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## Embedding consultation procedures

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*Published in:*  
European Public Law

*Publication date:*  
2011

*Document Version*  
Peer reviewed version

[Link to publication in Tilburg University Research Portal](#)

*Citation for published version (APA):*  
Meuwese, A. (2011). Embedding consultation procedures: Law or institutionalization. *European Public Law*, 17(3), 527-538.

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# Embedding consultation procedures: law or institutionalization?

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*This contribution explores the implications of the European Commission's choice to include reporting on consultation in the set of impact assessment (IA) requirements. It contrasts the 'text book story' on how IA and consultation can only strengthen one another and benefit the citizen with some riskier aspects of this joint 'Better Regulation vehicle'. It then zooms in on two different pathways to stronger (legal) embedding of consultation: through review and through social and institutional processes of incremental norm formation.*

## 1. INTRODUCTION

“The duty to consult is recognised in every sense except the legal one”.<sup>1</sup> This statement by Wade and Forsyth about English administrative law translates generally to the EU context. It can be read in two ways. On the one hand consultation is omnipresent, with observers even speaking of a revival of the ‘participation euphoria’ in the 1970s.<sup>2</sup> There is apparent convergence on standards for participation: codes of consultation, resembling the European Minimum Standards in its essential requirements surface across Europe.<sup>3</sup> As part of the Better Regulation (BR) initiative, the European Commission also reasserted its commitment to public and open consultation as part of the preparatory phase of lawmaking and perhaps beyond and made reporting on consultation one of the requirements of the impact assessment (IA) template. On the other hand administrative law scholars have recently drawn attention to the fact that legal participation rights are lagging behind.<sup>4</sup>

This contribution aims to explore this paradox by investigating the broader legal implications of combining consultation and IA as an example of ‘heavy’ procedural requirements for lawmaking. One possible path towards legal embedding of consultation is similar to the one explored regarding IA only in Alemanno’s contribution to this issue: if more information is available to courts they are more likely to review it, or at least to use it when they are reviewing

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<sup>1</sup> WHR Wade and CF Forsyth, *Administrative Law*, 9th edn (Oxford University Press, Oxford 2004), 896.

<sup>2</sup> Thanks to Oriol Mir Puigpelat for this observation at the ReNEUAL workshop on Participation rights in rulemaking in Osnabrück in February 2010.

<sup>3</sup> E.g. the Code of Practice on Consultation initiated by the second Blair government in 2001. For the up to date version see <http://www.berr.gov.uk/whatwedo/bre/consultation-guidance/page44420.html> accessed 28 March 2011.

<sup>4</sup> J Mendes, ‘Participation rights in EU law and governance’ in HC Hofmann and AH Türk (eds), *Legal Challenges In EU Administrative Law. Towards an Integrated Administration* (Edward Elgar, London 2009); J Mendes, *Participation in European Union Rulemaking. A Rights-Based Approach* (Oxford University Press, Oxford 2011); Also the Research Network on EU Administrative Law (ReNEUAL) has a working group on rulemaking that is paying attention to participation issues, <http://www.reneual.eu>, last accessed 24 October 2010.

regulation.<sup>5</sup> When consultation is combined with impact assessment courts are likely to raise the evidentiary standards. The second path towards stronger consultation requirements stays in the non-judicial arena. It relies on the normative implications of the European Commission's policy commitments on Better Regulation. The use of tools such as IA implies that input is taken seriously and not only triggers expectations among stakeholders in that regards, but also gives them a foundation on which to base participation claims. After a description of IA and consultation as two interconnected tools of Better Regulation, an analysis of these two paths towards enhanced consultation is presented.

## 2. VARIETIES OF CONSULTATION AND IA

### 2.1 'TEXT BOOK IA'

EU impact assessment, an informal but structured instrument based on soft law but with strong political backing, is not entirely novel. The existing procedures for pre-legislative consultation and collection of expertise have been strengthened and are integrated into the IA process. The novelty lies in the combination of the three following features: IA follows a uniform template, is used as a policy coordination tool and is published together with the proposal. The latter requirement is a means of disclosing the reasoning behind the proposed regulatory intervention as well as procedural aspects such as the consultation.

