

Improving Regulation-Making: Insights from Digital Policy

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1. Introduction

Efforts to systematically improve regulation-making in Europe date at least to the 1990s.¹ While few would disagree with the objective of “better regulation” in principle, determining how exactly regulation-making should be improved has been more difficult in practice. Indeed, the “better regulation” agenda in general, and how it seeks to promote Europe’s competitiveness in particular has sometimes become politically contentious. Many stakeholders, including businesses and industry bodies, see better regulation as critical to reduce business and economic burdens deemed to be holding back Europe’s economic growth and economic competitiveness.² However other stakeholders, including civil society organisations and social partners, worry that better regulation in its latest iteration could lead to significant deregulation with potentially negative consequences for consumer and social protections.³ Even leaving political controversies aside, there are a range of viewpoints about how, exactly, better regulation-making can be achieved. This paper examines how to improve regulation-making, drawing on insights and experiences from digital policy and digitalisation. It should be noted that improving the making of new regulations is one aspect of improving the EU’s overall regulatory framework. The European Commission’s work to improve the overall regulatory framework also includes evaluations and fitness checks of existing regulations⁴ and the Commission’s regulatory fitness and performance programme (REFIT),⁵ which assesses existing regulations. This paper specifically focuses on improving the making of new regulations, drawing on insights from digital policy. First, this paper examines some features of the regulation-making process and explores how regulation-making relates to Europe’s economy and competitiveness, with a focus on examples from digital policy and the digital economy. This paper then secondly considers the unintended negative social consequences and loopholes that can arise from regulations. A number of EU digital policies are examined to illustrate some of these possible unintended consequences, including for fundamental rights, democracy, and social resilience. Finally, this paper reviews some principles currently prominent in debates about regulation-making, especially as regards to digital policy regulation, and assesses their merits. This paper concludes by presenting some recommendations for consideration on how regulation-making might be improved.

2. Better Regulation Processes and Competitiveness

Impact Assessments and Consultations: Exploring Enough Options?

Impact assessments are procedures which assess the potential economic, social, and environmental effects of a public policy proposal and which explore different policy options to address a particular problem.⁶ Impact assessments form a key part of the European Commission’s efforts to ensure high-quality regulation and are conducted by Commission officials when new regulatory proposals are being developed. However, it has been argued that impact assessments can incline towards supporting the pre-selected course of action preferred by officials as opposed to rigorously exploring real alternative policy options to address the problem in question. According to the Regulatory Scrutiny Board, an independent body within the European Commission, the consideration of alternative possible options in impact assessments, was, “on average the weakest quality element across all first submission draft impact assessments scrutinised”.⁷ The Regulatory Scrutiny Board noted that impact assessments demonstrated “too limited [a] range of feasible options, options designed to support a preferred option or not sufficiently anticipating alternative combinations

1 Adrian Schout, PB_Better_regulation.pdf, https://www.clingendael.org/sites/default/files/2018-12/PB_Better_regulation.pdf

2 For an example see: Business Europe, 2024-04-09_reboot_europe_-_stronger_businesses_stronger_eu_-_final.pdf, https://www.buinessurope.eu/sites/buseur/files/media/reports_and_studies/2024-04-09_reboot_europe_-_stronger_businesses_stronger_eu_-_final.pdf

3 Further discussed later in paper but for one example see: Open letter of a coalition of organisations listed by Corporate Europe: Corporate Europe, Open letter on the European Commission’s ‘double deregulation’ push | Corporate Europe Observatory, <https://www.corporateeurope.org/en/open-letter-european-commissions-double-deregulation-push>

4 European Commission, Evaluating laws - European Commission, https://commission.europa.eu/law/law-making-process/evaluating-and-improving-existing-laws/evaluating-laws_en#:~:text=The%20Commission%20evaluates%20if%20specific,should%20be%20continued%20or%20changed.

5 European Commission, REFIT – making EU law simpler, less costly and future proof - European Commission, https://commission.europa.eu/law/law-making-process/evaluating-and-improving-existing-laws/refit-making-eu-law-simpler-less-costly-and-future-proof_en

6 European Commission, Impact assessments - European Commission, https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/impact-assessments_en#:~:text=Impact%20assessments%20are%20carried%20out,the%20negotiations%20of%20international%20agreements

7 Regulatory Scrutiny Board, “Annual Report 2023”, https://commission.europa.eu/document/download/caa20c82-6b3f-4d83-90bc-79e4e5af242a_en?file-name=RSB_Report_2023-WEB.pdf

of options”.⁸ Zach Meyers of the Centre for European Reform think tank, notes that impact assessments: “sometimes set out a range of unrealistic and extreme ‘strawman options’, to give the impression the Commission’s preferred approach is the best option available.”⁹ The impact assessments undertaken by the Commission for both the Digital Services Act (DSA) and General Data Protection Regulation (GDPR) demonstrate this trend, setting out three packages of options ranging from an option which is the least onerous or ambitious, a somewhat more ambitious middle-ground option, and a more comprehensive third option, which includes most of the features of the first two options.¹⁰ Additionally, impact assessments are primarily conducted when the European Commission initially proposes draft legislation rather than throughout the legislative process, during which significant amendments to the proposed regulation can occur. Proposals can undergo many amendments proposed by the European Parliament and the European Council, and impact assessments are not typically undertaken on these amendments, even if these entail new regulatory obligations.¹¹

The European Commission’s process of public consultation often presents similar problems. As Zach Meyers notes, impact assessments can include both “leading questions” and “closed questions” which limits the ability to provide feedback¹² or what could be deemed “inconvenient feedback.”¹³ Eric Van den Abeele, Associate Researcher at the European Trade Union Institute writes that European public consultations questions “are often leading in nature and designed to keep responses within a narrow bandwidth” and the low-quality of consultation questions can prevent “interested parties from submitting a meaningful opinion.”¹⁴

Public Consultations and Lobbying

Another issue relating to the European Commission’s public consultation practices relates to the risk of such activities being unrepresentative, as noted by the Regulatory Scrutiny Board.¹⁵ This can arise due to the often self-selecting nature of consultation responses. This can lead to at least three problems which can affect the effectiveness of public consultation results. The first is a motivational bias, when only those who care strongly about an issue are likely to respond to public consultations, leading to those with strongly-held views being overrepresented in consultation responses. Notably, even large numbers of consultation responses do not guarantee that the responses are representative of the public in general. Even the Commission’s consultation on daylight savings time – the most responded to consultation the Commission had ever conducted – displays the issue of unrepresentativeness.¹⁶ In this instance, respondents from countries such as Italy and Spain favoured the abolition of daylight savings time, while opinion polling in these countries suggest that a greater proportion of the general public in both countries actually opposed the abolition.¹⁷

A second and related problem is the stakeholder bias. Often only “stakeholders” - those who are directly affected by a regulation or who work in an affected sector, (including NGOs and interest groups) are inclined to respond to consultations. This could lead to regulation-making which can seek compromises that keep all stakeholders happy, but which come at the expense of the general public. Consider the public consultation on the European Chips Act; of the eight responses received in Ireland’s public consultation, seven were from industry.¹⁸ While there may be legitimate

8 Regulatory Scrutiny Board, “Annual Report 2023”, https://commission.europa.eu/document/download/caa20c82-6b3f-4d83-90bc-79e4e5af242a_en?file-name=RSB_Report_2023-WEB.pdf

9 Zach Meyers, “Better Regulation in Europe: An Action Plan for the Next Commission”, p. 9, https://www.cer.eu/sites/default/files/pb_ZM_better_regulation_19.3.24.pdf

10 DSA Impact Assessment, p. 38 - 45, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act>; GDPR Impact Assessment, p. 44 -49, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012SC0072>

11 Zach Meyers, “Better Regulation in Europe: An Action Plan for the Next Commission”, p. 13 – 14, https://www.cer.eu/sites/default/files/pb_ZM_better_regulation_19.3.24.pdf

12 Zach Meyers, “Better Regulation in Europe: An Action Plan for the Next Commission”, p. 6, https://www.cer.eu/sites/default/files/pb_ZM_better_regulation_19.3.24.pdf

13 Zach Meyers, “Better Regulation in Europe: An Action Plan for the Next Commission”, p. 6, https://www.cer.eu/sites/default/files/pb_ZM_better_regulation_19.3.24.pdf

14 Eric Van den Abeele, ETUI, ‘The European Union versus the Better Regulation Agenda’, <https://www.etui.org/sites/default/files/19-B-A-2019.02-Better-regulation-EVDA-WEB.pdf>, p. 32

15 Regulatory Scrutiny Board, “Annual Report 2023”, https://commission.europa.eu/document/download/caa20c82-6b3f-4d83-90bc-79e4e5af242a_en?file-name=RSB_Report_2023-WEB.pdf, p. 18

16 European Commission, Summertime Consultation: 84% want Europe to stop changing the clock, https://ec.europa.eu/commission/presscorner/detail/en/ip_18_5302

17 YouGov, Eurotrack: which Europeans want to get rid of daylight saving time? | YouGov, <https://yougov.co.uk/international/articles/45460-eurotrack-which-europeans-want-get-rid-daylight-sa>

18 Irish Department of Enterprise, Trade and Employment, european-chips-act-public-consultation-report.pdf, <https://enterprise.gov.ie/en/publications/publication-files/european-chips-act-public-consultation-report.pdf>. The European Commission’s initial proposal for a Chips Act states that: “Given the urgent need to act, no impact assessment was carried out and no online public consultation was foreseen”, eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0046, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52022PC0046>

public policy reasons to provide support to specific sectors, (as may be the case with promoting semiconductor production) it is unlikely that related public consultations would receive significant amounts of critical feedback from those who are not directly affected but who may not necessarily agree with the importance of the regulation proposed (if they believe that supporting other sectors may be more important for example.)

