The Impact of Better Regulation on EU Environmental Policy under the Sixth Environment Action Programme

An IEEP Report for the Brussels Institute for Environmental Management
(Bruxelles Environnement/Leefmilieu Brussel)

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1 INTRODUCTION

This is one of the three reports for the Brussels Institute for Environmental Management (Bruxelles Environnement/Leefmilieu Brussel) assessing different aspects of the 6EAP and ought to be read in conjunction with the other two reports. This report evaluates how Better Regulation approaches have shaped the implementation of the objectives set out in the 6EAP in the process of their translation into legislative measures. This process, from the adoption of the 6EAP in July 2002 and the further specification of its aims, especially through Thematic Strategies, resulted in legislation reflecting different aspects of the Commission's Better Regulation agenda. Consequently, to fully understand the influence of the Better Regulation approaches in the translation of the aims in the 6EAP into legislative measures it is important to be familiar with the changing faces of Better Regulation agenda. Hence this report will first assess this agenda based on Commission Communications and provide an overview of the strategic considerations behind the better regulation approach in the EU, from the time the better regulation approach was initially proposed in early 2000; how it developed under the Lisbon Strategy and where it stands today.

This study will then explore the extent to which the Better Regulation agenda has influenced environmental policy objectives during the process of implementation of the 6EAP. It will discuss how the original definition of better regulation, which includes, inter alia, a desire for more coherent legislation, enhanced implementation and better stakeholder participation in the process, could be interpreted in a way which is more consistent with the EU's key environmental objectives and principles.

2 SCOPE AND METHODOLOGY

The scope of this study is to assess how the Better Regulation agenda has shaped the implementation of the 6EAP in the course of translating general political objectives into concrete legislative measures. The specific policy areas within the 6EAP that form the focus of the empirical part of this study were identified based on a preliminary analysis of the Commission's strategic reviews of the better regulation agenda. These policy sectors are waste, industrial emissions, energy efficiency as part of climate change, air pollution, plant protection policy, chemicals and soil.

The methodology for this study and structure of the report is explained in Figure 1.

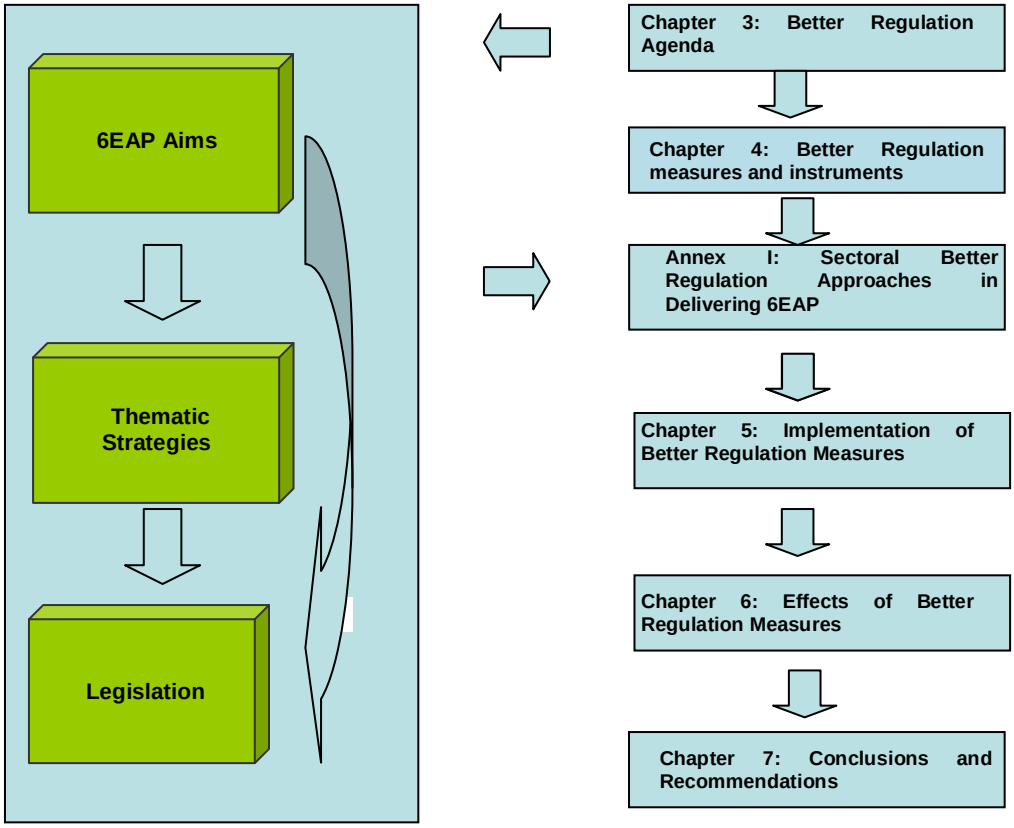

Figure 1 Methodology for the study

Chapter 3 of this report describes the background and current state of the EU's Better Regulation agenda. Based on the most recent Commission Communications and Strategic Reviews, the most relevant features of the current Better Regulation approach of relevance to the 6EAP were selected. This provides the framework to assess how better regulation has, or has not, shaped the transition from the broad aims of the 6EAP to concrete legislative measures, inter alia via the Thematic Strategies. Chapter 4 provides a discussion of the different measures and instruments that have been used to take forward the Better Regulation agenda.

Chapter 5 provides an assessment of how the objectives of the 6EAP in the pre-selected policy areas have been influenced by the Better Regulation framework described in Chapter 3. Detailed assessments of the implementation of these Better Regulation approaches for all selected sectors can be found in Annex I and are summarised in this chapter.

Chapter 6 provides an overall evaluation of the effect of the Better Regulation agenda and the extent to which it has contributed to harmonization, meeting environmental requirements, delivering positive economic effects and achieving good governance.

The final conclusions are presented in Chapter 7.

3 BETTER REGULATION AND EU GOVERNANCE

3.1 White Paper and the Debate on European Governance

In 2001 the Commission published a White Paper on European Governance (COM (2001) 428) addressing necessary reforms in the governance of the EU based on a set of principles of 'good governance': openness, participation, accountability, effectiveness and coherence. This White Paper was the Commission's response to a perceived crisis of legitimacy of the EU and formed a contribution to the subsequent debate on institutional reforms that was launched at the Laeken European Council later the same year. The White Paper is most frequently referred to for its advocacy of what it called "a reinforced culture of consultation and dialogue" through measures to enhance openness, participation and accountability in EU policy-making, and in particular for laying the basis for the Commission's new practices of stakeholder consultation in the preparation of policy proposals for which minimum standards were introduced by a Communication published in 2002 (COM(2002) 704) .

The White Paper was also part of the process which set the stage for the subsequent launch of the "Better Regulation" agenda by addressing not only the formulation, but also the delivery of EU policies as a key aspect of European governance. One of its chapters was entitled 'Better policies, regulation and delivery', focusing on the effectiveness and coherence of EU policies. However, while concern for the improvement of regulation was originally inspired at least in part by what researchers have termed an "open governance agenda targeting quality rather than quantity of regulation" (Radaelli and Meuwese 2008), the subsequent evolution of political debate has, in the view of some, transformed "Better Regulation" into political shorthand for a regulatory simplification agenda subservient to the Lisbon Strategy for growth and jobs. According to Radaelli (2007): "The malleability of better regulation discourse has enabled policy-makers to address different objectives over time and to push for their shifting regulatory reform agendas." According to this view, the re-definition of better regulation under the Barroso Commission as essentially synonymous with regulatory cost reduction for business has narrowed the scope of the concept and its range of stakeholders "at the cost of losing some of the initial ambitions in terms of inclusiveness and open governance" (Radaelli 2007).

This view of the broad political context of the evolution of the better regulation agenda at EU level is not only expressed by scholars but also reflects the perceptions of some stakeholders as they have witnessed the activities of some parts of the Commission Services. However, as with any generalization, it may obscure the detailed activities and actions accompanying the development of individual policies and specific relationships between specific players in the policy process in those policy fields. The EU’s better regulation agenda, because it originated as a set of broad principles, has effectively formed a large canvas allowing different individuals and policy fora to elaborate these principles in different ways.

This chapter tracks the evolution of the better regulation agenda, as the context in which the impact of the "Better Regulation" agenda on EU environmental policy must be addressed. This will make it possible to assess this impact, not only from the perspective of what this agenda currently stands for, but also from the perspective of a

broader, governance-related agenda which may influence the future development of EU environmental policy.

The 2001 White Paper identified a number of problems associated with the EU legislative process: increasing complexity of legislation; lack of flexibility due to slow procedures; lack of public confidence in the scientific and technical expertise on which regulatory decisions are based; inadequate implementation and enforcement in the Member States; etc. It set out the objective of "improving the quality, effectiveness and simplicity of regulatory acts". It is important to note that while simplification of existing legislation was mentioned as one of the aims to be pursued, it was not highlighted as an overriding aim in its own right, but presented as part of an overall approach aimed at improving the effective delivery of the policy objectives the EU sought to achieve through the most optimal combination of policy instruments, in which legislation would continue to play a central role.

The same can be said of reducing administrative burdens for business. Where the White Paper referred to the need to cut red tape, it stressed the responsibility of Member States to refrain from introducing "complex administrative requirements when implementing Community legislation". Costs to business were one of several factors to be taken into account in assessing the need for new regulatory initiatives but no quantified objectives were laid down in respect of reducing them.

Co-regulation and recourse to the open method of coordination (OMC) were mentioned as possible alternatives to legislation which would be considered on a case-by-case basis in the search for the most appropriate policy instrument, subject to certain conditions to ensure the principles of 'good governance' were complied with. Thus, for instance, the White Paper stated that the OMC should not be used when legislative action is possible under the Treaty. Whenever legislation is considered to be needed, the White Paper also stressed that it is also important to select the most appropriate type of legislative instrument. Depending on the circumstances, the White Paper advocated more frequent use of regulations instead of directives, or use of framework directives instead of more detailed directives. The option of limiting the scope of primary legislation to essential elements while allowing technical details to be laid down through implementing rules was also put forward. Interestingly, this option of leaving the development of specific rules to subsequent procedures (e.g. via comitology) might meet with the White Paper’s objective of effectiveness (e.g. responding to changed technical developments), but it would run counter to its principle of openness and participation in policy making.

In formulating a strategy to improve the quality and effectiveness of EU policies, the White Paper did not only devote attention to "upstream" issues of legislative policy, but also addresses the importance of "downstream" action to improve application and enforcement in the Member States, highlighting the primary responsibility of national administrations and courts in this area. They should ensure enforcement of EU rules as an integral part of the national legal order, rather than treat them as a "foreign" element as they too often continue to do. The Commission also highlighted its own "essential task" in monitoring the application of EU law and pursuing infringements "to make the Union a reality for businesses and citizens". It announced criteria to refocus and prioritize its efforts in this area.

In subsequent developments, what originated as a broad concern for improving the quality, legitimacy and effectiveness of EU policies, was narrowed down to a "Better Regulation" strategy with a heavy bias towards simplification of existing legislation, and the reduction of the cost and administrative burden of EU legislation for business. Over time, the link between this agenda and the original good governance principles formulated by the Commission in 2001 became increasingly remote.

3.2 Evolution of Better Regulation

In 2001, the Commission first sought to define the objectives of its better regulation agenda in a Communication entitled 'Simplifying and improving the regulatory environment' (COM (2001) 726 final). This referred, in essence, to a dual objective: "improving the practices and current provisions of regulatory activity, throughout the legislative cycle", and "simplifying existing legislation, in both qualitative *and quantitative* terms." The Commission went out of its way to stress that "the aim is not to deregulate", although the introduction of "quantitative simplification" as an aim made some stakeholders concerned that deregulation might occur. The two "most pressing concerns" it identified, in that order, were "simplifying and improving the *acquis communautaire*" and "well prepared and more appropriate legislation". The latter aim was to be achieved through enhanced practices of consultation and impact assessment. As to the former, the Communication stated: "Simplifying and reducing the volume of texts is clearly essential, as is the need for a quantified objective and a clear political deadline". It proposed a reduction of the volume of the *acquis* "if possible by at least 25%" by 2005. Though still mentioned, "better transposition and application of Community law" featured last among the areas of concern highlighted. The Commission also saw the simplification agenda as a vehicle for enhancing its own power: "With a view to making more use of less detailed directives, the Commission should, in appropriate cases, be given more executive powers." At the same time, the Communication advocated self-regulation as "a way of achieving the Treaty's objectives and avoiding excessive regulation."

The objectives set out in the 2001 Communication were further spelled out in operational terms in the Action Plan 'Simplifying and improving the regulatory environment', presented by the Commission in 2002 (COM(2002) 278 final). In this plan, the proposed role of the different institutional actors was clarified: it distinguished action to be taken by the Commission, Parliament and Council in their capacity as co-legislators and the Member States individually. The Commission's main purpose seemed to be to stress the responsibilities of the other institutions in achieving the aims of the "Better Regulation" agenda. While the Commission committed to improving the quality of its legislative proposals (mainly through impact assessment and improved consultation) and also to make greater use of its power to withdraw pending legislative proposals as a means of reducing the volume of legislation (especially when they have been "denatured" by Council or Parliament amendments increasing their complexity), the main objective of simplification was now formulated as a recommendation to the co-legislators, as it could not be achieved by the Commission alone. So was the appropriate use of legislative instruments - such as limiting directives to the essential aspects, thus reverting to their original definition - and ensuring the quality of legislative acts. According to the Commission, this was too often compromised by ill-conceived Council or Parliament amendments, and substantial amendments should be made subject to impact assessment as are

Commission proposals. The quantified objective of cutting the volume of the *acquis* by 25 %, which had been given great prominence in the 2001 Communication, is mentioned only in a footnote in the 2002 Action Plan. It seemed the Commission was uncertain it could ensure the other institutions would subscribe to this objective in the same terms, and did not wish to jeopardize interinstitutional consensus on the overall "Better Regulation" agenda on this point. Indeed it is striking that when that consensus was ultimately formalized in an Interinstitutional Agreement on "better law-making" in 2003, the aim of cutting down the volume of legislation was mentioned last, without any quantified objective. This Agreement placed stronger emphasis on the quality of legislation and other principles of good governance inspired by the Commission's original White Paper.

While the objectives of the "Better Regulation" agenda were still relatively broad and subject to political debate under the Prodi Commission, they were narrowed down considerably as a result of the Barroso Commission's 2005 relaunch of the Lisbon Strategy focused on growth and jobs. In a Communication entitled 'Better Regulation for Growth and Jobs' (COM(2005) 97 final), the Commission stressed that "better regulation is crucial for promoting competitiveness both at EU level and in the Member States" and announced a "step change in the rigour" of its approach to "reinforce the way in which better regulation contributes to achieving growth and jobs". The emphasis would increasingly be placed on "streamlining the EU's regulatory environment" and "striking the right balance between the policy agenda and the economic costs of regulation".

Though building on the 2002 Action Plan and measures already taken pursuant to it, the Barroso Commission's policy in the field of "Better Regulation" was decisively re-oriented to make it subservient to the aims of the renewed Lisbon strategy. Simplification of legislation in the interest of competitiveness becomes the overriding objective. In order to "ensure that future legislative proposals are fully assessed for all their potential impacts", revised impact assessment guidelines called for more extensive economic analysis including the development of methods to measure administrative costs of regulation. The screening of pending legislative proposals with a view to their possible withdrawal was intensified. A more detailed plan for simplification, entitled 'Implementing the Community Lisbon programme: A strategy for the simplification of the regulatory environment' (COM(2005) 535 final), was presented later the same year. For the first time, simplification was mentioned in the title of a Commission Communication without simultaneous reference to the improvement of legislation. It became a strategic objective in its own right.

This "simplification strategy", as the Commission put it, was "fully embedded into the revised Lisbon strategy for achieving growth and jobs in Europe and therefore focuses on those elements of the *acquis* that concern the competitiveness of enterprises in the EU." It established a multi-annual rolling programme for the simplification of the *acquis* targeting particular areas of existing legislation, including environmental legislation. The review of the *acquis* was to become "a continuous and systematic process" and simplification pursued through a variety of methods: repeal of obsolete legislation, codification, recasting and merging of legal acts, replacing directives with regulations, etc. The Council and the European Parliament were reminded of their commitments under the 2003 Interinstitutional Agreement and invited to improve their working methods to facilitate simplification.

The rolling programme of the simplification strategy for 2005 to 2008 specified 300 areas of EU legislation targeted for the following methods of simplification:

- **Repeal**, which is the abolition of legislation;
- **Codification**, which is the process whereby the provisions of an act and all its amendments are brought together in a new legally binding act which repeals the acts which it replaces, without changing the substance of those provisions;
- **Recasting**, which is the process whereby a new legally binding act repeals the acts which it replaces, and combines both the amendment of the substance of the legislation and the codification of the remaining which is intended to remain unchanged; and
- **Modification of the regulatory approach**, that is establishing a better regulatory environment through political consensus.

In both of the above-mentioned Communications "better regulation" was not yet "Better Regulation" (in capitals), hence indicating that it was not yet a separate core concept as such. In the Communication "Better Regulation for Growth and Jobs" better regulation was used as part of a sentence to describe how regulation could be better for growth and jobs. It did not imply that it was anything else apart from that. The same applied to the Communication on the Strategy for the Simplification of the Regulatory Environment. Here the emphasis was on simplification and in a similar way the references to better regulation were part of describing the outcomes of simplification. It was not yet a self-standing objective at EU level (although some Member States had undertaken significant elaboration of the concept and had detailed better regulation programmes).

It was not until the first strategic review of Better Regulation in the European Union COM(2006) 689 in November 2006 that Better Regulation appears in capitals as a concept and simplification appears as a part of the Better Regulation approach. This Communication was followed by a second review of Better Regulation in the European Union (COM(2008) 32 final) and a third review of Better Regulation in the European Union (COM(2009) final). In all three reviews the Commission's Better Regulation approach is divided broadly into:

- **Improving/modernising the stock of existing legislation**
  - Simplification
  - Reducing administrative burdens
  - Codification, recasting and repeal of obsolete legislation
- **Improving the preparation of proposals/quality of new proposals**
  - Impact Assessment
  - Other issues (screening and withdrawal of pending proposals, improving quality etc),

It is also important to note that in the second and third reviews, codification and repeal of legislation were included under simplification. This indicates that these terms are not rigid. However, the above distinctions between simplification, reducing administrative burdens and codification are still the most relevant in distinguishing approaches to Better Regulation.

Consequently, for the purpose of this study, they have been selected as the most relevant approaches in assessing the influence of Better Regulation on the implementation of the 6EAP. Accordingly, the following headings will be used:

- Simplification and streamlining (including also the reduction of administrative burdens)
- Codification and recasting
- Impact Assessment

More recently the above Better Regulation approaches have been described as part of "Better Regulation Services"[1]. This term recognises the existence of the institutional aspects and mandates behind the different approaches to Better Regulation within the Commission. These different mandates can also have an impact on the development of future Better Regulation initiatives and will be described in more detail in the section on measures and environment.

