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The “Better Regulation” programme: expertise over politics?

Charles de Marcilly
Matthias Touillon

Abstract :

The “Better Regulation” programme which received very little media coverage, was presented by the European Commission on 19th May last [1] in response to the second priority in Jean-Claude Juncker’s programme which was “to make the Union more democratic” [2]. It intends to improve the efficiency of the European legislative process via greater transparency and the use of pertinent expertise. Hence a dialectic between democratic legitimacy and legitimacy through efficiency emerges here. This approach illustrates the degree to which the community’s institution is torn between the will to open up the decision making process and its technocratic leanings, which result from its organisational nature and also from the institutional power games that are specific to the European Union. Moreover agreement regarding the proposal to revise the existing inter-institutional agreement, which dates back to 2003, before the adoption of the Lisbon Treaty, between the Parliament, the Commission and the Council, is hoped for before the end of 2015 [3].

1. COM (2015) 215 final

2. Jean-Claude Juncker, “A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change Political Guidelines for the next European Commission” Strasbourg 15th July 2014

3. Launch Meeting 25th June 2015. Communication by the European Parliament “Guy Verhofstadt, President of the ALDE group will represent the European Parliament.”

4. Amongst the few articles on the issue read “Too good to be true? A quick assessment of the European Commission’s new “Better Regulation” Package”, Andrea Renda, CEPS, <http://www.ceps.eu/publications/too-good-to-be-true-quick-assessment-ec%E2%80%99s-new-better-regulation-package> and “le ‘mieux légiférer’ européen, no man’s land entre démocratie et technocratie”, Jean-Sébastien Lefebvre, Contexte, https://www.contexte.com/article/mieux-legiferer/le-mieux-legiferer-un-no-mans-land-entre-democratie-et-technocratie_28651.html

INTRODUCTION

Alongside pre-eminent issues regarding economic, migratory and international questions, other public initiatives pertaining to daily European politics and its ordinary decision making process – formerly called “co-decision” – have been launched in a relatively discreet manner. The “Better Regulation” programme is a perfect example of this. Indeed since its presentation, one thing has become evident: beyond Brussels’ interests, albeit limited no doubt due to the Commission’s discreet communication methods, the media coverage of the programme has not been equal from a wider point of view to the questions raised, either in terms of transparency and openness, or the efficacy of European policies [4]. The 2015 version of “Better Regulation”, the last stage in a policy on-going for the last fifteen years, aims to provide new impetus to European public action, and has been undertaken in view of reforming the Union’s decision making process and the ensuing regulations. Hence the Commission aims to respond to the need for legitimacy that is required of it. This became clearer with the role played by the Commission in settling the Greek crisis and

the management of response to the refugee crisis. However beyond the pertinent measures put forward, the “Better Regulation” programme is the source of a certain number of questions.

1/ AN INCREMENTAL POLICY: EFFICACY, THE CORE OF AN OPEN/EXPERTISE DIALECTIC

a/ Gaining legitimacy for an improved status

The “Better Regulation” programme and its mechanisms are part of an incremental approach in which each element of added value improves the whole without creating any type of dysfunction. From the Commission’s standpoint this comprises maintaining that greater efficiency in the decision making process of European governance will be achieved via greater opening and transparency, associated with the use of pertinent expertise.

Hence the optimisation of this approach is of constant concern. Over the last fifteen years the improvement of the decision making process and of European regulation has become one of the European Commission’s battle horses; a quest for efficiency that undoubtedly was originally driven

5. Article 17 TEU (consolidated version), Eurlcx: 1. The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union. It shall execute the budget and manage programmes. It shall exercise coordinating, executive and management functions, as laid down in the Treaties. With the exception of the common foreign and security policy, and other cases provided for in the Treaties, it shall ensure the Union's external representation. It shall initiate the Union's annual and multiannual programming with a view to achieving interinstitutional agreements.

2. Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise. Other acts shall be adopted on the basis of a Commission proposal where the Treaties so provide.