A conceptual question that arises is whether impact assessment and consultation form a natural pair. The answer depends on the conception of the functions of the two instruments, which – certainly in the European context – differ greatly between systems and actors.<sup>6</sup> There is a kind of 'text book story' going around of how the two instruments can only strengthen one another. As will be argued in this paper, this win-win rhetoric needs to be looked upon somewhat carefully – as Brown and Scott argue forcefully in their contribution – but it is worth reiterating here since it is compelling and wide-spread. It is often stated that impact assessments create a new forum for policy deliberation, where private actors are offered the opportunity to influence the decision-making through the quality of their input and the merits of their arguments. The earlier the consultation is held the better the definition of the problem will be and the more unintended side-effects will be uncovered, thus strengthening the overall quality of regulation – or so the story goes.<sup>7</sup> The encouragement of participation can also be a means of strengthening democratic structures and alleviating public disillusionment with political processes. Thus – in

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<sup>5</sup> S Rose-Ackerman, 'Law and Regulation' in KE Whittington, RD Kelemen, and GA Caldeira (eds), *The Oxford Handbook of Law and Politics* (Oxford, Oxford University Press 2008).

<sup>6</sup> The preparatory text for this workshop assumes that they do: "More recently, better regulation programs, framed by the rhetoric of better tuning public regulation with societal needs and making it fit for purpose, have also played an important role in changing the face of the administrations, consultations being an important part of regulatory impact assessments." The same goes for the European Commission Impact Assessment Guidelines 2009: "Public consultations are an essential part of your IA work", 20.

<sup>7</sup> C Hey, K Jacob and A Volkery, 'Better regulation by new governance hybrids? Governance models and the reform of European chemicals policy', Environmental Policy Research Centre FFU-report 02-2006, Berlin, 2006.

the reasoning of the European Commission – the claim to legitimacy that consultation holds as an instrument can be added to the one that a fully-fledged IA system offers.<sup>8</sup> A final more practical reason to combine the two instruments is that otherwise inaccessible data that are needed for impact assessment can be collected through consultation procedures.

It is possible and necessary to challenge the text book story. Even apart from the costs and delays that consultation procedures can generate and the fact that consultation often comes too late to influence decision-making (cf. Brown and Scott), consultation will never be a perfect process. Also, in a pluralistic system of consultation in which the consultees are not pre-selected, it will generally be easier for powerful organizations to get access because they have the necessary resources and expertise. It should also be noted that consultation is not only an accountability enhancing tool. It also “allow[s] for social preferences to be directly fed into the process”.<sup>9</sup> Here we arrive at some issues that impact assessments are generally not very good at: incorporating public opinion and taking into account distributional effects.

Can we design impact assessment regimes in such a way that they incorporate the best elements from consultation, whilst countering the risks associated with it? Some would argue that we can indeed design a system for the preparation of laws and regulations in which rational elements such as impact assessment work perfectly in sync with participative elements such as consultation. More often than not, such a system will contain ‘thick’ procedural rules as demanded by a deliberative style of lawmaking. In theory Better Regulation can provide deliberative incentives “[w]ith its emphasis on open and transparent processes, disciplined consultation, fair treatment of the empirical evidence, robust and pluralistic peer review”.<sup>10</sup> But in practice this conception of the function of IA is not straightforward because there are other pervasive conceptions in use by IA stakeholders, such as IA as a means of using more ‘expert decision-making’, IA as a reason-giving document and IA as a purely rationalistic ‘evidence-base’.

## 2.2 HOW IA AND CONSULTATION ARE CONNECTED IN THE COMMISSION

Judging on the basis of the Impact Assessment Guidelines from 2009 the European Commission presents a seemingly unambiguous case for consultation, resembling closely the ‘text book story’ presented above:

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<sup>8</sup> GC Rowe, ‘Tools for the control of political and administrative agents: impact assessment and administrative governance in the European Union’ in HC Hofmann and AH Türk (eds.) *EU Administrative Governance* (Edward Elgar, Cheltenham 2006).

<sup>9</sup> AI Ogus, ‘Comparing Regulatory Systems: Institutions, Processes and Legal Forms in Industrialised Countries’, Centre on Regulation and Competition Working Paper Series, Manchester, 2002.

<sup>10</sup> CM Radaelli, ‘Whither Better Regulation for the Lisbon Agenda?’ (2007) 14 *Journal of European Public Policy* 190.