From April to June 2010 the Commission ran its consultation on "Smart Regulation", the next 'incarnation' of the Better Regulation agenda, under a new name. The consultation document[2] emphasises that Smart Regulation is not about more or less legislation, but about delivering results in the least burdensome way. In the same way as the earlier Better Regulation agenda, the Smart Regulation approach will aim to achieve the objectives of the Lisbon Strategy and its successor, Europe 2020. The stakeholder consultation aims to collect input for a Communication on smart regulation which the Commission intends to produce in the autumn of 2010.

In conclusion, the Better Regulation agenda has included a number of different strands. These include:

1. Simplification in the sense of reducing the stock of EU law. This includes codification and recasting, as well as, in some instances, an element of deregulation.
2. Reducing regulatory burdens. This involves examining the obligations placed on business (and to a lower priority on public administrations) by EU legislation to determine whether these obligations are required.
3. Ensuring regulation is adopted where it is needed. Given the prevailing political agenda this has received less emphasis, but the 6EAP, in its goals, focused on producing new or amended legislation to deliver 'good' regulation where needed.
4. Ensuring regulation is consistent and coherent so that the body of EU law is a coherent whole rather than a series of inconsistent and separate items of legislation.
5. Focusing on implementation, ensuring that better regulation means that legal obligations are delivered – that implementation failure is seen as 'bad' regulation, leading to market failures or lack of protection for EU citizens.

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1 http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/400&format=HTML&aged=0&language=EN&guiLanguage=en

2 http://ec.europa.eu/governance/better_regulation/smart_regulation/docs/smart_regulation_consultation_en.pdf

6. Adopting tools and processes to provide the necessary analysis and 'space' for better regulation to take place. This includes processes such as Impact Assessment or specific tools such as the standard cost model. It also includes the adoption of a variety of participatory approaches to deliver openness in regulatory development.

It is clear that these different strands have only been taken forward partially and to different degrees as part of the ongoing process of better regulation. Indeed, the Commission is hampered by the fact that it alone cannot deliver better regulation (as the European Parliament and Council amend proposals and eventually adopt legislation), so that it can never be sure that the better regulation approaches it proposes are actually followed.

4 BETTER REGULATION MEASURES AND INSTRUMENTS

4.1 Introduction

The better regulation agenda described in Chapter 3 is to be taken forward by different processes and measures at EU level. This Chapter provides a brief overview of these, not least because some of these (particularly Impact Assessment) form the main avenues through which the better regulation agenda has sought to influence the development of measures arising from the 6EAP.

The primary analytical process through which better regulation issues can be analysed in legal development is that of Impact Assessment. This Chapter, therefore, begins with an overview of what impact assessment consists of and how it has evolved. The Chapter continues with a consideration of the broader simplification agenda and the processes involved in taking this forward. It is also important to note that additional analyses have been undertaken at EU level and two of these are included here – that of the BEST Group formed by DG Enterprise and the better regulation analytical framework for EU law developed by IMPEL.

4.2 Impact Assessment

The start of Commission's Impact Assessment procedure can be traced back to the Göteborg European Council in 2001, which called for the introduction of 'mechanisms to ensure that all major policy proposals include a sustainability impact assessment covering their potential economic, social and environmental consequences'.

Subsequently, the Commission's Communication Simplifying and Improving the Regulatory Environment (COM (2001) 726) proposed that 'a coherent method for impact analysis' would be introduced for all major Commission proposals, by the end of 2002. This would bring together in a single integrated system all existing internal procedures for impact assessment. A further Communication on Impact Assessment issued in June 2002 (COM (2002) 276) provided more details of how the new system was intended to operate. This was followed by detailed methodological and procedural guidelines issued by the Commission in three volumes in the autumn of 2002. The Commission's 2002 Communication on Impact Assessment proposed the gradual introduction of the new IA system from 2003, with 2004 being the first full year of its operation. It was acknowledged that in the early stages a 'learning by doing' approach would be required, and that the quality of assessments could be expected to improve over time. Of the 580 proposals listed in the Commission's 2003 Work Programme, only 43 were formally identified as requiring an extended impact assessment. However, those not selected included several with significant effects on aspects of sustainable development.

The selection process for Impact Assessment was changed with the Annual Policy Strategy 2005, which stated that, as of 2005, all proposals in the Commission's yearly Legislative Work Programme had to undergo Impact Assessment and the new IA guidelines were published in 2005. An IA was required for all items in the Commission's Legislative and Work Programme with the exception of Green Papers,

proposals for consultation with Social Partners as well as some more specific proposals, such as the transposition of international obligations. This blanket approach of IAs to all items in the Work Programme covered also proposals that were not well suited for IAs (such as broad, policy defining communications). On the other hand some proposals with potentially significant impacts were not included in the Work Programme, and hence were exempt from IAs.

In 2009 the Commission published its latest impact assessment (IA) guidelines (SEC(2009)92)[3]. These guidelines do not actually define which Commission initiatives need to be accompanied by an IA. This is decided each year by the Secretariat General/Impact Assessment Board and the DGs concerned with an IA being required "for the most important Commission initiatives and those which will have the most far-reaching impacts". This would usually, but not necessarily always, cover items in the Work Programme but also items outside it, such as those linked to comitology.

Assessing the economic, social and environmental impacts of Commission proposals as part of the IA process serves in itself the aims of better regulation. However, this is not articulated in the guidance document and the only time the better regulation objective is mentioned is when assessing the simplification potential of different options, stating that "all policy options should be assessed for coherence with the better regulation objective that EU legislation should be made simpler and more transparent". Perhaps this is another indication of the strong emphasis on simplification in Commission's better regulation approach.

The Impact Assessment Board was created on 14 November 2006 to provide support and quality control in IAs. It is chaired by DG SEC GEN with other members from DG ECFIN, DG EMPL, DG ENTR and DG ENV, based on these DGs direct expertise in the three pillars of sustainable development. The results of the quality control are reflected in opinions of the IA Board which accompany the corresponding policy proposals throughout the Commission's decision making process and are then made publicly available. For IAs which require substantial improvements, the Board requests a revised version to be submitted on which it issues an additional opinion ("resubmission").

4.3 Action Programme for Reducing Administrative Burden

In 2007 key items of EU environmental legislation were made priority targets in a Commission drive to cut the burden of 'red tape' in the EU and the Member States. The main aim of the Programme is to reduce the obligations on businesses to collect and provide information to governments or consumers, where monitoring and reporting is unnecessarily frequent; is requested several times; or is no longer required for legal or technical reasons. Better targeting of information requirements through a risk-based approach, and special dispensation for SMEs are also proposed.

[3] European Commission, (2009), Impact Assessment Guidelines, SEC(2009)92), 15 January 2009, http://ec.europa.eu/governance/impact/docs/key_docs/iag_2009_en.pdf

For the purposes of the Action Programme, 'administrative burdens' are defined as costs to businesses rather than public authorities, and are restricted to reporting and information obligations (IOs), rather than wider compliance costs.

The aim is for a 25% reduction in burden and this is a joint target applying to both the Commission and the Member States. It targets the IOs set in EU Regulations and Directives; the measures put in place by Member States to transpose and implement these EU measures; and purely national and regional IOs.

The Commission stressed that the Action Programme is not about de-regulation. 'Nor does it aim to change policy objectives set out in the existing Community legislation or the level of ambition in existing legislative texts. Rather it represents an important effort to streamline and make less burdensome the way in which policy objectives are implemented – one important measure of the quality of regulation at every level'. However, critics of the EU's Better Regulation agenda point to the danger that reducing information collection and reporting could, in some cases, weaken the implementation and enforcement of environmental legislation, and make the evaluation of the effects and effectiveness of such measures – also a key element of Better Regulation - even harder than it already is. Moreover, reducing such 'administrative burdens' on business alone could in the longer term simply transfer them to public authorities.

The Action Programme identified 13 priority areas of Community legislation, including environment, agriculture, fisheries, transport and cohesion policy - altogether amounting to 39 items of legislation.

A further controversial aspect of the Action Programme is the use of the 'Standard Cost Model' (SCM) for calculating the administrative burdens of regulations. This is already being applied to varying extents in 17 Member States, but variations have occurred in the definition of information obligations and the treatment of overheads etc. This means that comparisons between Member States are difficult, and the Commission acknowledges that 'some technical harmonisation will be required'. However, it considers that such 'optimisation' of the EU's SCM model should be 'no precondition for its application'. As a result, it is not clear how valid are the results of EU assessments using the SCM and care should be taken also to draw on more detailed assessments that Member States may themselves undertake.

In August 2007, the Commission set up the "High Level Group of Independent Stakeholders on Administrative Burdens" (HLG) to advise it on the implementation of the Action Programme for Reducing Administrative Burden in the EU. The mandate of the HLG is limited to reducing the administrative burden of existing legislation (ex-post). The mandate of assessing ex-ante impacts lies with the IA Board

In September 2009 the HLG published its intermediate report on achievements and challenges in reducing administrative burdens. The report estimates that the proposals already put forward by the Commission amount to total savings to businesses of € 40 billion per year. After a meeting with Edmund Stoiber, the chair of the HLG, and Commission Vice President Gunter Verheugen, Commission President Barroso

expressed his endorsement of the report in a speech[4] the following day. Not only that, he also wanted to raise the profile of cutting the administrative burdens for businesses by announcing that better regulation services would now be under his direct authority. However, the reduction of administrative burdens is only one aspect of Better Regulation services, which also includes Impact Assessments. Here the role of Commission's IA Board has been vital in guiding the IA process towards a more balanced consideration of economic, social and environmental impacts of proposals As the consideration of administrative burden and SCM are also part of the IA process, it remains to be seen if Barroso's enthusiasm towards reducing administrative burdens will affect emphasis in IAs as well.

4.4 BEST

As part of the practical implementation of the Lisbon Strategy some Member States have developed their own national simplification programmes. These are aimed at reducing administrative burdens on industry by simplifying legislation and the framework for its implementation. DG Enterprise established the BEST project in 2004 to identify practical examples of actions that had successfully been taken to reduce burdens. These resulted in a report in 2006. It:

- described 76 examples of concrete actions taken to streamline and simplify environmental regulation across 24 countries;
- identified the elements of each action which represents best or good practice;
- elaborated on 26 examples of best practice actions which are particularly innovative in reducing administrative burdens; and
- made a series of recommendations to the Member States and Commission on how the results of the report can be used in national simplification programmes to reduce administrative burdens on businesses subject to environmental regulation.

The BEST Expert Group made 33 recommendations to the Member States and Commission on taking forward the simplification actions. Those relating to the European Commission are set out below as these are relevant to addressing the better regulation agenda:

- Member States and the European Commission should further develop and undertake strategic approaches to simplification. This would allow them to identify the biggest regulatory burdens (such as from poor design of regulations) which would subsequently allow for these burdens to be the subject of properly targeted simplification measures. Ideally these strategic approaches should be government-wide to provide the context for initiatives on environmental regulation.
- Member States and the European Commission should undertake quantified analyses (such as the standard cost model) of the burdens of regulation wherever practicable in discussion with the stakeholder groups. This will allow Member States to identify the actual burden so as to guide the targeting

[4]Speech by Barroso on Administrative Burdens 18.9.2009, http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/400&format=HTML&aged=0&language=EN&guiLanguage=en

of initiatives and the monitoring of progress during implementation. Authorities must always consider the burdens placed on businesses when new rules are proposed and ensure that they fully understand the implications for different types of business. Particular attention must be paid to SMEs as they are most likely to suffer if weighed down with excessive bureaucracy, and are the most likely to flourish from initiatives to simplify the regulatory regimes.

- Member States must look at the scope for introducing new or changed legal requirements using existing laws and structures rather than changing the legislative framework each time.
- Member States and the European Commission should encourage business stakeholders to come forward with ideas for simplifying regulations and evidence of unnecessary costs from regulation.
- Member States and the European Commission must ensure that all legal instruments are written so that they are easily understood, easily implemented, easily enforced and enable consistent, proportionate, risk-based approaches to be adopted. All interested parties must be consulted when they are being drafted.
- Member States and the European Commission should work to ensure full stakeholder consultation and buy-in to regulatory changes. There also needs to be an effective and ongoing communication strategy to ensure that businesses use and benefit from the tool and that simplification measures improve actual business experience.
- The European Commission must ensure that the drafting of legislative proposals does not preclude the opportunity afforded to Member States of simplifying or streamlining their own legislation during transposition (such as the opportunity to use general binding rules).
- Member States should ensure that all simplification initiatives are monitored and reviewed in order to determine if they have been fully implemented and to identify opportunities for further business benefits.
- The European Commission and Member States should examine the scope for harmonising monitoring and reporting requirements across different regulations, focusing on what the monitoring is trying to deliver.

The recommendations address many of the major themes of the EU's better regulation agenda. Importantly, they stress the importance of a role for both the EU institutions and the Member States together and separately to address better regulation actions. Thus failure to address better regulation at EU level inhibits better regulation achievements at national level, but also that make law 'better' at EU level is not sufficient – it needs taking forward effectively in the transposition and practical decisions for implementation by the Member States. For example, one strand in the better regulation agenda is to consider the potential use of framework directives or to set broad goals in directives leaving the Member States plenty of room to analyse options and making least cost implementation choices. However, if Member States make high cost choices (and some do), which are burdens on business, this is not the fault of the EU legislation itself (although some businesses may not see it this way).

4.5 IMPEL initiatives on better regulation at EU level

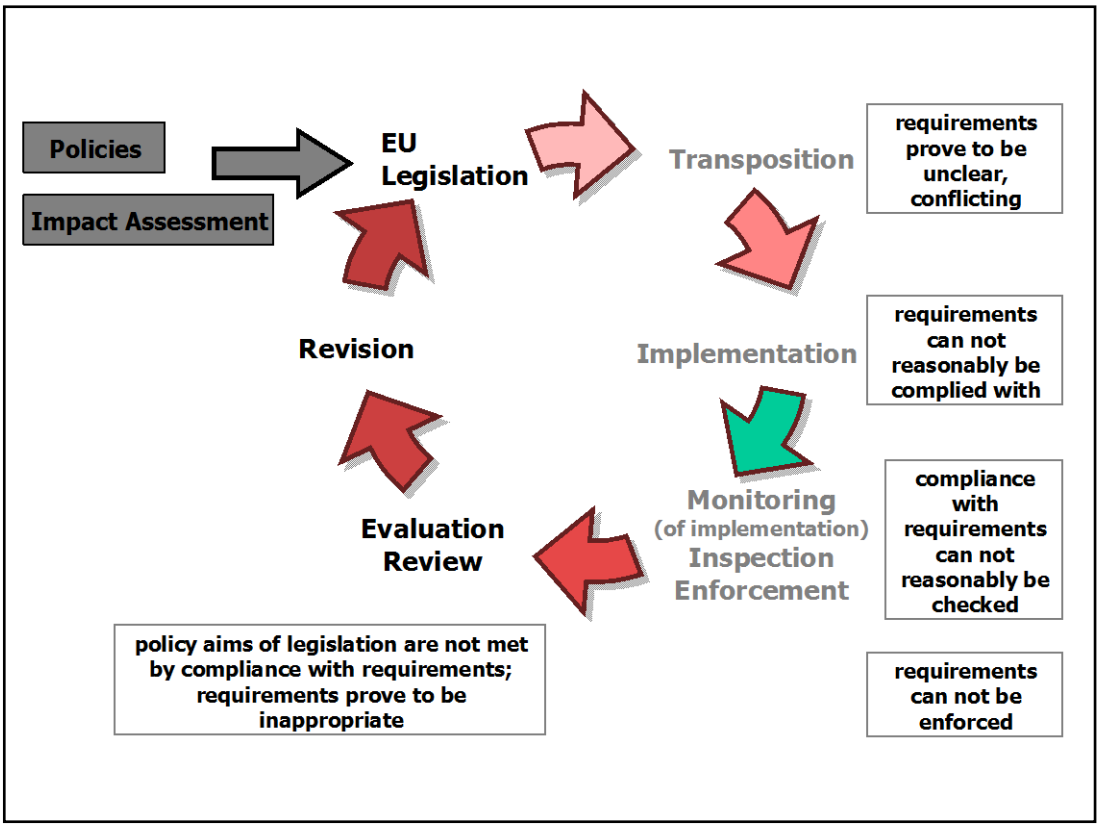
The EU Network for the Implementation and Enforcement of Environmental Law (IMPEL) is a network of environmental enforcement authorities of the Member States. IMPEL has a 'Better Regulation Cluster' which addresses various aspects of better regulation. This has included publication of a report which examines the issues of the practicability and enforceability of EU environmental law[5].

The report noted that problems of practicability arise when competent authorities in the Member States encounter difficulties in the practical application of legislation, because insufficient attention has been paid to the need for proper transposition into national law and application through individual administrative decisions, or to the need for adequate infrastructure and resources. Problems of practicability may also be faced by the regulated target group when their obligations as defined by the legislator are unclear or unrealistic. These problems may arise either through lack of consideration of better regulation at national level or in the adoption of law at EU level.

The figure below comes from the IMPEL report and presents a schematic overview of these phases of a typical piece of EU environmental legislation, e.g. a Directive. A Directive that contains requirements to be complied with by companies in the Member States may, when it is transposed, implemented and enforced, cause various problems in practice. It illustrates the problems that better regulation needs to address at different stages.

The IMPEL report developed a checklist to improve the practicability and enforceability of environmental law. Some of the questions in the checklist apply at the national level, but many are directed to the EU level. The checklist is structured in such a way as to facilitate its use at various stages of the legislative and implementation process and to take into account the differences between different types of EC legislative acts as well as, where relevant, the requirements of transposition.

[5] Pallemaerts, M. ten Brink, P. Farmer, A. & Wilkinson, D. 2007. Developing a checklist for assessing legislation on practicability and enforceability. IMPEL, Brussels.



The IMPEL checklist is structured in five parts:

A. Questions relating to legislative policy and the choice of legislative instrument

The questions in this section relate to the choice of the legislative instrument – whether directive or regulation and address issues of subsidiarity and proportionality. An example is: *Does the Directive allow for the use of different regulatory instruments and alternative options for implementation and, if so, is it sufficiently clear under what conditions these instruments and options can be applied?*

B. Questions relating to the suitability for transposition and implementation

The questions in this section address issues relevant to the proper transposition and implementation of legislation in the Member States, from the perspective of the public authorities competent for these stages of the process. They are best addressed at the proposal stage of the legislative process (potentially also as part of an ex post evaluation). An example is: *Are the implementation burdens for the authorities competent for the implementation of the legislation clear? (human resources, financial resources, knowledge and/or training, performance of new functions, ICT, organisational structure, etc.)*

C. Questions relating to the quality of the legislation

The questions in this section relate to the intrinsic quality of legislative drafting. They are designed to help improve the wording of the legislation at the proposal stage, where policy objectives need translation into robust legislative language. An example

is: *Have all the key terms been properly defined? Are these definitions clear and consistent with the definitions in related legislation?*

D. Questions relating to the practicability of compliance by the regulated target group

The questions in this section are aimed at assessing the likely response of the regulated target group to the legislation with a view to ensuring the highest possible level of non-coerced compliance with the rules that are intended to be laid down. They are best addressed at the proposal stage of the legislative process (potentially also as part of an ex post evaluation). An example is: *In the target group's perception, could breaking the rules be thought to yield little or no advantage (i.e. no incentive not to comply) or even disadvantages (i.e. positive incentive to comply)?*

E. Questions relating to the enforceability of the legislation

The questions in this section address the possibility and likely effectiveness of the use by national public authorities of legal, administrative and other means at their disposal to check compliance and to convince or if necessary compel the ultimate addressees of the legislation to comply with their obligations. An example is: *Is it clear what means of enforcement under administrative and/or criminal law can be used under the terms of the legislation and are these likely to be effective?*

IMPEL has followed-up this report by using it to examine the IPPC and WEEE Directive recast proposals. The points it addresses focus on the practical administrative consequences of EU law. Much is concerned with the burdens on public authorities themselves (an important aspect of better regulation, but not often highlighted at EU level). However, there is also concern for burdens on business.