6. Schmidt, Vivien A. (2013), *Democracy and legitimacy in the European Union* Revisited : Input, Output and 'Throughput', Political Studies Association, 61, pp. 2-22

7. COM(2001) 428 final

8. COM (2002) 278 final/2

9. COM (2002)0276

10. COM(2002) 704 final

11. COM (2002) 275 final/2

12. 2003/C 321/01

13. COM (2005) 97 final

14. Decision 14901/05

15. COM (2010)0543

16. COM(2012) 746 final

by a quest for legitimacy, which depends on the efficiency of governance and the quality of European legislation. [5]

Moreover, the European institutional system grants very little direct democratic legitimacy to the Commission. A first shift occurred with the European Elections in May 2014, which led to the emergence of the "Spitzenkandidaten" and the appointment of one of the candidates to lead the Commission. However this might be challenged in the next European elections. In addition to this "Juncker" jurisprudence is uncertain, and there is nothing to suggest that it will become one of the Union's customary rights. This new, indirect democratic legitimacy is also recent and the two Barroso Commission mandates from 2004 to 2014 were not part of it.

The European Commission's legitimacy is therefore mainly based on efficiency and the pertinence of its action: "output legitimacy" [6]. In other words, are the European public policies initiated by the Commission useful and recognised as such (since the perception of goals and that of the public of public policy are essential)? Do they achieve their initial goals and if this is not the case, are they adapted as a result?

b/ Thoughts about the long term

An analysis of the past fifteen years shows the importance of the "Better Regulation" tenet on the European Commission's agenda. The idea remains structurally the same: a dialectic between increased opening and transparency of the European legislative process on the one hand and the desire for increasingly efficient expertise on the other. Whether this involves the 2001 White paper on Governance [7]; the Commission's 2002 Communications regarding the "action plan to simplify and improve the regulatory environment" [8], *Impact Assessment* [9], "General principles and minimum standards for consultation of interested parties by the Commission," [10], and "European governance: better law-making" [11]; the 2003 interinstitutional agreement "Better law-making" between the Parliament, the Council and the Commission [12]; the Commission's 2005 Communication "'Better Regulation" for growth and

employment in the European Union" [13] as well as the "Common Approach to Impact Assessment" [14]; the Commission's 2010 Communication "Smart regulation in the European Union" [15]; or the Commission's 2012 Communication "EU Regulatory Fitness" [16], the same approach is promoted to improve the efficacy of European legislation. However the instruments are developing and adapting to previously adopted measures. Yet this succession of communications indicates that independently of evident good will, implementation and application have been unsatisfactory to date.

In response to this the Commission insists on the need for participation by all of the community's institutions and the Member States towards improvement, on the need to use consultations and impact assessment studies and even the requirement to simplify and assess European regulation.

For example in its 2002 Communication "Action Plan to simplify and improve the regulatory environment," the Commission aims, as far as the measures pertaining to itself are concerned, "to define minimum consultation standards", "assess the impact of major legislative and policy initiatives", "expand the explanatory memoranda accompanying legislative proposals" "include a review clause in legislative acts", ensure "the monitoring of adoption and application of legislative acts" notably via the "Commission making greater use of the opportunities to withdraw legislative proposals" and "ensuring the consistency of its legislative acts" and to implement the Communication's measures via "an internal "Better Regulation" network."

Beyond this the Commission calls on the "shared responsibilities" (the Parliament, the Council and the Member States) in improving the decision making process. Regarding the Parliament and the Council, the Commission exhorts them to "make a better adapted use of the instruments", "to simplify and reduce community legislation, as well as to pay attention to "the quality of the legislation adopted" notably via the appraisal of the "impact of the substantial amendments made by the European Parliament and the Council." Regarding the Member States, the Commission invites them to "transpose

the Community acts correctly within the given deadlines”, “to rationalise their internal procedures by introducing mechanisms that enable the involvement of their authorities”, to employ consultation and impact assessments notably “regarding possible additional measures inserted into the acts.”

We might note that an almost complete list of measures can be found in the Communication put forward in May 2015 by the Commission.

How might we explain this repetition?

A first explanation seems to lie in the complex nature of a legislative process, in which various institutional actors are involved, each pursuing their own strategy of influence. Moreover the Commission’s proposals are not necessarily supported by the other two institutions, thereby justifying this “step-by-step” policy. Each new stage contributes to improving regulatory procedure. The Commission acknowledged the complicated nature of this in 2005 when it stated: “A simpler and better regulatory environment will take time to materialize. Although the EU has achieved much in a relatively short period of time, these are but the first steps in what must be a permanent effort.” [17] One challenge facing the Commission is its ability to put forward a method and the tools, which will also be adopted by the other institutions.

