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NOTE

From: Presidency
To: Delegations
Subject: Future proof regulation

Delegations will find in Annex a Presidency discussion note on Future proof regulation.

Presidency discussion note on Future Proof Regulation

‘Impacts on innovation should be put at the core of the EU impact assessment methodology’ (Renda & Pelkmans 2014) ¹

The joint Working Party meeting Better Regulation and Research on 9 February 2016 discussed a number of issues related to the interrelation of better regulation and innovation:

- The importance of innovation for future economic growth as well as dealing with societal challenges, and the role of a well-designed and enabling regulatory framework to support this;
- The SWD of the Commission on ‘Better regulations for innovation-driven investments at EU level’, which deals amongst other issues with the innovation principle and innovation deals;
- The Commission’s communication on ‘Better regulation for better results’ and the renewed Impact Assessment Toolbox, that takes Research and Innovation and future proofing more into account;
- The strong call from industry organizations to give the ‘innovation principle’ an important role in the EU regulatory process;
- Possibilities for experimentation in developing regulation, such as innovation deals, the regulatory sandbox etc.
- Possibilities for making regulation more flexible and adaptable to technological change in order to avoid that regulation becomes outdated;
- Possibilities for using goal or outcome-based regulation as a means to maximize the innovative potential of regulation.

The aim of the discussions on innovation and better regulation during the meeting of the WP on Better Regulation on 1 April is to assess what needs to be done in practice to make EU regulation more future proof and enabling for innovation. The outcome of the discussions will be used to draft Council Conclusions, which will be discussed during the meeting of the WP on Better Regulation on 18 April 2016.

¹ J. Pelkmans and A. Renda (2014) ‘Does EU regulation hinder or stimulate innovation?’ CEPS No.96, November 2014.

The focus of the discussions in the WP Better Regulation meeting on 1 April will be on three issues:

i. Strengthening the way in which innovation is dealt with within the EU regulatory process both ex post and ex ante, including in Impact Assessments

The Commission's Communication on 'Better regulation for better results' provides an important step forward in dealing with future proof regulation: 'We will ensure solutions that take advantage of all the opportunities that digital and other technologies can offer today and might offer tomorrow, without constraining innovation and operating effectively both in the digital and the physical worlds.'² Within the Impact Assessment Toolkit a number of items have been included that deal with innovation and future proofing (i.e. number 12, 14, 15, 16, 17, 18 and 23). Since these tools have only be introduced recently, it is difficult to assess if they work in practice, and if the inclusion of different aspects of innovation in different tools provides enough coherence and effectiveness. At the same time there is a strong call from industry to put innovation even more at the heart of the regulatory process, by placing the innovation principle on more equal footing with other principles and considerations of relevance to Better Regulation.

Innovation – in particular in the context of the rapidly changing environment for innovation through digitization – is also important with regards to the scrutiny of existing legislation through the REFIT programme. Much of the focus on the innovation within the better regulation agenda so far has been on any need to confirm or clarify the meaning of regulation to provide certainty for innovators. Another aspect concerns any need to amend regulation or change the approach to regulation. A thorough analysis of how existing legislation helps or hinders innovation (particularly focusing on digitization and smart industry) could be an important and concrete step forward to ensure future proof regulation, for instance through a fitness check.

- i. How can the EU regulatory process be further strengthened to take its impact on innovation better into account?
- ii. What process could be set-up to explore the need and possibilities of embedding future proofing and the innovation principle within the EU regulatory process?
- iii. How can it be assessed and ensured that existing EU legislation is sufficiently future proof and enabling for innovation?

ii. Possibilities for making regulation more outcome based

² European Commission (2015) *Better Regulation for Better Results*, COM(2015)215, p.6

Regulation that focuses on the desired outcome or goal of legislation instead of being prescriptive as to the way to achieve this, can be an important aspect of future proof regulation: ‘performance or outcome-based regulations grant greater flexibility to businesses in how they achieve the desired outcome, stipulating only at a relatively high-level what they can and cannot do’.³ However, within the EU context in some cases more prescriptive regulatory tools can also have advantages, for instance with respect to the speed of introduction of available technologies (BATs/BREFs), in standard setting or in other aspects of the Single Market where economies of scale constitute an important driver for innovation, as well as in the efficiency and effectiveness in achieving public policy objectives.

What are the possibilities for fostering the use of outcome/goal based regulation within the EU regulatory context? Can answers be given on the horizontal level, or do the issues need to be considered more on a case-by-case basis?

iii. Possibilities for experimentation and flexibility within the EU regulatory process

The pace of technological developments is fast, frequently faster than the legislative process. As a result, sometimes regulation may rapidly become outdated; flexibility in regulation allowing it to accommodate this rapidly changing innovative environment is important. In some cases, private actors may develop innovative solutions which may not be precisely in conformity with existing regulations, but at the same time are not in contradiction with the public policy goals for which such policies have been designed; they may in this respect simply provide an alternative solution to that policy challenge. In a national context, examples exist of how private actors have a ‘right to challenge’ existing regulations, when their innovative solution is not in contradiction with the policy goal but provides such alternative means to achieve this.

³ European Commission Impact Assessment Guidelines, Tool 18.

Also, experimentation becomes a more and more important aspect of the regulatory process. When designing regulation, public-private cooperation in an experimental setting can help to better assess if regulation is necessary and what form of regulation works best. Such experiments may also help in assessing to what extent the existing regulatory practice needs to be modified to allow for innovative practices. Experience from ‘Green Deals’ in the Netherlands indicates that in many cases perceived regulatory obstacles in practice turn out to be limited, when public and private actors work together in an innovative project, and the possibilities that regulation offers are properly explained. Working closely together with innovators in the design of regulation offers advantages as well. The UK regulatory sandbox⁴ provides an example of an experimental cooperation between government and innovators to assess what regulation is deemed necessary and how much room for innovation the existing regulatory framework offers.

Whilst flexibility and room for experimentation offer important advantages for ensuring future proof regulation, at the same time predictability and a level playing field constitute important elements of an innovation friendly regulatory framework as well.

How can room for flexibility and experimentation within the EU regulatory process be enhanced whilst safeguarding the need for level playing field and predictability?

⁴ <https://www.fca.org.uk/news/regulatory-sandbox>