Importantly, the IMPEL report addresses the most basic interpretation of 'better regulation', i.e. simply that regulation should be better designed to achieve its objectives – that what is required is clear, consistent and achievable. These basic foundations for any law are not always met in interpreting EU environmental law and are not always highlighted as a key objective of better regulation in the Commission's better regulation agenda. This is certainly an area that needs further examination. Also again, as with the BEST report, IMPEL has highlighted that delivering better regulation requires a partnership between EU and Member State action, i.e. that EU action alone is no guarantee of a better regulation environment.

5 IMPLEMENTATION OF BETTER REGULATION MEASURES

Specific areas of interest to the Brussels Institute for Environmental Management were identified based on a preliminary analysis of the Commission's strategic reviews of the better regulation agenda. These policy sectors are waste, industrial emissions, energy efficiency, air pollution, plant product policy and chemicals, and soil.

Note that the level of detail in assessing these different sectors varies. For instance the sectoral evaluation of waste legislation linked to the 6EAP is much more detailed and specific than the others, for instance than that of the evaluation of the air pollution and industrial emissions sector, which deals with the Better Regulation approaches on a more general basis. It has not been feasible, based on resources and time, to conduct a very detailed evaluation of individual items of legislation. However, the approach taken provides a relatively good understanding of how simplification works on different levels of detail. All these sectoral assessments can be found in Annex I.

As described in Chapter 3, for the purpose of this study, the most relevant headings to assess the influence of Better Regulation on the implementation of the aims of the 6EAP have been selected as:

- Simplification and streamlining (covers also the reduction of administrative burden)
- Codification and recasting
- Impact Assessment

The evolution of the Thematic Strategies from the 6EAP is only very briefly discussed as these aspects have already been explained in detail in the accompanying report to this study and will hence not be addressed here. However, those aspects that are specifically relevant to Better Regulation approaches will be further developed and reflected upon here.

The following sections, based on the evaluation in Annex I, look at the measures which have been used to implement Better Regulation in the pre-selected fields of EU environmental policy. Broadly speaking, Impact Assessment, including stakeholder participation, and simplification and streamlining/reduction of administrative burdens were the main approaches. As illustrated further below, the second of these approaches implies various better regulation techniques.

5.1 Impact Assessment

Assessment of the likely impacts of the Commission's legislative proposals using, among other things, cost-benefit analysis, is one of the main instruments of the better regulation initiative. In one way or another, the vast majority of proposals which were analysed in the pre-selected sectors in this study were subjected to an Impact Assessment. In addition, most Impact Assessments include cost-benefit analysis and address issues which are relevant from the point of view of better regulation, in particular simplification and streamlining, but also impacts on the administrative burden. Finally, stakeholder consultation was a regular feature of the impact

assessments. It is therefore possible to conclude that the Commission implemented this aspect of the Better Regulation agenda in that Impact Assessments, which at least nominally address key aspects of the Better Regulation initiative – simplification and streamlining, stakeholder participation and the reduction of the administrative burden – were conducted.

The extent to which these Impact Assessments delivered results which helped to implement better regulation is more difficult to answer because the way in which the impact assessments were implemented, as well as their role in the policy-making process, differed strongly from case to case. The impact assessment of the REACH Proposal constitutes one extreme (see Box 1). In addition to the Commission's detailed Impact Assessment other actors, in particular industry, produced their own assessments. Although the Commission's original Impact Assessment was much more detailed than its average assessment, the Commission even produced additional studies, which complemented its Impact Assessment. Most other Impact Assessments were less detailed. Specifically with respect to the 6EAP, the interplay between the Thematic Strategies proposed in the action programme on the one hand, and impact assessment on the other, caused some problems. More specifically, directives closely related to the Thematic Strategies were not always covered by a separate Impact Assessment. While this caused no major problems in the case of the Directive on the sustainable use of pesticides, it resulted in a lack of assessment with regard to certain aspects of the Directive on waste, which was only assessed to a limited extent as part of the Impact Assessment of the waste Thematic Strategy.

The Impact Assessments usually addressed various aspects of the Better Regulation agenda. The effects of recasting, simplification and mainstreaming were discussed, including on the basis of different scenarios and options. However, the Commission services experienced more difficulties when examining the issue of administrative burdens. It was often only after the adoption in early 2007 of the Action Programme for Reducing Administrative Burdens in the European Union and with the methodologies supplied by certain 'advanced' Member States that this aspect received more attention. Even then, quantification of the effects of Better Regulation on administrative burdens remains difficult and is only partly and occasionally undertaken as part of the Impact Assessments.

Box 1: REACH impact assessment

The Extended Impact Assessment COM(2003)644 for the REACH Proposal was published in 2003. Total costs of implementing the Directive were estimated between €2.8 and 5.2 billion over 11 and 15 years respectively. Health benefits were estimated in the order of €50 billion over the next 30 years. A series of further analyses and a Commission funded study broadly confirmed these results. The additional benefits to the environment were expected to be significant but were not quantified.

This was followed by a number of other Impact Assessments, funded by the chemicals industry. In 2004 the Dutch Presidency invited the consultants ECORYS and OpdenKap Adviesgroep to compile all available REACH assessment studies, 36 in total, into a single synthesis document. The report was used to facilitate a comprehensive discussion on the impact of REACH during a workshop in Scheveningen. The report estimated the direct costs for REACH to be around €4 billion for the EU-25 but did not attempt to put a price on benefits or indirect costs.

It became soon quite clear that many of the Impact Assessments were mainly lobbying tools for the industry in order to influence the development of the Proposal. For instance, Horst Reichenbach, director-general of DG Enterprise, doubted industries' impartiality in conducting impact assessments, saying that "clearly, industry cannot do impact assessments in an impartial way, they have interests to defend, and they don't have a very high credibility".

However, as a result of the discussion with stakeholders, the Commission agreed to undertake further impact assessment work, complementary to its extended impact assessment. Two major studies were conducted under a Memorandum of Understanding between the Commission and the industry associations UNICE and CEFIC. Commissioned by the industry associations, consultants elaborated detailed business case studies in the sectors of inorganics, automotives, flexible packaging and high tech electronics. Another study was undertaken by the Joint Research Centre.

Stakeholder consultation usually included officials and experts from Member State authorities, representatives of business associations and environmental NGOs. In addition to meetings and other direct contacts, the Commission frequently conducted written/electronic surveys. However, there are no rules for how the results of these consultation exercises influence the final impact assessment. In the case of the WEEE Directive, the Commission's Impact Assessment did not follow the stakeholder view that the definition of the scope of the Directive should continue to be part of the Directive and instead proposed to transfer this to a recast RoHS Directive. In the case of the REACH Regulation businesses produced their own Impact Assessments mainly in an effort to influence the decision-making process in their favour.

As with stakeholder consultations, there are also no clear rules determining the implications of cost-benefit analysis for the policy-making process. In fact, sometimes conclusions in the impact assessment regarding the ambition of proposed legislation did not correspond to the findings of the cost-benefit analysis. This was the case for the Ambient Air Quality Framework Directive and the proposal for a Soil Framework Directive.

However, even if there had been clear rules regarding the role of stakeholder consultation and cost-benefit analysis, the accuracy of the Commission's Impact Assessments would have suffered from the fact that the assessments usually do not include the amendments to the Commission's Proposals, which Council and the European Parliament make during the legislative process. In the cases of REACH and the Directive on the Marketing and Authorisation of Plant Protection Products, industry therefore called for a re-assessment of the original impact assessments to evaluate the impacts of the amendments made to the Commission's original legislative proposals. However, the Commission rejected these calls.

5.2 Simplification and streamlining/ reduction of administrative burdens

Simplification and streamlining are key better regulation instruments to improve implementation and transparency and reduce the administrative burden. The Commission applied several streamlining and simplification techniques, in particular the integration of different, but related pieces of EU environmental legislation or parts thereof; the use of regulations and comitology rather than directives and the standard legislative procedure; revocation of unnecessary rules; integration and standardisation of information and reporting provisions; if possible, reliance on existing structures, in particular in the areas of information and reporting, but also registration and authorisation.

The analysis of EU environmental measures for this study suggests that the **integration of related pieces of EU legislation** is most frequently used to implement the Better Regulation agenda. There are many examples of this, including the revision of the IPPC Directive and the Directive on Waste, the Directive on ambient air quality and cleaner air for Europe and the revised Regulation concerning the placing of plant protection products on the market. As these examples illustrate, this integration concerns different types of provisions, i.e. whole directives or regulations governing different activities and facilities, amending legislation, comitology decisions, and the annexes of different but related items of legislation.

The revision of the IPPC Directive provides an example for the integration of legislation governing different activities and facilities. The proposed Directive merges a revised IPPC Directive with six other pieces of legislation on large combustion plants, waste incineration, solvent emissions and titanium dioxide (For further detail on this and the other examples below, see Box 2). The Directive on ambient air quality and cleaner air in Europe combines the 1996 framework Directive on ambient air quality assessment and management with several legislative amendments, i.e. its three daughter directives and the Information Exchange Decision. The Directive on Waste brings together the former Waste Framework Directive and Directives on hazardous waste and waste oils. The new Regulation on the placing on the market of plant protection products combines the old 1991 Directive on the same subject with the 1979 Directive prohibiting the placing on the market and use of certain pesticides, eliminating most of the annexes of the two older directives in the process.

Simple codification (as opposed to recasting) has not been a direct output of the 6EAP, although codification of some EU legislation has taken place in parallel to the implementation of the 6EAP. Indeed, sometime this has overlapped with the 6EAP.

An example is the codified IPPC Directive 2008/1/EC published in January 2008. The benefits of codification (which, while reducing the size of the text of the *acquis*, does not affect any obligations arising from the *acquis*) for businesses or administration are highly debatable. However, of even greater questionability is the effort taken to codify a directive when, the month before its publication, a proposal for its recast is published. This hints at the Commission 'ticking' a better regulation 'box' rather than seeking concrete better regulation outcomes.

Box 2: Integration of regulations

a) Revised IPPC Directive

The Commission's proposal to revise the IPPC Directive, presented in December 2007, merged a revised IPPC Directive and six other sectoral directives (large combustion plants (2001/80/EC); waste incineration (2000/76); solvent emissions (1999/13/EC); and titanium dioxide (78/176/EEC, 82/883/EEC and 92/112/EEC). The proposed revision, *inter alia*, would expand the scope of the Directive to additional activities such as combustion installations between 20 and 50 MW, tighten emission limits in industrial sectors, and introduce standards for environmental inspections.

b) Directive on ambient air quality and cleaner air in Europe

The Thematic Strategy was accompanied by a proposal for codifying (recast) several pieces of air legislation: to combine the Framework Directive on ambient air quality assessment and management (Directive 96/62/EC), the First Directive (1999/30/EC), Second (Directive 2000/69/EC) and Third (Directive 2002/3/EC) Daughter Directives, and the Exchange of Information Decision (Council Decision 97/101/EC) into one directive on "Ambient Air Quality and Cleaner Air for Europe". By doing so, it would clarify and simplify, and repeal obsolete provisions, modernise reporting requirements and introduce new provisions on fine particulates.

c) Regulation concerning the placing of plant protection products on the market

The Regulation (EC) No 1107/2009 simplifies and streamlines the earlier legislation in an, apparently, effective manner, by updating and combining the two earlier Directives under a single legislation. Both of these Directives contain Annexes that have been amended several times and hence the new Regulation also repeals most of these. As mentioned the Regulation repeals only partly Directive 91/414/EEC. The basic structure and organisation of the text was still acceptable but certain aspects of it required modifying.

The **integration and standardisation of reporting and information provisions** is a technique which is related to the integration of related pieces of legislation. The Directive on ambient air quality and cleaner air for Europe provides an example. While the directive itself does not require any additional reporting, the reporting requirements are to be modernised by using the internet as the main means of delivery and making this compatible with the EU infrastructure for spatial information (INSPIRE) (see Box 3).

Box 3: Directive on ambient air quality and cleaner air for Europe: Plans for future monitoring and reporting

Reporting obligations based on the Exchange of Information Decision and under the air quality legislation (framework and daughter Directives) were amended in such a way that all information would eventually feed into a shared information system to be established under the INSPIRE Directive. This shared information system is expected to reduce the administrative burden on the Member States in terms of reducing the numbers of reports that have to be prepared and transmitted to the Commission.

The elimination of rules as part of the process of integrating different but related regulations is a common result of better regulation. While this process reduces rule duplication and overlap among different rules, it is merely intended to increase transparency and clarity of regulation. In contrast, the analysis of the cases suggests that the **revocation of environmental rules** which is not linked to the integration of different, but related regulations appears to be a much less frequently used aspect of the better regulation agenda. One of the few examples is Article 6 of the Solvents Emissions Directive, establishing the possibility for Member States to use national plans for the implementation of the Directive. Although the elimination of Article 6 was not directly linked to the integration of different, but related rules, it had no practical effects because the provision had never been used by any Member State.

Converting directives into regulations and using comitology rather than legislative decision-making is another better regulation technique which has sometimes been used. For example, the two pieces of legislation which were merged to form the new Regulation concerning the placing on the market of plant protection products mentioned above were directives, whereas the new legislation is a regulation. Similarly the Regulation on classification, labelling and packaging of substances and mixtures will replace several existing directives. The Commission hopes that using regulations rather than directives will lead to a more harmonised and transparent approach at Member State level which should reduce administrative burdens for companies, in particular those operating in different Member States. For similar reasons the REACH Regulation was adopted as a regulation rather than a directive.

Regarding the use of comitology instead of the legislative process, the proposed recast of the Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment provides an example. An annex to the proposed recast partly defines the scope of the directive. While Member States' interpretations of the annex continue to differ, the recast allows the annex to be amended through a committee procedure as opposed to the ordinary legislative procedure foreseen in the original directive. Given that comitology is less cumbersome than the legislative procedure it will therefore be possible to react more easily to different interpretations by amending the annex than is currently the case. For broadly similar reasons the proposed recast of the Energy Labelling Directive for Household Appliances relies on the adoption of regulations and decisions rather than directives for its implementation.

Finally, **using existing provisions and practices** for information, reporting, registration and authorisation can help to reduce the administrative burden. The proposal for a Directive on stage II petrol vapour recovery is a case in point. In this

case monitoring of Member States' compliance could be gauged from the emission inventory reports that they are obliged to compile and submit to the Commission (and to the UNECE Convention on Long-Range Transboundary Air Pollution) pursuant to the NEC Directive. It was thus thought that the imposition of an additional specific reporting burden would be disproportionate as this would require the compilation of additional statistical information at the national level. Similarly, the review therefore of the WEEE Directive aimed to reduce the administrative costs arising from the Directive, notably with respect to registration and labelling requirements. The impact assessment found that creating interoperable national registers and harmonising registration requirements are the most viable options considering the costs occurring and the potential for a significant reduction in administrative burden. In order to reduce the administrative burden related to the application of the WEEE Directive, the harmonisation of the registration and reporting obligations for producers between the national producer registers was proposed including making the registers inter-operational. Thus, a new Article 16 has been added to the Directive laying the groundwork for an inter-operational registration system. However, while creating a single inter-operable Europe-wide system for business rather than separate national systems would seem an obvious better regulation action for new legislation, the proposed amendment to the WEEE Directive has proved controversial in that Member States have already established separate systems under the existing Directive and changing to a single EU-wide system will impose significant costs (at least in the short term).

6 EFFECT OF BETTER REGULATION MEASURES

As argued in the previous sections Impact Assessment and various techniques to simplify and streamline EU environmental legislation and to reduce the administrative burden have been applied in taking forward the measures proposed under the 6EAP. However, the conclusions of the Impact Assessments also showed that it is difficult to assess the degree to which this has led to more transparency and reduced administrative burdens. Quantification, in particular, remains a challenge.

Interestingly, the better regulation measures in the pre-selected sectors are more or less closely linked to effects extending beyond a narrow definition of the objectives of the Better Regulation agenda, which focuses on the reduction of administrative burdens mainly for private actors. More specifically, three main types of effects can be observed: increased harmonisation, more demanding environmental requirements and positive economic effects.

6.1 Harmonisation

Increased harmonisation which is more or less directly linked to better regulation measures can be observed in many cases. For example, the planned streamlining and simplification of reporting under the Directive on ambient air quality and cleaner air in Europe requires harmonisation as a result of the implementation of the INSPIRE Directive. To reduce the administrative costs arising from the WEEE Directive, notably with respect to registration and labelling requirements, it was argued that it is necessary to create interoperable national registers and harmonise registration requirements. As illustrated in the previous section, the use of regulations instead of directives is expected to increase transparency and reduce the administrative burden because Member States will no longer have to transpose legislation. However, this will also lead to more harmonisation as regulations tend to be more detailed than directives and Member States' options for implementing the legislation in different ways are much more limited. Having said this, the relative roles of directives and regulations can be overplayed. Some directives are very precise and prescriptive, so that transposition is easy to assess and leaves little room for manoeuvre by the Member States. Also some regulations are so complex that adoption of national law or, at the very least, guidance for implementation is needed, resulting in significant scope for divergence between the Member States. For example, this is illustrated by the Commission's growing concern over the wide disparities in the enforcement of the Waste Shipment Regulation by the Member States.

6.2 Environmental requirements

Regarding environmental requirements, measures which were proposed under the motto of 'Better Regulation' not infrequently effectively resulted in the introduction of more demanding provisions. The integration of related pieces of legislation is an important better regulation technique which contributed to this effect. From a better regulation perspective, overlaps and close links between different pieces of legislation often call for integration. Such integration then requires clarification of the scope of the relevant legislation. Discussion of the scope of legislation in turn creates political opportunities to extend the scope. For example, the Directive on ambient air quality

and cleaner air in Europe which, as mentioned above, resulted from a merger of several older pieces of legislation, also has an extended scope which includes fine particulate matter. Similarly, the proposed recast of the IPPC Directive merges the Directive with the Large Combustion Plants Directive and at the same time the proposal would extend the scope of the proposed future directive on industrial emissions to include additional activities such as combustion installations between 20 and 50 MW.

