

The true face of Better Regulation regarding environmental policy

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In December 2014, as part of its Better Regulation policy, the European Commission announced its intention to curtail significantly a number of important environment legislative proposals already in the pipeline, but the authors, all members of Avosetta, question both the legality and the substance of the Commission's decision.

The Avosetta Group consists of leading academic environmental lawyers in nearly every EU Member State who have been concerned with the development of environmental law in the European Union and Member States.

In that the European Commission is endowed with the sole right to initiate the legislative process in submitting proposals for legislation to the European Parliament (EP) and the Council, the EU democratic structure is known to be somewhat atypical. Thanks to its monopoly on the legislative initiative, the Commission is a key EU institutional player, and in the past, has succeeded in promoting a large body of legislation covering a broad range of competences. One can no doubt argue that, even though it has neither an army nor a police force, the EU became a global power, due to its dynamic legislative process, with its rules reaching far beyond the borders of its 28 Member States.

But this power to initiate is also a power to chill, as we may induce from recent policy developments regarding environmental issues. On Tuesday 16th of December 2014, the new Juncker Commission announced to the European Parliament its Work Programme 2015. The Commission's power to initiate is exclusively focussed on creating job opportunities. In relation to environmental policy any new vision is missing. Here, the Commission only looks at existing legislation and pending proposals asking if they are “fit for purpose” or are still topical.

This does not come as a surprise in relation to the refitting programme, although one would have expected that the Commission reconsiders if the checking of some of the legal acts designated for evaluation may not come out as counterproductive. For instance, the sensible but sustained compromise between environmental and economic interests achieved in EU nature protection law may be blurred if the Natura 2000 directives are tested in terms of economic efficiency.

The real surprise however comes from the content of the so-called ‘clear the decks’ list. There are potential withdrawals or freezing of initiatives which directly interfere with the substance of important developments, including the circular economy and new national limits on air pollution. Members of the European Parliament, 11 Member States and Non-governmental organizations have already reacted strongly, and have called into question the legitimacy of the European

Commission's sole right of initiative and the right to revoke proposals already on the table. As academics and experts in environmental law and policies, we too wish to express our concern at these developments. If the Commission wants to be big on big things and small on small things, where does it place environmental and health issues?

Farewell, circular economy and air pollution commitments

One of the initiatives that the Commission now wishes to delay concerns the circular economy, the aim of which being to turn waste into valuable secondary raw materials. So far, waste management policies have been successful in the EU inasmuch as there was a common playing field made up of directives laying down recycling obligations (cars, electrical waste, packaging, etc.). In a nutshell, the circular economy proposal is designed to increase recycling thresholds for a broader range of wastes. Expected benefits include the decoupling EU's faltering economic growth from its dependency on natural resources imported from third countries, boosting growth and jobs creation, and improving the state of the environment. The existing proposal is to be withdrawn because it is claimed there is "no foreseeable agreement" between member states and the European Parliament, and that the new Commission could do better. The Commission wants to replace it with new proposals next year.

The second proposal on the danger list concerns national reduction commitments for reducing air pollutants, including Nox and fine particulates, and directly relates to new international commitments adopted under the 2012 Goteborg Protocol agreed under the framework of the 1979 Geneva Convention on Long-Range Air Pollution. Despite the fact that it has already been negotiated for three years. The Commission now wants to block this proposal in order to take the opportunity to merge it better with long expected legislative proposals on the 2030 climate and energy package. Or is this in reality to simply lose more time again? One has to bear in mind that air pollution remains a major source of damage to health and the environment, with - according to the European Commission's impact assessment in 2013, an estimated 400,000 premature deaths per year and direct economic damage amounting € 23 billion a year. (€15bn from lost workdays, €4bn healthcare costs, €3bn crop yield loss and €1bn damage to buildings).

The Commission's decision to withdraw these proposals are based on the assumption that the two legislative packages would be unrealistic and would be too burdensome for the industry. But in fact they do not look especially demanding, and could even create jobs and stimulate innovation.

Why not restarting from scratch?

From a legal perspective, the Commission's decision begs the question whether Treaty law permits the European Commission to withdraw quite so easily major legislative proposals that have already discussed within the Council of Ministers? Rather than only streamlining existing legislation one would expect the Commission to set up a programme searching for the areas of non-attainment of objectives and designing new legislation. There are legal and political reasons supporting this quest.

First, both a progressive clean air policy and an efficient circular economy were among the key objectives of the 7th General Union Environment Action Programme to 2020 that was adopted on the 20 November 2013 by a legally binding Decision of the European Parliament and the

Council. From a democratic point of view, it would be odd that an executive agency is able to depart so easily and so significantly from the Union lawmaker's 2013 policy goals. It is fair to say that the Commission's proposals have to be in line with a policy programme adopted by the lawmaker

Second, a broad range of environmental objectives and obligations – sustainable development, high level of protection, integration clauses, policy principles, and fundamental rights – are enshrined in the Treaty on the EU, the Treaty on the Functioning of the EU (TFEU), and the Charter of Fundamental Rights, and thus occupy a high place in the hierarchy of EU norms. Both the TFEU and the Charter require the Union to aim at a high level of environmental and health protection, sustainable development is enshrined in Article 3(3) TEU as one of the key objective of the EU legal order and stands alongside the internal market. Article 11 TFEU provides that environmental protection requirements be integrated into the definition and implementation of the Union's policies and activities. The concept of Better Regulation as envisioned by the Commission has to be consistent with these Treaty obligations, since an administrative practice can in no way prevail over Treaty law. Third, in withdrawing the two legislative packages at this particular time, the Commission sends a confusing image of the EU's environmental leadership on the eve of the Paris conference on climate change.

Finally, giving up ambitious environmental policies is counterproductive from an internal market perspective. Waste and pollutants do not respect Member States borders. Indeed, the EU is better placed than 28 individual Member States to lay down common regulatory framework to deal with these issues. What is more, the Commission's own impact assessment studies highlighted the business opportunities and the job growth the two legislative packages were likely to create: 180,000 new jobs from the circular economy, and the benefits from reduced air pollution of around € 40 billion a year, over 12 times the costs of pollution abatement.

Is there a way back?

How can the European Parliament and the Council reactivate the legislative process? For a start they can first under Treaty law oblige the Commission to come up with legislative proposals to address a specific issue. Second, they can remind the Commission that a definitive withdrawal from existing proposals would run counter the general legal principle of loyal cooperation.

The authors believe that the Commission's decision, if maintained, could undermine the European Union's global leadership role at a critical time in the run-up to the 2015 Paris meeting on Climate Change and call upon the Council of Ministers and the European Parliament to use their legal and political powers to ensure that the Commission reconsider its decision and reactivate the core environmental proposals it wishes to withdraw.

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