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“Impact assessments: where do they come from, where should they go”

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Index:

Foreword	3
Author's preliminary reasoning over the content	
Introduction	4
An overview of the paper together with its main findings	
1 Where do Impact assessments come from?	5
<u>1.1 RIA: from the cradle to present days</u>	
1.1.1 <i>Presidents Nixon, Ford and Carter and the "ex-ante assessments"</i>	5
1.1.2 <i>RIA under Reagan administration</i>	6
1.1.3 <i>RIA under Bush (sr.) and Clinton administration</i>	6
1.1.4 <i>George W. Bush and Obama administration</i>	7
<u>1.2 RIA: technical features</u>	7
1.2.1 <i>The structure</i>	7
1.2.2 <i>The procedure to draft a RIA document</i>	8
2 EU's IA procedure: proud daughter of mother RIA?	9
<u>2.1 What is behind the EU adoption</u>	9
2.1.1 <i>Strengthening ex ante analysis</i>	9
2.1.2 <i>An (un)desirable convergence</i>	10
2.1.3 <i>Progresses</i>	11
<u>2.2 The IA model following the 2009 guidelines</u>	11
2.2.1 <i>Part 1: IA basics and Procedures</i>	11
2.2.2 <i>Part 2: key analytical steps in IA</i>	12
2.2.3 <i>Part 3: annexes</i>	13
3 Is impact assessments quality being enhanced over time?	13
<u>3.1 Who watches over the quality?</u>	13
<u>3.2 The scorecards</u>	14
<u>3.3 Overview of IAs from 2003 to 2010</u>	15
3.3.1 <i>IAB opinions</i>	16
3.3.2 <i>Impacts measurement: CBA, CEA</i>	18
3.3.3 <i>Impacts measurement: environmental, social and economic impacts</i>	20
3.3.4 <i>Comparison of options</i>	21
4 IA, a concrete example. Getting hands dirty	23
<u>4.1 IA presentation</u>	24
4.1.1 <i>Problem definition</i>	24
4.1.2 <i>Objectives</i>	24
4.1.3 <i>Policy options</i>	24
4.1.4 <i>Analysis of impacts</i>	25
<u>4.2 Here we are again... options comparison</u>	26
<u>4.3 IAB opinions</u>	28
<u>4.4 What to say?</u>	28
5 Conclusion	29
Bibliography	31

-FOREWORD-

The need to foresee the impact of our actions does exist, and this is a matter of fact; or, to say it more philosophically, every human being has the aspiration to comprehend the effects he could produce with certain behaviors rather than others, given the environment and the circumstances surrounding him.

When I first approached the study of econometrics, I couldn't help being fascinated by the idea to predict something while investigating all the different factors that diversely and complementary affect it. My enthusiasm aroused particularly because it was the first time since I started studying economics that I was not asked to simplify some models to render them more understandable; instead, I had to render them multifaceted and detailed. Not that I have something against simplicity and essentiality *in se*; but before the econometrics course I developed a hate for over simplistic ways to portray some economics aspects, which are exactly the approach used with early-years economics students (and probably the only method that prevents them from running away) but which left me with the impression to be sweating on something too unrealistic to be useful.

However, the sign that such enlightening econometrics course traced on my studies is probably due more to the second big discovery it brought me to: namely that, whatever approximation one can perform to portray reality, the model obtained will never perfectly mirror it. It remains, in fact, an over simplistic one. Quite an ironic situation, but at least I finally had the intuition of what Pascal meant with his famous aphorism "the last function of reason is to recognize that there are an infinity of things which surpass it."

Acknowledging the limit of models is the first, necessary step to accept that whatever analysis or forecast one performs, it remains a "best approximation" of reality. One could investigate the countless side-effects that such avowal produces on human's pride, but this is not in the scope of the work here introduced. Instead, one particular feature to be taken into account and that constitutes the *fil rouge* of this paper is the perfectibility of an analysis, aspect which probably induces less existential reasoning and pushes a more optimistic attitude. In fact, the good side of what was admitted at the beginning of this paragraph is that the word "approximation" already reminds the concept of a continuous approaching to something, a never-ending path toward the goal, where the closest portray of reality is yet to come. In the study of law and economics, I found this concept particularly true for what concerns impact assessments for future regulations: there, *ex ante* analysis of the effects is performed to try to avoid unexpected and undesirable outcomes and the intent is to foresee which legislative option, among a number of possibilities, induces the best scenario. That said, it is already clear that any *ex ante* analysis is a conjecture: thus, due to its own nature, it will never equal reality in each and every aspect. Acknowledging this could lead to a halt in such analysis; or, after one has recognized the limit, he can push his efforts toward it, seeing that any impact assessment is better than no assessment at all. Whether it is at personal level or at an institutional one, impact assessments will have to be grounded on assumptions and proxies, this constituting both the source of their limitedness and the origin of their perfectibility. The medal is, as usual, two sided; but as long as one accepts the limit, it is worth spending a word on the ways through which improvements can occur. This is exactly the final aim of present work: to stimulate thought on the future steps to be taken to ameliorate the impact assessment exercise (with particular focus on the European Union practices), in order to provide a better fit of regulations to the Union needs.

Introduction

The present work observes the quality of Impact Assessments carried out in the EU: the goal is to suggest action spaces to improve its exercise, so to optimize the procedure with respect to the community needs.

For this reason, the historical background is first presented, describing the US' RIA history and its model, which constitutes the ancestor of EU's IA (Chapter 1).

Subsequently, the European IA model is introduced, and its key differences with RIA are highlighted, so to present the different rationales that hold behind the two practices, and thus reveal why certain "adjustments" can fit a model but not the other (Chapter 2).

Later, the scorecard instrument is presented and its data adopted to carry out an analysis of IAs over the period 2003-2011; the patterns and trends over the years are highlighted so to provide insight on quality of the drafts (Chapter 3).

The weaknesses underlined generally in previous chapter are then studied more specifically, through a "real life" example: Impact assessment SWD 401 (drafted in 2012) is analyzed, to describe in details the way economic analysis and comparison of options is carried out when quantitative analysis is absent (Chapter 4).

Finally, conclusive chapter summarizes the findings and draws the possible paths available to improve IAs exercise (Chapter 5).

Chapter 1 - Where do Impact assessments come from?

1.1 RIA: from the cradle to present days

1.1.1 Presidents Nixon, Ford and Carter and the “ex-ante assessments”

The impact assessment exercise, as it is currently broadly performed at institutional level, is “nothing more” than the *ex ante* assessment of effects of a new regulatory measure. Such practice finds its roots in the early seventies of twentieth century when in the US, under the Nixon administration, some regulations were first issued requiring the calculation of prospective expenses and economic advantages¹. Later on, during the Ford administration, such practice evolved, and the idea of the computation and comparison of benefits and costs became particularly in vogue, being seen a necessary step to regulate in a more efficient way. The wording “impact assessment” first appeared in the Executive Order (EO) 11821, issued in 1974 following the president’s concerns about the inflationary impact of the regulations by the federal government; the document mandated and designed the procedures for preparing Inflation Impact Statements that were designed to make clear the economic impacts of regulations proposed². The statements were initially drafted by the various executive agencies and later reviewed by the Council on Wage and Price Stability (CWPS). The title of the EO 11821 was later amended to reach its final wording: “Economic Impact Statements”³.

In February 1978, President Jimmy Carter established the Regulatory Analysis Review Group (RARG). That cabinet-level body had the authority to review the most important regulations proposed, while the huge volume of analytical work was always performed by the CWPS. To formalize regulatory review during his administration, President Carter issued Executive Order 12044 in March 1978, replacing Ford’s Economic Impact Statement with the Regulatory Analysis. It is already in this document⁴ that some important peculiarities of regulatory analyses are set, those which were maintained in successive modifications and today are still present in modern form of Regulatory Impact Assessments (RIA): namely, that regulations shall explicitly follow a need of public intervention, that consultations shall include opinions of individuals from the general public, that the analyses shall include all meaningful alternatives to a regulation, that the regulations shall be periodically reviewed. In addition, a rudimentary cost-effectiveness test was mandated, to ensure that “the least burdensome of acceptable alternatives has been chosen.”⁴

Both Presidents Ford and Carter encouraged analyses weighing the costs and benefits of proposed regulations, but the final authority for rule promulgation still belonged to the regulating agency; thus, even if cost effectiveness analysis was performed, no rule mandated that an agency could promulgate only regulation whose costs would exceed benefits, as the analysis had only advisory

¹ For a more detailed discussion see Renda (2011), “*Law and economics in the RIA world*”, Intersentia ; page 18 paragraph “*the early years*”.

² See e.g. M. Weidenbaum, (2000), “*Regulatory process reform from Ford to Clinton*”, the CATO Institute; (available at www.cato.org/pubs/regulation/regv20n1/reg20n1a.html).

³ The Executive Order 11949 of December 31st 1976, where the title of EO 11821 was amended, is available at www.thecre.com/ombpapers/ExecutiveOrder11949.htm.

⁴ The document of Executive Order 12044 (Improving Government Regulations) of March 23rd 1978 is available at <http://thece.com/pdf/12044.PDF>

relevance.⁵ A more effective procedural law toward reform was the Paperwork Reduction Act of 1980, which took effect right after President Carter left office. The act created the Office of Information and Regulatory Affairs (OIRA), in the already existing Office of Management and Budget (OMB), to over watch that the burden of federal reporting requirements was effectively reduced, as required by the act.

1.1.2. RIA under Reagan administration

On February the 17th 1981 President Reagan, with EO 12291⁶, appointed OIRA to review the regulations promulgated by the agencies invested with executive power, and mandated to all agencies the drafting of Regulatory Impact Assessments (RIA) following given instructions and schemes. This was the first time that the RIA acquired a well-structured form, standardized for every analysis to be carried out.

Reagan strongly sustained regulatory reform, which he considered a fundamental measure to heal US economy. In this direction, the President established the Task Force on Regulatory Relief, chaired by George Bush (senior), who at that time was Vice-President. Moreover, the failure of precedent administration in reforming regulatory process was partly due to mere advisory relevance of RIA: with the already mentioned EO 12291, Reagan addressed the issue and cleared that “regulatory action shall not be undertaken unless the potential benefits to society from the regulation outweigh the potential costs to society.”⁶

The same document required agencies to draft a RIA for each "major rule" pending and the OIRA to review them; until the review was completed and eventual concerns were addressed, the other agencies could not formalize a proposed rulemaking. For what concerned organization, President Reagan abolished the CWPS and shifted its regulatory review power to the OIRA.⁷

1.1.3. RIA under Bush (sr.) and Clinton administration

Bush, who succeeded Reagan, did not change much of the existing regulatory process reform program set by the former President. The main structural modification was in March 1989, when the Council on Competitiveness replaced the Task Force on Regulatory Relief; it was headed again by the then Vice-President, Richard Quayle, whose mission was to abrogate the federal rules hindering US firms' competitiveness. In January 1992, due to criticisms and pressuring to pursue the reform, Bush imposed a three month moratorium on the issuance of new laws: agencies were required to evaluate existing regulations and eliminate any unnecessary regulatory burden, request inspired to Reagan's intent to relieve the burden of regulatory activities on the economy.

