



THE EUROPEAN COMMISSION'S 2015 BETTER REGULATION STRATEGY – A ERF COMMENTARY –

HIGHLIGHTS NOTE 01

BETTER REGULATION FOR 21ST CENTURY GOVERNMENT

Regulation is essential to the functioning of a modern society. It lies at the heart of modern government. It is one of the main mechanisms used by politicians to meet the complex social and economic goals set by citizens. At its best, regulation strengthens legitimacy and consent, ensures that social goals are achieved and, at the same time, creates a context that encourages investment and innovation.

In a mature society, achieving these goals is difficult. Regulators are called on to address complex, interlinked societal problems, many of which cannot be solved by traditional rule-making. Many of the powers of the state are, increasingly, delegated to agencies or officials, stretching technical and rule-making expertise to its limits. Regulations frequently overlap or conflict, as new rules designed to combat new concerns are added to existing, established legal frameworks.

Within this context, regulatory failure is widespread. All too often, regulations fail to achieve their goals or create unintended consequences, such as additional risks or less innovation. Legitimacy is undermined as well, if the development of regulations fails to meet modern standards of governance.

Better Regulation strategies seek to overcome these problems. They seek to *establish decision-making processes that meet the needs and expectations of citizens, including businesses, in the most legitimate, proportionate and cost-effective manner, while recognising and limiting unintended consequences.* There must be a structured, dynamic and consistent

effort to improve the quality of decision-making processes and the resulting public policy interventions. Indeed, by overcoming the limitations and weaknesses of the regulatory process, Better Regulation strategies underpin the delivery of the goals of 21st Century government. For most modern governments, it is inspired by the OECD's guidance on regulatory policy, beginning in 1995.

For more than a decade, the European Commission has invested in the development of one of the world's largest regulatory management programmes. Policies have been established; process management standards covering impact assessment, consultation, and ex post evaluation have been created; and new Better Regulation institutions have been set up, not least, the Impact Assessment Board. *The Commission's new Better Regulation Communication, and accompanying guidelines and tool kits, builds on these firm foundations.*

THE COMMISSION'S NEW STRATEGY: GOVERNANCE, BEHAVIOURAL CHANGE, AND UNINTENDED CONSEQUENCES

Overall, the new strategy represents a major step forward, and as such is to be welcomed. More than in the past, it focuses on governance, presenting the Better Regulation strategy as essential for delivering the social and economic policies of the European Union. It elevates the importance of consultation with stakeholders within the regulatory process, recognising its importance for the quality and legitimacy of decisions. It strengthens scrutiny, establishing a new oversight institution (the Regulatory Scrutiny Board) with a wider remit, greater resources, and more involvement of

external experts than its predecessor. It integrates all existing regulatory management standards, creating a seamless, consistent, and coherent approach throughout the policy cycle. There is also a greater recognition of role that good regulation can play in driving up productivity, wages, and living standards. Competitiveness impacts, including changes in incentives to innovate, must now be considered at all times, for instance.

One of the most important functions of modern governments is the public management of risks, including those posed by technologies and lifestyle choices. Here too the new Better Regulation strategy outlines major reforms in the way in which risk management decisions will be designed and undertaken. It highlights the need for regulators, when making new rules or assessing the impact of old ones, to focus on behavioural change, to recognise that there will be wider impacts for citizens, affected entities, and the economy that go beyond simple compliance with rules, and to accept the likelihood of unintended consequences. Taken together, these requirements create the potential for a new landscape for risk management decision-making to emerge. Regulators must recognise that their interventions will be embedded in contexts of uncertainty that cannot be eliminated fully. This will require interventions to be systematically and rigorously revised throughout the policy cycle. Old *nostrums* about the limited nature of regulatory impact are to be set aside. New tool kits support this, most notably those covering risk assessment and innovation impacts.

THE INDISPENSIBLE CALL FOR RESPONSIBLE CO-OPERATION

Work remains to be done by the Commission to define and communicate the exact nature of the plan for implementing the new Better Regulation strategy. Despite this, it is clear that, *if the reforms are to be effective and societal aspirations are to be met, then prompt and constructive co-operation will be required from all of the actors participating and benefitting from policy-making.*

EU co-legislators must take a lead. While the European Parliament has already made significant progress, the Council has yet to demonstrate 'ownership' of the Better Regulation agenda or to take steps to implement its fundamental principles and practices. The agreed content of the Inter-Institutional Agreement being negotiated between the Commission, Council, and Parliament will be an initial objective indicator of the impact of the new strategy.