A third problem with the consultation process that can be identified relates to resource imbalance. Commentators have pointed out that, in certain cases, large businesses are much better placed to actively engage in consultation processes and to provide high-quality feedback than smaller companies, NGOs, or individuals.¹⁹

Concerns have also been raised by small-and-medium enterprises (SMEs) and their representatives, including the European Digital SME Alliance, and NGOs, such as Transparency International, in relation to the manipulation of the consultation processes and in relation to lobbying, including potentially deceptive lobbying.²⁰ For example, there are concerns about powerful companies engaging in “astroturfing”, by promoting inauthentic front organisations to provide lobbying or consultation responses which misleadingly claim to represent the interests of civil society or SMEs.²¹ The Corporate Europe Observatory claims that some consultations can be “swamped” with responses from “fake grass-roots campaigns” which are industry-linked, noting one consultation as an example which received over 85,000 responses.²² Speaking about lobbying more generally, Sebastiano Toffaletti, Secretary-General at the European Digital SME Alliance described ‘astroturfing’ as the “single most important issue” in the digital policy debate.²³ This is reflective of broader problems relating to lobbying and policymaking. While lobbying is an essential part of the democratic process, concerns exist that lobbying can privilege well-resourced voices compared to others.²⁴ The Corporate Europe Observatory reports that over €100 million was spent on lobbying by the technology sector in 2023, with over a third of this coming from just ten companies.²⁵

Regarding consultation responses, rather than correcting for the problems outlined above, the way that the European Commission processes consultation responses can actually further exacerbate the problems outlined above. For example, the Commission may pay more attention to the quantity of responses in consultations, rather than the quality or diversity of views expressed.²⁶ The Regulatory Scrutiny Board has noted that the Commission sometimes does not pay “sufficient attention to the non-representativeness of the stakeholder feedback received”²⁷ and may perform poorly at “presenting contradictory views of different stakeholder categories in a sufficiently transparent, granular, and balanced manner.”²⁸ There is thus potential room for improvement in relation to the consultation process and how the Commission takes consultation results into account.

19 Linda A. Thompson, Is the EU’s consultation process broken?, <https://www.theparliamentmagazine.eu/news/article/eu-consultation-process-citizen-participation>; Zach Meyers, “Better Regulation in Europe: An Action Plan for the Next Commission”, p. 7, https://www.cer.eu/sites/default/files/pb_ZM_better_regulation_19.3.24.pdf

20 Transparency International EU, [Transparency-international-EU_briefing_Lobby-transparency-in-the-EU.pdf](https://transparency.eu/wp-content/uploads/2024/02/Transparency-international-EU_briefing_Lobby-transparency-in-the-EU.pdf), https://transparency.eu/wp-content/uploads/2024/10/Deep_pockets_open_doors_report.pdf; Transparency International EU, [Deep_pockets_open_doors_report.pdf](https://transparency.eu/wp-content/uploads/2024/10/Deep_pockets_open_doors_report.pdf), <https://www.politico.eu/newsletter/politico-eu-influence/big-tech-astroturfing-who-speaks-for-small-eu-companies-eyes-on-washington-2/>

21 Samuel Stolton, EU Influence: Big Tech astroturfing — Who speaks for small EU companies? — Eyes on Washington – POLITICO, <https://www.politico.eu/newsletter/politico-eu-influence/big-tech-astroturfing-who-speaks-for-small-eu-companies-eyes-on-washington-2/>

22 In the section: “Surely we need more, not less, consultation on what the Commission is up to?”, Corporate Europe Observatory, ‘Better Regulation’: corporate-friendly deregulation in disguise | Corporate Europe Observatory, <https://corporateeurope.org/en/better-regulation-corporate-friendly-deregulation-disguise>

23 Samuel Stolton, <https://www.politico.eu/newsletter/politico-eu-influence/big-tech-astroturfing-who-speaks-for-small-eu-companies-eyes-on-washington-2/>, <https://www.politico.eu/newsletter/politico-eu-influence/big-tech-astroturfing-who-speaks-for-small-eu-companies-eyes-on-washington-2/>

24 Samuel Stolton, <https://www.politico.eu/newsletter/politico-eu-influence/big-tech-astroturfing-who-speaks-for-small-eu-companies-eyes-on-washington-2/>, <https://www.politico.eu/newsletter/politico-eu-influence/big-tech-astroturfing-who-speaks-for-small-eu-companies-eyes-on-washington-2/>

25 Corporate Europe Observatory, Lobbying power of Amazon, Google and Co. continues to grow | Corporate Europe Observatory, <https://corporateeurope.org/en/2023/09/lobbying-power-amazon-google-and-co-continues-grow>; Mared Gwyn Jones, Tech companies spend more than €100 million a year on EU digital lobbying | Euronews; <https://www.euronews.com/my-europe/2023/09/11/tech-companies-spend-more-than-100-million-a-year-on-eu-digital-lobbying>

26 Zach Meyers, “Better Regulation in Europe: An Action Plan for the Next Commission”, p. 6 – 7, https://www.cer.eu/sites/default/files/pb_ZM_better_regulation_19.3.24.pdf

27 Regulatory Scrutiny Board, “Annual Report 2023”, https://commission.europa.eu/document/download/caa20c82-6b3f-4d83-90bc-79e4e5af242a_en?file-name=RSB_Report_2023-WEB.pdf, p. 18

28 Regulatory Scrutiny Board, “Annual Report 2023”, https://commission.europa.eu/document/download/caa20c82-6b3f-4d83-90bc-79e4e5af242a_en?file-name=RSB_Report_2023-WEB.pdf, p. 18

Better Regulation and the Economy: Costs and Competitiveness

The European Commission's better regulation guidelines and better regulation toolbox set out the Commission's approach toward developing new regulatory proposals and to assessing the impacts of these regulations, in order to ensure high-quality regulation.²⁹ The Commission's better regulation guidelines and toolbox focus to a great extent on the economic implications of regulations, including in relation to Europe's competitiveness.³⁰ Notably, the Commission's focus when assessing economic implications often tends to be relatively narrow, often concentrating on the direct businesses costs of compliance with a given regulation (e.g. administrative or production costs) than on more general business and economic consequences. Indeed, even for direct compliance costs, the Commission tends to focus disproportionately on administrative costs.³¹ Even the revamped SME and competitiveness check set out for the new European Commission's mandate in 2024–2029³² may mainly aim “to help avoid unnecessary administrative burdens”, as is stated in the proposed Commission's political guidelines for 2024–2029.³³ Yet, administrative costs are only one portion of overall compliance costs imposed by regulation, and other compliance costs may be more significant.³⁴ Even when considering broader factors, the Commission rarely goes far beyond considering the directly imposed business compliance costs and price competitiveness.

For example, the bulk of the current “competitiveness check” in the Commission's better regulation toolbox comes under the headings “costs and price competitiveness”, which is one of four dimensions of competitiveness considered.³⁵ Two of the other dimensions of competitiveness – international competitiveness and SME competitiveness – are also primarily focused on costs and price.³⁶ Only one of the four dimensions of competitiveness, “Capacity to innovate”, examines broader factors, but it only examines some of these, and this dimension is less extensively detailed than the others.³⁷ The competitiveness check thus seems to pay relatively little attention to competitiveness factors that go beyond costs and price.