“[Consultation] is an essential tool for producing high quality and credible policy proposals. [It] helps to ensure that policies are effective and efficient, and it increases the legitimacy of EU action from the point of view of stakeholders and citizens.”<sup>11</sup>

The Commission in the Impact Assessment Guidelines warns its officials against some pitfalls but avoids drawing up rules to maximise the chances consultation will lead to a fairer and better substantive output:

“Not all interest groups are equally able to take part in consultations or express their views with the same force. For this reason, an open consultation is unlikely to provide a fully representative picture of opinions. You may need, therefore, to make specific efforts to ensure that all relevant stakeholders are both aware of and able to contribute to the consultation.”<sup>12</sup>

Consultation processes in the Commission are regulated by the ‘Minimum standards for consultation’,<sup>13</sup> with the main rules reiterated in the IA Guidelines.<sup>14</sup> The general principles articulated are participation, openness and accountability, effectiveness, coherence.<sup>15</sup> Both the Minimum Standards and the IA framework are governed by ‘the overriding principle of proportionate analysis’. This principle is a specific application of the principle of proportionality

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<sup>11</sup> European Commission, Impact Assessment Guidelines, SEC(2009) 92. The pragmatic approach continues in the following text box that serves as a translation of the Minimum Standards:

“Consulting interested parties is an obligation for every IA and it must follow the Commission's minimum standards. You should:

- plan your consultations early
- ensure that you engage all affected stakeholders, using the most appropriate timing, format and tools to reach them
- ensure that stakeholders can comment on a clear problem definition, subsidiarity analysis, description of the possible options and their impacts
- maintain contact with stakeholders throughout the process and provide feedback
- analyse stakeholders' contributions for the decision-making process and report fully in the IA report on how the input was used.”

<sup>12</sup> European Commission, Impact Assessment Guidelines 2009, 20.

<sup>13</sup> COM(2002) 704 final. According to the Minimum Standards some participants in the consultation on the new consultation standards proposed that they ‘should be separated from the Commission’s approach to extended impact assessments’. This idea has not been taken up by the Commission since one of the main points of the reforms was to integrate assessment and consultation more.

<sup>14</sup> European Commission, Impact Assessment Guidelines 2009, 20.

<sup>15</sup> The main provisions that operationalise these principles are the following:

‘All communications relating to consultation should be clear and concise, and should include all necessary information to facilitate responses.’

‘When defining the target group(s) in a consultation process, the Commission should ensure that relevant parties have an opportunity to express their opinions.’

‘The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, open public consultations should be published on the Internet and announced at the "single access point".’

‘The Commission should provide sufficient time for planning and responses to invitations and written contributions. The Commission should strive to allow at least 8 weeks for reception of responses to written public consultations and 20 working days notice for meetings.’

‘Receipt of contributions should be acknowledged. Results of open public consultation should be displayed on websites linked to the single access point on the Internet.’

to the decision-making process itself. It stipulates that the depth of the analysis and the extent of the consultation must be fitting for the likely impact of the proposal.<sup>16</sup> In practice this means that ‘the Commission has to assess its consultation needs on a case-by-case basis in line with its right of initiative’. Yet there are limits to how far integration of consultation and IA can go: “[T]he Commission must emphasise that consultation can never be an open-ended or permanent process. In other words, there is a time to consult and there is a time to proceed with the internal decision-making and the final decision adopted by the Commission.”<sup>17</sup> The Common Approach to Impact Assessment,<sup>18</sup> a more informal kind of inter-institutional agreement concluded between Commission, Parliament and Council to coordinate their IA efforts, mandates consultation for IAs albeit with the disclaimer “where reasonably possible and without causing undue delay in the legislative process”.

