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Technical Differences or Power Play? EU Inter-institutional (Dis)agreements over Better Regulation

Karolina Borońska-Hryniewiecka

Negotiations between the European Commission, the EU Council and the European Parliament on the new Inter-institutional Agreement on Better Regulation are unlikely to be concluded, as originally planned, before the end of 2015. An overview of the positions of these three parties reveals conflicting approaches to how the EU legislative process should work. It also exposes a clear case of power play between the institutions, and poses the question of whether EU policymaking should evolve in a more political or technocratic direction. It is in the interest of Poland, as a member of the Council supporting the community method, to advocate for more expertise in EU policymaking, but not to the detriment of democratic principles of EU governance.

On 25 June, the European Commission (EC), together with the EU Council and the European Parliament (EP), officially started negotiations on the new Inter-institutional Agreement on Better Regulation (IIA), aimed at improving the quality of EU law-making. The new IIA is viewed as a document of high political importance for several reasons. First, it will replace the 2003 IIA, signed against a very different institutional, political and economic situation. Second, it is supposed to adjust the EU legislative process and streamline cooperation between the three EU institutions, to better suit the post-Lisbon setting. Third, it is being pursued at a moment in which the EU is seeking to become more competitive by cutting regulatory burdens for businesses and ensure a speedy completion of the single market. Fourth, the new IIA is viewed as the EU's response to British demands for EU reform and cutting red tape. Finally, civil society organisations expect the new IIA to bring more transparency to the often opaque process of EU policymaking.

The issues covered by the Commission's IIA proposal, which forms the basis of negotiations, range from organisation of legislative programming, through improving EU regulatory tools, to ensuring swifter implementation of EU law, and will have repercussions in virtually all policy fields. Yet the document does not enjoy the unanimous backing of the two co-legislators. It looks likely that each of the three lawmakers will use the IIA to maximise their own powers and limit those of others.

Control of Legislative Planning. Both the EP and the Council criticise the new IIA for what they claim is insufficient involvement in the process of annual and multi-annual programming. They perceive the EC as wanting to centralise its powers by imposing its agenda on others. In fact, the Commission's assurance of an "exchange of views" on its draft annual work programme (CWP) is a step backward with respect to the current setting, and might fail to ensure joint ownership of future legislation.

The EP, which would like to take a more pro-active stance in proposing legislation under its right of indirect legislative initiative (Article 225 of the Treaty on the Functioning of the EU), has urged the EC to commit in the IIA to providing robust explanations in the event that it does not want to take legislative action suggested by the EP. In fact, the current proposal to only "inform the institution concerned of the reasons" does not seem sufficient. The same should apply to any future envisaged withdrawals of legislative proposals, for which the EC should submit similar justifications.

The Council, on the other hand, would like to ensure that it has an equal role to the EP in legislative programming, and postulates the inclusion in the IIA of a detailed mechanism for consultation of annual CWPs, something that is missing from the current agreement. One of the conflicting views between the EP and the EU Council is their perception of the role of the European Council in multi-annual programming. While the EP holds that it should not pre-empt the content of future legislation by intervening in the process, the EU Council insists that CWP priorities should lie specifically within the European Council's strategic agenda.

Cutting Regulatory Burdens. The three institutions also disagree on the way the EC proposes to simplify EU law and cut red tape. The EP, together with representatives of civil society, view the IIA as a one-sided drive to deregulation, due to its excessive focus on calculating the financial costs of proposed EU solutions for businesses rather than on meeting social and environmental standards, which cannot often be quantified. While such criticism is only partly justified (the EC conducts qualitative analyses), it would be right that EU lawmakers take into account the cost of not taking action at the EU level, especially in the long run.

For national governments in the Council, the biggest bone of contention is the EC's requirement to report on "gold plating", which is adding extra rules to EU legislation during its transposition into domestic law. The IIA foresees that Member States will provide justification for any such actions and even carry out their own Impact Assessments (IAs) where appropriate. The vast majority of national delegations bluntly see this suggestion as "unacceptable" since Member States have the full right to introduce further-reaching regulations than those accepted at the EU level.

More Impact Assessments. It is precisely the requirement of the IIA, directed to the co-legislators, to conduct their own impact assessments prior to the adoption of any substantial amendments that evokes the greatest controversy. The EC also proposes that each institution may call, at any time, for an independent panel to carry out an IA of the proposed amendments. For the EP, such possibility is unacceptable as it would seriously depoliticise the legislative process by shifting power from democratically elected politicians to hired experts. While the EP invests in its own IA infrastructure, it claims that it should be up to each co-legislator to define whether and when to conduct IAs. Moreover, the multiplicity of IAs would not only slow down the legislative process, but it would also generate additional costs at EU level.

The Council also views such an obligation as a threat to the political character of the legislative process. While the Council should, in principle, invest in building its own analytical capacity, the question is how to ensure independence and objectivity in an institution driven by national interests.

Controversy over Delegated and Implementing Acts. A real bone of contention in the IIA proposal is the question of dealing with delegated and implementing acts (D&IAs), that is, measures that supplement or update basic legislation. These might refer to food labelling, authorisation of GMO products, or the imposition of milk quotas, and are important for industry, business and consumers. In practice, differentiation between D&IAs is very unclear, and provokes conflicts between the legislators as to who should approve their application. This results in significant delays in the legislative process.

The aim of the EP, which favours delegated acts, is to capitalise on its recently granted powers to scrutinise them on the same basis as the Council. To this end, it supports more rigid delineating criteria between D&IAs, and wants the IIA to ensure it equal access to information on the process of delegation. As implementing acts are out of parliamentary control, the EP objects to assigning "multi-annual and annual financial programmes" and "authorisations" to this category.

The Council, on the other hand, would like to keep delegated acts to a minimum, preferring implementing acts, which give Member States more scope to influence EC's texts and require less transparency. It is also important for the Council that the IIA include a requirement for consultation with Member State experts during the drafting of delegated acts and, contrary to the EP's position, the Council seeks less rigid delineation criteria between delegated and implementing acts.

What Union Do We Want? The negotiations over the IIA reveal that, in many aspects, the notion of better regulation is understood differently by EU lawmakers. These differences do not refer to mere technical arrangements but to the operational logic of the EU regulatory system, and reflect a clear case of power play between the institutions.

Countries such as Poland that support the community method but also seek guarantees to ensure the political interests of Member States should seek to strike the right balance between simplification and effectiveness of EU regulatory regime on the one hand, and democratic oversight on the other. To this end, such countries should advocate within the Council that the EC commit to conducting comprehensive trilateral consultations during legislative programming. This will ensure that the general interest of the EU is genuinely promoted, and guarantee uniform support for its proposals. The discussion on the 2016 CWP will be a test for such a formula. Cutting regulatory burdens should be accompanied by a more long-sighted approach to IAs, taking into account the "no EU-action" scenario. At the same time, this should not lead to imposing limits on Member State transposition of laws in cases where national legislation goes beyond EU requirements. To ensure better democratic oversight of the EU, the EC should not over-rely on implementing acts when their contents have important effects on consumers and environmental issues. In these cases, the EP should be allowed to scrutinise them on the same basis as the Council. Finally, while the EP and the Council need to invest further in their own analytical capacities and robust IAs, these should complement, not replace, political judgment. More technocratic policymaking is not a good idea at a time of an EU legitimacy crisis.