A second explanation seems to lie in the inadequacy of the solutions brought to settle a public problem. The tools – consultations and assessment studies, simplification – were defined to solve a specific public problem – in this case non-optimal European regulation. But the essence of a public policy is to be assessed to see whether it can achieve the goals that have been set for it. And when the result of this assessment tends to be negative, the reasons for failure have to be identified so that that specific public policy might be adapted. The Commission’s “Better Regulation” might therefore give rise to the following paradox: it aims to assess and reform the entire European legislative framework without admitting the inadequacy of the instruments implemented to settle the problem. However choosing one or the other of these reasons is difficult since the answer certainly lies in a combination of both.

c/ Is it different this time round?

The desire to improve legislation is legitimate for any institutional organisation. But with the present Commission, in office since November 2014, it has taken a political turn. Of course the start of a mandate provides an opportunity for renewed impetus, but in this instance it has provided a means to respond to problems raised by certain Member States for a long time.

Indeed several States are oriented towards rationalising subsidiarity and proportionality. For example, in a letter addressed to the Dutch Chamber of Deputies on 21st June 2013 Frans Timmermans, the then Dutch Foreign Affairs Minister, established a list of 54 European rules, which, in his opinion, should be returned to the competence of the Member States. This exercise in subsidiarity deems that “the time for an ‘ever closer union’ regarding all possible policies, is over, and that the Union’s leitmotif should be: what should be European should be European and that what should be national should be national.” [18] For this exercise all of the ministers in the Dutch government analysed the legislation in force and that which was about to come into force. They singled out the European actions they deemed ought to be taken on a national level according to the subsidiarity principle, including domains in which existing standards went beyond what was necessary [19].

These requests are also part of a wider context of belonging to the European Union and to the legitimacy model via the resulting standard. In this case “Better Regulation” seems to enable a response to some of the requests made by the UK.

The specific political situation, which raises a deep-seated issue, seems to point to the following expression – regulating less in order to regulate better?

This is one of the observations we might make as we look at the tighter work programme for the 2014-2019 mandate: in 2015 the programme comprises the withdrawal of 80 proposals of the 450 that are waiting for a decision on the part of the Parliament and the Council [20]. The 2016 work programme provides for 23 initiatives against 130 in the previous

17. COM (2005) 97 final

18. The letter can be downloaded at the following address: <http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/kamerstukken/2013/06/21/kamerbrief-inzake-uitkomsten-subsidiariteitsexercitie/kamerbrief-inzake-uitkomsten-subsidiariteitsexercitie.pdf>

19. Explanatory paper by the Dutch authorities in English: <http://www.government.nl/files/documents-and-publications/notes/2013/06/21/nl-subsidiarity-review-explanatory-note/explanatory-note.pdf>
The list in English: <http://www.government.nl/files/documents-and-publications/notes/2013/06/21/testing-european-legislation-for-subsidiarity-and-proportionality-dutch-list-of-points-for-action/eindrappage-definitief.pdf>

20. European Commission, Press release: “A new start: a European Commission work plan for growth, employment and investment”: http://europa.eu/rapid/press-release_IP-14-2703_en.htm

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years [21], 20 pending modifications and proposal withdrawals [22]. This is the policy announced by Jean-Claude Juncker who, when candidate for the presidency of the Commission, declared to the Parliament: *"Not every problem that exists in Europe is a problem for the European Union. We must take care of the big issues."* [23]

Given all of this, the philosophy behind the new programme is part of the work undertaken by the institution since the beginning of the 2000, but it is now trying to provide new impetus to "Better Regulation": *"Over the last decade, the EU has introduced a comprehensive set of "Better Regulation" tools and procedures to ensure this. These important changes are already delivering results but this Commission has decided to go further."* [24]

II/ "BETTER REGULATION" 2015: NEW AMBITION AT THE SERVICE OF CONTINUITY

The 2015 version of "Better Regulation" aims to help the EU's public policies to achieve their *"goals more effectively and as efficiently as possible,"* with a three-fold strategy based on the enhancement of *"openness and transparency of the EU's decision making process,"* on an improvement of the *"quality of new laws thanks to improved impact assessment of draft legislative acts and proposed amendments,"* and on the promotion of a constant and consistent review of existing EU laws." [25] In other words the improvement of the European legislative process means being more efficient, more transparent and open, as well as monitoring and reviewing legislation (REFIT). How is this new programme unfolding?

a. Enhancing the openness and transparency of the European decision making process

The first of the three sections involves enhancing the openness and the transparency of a European decision making process that is often deemed opaque. To this end the Commission provides for measures in its communication that will enable the enhancement of the democratic and, at least, the citizen nature of this complicated process.