Under the Clinton administration, the existing executive orders on regulatory review were rescinded and the Council on Competitiveness abolished, while the “Reinventing Government” project was launched to take the vacant role. In September 1993 the EO 12866 was issued to redress the Reagan-Bush initiatives which were found to render OIRA excessively powerful in regulatory

⁵ See Weidenbaum, *supra* note 2.

⁶ The text of EO 12291 (Federal Regulation) of February the 17th 1981 is available at www.thecre.com/pdf/EO12291.PDF

⁷ See Weidenbaum, *supra* note 2 and Renda, *supra* note 1

making process⁸. This newborn Executive Order endowed OMB (of which OIRA was part) with the power to syndicate over proposed regulations only within a limited lag of time, *de facto* impeding it from postponing every regulation they did not want to consider a “major rule”; after the said amount of time elapsed, the President would intervene to solve any controversy between OMB and federal agencies.

This mechanism was found to incredibly contribute to enhance transparency in US lawmaking process with respect to the past.⁹ However, whereas Executive Order 12291 impeded to publish a rule until the OMB’s concerns were addressed, Order 12866 brought the situation back to the standards of the pre-Reagan years, with agencies only having to make sure “that the benefits of the intended regulation justify its costs”. By saying “Justify” and not “exceed”, the EO rendered the criteria a subjective one, as before Reagan intervention. With another clause of Order 12866, President Clinton reduced the enormous amount of workload which was falling on OMB’s shoulders every year, and this produced quite satisfying results¹⁰.

1.1.4. George W. Bush and Obama administration

After Clinton’s presidency, the eight years of Bush administration were characterized by several changes deeply affecting RIA structure, and in particular the redefinition of powers attributed to OIRA and the Vice President: the latter was removed from its usual prominent role in regulatory review process, while the first was restructured into only four branches:

- 1) Health, Transportation and general Government;
- 2) Information Policy and Technology;
- 3) Natural resources, Energy and Agriculture;
- 4) Statistical and Science Policy¹¹.

It was argued¹² that the removal of Vice-President from his role caused a mutation in the relationship between OIRA and the other agencies, this arriving to resemble more a rivalry than a collaboration.

Under Obama’s presidency a radical turn back was marked: with EO 13497 he “restored the regulatory review process to what it had been under Executive Order 12866 between 1993 and 2007”¹³. The newly-appointed chairman of OIRA, Cass R. Sunstein, described President’s attempts as expressing the willingness to render RIA “closer to human beings”: this meant taking into account the human behavior to the side of mere rationality and willpower, accounting for data beyond purely monetary measures, strengthening government transparency.¹⁴

⁸ See the text of EO 12866 available at www.thecre.com/pdf/Administrative_Law_Review.pdf

⁹ See, Renda, *supra* note 1, section “RIA under the Clinton Administration” (ch. 2.1.3).

¹⁰ See Renda, *supra* note 1, and the OMB’s Report to Congress on the Costs and Benefits of Federal Regulations (available at www.whitehouse.gov/omb/inforeg_regpol_reports_congress/).

¹¹ See e.g. Renda, *supra* note 1, section “RIA Under George W. Bush” (ch. 2.1.4) for more details on previous structure of OIRA and reorganization effects.

¹² See the Report by the General Accounting Office (GAO) on *OMB’s Role in the Reviews of Agencies’ Draft Rules and the Transparency of these Reviews*, September 2003; (available at www.gao.gov/new.items/d03929.pdf)

¹³ See OIRA Memorandum M-09-13, (available at www.whitehouse.gov/sites/default/files/omb/assets/memoranda_fy2009/m09-13.pdf)

¹⁴ See e.g. Renda, *supra* note 1.

1.2 RIA: technical features

1.2.1 The structure

As time elapsed, the RIA procedure was consolidated and reviewed, until it obtained a defined structure; this consists of different steps to be taken necessarily into account while assessing the impact of a given regulation¹⁵:

- First, the *definition of a problem* is required: it is necessary to identify the flaw present in the system, its cause, and then determine whether the need for intervention exists.
- The *identification of different regulatory options* follows: what are the feasible approaches to address the issue? Any RIA should contain different options, varying in terms of legal means proposed.
- RIA requires a collection of information and data relevant to the issue at stake; *data collection* is thus the third necessary component of the assessment. Following it, the validity of an option and its dominance (in desirability terms) over another shall be determined following a proper data analysis.
- Those *different options presented* are varying in the approach toward the problem (i.a. they suggest different solutions); obviously, this implies the occurrence of different impacts on the scenario; the comparison of these alternatives is therefore meant to detect optimal choices. The criteria generally used for this purpose are Cost-Effectiveness Analysis (CEA), Cost-Benefit Analysis (CBA), Least-Cost assessment (LCA) and risk analysis.¹⁶
- The said comparison of alternatives leads to the *identification of a preferred option*, (but as the analysis is not binding the issuance of the selected policy proposal is not mandatory).
- The *in depth assessment of the impact of the preferred policy option* is then needed to quantify the prospective impacts and risks, devoting time to the elaboration of a follow-up strategy, to monitor evolution of variables over time.
- At the end of RIA procedure, its findings are summarized into a document, to be used as *input to policy proposal*, again not binding. The RIA draft closes with notes and indication to monitor future progress and the impact of the selected policy option (if regulation adopts it) over time.

1.2.2 The procedure to draft a RIA document

What is remarkable about RIA is that it pertains only secondary legislation, namely the regulations proposed by agencies¹⁷, and that it is not mandatory for each and every regulation, but only for ‘significant regulatory actions’¹⁸, detected following specific criteria.

For what concerns procedural aspects, the RIA drafting takes several steps. The first one encompasses OIRA’s action as a supervisor, through feedback provision and formal review; after these preliminary consultations, RIA is published together with the draft rule into the *Federal Register* for a period of 60 days, during which the public can provide comments and notes. After this consultation stage, the RIA is finalized and revised; afterwards, OIRA has 90 days to approve

¹⁵ See, among the others, Renda, *supra* note 1; and Renda, “*Impact assessments in the EU. The state of the art and the art of the States*”, Centre for European policy studies, Brussels (2006).

¹⁶ See Renda, *supra* note 1

¹⁷ See Renda, *supra* note 1

¹⁸ See, as mentioned in historical background, Executive Order 12866, *supra* note 8

or reject the rule proposed, depending on the quality of the CBA performed by the agency.¹⁹ Then if the proposal has been judged satisfactory, the procedure continues; otherwise, the agency has to redraft the document that the OIRA sent back with the so-called “refusal” letter. During the whole procedure, OIRA reviews the proposal three times: at the planning stage, before the publication in the *Federal Register* and before it is finally published in its final form.

The main analytical models for RIA, as noted in previous section, are CBA and CEA; the two are anyway adopted in different circumstances, as the first is the standard one, normally used for all RIAs except for health and safety ones, where the CEA is required instead. This substitution holds true unless the benefits and the costs of the health-related proposal are easily computable; if this is the case, then the Cost-Benefit Analysis is preferred. However, the CBA shall not be considered as the “absolute sovereign” in the regulatory panorama, as in all the cases when the law is in conflict with it, the law prevails, as pointed out by Harrington *et al.* (2009).²⁰

Chapter 2 - EU’s IA procedure: proud daughter of mother RIA?

Up to this point of present work, the European Impact Assessment (IA) procedure found only little attention; this chapter points out the way in which the examined US RIA model constitutes the roots and the basis for EU’s IA. The history of European Impact Assessment model is summarized, highlighting the contrasts and the shared characteristics with its predecessor.

2.1 What is behind the EU adoption

While the RIA notion in the US first appeared in 1974, the European Union only adopted an initial rough form of impact assessment in 1986, when the concept was introduced thanks to UK pressure; under UK presidency, in fact, the *Business Impact Assessment System* (BIA) was launched, aimed at assessing impacts of proposed regulations over business enterprises; this however did not include any kind of societal welfare analysis yet. For this reason, the BIA suffered from strong criticisms as it appeared as an “island with no bridges toward external world”. To intervene in this direction and “bridge the gap”, many initiatives were started covering different fields and trying to extend the scope of BIA. However, this was found to worsen the complexity of EU regulatory system, rather than ameliorating it as IAs were supposed to. Hence, in 2002 EU institutions uniformly agreed upon the need for better regulations, with specific reference to impact assessing exercise.

2.1.1. Strengthening ex ante analysis

Following that conclusion, under the last two years of Prodi mandate as President of the European Commission²¹ the diffusion of *ex ante* analysis was prioritized and supported as milestone to reach to progress toward the desired ‘better regulation’. To reform the said regulatory process, from January 2003 the new Integrated Impact Assessment (IIA) project entered into force; it mandated

¹⁹ See Renda (2006), *supra* note 15

²⁰ Renda produced a clarifying example of this: if the Congress mandates a given performance level to be reached and if monetization of costs and benefits occurs and the result of calculations doesn’t justify the level fixed by the Congress, the CBA and the law enter into conflict but the law prevails. See Renda (2011), *supra* note 1

²¹ Romano Prodi was President from 1999 to 2004, while the push toward IAs mostly occurred after 2002.

the analysis of economic, social and environmental impacts of major new initiatives included in the Annual Policy Strategy or in the annual Legislative Work Program.²²

The European Commissioners' enthusiasm was easily captured by the impact assessment concept and its applications, which they saw in the US and in the UK; its advantages and effects were thought to perfectly match the needs and deficiencies of existing European regulatory system. This led almost to a "copy-paste" action occurred in many respects of the said newborn model, the IIA. However, the second thought that probably missed was that the RIA model in the US (and similarly in the UK) had been shaped during the years following the needs of a federal republic and not of a group of states, with different governments, organized into a Union; in addition, its application had been limited to certain given regulations while, instead, the enthusiasm of the European Commission led to the requirement to perform IIAs for all the major new initiatives.