The case studies suggest that the same dynamic also applies more generally. The review or recast of a piece of legislation *de facto* creates opportunities to **add environmental requirements** even if the process is mainly framed as a better regulation exercise. As illustrated in Box 4, the recast of Directive 2002/91/EC on the Energy Performance of Buildings (EPBD) led to a significant extension of its scope as well as to additional environmental requirements regarding the installation of smart meters and requirements regarding the construction of zero-energy buildings. The case shows how the recast of the directive created political opportunities for the Commission, which proposed the extension of the scope, but, perhaps more importantly, also for the European Parliament, which introduced the additional environmental requirements into the legislative process.

Box 4: Additional environmental requirements of the Directive on the Energy Performance of Buildings

Under the original revision proposed by the Commission as part of its Second Strategic Energy Review in November 2008, the recast of the Directive on the energy performance of buildings would have merely extended the scope of the original directive, eliminating the 1000 m^2 threshold for buildings undergoing renovation. (Under the original EPBD, only buildings above 1000m^2 undergoing major refurbishment were required to meet minimum national efficiency standards. This eliminated approximately 71% of the current European building stock).

The European Parliament agreed with the Commission on the elimination of the 1000m^2 threshold but advocated adding to the recast conditions requiring: the installation of smart meters in all new and renovated buildings; Member States to set percentages for the minimum share of buildings to be energy-neutral by 2020; all buildings constructed as of 2019 to be zero-energy. However, the Council called these proposed additional conditions "overly ambitious and even unrealistic," arguing that they would unnecessarily increase administrative burdens.

EU lawmakers were able to forge a compromise on the recast of the Directive. The proposed recast, as it now stands, would require that all buildings built as of 2019 be zero-energy. It would also prevent the public sector from renting or owning any building after 2018 that is not at least "nearly zero energy."[6] It would further require that an energy performance certificate be provided whenever a building be sold or rented to a new tenant; such a certificate will also have to be displayed in buildings meeting certain size and occupancy requirements.

[6] EU reaches agreement on energy savings in buildings.' *Euractiv*. 18 November 2009. Available at < http://www.euractiv.com/en/energy-efficiency/energy-performance-buildings-directive/article-187130>.

As with the proposed recast of the Directive on the energy performance of buildings, the proposed recast of Directive 92/75/EEC on Energy Labelling for Household Appliances also foresees a significant extension of the scope of the directive which will no longer be restricted to household appliances but will cover all energy related products. The revision of the IPPC Directive provides another example. Beyond the extension of the scope of the Directive, the proposal for the Directive on industrial emissions tightens emission limits in industrial sectors, and introduces standards for environmental inspections.

In addition to more demanding environmental requirements, the case studies suggest that better regulation may also be associated with **turning voluntary measures into compulsory** ones. This occurred in the case of Regulation (EC) No 2422/2001 on a Community energy efficiency labelling programme for office equipment (hereafter "Energy Star programme"), which was recast by Regulation (EC) No 106/2008. The recast made the originally voluntary energy efficiency criteria mandatory in the public procurement of office equipment.

Efforts to improve **implementation** in the framework of better regulation by using a more prescriptive approach may increase the effectiveness of environmental requirements. More prescriptive approaches may, among other things, result from several better regulation techniques described above, such as the elimination of ambiguity caused by overlapping regulations or the use of detailed regulations instead of more flexible directives.

6.3 Positive economic effects

Besides a reduction of the administrative burden and corresponding economic effects on competitiveness, better regulation measures may sometimes also be linked to additional positive economic effects, which are not the result of a reduction of administrative burdens. Among the pre-selected sectors, the Directive on the Energy Performance of Buildings provides a clear example. According to the impact assessment, the recast will generate an additional €25 billion in annual returns (mainly thanks to energy savings) and additional yearly investments of €8 billion. Anywhere from 280,000 to 450,000 new jobs by 2020, mainly for energy certifiers and auditors, inspectors of heating and air-conditioning systems, and those in the construction sector could be created. The EU's final energy consumption is expected to decrease by 5-6% by 2020. To a significant extent, these economic benefits result from the extension of the scope of the directive – that is, an increase of the level of environmental regulation. Also, a major driver for the revision of Directive 67/548/EEC was to provide an improved foundation for the European chemicals industry in international trade.

7 CONCLUSIONS AND RECOMMENDATIONS

The examination of the implementation and of the effects of Better Regulation in the pre-selected sectors suggests that - whatever the political intentions behind the better regulation initiative - implementation has often focussed on addressing the overlaps, duplication, and lack of transparency of EU environmental legislation, which resulted from the successive adoption and amendment of different, but related pieces of legislation. In this respect the practice of better regulation has often mainly been about the modernisation and rationalisation of EU legislation. In this way better regulation often helped to simplify regulation, increase transparency, and may thereby contribute to improved implementation and effectiveness. However, as illustrated by the continuing uncertainty linked to defining the scope of the WEEE and RoHS Directives, EU institutions have not managed successfully to address all issues of overlap, ambiguity and lack of transparency, although the better regulation approach was indeed successful in integrating many related pieces of environmental EU legislation. Similarly, while the reduction of the administrative burden has increasingly been emphasised by some proponents as the main aim of better regulation, the extent to which better regulation succeeded in reducing the administrative burden remains unclear. Two factors appear to be responsible for this: insufficient information (such as accurate data for the Standard Cost Model) and the fact that better regulation has a number of aims, which include, but are not restricted to, the reduction of administrative burden.

Better regulation has developed and been expressed in a wider political context, which has included the Lisbon Strategy. At the level of political rhetoric, this led to an increasing emphasis on the reduction of administrative burdens and the improvement of economic competitiveness. However, the political context in which better regulation initiatives were implemented also included, among other things, the EU Sustainable Development Strategy and the 6EAP. These strategies also supported some better regulation instruments, such as impact assessment. However, according to these strategies, such instruments were first and foremost meant to increase the effectiveness of environmental regulation and the integration of environmental concerns into other policy areas. Given these partly conflicting contexts, better regulation initiatives ended up mainly focussing on an area where win-win situations (in terms of both the reduction of administrative burdens and increased environmental effectiveness) could be found: existing EU environmental legislation which for reasons of the historical development of EU environmental policy was in need of modernisation and rationalisation.

Regarding information, the impact assessments, which are themselves an important better regulation procedure, have usually addressed questions linked to the reduction of administrative burdens. The Impact Assessments examined different scenarios and explained the implications of different choices for, among other things, simplification and streamlining and the reduction of administrative burdens. Also some IAs have been limited in their analysis as the administrative burden is not clear when directives set general objectives for Member States, which remain to be further elaborated at Member Sate level.

Even if backed by an extensive Impact Assessment, such as the one prepared for the REACH Regulation, the Commission's legislative proposals are subject to the co-decision procedure and are therefore amended by the Council and the European Parliament. Consequently, proposed provisions consistent with better regulation objectives may be altered which, in turn, may render the corresponding results of the impact assessment at least partly invalid.

There are competing concepts of better regulation. Thus, where the White Paper on European Governance conceives of better regulation as a means to increase the effectiveness and the legitimacy of EU governance, the revised Lisbon Strategy sees better regulation as a means to increase competitiveness. However, the currently prevailing rhetoric tends to emphasise competitiveness issues in the debate, while the actual practice of better regulation often seems to be more balanced. A similar kind of conflict exists between the different mandates and aims of the "High Level Group of Independent Stakeholders on Administrative Burdens" (aim: reducing administrative burden) and the Impact Assessment Board (aim: balanced consideration of economic, social and environmental impacts).

The different interpretations of better regulation as well as the role of the political context of, in particular, the co-decision procedure, in which different EU institutions attempt to maximise their relative influence on the political process, suggest that better regulation is more than a "neutral" instrument to rationalise EU legislation and reduce administrative burdens. Better regulation may also be used as a "weapon" in the political struggle between the Commission, the European Parliament and the Member States about who controls agenda setting and policy formulation and internally within the Commission between the Secretariat General and the Directorates General. At a certain point in time better regulation appears to have been extensively used in this way, in particular around 2005 after the new Barroso Commission had taken office. The new Commission used better regulation to promote new political priorities, which focussed on the renewal of the Lisbon Strategy as a strategy for "Growth and Jobs". More effective EU environmental measures, as proposed by the 6EAP, were seen as an obstacle to these new priorities, as these measures where associated with potential economic costs. Against this background, the new Commission used the Better Regulation agenda in an attempt to prevent or weaken such environmental measures.

The Directive on Waste provides an example. The Directive, which is closely linked to the Thematic Strategy on the prevention and recycling of waste , fails to implement many of the objectives of the 6EAP in the area of waste, in particular regarding the adoption of concrete targets and measures for waste prevention. While the Directive on Waste contains recycling targets as required by the 6EAP, these targets had not been part of the Commission's original legislative proposal, but resulted from amendments introduced by the European Parliament. As a result of Better Regulation, in particular the impact assessments of the Waste Thematic Strategy and the Directive on Waste, the Commission's proposal for the Directive focused almost exclusively on streamlining and simplification of existing EU Waste legislation.

However, the empirical results of our case studies suggest that, in more recent years, this "aggressive" use of better regulation has given way to what might be called "bureaucratic normalisation", i.e. the integration of better regulation into the standard

routines and balance of power within the Commission. In practice the more recent effects of better regulation are ambivalent and characterised by:

- somewhat mixed results: despite the competitiveness and reduction-of-administrative-burden rhetoric, competitiveness is often only one of several considerations in the better regulation process.
- relatively weak results even in terms of the better regulation agenda itself: impact assessment clearly emerged as the main tool for implementing better regulation. But the actual effects of the IAs on the decisions adopted remained limited.

In particular during the second half of the Commission's term better regulation often focussed on the codification of existing directives/regulations and one would expect that the number of these opportunities is now more limited. As a consequence the focus of better regulation moves naturally towards the assessment of new proposals and the role of IA. In the case of REACH the political lobbying through privately commissioned IAs was evident but still the outcome was shaped much more by the positions of individual Member States.

Concerning changes to existing legislation, the effects of better regulation tended to be somewhat marginal, or even occasionally frankly counterproductive in terms of increasing simplicity, clarity and legal certainty, including with respect to the elimination of certain requirements, which are perceived to be detrimental to the competitiveness agenda.

It remains to be seen whether the Commission's rebranded 'smart regulation' agenda will have a different relationship with revised and new EU environmental law. However, as the tools to assess better regulation issues in the development and implementation of legislation improve, more concrete positive outcomes of the better regulation agenda may be expected in the future.

Recommendations

- The role of better regulation in impact assessment should be clarified.
- Under the "routine" application of better regulation the Commission is more interested in producing EU decisions and politically correct statistics of its commitment to the Better Regulation agenda (eg the number of old directives repealed or recast even if the net effect in terms of European competitiveness is zero) than in effective implementation. Therefore, structured consultation of stakeholders, including those involved in implementation, should be improved, using more diverse tools than the internet alone. The data and expertise of EU agencies, such as EEA, EUROFOUND and others, should be used in this process, while respecting their independence from the political decision-making institutions.
- The political/legal context of better regulation needs to be improved, for example by strengthening EU administrative law by introducing a formal requirement for the Commission to state its reasons in exercising its right of initiative or choosing not to in a certain way etc. Many explanatory memoranda of Commission proposals would not pass scrutiny on this account on standard principles of good administration upheld in national administrative law.

- Impact assessment could benefit from professionalization and involvement of EU agencies, at least in ex post IA
- Better regulation and impact assessment are often performed as "box-ticking" exercises. The application of better regulation instruments should be more selective (development of criteria to decide where to apply these instruments)
- More quality control would be justified, including by independent bodies such as the European Ombudsman and the Court of Auditors. It would be within the power of the European Parliament to request an audit of the Commission's 'Better Regulation' activities against the background of the good governance principles of the 2001 White Paper.

ANNEX I: SECTORAL APPROACHES TO ACHIEVING THE AIMS OF 6EAP

1 WASTE LEGISLATION LINKED TO 6EAP AND THEMATIC STRATEGIES

The 6EAP foresaw two waste thematic strategies, one for prevention/management and another for recycling; however in the end the Commission published a single Thematic Strategy encompassing both recycling and prevention. The Thematic Strategy on the Prevention and Recycling of Waste (hereafter Waste TS) was adopted on 21 December 2005 alongside a proposal for an amended Waste Framework Directive (COM(2005)667) and an Impact Assessment.

The Waste TS was also supported by a parallel Thematic Strategy on the Sustainable Use of Natural Resources (COM (2005)670), also adopted on 21 December 2005. The Natural Resources TS aims to provide a framework to improve resource efficiency, reduce the negative environmental impact of resource use, and achieve overall improvements in the environment going hand in hand with economic growth (to be achieved through a 'decoupling' of economic growth and negative environmental impacts).

According to Article 8(2)(iv) of the 6EAP Decision, priority areas for the development and revision of legislation on waste therefore included, inter alia, the development of legislation in the field of construction and demolition waste and biodegradable wastes; a revision of legislation in the fields of sewage sludge, packaging, batteries, and waste shipments; and a 'clarification of the distinction between waste and non-waste and the development of adequate criteria for the further elaboration of Annex IIA and IIB of the Framework Directives on wastes'.

The areas where Better Regulation approaches have been used are for the revision of the packaging and packaging waste Directive (94/62/EEC), shipment of waste Regulation (93/259/EC), batteries Directive (91/157/EEC) and the waste framework Directive (2008/98/EC). These will be assessed in more detail the role of the Better Regulation approaches in developing these legislative measures.

1.1 Waste Framework Directive

The Waste TS was accompanied by a proposal for a Directive on Waste (DoW), which was to replace the waste framework Directive (WFD). Annexed to both the Strategy and legislative proposal was an Impact Assessment[7] of both the Thematic Strategy and its immediate implementing measures. The proposed Directive on Waste would update the text of the WFD but it also added important new provisions and integrating requirements previously dealt with by the hazardous waste Directive[8] (HWD) and the waste oils Directive[9] (WOD). The proposed Directive on Waste would replace both of these Directives, as well as the WFD.

The WFD was adopted in 1975 and had been amended repeatedly. A consolidated version of the Directive was adopted in 2006[10].

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[7] Commission Staff Working Document SEC(2005)6181 *Impact Assessment on the Thematic Strategy on the prevention and recycling of waste and the immediate implementing measures*

[8] Council Directive 91/689/EEC on hazardous waste, OJ L 377, 31.12.1991, p.20

[9] Council Directive 75/439/EEC on the disposal of waste oils, OJ L 194, 25.7.1975

[10] Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, 27.4.2006, OJ L 114/9

1.1.1 Simplification and Streamlining

The Commission's intention to unite the WFD and the HWD in one Directive on Waste was intended to contribute to the simplification and streamlining of European Waste Law.[11] Both the WFD and the HWD can be considered to be "horizontal" directives. While the WFD applies to nearly all waste streams, the HWD applies to waste containing certain hazardous substances, which are of very diverse origin and content. The technical term "hazardous waste" includes a myriad of very different waste streams with regard to their origin and composition. As a consequence, "hazardous waste" is a waste category much less specific than other waste streams such as electronic waste, batteries, sewage sludge, etc.

In fact, many articles of the HWD just refer to "brother" articles of the WFD. Against this background it seemed wise to produce one compact horizontal directive laying down the requirements for waste in general that includes specific requirements for hazardous waste. The resulting Directive on Waste has, therefore, repealed (as of 12 December 2010) both of these Directives.

1.1.2 Impact Assessment

The proposed DoW and the Waste TS share some important common themes, i.e. the former addresses many of the issues identified in the latter. Importantly, however, they address the issues in very different ways, consequently their needs in terms of an impact assessment differ greatly. The Waste TS covers some issues not considered in the DoW. Meanwhile the DoW contains detailed and potentially significant changes to the EU's approach to waste. A study[12] by IEEP and Ecologic for the European Parliament found that the IA had a very broad remit and that there was a lack of an Impact Assessment devoted explicitly to the proposed DoW. However, in contrast the impacts of the changes to the Mineral Waste Oils Directive (also included into the DoW) are comprehensively assessed in the Impact Assessment. The assessment of the impacts of mineral waste oils is proportionate and shows the benefits of dealing with the issues in hand on an appropriate level. The pitfalls of addressing detailed issues within a general strategy are avoided by increasing the specificity of the options and changes proposed.

1.2 Directive on Waste Electrical and Electronic Equipment (WEEE Directive)

The Directive on Waste Electrical and Electronic Equipment (WEEE Directive) is the most recent of the waste-stream-based "Recycling Directives", published on 27 January 2003. The WEEE Directive most importantly lays down minimum collection rates of four kilograms on average per inhabitant per year of WEEE from private households. This mandatory target was to be revised in 2008.

The **treatment of WEEE** has to, at a minimum, include the removal of all fluids. The Directive lays also down specific recycling and recovery targets, which vary according to the specific categories of equipment.

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11 http://ec.europa.eu/environment/waste/hazardous/hazardous_consult.htm (26 November 2006).

12 Bowyer C, Hjerp P and Neubauer A (2006) *The Proposed Directive on Waste: An assessment of the Impact Assessment and the Implications of the Integration of the Hazardous Waste Directive into the existing Waste Framework Directive* Report number 631-601 for the European Parliament's Environment Committee, December 2006.

The **principle of producer responsibility** is the core mechanism introduced in the Directive. Whereas the Directive is addressed to Member States, it is the producers or third parties acting on their behalf that are responsible for collection, treatment, recovery and environmental disposal.

The WEEE Directive, being a very recent directive (2003) which complements the current suite of EU recycling directives, was likely to produce overlaps with pre-existing European waste law and/or inconsistencies with the terminology of other European directives. The European Commission was conscious of this problem and issued guidelines on the implementation and interpretation of these directives aiming to give assistance to practitioners (national legislators, producers, lawyers), which in turn produced uncertainties and contradictions. These guidelines also address the problem of interaction of the WEEE Directive with the other waste-related directives (such as the RoHS Directive, battery Directive, packaging Directive).

1.2.1 Codification and Recast

In the Commission Communication "A strategy for the simplification of the regulatory environment"[13], the Commission announced as early as 2005 a review of the WEEE Directive in the period 2006-2009. The review was to be based on the experience with the application of the WEEE Directive and on the development of the state of technology, experience gained, environmental requirements and the functioning of the internal market. The review was, as appropriate, to be accompanied by proposals for the revision of the relevant provisions of the WEEE Directive and should be in line with the Community environmental policy.[14] The WEEE Directive was also included in the scope of the Action Programme for Reducing Administrative Burdens in the European Union adopted by the Commission in January 2007. The review therefore also aimed to reduce the administrative costs arising from the Directive, notably with respect to registration and labeling requirements.

In order to address the problems experienced with the WEEE Directive the Commission launched the procedure to recast the Directive, implying a thorough review of the Directive.