Amongst these measures the multiplication of public consultations during the decision making process is a major step forward. Now a 12 week public consultation will take place with every new proposal, assessment or review focusing on the quality of existing legislation. This approach exists already but it is now being strengthened. The Commission stresses that "Better Regulation" opens the door to greater public consultation. A record number of people entered observations under the review of the "Birds" and "Habitats" directive [26]. In addition to this there is a novelty – an 8 week public consultation will be undertaken when a proposal is adopted by the Commission; the contributions collated during this consultation will be communicated to the Parliament and the Council, which will now be able to include them in their work. Finally a four week consultation will be organised for delegated acts and implementing acts. This is a significant step forward since these acts were previously totally opaque. The Parliament has challenged these procedures on several occasions. More transparency will enable other institutions, as well as civil society, to play an active role. Moreover the Commission has committed to publishing an indicative list of the acts pending. In addition to this and still regarding transparency, the Commission is creating a web interface on which everyone will be able to follow the development of initiatives. At the same time a platform called *"Help us to reduce red-tape – Tell us what you think"* will allow every citizen to have his/her say regarding existing legislation or laws that are under preparation. The Commission is even quite frank when it writes *"we want to hear what people find irritating."* [27] However the method used to guarantee wide distribution and high return on the part of the citizens has not been revealed. It is likely that the answers given to this type of consultation will be made via structures organised to this end or by citizens movements involved in the topic. Moreover, since the path to hell is paved with good intentions, there is a real risk of the institution being overwhelmed. The Commission has already a resource problem in responding to oral or written questions set by MEPs, without counting the translation costs. Also a response or comment made to the public might be understood as a stance

21. European Commission, Q&A "The work programme 2015": http://europa.eu/rapid/press-release_MEMO-14-2704_en.htm

22. COM(2015) 610 final

23. Speech by Jean-Claude Juncker, "A new start for Europe": http://europa.eu/rapid/press-release_SPEECH-14-567_en.htm

24. COM (2015) 215 final, p.4.

25. Official press release by the European Commission: "Better Regulation" Agenda: Enhancing transparency and scrutiny for better EU law-making, Strasbourg", 19th May 2015, http://europa.eu/rapid/press-release_IP-15-4988_en.htm

26. Data quoted in "Progress Report on the European Commission's 10 priorities", October 2015 p.12

27. Com (2015) 215 final, p6

taken on the institution’s part. Finally, care has to be taken not to undermine this type of objective with overly burdensome procedures. The lack of use of the citizens’ initiatives shows this.

In addition to this public consultations and also, consultations with experts, presuppose an overlapping of responses. Which will take precedence? The extension of procedures might be a result of the “Better Regulation” programme. Finally the Commission has announced that “roadmaps” and “initial impact assessments” will be communicated via an automatic warning system so that “interested parties” can provide expertise as soon as the decision making process is launched. This implies representatives of interests, whose expertise is required by the institution at each stage of the programme: this does not mean regulating in an autarchic manner but ensuring that all of the vital elements for the analysis are taken on board.

b. Improving the quality of new legislation

The second part of the programme, improving new legislation, implies the use of pertinent expertise. This is typified by the multiplication of impact assessments. The Commission would like to see their use extended to the Parliament and the Council, which are not however very enthusiastic about using them, notably due to a lack of means in the first instance and out of preference for national expertise in the second [28].