2.1.2 An (un)desirable convergence

The two flaws which the abovementioned reasoning anticipates have important implications over the execution of the impact assessments exercise: first, considering the US structure, the impact assessments are to be considered a tool for delegating certain steps of the regulatory process in order to relieve the regulatory burden distributed on every actor. Instead, given the different European structure and diverse regulatory process, after the IAs have been drafted, the following co-decision procedure and further amendments bring so many changes to the document that the final legislation pieces have only little in common with the initial Impact Assessment, independently of the efforts the Commission put in the draft. This implies that the document is particularly short lived, and its relevance is limited to the opportunity, for Commissioners, to get an advice on how to structure a good piece of regulation.²³ Second, the requirement to draft impact assessments for any major new initiative may suggest that IIA procedure works perfectly for every kind of regulation whose impact are to be assessed; this is, instead, against the evidence, as chapter three of present work will show. In fact, the quantitative assessment of costs and benefits may work for regulations concerning the economic field in a direct way, whereas the same analysis are typically more difficult to perform over environmental regulations and while dealing with social norms. At the end of 2004 the Commission assessed the first results on the IIA model, and the picture they obtained showed worrying signals with respect to employment, growth and administrative burdens reduction, which were some main goals to achieve before the mid-review of Lisbon treaty to be held in February 2005. This pushed the European model toward the US one, and after 2005 this convergence was even more evident: the emphasis on the monetization and quantification of impacts (even of macroeconomic ones) led to the creation of the Impact Assessment Board (IAB) in 2006 to better coordinate the *ex ante* assessment activities performed by the various DGs. This and other initiatives undertaken highlighted the similarities between IIA and the US cost-benefit analysis; however, as some pointed out²⁴, the different purposes and scope

²² See Renda (2006), *supra* note 15 and Renda (2011) *supra* note 1

²³ I owe those reasonings to Renda, who illustrated them in classes during the course Law and Economics (held at LUISS Guido Carli, Rome, Italy) and who conveyed them in written form in his book (2011), *supra* note 1, section "EU Impact Assessment: history, practice and outcomes"

²⁴ See, e.g. Renda (2011), *supra* note 1, and, for an opposite viewpoint, Verheugen (Commission Vice-President in 2005) in his speech on Sept. the 23rd 2005, Edinburgh (available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/05/543&format=PDF&aged=1&language=EN&guiLanguage=en>)

of the EU IA system render such kind of approach particularly unfitting the Union needs, as IAs are not performed only on “regulations with economic impact surpassing the amount of \$100 million”²⁵, but, as already said, on a wide array of different topics with diverse weights on the economy. This made the Commission DGs carry out impact assessments of Directives, Regulations, White papers, Decisions, negotiating guidelines of international agreements and other types of documents, the majority being of non-binding nature²⁶. In addition, the drafting procedure required that a number of aspects were checked for each of them: e.g. proportionality, subsidiarity, competitiveness, impact on SMEs. The impossibility to exclude the assessment of any of those aspects from the IA document naturally lead to a growth in volume and dispersion of the focus for which it was created; often, the papers ended up being very little specific on the important issues while attempting to consider all the required variables, and their conclusions were often more grounded on political interest rather than on sound economic analysis contained in the document pages. Moreover, this consideration over the lack of transparency seems supported by the missing consultation of the Commission on the draft IA, during the last step of the policymaking process.²⁷

2.1.3. Progresses

Leaving aside for a moment the negative considerations, there are some other aspects of the IA procedure which admittedly were place for considerable progresses in the period 2003-2010 (analysis in chapter 3 indicates some of them). Those improvements were testified by a progressive change in the way the IAs were performed; thus, the admission of improvements in the procedure lead, at the beginning of 2009, to the issuance of the new Impact Assessment Guidelines, displaying the new scheme to be followed while drafting IAs, a procedure still in use today.

2.2 The IA model following the 2009 guidelines

The Impact assessment guidelines provided on January the 15th 2009 by the European Commission are composed of three parts: the first illustrates the IA basics and the procedures; the second focuses on key analytical steps in IA; the third is constituted by the annexes and is provided in a separate document. This last part is formed both by explanatory sections clearing some model to be used in the IA draft, and by paragraphs providing ‘detailed guidance on specific moments in the IA analytical process’²⁸. The 2009 guidelines replace the Commission guidelines adopted in 2005 and updated in 2006. This last version of the guidelines contains all the instructions that are needed to draft an IA according to the norms most recently agreed upon.

2.2.1 Part 1: IA basics and Procedures

First, a formal definition of IA is thereby provided, describing it as ‘a key tool to ensure that Commission initiatives and EU legislation are prepared on the basis of transparent, comprehensive and balanced evidence’²⁹; IAs are cleared to be an aid to political decision making, not a substitute

²⁵ This statement makes reference to EO 12866, Issued under Clinton administration and above-cited in note 8

²⁶ See analysis (ch. 3) over the scorecards

²⁷ See Renda, (2011) *supra* note 1

²⁸ See the front page of the annexes of IA guidelines, by the European Commission (2009), available at http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf

²⁹ See Impact Assessment guidelines, *supra* note 28

for it. Following those preliminary details, the first section lays down the questions an IA should be answering to - i.a. what is the nature and scale of the problem, who is affected most, whether the Union should be involved or not, which are the options available and their impacts, etc. - and clarifies the roles of all the actors who take part to the drafting process, explaining who should be in charge of doing what (e.g. “the IAB provides support and advice, and scrutinizes the quality of all impact assessments”). Then, the timing of the drafting is explained in details: the IA procedure, complete of stakeholders consultation, takes approximately 52 weeks; then, the IAB has 4 weeks to comment on the draft and require changes to be brought to content and/or structure; after that period the final version of the report is written (taking approx. 2-8 weeks). When the document reaches its final shape, and it is correlated with executive summary and annexes, it passes once again across the IAB scrutiny, which has another 4 weeks to issue final opinions over the quality (and mainly check that former requirement were addressed). Final steps of the drafting cycle are the translation process, taking approximately 2-4 weeks, and the adoption by the commission (1 week). Finally, the document can be transmitted to other institutions. First section of the guidelines also provides guidance about some technical aspects necessary to draft a IA document: it is specified that the paper, executive summary and annexes excluded, should not be longer than 30 pages unless it covers several initiatives³⁰; the report can be written in English, French or German, without the need to translate it, but the executive summary must be translated into all official languages³¹ and must be provided into a separate document.

2.2.2 Part 2: key analytical steps in IA

The second section of the guidelines spells out the stepladder to be followed when organizing contents. First, a proper definition of the problem is to be found: it is required to support the description with evidence, to set out the scale of the problem, to identify the drivers, a baseline scenario (one portraying the situation as it is likely to develop without intervention), to identify assumptions made, and to prove the need of EU intervention. This last condition is fundamental in that it responds to the principle of conferral, i.a. sets out the EU rights to act, and the justification for the action itself. The said proof has to be provided through a clear link with at least one article of the EU Treaty; this shall be explicitly mentioned in the text of the IA. In addition, in areas where the EU has not exclusive competence the principles of subsidiarity and proportionality apply: to check for that, the IA must carry both a “necessity test”, meaning one showing that objectives proposed cannot be achieved sufficiently by Member States, and a “EU value added test”, one proving that the said objectives can be better achieved through action at a community level.

Sensitivity analysis is also described in second section of the guidelines: it consists of the assessment of possible variations of the impacts of the policy options when external factors intervene. Basically, the assumptions are not kept fixed but are questioned, and the way consequences vary is taken into account. Also, policy objectives must form a fundamental part of a well-drafted IA, clearing the goals of the proposed regulation during the application process (short run) and on a long run basis. Objectives must be set out in a SMART way, meaning Specific, Measurable, Achievable, Realistic and Time-dependent.

³⁰ But in such case the steering group has to discuss this possibility with the Secretariat General’s unit.

³¹ For a list of all languages available, please select any document from the list available and double click on it, e.g. visiting http://ec.europa.eu/governance/impact/ia_carried_out/cia_2013_en.htm

Policy options must be fully described, take account of existing EU policies, always consider alternative approaches to more classical ways to regulate. Once this step has been cleared, the document shall continue with the assessment of impacts, mainly following three steps: first, identification of economics, social and environmental impacts; second, qualitative assessment of more significant aspects; third, in-depth qualitative analysis of most significant impacts. This structure seems to imply that the three areas of impact (economic, social, environmental) must be kept separate, and that little importance is attributed to the outcomes of their intersection.

For what concerns quantitative analysis, if it possible to compute most part of benefits and costs and therefore continue with cost-benefit and cost-effectiveness analyses, the guidelines set out precise rules over the use of tables and lists as properly indicated to show results of tests³², and same precautions must be used while proceeding with the ranking of options. What is remarkable is that the results of CEA and CBA are present only in cases when the “most part of benefits and costs is computable”: this seems to imply that quantitative CBA or CEA is not always needed. This heavily affects the nature of IAs because, coupled with the distinction of impact areas (described in former paragraph), it produces the idea that IA are more a document informing policymakers about different impacts of options, rather than an instrument showing quantitative comparison and suggesting a dominant alternative on the basis of net benefits. This constitutes one of the main distances that the 2009 guidelines define between IA and the RIA concept, which was instead a ‘tool to learn if the benefits of an action are likely to justify the costs’³³.

The guidelines finally set the way the IA shall be concluded, namely with the arrangements for future monitoring and evaluation of the policy, so to allow a follow-up of the regulation impacts over time.

2.2.3 Part 3: annexes

The third section mainly goes in-depth with respect to already presented models for which the user of the guidelines may seek clarifications; in addition, it contains the formats to be adopted for the executive summaries and the IA, as well as a very detailed list of “items” to be considered while passing through each section. Formulas and reasoning to apply while computing CBA and CEA are contained in annexes too, coupled with explanation and practical examples. The idea is to enable virtually everyone (independently of his study background) to draft an IA with accuracy.

Chapter 3: IAs quality assessment

After the structure of IAs has been cleared, an analysis of the content is performed in present chapter, with specific focus on quality monitoring over time. This activity can be performed thanks to one of the main instruments currently adopted to assess the value of IAs and supervise their path over time: the scorecards. Thus, the IA’s trends observable in the period 2003-2011 are described, and the results compared with the content of IAB opinions for same years.

³² See, in this respect, the text of the IA Guidelines, *supra* note 28, page 46 section II.

³³ See OIRA circular A-4

3.1 Who watches over the quality?

Letting the focus shift from the structure of IAs to their content, the concern that may arise is that, while the guidelines set the scheme to organize the structure of the document, the quality of the paper itself is not an immediate consequence. In fact, even if the IAB oversees the IA at least for four weeks and may comment on improvements to be carried out, it is able to judge what is inside the document, but can say only little about what is missing: as the drafting process lasts 52 weeks, if the steering group has some interest (say, for personal reasons or due to external pressure) in encouraging one option over another, the analysis and the supports for the said alternative may be carried out in a much more precise way, so to make the option appear more desirable than the others (especially if it is the case where no CBA or CEA is performed). At the same time, the other options can be described sufficiently enough to respect the stepladder provided by the guidelines, thus not really allowing for complaints on the IAB's side. Moreover, and more remarkably, the IAB opinions are not binding: this means that, theoretically, even if the above described scenario occurs IAB possibilities to foil it are very low. However, some observed³⁴ that the current state of the art does not require the binding nature of the opinions, as the presence of a principal-agent dynamic makes the steering group components “desperately” seek to please the IAB members.

However, even accepting this moral motivation to efficiently substitute for the binding nature of opinions, another flaw of the supervisory system may be leading to the undesired scenario illustrated above: the amount of IAs examined every year by the board is so high that the average time available to them is of four person/days to read and comment every draft³⁵; in addition, the arguments of IAs vary so sensibly that it is really unlikely that the scrutinizers always own the optimal level of information and knowledge to analyze the IA, although the preparation and culture of IAB members is undoubtedly excellent. This has been highlighted to identify possible action room, and exploit the “perfectibility” of the IAs exercise described in the foreword section, at the very beginning of present work.