In preparation for the review of the WEEE Directive, the Commission launched a stakeholder consultation asking questions on the possible amendments to scope[15], producer responsibility provisions and treatment requirements.[16] In this stakeholder consultation, the Commission presented different options as regards the above mentioned issues. In addition, Small and Medium Sized Enterprises (SMEs) were consulted. An 'SME Panel' was held at the end of 2006 to use the knowledge,

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13 Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Implementing the Community Lisbon Programme: A Strategy for the Simplification of the Regulatory Environment COM(2005)535,

14 http://circa.europa.eu/Public/irc/env/weee_2008_review/library?l=/stakeholder_consultation/stakeholder_consultation/_EN_1.0_&a=d .

15 Especially the scope question was a question of simplification.

16 http://circa.europa.eu/Public/irc/env/weee_2008_review/library?l=/stakeholder_consultation/stakeholder_consultation/_EN_1.0_&a=d

experience, difficulties and costs encountered by small and medium sized businesses whilst implementing the WEEE Directive.[17]

The final proposal for the WEEE Directive recast was published on 3 December 2008. It is currently being discussed by the European Parliament and the Council.

1.2.2 Simplification and Streamlining

Problems to be simplified/streamlined

Simplifying the WEEE Directive concerns mostly its **scope** as the current scope has given reason for many concerns and is thus a preferential field for simplification. Along with this, the inter-dependence between the WEEE Directive and the RoHS Directive has been a problem in interpreting the WEEE Directive and needed to be addressed.

The most virulent problem concerning the scope of the WEEE Directive was the interpretation of the list in Annex IB. The WEEE Directive, in addition to giving an abstract definition of WEEE in Annex IA, also includes a list of concrete exemplary appliances which are subject to the WEEE definition (Annex IB). Some stakeholders and MS have viewed this list as a complete and exhaustive list of products covered by the Directive, excluding therefore products not included in this list from the scope.

Furthermore, the inter-dependence between the WEEE Directive and the RoHS Directive has raised concerns given that the WEEE Directive is often referred to by the RoHS Directive and the WEEE Directive provides the legal basis for the interpretation of the RoHS Directive's stipulations (e.g. the scope of the WEEE Directive is referred to by the RoHS Directive).

Another problem of the scope is the so called "fixed installation" exception. Art. 2(1) says that the WEEE Directive shall apply to EEE falling under the categories set out in Annex IA provided that the equipment concerned is not part of another type of equipment that does not fall within the scope of this Directive. Although the Commission guidelines tried to clarify this approach developing the figure of "fixed installations" the guidelines still lack clarity and leave many questions open. The European Commission also extends this "functional" interpretation of "being a part of another type of equipment" to the RoHS Directive, which does not even expressly take up "being a part of another type of equipment" as a limit to its scope (this limit is only included in the WEEE Directive).

Another problem linked to the WEEE Directive was that diverging producer registration requirements in Member States can result in economic actors having to

[17] Commission Staff Working Paper accompanying the Proposal for a Directive of the European Parliament and the Council on waste electrical and electronic equipment (WEEE) (recast) Impact Assessment, S. 23

comply with 27 different producer registration schemes, causing an increased administrative burden.[18]

Results of the simplification/streamlining exercise
The proposal for a WEEE recast was intended to address the aforementioned problems and come up with a clearer approach to these issues. In order to develop a **proposal** for amending the WEEE Directive and target the different problems in an effective and efficient way, the European Commission launched an **Impact Assessment** regarding the review of the WEEE Directive. In parallel with this an impact assessment of the review of the RoHS Directive was launched, given that this sister directive would be recast alongside with the WEEE Directive.

1.2.3 Impact Assessment

The Impact Assessment[19] which has preceded the proposal for the amendment of the WEEE Directive went into detail on the **scope,** developing four different options (including "no action").

The IA concluded the best option was to transfer the definition of the scope of the WEEE Directive to the RoHS Directive and require Member States to publish the list of products within the national scope. According to the IA "this would lead to an increased, but not total, clarity on the scope of products, with the possibility for Member States to expand the scope in their territory".[20] This was against stakeholder opinion which favoured harmonising the scope under the WEEE Directive rather than defining the scope under RoHS. However, the Commission based its choice on a legal consideration.

Therefore, the **recast proposal for the WEEE Directive** shifted the definition of the scope to the RoHS Directive. However, this does not make things any simpler given that the approach taken remains the same, i.e. Annex I enlists the general categories of WEEE while Annex II constitutes a binding list of example of the categories. Thus, the point of whether Annex II is exhaustive or not will remain. However, Annex II is more elaborate (gives more examples) than the former Annex IB of the current WEEE Directive.

Clarification is also proposed on the division between WEEE from private households and non-household WEEE by classifying equipment as either B2C or B2B through the comitology procedure. These actions will contribute to the further clarification of which products fall under the WEEE Directive and of the obligations applying to different equipment producers, which will contribute to establishing a level playing field.

An issue not treated in the IA was the exceptions from its scope: thus "equipment which is specifically designed as part of another type of equipment that does not fall

[18] Vgl. Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCILon waste electrical and electronic equipment (WEEE), 3 December 2008, COM(2008)810.

[19] Commission staff working paper accompanying the Proposal for a Directive of the EU Parliament and the Council on waste electrical and electronic equipment (WEEE), SEC(2008)2933.

[20] Ibidem, p. 15.

within the scope of this Directive and can fulfill its function only if it is part of that equipment" is not subject to the directive. This could make the implementation of the scope easier (see the above discussion on "fixed installation").

With regard to simplifying EEE producers' registration to **a WEEE management system**, the impact assessment developed two options:

- Inter-operability of national registers and harmonisation of reporting requirements
- EU operated Register

It was found that creating interoperable national registers and harmonising registration requirements were the most viable options considering the costs occurred and the significant reduction in administrative burden. Thus, a new Article 16 has been added to the Directive laying the groundwork for an inter-operational registration system.

1.2.4 Summary and Assessment

The Commission started the review of the WEEE Directive five years after issuing the original directive, thereby intending to remedy interpretation and implementation uncertainties caused by the WEEE Directive's provisions.

The intent was to clarify the scope of the WEEE Directive and streamline it especially with its sister directive, the RoHS Directive. Furthermore, the recast is an attempt to harmonise producer registration and reduce unnecessary administrative burden through creating inter-operable registers between Member States or an EU register.

In line with these deliberations, in its introduction and "self-appraisal", the Commission said that the proposal provides for simplification of legislation and of administrative procedures for private parties by:

- clarifying the scope of both the WEEE and RoHS Directives which tackle the same kind of equipment; and
- harmonising formats and frequencies concerning the registration and reporting for producers.

The Commission applied stakeholder consultation and IA as means to identify stakeholder preferences and the potential impacts of various options. The Commission's proposal reflects the findings of the IA as regards the overhaul of the scope of the Directive. However, there is strong reason to believe that the solution chosen to modify the scope does not simplify the interpretation of the WEEE Directive as the current approach of definition of WEEE is retained, i.e. one annex lists the abstract categories, such as IT and telecommunication equipment, and another annex gives concrete examples, such as laptops, notebooks. Again, there will be claims that the concrete annex is exhaustive and items not being mentioned there are outside the scope of the WEEE Directive. Some simplification results from the fact that the concrete annex has been updated and extended. However, the shift of the definition of the scope of the WEEE Directive to the RoHS Directive does not necessarily result in simplification and did not correspond to the results of the stakeholder consultation.

Furthermore, a more concrete definition for items not falling under the Directive (exemptions) has been developed which might be more easily applicable than the former definition, i.e. "equipment which is specifically designed as part of another type of equipment that does not fall within the scope of this Directive and can fulfill its function only if it is part of that equipment". In this respect, there is reason to believe that the wording contributes to clarification of the contents of the exemptions.

A new provision for an inter-operational registration system has been taken up in the recast. This is aimed at reducing administrative costs for producers. Given that more concrete requirements are to be developed via comitology, it remains to be seen whether this article contributes to this goal and the simplification of the WEEE Directive. It is, however, important to note the difference between the better regulation consequences for a new Directive compared to a revised Directive. While an inter-operable system would undoubtedly be better if it began from scratch, such a system being introduced under the revised Directive may impose costs on Member States and others due to the fact that national systems have already been established and understood by businesses. This is certainly one concern raised by Member State authorities[21].

1.3 Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment (RoHS)

The RoHS Directive (Directive on the restriction of the use of certain hazardous substances in electrical and electronic equipment 2002/95/EC) is complementary to the WEEE Directive. It bans the use of certain heavy metals and brominated flame retardants in electrical or electronic equipment in order to reduce the environmental impact of landfilled or incinerated WEEE.

The RoHS Directive being a very recent directive (2003) was likely to produce overlaps with pre-existing European waste law and/or inconsistencies with the terminology and concepts of other EU legislation (e.g. its sister directive, the WEEE Directive). The European Commission was conscious of this problem and issued guidelines on the implementation and interpretation of the RoHS (and WEEE) Directive(s) aiming to give assistance to practitioners, which, in turn, produced uncertainties and contradiction. Among other things, these guidelines address the problem of interaction of the RoHS Directive with the other waste-related directives.

1.3.1 Codification and Recast

As with the WEEE Directive, following a stakeholder consultation, a review of the RoHS Directive was launched and a series of studies were undertaken to assist the review procedure.

The final proposal for the RoHS Directive recast was published on 3 December 2008.[22]

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[21] Farmer, A. & Watkins, E. 2009. Practicability and Enforceability of the WEEE Recast Proposal. IMPEL, Brussels.

[22] See Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the restriction of the use of certain hazardous substances in electrical and electronic equipment, COM(2008)209.

1.3.2 Simplification and Streamlining

Problems addressed

Simplification of the RoHS Directive mainly concerns its **scope:**

The current **scope** of the RoHS Directive is defined in the RoHS's sister directive, the WEEE Directive, to which the RoHS Directive refers. Given that the WEEE Directive is based on Art. 175, this gives Member States the opportunity to introduce more stringent measures than in the legislation, such as extend the scope of the WEEE Directive. This could then have an impact on the economic competitiveness of relevant industries.

Another problem also refers to the interdependence of the scope of the RoHS Directive with the scope of the WEEE Directive: This is the so-called "**fixed installation**" exception as developed by the European Commission (see above on the WEEE Directive for this problem). The Commission has **extended this "functional" interpretation** of the scope based on "being a part of another type of equipment" (see Art. 2(2) of the WEEE Directive) to the **RoHS** Directive, which does not even expressis verbis include the limit of scope of "being a part of another type of equipment".

Adding/modifying definitions: It was felt that there was a need for additional definitions to be included in the RoHS Directive. These would be definitions relevant for RoHS from the recently adopted "Marketing of Products Package"; definitions for medical devices and industrial control and monitoring equipment and definitions for "homogeneous material" from the Guidance Document of the Commission services.

Results of the simplification/streamlining exercise

The proposal for a RoHS Directive recast was intended to address the aforementioned problems and offer a better approach to these issues. In order to develop a proposal for amending the RoHS Directive and target the different problems in an effective and efficient way, the European Commission launched an Impact Assessment, which ran in parallel to an impact assessment of the WEEE Directive recast.

1.3.3 Impact Assessment

The options assessed by the IA are grouped in three main classes:

1. Clarify and simplify the Directive;
2. Improve enforcement at national level;
3. Adapt the Directive to technical and scientific progress.

In the following sections, only the options for "clarification and simplification" purposes are discussed.

Create an independent scope for RoHS

To date, the RoHS Directive refers to the WEEE Directive for the purpose of defining its scope. This option consists in (1) providing the RoHS Directive with an independent, but harmonised scope; (2) the current WEEE annex, including indicative examples, is made binding and opened to amendment by Committee procedure; (3)

the annex is transferred from the WEEE Directive to the RoHS Directive (see section on the WEEE Directive).

Both the Impact Assessment and the final Commission proposal for the recast of the RoHS Directive supported this approach.

Clarification on spare parts
The IA also dealt with questions relating to the inclusion/exclusion of spare parts in/from the scope of the RoHS Directive:

The options were:

(a) Explicit inclusion of spare parts: RoHS does not define "spare parts"; an option for increased clarity and legal security would be to include them explicitly in RoHS;

(b) "Repair as produced principle" This option would modify the legal text of RoHS so that it is explicitly allowed that EEE using a banned substance in an application exempted from the ban when placed on the market, would be able to be repaired and reused with employing parts using the banned substance in this application even after the expiry of the exemption.

Both options were accepted as valid. As a result, the exclusion would be retained only if spare parts were used for repairing EEE lawfully placed in the market.

Clarification regarding excluded equipment

The WEEE Directive explicitly excludes some types of equipment from its scope. Although the Commission services and stakeholders deem these exclusions to apply to RoHS, too, this is not stated in the RoHS Directive. The solution discussed in the IA and mostly accepted in the Commission's proposal was to explicitly exclude military equipment and equipment which is part of another piece of equipment from the definition of the scope of the RoHS.

Adding/modifying definitions
To improve the clarity of the RoHS Directive and to aid implementation, the IA proposed to insert the definitions mentioned above derived from, among other things, the "Marketing of Products Package" (see Commission Decision 768/2008/EC on a common framework for the marketing of products). The Commission's proposal for the recast of the RoHS Directive took these proposals on board.

1.3.4 Summary and Assessment

The intention behind the recast of the RoHS Directive was to clarify the scope of the Directive, add missing definitions or improve definitions and streamline the RoHS Directive especially with its sister directive, the WEEE Directive. Furthermore, the recast was to add new requirements for product conformity assessment.

The RoHS Directive recast was accompanied by an Impact Assessment. In general the Commission's proposal takes up the suggestions of the IA as regards simplification and streamlining objectives.

The scope of the RoHS Directive has been clarified as the Directive now relies on its own definition of scope rather than the definition which used to part of the WEEE Directive. In addition, parts of the definition are now amendable by Committee procedure. Furthermore, new definitions, such as for “medical devices” and “homogenous material” were added and the exemptions from the scope of the RoHS Directive were clarified and streamlined with the WEEE Directive. Articles 6-8 of the proposed RoHS Directive recast are new and introduce product conformity assessment requirements and market surveillance mechanisms in line with the "Marketing of Products Package”.

The recast of the RoHS Directive has resulted in a clarification of the scope of the Directive. However this clarification may give rise to less clarity of scope of the WEEE Directive, which has been stripped of the relevant definitions and now depends on the definitions of the RoHS Directive. The question of whether or not the list of relevant products is exhaustive has not been resolved. Whether the possibility of amendment of this list via the comitology procedure will mitigate some of the effects remains to be seen. This also applies to the new definitions which were included in the proposal for the recast of the RoHS Directive.

2 LEGISLATION ON AIR POLLUTION AND INDUSTRIAL EMISSIONS LINKED TO 6EAP AND THEMATIC STRATEGIES

Air quality is one of the areas in which the European Union has been most active. Since the early 1970s, the EU has been working to improve air quality by controlling emissions of harmful substances into the atmosphere, improving fuel quality, and by integrating environmental protection requirements into the transport and energy sectors.

As the result of EU legislation, much progress has been made in tackling air pollutants such as sulphur dioxide, lead, nitrogen oxides, carbon monoxide and benzene. However, despite a reduction in some harmful emissions, air quality continues to cause problems.

The EU's Sixth EAP, includes Environment and Health as one of the four main target areas requiring greater effort - and air pollution is one of the issues highlighted in this area. The Sixth EAP aims to achieve levels of air quality that do not result in unacceptable impacts on, and risks to, human health and the environment.

The Clean Air For Europe (CAFE) initiative led to the Thematic Strategy, setting out the objectives and measures for the European air quality policy.

2.1 Thematic Strategy of Air Pollution

The Thematic Strategy on Air Pollution[23] stresses that current air quality legislation must be simplified and other legislation be revised, where appropriate. The Commission proposed to streamline current legislation on air quality to lighten the administrative burden and to enable Member States to overcome difficulties experienced in complying with the rules.

The Thematic Strategy was accompanied by a proposal for codifying (recast) several pieces of air legislation: to combine the Framework Directive on ambient air quality assessment and management (Directive 96/62/EC),[24] the First Directive (1999/30/EC),[25] Second (Directive 2000/69/EC)[26] and Third (Directive 2002/3/EC) Daughter Directives, and the Exchange of Information Decision (Council Decision 97/101/EC)[27] into one directive on "Ambient Air Quality and Cleaner Air for Europe". By doing so, it would clarify and simplify, repeal obsolete provisions, modernise reporting requirements and introduce new provisions on fine particulates.

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[23] Communication from the Commission to the Council and the European Parliament - Thematic Strategy on air pollution, COM(2005) 446, 21/09/2005.

[24] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management, OJ L 296, 21/11/1996, p. 55–63.

[25] Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air, OJ L 163, 29/06/1999, p. 41–60.

[26] Directive 2000/69/EC of the European Parliament and of the Council of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air, OJ L 313, 13/12/2000, p. 12–21.

[27] Council Decision 97/101/EC of 27 January 1997 establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States, OJ L 35, 05/02/1997, p. 14–22.

The Thematic Strategy also proposed to review the National Emissions Ceiling Directive (NEC-Directive, Directive 2001/81/EC)[28] in 2006 and to revise emission ceilings to ensure reduced emissions of nitrogen oxides, sulphur dioxide, volatile organic compounds, ammonia and primary particulate matter and the Large Combustion Plant (LCP) Directive (2001/80/EC).[29]Also the expansion of the coverage of the IPPC Directive, Directive 96/61/EC[30] was foreseen in the Thematic Strategy. The strategy also sets out the Commission's proposals to 'modernise' monitoring and reporting by setting up a system of electronic reporting based on a shared information system.

Other measures foreseen in the Thematic Strategy included a proposal for stricter emission standards for cars, with stricter standards for heavier vehicles to follow and the adoption of measures to reduce VOC emissions at petrol Stations.

The benefits, costs and health and environmental objectives of the Strategy are summarised in the tables and figure below.

Benefits and costs of the Strategy in 2020

Ambition level	Benefits								Costs per annum (€bn)
	Human health			Natural environment					
	Life Years Lost (million) fine particulate matter only	*Premature deaths* (000s) particulate matter and ozone	Range in monetised health benefits per annum (€bn)	Ecosystem area exceeded acidification (000 km^2)			Ecosystem area exceeded eutrophication (000 km^2)	Forest area exceeded ozone (000 km^2)	
				Forests	Semi-natural	Fresh-water			
2000	3.62	370	-	243	24	31	733	827	-
Baseline 2020	2.47	293	-	119	8	22	590	764	-
Strategy	**1.91**	**230**	**42 – 135**	**63**	**3**	**19**	**416**	**699**	**7.1**
MTFR	1.72	208	56 – 181	36	1	11	193	381	39.7

Source: COM (2005) 466

[28] Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, OJ L 309, 27/11/2001, p. 22–30.

[29] Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, OJ L 309, 27.11.2001, p. 1–21.

[30] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257, 10/10/1996, p. 26–40.