In this regard the Commission is calling for the three Community institutions to agree on a new inter-institutional agreement, which should, amongst other things, offer them the means to use a group of independent experts to assess the impact of “substantial amendments made to the Commission’s proposal”; to prioritize initiatives whose content leads to simplification and improvement to existing legislation; to invite the Parliament and the Council to assess the impact of all the amendments when the agreement between them “is significantly different from the Commission’s initial proposal,”; to encourage the Community institutions to deliver intelligible, easily implemented legislation; to encourage the institutions to assess existing legislation; to prevent

“over regulation” (gold plating) by the Member States if this is unjustified and to demand that the latter justify any “gold plating”; to define jointly delegated acts. On this last point there is a real danger of dysfunction in terms of transparency and democracy. Indeed the system is extremely opaque notably in terms of the criteria which define the nature of delegated acts and their procedures.

Another significant measure to be added to this proposal for a new institutional agreement is the announcement by the Commission of the replacement of the impact assessment committee established since 2006, by a new “Regulatory Scrutiny Board” which will assess the quality of the impact assessments, check major assessments and also the main “quality reviews” regarding existing European legislation. To this end the new board will comprise a Chairman and six members, who will work full time and not have any other European policy under their responsibility. A major innovation is that three members will be recruited from outside of the Community institutions for a defined, non-renewable period, which tends to show the Commission’s determination to open up the “internal kitchen” to quote a metaphor employed by Frans Timmermans [29]. In theory this will weaken the idea that the Commission’s departments for project management are also responsible for their impact assessment. [30]

c. Implementing a review of existing legislation

Regarding the third aspect of this programme some devices are already part of the previously mentioned measures, notably under the new inter-institutional agreement.

Apart from the latter the Commission is targeting regulations that do not increase the administrative burden, notably of SMEs. This objective mainly entails the reform of the programme for clearer, efficient regulation (REFIT) which aims to do away with unnecessary red tape and adapt existing legislation. Also the introduction of a new “REFIT platform”, whose aim it will be to involve those interested in the assessment of European legislation, opens up new perspectives. Indeed the new platform that is due before the end of 2015, chaired over

28. According to the Commission, over the period 2007 to 2014, the Commission undertook more than 700 impact assessments whilst the European Parliament only used them twenty times and the Council never.

29. Press conference of 20th May 2015, Strasbourg

30. On an extrapolation of the study by Ms Laure de la Raudière and Mr Régis Juanico in the report from the ‘Assemblée Nationale’ dated 9th October 2014, n°2268, “Information Report on Legislative Simplification”, p.53

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by the Commission's First Vice-President, Frans Timmermans, will comprise experts from the business world, civil society and social partners, who will work alongside those of the 28 Member States, the Economic and Social Committee and the Committee of Regions. In 2016 the Commission's work programme indicates 40 quality reviews of legislation in force using the REFIT procedure. [31]

III/ THE CHALLENGES: OPENNESS AND TRANSPARENCY REGARDING POTENTIAL DEPOLITICISATION

On the surface the "Better Regulation" programme puts forward measures with which it is difficult to find fault. It is legitimate to support the addition of the public consultation process, the simplification of policy assessment bodies and even the inclusion of the feasibility of public action in its design, if it is proven that these measures will, *in fine*, lead to an improvement in the efficiency of European policy. However the ambivalence lies in the fact that this programme, beyond the declared goals, might pursue considerations that are specific to the Commission, and notably linked to the quest for the legitimacy of the latter, as well as the protection of its interests within the battle for institutional influence.

The power struggle between the Commission and the Parliament emerges notably in the reduction of the work programme down to 23 initiatives. This low number of proposals mechanically reduces the amount of MEPs' work. The "Better Regulation" programme appears as a complement to the tightened agenda in that the multiplication of impact assessments and public consultations could extend the decision making process. The Commission's approach points to an opportunity for the Parliament to use new levers to fine tune its expertise. In a provoking manner the Commission reminds us that "*the politicians' natural tendency is to focus on new initiatives*" [32] and it recommends that they concentrate on improving what already exists.