There is a broad range of factors which affect the competitiveness of a product or service, including attractiveness, taste, durability, and convenience amongst many others, all of which could be affected by regulation. Indeed, in the digital economy, many products or services do not even have a conventional monetary “price” for the majority of their users. Thus, a cost and price-centred approach to competitiveness may be particularly insufficient for the digital economy. This is striking given that the lack of European equivalents to major tech giants is often cited as evidence of Europe's lagging competitiveness. It is also notable that the impact assessments of both the GDPR and the DSA are primarily focused on compliance costs, and administrative costs in particular.³⁸ These impact assessments pay less attention to broader business factors that may be relevant (such as the restrictions on profitable data processing, reduced user engagement, or less efficacious advertising amongst others.)³⁹ Finally, it should be noted that competitiveness and

29 European Commission, Better regulation: guidelines and toolbox, https://commission.europa.eu/law/law-making-process/planning-and-proposing-law/better-regulation/better-regulation-guidelines-and-toolbox_en

30 European Commission: Better Regulation Guidelines, d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en, https://commission.europa.eu/document/download/d0bbd77f-bee5-4ee5-b5c4-6110c7605476_en?filename=swd2021_305_en.pdf; European Commission: Better Regulation Toolbox, 9c8d2189-8abd-4f29-84e9-abc843cc68e0_en, https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=br_toolbox-nov_2021_en.pdf

31 Zach Meyers, “Better Regulation in Europe: An Action Plan for the Next Commission”, p. 9, https://www.cer.eu/sites/default/files/pb_ZM_better_regulation_19.3.24.pdf

32 European Commission, Statement by candidate Ursula von der Leyen, https://ec.europa.eu/commission/presscorner/detail/en/statement_24_3871

33 Ursula von der Leyen, “Europe's Choice POLITICAL GUIDELINES FOR THE NEXT EUROPEAN COMMISSION 2024–2029”, e6cd4328-673c-4e7a-8683-f63ffb2cf648_en, https://commission.europa.eu/document/download/e6cd4328-673c-4e7a-8683-f63ffb2cf648_en?filename=Political%20Guidelines%202024-2029_EN.pdf

34 Felice Simoneli and Nadina Iacob, “Improving the EU Policymaking Process: The Dos and Don'ts”, p. 4 Instituto Affari Internazionali; Regwatch Europe, RWE-opinion-on-communication-on-EU-competitiveness.pdf, <https://www.regwatcheurope.eu/wp-content/uploads/2023/11/RWE-opinion-on-communication-on-EU-competitiveness.pdf>

35 European Commission, Competitiveness Check 2023, https://commission.europa.eu/document/download/bab4c97d-c400-473f-a646-0a9c712a354d_en?filename=BRT-2023-Appendix-Competitiveness%20check.pdf

36 European Commission, Competitiveness Check 2023, https://commission.europa.eu/document/download/bab4c97d-c400-473f-a646-0a9c712a354d_en?filename=BRT-2023-Appendix-Competitiveness%20check.pdf

37 European Commission, Competitiveness Check 2023, https://commission.europa.eu/document/download/bab4c97d-c400-473f-a646-0a9c712a354d_en?filename=BRT-2023-Appendix-Competitiveness%20check.pdf

38 GDPR Impact Assessment, p. 148 – 151, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012SC0072>; DSA Impact Assessment, p. 50 – 58, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act>

39 GDPR Impact Assessment, p. 148 – 151, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012SC0072>; DSA Impact Assessment, p. 53, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act>

economic implications are not the same thing as the direct business implications of a given regulation, but there is a risk that in the current framework the two could be conflated. A regulation may only have costs for all businesses directly affected and yet still be economically beneficial. For example, consider Article 25 of the DSA, which seeks to prevent online services from making the practice of unsubscribing from their services unduly difficult.⁴⁰ This provision could negatively affect a variety of businesses (e.g. due to lost customers.) However, it is arguably economically beneficial and beneficial for Europe's competitiveness, by freeing up money customers lose to services they may no longer want or use and may also indirectly benefit other businesses these customers may switch to.

Notably, regulation is sometimes assumed to be economically burdensome, including in the better regulation discourse, but this need not always be the case, as in the example above. Regulations can impose significant burdens for businesses, and the Commission's impact assessments may not always detect accurately how burdensome regulations may be. It seems that the GDPR may have been more burdensome for businesses than was expected by the Commission's GDPR impact assessment for example.⁴¹ However, recent years have seen several digital policy regulations specifically designed to promote economic growth and innovation. Some examples include the EU's Data Act and the Data Governance Act⁴² which are intended to promote innovation by facilitating greater data sharing across the economy.⁴³ Another widely cited example is the Digital Markets Act (DMA), which is intended to promote competition in the digital economy.⁴⁴ Regulation can also help to reduce risks that could give rise to major economic disruption and thus benefit competitiveness in the long-run, for example as could be the case with the introduction of well-designed cybersecurity regulations. Anu Bradford states that "certain types of regulation are by design susceptible to promoting innovation" and notes some possible examples in digital policy.⁴⁵ The better regulation framework should explicitly take into account areas where regulation can promote growth and innovation. More generally, to assess the implications of regulations for competitiveness it may be beneficial to assess the broader business and economic consequences, rather than to focus primarily on compliance costs and price competitiveness.

Better Regulation Controversies

The better regulation agenda and its focus on competitiveness has drawn criticism from a variety of stakeholders, including NGOs, trade unions, and environmental organisations amongst others, who fear that it represents a deregulation agenda that will undermine consumer, social, and environmental protections and prevent beneficial new regulations.⁴⁶ Indeed, the Commission's communications in relation to the better regulation agenda tend to stress the economic burdens of regulation. It is thus important to note that deregulation can also lead to negative, potentially unanticipated, consequences.⁴⁷ Deregulation efforts intended to promote innovation are considered to have played a contributing role to the 2008 financial crisis, for example.⁴⁸

40 Digital Services Act, Regulation - 2022/2065 - EN - DSA - EUR-Lex, <https://eur-lex.europa.eu/eli/reg/2022/2065/oj>

41 Chinchih Chen, Carl Benedikt Frey, and Giorgio Presidente, Privacy-Regulation-and-Firm-Performance-Giorgio-WP-Upload-2022-1.pdf, <https://oms-www.files.svdcn.com/production/downloads/Privacy-Regulation-and-Firm-Performance-Giorgio-WP-Upload-2022-1.pdf>

42 European Commission, European Data Act enters into force, putting in place new rules for a fair and innovative data economy | Shaping Europe's digital future, <https://digital-strategy.ec.europa.eu/en/news/european-data-act-enters-force-putting-place-new-rules-fair-and-innovative-data-economy>

43 European Commission, European Data Act enters into force, putting in place new rules for a fair and innovative data economy | Shaping Europe's digital future, <https://digital-strategy.ec.europa.eu/en/news/european-data-act-enters-force-putting-place-new-rules-fair-and-innovative-data-economy>; Oxera, Economics of the Data Act: part 1 - Oxera, <https://www.oxera.com/insights/agenda/articles/economics-of-the-data-act-part-1/>; Philipp Rosenauer, Understanding the EU Data Act | PwC Switzerland, <https://www.pwc.ch/en/insights/regulation/understanding-eu-data-act.html>

44 Fiona M. Scott Morton, How can the Digital Markets Act enhance digital innovation?, <https://www.bruegel.org/newsletter/how-can-digital-markets-act-enhance-digital-innovation>; Jacques Crème, Will the Digital Markets Act create a level playing field? | TSE, <https://www.tse-fr.eu/Digital-Markets-Act>

45 Anu Bradford, The False Choice Between Digital Regulation and Innovation by Anu Bradford :: SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4753107&utm_source=pocket_saves, p. 402 - 419

46 Olivier Hoedeman, Von der Leyen's 'mission letters' let slip deregulation agenda of next commissioners, <https://euobserver.com/eu-political/ar3d655039>; Corporate Europe Observatory, 'Competitiveness': inside the troubling corporate blueprint for the coming Commission | Corporate Europe Observatory, <https://corporateeurope.org/en/2024/09/competitiveness-inside-troubling-corporate-blueprint-coming-commission>; European Trade Union Confederation, ETUC response to Enrico Letta's Report "Much more than a Market".pdf, <https://etuc.org/sites/default/files/document/file/2024-06/ETUC%20response%20to%20Enrico%20Letta%E2%80%99s%20Report%20%E2%80%9CMuch%20more%20than%20a%20Market%E2%80%9D.pdf>; New Economics Foundation, Reprotecting Europe | New Economics Foundation, <https://neweconomics.org/2020/01/reprotecting-europe>; Social Europe, 'Better regulation'? Capital first, society second, <https://www.socialeurope.eu/better-regulation-capital-first-society-second>

47 Nadia Hilal, Unintended effects of deregulation in the European Union: The case of road freight transport - ScienceDirect, <https://www.sciencedirect.com/science/article/abs/pii/S0038029608000848>; John Hopkins University, The unintended consequences of well-meaning deregulation | Hub, <https://hub.jhu.edu/2016/12/12/unintended-consequences-of-deregulation/>

48 Charles Randell, Rolling the rock: The cycle of deregulation, crisis and regulation | FCA, <https://www.fca.org.uk/news/speeches/rolling-rock-cycle-deregula>

There are also well-founded concerns that insisting on an excessively high threshold of evidence could lead to an inertia bias which could prevent the adoption of new regulations even in the face of strong evidence about the benefits of such regulation. In relation to tobacco regulation, for example, the Tobacco Control Research Group at the University of Bath states that “‘Better Regulation’ processes intended to enhance evidence-based policy making may actually undermine it, enabling corporate interests to misrepresent evidence in order to create confusion, doubt, and delay.”⁴⁹ It is important for both the legitimacy and effectiveness of the better regulation framework that clear thresholds of evidence are designed to avoid an inertia bias which could prevent the adoption of new regulations for which the overall benefits outweigh the costs. The better regulation framework could treat deregulation and new regulation evenhandedly, with similar thresholds of evidence, impact assessments and consultations being deployed in equivalent scenarios. Furthermore, while much of the discussion relating to better regulation focuses on economic factors, the need to improve regulations with regards to the social consequences may be just as great, as will be considered in the next section.