Objectives of the Strategy expressed as % improvements relative to the position in 2000					
Life Years Lost (million) from particulate matter	Acute mortality from ozone	Ecosystem forest area exceeded acidification	Ecosystem freshwaters area exceeded acidification	Ecosystem area exceeded eutrophication	Forest area exceeded ozone
47%	10%	74%	39%	43%	15%

Source: COM (2005) 466

2.1.1 Impact Assessment

In 2005 an IA was conducted on the proposed directive on "ambient air quality and cleaner air for Europe."[31] The resulting Directive 2008/50/EC, on ambient air quality and cleaner air for Europe was adopted on 14 April 2008.[32]

In 2007 the Proposal for the recast of the IPPC-Directive was also subject to an IA.[33] Its review had already been identified in the context of Better Regulation and was included in the EC's Simplification Rolling Programme covering the period 2006-2009.[34] The IPPC Directive was also included in the Commission's action programme for reducing administrative burdens[35] as one of the priority areas for the measurement of administrative burdens deriving from information obligations. One of the five specific objectives of the review consisted in cutting all identified unnecessary administrative burdens and simplifying current legislation.

The main issues addressed in the IPPC-IA relate to inconsistencies between directives, costs of permitting and enforcement, and costs of Member States' reporting. These were identified as the priority topics for attention in the review.

The Commission's proposal to revise the IPPC-Directive,[36] presented in December 2007, merges a revised IPPC-Directive and six other sectoral directives (large combustion plants (2001/80/EC);[37] waste incineration (2000/76);[38] solvent emissions

[31] SEC (2005) 1133.

[32] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe**,** Official Journal L 152, 11/06/2008, P. 1-44.

[33] Proposal for a Directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) (recast), Impact Assessment, COM(2007) 843 final, SEC(2007) 1682.

[34] Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Implementing the Community Lisbon programme : A strategy for the simplification of the regulatory environment , COM(2005) 535 final, 25/10/2005.

[35] Action programme for reducing administrative burdens in the European Union, COM(2007) 23 final, 24/01/2007.

[36] Proposal for a Directive of the European Parliament and of the Council on industrial emissions (integrated pollution prevention and control) (Recast), COM(2007) 843 final.

[37] Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, OJ L 309, 27/11/2001, p. 1–21.

[38] Directive 2000/76/EC of the European Parliament and of the Council of 4 December 2000 on the incineration of waste, OJ L 332, 28/12/2000, p. 91–111.

(1999/13/EC);[39] and titanium dioxide (78/176/EEC, 82/883/EEC and 92/112/EEC).[40]/ The proposed revision, *inter alia*, expands the scope of the directive to additional activities such as combustion installations between 20 and 50 MW, tightens emission limits in industrial sectors, and introduces standards for environmental inspections. The directive was codified in 2008 (Directive 2008/1/EC).[41] The codified act includes all the previous amendments to the Directive 96/61/EC and introduces some linguistic changes and adaptations (e.g. updating the number of legislation referred to in the text). The substance of Directive 96/61/EC has not been changed and the adopted new legal act is without prejudice to the new Proposal for a Directive on Industrial Emissions.

An IA was conducted on Proposal for a Directive on Stage II petrol vapor recovery during refuelling of passenger cars at service stations.[42] The proposal was adopted through Directive 2009/126/EC.[43]

2.1.2 Simplification and Streamlining

The IA on the proposed directive on "ambient air quality and cleaner air for Europe" pointed out that the reporting requirements for air quality were to be modernised by using the internet as the main means of delivery and making this compatible with INSPIRE.[44] The reporting obligations based on the Exchange of Information Decision and under the air quality legislation (framework and daughter directives) would be amended in such a way that all information would eventually feed into a shared information system to be established under the INSPIRE directive when adopted. This shared information system was expected to reduce the administrative burden upon the Member States in terms of reducing the numbers of reports that have to be prepared and transmitted to the Commission. It was not possible to quantify the impact of this proposal. Since the proposed regulation did not in itself increase the monitoring requirements, the Commission did not consider that the additional monitoring requirements would increase the regulatory burden for Member States.

The implementation of the IPPC-Directive involves several information obligations, with significant variations in practices and costs across the Member States. The cost

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[39] Council Directive 1999/13/EC of 11 March 1999 on the limitation of emissions of volatile organic compounds due to the use of organic solvents in certain activities and installations, OJ L 85, 29/03/1999, p. 1–22.

[40] Council Directive 78/176/EEC of 20 February 1978 on waste from the titanium dioxide industry, OJ L 54, 25/02/1978, p. 19–24; Council Directive 82/883/EEC of 3 December 1982 on procedures for the surveillance and monitoring of environments concerned by waste from the titanium dioxide industry, OJ L 378, 31.12.1982, p. 1–14; Council Directive 92/112/EEC of 15 December 1992 on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, OJ L 409, 31/12/1992, p. 11–16.

[41] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control**,** Official Journal L 24/8, 29/01/2008.

[42] Commission staff working document - Accompanying document to the Proposal from the Commission to the European Parliament and Council for a directive proposal for stage II petrol vapour recovery during the refuelling of petrol cars at service stations - Impact Assessment, COM(2008) 812 final, SEC(2008) 2938, SEC/2008/2937 final, 4/12/2008.

[43] Directive 2009/126/EC of the European Parliament and of the Council of 21 October 2009 on Stage II petrol vapour recovery during refuelling of motor vehicles at service stations, OJ L 285, 31/10/2009, p. 36–39.

[44] Proposal for a Directive of the European Parliament and of the Council establishing an infrastructure for spatial information in the Community (INSPIRE) COM(2004) 516 final, SEC (2004) 980.

of these IPPC-related information obligations was expected to be only a small fraction of the estimate of total EU administrative burdens of €350 billion per year, or even of the proportion attributed to environmental legislation (4% or about €14 billion).

Some of the other issues addressed in the IA also supported better regulation and cut administrative burdens. This is particularly the case for some of the possible modifications to the scope of the IPPC Directive to clarify the present coverage rather than to introduce new sectors. It is also foreseen to cut some provisions in the legal text, which are no longer relevant or never have been applied in practice. A good example is Article 6 of the Solvents Emissions Directive, establishing the possibility to use national plans for the implementation of the directive. As no Member State is making use of this possibility, this provision could be removed, without having any impact except simplifying the legislative body.

The IA on the proposal for a Directive on Stage II petrol vapor recovery put attention to the fact that reporting mechanisms were already in place to monitor ambient air quality and Member States' adherence to Community air quality objectives and non-compliance with legal air quality requirements was enforced pursuant to existing Treaty provisions. Member States would need to transpose the Stage II directive's provisions once adopted and bring about their practical implementation. The Commission will assess the conformity of those transposing measures. Monitoring of Member States' progress could be gauged from the emission inventory reports that they are obliged to compile and submit to the Commission (and the Convention on Transboundary Air Pollution) pursuant to NEC Directive. It was thus thought that the imposition of an additional specific reporting burden would be disproportionate as this would require the compilation of additional statistical information at the national level.

2.1.3 Simplification and Streamlining

The IA on the proposed directive on "ambient air quality and cleaner air for Europe" pointed out that in order to improve the regulatory framework on air quality, it was indispensable to modernise and simplify the then applicable air quality legislation – and to reduce its volume – in order to improve the competitiveness of the European economy (COM(2005) 446). The impacts of this modernisation and simplification exercise could not be quantified in monetary terms, but that it was anticipated to have positive effects on competitiveness by reducing bureaucracy and increasing transparency.

The IPPC Directive exists alongside other pieces of Community law affecting many of the same installations. The range of separate pieces of legislation, enacted at different times, has led to problems of interaction, difficulties in reconciling the different standards and approaches used, and confusion over differences in definitions.

2.2 Summary and Assessment

The importance of taking into account aspects of better regulation, *i.e.* simplification, rationalisation of legislation and reducing the administrative burdens, has been acknowledged from the outset when designing the regulatory framework of air pollution. These concerns have been taken into account with a varying degree when conducting Impact Assessments - which in itself constitutes an important element of

the better regulation agenda – on several of the measures identified in the Thematic Strategy on Air Pollution.

The Commission services experienced difficulties when elaborating on the administrative burden aspects. It is only with the adoption beginning 2007 of the Action Programme for Reducing Administrative Burdens in the European Union and with the methodologies supplied by certain 'advanced' Member States that this aspect also comes to the foreground when proposing and adopting air legislation. Henceforth, the administrative burden potentially resulting from new directives is reduced or constraint, in particular with respect to the reporting and monitoring procedures (new light commercial vehicles, petrol vapor recovery).

Given the absence of quantifiable data in the Impact Assessments, it is difficult at this stage to assess whether the better regulation measures were effective in terms of the aims of better regulation. Also given the absence of *ex post* evaluations - which can be justified by the recent adoption of most of the discussed instruments - it is difficult to assess the impacts of legislative processes against the scenarios developed in the impact assessments.

The general principle on stakeholder involvement when developing legislation and conducting the Impact Assessments has allowed a larger involvement of regional, local authorities and stakeholders. Nevertheless, the stakeholder involvement is constraint by the absence of objective rules for evaluating and following up the consultations.

3 CHEMICALS LEGISLATION LINKED TO 6EAP AND THEMATIC STRATEGIES

The 6EAP sets ambitious objectives for the EU's chemicals policy. The aims and priority actions agreed to in the 6EAP broadly reflect the proposals formulated by the Commission in its White Paper of February 2001 outlining a strategy for the future of EU chemicals policy (COM(2001)88), and endorsed by the Council in its conclusions of June 2001. The stated overall objective is to produce and use chemicals in ways that do not lead to a significant negative impact on human health and the environment by 2020..

3.1 REACH

REACH is the longest, most detailed, and complicated item of EU environmental legislation. It introduces a single system for all chemicals and abolishes the distinction between "new" (introduced to the market after 1981) and "existing" chemicals (listed in the European Inventory of Existing Commercial Chemical Substances (EINECS) before 1981). Hence it incorporates into its remit all existing chemicals about which sufficient information was often lacking for effective assessment and control. It also transfers the burden of proof of risk assessments of substances from the public authorities to industry and places much more responsibility on manufacturers, importers and downstream users to provide useful information about the chemicals on the market. REACH also calls for the substitution of the most dangerous chemicals when suitable alternatives have been identified. The REACH process consists of four main stages, registration, evaluation, authorisation and restriction.

3.1.1 Simplification and Streamlining

Following a request from the European Council on 24-25 June 1999, the Commission published the White Paper on the Strategy for a Future Chemicals Policy (COM(2001)88) on 25 February 2001. The White Paper elicited numerous reactions, including proposals to simplify the strategy or to reinforce the protection of the environment and health it would provide. The Commission met with stakeholders and established expert groups before publishing a draft proposal for a Regulation on 7 May 2003. This was strongly criticised by Governments of three Member States (Britain, Germany and France) as well as non-member States. A joint letter written by President Chirac, Chancellor Schroeder and Prime Minister Blair was sent to Commission President Prodi before the Commission had even finalised the Proposal. This letter warned of the possible impacts REACH might have on the competitiveness of the European chemical industry. At the time of the letter, these three Member States together could constitute a blocking minority in Council and hence it was a powerful expression of opinion. Consequently the letter may have influenced the decision that the proposal would be examined by both the Competitiveness Council and the Environmental Council.

The publication of draft legislation for consultation was unprecedented and emphasises how contentious the Proposal was. Following the consultation and following further studies, discussions, position papers, lobbying and negotiations, the Commission formally proposed REACH on 29 October 2003. This Proposal was substantially modified from the earlier draft and overall these changes led to a reduced burden on industry and the weakening of environmental provisions.

Trialogue meetings, in accordance with the Interinstitutional Agreement, between the European Parliament, Council and the Commission played a major role in the agreement of REACH. Before the vote in the European Parliament's plenary session in November 2005, trialogue meetings were held, in order to avoid the conciliation procedure. However, the negotiations between the European Parliament, Council and the Commission failed to achieve a deal in the meeting on 20 November. During the scheduled final meeting on 27 November negotiations broke down after only an hour. At this point the prospect of conciliation seemed increasingly likely with the substitution rules for substances of very high concern being the main sticking point. An emergency meeting was scheduled for 30 November in which an informal deal was struck based on a compromise plan tabled by the Finnish Presidency. In the end the European Parliament moved from a requirement of mandatory substitution to mandatory substitution plans. One can question the role of trialogue meetings as a transparent way of reaching agreements, and this point was duly flagged up on both sides of the debate.

3.1.2 Impact Assessment

The Extended Impact Assessment COM(2003)644 for the REACH Proposal was published in 2003. Total costs for REACH were estimated to be between €2.8 and 5.2 billion over 11 and 15 years respectively. Health benefits were estimated in the order of magnitude of €50 billion over the next 30 years. A series of further analyses and a Commission funded study broadly confirmed these results. The additional benefits to the environment were expected to be significant but were not quantified.

This was followed by a number of other Impact Assessments, funded by the chemicals industry. In 2004 the Dutch Presidency invited the consultants ECORYS and OpdenKap Adviesgroep to compile all available REACH assessment studies, 36 in total, into a single synthesis document. The report[45] was used to facilitate a comprehensive discussion on the impact of REACH during a workshop in Scheweningen, the Netherlands, held on 25-27 October.

The report estimated the direct costs for REACH to be around €4 billion for the EU-25 but did not attempt to put a price on benefits or indirect costs. The table below shows the estimates used in the report compared to the Commission's estimates.

Step	Costs (millions)	Range	Commission estimate
Pre-registration	€ 100	50-100	
Test cost	€ 2,400	2400-3000	€ 1,250
Drawing up Chemical Safety Assessments	€ 190	150-250	
Drawing up Safety Data Sheets	€ 250	Depends on current costs	€ 250
Registration	€ 800		€ 800

[45] Dutch Presidency (2004), *EU 2004 REACH, the Impact of REACH, Overview of 36 studies on the Impact of REACH on Society and Business.*

Evaluation	-		-
Authorisation	€ 200	180-220	€ 100
Total	€ 3940		€ 2400

It is important to note that the Commission's lower estimate is based on an EU-15 figure. In addition, the Commission's lower test costs are linked to a greater reliance on alternative test methods, which would replace expensive animal testing. The table does not include an estimation of the reduced costs for new substances, which the Commission estimated to be € 100 million.

It became soon quite clear that many of the Impact Assessments were mainly lobbying tools for the industry in order to influence the development of the Proposal. For instance, Horst Reichenbach, director-general of DG Enterprise, doubted industries impartiality in conducting impact assessments, saying that "clearly, industry cannot do impact assessments in an impartial way, they have interests to defend, and they don't have a very high credibility". [46]

However, as a result of the discussion with stakeholders, the Commission agreed to undertake further impact assessment work, complementary to its IA. Two major studies were conducted under a Memorandum of understanding between the Commission and the industry associations UNICE and CEFIC. Commissioned by the industry associations, KPMG consultants elaborated detailed business case studies in the sectors of inorganics, automotives, flexible packaging and high tech electronics. Another study by the Joint Research Centre of the Commission (DG JRC/IPTS) focussed on the situation in the new Member States, through business case studies and surveys in the chemicals sectors of Poland, Estonia and the Czech Republic.

3.2 Classification, Packaging and Labelling of Chemical Substances and Mixtures

EU legislation on classification, labelling and packaging aims to ensure a high level of protection of human health and the environment and the functioning of the internal market. It does so by laying down EU-wide criteria that must be applied to determine whether a substance or mixture which is manufactured or imported into the European market has properties which could damage human health or the environment. The EU legislation on classification, labelling and packaging consists of three acts: The dangerous substances Directive 67/548/EEC (DSD), the dangerous preparations Directive 1999/45/EC (DPD) and Regulation (EC) No 1272/2008 on classification, labelling and packaging of substances and mixtures (CLP).

3.2.1 Simplification and Streamlining

DSD has been constantly adapted by Directives and amended by Council Directives. The amendment to adapt DSD to the REACH Regulation (EC) No 1970/2006 introduced the same registration requirements for new chemicals as for existing substances, which means that the rules for notification of new chemicals will be

[46] Dutch Presidency (2004), *EU 2004 REACH, the Impact of REACH, Overview of 36 studies on the Impact of REACH on Society and Business.*

replaced by those of REACH. In addition the amendment will repeal requirements on testing and assessment and confidentiality of data. However, since REACH does not include rules on the classification, packaging and labelling of dangerous substances, the requirements set by DSD regarding these matters will continue to apply.

The Commission issued a proposal (COM(2007)355) to align Directive 67/548/EEC with the Globally Harmonised System of Classification and Labelling of Chemicals (GHS), developed at the level of the United Nations. The current EU system and the GHS system are conceptually similar and cover the same structural elements: classification, packaging and hazard communication including labelling and safety data sheets. The Regulation was published in the Official Journal on 31 December 2008 and gradually repeals the earlier legislations on classification, packaging and labelling.

Until 1 December 2010, substances are to be classified, labelled and packaged in accordance with DSD. After that date substances are to be classified according to DSD and CLP but labelled and packaged in accordance with the CLP only. However, a substance may also be classified, labelled and packaged in accordance with the provisions of CLP before 1 December 2010. In this case the packaging and labelling provisions of DSD do not apply. The DSD will be repealed by CLP as of 1 June 2015. Until 1 June 2015, mixtures are classified, labelled and packaged accordance with DPD. This Directive will be repealed by CLP as of 1 June 2015.

The CLP Regulation will not only harmonise the EU legislation with GHS but will also streamline and simplify the earlier legislation on classification, labelling and packaging.

3.2.2 Impact Assessment

The Impact Assessment COM (2007)355 estimates that in the long term, the GHS implementation seems worthwhile as the (recurrent) benefits which have the form of trade-related cost savings will ultimately be greater than the one-off costs of the implementation. The cost savings, which in all estimates amount to an average of a few labour days per company per year, are caused by substantially lowering the regulatory barrier to trade of world wide differences in classification and labelling. Consequently, the Impact Assessment estimates that this will lead to more chemicals trade with countries outside the EU and thus contribute, through a better external competitiveness of the EU industry, to more growth and jobs.

3.3 Summary and Assessment

REACH brings many of the aims of the 6EAP under a single law and repeals the earlier Directives on testing chemicals in a way that is more comprehensive than previously. The development of the Proposal also reflects the changing role of Impact Assessments and the realisation that Impact Assessments can be used as lobbying tools. The other interesting aspect, and now a more common feature in co-decision procedures, is the use of triologue meetings between the European Parliament, the Commission and the Council. On one hand one can argue that the triologue meetings was the only way to achieve an agreement on a proposal where there exists many points of contention to discuss. On the other hand it could also be perceived as reaching decisions made behind closed doors in a non-transparent way.

The Impact Assessment of the CLP Regulation shows how the focus has moved towards the renewed Lisbon Agenda. The executive summary covers only the impacts for industry, especially SMEs, and how the proposed legislation will lead to more growth and jobs.

4 PESTICIDES LEGISLATION LINKED TO 6EAP AND THEMATIC STRATEGIES

The overall objective of the 6EAP with respect to pesticides is to 'reduce the impacts of pesticides on human health and the environment and more generally to achieve a more sustainable use of pesticides as well as a significant overall reduction in risks and of the use of pesticides consistent with the necessary crop protection'.