One practical point of linkage between IA and consultation is the Roadmap. This is a kind of ‘pre-IA’ of three pages (regular IAs tend to be around 30 pages long) that is published when an initiative is announced in the Common Legislative and Work Programme. The Guidelines stipulate that “the Roadmap should outline the consultation plan.”<sup>19</sup> A second phase where the two instruments connect is when the IA report is drawn up after the analysis is completed when the IA Guidelines require a detailed report of the consultation process and outcome.<sup>20</sup> A final means of keeping IA and consultation together is the requirement to ensure that any external experts hired to carry out public consultations adhere to the Commission’s minimum standards.<sup>21</sup>

### 2.3 CONSULTATION BETWEEN PLURALISM AND NEO-CORPORATISM

The dividing line between participation rights in individual determinations and participation rights in rulemaking procedures<sup>22</sup> is not the only one in EU governance. Participation in EU lawmaking takes place in two different streams: areas where ‘social dialogue’ is common or compulsory (exempted from IA) and consultation as part of ‘good practice’ IA. This separate treatment of ‘social partners’ vis-à-vis ‘regular’ stakeholders’ is by no means uncommon in continental political systems. What is in fact remarkable is the quick rise of ‘open’ or ‘pluralistic’ consultation as a governance tool, even where the administrative law backing is often missing or lagging behind.

The IA framework acknowledges the distinction in an interesting manner. As the scope of IA has been broadened recently so as to include comitology measures as well, the exceptions for Green

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<sup>16</sup> Impact Assessment Guidelines 2009, 13.

<sup>17</sup> COM(2002) 704 final, 11.

<sup>18</sup> Common Approach to Impact Assessment. As foreseen in the Inter-Institutional Agreement on Better Lawmaking (2003) the Common Approach sets out basic rules for impact assessment throughout the legislative process.

<sup>19</sup> Impact Assessment Guidelines 2009, 8.

<sup>20</sup> *Ibid.*, 20.

<sup>21</sup> *Ibid.*, 18.

<sup>22</sup> J Mendes, ‘Participation rights in EU law and governance’ in HC Hofmann and AH Türk (eds), *Legal Challenges In Eu Administrative Law. Towards an Integrated Administration* (Edward Elgar, London 2009).

Papers and proposals subject to consultation with the social partners are maintained. As the old Impact Assessment Guidelines from 2005 phrase it “the logic behind this is that Green Papers are effectively a consultation document and when the social partners have the right to propose an option IA, would interfere with that right”.<sup>23</sup> There is a clear sense that the two types of consultation rely on a different logic. Simply put, should the amount of decisional influence you have, depend on who you are representing or on the quality of your input?

A procedure such as IA is – on most accounts anyway – a means of translating stakeholder policy preferences into policy proposals. The Commission consultation process which is supposed to interact with the IA process clearly relies on pluralistic assumptions that such a procedure puts – or should put – all possible stakeholders on an equal footing. Apart from doubts about the integration of stakeholder consultation and draft impact assessment reports,<sup>24</sup> the corporatist features of special advisory committees such as the Committee of the Regions (CoR) puts the supposed pluralistic nature of the European lawmaking process into doubt.

### 3. EXPECTATIONS AND USE OF THE CONSULTATION-IA ‘VEHICLE’

#### 3.1 THE PATH OF REVIEW

The crucial question is what happens when the Commission violates its own minimum standards on consultation? For instance, what does it mean to ‘use’ or ‘ignore’ consultation input? And is this a question for the courts (judicial review) or for the Impact Assessment Board (administrative review)?

As extensively set out by Alemanno in his contribution to this issue the European Commission has established the Impact Assessment Board (IAB) in an effort to avoid juridification. This is an internal IA quality control body as part of subtle system of checks and balances that is to contribute to the legitimization of lawmaking in Better Regulation terms. Although it does not have any veto powers the IAB has considerable leverage, especially because it raises the profile of IA among the higher ranks of the Commission administration. The IAB does occasionally ask DGs to revise impact assessments because of insufficient reporting on consultation. For instance, it will tell services to incorporate the views of consultees more clearly or to justify better why consultation has been undertaken in a more limited way than usual. Quite a few IAB opinions contain a recommendation to “integrate the main results of the stakeholder

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<sup>23</sup> European Commission Impact Assessment Guidelines 2005, SEC(2005) 791. That wording has been scrapped in the 2009 revision, after which the Guidelines simply state that “[y]ou should note that there are specific provisions for consulting social partners on initiatives in the field of social policy based on articles 137-139 of the Treaty and on initiatives having a social impact for a specific sector”. European Commission Impact Assessment Guidelines 2009, 14.