Member States must support too. *The 'old narrative', advocating Better Regulation as a device for reducing red tape, administrative burden, and compliance costs, must be complemented by one grounded in a better understanding of the scope and nature of modern regulation and its impacts.* Issues of governance must

be given greater prominence as well. Alongside these changes in the rationale for change, some Member States should take the opportunity to internalise the ideas of Better Regulation as a means of supporting structural reform efforts rather than as requirement for disbursement of EU Structural Funds.

In their turn, entities affected by risk management laws will need to modernise their approach. They will need to invest in developing tools to help regulators make good decisions. Sectoral socio-economic analyses should be carried out, showing the public benefits of the activities of companies, their technologies and their value chains. Such analyses set out the wider impacts of private sector activities. Alongside these studies, affected entities will need rigorous analyses of the impact of the current regulatory framework on their competitiveness, and hence on their ability to deliver wider benefits to Europe and its citizens.

LOOKING AHEAD: MEETING THREE CHALLENGES TO REAP THE FULL POTENTIAL OF THE NEW STRATEGY

In adopting such a comprehensive and ambitious strategy, the Commission has set the tone for a major examination of not only the overall approach to Better Regulation but also the *raison d'être* of EU policy-making. *Better Regulation has been established as a critical test of the credibility of the EU institutions, what they stand for and what they ought and can deliver for citizens.* How this will inform future EU risk management decisions, in particular, is of paramount relevance.

The Commission's Communication is, of course, not the end of the process of applying Better Regulation ideas to the management of risk or other policy domains. It will evolve as it faces the challenge of implementation. **Looking ahead, a number of challenges will need to be overcome, including:**

- **The nature of law-making at EU-level is changing** – It is moving away from the development of new secondary legislation implemented by Member States and towards a focus on implementation by direct EU-level institutions using a range of legal and administrative measures. This will involve considerable use of agencies, delegated and implementing acts, and substantive guidance.¹ The Better Regulation strategy will need to reflect this and adapt accordingly. This may require the scope of regulatory process standards and tools to be expanded.

¹ Substantive guidance sets out the detailed technical, scientific, or regulatory requirements that must be met to fulfill obligations laid down in EU law, or it may provide a detailed interpretation of statutory obligations thereby defining requirements or impacts for affected entities.

- **Clear criteria and standards for regulatory quality must be spelled out** – The best strategies for embedding Better Regulation ideas into the decision-making process emphasise the need to make decisions only when benefits justify costs and encourage the selection of regulatory options that are least restrictive, make greatest use of market forces, and promote innovation. Recourse to novel or untried regulatory options, especially when used to manage risks, is viewed sceptically. Adoption of these additional principles may be of value to the Commission’s strategy.

- **Synergies with the production and provision of scientific advice must be nurtured** – The success of the strategy will depend, to a significant extent, on basing decisions on the best available knowledge and evidence. Within the Commission’s ‘package’ this is recognised. However, if this is to be achieved, new, ‘horizontal’ standards for scientific evidence and for the provision of scientific advice will need to be developed. Existing EU-level standards and guidelines lag global best practices. Findings from

internationally respected science, derived through world-leading advisory processes, must be the principal basis for making risk management decisions. Ensuring this occurs is one of the biggest challenges facing the Commission’s Better Regulation strategy.

Finally, the Commission needs to be supported in its efforts. Experience from throughout the OECD area shows that delivering Better Regulation is difficult and time consuming. To change a culture in a complex organisation is never easy. New ideas will be needed, as the strategy faces obstacles and new challenges. Stakeholders and think tanks will need to play a part in providing useful, constructive advice, so as to help the Commission achieve its ambitious goals.

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This Highlights Note was written by Richard Meads and Lorenzo Allio, the Rapporteur and a Senior Policy Analyst at the European Risk Forum, respectively. The Note draws from their article “Paving the way to an improved, modern management of risk”, published in the *European Journal of Risk Regulation*, Issue 4/2015. However, the views and opinions expressed in this paper do not necessarily reflect or state those of the European Risk Forum or its members.