value. The real challenge is not to improve the compliance of IAs with the guidelines, but to design IA guidelines that better reflect the ways in which policy-making works.

This is difficult because IAs are not only meant to provide technical gains. They also provide greater transparency and legitimacy to the policy process. Rationality is linked to intelligent choices, and few values are closer to the core of Western political ideologies. IAs should show stakeholders that other options they may prefer have been analysed seriously and explain why they have not been selected (European Commission 2009:28). A priori, there is no trade-off between effectiveness and legitimacy functions, as adopting effective policies can increase legitimacy. Yet, Hertin et al. (2007) suggest, and this article reinforces this view, that IAs inform policy design at the margins. IAs were established for different purposes: Member States and the Parliament wished to control the Commission, yet the Commission, has been able to turn the system to its advantage and has increased its capacity for policy formulation (Radaelli and Meuwese 2010). But the Commission is itself a

complex policy actor and this complexity is reflected in the political economy of IA production. Thus, the Secretariat General benefits from the symbolic value of the IA *system* and the procedural legitimisation of the outcomes. However, for individual DGs (IA producers), the usage of *individual IAs* may not be primarily instrumental, symbolic or conceptual, but 'imposed', whereby a superordinate body demands specific action on lower operating levels, based on evidence, to release funds (Weiss et al. 2005). This may help to explain some of the deficiencies in the IAs reviewed. Given the nature of these deficiencies, they are highly unlikely to reflect only lack of knowledge. The reported low substantive quality is suggestive of the low instrumental value of IAs.

A final conclusion, methodological, refers to the need to complement 'formal' assessments of IA quality with 'substantive' assessments. The analysis suggests that there are significantly higher shortcomings in the substantive quality of IAs than in their formal quality. Moreover, it is the examination of those substantive shortcomings that is more likely to produce results in terms of better governance. As IAs become more important, one might ask how often the quality of their substantive arguments will justify their use.

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