It is here that one of the first dangers of "Better Regulation" comes to light, i.e. that of a possible depoliticisation of the European decision making process, resulting from the Commission imposing its rationale of expertise regarding political

considerations on the other two institutions. The Commission knows that the obligation to use impact studies, notably in a context in which the Council and the Parliament came to an agreement that "*differed significantly from the Commission's initial proposal,*" would greatly reduce the Council's room for negotiation and even more that of the Parliament, since they do not have the adequate material or human means to undertake this type of study. In addition to this the Council and the Parliament clearly function according to a more political rationale than the Commission and do not therefore answer to the same imperatives. Hence expertise and feasibility might sometimes be supplanted by political considerations. Beyond any value judgement about the timeliness of that latter, the vote on minerals from zones of conflict on 20th May 2015 shows the pre-eminence that the political dimension can have over technical considerations [33]. Hence, if "*Better Regulation*" is accepted as it stands, there is a danger of depoliticisation.

The negotiations that have started between the three institutions on an "inter-institutional" agreement will be enlightening on this point. The Barroso I and II Commissions did not succeed in imposing the rationale of expertise on the other two institutions. However the Juncker Commission's ability to convince should not be underestimated, since the new Commission matches a political rationale that did not exist on this scale in the last two mandates. The Commission stressed this explicitly in its Communication of May 2015 when it maintained that "*improving regulation is not just an administrative exercise.*" [34]

At the same time the Parliament is not the only one to have expressed doubts about this new approach that aims to legislate less to legislate better. Hence in response to the Commission's presentation of its programme some civil society organisations created a platform "the 'Better Regulation' Watchdog" that aims to ensure that the agenda is not used to weaken or negate European labour, consumer, citizens' and environment law [35]. The Commission maintains that "*Better Regulation is not about 'more' or 'less' EU legislation; nor is it about deregulating or deprioritising certain policy areas or compromising the values that we hold dear: social and environmental*

31. The detailed list : annex COM(2015) 610 final : http://ec.europa.eu/atwork/pdf/cwp_2016_annex_ii_en.pdf

32. COM (2015) 215 final, p 11

33. On 20th May 2015 after having thrown the European Commission's proposal as well as that of the EP's international trade committee the European Parliament adopted a draft bill requiring an obligatory certification of European companies importing pewter, tantalum, tungsten and gold in order to guarantee that these minerals do not come from zones of conflict. The Commission and the proposal from the international trade committee defended the idea of voluntary certification, promoting the non-feasibility of obligatory certification as well as its cost to businesses.

34. COM (2015) 215 final, p.4.

35. http://www.beuc.eu/publications/beuc-x-2015047_upa_better_regulation_watchdog_founding_statement_and_members.pdf

protection, and fundamental rights including health - to name just a few examples. "Better Regulation" is about making sure we actually deliver on the ambitious policy goals we have set ourselves." [36]

Moreover there is a question of knowing whom the consultation processes added to that of decision making, are really addressing. For the informed observer they are clearly directed towards the traditional "players" (NGO's, businesses, professional federations, consumer associations and unions) in the policies in question whose power struggles will be spread across many more levels, due to the multiplication of consultations and assessment platforms. Indeed reality shows that these consultation platforms are directed towards organised representatives of interest (industries, businesses, NGOs and consumer associations), which provide their expertise, information and hindsight). Hence the transparency and openness of the European decision making process is *de facto* placed at the service of the expert.

Finally defining the methodology to be used during impact assessments augurs for some uncertainty. The Commission maintains that the economic, social and environmental consequences of any new proposal will be taken on board, whilst one of the major tactics of the Brussels lobbyists is to challenge the methodology of every study which does not go in

their favour. How will the new programme improve the methodology that is used?

CONCLUSION

In spite of its technocratic aspects "Better Regulation" provides response to criticism related to Brussels' opaqueness. Indeed the Commission is applying a wide range of its "new" proposals. This programme seems almost to be more oriented towards the two other institutions than towards the Commission, which in fact is applying it already. The paradox of calling for less bureaucracy, whilst adding layers to it, enables the association of the desire to regulate better and to avoid "over regulation". However we should remember that more than procedures, the men and women who embody the Commission are the ones who will make the latter "*more political and bring it closer to the citizens.*" [37]

Charles de Marcilly,

Manager of the Robert Schuman Foundation's Brussels office,

Matthias Touillon,

a graduate of Sciences Po Grenoble, Research Assistant

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36. COM (2015) 215 final, p.4.

37. The long version of our article called "Expertise over Politics", in Euractiv.eu, 4 August 2015, et ""Better Regulation" : the democratic panacea for the European Union", in Les Echos, 19th August 2015