<sup>24</sup> European Court of Auditors, Impact Assessments in the EU institutions: do they support decision-making?, Special report No 3/2010 (Publications Office of the European Union, Luxembourg 2010).

consultation into the main body of the report” and to “address clearly those views which do not support the preferred approach”.<sup>25</sup>

As for the judicial review path, it is well known that the Court has limited the scope of participation rights so as to not include acts of a general nature.<sup>26</sup> This is in line with the current limitations on standing,<sup>27</sup> but unsatisfactory and probably untenable in view of the constitutionalisation of participation.<sup>28</sup> An important caveat when analysing the case law on ‘consultation’ is that the most far-reaching cases all deal with participation by the social partners. This is traditionally a widely accepted form of participation in Europe, but is less relevant for the link with IA, because the IA requirement does not traditionally apply to initiatives that involve the social partners as it aims to facilitate a more pluralistic style of governance.

One important example of this body of case law is the *UEAPME* case. Here the Court of First Instance accepted the lack of democratic legitimation – the legislative procedure in question did not provide for full involvement of the European Parliament – as a relevant argument to support a claim for enhanced consultation duties on the part of Commission and Council. Although the specificities of the case led to an unsuccessful outcome for the applicants, the Court accepted that standing rights could be granted to stakeholders in such cases, even if they were appealing against what appears to be ‘legislation’.<sup>29</sup> Even though it may be receptive to certain arguments that may help push the case law in a different direction, the European Courts have never engaged in more than very marginal review exercises of complaints by stakeholders that they had not received proper access to the lawmaking process.<sup>30</sup>

Looking for case law that might shed light at the link between IA and consultation, most examples of cases involving IA at all are too tied up with the specific circumstances of the case to be fit for this purpose. ‘IA case law’ is either about risk assessment – a much more clearly delineated exercise for which there is often a legal obligation, usually related to the WTO context<sup>31</sup> – or about other more limited types of assessments that simply aim to ‘get the numbers

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<sup>25</sup> See for instance the IAB opinion on the Impact Assessment Report for the Commission Communication on Transforming the digital dividend opportunity into social benefits and economic growth in Europe, SEC(2009) 1438, downloadable from [http://ec.europa.eu/governance/impact/ia\\_carried\\_out/cia\\_2009\\_en.htm](http://ec.europa.eu/governance/impact/ia_carried_out/cia_2009_en.htm) accessed 28 March 2011.

<sup>26</sup> Case T-521/93, *Atlanta AG and others v. Council and Commission* [1996] ECR II-1707; Case C-104/97, *Atlanta AG and others v. Council and Commission* [1999] ECR I-6983; Case T-199/96, *Laboratoires pharmaceutiques Bergaderm SA and Jean-Jacques Goupil v. Commission* [1998] ECR II-2805. For an extensive discussion of this case law see chapter 5 of J Mendes, *Participation in European Union Rulemaking. A Rights-Based Approach* (Oxford University Press, Oxford 2011).

<sup>27</sup> PP Craig, 2003, ‘Standing, rights and the structure of legal argument’ (2003) 9 *European Public Law* 493.

<sup>28</sup> Article 10 paragraph 3 TEU: “Every citizen shall have the right to participate in the democratic life of the Union. Decisions shall be taken as openly and as closely as possible to the citizen”. See also Article 11 TEU paragraph 1: “The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action”.

<sup>29</sup> Case T-135/96 *UEAPME* para 89; See the contribution by Voermans and Schuurmans in this issue for more on *locus standi*.

<sup>30</sup> Case T-339/00 *Bactria*. As for the latter part of the paragraph, see note 14.

<sup>31</sup> Case T-13/99 *Pfizer Animal Health v Council* [2002] ECR II-3305.



right’. This is distinct from the kind of IA aimed at ‘overhauling the EU’s legislative culture’ by forcing political decision-making to pay attention to trade-offs between different policy options whilst incorporating the views of stakeholders. In turn, the two ‘signpost cases’ on IA in the proper sense of the term, *Spain v. Council* and *Vodafone*,<sup>32</sup> indicate that proportionality is the main gateway to judicial enforcement of BR requirements. The step to enforcing consultation commitments is not that big, but it is one that has not been taken yet. Requiring a sound information basis for consultees to base their input on, and having the courts enforce that requirement, would be the clearest sign that consultation mechanisms are valued. However, for this to happen, we may have to wait for the build-up of momentum, and the simultaneous strengthening of institutional practices, policy commitments and judicial dynamics.<sup>33</sup> In the next sub-section we will explore further the first two elements, i.e. the incremental normative developments around consultation in the lawmaking process.