3.2 The scorecards

Apart from a quality check during the drafting process, which is performed as mentioned by the IAB, it is also possible to control *ex post* the quality both of a proposal turned into law (and in this respect increasing enthusiasm has been registered lately³⁶) and of its IA. The latter is analyzed checking that the structure has been respected, the items all included and the criteria properly addressed; this is often done through a scorecard, functioning as a check list: if a criteria is matched, the space is filled with a “1”, otherwise with a “0”.

Obviously enough, the flaw of this kind of method is that everything is assessed “black or white”, there is no room for shadows of grey; thus, if an analysis (e.g., risk analysis) is poorly performed, but the criteria asks: “Is any kind of risk analysis provided?”, the result may be that the scorecard is checked in the corresponding square, but this sign represents something very different from a perfectly-done risk analysis, marked with same sign. In addition, the scorecard items may own complex definitions whose interpretation is finally left to the scorer: although scoring-guides are

³⁴ See Renda, (2011) *supra* note 1, page 63 section “the oversight querelle”

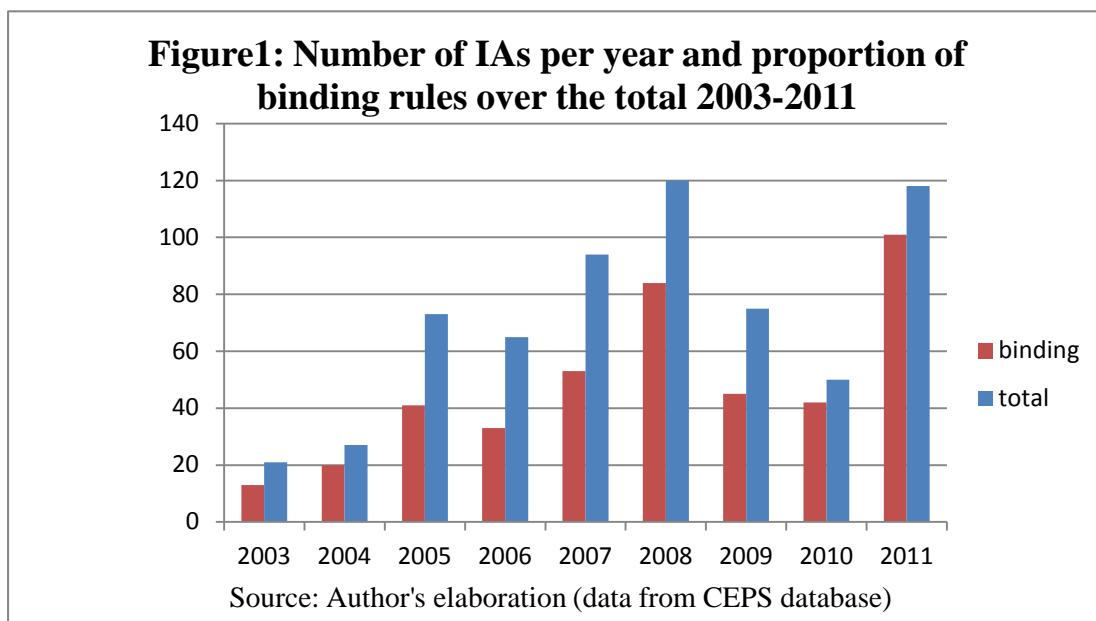
³⁵ See the Report of the European Court of Auditors, *Impact Assessment in the EU Institutions: do they support decision-making?*, Special Report 3/2010.

³⁶ The second Barroso Commission has been placing emphasis on the need to performs *ex post* evaluation before any new IA is carried out, as reported by Renda (2011), *supra* note 1.

usually provided, given the different backgrounds (cultural but also linguistic) of scorers, unless intensive training sessions are held, different people may end up scoring differently the same piece of document, this constituting a bias.³⁷ Nevertheless, those weaknesses of the scorecard instrument do not impede it from being a good instrument for “quality” monitoring over time, if by quality we mean completeness and correspondence to the criteria contained in the IA guidelines. In addition, the described weaknesses may turn out to be useful, in that they provide room for further improvements in what revolves around the IAs exercise (again, perfectibility exploitation). Later in this chapter a concrete example of the versatility and usefulness of the scorecard instrument is provided.

3.3 Overview of IAs from 2003 to 2011

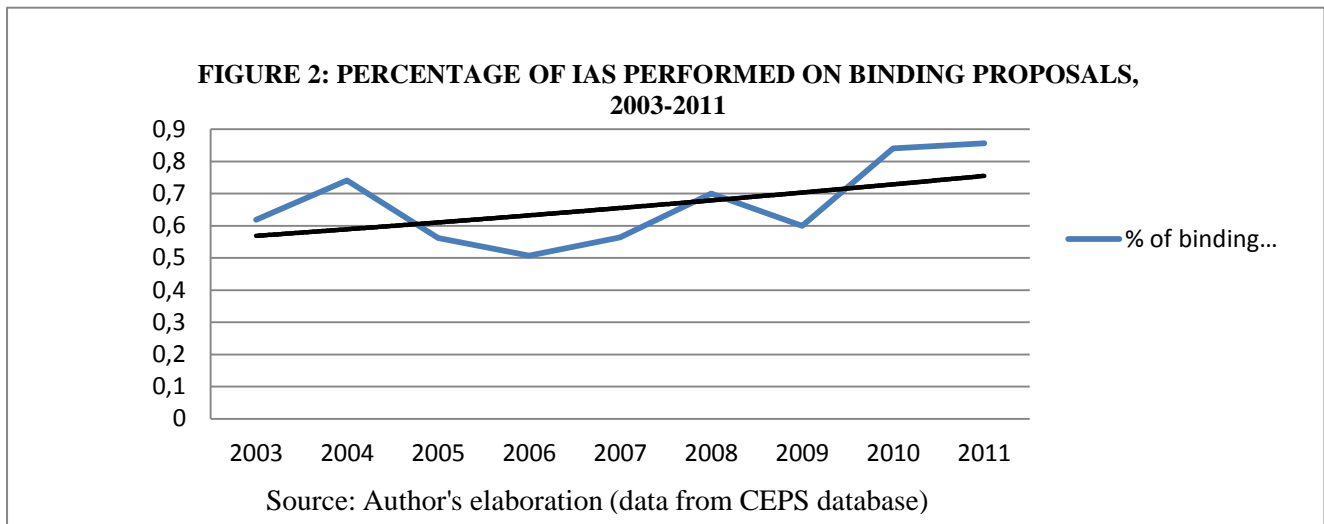
The analysis carried out in present and in following section uses data from the scorecards forming part of the database of the Centre for European Policy Studies (CEPS), based in Brussels.³⁸ Up to 2011, the European Commission had performed 643 IAs, between binding and non binding pieces of regulation. The figure 1 below shows their distribution in the years and the proportion of binding proposals over the total.



³⁷ I gained awareness of this through my personal experience as a scorer for the Centre for European Policy Studies (CEPS) databases: peer consultation revealed that differences existed in scoring methods due to diverse interpretations, especially when the requirements were more vague (e.g. “score 1 if all, or the most important, categories of costs are monetized”).

³⁸ For the kind authorization to access and use the database for present research, my gratitude goes to Mrs Lorna Schrefler, head of regulatory policy unit at CEPS, Brussels.

The number of IA increased significantly up to 2008, and then diminished in the following two years, to rise back to 2008 levels in 2011; noticeably, the percentage of binding measures analyzed over the total IAs performed is rising, as trend line shows in figure 2.



This result has been pointed out as in previous sections of present work the difference with the RIA system was highlighted, where the US model doesn't take into account any non-binding measure; EU's IA system was criticized for the "dispersion of energies" that consideration of non binding measure brings about. However, the upward-sloping trend line suggests that such effect, if existent, was reduced along the years.

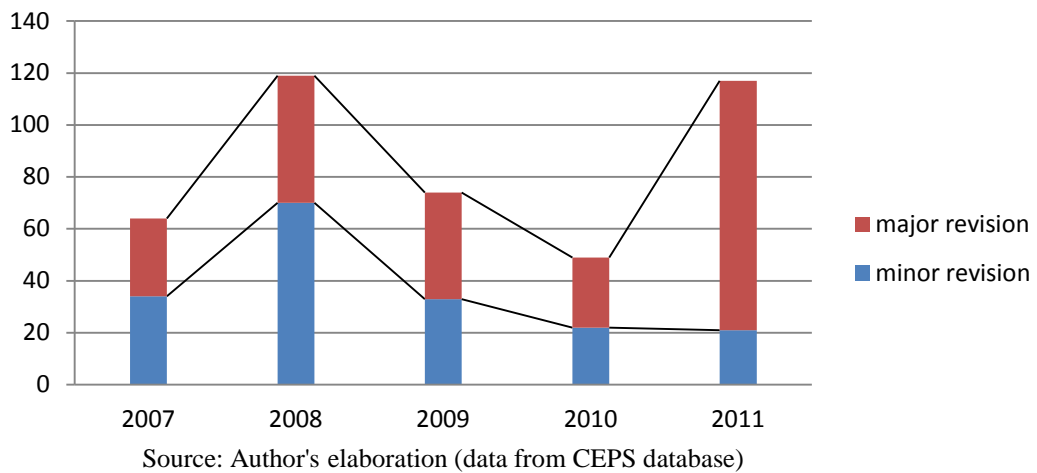
3.3.1 IAB opinions

As present chapter is aimed at assessing a quality improvement (if any) in the IAs, the concerns raised by the IAB are also taken into account; the scorecard registers whether the IAB issued an opinion and, if so, the number of opinions accompanying each IA.

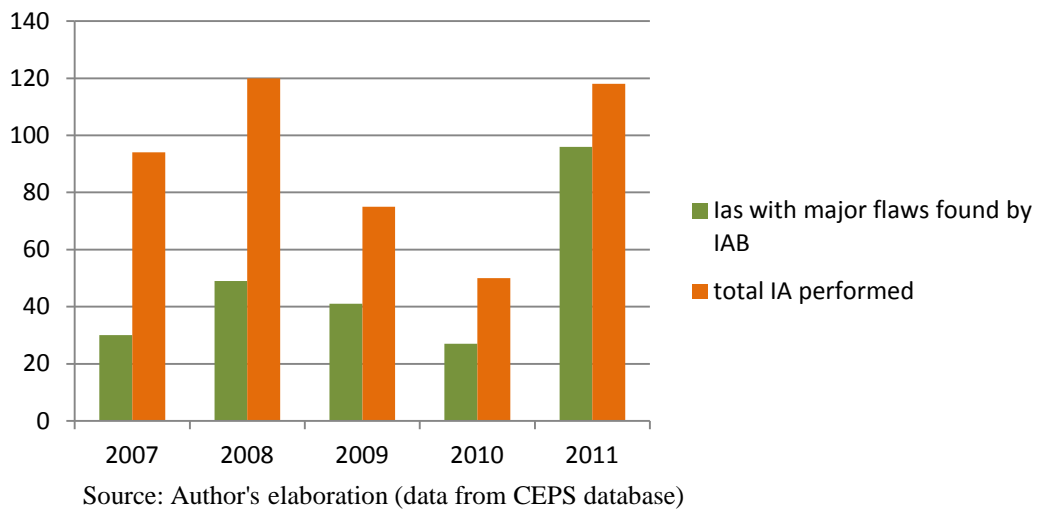
They are classified according to the improvement to be carried out: reinforce analysis of impacts; describe more clearly problem definition, objectives or baseline scenario; review options and their comparison; better analyze procedural issues and content of executive summary; consult more stakeholders; improve assessment of subsidiarity or proportionality; better describe the ways through which proposal can be transposed and implemented; address more in-depth the post evaluation and monitoring phase. In addition, to assess whether those improvements have been suggested for heavy flaws or minor ones, the scorecard presents an item for "minor revision" and "major revision".