3. Negative Social Implications of Regulations: Unintended Consequences and Loopholes

The discussion about “better regulation”, both by policymakers and in the literature, often focuses on improving regulation-making with regards to its economic consequences. However, it may be just as important to improve regulation-making with regards to unintended social consequences. This may particularly be the case when it comes to digital policy. Digital technologies and services have become essential mediums through which citizens exercise fundamental rights and digital technologies can have major social implications, including for democracy, social resilience, and security.

The European Commission’s better regulation toolbox and guidelines place greater emphasis on the economic impact and burdens of regulations than they do on the potential negative social consequences. The word “competitiveness” appears 122 times in the Commission’s better regulation toolbox; while the word “democratic”, “democracy” and “democratically” combined appear a total of twelve times throughout the 614-page document.⁵⁰ While the toolbox pays significant attention to how regulation can have negative unintended consequences for competitiveness, the document does not explicitly mention the possibility of regulations having negative consequences for democracy. “Freedom of expression” appears to be mentioned only twice in the entire document.⁵¹ Other than information about the Commission’s own internal data protection procedures (e.g. consultation activities and transparency) the word “privacy” appears only four times.⁵² Although the need to assess the potential impacts of regulation on fundamental rights is considered in the Toolbox (tool #29)⁵³, far greater emphasis is placed overall on the potential economic implications of regulations than on the potential negative social consequences.

Even impact assessments on legislation such as the GDPR and the DSA, which have major social implications, place much greater emphasis on the possible economic costs compared to the social costs of these regulations.⁵⁴ In the

tion-crisis-and-regulation; Charles W. Murdock, *The Big Banks: Background, Deregulation, Financial Innovation and Too Big to Fail*, https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1038&context=social_justice

49 University of Bath, Institute for Policy Research, *ipr-evidence-based-policy-making-and-better-regulation.pdf*, <https://www.bath.ac.uk/publications/evidence-based-policy-making-better-regulation-standardised-packaging-of-tobacco/attachments/ipr-evidence-based-policy-making-and-better-regulation.pdf>

50 Search by author on document: European Commission, “Better Regulation Toolbox”, 9c8d2189-8abd-4f29-84e9-abc843cc68e0_en, https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf

51 The phrase “Freedom of expression” is mentioned once while a list containing a variety of freedoms (with expression listed) is mentioned on page 150. Freedom of speech and other equivalent phrases do not appear to be used. “Access to information” appears six times, but only in relation to governance (e.g. access to Commission information) or in relation to consumer protection. European Commission, “Better Regulation Toolbox”, 9c8d2189-8abd-4f29-84e9-abc843cc68e0_en, https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf

52 European Commission, “Better Regulation Toolbox”, 9c8d2189-8abd-4f29-84e9-abc843cc68e0_en, https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf

53 European Commission, “Better Regulation Toolbox”, 9c8d2189-8abd-4f29-84e9-abc843cc68e0_en, https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=BR%20toolbox%20-%20Jul%202023%20-%20FINAL.pdf

54 DSA Impact Assessment, p. 59 – 66, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act>

case of the DSA, the Commission's impact assessment clearly identifies potential social benefits from the regulation but does not identify any meaningful social costs or disadvantages.⁵⁵ It states that the proposal is "generally well balanced" and is "not expected to have a negative impact on fundamental rights."⁵⁶ The GDPR impact assessment likewise finds only positive benefits when it comes to all fundamental rights considered (with the partial exception of noting increased burdens for freedom to conduct a business.)⁵⁷

Regulations dealing with complex subject areas such as the GDPR and the DSA may be more likely to effectively manage social trade-offs and to balance competing rights when these are identified by impact assessments while the regulations are being designed. Furthermore, impact assessments often assume that legislation will deliver the intended social benefits without rigorously examining whether this will necessarily occur. Sometimes regulations can have the opposite effect of what is intended if there is insufficient scrutiny of whether they will actually achieve their objective (e.g. as with the famous Cobra effect;⁵⁸ or if prohibited methods or ingredients in food health regulations could sometimes lead to producers using less healthy methods or ingredients.⁵⁹) This paper now turns to some digital policy regulations where negative consequences - including with respect to fundamental rights, democracy, or social resilience - could potentially have been detected by impact assessments which placed a more rigorous focus on the detection of unintended social consequences.

Privacy Policies and the GDPR

The GDPR has had a number of unintended negative consequences, including in relation to online privacy disclosure, transparency measures, censorship, and data collection intended to benefit minority groups. The Commission's GDPR impact assessment noted that in the online environment many citizens felt they lacked control over their data and had no alternative to disclosing their data online.⁶⁰ The proliferation of website privacy notices to which users passively consent was a problem which pre-existed the GDPR; one pre-GDPR study estimated that it could take the average internet user more than 44 hours a year to read all the privacy policies that they agreed to.⁶¹ Rather than fixing this problem, however, studies have found that the length of privacy policy notices have only increased since the introduction of the GDPR with its strengthened rules on disclosure.⁶² Rather than empowering users, reinforced disclosures can make it even more difficult for citizens to effectively inform themselves or to meaningfully consent.

Another unintended and potentially negative consequence arose due to tensions between the GDPR and various transparency and anti-corruption measures it could hamper⁶³, including the Anti-Money Laundering Directive (AMLD)⁶⁴ amongst others.⁶⁵ Paul Lavery and Ruth Hughes from the Irish law firm McCann Fitzgerald have noted that the GDPR has "presented significant (and arguably unintended) challenges" in relation to "anti-bribery and anti-corruption due

55 DSA Impact Assessment, p. 59 – 66, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act>

56 DSA Impact Assessment, p. 60, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act>

57 GDPR Impact Assessment, p. 128 – 130, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012SC0072>

58 Barry Newell and Christopher Doll, Systems Thinking and the Cobra Effect - Our World, <https://ourworld.unu.edu/en/systems-thinking-and-the-cobra-effect>

59 For an example of this argument being made, see: Jack Power, Food industry tried to push Government to oppose EU ban on smoky flavourings – The Irish Times, <https://www.irishtimes.com/politics/2024/10/29/food-industry-tried-to-push-government-to-oppose-eu-ban-on-smoky-flavourings/>

60 GDPR Impact Assessment, p. 22, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52012SC0072>

61 Office of the Privacy Commissioner, Office of the Privacy Commissioner | Have you read your privacy policies?, <https://www.privacy.org.nz/blog/have-you-read-your-privacy-policies/>

62 De Montfort University Leicester, Study shows privacy policies are longer and harder to understand in 2021, <https://www.dmu.ac.uk/about-dmu/news/2022/february/study-shows-privacy-policies-are-longer-and-harder-to-understand-in-2021.aspx>; Irma Šlekytė, NordVPN study shows: Nine hours to read the privacy policies of the 20 most visited websites in the US | NordVPN, <https://nordvpn.com/blog/privacy-policy-study-us/>

63 Ben Cowdock, Striking the right balance between privacy and fighting financial crime | Transparency International UK, <https://www.transparency.org.uk/striking-right-balance-between-privacy-and-fighting-financial-crime>

64 Lorenzo Gugliotta, Anti-money laundering and data protection: A complex relationship? (Part 1) - CiTiP blog, <https://www.law.kuleuven.be/citip/blog/anti-money-laundering-and-data-protection-a-complex-relationship-part-1/>; Mikaela Constantinou, GDPR vs AML: A Delicate Balance - Eurofast, <https://eurofast.eu/gdpr-vs-aml-a-delicate-balance/>

65 Ruta Mrazauskaite, Managing Anticorruption Compliance Under the EU's General Data Protection Regulation | GAB | The Global Anticorruption Blog, <https://globalanticorruptionblog.com/2019/06/03/managing-anticorruption-compliance-under-the-eus-general-data-protection-regulation/>; Centre for Information Policy Leadership, [gdpr_six_years_on_cipl_may24.pdf](https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/gdpr_six_years_on_cipl_may24.pdf), https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/gdpr_six_years_on_cipl_may24.pdf

diligence” which they claimed were “severely restricted” by the GDPR.⁶⁶

Another example is the upsurge in the use of the GDPR’s provisions to engage in censorship efforts. The GDPR has become an increasingly prominent component in strategic lawsuits against public participation (SLAPP) cases against the media in recent years, despite what is supposed to be a journalistic exemption in the GDPR.⁶⁷ As Oliver Bullough, a writer on financial crime, has commented, the GDPR “has become a weapon against journalists” who wants to scrutinise the activities of wealthy oligarchs.⁶⁸ Similar controversies arise in relation to the “Right to be Forgotten” which has been exploited by people accused of misconduct to deindex online search engine results, including media content.⁶⁹

Finally, GDPR provisions on special categories of personal data (so-called “sensitive data”) which includes factors such as race, ethnicity, and religion has also led to unintended consequences. For example, it has led to cases where the collection of data including in relation to pay,⁷⁰ public services,⁷¹ and healthcare⁷² is sometimes insufficient and could potentially pose negative consequences for minority groups in relation to the provision of public services or the formulation of public policy.

