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**ARTICLE:** RULEMAKING IN THE AGES OF GLOBALIZATION AND INFORMATION: WHAT AMERICA CAN LEARN FROM EUROPE, AND VICE-VERSA

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\* Betts Professor of Law, Columbia Law School. This Article would not have been possible without the generous support of the Rockefeller Foundation at its Study and Conference Center in Bellagio, Italy. It has benefited greatly from conversations there, at the European University Institute, and at the Law Faculty of the University of Bologna, as well as with American colleagues such as George Bermann, Francesca Bignami, Joanne Scott, Grainne de Burca, Petros Mavroidis, and the American lawyers assisting the American Bar Association's study of European Union administrative procedures that provided its initial push. Its mistakes and misconceptions are, of course, my own. This Article is current to January 1, 2006; more recent drafts of the ABA study may be found at <http://www.abanet.org/adminlaw/eu/home.html>.

[\*660] *B. Impact Assessment* <sup>n36</sup>

Impact assessment, proportionate to the significance of the action being undertaken, is a required element of the Commission's development of legislative proposals. For the Commission, but not for the American Congress, this is a seriously considered obligation, albeit one that like the American counterpart for regulations, E.O. 12,866, is enforced solely by internal means. <sup>n37</sup> The Commission maintains a dedicated impact assessment website with links to all documents, <sup>n38</sup> including most impact assessments that have been completed. <sup>n39</sup> Effective as of [\*661] 2005, all items on the Commission's legislative and work programme require impact assessment. A preliminary assessment appears in the roadmap document; an extended impact assessment accompanies the proposal to Commission for approval and then to the Council and Parliament, at which time it is made available on the web. That it is developed in two stages, with the first appearing in the published "road maps" and including contact information, effectively assures interested parties an opportunity to make their views heard.

The mechanics of and general adherence to this guidance are, necessarily, works in progress. Prior to the communications of 2002, practice was highly variable from directorate general to directorate general. The new guidelines of June 2005--issued in the shadow of the rejection of the draft Constitution in France and the Netherlands and so perhaps signaling renewed Commission awareness of its need to build credibility--promise yet more disciplined attention to the process. Under the 2005 Impact Assessment Guidelines, the impact assessment process has six basic steps:

- . What is the problem?
- . What are the objectives?
- . What are the policy options?
- . What are the likely economic, social and environmental impacts?
- . How do the options compare?
- . How could future monitoring and evaluation be organized? <sup>n40</sup>

What the Commission *means* by "impact assessment" differs somewhat from how Americans would understand the process. The Commission published an initial guidance document, "Impact Assessment in the Commission," in the fall of 2002, <sup>n41</sup> elaborating the expected processes for developing both preliminary and extended Impact assessments, with models for each. This document made clear that these analyses were seen as aids to a political process, and thus might often be appropriately qualitative in character. It strongly emphasized the obligation of consultation with interested parties and relevant experts. "Consultation with interested parties is an important part of the impact assessment process, and is carried out according to a set of minimum standards." <sup>n42</sup> These minimum standards were themselves specified in Commission communications <sup>n43</sup> and the consultations are conducted through the Commission's "your voice" website. "In order to be credible, impact assessment cannot be carried out behind 'closed doors.'" <sup>n44</sup>

The 2002 Communication described the desired analysis in terms much broader than might be familiar to American audiences. Impact analysis was presented as a technique for identifying policy options and alternatives by considering the likely forward consequences of a proposed action, as it would also be seen in the United States. Yet for the Commission, these impacts were to be "expressed in economic, [\*662] social *and* environmental terms," (emphasis added) with no particular emphasis on quantification or cost-benefit balancing. <sup>n45</sup> "[S]trict cost-benefit analysis may not always supply the most relevant information; for example, the degree of irreversibility ... [t]he precautionary principle ... [and the] impact on established policy

objectives ... should be assessed." <sup>n46</sup> American authors have criticized this aspect sharply, urging the EU to "specify [] that the primary objective of regulation is to maximize net benefits." Yet these authors do not appear to recognize the rather different institutional function that impact assessment serves in the European context; they rely on data much of which is national in character and largely predates the recent Commission measures.