The Thematic Strategy on Sustainable Use of Pesticides COM(2006)372 was published in July 2006 in parallel with a Proposal (COM (2006) 388) for a Regulation concerning the placing of plant protection products on the market and a Proposal (COM (2006) 373) for a Framework Directive to achieve a sustainable use of pesticides. Most of the new measures that cannot be integrated into existing instruments were included into the proposed Framework Directive. Most of the measures that can be integrated into existing instruments were those included into the proposed Regulation. These Proposals were approved in 2009 and together with legislation on maximum residue levels on pesticides and the authorisation and marketing of biocides, form the base of current EU pesticides policy.

4.1 Thematic Strategy on Sustainable Use of Pesticides

The aim of the Thematic Strategy is to support forms of agriculture and pest management methods that restrict or better target the use of plant protection products, such as organic farming, integrated pest management, or the use of less susceptible varieties. It aims also to encourage a rational and precise pesticide use, as well as appropriate crop and soil management practices and improve the behaviour of pesticide users (in particular professional users), who are responsible for a number of misuses including overuses, by ensuring better training and education. The Thematic Strategy finds it also necessary to improve the quality and efficacy of pesticide application equipment to enable pesticide users to optimise the effectiveness of the treatments whilst minimising any adverse impact on human health and the environment.

4.1.1 Simplification and Streamlining

The publication of the Thematic Strategy in parallel with the proposed Regulation and Directive gave the Strategy an overarching role in bringing the required changes to pesticides legislation in a credible way. Many of the issues covered in the 6EAP were addressed in the Strategy as well as in the proposed legislation. One could suggest that by already consulting on the issues, as part of the Thematic Strategy process, this made the later discussions, as part of the co-decision procedure, more familiar and framed, making the whole legal process smoother.

4.2 Authorisation and Marketing of Plant Protection Products

The purpose of Regulation (EC) No 1107/2009 is to ensure a high level of protection of both human and animal health and the environment and harmonise the rules on the placing on the market of pesticides, while improving agricultural production. The Regulation concerning the placing of plant protection products on the market moves away from the risk based assessment of substances to hazard based criteria for granting market authorisations. Substances that do not comply with certain Annex II hazard criteria, but for which no other means of control are available, may be

approved for up to five years under a derogation. A plan for developing alternative means of control and phasing out the substance must be provided. There will also be a candidate list for substitution (those which may be eliminated where safer alternatives are available) for up to seven years. The above approach to ban the approval of substances is very similar to that under REACH. Hence it also provides an opportunity to encourage producers and importers to find alternatives for hazardous substances in order to get a market advantage.

4.2.1 Simplification and Streamlining

The Regulation (EC) No 1107/2009 simplifies and streamlines the earlier legislation in an, apparently, effective manner, by updating and combining the two earlier Directives under a single legislation. Both of these Directives contain Annexes that have been amended several times and hence the new Regulation also repeals most of these. The basic structure and organisation of the text was still acceptable but certain aspects of it required modifying. Accordingly, the Impact Assessment[47] of the Proposal states that the main objectives of the Proposal were:

- Simplification, better definition and streamlining the procedures
- Increase the level of harmonisation throughout the EU
- Coherence of the text with the general EU policy in the same subject area

As a consequence of growing public concern over the impact of pesticides, the Commission presented in July 2006 a set of proposals, the so called pesticides package, aimed at the protecting human health and the environment from dangerous or excessive use of pesticides in agriculture. The pesticides package included the Proposal (COM(2006) 388) for this Regulation together with the Proposal for a Directive establishing a framework for Community action to achieve a sustainable use of pesticides (COM(2006) 373).

The Presidency, Commission and Parliamentary rapporteurs concluded a series of 'trialogue' discussions in December 2008 with agreement on a set of amendments to the common position adopted by the Council in September on the Proposal. One of the most contentious issues of the proposed Regulation was the “cut-off criteria” for substances used in the production of plant protection products, introducing a market ban on a wide range of substances that pose potentially severe risks to humans and the environment. Another issue fiercely debated was zonal licensing, under which the European Union would be divided into authorisation zones with compatible conditions. It was argued by the European Parliament that this approach was arbitrary and did not meet environmental nature conservation criteria. In the end it was agreed that Member States will still be allowed to ban a product on the basis of specific environmental or agricultural circumstances. This addition was a concession to the European Parliament, which demanded that Member States should be allowed to make national or regional specifications based on nature conservation areas and soil-climate conditions.

[47] The Impact Assessment for a Regulation replacing Directive 91/414/EEC on plant protection products. http://ec.europa.eu/food/plant/protection/evaluation/report_impact_assessment_en.pdf

At the time that Directive 91/414/EEC on placing plant protection products on the market was adopted, it was recognised that the Community evaluation process for active substances was lengthy and complex. To avoid delays in the introduction of plant protection products containing new active substance to the market, it was decided that Member States could grant a national provisional authorisation before a decision was made about the approval of the new active substance (inclusion in Annex I to the Directive) once the Member State has concluded that the active substance and the plant protection products can be expected to satisfy the Community conditions. The system of national provisional authorisation has, however, led to a duplication of administrative efforts of competent authorities and applicants. Furthermore, the duration of the national provisional authorisation procedure differs significantly between Member States.

The product authorisations set by the Regulation will follow the existing procedures, where plant production products are authorised by Member States where they meet the criteria for approval. Within the zonal approach product authorisation may be made for several Member States, where a lead Member Sate evaluates the dossier on behalf of the others, which is likely to reduce administrative burden without reducing the effectiveness of the Regulation. Indeed, the Regulation states that provisions governing authorisation must ensure a high standard of protection. In particular, when granting authorisations of plant protection products, the objective of protecting human and animal health and the environment should take priority over the objective of improving plant production.

4.2.2 Impact Assessment

The main stakeholders concerned with the amending Directive 91/414/EEC were consulted and participated in meetings in 2002, 2004 and 2006 and in a written consultation in 2005. In addition to the Member State representatives, several other organisations were consulted. The Impact Assessment[48] was published in July 2006, stating that main objectives of the Proposal as:

- simplification, better definition and streamlining the procedures;
- increase the level of harmonisation throughout the EU; and
- Coherence of the text with the general EU policy in the same subject area.

Interestingly the pesticide manufacturing lobby requested the Commission and the European Parliament a second Impact Assessment to reflect the amendments that were introduced to the original draft proposal[49]. However, there is no obligation on the European institutions to undertake a second Impact Assessment and indeed this did not happen.

[48] The Impact Assessment for a Regulation replacing Directive 91/414/EEC on plant protection products. http://ec.europa.eu/food/plant/protection/evaluation/report_impact_assessment_en.pdf

[49] 'Crop prices set to rise up to 70%', News Release, European Crop Protection Association, 9.10.2008.

4.3 Sustainable Use of Pesticides

Directive 2009/128/EC establishes a framework to achieve a sustainable use of pesticides by reducing the risks and impacts of pesticide use on human health and the environment and promoting the use of integrated pest management and of alternative approaches or techniques such, as non-chemical alternatives to pesticides.

Among other things, Member States are required to ensure that the use of pesticides is minimised or prohibited in certain specific areas after appropriate risk management measures, the use of low-risk plant protection products and biological control measures have been considered in the first place.

4.3.1 Impact Assessment

The Impact Assessment for the Directive is part of the Impact Assessment of the Thematic Strategy. The issues covered by the Thematic Strategy and for the Directive are broadly similar and hence combining the IAs for the Thematic Strategy and this Directive works well. The Directive and the Thematic Strategy cover also a similar level of detail and hence makes a combined IA appropriate for these, as it enables a similar scope of detail to be used for both the Directive and the Thematic Strategy.

4.4 Maximum Residue Levels of Pesticides

The purpose of Regulation (EC) No 396/2005 is to protect consumers and animal health by setting limits and controls on the amounts of pesticides on food and animal feeding stuffs and to facilitate trade by setting common standards. The Regulation is not primarily intended to protect the environment.

4.4.1 Simplification and Streamlining

Prior to Regulation (EC) No 396/2005 EU legislation on pesticides residues was based on four framework Council Directives, covering fruit and vegetables (Directive 76/895/EEC), cereals and food of animal origin (Directives 86/362/EEC and 86/363/EEC), and animal feedingstuffs (Directive 90/642/EEC), which established different MRLs for different sets of commodities.

The European Commission announced in May 2001 that its fifth round of Simplification of Legislation in the Internal Market (SLIM) would focus on reducing the regulatory burden and cost to users of legislation on pesticide residues in fruit and vegetables. The SLIM initiative, an early manifestation of the better regulation approach, was launched in 1996. The SLIM report published in November 2001 called for EU rules on MRLs to be 'comprehensively overhauled and streamlined'. Its main recommendations were for the four main MRL Directives to be replaced by a single piece of legislation covering all food products and for a more direct procedure for setting MRLs. In addition, it recommended that the EU re-examine the rules requiring MRLs to be set at the limit of detection for any non-authorised pesticide-foodstuff combination, with a view to speeding up the consequent MRL-setting process by the Member States. In response to this report, in March 2003, the Commission proposed a Regulation that would harmonise EU MRLs of pesticides permitted in products of plant and animal origin.

The delay in bringing the Regulation into effect completely was due to the fact that a number of Annexes establishing MRLs through separate amending Regulations required consideration by the European Food Standards Authority.

4.5 Summary and Assessment

The Thematic Strategy on Sustainable Use of Pesticides COM(2006)372 was published in July 2006 in parallel with a Proposal (COM (2006) 388) for a Regulation concerning the placing of plant protection products on the market and a Proposal (COM (2006) 373) for a Framework Directive to achieve a sustainable use of pesticides. This gave the Strategy an overarching role in bringing the required changes to pesticides legislation in a credible way. Many of the issues covered in the 6EAP were addressed in the Strategy as well as in the proposed legislation. One could suggest that by already consulting on the issues, as part of the Thematic Strategy process, this made the later discussions, as part of the co-decision procedure, more familiar and framed, making the whole legal process smoother.

The Impact Assessment for the Sustainable Use of Pesticides Directive is part of the Impact Assessment of the Thematic Strategy. The issues covered by the Thematic Strategy and for the Directive are broadly similar and hence combining the IAs for the Thematic Strategy and this Directive works well. One reason for this is that the both the Directive and the Thematic Strategy have similar level of detail and hence easier to assess on a similar level of detail.

5 SOIL LEGISLATION LINKED TO 6EAP AND THEMATIC STRATEGIES

Soil has not been subject to a specific protection policy at the EU level before 2002, when the Commission published a Communication "Towards a Thematic Strategy for Soil Protection" (COM(2002)179)[50]. The Communication outlined the first steps to the development of a Thematic Strategy to protect soils in the European Union.

The Thematic Strategy for Soil Protection was set out in a Communication from the Commission COM(2006) 231) in 2006. The Strategy establishes a ten-year work programme for the European Commission. It is accompanied by a proposal for a soil framework Directive (COM(2006) 232) with the objective to protect soils across the EU, and an Impact Assessment (SEC(2006) 620 and SEC (2006) 1165 (summary)) of the Thematic Strategy for Soil Protection with an analysis of the economic, social and environmental impacts of the proposed measures.

As for now, the Council has been unable to reach a political agreement on the legislative proposal for the soil framework Directive due to the opposition of a number of Member States. The latest discussions during the Czech and Swedish Presidencies, in 2009, have not changed this situation.

5.1 Proposal for the Soil Framework Directive

The Proposal for the soil framework Directive establishes a framework for action to protect and restore soil and preserve the capacity of soil to perform its functions; and sets common principles, objectives and actions at the Community level. Member States are required to take action to deal with threats such as landslides, contamination, soil erosion, the loss of soil organic matter, compaction, salinisation and sealing wherever they occur, or threaten to occur, on their national territories. Member States are flexible in implementation by identifying the areas and sites at risk, defining targets and selecting specific measures fitting best to their local situations.

In more detail, Member States are required:

- to identify areas of risk to erosion, organic matter decline, compaction, salinisation and landslides; set risk reduction targets for those risk areas and establish programmes of measures to achieve the targets;
- to establish an inventory of contaminated sites on their territory and draw up national remediation strategies. Selling a site, where a potentially polluting activity has taken or is taking place, a soil status report has to be provided by the seller or the potential buyer to the administration and the other party in the transaction; and
- to limit sealing or mitigate its effects, for example by rehabilitating brownfield sites.

[50] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0179:FIN:EN:PDF

The proposal for the soil framework Directive obliges Member States to use a systematic approach to identify and combat soil degradation, undertake precautionary measures and integrate soils protection into other policies. In this way, a common framework at EU level is expected to ensure a comprehensive and coherent approach to soil protection and to consider principles of subsidiarity and proportionality as set out in Article 5 of the Treaty.

5.1.1 Simplification and streamlining

A comprehensive screening of the existing stock of EU legislation (*acquis*) was completed by the Commission at the end of 2008. The proposal for the soil framework Directive was one of the main regulatory instruments across different policy fields that was examined to determine whether simplification efforts to date are sufficient or whether there is scope for future simplification activities.[51] The document "Screening of DG Environment's acquis" states that currently there is no scope for simplification as the proposal for the soil framework Directive is in co-decision process and a common position has not yet been adopted by the Council.[52] This conclusion refers to the political process rather than the substance of the Commission's proposal for the soil framework Directive. It therefore does not answer the question whether or not the proposal as such leaves scope for simplification. However, so far commentators appear not to have identified a significant scope for simplification either.

In their position on the Thematic Strategy and the proposal for the soil framework Directive, COPA-COGECA strongly disagrees that there is a need for a framework directive on soil protection[53]. It argues that the draft framework directive "does not recognize the already existing national and Community legislation and will add unnecessary administrative burdens on Member States, regional and local authorities, and land managers. It is particularly concerning that the Commission's objectives of better regulation appear to have been disregarded in respect of these proposals".

The European Environmental Bureau (EEB) supports the draft soil framework Directive, however criticizes it as "too weak" to foster necessary changes to reverse the continuing soil degradation in Europe. It is concerned about the lack of "enforceable targets" and "common quality standards" for Member States.[54]

5.1.2 Impact assessment

The Impact Assessment considered the following policy options:

- Member States are encouraged to take action under a general non-binding EU soil strategy;
- A flexible legal instrument which would take the form of a Soil Framework Directive, ambitious in its scope but not overly prescriptive in its content; and

[51] Screening of the existing stock of legislation (*acquis*), http://ec.europa.eu/governance/better_regulation/simplification_en.htm

[52] http://ec.europa.eu/governance/better_regulation/documents/screening_2009/env.pdf

[53] http://www.euractiv.com/31/images/COPA%20letter%20June%2008_tcm31-174437.pdf

[54] http://www.eeb.org/activities/Soil/Index.html

- Legislative proposals for the different soil threats, setting also all targets and means at EU level.

The Soil framework directive was chosen based on the following two arguments:

- A first proposed option, a non-binding action at EU level, would be insufficient to address the identified soil problems, since the fragmented approach that has been taken so far without a focused soil protection policy, has been not sufficient enough to address and combat the identified soil threats. Actions on supranational, national, regional and indeed local levels are needed in order to succeed to protect soil.
- Due to variability of soil regarding its general characteristics, and taking into account use of soil in the socio-economic context, it is very difficult to set up general EU-wide soil quality standards and measures to address soil threats. Therefore, the third option has not been considered compatible with the subsidiarity principle.

During the process of the Thematic Strategy development, the Commission carried out a widespread consultation process of the general public and stakeholders in 2003 and 2005.[55] The questionnaire provided to citizens and organizations during the stakeholder consultation addressed different courses of actions, such as:

- a framework is developed at EU level and measures are established at national/local level;
- all measures are established at EU level; and
- no action is taken at EU level.

Interpreting the result for citizens and organizations, 75% and 88% of the respondents accordingly were in favour of the first course of action; 16% and 6% preferred the second course of action; 5% of each respondent group supported the third possibility; and 4% and 2% had no opinion. The results show that the Commission's decision in favour of the second option, in form of a soil framework Directive, conforms to the results of the extensive stakeholder consultation.

The Commission did not carry out a cost-benefit analysis for all three options. Nevertheless, in order to support the decision making process, different scenarios have been developed that attempt to quantify the environmental, economic and social impacts of possible measures that have to be chosen by Member States implementing the proposed framework directive. The impact assessment indicates that a package of potential measures will greatly differ for each Member State depending on local, regional and national differences and the level of ambition and thus will their impacts, costs and benefits. Taking into consideration limited available information, the costs and benefits analysis shows that the proposed Soil Framework Directive will yield benefits far outweighing the costs. It has to be stressed however that the impact assessment has been unable to assess the real costs of implementation of the proposed Soil Framework Directive. Since the Commission's choice does not reflect the results

[55] http://ec.europa.eu/environment/soil/making_en.htm

of the cost-benefit analysis for other two options, it is questionable whether the cost-benefit analysis was indeed taken seriously.

As regards administrative costs linked to the specific proposed measures, the Impact Assessment has made several attempts to estimate these. As a result, insufficient data to do so were indicated, or it was estimated that the burden on public administrations was not likely to be significant.

According to the European Parliament resolution on the thematic strategy for soil protection (adopted on 13 November)[56], "an EU framework directive is fully justified in accordance with the principles of better lawmaking" since the framework directive fills in gaps in the current fragmented soil protection legislation, which provisions do not ensure a sufficient and coherent level of soil protection, as they aim at different objectives. The Directive applies the subsidiarity and proportionality principles and enables Member States to develop soil policies (that have not yet done so) without creating distortion of competition. The Parliament, in addition, pointed out that a clear differentiation is needed between the framework directive and other European legislative soil protection standards, in order to avoid regulatory duplication.

The Report on the Thematic Strategy for Soil Protection (2006/2293(INI)) prepared by the Committee on the Environment, Public Health and Food Safety[57] also stresses that "in accordance with the principles of better lawmaking, an EU framework directive is fully justified". It also concludes that "that a clear differentiation is needed between the framework directive and other European legislative soil protection standards, in order to avoid regulatory duplication". The Report adds that "A framework directive on soil is needed to ensure a minimum level of soil protection in all Member States and to enable Member States to develop soil policies without creating distortion of competition. In line with the principles of better regulation, this framework directive should recognise the already existing national and Community legislation and it should not add any unnecessary administrative burden on the Member States, the regional and local authorities, and the land owners."

5.1.3 Summary and assessment

The EU soil policy is an area of EU environmental policy that has evolved recently in comparison with other areas. It was first addressed in 2002 in the Communication "Towards a Thematic Strategy for Soil Protection". The current Thematic Strategy for Soil Protection is accompanied by the proposal for the soil framework Directive and the Impact Assessment of the Thematic Strategy for Soil Protection. The Council has not yet reached a political agreement that would lead to the adoption of the Soil Framework Directive as a legally binding instrument.

A screening of the existing stock of EU legislation that evaluated simplification efforts states that there is currently no scope for simplification of the draft soil framework Directive as this directive is still going through the co-decision process. This conclusion however refers to the political process rather than the content of the Commission's proposal for the soil framework Directive. The screening did not

56 http://europa.eu/bulletin/en/200711/p122002.htm.

57 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A6-2007-0411+0+DOC+PDF+V0//EN (p. 4, 10 and 14)

address the question of whether the content of proposal as such leaves scope for simplification. However, so far commentators have not identified a significant scope for simplification either.