The abovementioned categories are analyzed in following figures, to portray the evolution of the IAB opinions content. Figure 3 shows the variation over time of minor revisions and majors revisions requested by IAB opinions. Figure 4 completes the third, in that it shows the proportion of major flaws out of total IAs drafted. To provide further clarity, the graph which follows indicates the variation of the percentage value over time of both major and minor flawed IAs (Figure 5).

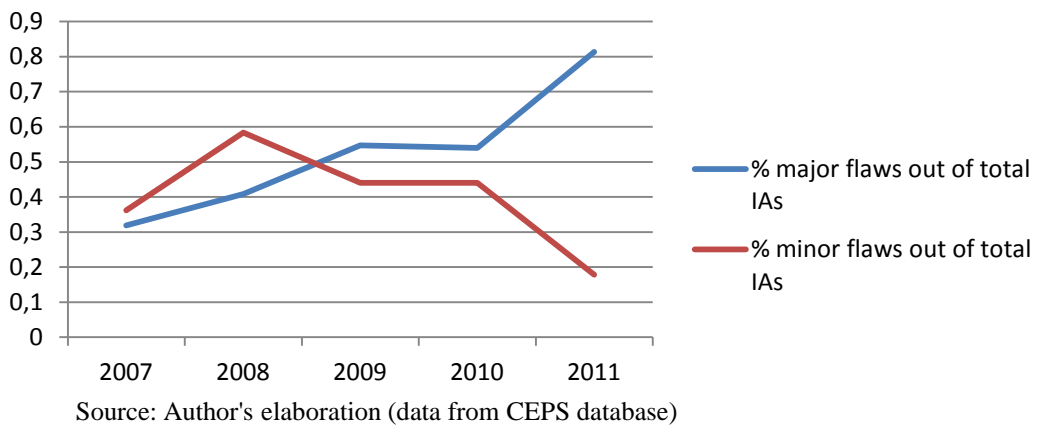
**FIGURE 3: CONTENT OF IAB OPINIONS OVER YEARS
2007-2011 (IAB WAS ESTABLISHED IN 2006)**



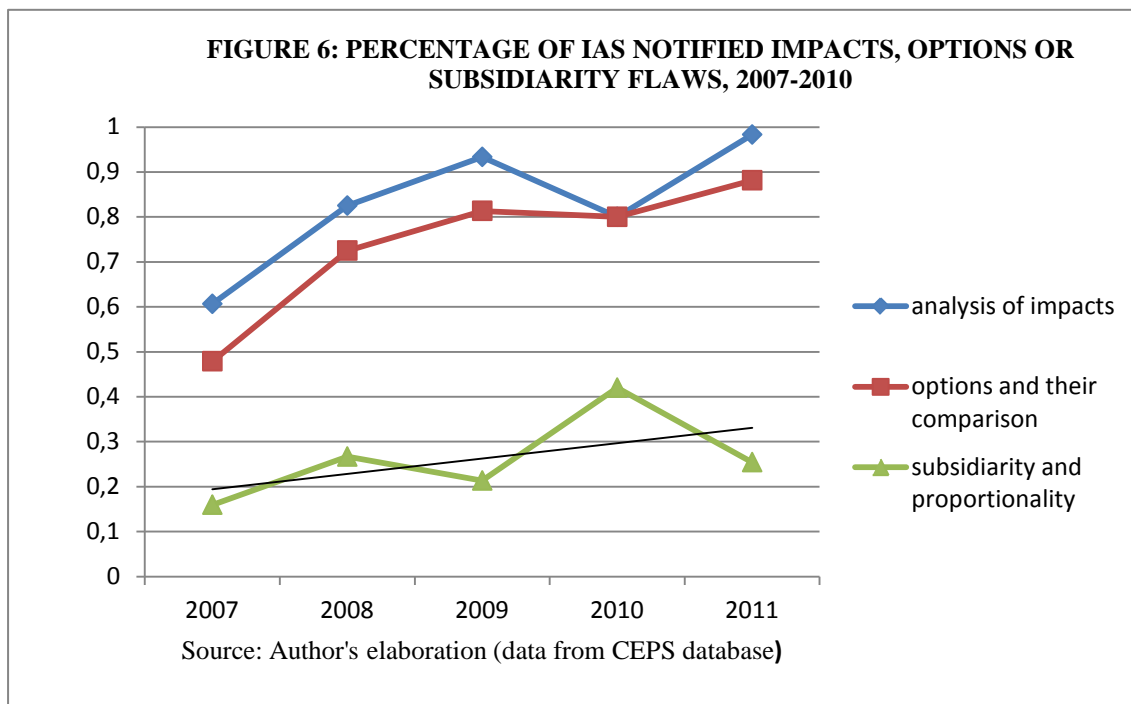
**FIGURE 4: IAS FOR WHICH MAJOR FLAWS WERE FOUND BY
IAB**



**FIGURE 5: PERCENTAGE OF IAS NOTIFIED MINOR/ MAJOR
FLAWS**



The scorecard item “Analysis of impacts” in the IAB opinions section indicates, if marked, that the board suggested, for instance, review of the coverage of all relevant impacts, or the need of more quantitative analysis. Item “Options and their comparison” indicates that IAB raised concerns over possible inclusion/exclusion, identification and definition of a policy option. Item “Subsidiarity and proportionality” is checked if insufficient performance was found in this respect; here, proportionality is to be intended in its EU-treaty meaning, and not as the principle of proportionate analysis.³⁹ Figure 6 describes the patterns followed from 2003 to 2011 by these three variables.



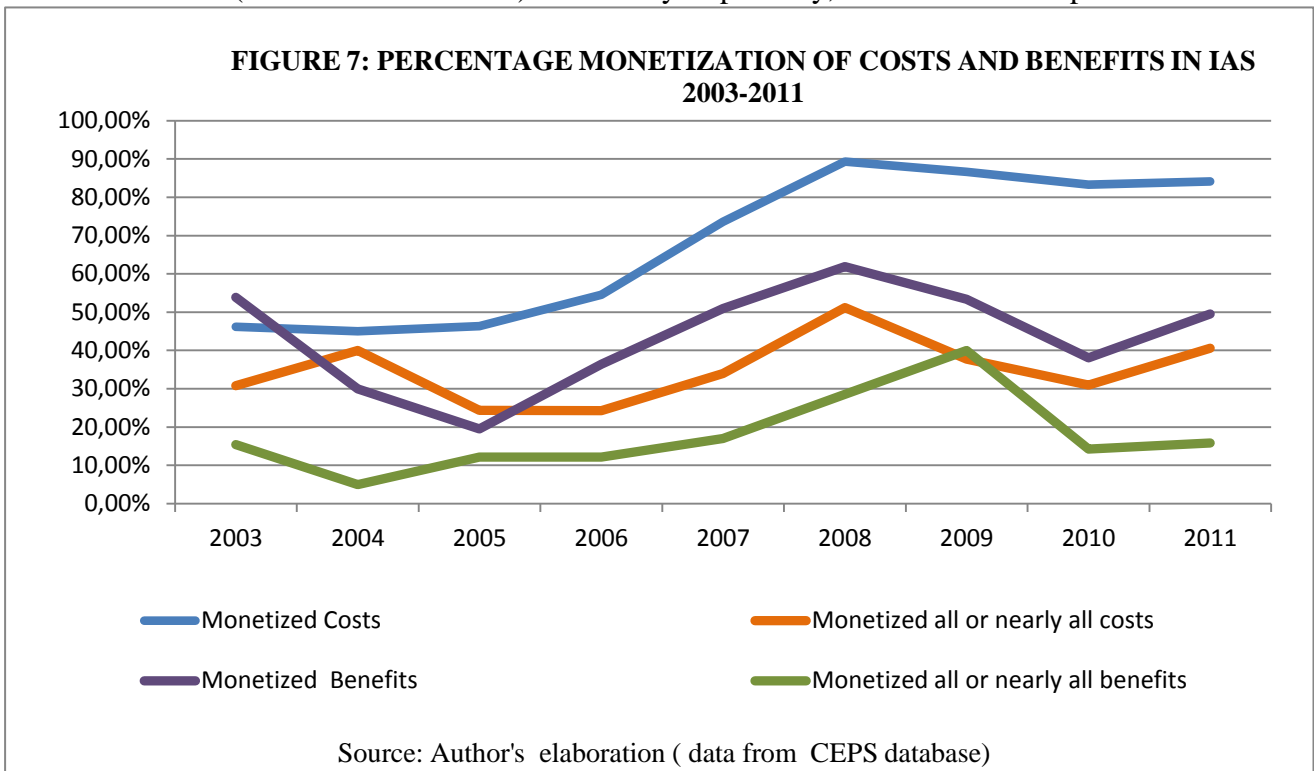
The quality of the analyses of impacts was found to be poor in many cases (in 2009 and 2011, over the 90% of IAs scrutinized was judged insufficient in this respect); instead, subsidiarity and proportionality are well assessed in large part of IAs, but the trend indicates that the situation is worsening as time elapses (trend line for green trace is upward sloping). The comparison of options was performed better in 2007 than in following years, and later up to 80% of IAs were notified such flaw. Following those indications, for next section of present chapter the focus is centered on the way impacts as well as options are assessed, in order to identify the origin of the bad performances underlined.