The Digital Services Act (DSA)

The European DSA is another important piece of legislation which may present unintended negative consequences and loopholes. One of the DSA’s goals is to ensure that online platforms take expeditious action to remove or block illegal content on their platforms, which includes blocking access to content from EU Member States where such content may be illegal.⁷³ One risk posed by DSA is that it could bolster state censorship in countries experiencing democratic backsliding in Europe. Generally, the DSA seems to apply to all national laws in the EU, which potentially could lead to it applying to extreme or anti-democratic laws in place in some Member States.⁷⁴ The DSA could bolster the capability of governments to ensure that regulators and online platforms in other EU Member States help them to censor their own citizens by ensuring the blocking of content - as these regulators and platforms would potentially be infringing the DSA if they did not do so.

Secondly, the DSA was intended to curtail the ability of powerful online platforms to engage in discretionary censorship⁷⁵ but an important loophole exists. The users of online platforms can contest against decisions by platforms to remove their posts if these posts are incorrectly removed by the platform on the grounds that the post breached the platform’s terms and conditions. The DSA mandates that the online platforms would restore such posts if these are legal and do not actually breach the platform’s terms and conditions.⁷⁶ However, nothing in the DSA appears to prevent an online platform from simply changing its terms and conditions to subsequently remove the exact same content. The DSA imposes few restrictions on how large platforms set their terms and conditions and provides no mechanisms by which users can actually contest against the contents of the terms and conditions of large, powerful online platforms.

66 Paul Lavery and Ruth Hughes, McCann FitzGerald, GDPR – an unintended obstacle to anti-bribery laws – SBP, https://www.mccannfitzgerald.com/uploads/GDPR_%E2%80%93_an_unintended_obstacle_to_anti-bribery_laws_-_SBP.PDF

67 Melinda Rucz, Full article: SLAPPed by the GDPR: protecting public interest journalism in the face of GDPR-based strategic litigation against public participation, <https://www.tandfonline.com/doi/full/10.1080/17577632.2022.2129614#d1e105>; Mike Masnick, The Rich And Powerful Are Abusing ‘Privacy’ Laws To Silence Journalists And Authors | Techdirt, <https://www.techdirt.com/2022/05/13/the-rich-and-powerful-are-abusing-privacy-laws-to-silence-journalists-and-authors/>

68 Oliver Bullough, Why oligarchs love European data-protection laws, <https://www.economist.com/1843/2022/05/04/why-oligarchs-love-european-data-protection-laws>

69 Jack Power, ‘Right to be forgotten’ should be reviewed after use by Quinns, data privacy expert says – The Irish Times, <https://www.irishtimes.com/news/ireland/irish-news/right-to-be-forgotten-should-be-reviewed-after-use-by-quinns-data-privacy-expert-says-1.4721975>

70 Central Statistics Office, Data Issues and Recommendations Equality Data Audit 2020 - Central Statistics Office, <https://www.cso.ie/en/methods/methodologicalresearch/rp-eda/equalitydataaudit2020/dataissuesandrecommendations/>

71 Central Statistics Office, Data Issues and Recommendations Equality Data Audit 2020 - Central Statistics Office, <https://www.cso.ie/en/methods/methodologicalresearch/rp-eda/equalitydataaudit2020/dataissuesandrecommendations/>

72 Maria Roura et al., ‘If relevant, yes; if not, no’: General practitioner (GP) users and GP perceptions about asking ethnicity questions in Irish general practice: A qualitative analysis using Normalization Process Theory - PMC, <https://pmc.ncbi.nlm.nih.gov/articles/PMC8115799/>

73 Department of Enterprise, Trade and Employment, Digital Services Act - DETE, <https://enterprise.gov.ie/en/what-we-do/the-business-environment/digital-single-market/eu-digital-single-market-aspects/digital-services-act/#:~:text=The%20DSA%20is%20designed%20to,certain%20circumstances%20and%20addressing%20complaints>

74 See Digital Services Act, Regulation - 2022/2065 - EN - DSA - EUR-Lex, <https://eur-lex.europa.eu/eli/reg/2022/2065/oj>, Article 3 for definition of illegal content.

75 DSA Impact Assessment, p.18, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-digital-services-act>

76 Digital Services Act, Regulation - 2022/2065 - EN - DSA - EUR-Lex, <https://eur-lex.europa.eu/eli/reg/2022/2065/oj>

Thirdly, the DSA even incentivises the expansion of the role of very large online platform companies to shape public discourse by mandating them to decide what information may have “negative effects on civic discourse” and to take action against such content, including by expanding their terms and conditions or by altering their algorithmic and recommender systems.⁷⁷ This is a major power for online platforms amidst the increasing politicisation of some online platform companies and growing evidence of politically biased moderation and recommender systems.⁷⁸ Rather than empowering citizens in some cases, the DSA risks empowering public authorities and private companies to shape public discourse including in ways that may be harmful to democracy.

The European Media Freedom Act

Two features of the European Media Freedom Act (EMFA) also deserve attention. The first is a potential loophole in EMFA’s protection against surveillance. Article 4 of the EMFA contains a prohibition on the use of spyware against journalists but the legislation fails to prohibit other forms of surveillance against journalists, aside from the function of protecting journalistic sources.⁷⁹ However, many forms of digital surveillance do not necessarily rely on the use of spyware as is defined in the EMFA⁸⁰ as will be further discussed later in this paper.

Secondly, the “media privilege” provision in Article 17 of the EMFA mandates that media providers’ content should receive special protection from content moderation on large online platforms.⁸¹ Some stakeholders have expressed concern that rogue actors such as inauthentic media organisations could deliberately exploit these provisions of the EMFA to spread disinformation.⁸² However, a bigger problem relates to media capture taking place in many European countries amongst traditional mainstream media, at the hands of governments undermining media freedom and democracy.⁸³ Such captured media outlets could gain advantages under the legislation compared to those who criticise or challenge them who are not afforded the same protections of the EMFA. Furthermore, even reputable mainstream media outlets can make mistakes and have biases; ensuring that stakeholders can challenge the media on a level playing field may help to ensure that the media is held accountable and is trustworthy in the long-run. Thus, this feature of the EMFA could potentially have some long-term negative implications for democracy.

The Cyber Resilience Act

The Cyber Resilience Act (CRA) is another example of legislation which has caused some controversy. The CRA includes requirements for mandatory disclosure by companies of unmitigated and actively exploited vulnerabilities to public authorities within twenty-four hours of discovery.⁸⁴ This provision has been criticised by stakeholders including from industry, cybersecurity experts, and civil society organisations, who argue that the wider dissemination of this

77 Digital Services Act, Regulation - 2022/2065 - EN - DSA - EUR-Lex, <https://eur-lex.europa.eu/eli/reg/2022/2065/oj>

78 See for examples: Dan Milmo and Alex Hern, Facebook moderation system favours ‘business partners’, says oversight board | Meta | The Guardian, <https://www.theguardian.com/technology/2022/dec/06/meta-protecting-business-partners>; Pascal Davies, Meta slammed for special treatment of VIP Facebook users, including Donald Trump | Euronews, <https://www.euronews.com/next/2022/12/06/meta-slammed-for-special-treatment-of-vip-facebook-users-including-donald-trump>; Sam Biddle, Facebook’s Ukraine-Russia Moderation Double Standard (theintercept.com), <https://theintercept.com/2022/04/13/facebook-ukraine-russia-moderation-double-standard/>; How Meta censors Palestinian voices (accessnow.org), <https://www.accessnow.org/publication/how-meta-censors-palestinian-voices/>; New Arab Staff, Say ‘from the river to the sea’, get suspended from X: Musk (newarab.com), <https://www.newarab.com/news/say-river-sea-get-suspended-x-musk>

79 European Media Freedom Act, EUR-Lex - 52022PC0457 - EN - EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457>

80 For examples of digital surveillance that may not necessarily constitute spyware see: Adriel Bogle, Is your smartphone being tracked? Here’s how to tell | Domestic violence | The Guardian, <https://www.theguardian.com/society/2024/oct/31/is-your-smartphone-being-tracked-heres-how-to-tell>. Some prominent examples of journalists being spied upon using technological means but which may not necessarily meet the definition of spyware in the EMFA, see: Conor Lally, Call for Gsoc and Minister for Justice to ‘urgently’ address journalists’ phones being accessed – The Irish Times, <https://www.irishtimes.com/crime-law/2024/06/18/call-for-gsoc-and-minister-for-justice-to-urgently-address-journalists-phones-being-accessed/>; Conor Lally, Why the Garda watchdog is now under fire over surveillance on journalists’ phones – The Irish Times, <https://www.irishtimes.com/crime-law/2024/06/18/why-the-garda-watchdog-is-now-under-fire-over-surveillance-on-journalists-phones/>; Cianan Brennan, Garda requests for phone records down dramatically since new law was enacted, <https://www.irishtimes.com/news/courtandcrime/arid-41308759.html>