### 3.2 THE PATH OF INCREMENTAL NORM FORMATION

The substantive norms of the BR framework trigger procedural ones, which in turn often trigger further procedural norms. This norm formation takes place in the realm of soft law, often relying on social mechanisms such as peer pressure and reputational concerns rather than on legal enforcement. This part discusses a few examples that are relevant to the embedding of consultation in EU lawmaking. First, the focus on ‘impacts’ has triggered participation claims. Below we will see how this has led in shifts in the communication with public legislative actors (Member States, advisory bodies) and then we will look briefly at the position of lobby groups.

Just as the Commission has tried to use IA to push the system towards open and pluralistic consultation, the advisory bodies – the CoR in particular – have made an attempt at greater influence through IA.<sup>34</sup> The Committee has used the language of ‘impacts’ to argue for an elevated status in the procedure or greater consequences for its consultative opinions. If the Commission – as the reasoning goes – is serious about assessing local and regional impacts, it needs to take seriously the advice of the organisation best placed to come up with data on this. It has demanded that the partnership between the Commission and the Committee of the Regions in the process of drafting and implementing Community policies would lead to an “increasingly systematic use of the new impact assessment method for the European Commission’s major initiatives, and its involvement in the impact assessment method”.<sup>35</sup> This implies a more formal

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<sup>32</sup> Judgment of 7 September 2006, C-310/04 *Spain v Council*, [2006] ECR I-7285; ECJ Case C-73/08 *Vodafone and others*, 8 June 2010.

<sup>33</sup> See Alemanno’s contribution to this issue for an extensive analysis of this trend and some predictions.

<sup>34</sup> For example, the Commission for Constitutional Affairs and European Governance of the Committee for the Regions organized a seminar entitled ‘Regional governance: a challenge for the efficiency and democracy of the European Union’ on 13 May 2005 at which ‘the institutions’ obligations under the agreement on Better lawmaking’ and ‘the initiatives taken or planned by the Committee of the Regions to improve its ability to produce impact analyses’ were discussed.

<sup>35</sup> Resolution of the Committee of the Regions on the European Commission’s Work Programme and the Committee of the Regions’ Priorities for 2006, Brussels, 23 November 2005.

role in the Commission's IA procedure, but the Commission's stance remains that public consultation provides sufficient opportunities for everyone (including advisory bodies and Member States). The final Protocol contains little explicit text on IA and what is there has been phrased most cautiously: the Commission may ask the Committee to become involved (a) in studies pertaining to the impact of certain proposals on the local and regional authorities and (b) in exceptional cases, downstream, in the local and regional impact reports on certain directives."<sup>36</sup> Finally, the use of 'consultation' as a mode of interacting with Member States deserves to be mentioned. Some national guidelines for civil servants even provide advice along the following lines:

"Use your RIA as a basis for discussion with the Commission, other Member States and the European Parliament before and during the negotiations. Be prepared to contribute information from your own RIA into the Commission's impact assessments and its consultation exercises"<sup>37</sup>

Lobbying, despite its negative connotations, is in many ways just a different word for 'consultation' and is a legitimate activity in the European lawmaking process, perhaps increasingly so. The increased emphasis on 'justification of regulatory demand' that BR has brought about plays into the hands of interest groups. It also helps that IA does not have any formal legal status, lacks binding effect and – different from the activity of 'legislating' – no competence is needed for engaging in the activity of 'assessing impacts'. So nothing will stop stakeholders in the EU legislative process from producing their own report on possible effects of possible regulatory interventions (or absence thereof) and present it as an 'impact assessment'. The best-known example of this is the REACH case in which the line between 'institutional IAs' and 'private IAs' became blurred, especially because some IAs were financed in a non-transparent way.<sup>38</sup> Of course these 'private IAs' are not embedded in the process as Commission IAs are. Also, it became clear in interviews that actors tend to see Commission IAs as more authoritative than other IAs (including those from other Institutions), but a more striking finding is that they did not consider them as qualitatively different types of document.<sup>39</sup> Apart from the possibility to present 'position papers' as IAs, the structured format of IA also gives interested parties the opportunity to voice their lobby by offering suggestions for a better impact assessment (process or document) than the one that has been prepared by an Institution.