3.3.2 Impacts measurements: CBA, CEA

As described in previous pages, the mainstream models followed to assess the convenience of an option over another are the Cost Benefit Analysis and the Cost Efficiency Analysis. Following what the guidelines indicate, those two analyses must be performed if “all or most part of costs and benefits can be monetized”, i.a. their value can be expressed with an amount of money. This procedure is simple if the problem at stake is of economic nature; instead, it becomes very harsh

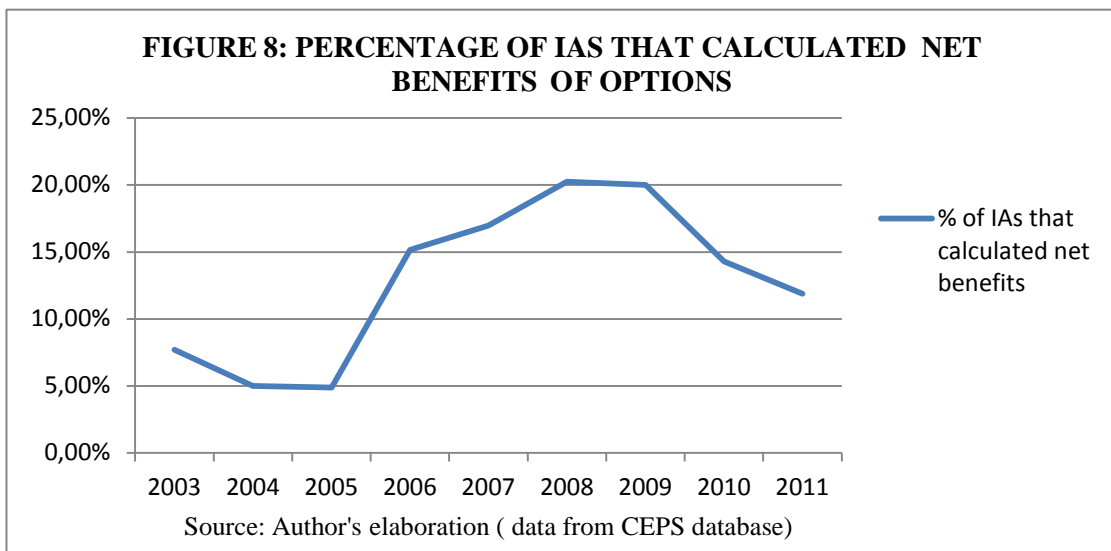
³⁹ As specified in the Scorecard Guidelines 2.0

when it comes to environmental or social issues. Figure 7 shows the amounts of costs that have been monetized (and same for benefits) either fully or partially, in the 2003-2011 period.



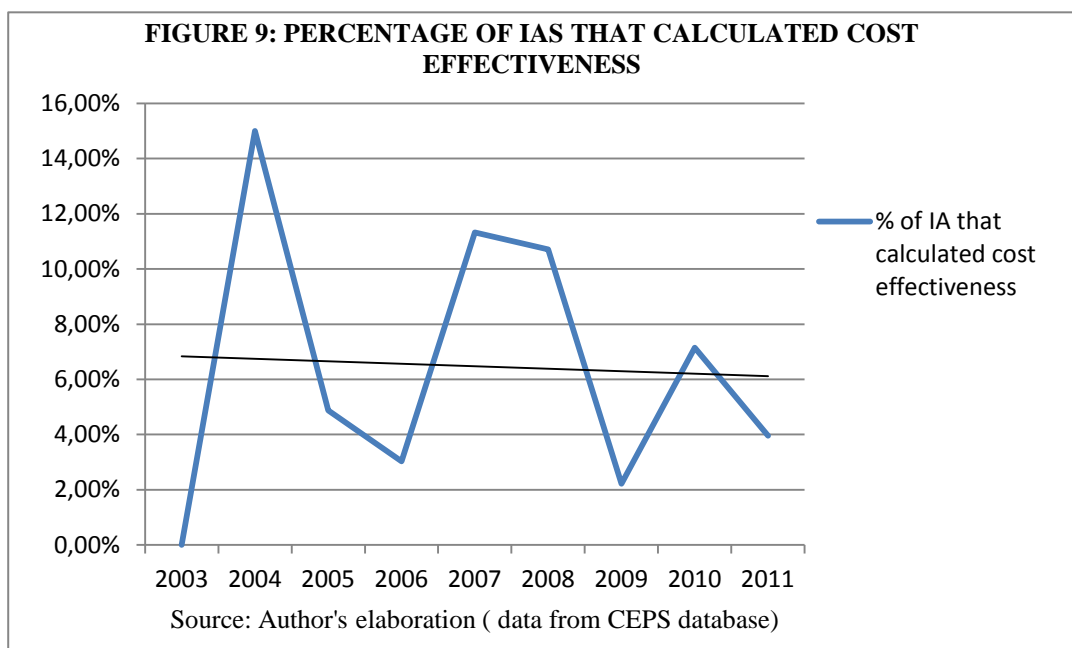
Throwing a closer glance to variables represented it can be observed that, with the exception of 2009, monetization of total costs (orange variable) happens more frequently than monetization of total benefits (green variable), during the whole period of the sample. In addition, IAs containing at least some monetized cost (blue variable) are more than the 80% of the total from 2008 on, while for the same years the IAs containing at least some monetized benefits are always below 63% (purple variable).

Once those results have been assimilated, another interesting question is whether the monetized costs and benefits are then used for CBA or CEA. Figure 8 displays the percentage of IAs over the 2003-2011 lag that included calculation of net benefits of the options, useful to analytically assess whether a given alternative is preferable to others.



Interestingly, there are some mismatches with the results underlined in Figure 7: in 2008 and 2009, for instance, the IAs that monetized total costs were respectively 51% and 38%, whereas those that monetized all or nearly all benefits were respectively the 28 % and 40% of the total. Thus, allowing a margin of error in those numbers, it is anyway logical to assume that at around 29% of IAs in 2008 and 38% in 2009 had sufficient instruments to compute net benefits, thus to assess analytically the quality of options. Instead, as Figure 8 portrayed, the percentage value of IAs that indeed calculated net benefits stays fixed at the 20% level, in both 2008 and 2009. In addition, if the introduction of the 2009 guidelines is assumed to have influenced the CBA, the effect seems to be that it discouraged the performance of such analysis (segment corresponding to 2010 and 2011 has negative slope).

Also, another variable may be interesting to investigate: the one relative to CEA. Figure 9 portrays the percentage of IAs that computed of cost effectiveness of options. As said, this less often adopted than CBA, thus lower values are expected. Continuing the example above, for 2008 and 2009 the percentages indicated in figure 9 are respectively 10.8% and 2.2% (rounded to 11% and 2% for simplicity). Note that while the percentage of IAs performing CBA seems following a trend, the one relative to CEA is much more unpredictable (the graph exhibits various peaks and lows). However, no apparent justification explains the low values analyzed, especially for 2009.



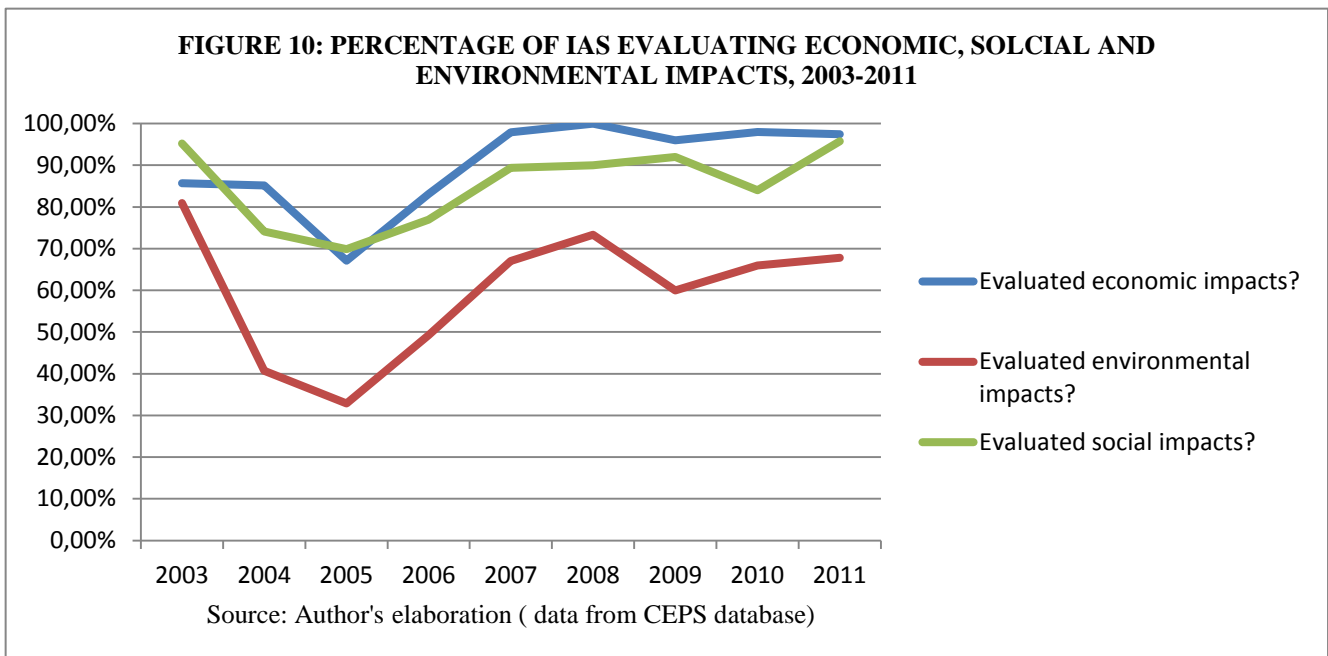
3.3.3 Impacts measurement: environmental, social and economic impacts

Always relating to the IAB perplexities over the ways impacts are assessed, to the side of monetization and CBA/CEA analyses, another interesting percentage to consider is the one of IAs in which environmental, social and economic impacts are always assessed. Figure 10 describes the patterns followed by these three percentages over the time period in analysis.

Remarkably, Economic impacts are said to be assessed in more than 90% of IAs since 2006. As the previously shown graphs explained, quantitative analysis has been found very rarely in IAs; it may

therefore be complicate to imagine, for someone who never entered into direct contact with an IA, how such economic analysis of impact is carried out, if the proper weights (monetization of costs and benefits, first) have rarely been attached to effects.⁴⁰ It is necessary to specify that in order for an IA to result “checked” in the scorecard item “evaluation of economic impacts”, it just needs to explicitly consider possible impacts of regulation on given categories⁴¹ such as competitiveness, SMEs, innovation, single market, inflation etc.; this item indicates therefore the presence of a qualitative analysis rather than of a quantitative one.

Hence, even if economic, environmental and social impacts are largely assessed, this does not necessarily testify quality of IAs, and certainly it is not enough to confute analytical flaws highlighted above. This aspect of IAs is better addressed in chapter 4 of present work, where a case study over the evaluation of economic impacts is provided.