81 European Media Freedom Act, EUR-Lex - 52022PC0457 - EN - EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457>

82 Paige Collings and Christoph Schmon, EU Media Freedom Act: A Media Privilege in Content Moderation Is a Really Bad Idea | Electronic Frontier Foundation, <https://www.eff.org/deeplinks/2023/07/eu-media-freedom-act-media-privilege-content-moderation-really-bad-idea>

83 Jon Henley, Media freedom ‘perilously close to breaking point’ in several EU countries | Press freedom | The Guardian, <https://www.theguardian.com/media/2024/apr/29/media-freedom-perilously-close-breaking-point-several-eu-countries>

84 Rayna Stamboliyska, Vulnerability reporting in the Cyber Resilience Act: not such a good idea? - INCYBER NEWS, <https://incyber.org/en/article/vulnerability-reporting-in-the-cyber-resilience-act-not-such-a-good-idea/#:~:text=Article%2011%20of%20the%20CRA,the%20authorities%20within%2024%20hours.>

information itself poses cybersecurity risks.⁸⁵ This is because information about vulnerabilities could be disseminated among potentially dozens of government agencies who could themselves be hacked, infiltrated, or compromised.⁸⁶ While there may be merit to the introduction of mandatory disclosure rules, a variety of stakeholders have proposed alternatives that could reduce some of the associated risks.⁸⁷

Interactions Between Legislation: The GDPR, the AI Act, and the DSA

Unexpected or negative consequences can also arise from the way in which different pieces of regulation can interact. For example, the AI Act requires that developers of high-risk AI try to minimise the risk of bias and discrimination to which these systems can sometimes give rise.⁸⁸ This requires the use of datasets that are sufficiently broad, representative, and diverse.⁸⁹ This can give rise to tensions with the provisions of the GDPR which set out the principles of data minimisation and those which impose even stricter restrictions on the use of data relating to ethnicity, religion, race, and other factors upon which discrimination can occur. Some commentators have noted that there may be tensions between these legal obligations of the GDPR and the AI Act and this could have negative consequences for minority groups, if discrimination by AI systems arises as a result.⁹⁰ Similar negative consequences could arise due to interactions between the GDPR and DSA Article 26.3, which could inhibit the ability of minority groups to specifically advertise to each other and prohibit advertising intended to promote opportunities to, or be socially beneficial for, minority groups.⁹¹

4. Technologies and Principles

Technological Change, Regulation, and the Technology-Neutral Principle

The principle of technology-neutrality holds that legislation should neither impose specific regulations upon, nor discriminate in favour of or against, the use of a particular type of technology.⁹² The European Commission explains that the principle of technological-neutrality is important because: “regulations tied to a particular technology may quickly become obsolete and require further amendment”, and stating that regulations should “not require the use of any specific technology”.⁹³ Despite technological-neutrality remaining a guiding principle of EU regulation,⁹⁴ there

85 Digital Europe, Oversharing is not caring, it is a cyber risk: joint statement raising concerns on unpatched vulnerability reporting in the Cyber Resilience Act - DIGITALEUROPE, <https://www.digitaleurope.org/news/oversharing-is-not-caring-it-is-a-cyber-risk-joint-statement-raising-concerns-on-unpatched-vulnerability-reporting-in-the-cyber-resilience-act/>; Electronic Frontiers Foundation, EFF And Other Experts Join in Pointing Out Pitfalls of Proposed EU Cyber-Resilience Act | Electronic Frontier Foundation, <https://www.eff.org/deeplinks/2023/10/eff-and-other-experts-join-pointing-out-pitfalls-proposed-eu-cyber-resilience-act>; Nathan Eddy, Security Pros Warn That EU’s Vulnerability Disclosure Rule Is Risky, <https://www.darkreading.com/application-security/security-pros-warn-that-eu-vulnerability-disclosure-rule-is-risky>

86 Digital Europe, Oversharing is not caring, it is a cyber risk: joint statement raising concerns on unpatched vulnerability reporting in the Cyber Resilience Act - DIGITALEUROPE, <https://www.digitaleurope.org/news/oversharing-is-not-caring-it-is-a-cyber-risk-joint-statement-raising-concerns-on-unpatched-vulnerability-reporting-in-the-cyber-resilience-act/>; Electronic Frontiers Foundation, EFF And Other Experts Join in Pointing Out Pitfalls of Proposed EU Cyber-Resilience Act | Electronic Frontier Foundation, <https://www.eff.org/deeplinks/2023/10/eff-and-other-experts-join-pointing-out-pitfalls-proposed-eu-cyber-resilience-act>; Nathan Eddy, Security Pros Warn That EU’s Vulnerability Disclosure Rule Is Risky, <https://www.darkreading.com/application-security/security-pros-warn-that-eu-vulnerability-disclosure-rule-is-risky>

87 Electronic Frontiers Foundation, EFF And Other Experts Join in Pointing Out Pitfalls of Proposed EU Cyber-Resilience Act | Electronic Frontier Foundation, <https://www.eff.org/deeplinks/2023/10/eff-and-other-experts-join-pointing-out-pitfalls-proposed-eu-cyber-resilience-act>; Digital Europe, Oversharing is not caring, it is a cyber risk: joint statement raising concerns on unpatched vulnerability reporting in the Cyber Resilience Act - DIGITALEUROPE, <https://www.digitaleurope.org/news/oversharing-is-not-caring-it-is-a-cyber-risk-joint-statement-raising-concerns-on-unpatched-vulnerability-reporting-in-the-cyber-resilience-act/>

88 AI Act, Regulation - EU - 2024/1689 - EN - EUR-Lex, <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

89 AI Act, Regulation - EU - 2024/1689 - EN - EUR-Lex, <https://eur-lex.europa.eu/eli/reg/2024/1689/oj>

90 Marvin van Bekkum and Frederik Zuiderveen Borgesius, Using sensitive data to prevent discrimination by artificial intelligence: Does the GDPR need a new exception? - ScienceDirect, <https://www.sciencedirect.com/science/article/pii/S0267364922001133#sec0007>

91 General Data Protection Regulation, Regulation - 2016/679 - EN - gdpr - EUR-Lex, <https://eur-lex.europa.eu/eli/reg/2016/679/oj>; For examples of potentially beneficial advertising see Scott Mark, You get an AI summit! And you get an AI summit! – POLITICO, <https://www.politico.eu/newsletter/digital-bridge/you-get-an-ai-summit-and-you-get-an-ai-summit/>; Panoptikon Foundation, Who (really) targets you? | Panoptikon Foundation, <https://en.panoptikon.org/political-ads-report>

92 Revue du Centre de recherche en droit public, https://www.lex-electronica.org/files/sites/103/14-2_ali.pdf

93 European Commission, Technology Neutrality | Joinup, <https://interoperable-europe.ec.europa.eu/collection/common-assessment-method-standards-and-specifications-camss/solution/elap/technology-neutrality#:~:text=Rationale%3A,distributors%20of%20technology%20or%20services.>

94 European Commission: Better Regulation Toolbox, 9c8d2189-8abd-4f29-84e9-abc843cc68e0_en, <https://commission.europa.eu/document/down->

are instances when there might be good reason to differentiate between technologies. Many countries differentiate between telephone calls and emails for marketing purposes for instance⁹⁵ and there may be good reasons to differentiate between rules for e-books and physical books to protect intellectual property.⁹⁶ Despite the principle of technological-neutrality being widely cited by policymakers, however, it seems that policymakers have sometimes started to depart from the principle in practice.

The EU's Artificial Intelligence Act (AI) itself arguably departs from the principle of technological-neutrality, by seeking to regulate a specific type of technology. Indeed, specific features of the AI Act depart from the principle of neutrality even further by differentiating between different types of AI technologies, for example, in relation to generative and general-purpose AI.⁹⁷ Debates about the definition of AI have arisen as a result. Some have argued that the definition of AI under the Act needs to be adequately broad to ensure that certain software systems which can have important social consequences are not excluded from the obligations imposed by the Act.⁹⁸ In contrast, others have argued that the definition of AI, if too broad, would risk including a variety of technologies which do not present novel risks that the AI Act is seeking to address.⁹⁹

Some examples of technologies which could fall outside the definition of AI depending on how it is defined include the Fujitsu software responsible for the well-documented Post Office scandal in the UK, which saw hundreds of innocent people being wrongly prosecuted for theft,¹⁰⁰ as well as examples of algorithms that can be used to grade exam results¹⁰¹ or to detect welfare fraud.¹⁰² Debates about whether or not these technologies are AI or not, may miss the more important point that many of the underlying premises underpinning the AI Act, including ensuring human accountability for machine-generated decisions, could fruitfully apply in the above examples. In some cases, there is a danger that policymakers demonstrate a 'headline bias' and rush to regulate the most attention-grabbing and hyped technologies, while neglecting those whose impacts may be just as significant.