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<sup>36</sup> Protocol on the Cooperation Arrangements between the European Commission and the Committee of the Regions, 17 November 2005, para. 3.

<sup>37</sup> Cabinet Office, Regulatory Impact Unit, 'Transposition guide: how to implement European directives effectively?', 4. See also the Flemish 'Draaiboek' for the implementation of European legislation.

<sup>38</sup> Representatives of the business community even went on to complain that they had to finance some of these 'impact assessments'. Mr John Cridland, Deputy Director-General, Confederation of British Industry (CBI) at a hearing for the House of Lords, in preparation of its Ninth Report on 'Ensuring Effective Regulation in the EU. Report with Evidence': "[A]t the end of the day some of the impact assessments in relation to chemicals had been funded by the business community which we did not do with any enthusiasm because we did not think it was a thing that we should have to pay, but we came to the view that it was the only way of making sense of the proposals."

<sup>39</sup> ACM Meuwese, *Impact Assessments in EU Law Making* (Kluwer Law International, Alphen aan den Rijn 2008).

The structural role IA now plays in EU lawmaking means that a certain degree of institutionalisation – if not juridification – of consultation has occurred. This development has provided a new opportunity for those arguing in favour of a ‘structural partnership’ between business and the institutions and thereby effectively for a neo-corporatist revival, in similar vein to the CoR’s efforts. Business Europe – still called UNICE at the time – for instance has stated that it “strongly believes that business representatives and other stakeholders should be part of the network of external experts which is to advise on the quality of impact assessments.”<sup>40</sup> The expectations that the ‘power combination’ of IA and consultations can raise among stakeholders are also nicely illustrated by the following complaint by the American Chamber of Commerce (AmCham): “A revision of the Design Protection Directive was proposed in 2004, without any official consultation process. Although an externally contracted impact assessment did include a consultation with industry, the Commission ignored its results and based its proposal on its own internal impact assessment, which had been carried out without any dialogue with the industries concerned.”<sup>41</sup> Procedural *standards* (e.g. ‘consultation input must be used when appropriate and proportionate’) cannot define what it means to ‘use’ or ‘ignore’ consultation input, leaving that question open for the courts. Procedural *rules* (e.g. ‘the Commission shall respond to consultation input with a motivated reply’) might be more determinative here, but are clearly much harder to agree on.

The merging of consultation and IA into one regime is inevitably leading to the emergence of a further procedural norm: the publishing of draft versions of legislative proposals is increasingly being seen as a ‘good practice’.<sup>42</sup> The European Commission has tried to resist pressure to publish draft proposals in the phase between consultation and the publication of the proposal, but it keeps returning.<sup>43</sup> For instance, although all IAB opinions are published online<sup>44</sup> this only happens once the proposal and the IA have been published, in order to avoid the IAB opinions being regarded as ‘previews’ by stakeholders. However, the information that is available in the usual phase in which consultation takes place – early on in the process is often so minimal that it

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<sup>40</sup> UNICE, ‘Comments on the Commission Communication A Strategic Review of Better Regulation in the European Union’ (Executive Summary), 18 December 2006, 5. See also UNICE position paper of 12 June 2006 in which some further recommendations for rendering the Community impact assessment system more effective are listed.

<sup>41</sup> AmCham EU, 20 September 2005, Position Paper on Consultation Processes, 4. Available at <<http://www.eucommittee.be/Pops/2005archive/consultationprocess20092005.pdf>> accessed 20 April 2007.

<sup>42</sup> R Hazell, ‘Prelegislative scrutiny of draft Bills’ [2004] Public Law 477. The European Commission maintains this is not part of its working method. Article 15 TFEU (“In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible”) fits in with the trend.

<sup>43</sup> E.g. at the annual International Regulatory Reform Conference, which started out as a private initiative of the Bertelsmann Foundation, and most recently co-organised by the OECD on 28-29 October 2010 in Paris.