3.3.4 Comparison of options

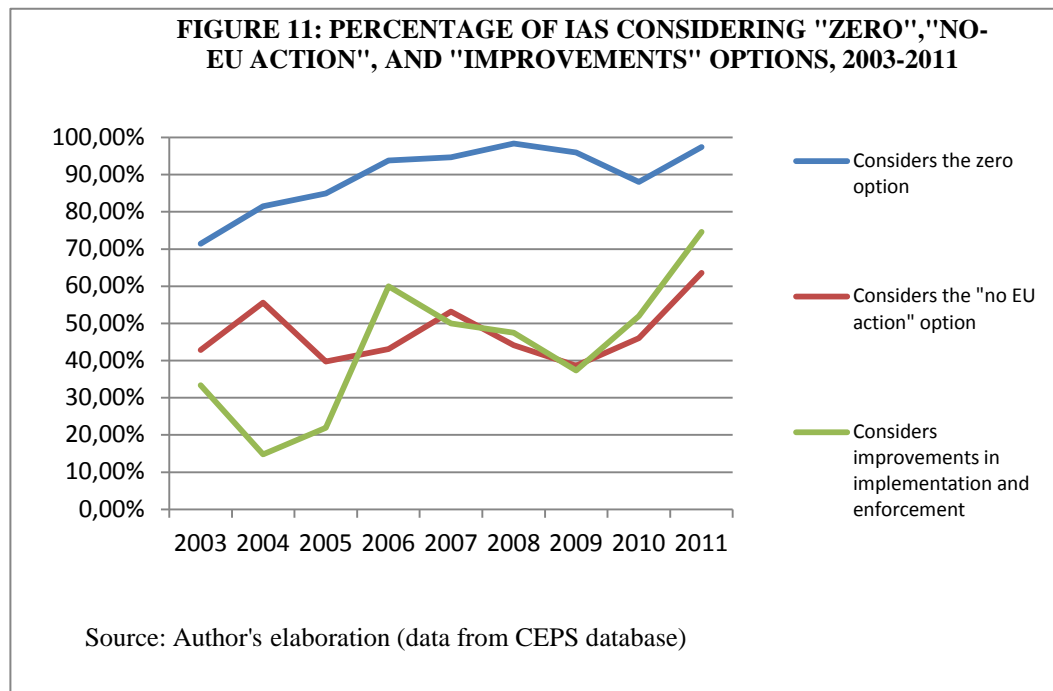
The results of IAB opinions scanning revealed that the board lamented low quality in presentation of options and their comparison; this section briefly digs in this direction, exhibiting the trends of variables such as presence of “zero” option (an alternative hypothesizing the situation as it would evolve if no initiative is undertaken), presence of “no EU action” option (which coincides with the zero option if at the time the IA is drafted no policy action is taken at the EU level in the field under examination) and “improvements in implementation and enforcement” option (one considering changes to the way the substantial norms or policies are currently applied, thus not adding a new regulation but modifying one). ⁴²Figure 11 shows the percentage IAs containing each of those

⁴⁰ See figure 7 for precise facts and numbers.

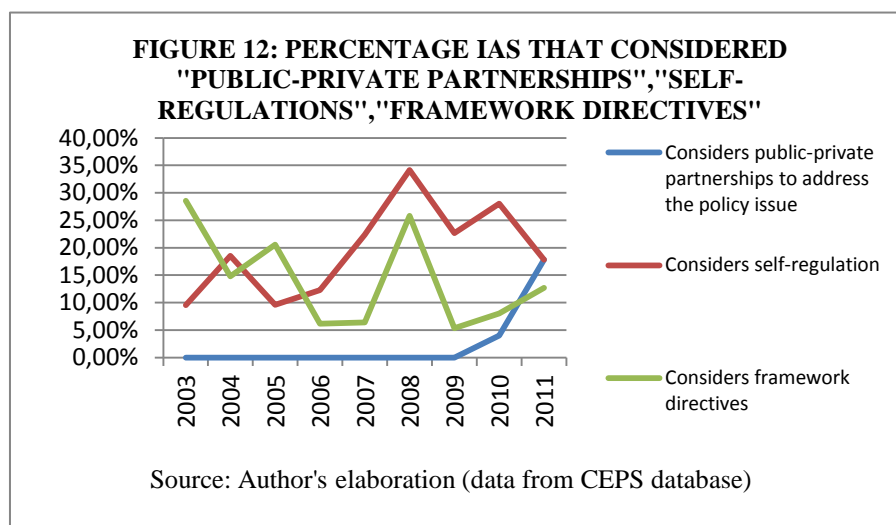
⁴¹ See the 2009 guidelines for reference on these categories.

⁴² The accurate definitions of those options have been drawn from the scoring guide by the CEPS

options, during the period 2003-2011; the three traces all own a positive-slope trend line, indicating that progressively the inclusion of those kinds of options is becoming common. Remarkably, in last two years (2010-2011) the tendency to consider amendments of existing regulations gain strength (the green trace has a peak).



Other alternatives to be included in the IAs among the options are those linked to “reliance on public-private partnerships to address the policy issue” and to “self regulation” (delegation of whole drafting process to private entity-ies). “Framework directives” are also a option scheme available, meaning a system where a directive is enacted and then leads to adoption of other delegated acts, to distribute administrative burdens. Figure 12 illustrates the trends relative to the presence of these alternatives among IAs options.



Note that the “public-private partnership” option appeared after the 2009 guidelines, hence the variable is null before.

The evaluation of options impacts, as well as of benefits and costs, usually leads to the indication of one alternative which results preferred; it is not necessary that the choice indicates a single one: in some cases two or more equally valid options result, and then the Commission, during the further steps of regulatory process, decides upon political preference.

3.4 Summarizing the findings

The analysis over the scorecard data for 2003-2011 brought to light several findings: first, the percentage of IAs performed on binding proposals is rising over time, with a peak of 85% in 2011. For what concerns IAB opinions, the percentage of IAs notified major flaws is consistently rising, with a peak in 2011 as well, while the percentage of IAs notified with minor flaws own an opposite decreasing trend, perfectly symmetric from 2009 onward. Those notifications mainly concern the way analysis of impacts is carried out, which is found to be incomplete and/or imprecise. Data on monetization of costs and benefits confirm this diagnosis, as complete monetization of costs occurred on average only in roughly 35% of the cases, and for total benefits only in roughly 20%; partial monetization of costs occurred on average in roughly 60% of the cases, while partial monetization of benefits in roughly 45%. Those data have been used to calculate net benefits in only approximately 12% of the cases on average, and cost effectiveness analysis has been performed only in roughly 7%. Finally, the presence of economic, social and environmental impacts measurements has been verified: economic impacts are said to be evaluated in about 90% of the cases on average, while environmental impacts only in 50% and social impacts in 80%.

This collection of information portrays a reality which partly contrasts the purpose for which IAs are conceived: in fact, the rationale behind the documents is to try to assess *ex ante* the impacts of policy proposals, so that the best alternative can be chosen, the one inducing the best scenario. This alternative shall be detected analytically and not intuitively (otherwise there would be no need of draft an entire IA document), and the choice of prevailing option shall be supported by actual facts, and not by subjective interpretation of same facts.

Instead, in the analyses shown, the data denounce poor performance especially in attaching economic weights to considered consequences, failing to measure it analytically, and therefore not allowing a proper “ranking” of heaviest impacts. In conclusion, economic analysis is performed indeed, but in a feeble way, and this raises suspiciousness on how “prevailing option” is then chosen: what is the ground on which impacts (both negative and positive) of an option are considered heavier than those of another, if quantitative analysis (which is the best available instrument to maintain objectivity) is so scarce and poor?

Chapter 4: IA, a concrete example. Getting hands dirty

Present chapter addresses the question raised by previous one and tries to provide further insight. Note that, while before the data used pertained to the 2003-2011 time lag only, the present section uses an IA drafted in 2012. Apart from this specific analysis, the data from 2012 IAs are not present in the other sections because the updating of CEPS database is in progress at the moment this paper is being written.

4.1 IA presentation

The document hereby analyzed is Impact Assessment SWD(2012)401, realized in 2012 to accompany a “Proposal for a Directive of the European Parliament and of the Council on the accessibility of public sector bodies' websites”. The paper is marked in the scorecard as cross-cutting initiative, meaning that the proposal it is done for has impacts in at least two of the three pillars (economic, social, environmental) and on a wide range of stakeholders. The document belongs to the category of IAs falling under responsibility of the DG INFSO (Directorate General for the Information Society and Media).

4.1.1 Problem definition

Hereby, the content of IA's problem definition section is synthesized:⁴³

Despite ten years of voluntary EU policy actions (Council conclusions, Parliament resolutions, etc.) there has been no adequate progress on web-accessibility. Market fragmentation and insecurity are at the root of the issue. The internal web-accessibility market does not function adequately: Web-developers face barriers in the form of additional production costs if they operate across borders. This hampers competition and economic growth.

Without harmonization at EU level, fragmentation cannot be reduced; since the Member States cannot achieve a single web-accessibility market, the Union proposes to adopt measures, while respecting subsidiarity and proportionality, on the legal basis of Article 114.1 of the Treaty on the Functioning of the European Union.

4.1.2 Objectives

Every IA shall clearly and explicitly state which are its objectives, as laid down in 2009 Guidelines⁴⁴; this section generally follows the problem definition.

IA SWD401 reports the following goals:

- I→ Improvement of the functioning of the Internal Market for the specific market segment
- II→ Support commitment to web-accessibility in public sector websites decided in the Digital Agenda for Europe
- III→ Establish harmonized EU standards in websites accessibility
- IV→ Find a definition of types of websites concerned, with a minimum common list
- V→ Promote the web-accessibility of websites beyond 'basic public services', and sustain a behavioral change towards 'web-accessibility.'

4.1.3 Policy options

Only Three policy options have been identified in the IA:

- 1 — Baseline Scenario ('no additional action')
- 2 — A Recommendation ('soft law')

⁴³ For the full text of problem definition, see the IA document available at http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2012/swd_2012_0401_en.pdf

⁴⁴ See the text of European Commission's 2009 IA Guidelines, *supra* note 28

3 — Legally binding measure

Option 2 concerns the adoption of a Recommendation fostering implementation of the Web Content Accessibility Guidelines (WCAG 2.0 level AA) for a minimum list of types of public sector websites concerned.

Option 3 suggests a legally binding measure and lays down the rules for making a minimum list of public sector websites accessible; Member States are still free to extend the approximated provisions to other types of public sector websites. The proposal pushes standardization of regulation: Member States shall participate in the establishment of a harmonized standard for web accessibility and in the definition of both the monitoring methodology and the reporting arrangements. They shall have their laws, regulations and administrative provisions in place by 30 June 2014 and apply their measures by 31 December 2015. In addition, Member States shall promote web-accessibility in general and cooperate with industry and civil society to exchange best practices and review new developments.

The option description continues by saying that a Directive is found to be the appropriate instrument to pursue abovementioned goals: this is because of its flexibility in respecting those Member States that already have related legislation in place. Instead, a Regulation would be immediately enforceable and would probably make it possible to fulfill the commitments in time, but web-developers would incur considerable compliancy costs even if they were to operate only in their own country.

4.1.4 Analysis of impacts

The IA presents separately the effects evaluated for each option; a brief description of the content is here provided:

➔ Policy option 1: Baseline scenario — no change in policies

In the document it is said that the impact of continued weak EU coordination is thought to be limited: slow progress on web-accessibility, with possibility that new national measures cause further fragmentation.

Economic impacts: Web developers would still face high entry barriers for cross-border sales of products and services, and smaller domestic demand. Another impact is on Public administrations, which would not benefit from better offers and from sharing their approaches; they would not be able to benefit from taking off-line information and services on-line.

Social impact: Persisting ‘Digital exclusion’ of those not able to benefit from on-line facilities (e.g. for employability).

Political impact: The efficiency of service provision and social responsibility would be in jeopardy. Commitments, as those in the Digital Agenda for Europe, could not be achieved.