The Impact Assessment considered three policy options for soil protection in Europe, including actions at Member States level, a flexible framework directive, and actions at EU level. A second option, the soil framework Directive, was chosen. The Commission's decision in favour of the second option conforms to the results of the extensive stakeholder consultation. The Commission did not carry out a cost-benefit analysis for the other two options. Nevertheless, in order to support the decision making process, different scenarios have been developed that attempt to quantify the environmental, economic and social impacts of possible measures that have to be chosen by Member States implementing the proposed framework directive. The costs and benefits analysis shows that the proposed soil framework Directive will yield benefits far outweighing the costs, even if this estimation does not provide real costs of implementation of the proposed Soil Framework Directive. The Impact assessment has made several attempts to estimate the burden on public administrations and evaluated it as low or indicated that there is insufficient data.

6 ENERGY EFFICIENCY LEGISLATION LINKED TO 6EAP AND THEMATIC STRATEGIES

Although the Thematic Strategies were introduced as the principle instrument for implementing the 6EAP, many objectives and priority actions identified in the 6EAP fell outside the scope of the seven Thematic Strategies. In certain cases these objectives and priority actions have been addressed by other environment action plans and programmes. One of these is the energy efficienvy action plan.

The term 'energy efficiency law' came to be in 1974, following the oil crisis and the guiding principles established then are reflected to this day in current energy efficiency law, in the form of its main goals:

- Extraction safety and environmental protection
- The maintenance of economic power and living standard
- Using energy efficiency as the way to read the two aforementioned goals[58]

The Commission's "Action Plan to improve energy efficiency in the European Community" (COM(2000) 247), which was presented in 2000, laid the basic foundation for these goals.[59] Explicitly stated in the Action Plan were also the goals of protecting the environment, enhancing security of energy supply and establishing a more sustainable energy policy. Reducing energy consumption by improving energy efficiency was seen as the best way to achieve these aims.

In October 2006, the Commission adopted the Action Plan for energy efficiency[60]. The Action Plan is built around one key objective; help reach the EU's energy savings potentials of 20% by 2020. To this end, the Plan lists over 70 initiatives and measures to be put in place and implemented until 2012 and a number of qualitative and quantitative targets to be met. A number of actions are listed as 'priority actions' to be implemented as soon as 2007, while the remaining initiatives are to be implemented gradually until the end of the Action Plan in 2012.

The three pieces of legislation to be examined in this section can be seen as laws secondary to, or building directly from the Action Plan and these are:

- Directive 2002/91/EC on the Energy Performance of Buildings, the recasting of which is in progress;

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[58] Reimer, Franz (2008). ‚Ansätze zu Erhöhung der Energieeffizienz im Europarecht – Eine kritische Bestandsaufnahme.' *Europäisches Klimaschutzrecht*. Baden-Baden: Helmuth Schulze-Fielitz/Thorsten Müller, p. 148.

[59] Reimer, p. 151.

[60] Commission of the European Communities, Communication from the Commission, Action Plan for Energy Efficiency: Realising the Potential, COM(2006)545, Brussels, 19/10/2006, http://ec.europa.eu/energy/action_plan_energy_efficiency/doc/com_2006_0545_en.pdf

- Directive 92/75/EEC on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances, the recasting of which is in progress; and
- Regulation (EC) No 2422/2001 on a Community energy efficiency labelling programme for office equipment and its recast Regulation (EC) No 106/2008

The main fields of energy efficiency law are a) residential and tertiary buildings, b) industrial buildings, c) home appliances, d) office equipment and e) commercial buildings. Residential and tertiary buildings account for over 40% of end energy consumption with the potential for saving estimated to be 22%.[61]

Directive 2002/91/EC falls under the category of residential buildings. Directive 92/75/EEC falls under the category of home appliances. Home appliances can and have been regulated by way of labelling requirements and minimum efficiency standards. Directive 92/75/EEC formed the basis for numerous subsequent household appliance Directives, such as:

- Directive 94/2/EG (Refrigerators)
- Directive 95/12/EG (Washing machines)
- Directive 95/13/EG (Dryers)
- Directive 97/17/EG (Dishwashers)

Directive 92/75/EEC governs many types of home appliances, but traditionally it has been the case that each Directive related to home appliances governs a different class of appliances, as shown by the list above. In contrast, those governing office equipment have tended to apply to all types of office equipment. Regulation (EC) No 2422/2001 and its recasting Regulation (EC) No 106/2008 are examples of this in that they both refer to the Energy Star Program, which covers computers, monitors, printers, fax machines, copiers, scanners and more.

Though Regulation (EC) No 2422/2001 and the subsequent Regulation (EC) No 106/2008 are similar to Directive 92/75/EEC in that they are broad in scope, the two regulations governing office equipment differ significantly from that governing home appliances in that they are voluntary. That is, producers, manufacturers, exporters, importers, and retailers of office equipment may choose whether or not to put the Energy Star emblem on their products and /or in their advertisements.[62]

6.1 Directive 2002/91/EC on the Energy Performance of Buildings

The objective of Directive 2002/91/EC is "to promote the improvement of the energy performance of buildings within the Community, taking into account outdoor climatic and local conditions, as well as indoor climate requirements and cost-effectiveness."[63] The Directive lays down requirements as regards:

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[61] Reimer, p. 155.

[62] Reimer, p. 164.

[63] 'Directive 2002/91/EC of the European Parliament and of the council of 16 December 2002 on the energy performance of buildings.' *Official Journal of the European Communities*. L 1/65. 4 January 2003. Available at <http://eur-lex.europa.eu/en/index.htm>.

(a) the general framework for a methodology of calculation of the integrated energy performance of buildings;

(b) the application of minimum requirements on the energy performance of new buildings;

(c) the application of minimum requirements on the energy performance of large existing buildings that are subject to major renovation;

(d) energy certification of buildings; and

(e) regular inspection of boilers and of air-conditioning systems in buildings and in addition an assessment of the heating installation in which the boilers are more than 15 years old.[64]

Directive 2002/91/EC builds on pre-existing legal instruments, such as the Boiler Directive (92/42/EEC), the Construction Products Directive (89/106/EEC) and the buildings provisions in the SAVE Directive (93/76/EEC). Directive 2002/91/EC was adopted on December 16, 2002 and entered into force on January 4, 2003. All Member States then had three years to build up the systems and measures necessary to transpose and implement the requirements of the Directive. Thus on January 4, 2006, the minimum requirements for the energy performance of buildings became legally binding, Energy Certificates became required and inspections for heating and cooling devices needed to have been organised under an established system in all Member States.

A recast of the Directive was proposed on November 13, 2008. The Council decision from the 1st reading is still being awaited, and the 2nd reading will take place at the EP plenary sitting on March 8, 2010. An Impact Assessment of the proposed recast has already been conducted.[65] The proposed recast would consolidate the original Directive and its amendments into one single document. It would also simplify the definitions used in the original Directive's text by referring to existing EU standards.[66] This would facilitate a more homogenous transposition and application of the Directive's rules throughout the Member States, and ensure coherence of the Directive with other existing EU legislation.

Furthermore, the recast would make energy performance certificates on houses mandatory for sale or rental, and would broaden the scope of the Directive to include all existing buildings undergoing a major renovation that do not reach certain efficiency levels (as opposed to only those larger than 1000m^2). Altogether, it is

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64 Bowie, Randall and Annette Jahn (2003). *European Union – the new Directive on the energy performance of buildings – Moving closer to Kyoto*. Brussels, Belgium: European Commission, Directorate General for Energy & Transport / Unit D1 – Regulatory Policy & Promotion of New Energies and of Demand Management.

65 'Accompanying document to the proposal for a recast of the energy performance of buildings directive (2002/91/EC) – Impact Assessment.' *Commission Staff Working Document.* COM(2008) 780 final. SEC(2008) 2865. 13 November 2008. Available at <http://eur-lex.europa.eu/en/index.htm>.

66 'Energy performance of buildings (repeal. Directive 2002/91/EC). Recast.' *Procedure File COD/2008/0223.* European Parliament / DG Presidency, Directorate B. <http://www.europarl.europa.eu/oeil/file.jsp?id=5716032> 22 January 2010.

expected that the recast will result in energy savings of 60-80 Mtoe by 2020, which translates roughly into an energy consumption reduction in the EU of 5-6%.[67]

6.2 Directive 92/75/EEC on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances.

The purpose of Directive 92/75/EEC is "to enable the harmonization of national measures on the publication, particularly by means of labelling and of product information, of information on the consumption of energy and of other essential resources, and additional information concerning certain types of household appliances, thereby allowing consumers to choose more energy-efficient appliances."[68] The Directive applies to the following types of household appliances:

- refrigerators, freezers and their combinations,
- washing machines, driers and their combinations,
- dishwashers,
- ovens,
- water heaters and hot-water storage appliances,
- lighting sources,
- air-conditioning appliances.

A recast of Directive 92/75/EEC was proposed on November 13, 2008 (the same day the recast for Directive 2002/91/EC was proposed). The Council's decision from the 1st reading is being awaited, and the 2nd reading is expected on 8 March 2010. The proposed recast would streamline the current Directive and its amendments into one singular Directive. It would also make it possible for implementing measures to take the form of regulations or decisions not requiring transposition by the Member States instead of directives,[69] thus massively simplifying the process of implementation.

The recast of Directive 92/75/EEC was in fact announced as a priority of the Energy Efficiency Action Plan and of the Sustainable Consumption and Production and Sustainable Industrial Policy (SCP/SIP) Action Plan (COM(2008)0397). This is because the SCP/SIP showed that the limited scope of the Directive restricts its potential to further mitigate climate change, contribute to the EU-wide target of 20% energy efficiency gains by 2020 and achieve the goals of sustainable production and consumption. The proposed recast would thus extend the scope of Directive

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[67] ‚Energy efficient buildings save money: Recast of the Energy Performance of Buildings Directive.' *European Commission.* MEMO/08/693. 13 November 2008. Available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/693&format=HTML&>. 23 January 2010.

[68] 'Council Directive 92/75/EEC of 22 September 1992 on the indication by labelling and standard product information of the consumption of energy and other resources by household appliances.' *Official Journal of the European Communities.* L 297/16. 13 October 1992. Available at <http://eur-lex.europa.eu/en/index.htm>.

[69] 'Energy-related products: indication of the consumption of energy (repeal. 'Energy Labelling Directive' 92/75/EEC). Recast.' *Procedure File COD/2008/0222*. European Parliament / DG Presidency, Directorate B. < http://www.europarl.europa.eu/oeil/file.jsp?id=5715632> 22 January 2010.

92/75/EEC, which is currently restricted to household appliances, to allow for the labelling of all energy-related products: this could include products used in the household, commercial and industrial sectors and non-energy using products such as windows which have significant potential to save energy once in use or installed.[70]
An impact assessment of the proposed recast has shown concretely that Directive 92/75/EEC could deliver more savings in energy and reduction of environmental impacts if extended to all energy related product groups. It has also shown that other changes, such as setting classes of efficiency for which Member States not be allowed to provide incentives or procure, would not increase the effectiveness of the Directive as much as broadening its scope to include all energy-related products.[71]

6.3 Regulation (EC) No 2422/2001 on a Community energy efficiency labelling programme for office equipment and its recast Regulation (EC) No 106/2008

Originally passed on November 6, 2001, Regulation (EC) No 2422/2001 established "the rules of the Community energy efficiency labelling programme for office equipment (hereinafter the 'Energy Star programme') as defined in the Agreement between the Government of the United States of America and the European Community on the coordination of energy efficient labelling programmes for office equipment."[72] In contrast to Directive 92/75/EEC, participation in the Energy Star programme has always been on a voluntary basis.

The original Regulation was recast with the adoption of Regulation (EC) No 106/2008 on January 15, 2008 to provide for the continued use of the Energy Star programme in the European Community for a second 5-year period. The recast entered into force on February 4, 2008. The recast Regulation takes into account experience gained during the first Energy Start programme implementation period (2001-2006). In particular, the recasting changed the following Articles of the original regulation:

- Article 6: Promotion of the logo
- Article 8: European Community Energy Star Board (ECESB)
- Article 10: Working Plan
- Article 11: Preparatory procedures for the revision of technical criteria
- Article 13: Implementation

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70 'Energy-related products: indication of the consumption of energy (repeal. 'Energy Labelling Directive' 92/75/EEC). Recast.' *Procedure File COD/2008/0222*. European Parliament / DG Presidency, Directorate B. < http://www.europarl.europa.eu/oeil/file.jsp?id=5715632> 22 January 2010.

71 'Accompanying document to the proposal for a directive of the European parliament and of the council on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products – Impact Assessment.' *Commission Staff Working Document*. COM(2008) 778 final. SEC(2008) 2863. 13 November 2008. Available at <http://eur-lex.europa.eu/en/index.htm>.

72 'Regulation (EC) No 2422/2001 of the European Parliament and of the Council of 6 November 2001 on a Community energy efficiency labelling programme for office equipment.' *Official Journal of the European Communities*. L 332/1. 15 December 2001. Available at <http://eur-lex.europa.eu/en/index.htm>.

- Article 14: Revision

The primary objective of the recasting was to improve implementation of the Energy Star programme and make it more effective in saving energy. Another objective was to simplify procedures and thus reduce implementation costs for Community institutions and Member States. A further objective of the recasting was to make the Community legislation as laid out in the original Regulation more accessible, transparent and clear.[73]

On top of altering the abovementioned Articles, the recasting Regulation (EC) No 106/2008, for reasons of clarity, consolidated the original Regulation and all of its subsequent amendments into one single text. This was a simplification measure. It also established rules for the Community energy-efficiency labelling programme for office equipment (the Energy Star programme) as defined in the Agreement of 20 December 2006 between the USA and the European Community on the coordination of energy-efficiency labelling programmes for office equipment. It is not clear whether or not an Impact Assessment was carried out, whether of the original Regulation (EC) No 2422/2001 or of the recasting Regulation (EC) No 106/2008.

6.4 Summary Assessment and Conclusion

The three main means of taking forward the better regulation agenda in Europe have been simplification and streamlining, codification and recasting, and impact assessment. In the case of all three items of EU legislation considered here, recasting and codification either has taken place or is in the process of taking place. In the case of at least two of the pieces of legislation (Directive 2002/91/EC and Directive 92/75/EEC), an Impact Assessment of the proposed recasting definitely took place. Thus it can be said that certain measures within the better regulation agenda were applied to these pieces of energy efficiency legislation although their contribution to substantive improvements in this sphere of regulation is less clear. At least two questions arise. The first is whether or not the recasting and codifying actually simplified or streamlined the legislation. The second is whether or not the impact assessment was necessary, or if it merely increased the administrative burden.

To the first question it can be answered that the recasting, in all three cases, simplifies the legislation overall, making it easier to understand and implement. In all three cases, the recasting at a very minimum clarifies definitions laid out in the original Regulation or Directive, and brings it and all subsequent amendments into one single text. In the case of Directive 92/75/EEC and Regulation (EC) No 2422/2001, the recast also substantially amends articles in the original piece of legislation such as to make it more easily implementable. In the case of Directive 92/75/EEC and Directive 2002/91/EC, on the other hand, the recast broaden the scope of the legislation, thus making it potentially more difficult to implement. The complications posed by this broadening of scope are not significant enough, however, to outweigh the simplification and streamlining effects of other aspects of the legislation's recasting

[73] 'Energy efficiency products: office and communication technology equipment, labelling programme Energy Star (recast Regulation (EC) No 2422/2001). *Procedure File COD/2006/0187*. European Parliament / DG Presidency, Directorate B. <http://www.europarl.europa.eu/oeil/file.jsp?id=5393632> 22 January 2010.

and codifying exercise; the case for a net benefit in terms of better regulation is relatively strong.

To the second question the answer is less clear. When a completely new Directive is being proposed, an Impact Assessment is most definitely necessary to properly structure and develop the provisions of a new measure and consider the full implications of its introduction. An impact assessment helps in assessing the problem at hand so that the objectives can be identified correctly and then pursued effectively.[74] For the mere recasting of a Directive or Regulation, however, an Impact Assessment may not be as important, if no new provisions are introduced. Existing provisions will have been covered by an earlier Impact Assessment, unless the measure in question pre-dated this system or there has been a major change in the context. In none of the three cases discussed here were significant amendments to the measure made, thus it could be that the Impact Assessments created more administrative burden than was justified by their usefulness.

Understood in the context of the Lisbon Strategy, the reduction of administrative burden and simultaneous improvement in economic competitiveness are the main aims of better regulation. Given that the Lisbon Strategy was the most recent major EU document to significantly contribute to the understanding of better regulation, these two main aims still appear to shape the currently dominant view of better regulation. As discussed above, administrative burden for the Commission was increased by the performance of (possibly unnecessary) Impact Assessments for the recasts of Directives 92/75/EEC and 2002/91/EC. However, administrative burden for the addresses of legislation throughout the EU will decrease in the long run after a successful recast, which simplifies and streamlines legislation and thereby decreases the administrative cost of implementation. It would be surprising if the additional administrative burden of the Impact Assessment was not outweighed by the easing of administrative burdens in the Member States and the Commission brought upon by a streamlined and simplified recast Directive.

Viewed from the previously dominant good governance perspective, these two aims of better regulation remain the same. However, further and rather stricter conditions apply in assessing the impact on an item of legislation. Specifically but applicable legislation is further subject to relatively strict conditions, namely that neither the main goals nor the overall legitimacy of a measure should be negatively impacted by the implementation of better regulation processes. In the case of these three pieces of energy efficiency legislation, their main goals and legitimacy were strengthened, not weakened, by streamlining and simplification, codification and recasting and impact assessments. In *reasonably* expanding the scope of the legislation, refining definitions, simplifying implementation processes, and combining original text with amendments, the main goals and legitimacy of the legislation was strengthened.

In conclusion, all three of the main tools for promoting better regulation were successfully applied to the three pieces of energy efficiency legislation, with the possible exception of an Impact Assessment in the case of the recasting of Regulation

[74] 'Impact Assessment.' *European Commission*. 25 November 2009. <http://ec.europa.eu/governance/impact/index_en.htm> 20 January 2010.

(EC) No 2422/2001. The better regulation exercise applied to Directive 2002/91/EC, gave rise to simplified definitions, a consolidated text and a broadened scope, leading to a less administratively burdensome piece of legislation, with potential benefits for competitiveness. As regards Directive 92/75/EEC, the results were a consolidated text, a broadened scope and a more efficient implementation process. Finally, as regards Regulation (EC) 2422/2001, application of the better regulation tools produced numerous amended Articles and a generally clearer, more consolidated text; here again, the outcome was economically and administratively positive and consequently less burdensome from a competitiveness perspective. Thus it is evident that although the exact ways in which these approaches were implemented differed from case to case, the overall outcome for implementation was positive in each case. This positive outcome should only be qualified on the grounds that an impact assessment may not have been necessary for the recasting of Directives 2002/91/EC and 92/75/EEC, neither of which involved substantive amendments.