<sup>44</sup> Regulation 2001/1049 would probably have obliged the Commission to grant access to most of these opinions upon application by members of the public anyway.

is difficult for stakeholders to focus on their comments. This undermines the gist of the general principles and minimum standards.<sup>45</sup>

Finally, one feature of the EU IA regime that might strengthen consultation is that the tool is also supposed to play a role *after* the Commission's proposal has been published. As mentioned above, the co-legislators have committed to BR norms in inter-institutional agreements and the Commission has said that it "will use the consultations and impact assessments it conducted earlier in order to rally support for its proposals".<sup>46</sup> There is a lack of clarity on the rules that apply to the inter-institutional dealings with IA and consultation, but – as the case of the IA for a Directive on pre-packaging nicely illustrates – this offers some room for the European Parliament to shape those rules. In an effort to avoid full liberalisation of fixed pack sizes this dossier was selected by MEP Toubon to be the subject of the first 'parliamentary IA'. This produced an impact assessment which contradicted the 'original' IA by the Commission, in particular as far as the impacts on vulnerable consumers were concerned. Interestingly though a lot of the inter-institutional discussion in this case was about the rules and standards to follow when consulting. The European Parliament accused the Commission of selective consultation and argued that this led to insufficient consideration of the social impacts of the proposal. The rapporteur's low opinion of the Commission's consultation was quite apparent from his report where he proposed to delete the qualification 'wide' to describe the consultation. The main problem in the eyes of the rapporteur and other MEPs was that the Commission had on the basis of the lack of reactions from consumer organizations concluded that they did not really take an interest. When only six consumer organizations out of the 25 Member States respond to the Commission's consultation of the European Consumer Consultative Group, is the conclusion warranted that 'the issue of pack sizes does not seem to be a major preoccupation of consumer organizations', or is it a matter of a lack of resources on the part of consumer organizations that should have been compensated for more actively?". The Commission insists that it is the former and says that it carried out informal checks. There is another interesting aspect to this case study: it was only because of the existence of an IA report that the Parliament became aware of the limits of the consultation.

#### 4. CONCLUSION

The analysis has shown that EU IA is developing in the direction of an information tool and a bargaining device for all EU legislative stakeholders rather than as a decision tool for the core legislative bodies. This is compatible with the Commission's choice to extend participation opportunities, without extending participation *rights* in its rulemaking procedures. Better Regulation, through the way impact assessment is 'proceduralised', offers both more information and more hooks to hang possible participatory rights on (such as increasingly legitimate expectations triggered by the existence of clear policies and emerging standards). Furthermore,

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<sup>45</sup> Ibid.

<sup>46</sup> COM(2002) 278 final, 8.

the open character of the current EU IA regime serves as an encouragement for actors to pursue access to the legislative process much more actively than before, often by embracing the substantive values of Better Regulation, such as sustainability, competitiveness and even good governance, whilst challenging the procedures. The path of legal backing for consultation through judicial review is still open-ended, but so far stakeholders have made the most of the option to claim access on the basis of participation *expectations*. Lobby organisations use the pro-business side of the Better Regulation agenda to forge a privileged position in the legislative procedure. Whether this is seen as leading to enhanced participatory rights, are as a revival of neo-corporatist lawmaking, depends not only on perceptions but also on the procedural rules that are currently being shaped in practice.

The need for further rules is evident as IA as used by the European Commission does not tend to fit the ideal-type of one uncontested, objective, IA document that was prepared alongside a dedicated consultation process, thus undermining the ‘text book story’ of how IA and consultation work perfectly in sync. A crucial question is whether impact assessment a tool to facilitate consultation or the other way around. We may be inclined to say ‘both’, but in practice the balance tends to get lost only too easily, as the REACH and pack sizes case studies have shown. The rules of the game of IA are certainly not ‘thick’ enough to foster deliberation at the moment.<sup>47</sup> Enhanced stakeholder consultation cannot be a substitute for impact assessment as the expectations that both tools create are different. Impact assessment needs a certain degree of ‘proper analysis’ to be credible. At the same time, IA not as an instrument, but as a wider procedural framework for lawmaking, has proved to be rather effective at ‘absorbing’ alternative legitimisation strategies’, as the inclusion of comitology measures also shows. One plausible explanation for the resilience of IA is the clever way in which the Impact Assessment Board operates, balancing awareness of the limits of its position and the need for credible review. In the context of consultation this approach is evident in the marginal review the IAB exercises, aimed at the reason-giving in the IA report as regards the way the Commission carried out a consultation, and not at the consultation itself.

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<sup>47</sup> See Brown and Scott’s contribution to this special issue.