➔ Policy option 2: Adoption of a Recommendation (‘soft law’)

“The impact of a Recommendation - quotes the executive summary - depends on the motivation of Member States”. With this sentence the message was that its introduction *per se* does not guarantee that the fragmentation problem is reduced. The documents claims that some not-better-defined “studies and consultations” show that such approach over the past ten years in general had not been effective.

Economic impacts: the possibility is presented that web-developers might still be confronted with a fragmented internal market. Instead, in case all Member States did fully endorse the recommendation, the net-benefits are assessed to be similar to those of option 3.

Social impacts: Possibly persisting ‘Digital exclusion’ of those not able to benefit from online facilities (e.g. for searching job opportunities).

Political/reputational impacts: similar risks as in option 1.

➔ Policy option 3: Legislative measure based on Internal Market Economic impacts

The IA argues that “If the six Member States without existing web-accessibility measures would have zero web-accessibility in their public sector web sites, they would have to invest between €37 and 88 million to achieve 100% compliance”⁴⁵. Then, it adds the yearly expenditures estimations, equal to €41 million assuming redevelopment of one third websites and maintenance and monitoring of web-accessibility for the rest. For the 21 Member States already owning web-accessibility measures, additional investments are said to be minimal.

The document continues by signaling that the proposed measure accelerates implementation and lower prices, and “Countries that adhere to WCAG 1.0 (as, for instance, UK) would save money, as the ‘(re-)development’ of websites according to WCAG 2.0 is about 8% cheaper”⁴⁶.

Then it reports some costs: the total investment to achieve 100% compliance of the websites concerned in one year, for the entire EU, is said to have value between €260 and 560 million, with no apparent possibility to better estimate it.

4.2 Here we are again... options comparison

The whole purpose of the chapter is centered around the content of this section: a direct analysis on the way options are compared when the analytical assessment of impacts is missing. As noted above, a proper “weight” to effects cannot be attached in a objective way, and in fact the result is a table which looks - at least- unreliable and not-convincing. The image is proposed in table 1a and table 1b below (Source: IA SWD 401 by the European Commission).

Table 1b: Comparison of Economic Impacts of options, IA SWD 401	Options			Obj.
	1	2	3	
Web-developers: on the functioning of the internal market and competition				
<ul style="list-style-type: none"> • approximation of provisions laid down by Member States, lowering barriers for economic operators to act across border 	--	--	↑	I, III, V
Web-developers: competitiveness				
<ul style="list-style-type: none"> • global competitiveness of European web-developers thanks to practices with a widely adopted specifications 	--	→	↑	I, III, V
<ul style="list-style-type: none"> • economy of scale 	--	→	↑	I, III
Web-developers: for SME specifically				
<ul style="list-style-type: none"> • opportunities for new business 	--	→	↑	I, II, V

⁴⁵ See IA SWD 402, executive summary of SWD401, section “analysis of impacts”, page 7; the entire document is available at http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2012/swd_2012_0402_en.pdf

⁴⁶ See IA SWD 402, executive summary of SWD401, *supra* note 45

Table 1b: Comparison of Economic Impacts of options, IA SWD 401				
Citizens: as consumers				
• new way to get access to information and services	--	→	↑	II, IV
• their assistive technologies are fit for websites across the EU	--	→	↑	V
Public authorities including EU institutions: as buyers				
• benefits of using common standards and collaborating on responses to technological evolutions	--	→	↑	I, II, III, V
• saving on the need to provide alternative services	--	→	↑	II
• address web-accessibility in a systematic way, in line with other commitments (DAE, eGovernment Action Plan)	--	→	↑	II
• administrative burden	--	--	↑	II

According to the explanation provided in the document, to interpret the image “the following coding applies: ‘↑’ stands for ‘very likely’; ‘→’ for ‘to some degree’; ‘--’ for ‘unlikely’”⁴⁷.

The table column marked “Obj.,” located to the right of the “options” one, contains the reference to the objectives of the proposal, the ones listed at the beginning of the IA.

After the comparison table the IA, in its “Preferred option” section, states⁴⁸:

“To summarize the analysis: option 1 and 2 are assessed to be ineffective, because they are non-mandatory and incomplete with respect to the objectives. They are not likely to overcome fragmentation and reduce uncertainty sufficiently to unlock the market rapidly enough, if at all, to meet the political deadlines. [...] Option 3 is recommended as the preferred option.”

The terms “likely” “sufficiently” and “rapidly enough” are a good mirror of the way the comparison is carried out as a whole: it lacks punctuality, precision, reference to actual numbers and facts at least for benchmarking (“sufficiently” with respect to what? How rapid is “rapid enough”?). Moreover, the grounds on which option 3 is assessed to be “preferred” are ideological ones (meaning that it is preferred simply because it respects the objectives) rather than analytical, since the quantitative and monetized measurement of impacts, negatives as well as positive, is totally neglected while drawing the conclusion; it seems, therefore, that it was not central for the matter at stake. Another important particular is the way the “arrows” of the table are chosen: note that the monetization of costs was partial and incomplete for several respects (and even worse scenario existed for benefits), therefore any kind of “conclusive judgment” on table items such as ‘economies of scale’ or ‘competitiveness’ that lead to selection of upward-looking arrows or horizontal arrows is totally hidden to the reader. In conclusion, the IA does effectively recommend an option, but the reasoning behind the selection is at least obscure.

⁴⁷ See IA SWD 402, section “comparison of options” page 40, *supra* note 43

⁴⁸ See IA SWD 402, “preferred option” section, page 44, *supra* note 43

4.3 IAB opinions

Such fact did not escape from IAB attention: the board issued a first opinion and already then mandated resubmission for a second check.

In its first reading, the IAB found significant flaws in exposition of the problem, in the explanation of EU's right to act and EU value added, and, most remarkably, in the discussion of options, in their comparison and in the way impacts are assessed.⁴⁹ Apparently, very few things were done the right way.

IAB "suggested" to review and deepen analysis especially for other options, as the impacts are assessed quite in detail only for option 3 (which is, not by chance, the supported one). After the document was re-submitted two months later (12 January 2012), some improvements were found, but several weaknesses were still identified by the board.⁵⁰ Note that, in this paper, the previous analysis and description of the IA was performed over its final version (the one available online), which was already revised twice by the IAB; thus, all the "weaknesses" highlighted in this work were only the ones which survived, in a sense, to IAB double scrutiny.

At its second reading the board indicated the remaining flaws: the need for a better explanation of the way market segmentation would be removed thanks to the directive; the need for a broader range of option, or at least a sound explanation for scarcity of alternatives; and, last but not least, the assessments of impacts was still found to be very poor, with quantitative analysis absent for what concerned the non-preferred options, and very vague for the preferred one, while the comparison of options was to improve.

4.4 What to say?

It has been shown, in previous sections, that IA SWD401 has several deficiencies, especially for what concerns quantitative analysis and comparison of options. Those flaws survived undisturbed the double check of the IAB; not because they were not detected, but rather because the opinions were not binding, and evidently the intention to push an option over the others was more urgent than the willingness to "desperately seek to please the IAB members"⁵¹; in this case the moral incentive did not work. The reason for which an alternative has been picked, since not based on sound and clear analysis, shall then be searched elsewhere. Without any further conjecture, it is only sufficient to remark that this is against the purpose of IAs themselves.

⁴⁹ See the text of IAB first opinion, available at

http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2012/web_accessability.pdf

⁵⁰ See the text of the second IAB opinion, available at

http://ec.europa.eu/governance/impact/ia_carried_out/docs/ia_2012/sec_2012_0672_en.pdf

⁵¹ Here, the quotation is from Renda (2011), *supra* note 1, who suggested that in some cases the moral push could sufficiently compensate the not-binding nature of IAB opinions.

Chapter 5: Conclusions

Economic quantitative analysis is fundamental to understand whether one option produces more negative effects than another, or if its positive effects are simply less than those of an available alternative; this is because there is no way to compare two different things if no common measure-unit is found. However, as the IA Guidelines do not mandate monetization of impacts, one can infer that quantitative analysis is not believed necessary (there is no other way to perform it without those data). The implicit message is that qualitative assessment of impacts is enough to pursue the goal of IAs. But what is then this goal?

In the US, RIA is an instrument to lay down the best alternative in terms of cost-benefits analysis: the political choice then could maintain the distance and legislate differently, but the assessment proposes an option on the basis of objective, unquestionable results (provided that the calculations are correct, for sure). Certainly, this is possible because the monetization of impacts is mandatory; and, in turn, this rule can be always applied thank to the fact that the RIA procedure is mandated for a narrow range of regulations, those with an high economic relevance (whose figures and facts are thus easier to monetize). Those conditions make of RIA a real consulting instrument, informing policymakers about aspects and weights whose description is reliable, and so are conclusion; those documents have a weight in that they can portray realistically the future, and this is why they are then heavily taken into account while regulating. In addition, their usefulness constitutes a gain (especially in terms of administrative relief) that can repay the effort spent in drafting them.

Instead, on the basis of what present work has shown about IAs performance, it seems that Impact assessments in the EU are not thought to serve for the same purpose of their American cousins: by mandating the IA for every proposal, and by not imposing full monetization of impacts (which anyway would be impossible as long as the first rule is maintained), the European Commission seems to have accepted the IAs exercise as an additional burden on the regulatory process, rather than a relief; this holds true because, as shown above in chapter 4, the final indications offered by IAs are in many cases unreliable or based on reasoning too obscure for the readers. Some argued⁵² that the EU Impact Assessment exercise it thought today not as an opportunity to gain insight on issues at stake, necessary to understand before regulating, but rather as an occasion to make practice and learn the procedure to draft a good piece of regulation.

Gathering ideas: it appears evident that EU's IA and US RIA are, willingly, different. It remains to understand what is then the purpose for which carrying out IAs is worth, after all. The attempt to anticipate future outcomes before a regulation is enacted is certainly a good one; however, if the said anticipation is carried out roughly, the outcomes cannot be portrayed realistically and the whole exercise procures small benefits. For sure, something that has to be reviewed is the scope of IAs: in some cases in fact drafting an Impact Assessment is very inappropriate, as the impossibility to accurately translate facts into monetary value renders the final selection of an option at least unreliable (nothing of exaggerated, given what has been revealed of IA SWD 401). A possible intervention may be the differentiation of IAs depending on the issues treated: new directives can be produced to vary the drafting procedure for some DGs, so to avoid undesirable vagueness. If this could not be operated, then it should be retreated the decision of compulsory Impact assessments for all proposals. Once this has been obtained, further effort could be devoted to turn Impacts

⁵² See, among the others, Renda (2011) *supra* note 1, and the Report of the European Court of Auditors, *supra* note 35.

Assessments into the highly scientific advisory documents they should be: in this paper it has been highlighted that the IAB identified several improvements to be carried out on IA SWD 401, but since its opinion was not binding, recommendations were almost ignored. Instead, the suggestion is exactly that opinions become binding: in those cases where IA steering group already carry out well-done works, this would not bring much change, whereas it would contribute to halt phenomena of approximation.

Reforming the IAs exercise by rendering its scope more specific and by allowing IAB opinions to be binding would mean making a first fundamental step toward future regulations really fitting the Union needs.

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