A similar case arises with the AI Act's provisions on generative AI intended to counter the threat of "deepfakes."¹⁰³ The use of software to generate artificial fake images is not new and non-AI methods of doing so may continue to be significant, regardless of the development of AI technologies.¹⁰⁴

The EMFA contains a provision (Article 4.3) dedicated specifically to countering spyware surveillance, while all other forms of surveillance are dealt with together under Article 4.2 and only for the purpose of the protection of journalistic sources.¹⁰⁵ There is a range of potential ways that journalists could be digitally surveilled using methods that may not

load/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=br_toolbox-nov_2021_en.pdf

95 Laura Slattery, Regulator's plans would relax some rules controlling cold-calling – The Irish Times, <https://www.irishtimes.com/business/regulator-s-plans-would-relax-some-rules-controlling-cold-calling-1.418237>

96 See for discussion on this see: David Meyer, Second-hand e-book seller complains about Dutch publishers – POLITICO, <https://www.politico.eu/article/e-book-seller-competition-complaint-dutch-publishers/>; Caterina Sganga, Waiting for Tom Kabinet, a.k.a why EU copyright needs digital exhaustion, and how the CJEU can help with this – Part 2 - Kluwer Copyright Blog, <https://copyrightblog.kluweriplaw.com/2019/04/23/waiting-for-tom-kabinet-a-k-a-why-eu-copyright-needs-digital-exhaustion-and-how-the-cjeu-can-help-with-this-part-2/>; Ansgar Kaiser, Exhaustion, Distribution and Communication to the Public – The CJEU's Decision C-263/18 – Tom Kabinet on E-Books and Beyond | GRUR International | Oxford Academic <https://academic.oup.com/grurint/article/69/5/489/5854748?login=false>

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98 Joanna J. Bryson, Europe Is in Danger of Using the Wrong Definition of AI | WIRED, <https://www.wired.com/story/artificial-intelligence-regulation-european-union/#:~:text=Some%20intelligent%20systems%20are%20at,for%20both%20businesses%20and%20citizens.>

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100 Karl Flinders, Post Office Horizon scandal explained: Everything you need to know | Computer Weekly, <https://www.computerweekly.com/feature/Post-Office-Horizon-scandal-explained-everything-you-need-to-know>

101 BBC, A-levels and GCSEs: How did the exam algorithm work?, <https://www.bbc.com/news/explainers-53807730>, <https://www.bbc.com/news/explainers-53807730>

102 EU Law Enforcement, The Dutch benefits scandal: a cautionary tale for algorithmic enforcement – EU Law Enforcement, <https://eulawenforcement.com/?p=7941>; Dutch News, Childcare benefit victims criticise slow pace of redress - DutchNews.nl, <https://www.dutchnews.nl/2024/02/childcare-benefit-victims-criticise-slow-pace-of-redress/>

103 Brian McElligott, Regulating Chatbots and Deepfakes | Mason Hayes Curran, <https://www.mhc.ie/hubs/the-eu-artificial-intelligence-act/regulating-chatbots-and-deepfakes-under-the-eu-ai-act>

104 Kalev Leetaru, Deep Fakes Are Merely Today's Photoshopped Scientific Images, <https://www.forbes.com/sites/kalevleetaru/2019/08/24/deep-fakes-are-merely-todays-photoshopped-scientific-images/>

105 European Media Freedom Act, EUR-Lex - 52022PC0457 - EN - EUR-Lex, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0457>

necessarily meet the definition of spyware under the EMFA.¹⁰⁶

While the GDPR does sometimes differentiate between technologies, it generally holds to the principle of technological-neutrality.¹⁰⁷ However, Oliver Bullough notes that in some cases the GDPR may in fact be more onerous for those employing less digitally sophisticated practices compared to the practices of the “big tech companies – the ones the law was intended to inconvenience – [who] have automated this process.”¹⁰⁸ The fact that the GDPR applies just as much to handwritten notes and posted letters is sometimes overlooked.¹⁰⁹ Thus regulations that seek to treat technologies equally, can, in some cases, have unequal effects. It has been noted, for example, that mandatory disclosure rules may have a more negative impact on advertising via the medium of radio compared to other means.¹¹⁰

When the principle of technological-neutrality is being applied there may also be merit to deepening efforts to future-proof the principle. The rush of amendments to the AI Act proposal in response to the arrival of ChatGPT, for example, suggests that greater effort could have been taken to assess how technological change might have been better accounted for when the regulatory proposal was initially being drafted.¹¹¹ There may be scope for policymakers to readjust their stance on the principle of technological-neutrality, by accepting that the principle need not always be applied, but that when it is rational to do so, the principle should be applied with greater rigour than is sometimes currently the case. Policymakers could also adopt what might be called a past-proofing principle, to make sure that policymakers are not neglecting older technologies when making new regulations, as may have occurred in some of the cases above.

Size-Based and Risk-Based Approaches

Two regulatory approaches that have recently become prominent in digital policy are the size-based approach to regulation, as seen in the DSA and DMA, and the risk-based approach to regulation, as seen in the AI Act. The size-based approach treats companies differently based either on their size or on the number of their users. The risk-based approach seeks to ensure that regulation applies with greatest rigour in cases where the greatest risk is posed. Both approaches can potentially reduce the regulatory burdens imposed on businesses and the economy while maintaining high standards of protection.¹¹² The Commission intended for most AI applications to face no new regulatory requirements under the AI Act, with the Act’s provisions being primarily targeted at only high-risk AI.¹¹³ This approach was broadly welcomed by industry and other stakeholders.¹¹⁴ How the principle may operate in practice may

106 For examples of digital surveillance that may not necessarily constitute spyware see some examples mentioned in the following: Adriel Bogle, Is your smartphone being tracked? Here’s how to tell | Domestic violence | The Guardian, <https://www.theguardian.com/society/2024/oct/31/is-your-smartphone-being-tracked-heres-how-to-tell>. Some prominent examples of journalists being spied upon using technological means but which may not necessarily meet the definition of spyware in the EMFA, see: Conor Lally, Call for Gsoc and Minister for Justice to ‘urgently’ address journalists’ phones being accessed – The Irish Times, <https://www.irishtimes.com/crime-law/2024/06/18/call-for-gsoc-and-minister-for-justice-to-urgently-address-journalists-phones-being-accessed/>; Conor Lally, Why the Garda watchdog is now under fire over surveillance on journalists’ phones – The Irish Times, <https://www.irishtimes.com/crime-law/2024/06/18/why-the-garda-watchdog-is-now-under-fire-over-surveillance-on-journalists-phones/>; Cianan Brennan, Garda requests for phone records down dramatically since new law was enacted, <https://www.irishexaminer.com/news/courtandcrime/arid-41308759.html>

107 GDPR, Regulation - 2016/679 - EN - gdpr - EUR-Lex, <https://eur-lex.europa.eu/eli/reg/2016/679/oj>

108 Olliver Bullough, Why oligarchs love European data-protection laws, <https://www.economist.com/1843/2022/05/04/why-oligarchs-love-european-data-protection-laws>; easyGDPR, I only have handwritten notes, does the GDPR apply to me? - easyGDPR, <https://easygdpr.eu/en/gdprfaq/i-only-have-handwritten-notes-does-the-gdpr-still-apply-to-me/>

109 Olliver Bullough, Why oligarchs love European data-protection laws, <https://www.economist.com/1843/2022/05/04/why-oligarchs-love-european-data-protection-laws>; easyGDPR, I only have handwritten notes, does the GDPR apply to me? - easyGDPR, <https://easygdpr.eu/en/gdprfaq/i-only-have-handwritten-notes-does-the-gdpr-still-apply-to-me/>; IIEA, Helen Dixon - The GDPR at Age 2 – Reflections of the Irish DPC, <https://www.youtube.com/watch?v=sxAgwKQhJxc>

110 Central Bank of Ireland, Consumer Protection Code Regulatory Impact Analysis. <https://www.centralbank.ie/docs/default-source/regulation/consumer-protection/other-codes-of-conduct/14-gns-4-2-7-consumer.pdf?sfvrsn=8>

111 Gian Volpicelli, ChatGPT broke the EU plan to regulate AI – POLITICO, <https://www.politico.eu/article/eu-plan-regulate-chatgpt-openai-artificial-intelligence-act/>