n36 In considering the Union's impact assessment procedures, this report does not concern itself with disputes regarding their possible political tendencies to permit or promote excessive regulation, as some assert. See Lawrence Kogan, *Exporting Precaution: How Europe's Risk-free Regulatory Agenda Threatens American Free Enterprise* (Washington Legal Foundation 2005), available at <http://www.wlf.org/upload/110405MONOKogan.pdf>. The new guidance document, it may be observed, seems intended to promote greater use of quantification and monetization of anticipated impacts for major proposals. Progress report on implementing better regulation for growth and jobs and up-date of the Commission's Guidelines for Impact Assessment, SEC (2005) 790, *supra* note 32, at 3.

n37 *Communication from the Commission on Impact Assessment*, COM (2002) 276 final (June 5, 2002). Precursor regimes required analysis of budgetary impacts, and impacts on small and medium sized enterprises. Guidance issued during the summer of 2005 considerably strengthened the analytic requirements involved. *Impact Assessment Guidelines*, SEC (2005) 791, *supra* note 32.

n38 Impact assessment in the Commission: Introduction, [http://europa.eu.int/comm/secretariat\\_general/impact/index\\_en.htm](http://europa.eu.int/comm/secretariat_general/impact/index_en.htm).

n39 Impact assessment in the Commission: Impact Assessment in Practice, [http://europa.eu.int/comm/secretariat\\_general/impact/practice\\_en.htm](http://europa.eu.int/comm/secretariat_general/impact/practice_en.htm). A small number of the statements here are restricted from public access.

n40 *Impact Assessment Guidelines*, SEC (2005) 791, *supra* note 32, at 2-3 (Table of Contents).

n41 *Impact Assessment in the Commission: Guidelines* (2002), [http://europa.eu.int/comm/secretariat\\_general/impact/docs/ia\\_technical\\_guidelines\\_en.doc](http://europa.eu.int/comm/secretariat_general/impact/docs/ia_technical_guidelines_en.doc) [hereinafter Initial Guidance Document].

n42 See The impact assessment process: Consultation and use of expertise, [http://europa.eu.int/comm/secretariat\\_general/impact/expert\\_en.htm](http://europa.eu.int/comm/secretariat_general/impact/expert_en.htm).

n43 *Communication on General principles and minimum standards for consultation of interested parties by the Commission*, COM (2002) 704 final (Dec. 11, 2002); *Communication on Principles and Guidelines--"Improving the knowledge base for better policies"*, COM (2002) 713 final (Dec. 11, 2002).

n44 Initial Guidance Document, *supra* note 41, at 9.

n45 For an examination of the EU directives specifically concerning environmental assessments, see Joanne Scott & Jane Holder, *Law and "New " Environmental Governance in the European Union*, in *NEW GOVERNANCE AND CONSTITUTIONALISM IN EUROPE AND THE US* (G. de Burca & J. Scott eds., 2005). Addressing its procedures requiring provision for public participation at the local level, they find democratizing tendencies supportive of new governance ideas--"a more inclusive, less technicist environmental assessment procedure, with public involvement in decision making expressed in the manner of an entitlement to participate and to access to the courts to enforce its provisions." *Id.* at 6.

n46 *Communication from the Commission on Impact Assessment*, at 15-16, COM (2002) 276 final.

n47 Robert Hahn & Robert Litan, *Counting Regulatory Benefits and Costs: Lessons for the US and Europe*, 8(2) J. INT'L ECON. L. 473, 473 (2005); see also Kogan, *supra* note 36.

n48 *Impact Assessment Guidelines*, SEC (2005) 791, *supra* note 32.