112 Digital Europe, Joint statement: Let’s give AI in Europe a fighting chance - DIGITALEUROPE, <https://www.digitaleurope.org/news/joint-statement-lets-give-ai-in-europe-a-fighting-chance/>; Digital SME Alliance, AI Act: The EU agrees on rules to support the uptake of trustworthy AI - European DIGITAL SME Alliance, <https://www.digitalsme.eu/ai-act-the-eu-agrees-on-rules-to-support-the-uptake-of-trustworthy-ai/>; Computer and Communications Industry Association, CClA Welcomes the EU’s Risk-Based AI Proposal, Urges Further Clarifications - CClA, <https://ccianet.org/news/2021/04/ccia-welcomes-the-eus-risk-based-ai-proposal-urges-further-clarifications/>; European Commission, Impact Assessment of the Regulation on Artificial intelligence | Shaping Europe’s digital future, <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-regulation-artificial-intelligence>

113 Future of Life Institute – EU Artificial Intelligence Act, EU AI Act Compliance Checker | EU Artificial Intelligence Act, <https://artificialintelligenceact.eu/assessment/eu-ai-act-compliance-checker/>

114 Digital Europe, Joint statement: Let’s give AI in Europe a fighting chance - DIGITALEUROPE, <https://www.digitaleurope.org/news/joint-statement-lets-give-ai-in-europe-a-fighting-chance/>; Digital SME Alliance, AI Act: The EU agrees on rules to support the uptake of trustworthy AI - European DIGITAL SME Alliance,

be more complicated than was initially widely expected, as determining what actually constitutes high-risk AI may be a challenge across a variety of cases.¹¹⁵

The size-based approach to regulation is often also derived from a risk-based approach, as is the case with the DSA and the DMA, where larger platforms or gatekeepers are deemed to pose particularly large societal risks. It also reflects the Commission's "think small first" principle. This principle seeks to ensure that SMEs are given special consideration when new regulations are drafted and created.¹¹⁶ This is because regulatory burdens are often disproportionately heavy for SMEs due to their limited resources.¹¹⁷ However, the Commission arguably has more work to do to make the "think small first" principle a reality. It seems to be the case that the GDPR impact assessment undertaken by the Commission underestimated the burdens of the regulation on SMEs, for instance.¹¹⁸ Both the DSA and GDPR impact assessments claimed that the regulations would bring economic benefits for SMEs by increasing regulatory harmonisation across Europe, thus making it easier for SMEs to scale-up.¹¹⁹ However, the impact assessments paid insufficient attention to the fact that many SMEs are predominantly focused within their own national markets,¹²⁰ to a much greater extent than compared to larger companies, and thus many may not experience significant benefits from harmonisation across Europe.¹²¹ There may be a risk that SMEs in general are being conflated with a prestigious subset of the SME category, particularly given that the current categorisation of SMEs includes more than 99% of European businesses.¹²² There may thus be merit in differentiating between different categories of businesses within the SME sector, for the purpose of assessing the the implications of regulations for different types of SME businesses.

5. Conclusion and Recommendations

Throughout this paper, a number of areas have been identified where regulation-making in the EU could be improved. Many of the problems identified here relate to the need for more robust critical assessment of the broader economic consequences and potential unintended social implications of regulations. This paper concludes with recommendations relating to how regulation-making in Europe might be improved.

1. An affirmative consultation strategy and consultation-results adjustment tests

Policymakers could consider adopting an affirmative consultation strategy to proactively seek to engage stakeholders whose voices are currently under-represented in the consultation process (methods could potentially include site-visits outside Brussels to under-represented stakeholders, or expanding targeted consultations with compensation provided in some cases).

A consultation-results adjustment test could also be employed to assess consultation feedback results, to identify under-represented stakeholders and viewpoints, and to examine possible arguments that may represent these stakeholders. These tests could also apply a 'general public interest test' to identify how the interests of the general public as a whole may differ from those motivated to participate in consultations.

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115 See "What share of AI systems will fall into the high-risk category?" at Future of Life Institute – EU Artificial Intelligence Act, EU AI Act Compliance Checker | EU Artificial Intelligence Act, <https://artificialintelligenceact.eu/assessment/eu-ai-act-compliance-checker/>

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122 European Commission: Better Regulation Toolbox, p. 183, 9c8d2189-8abd-4f29-84e9-abc843cc68e0_en, https://commission.europa.eu/document/download/9c8d2189-8abd-4f29-84e9-abc843cc68e0_en?filename=br_toolbox-nov_2021_en.pdf

2. A designated adversarial-critic

As was noted in the beginning of this paper, some observers detect a lack of objectivity and critical probing of alternative options and possible problems when it comes to impact assessments and consultations. Studies suggest that those involved in drafting regulations, conducting impact assessments, and running consultations may be less objective when it comes to assessing their own work than an outside assessor may be.¹²³ A designated adversarial-critic could evaluate regulations, consultations, and impact assessments and be specifically tasked with finding gaps, unsupported assumptions, and unintended consequences that may not have been identified by the original drafters of regulatory proposals. The implementation of this recommendation could draw on the model used in adversarial legal systems and on psychological research related to motivated reasoning.¹²⁴

3. Stress-testing regulatory proposals

As noted throughout this paper, regulations can sometimes fail to achieve their directly stated or ultimate objective, or can lead to unintended negative consequences. Complex far-reaching regulations could be subject to a stress test specifically intended to detect the above possibilities, both as part of the impact assessment and as part of the adversarial-critic's assessment discussed above. Some of the questions that could be probed could include:

- What is the direct objective that the regulation is trying to achieve? What is the underlying or deeper problem that the regulation may actually be trying to address? Could there be a possible tension between these two goals?
- Will the regulation actually achieve what it aims to do? Are there plausible ways that the regulation could be enacted but could fail to achieve either its directly stated objective or its ultimate goal?
- *Contingency testing* – Does the regulation have potential negative consequences in the event that things “go wrong” due to unforeseen circumstances or a crisis scenario?
- *Red testing the regulation* – Can the regulation be misused by actors with malign objectives, such as would-be authoritarian governments or corrupt oligarchs?
- *Loophole test* - Are there identifiable ways that businesses or other stakeholders could find loopholes in the regulation that might prevent it from delivering some of the intended outcomes?
- *Misincorporation* – does the regulation potentially incentivise companies or stakeholders to act in a particular way that does not necessarily align with the regulation's objectives or that may otherwise be socially detrimental?

The rigorous application of questions such as those outlined here, particularly by an adversarial-critic as proposed above, could potentially help to detect various unintended negative consequences that were discussed earlier in this paper.

4. A democracy test could be adopted within impact assessments, alongside a separate social resilience test, for relevant complex regulations.

123 Michael Hallsworth and Mark Egan, Why Governments Need to Nudge Themselves - Behavioral Scientist, <https://behavioralscientist.org/why-governments-need-to-nudge-themselves/>; Paul Cairney, The Psychology of Evidence Based Policymaking: Who Will Speak For the Evidence if it Doesn't Speak for Itself? | Paul Cairney: Politics & Public Policy, <https://paulcairney.wordpress.com/2014/04/07/1288/>; Dr Michael Hallsworth and Dr Mark Egan, How confirmation bias stops us solving problems | BIT, <https://www.bi.team/blogs/how-confirmation-bias-stops-us-solving-problems/>

124 Tom Stafford, *stafford-biases-in-decision-making-winter-2017.pdf*, <https://www.judiciary.uk/wp-content/uploads/2018/02/stafford-biases-in-decision-making-winter-2017.pdf>; Kimberly S. Kunkler and Tiffany Roy, Reducing the impact of cognitive bias in decision making: Practical actions for forensic science practitioners - ScienceDirect, <https://www.sciencedirect.com/science/article/pii/S2589871X23000281>; Julian Christensen and Donald P. Moynihan, Motivated reasoning and policy information: politicians are more resistant to debiasing interventions than the general public | Behavioural Public Policy | Cambridge Core, <https://www.cambridge.org/core/journals/behavioural-public-policy/article/motivated-reasoning-and-policy-information-politicians-are-more-resistant-to-debiasing-interventions-than-the-general-public/A3126372516F291CDEA12772425E4FA2>

A democracy test would apply similar questions to the stress test listed above, but from the perspective of examining potential negative implications of regulation for democracy. This would specifically include the consideration of factors such as: if there are provisions that can be exploited by a would-be authoritarian government or part thereof, if there are possible risks to media freedom, or threats to equal participation in public discourse or risks for electoral processes and integrity. A social resilience test could consider similar factors but with assessments of hybrid and cybersecurity risks, disinformation risks, and crisis scenarios, such as pandemics or riots, where relevant.

5. The existing fundamental rights impact assessment could be strengthened and applied with greater diligence, particularly when it comes to complex regulations.

This could draw on similar questions as set out above and should involve a genuine attempt to detect areas where competing rights may be in tension and may need to be balanced, or where individual rights may need to be balanced with the public good.

6. The Competitiveness check could be broadened to assess a wider range of factors relevant to competitiveness

The competitiveness check employed by the Commission could more extensively consider factors other than compliance costs (including with respect to administrative costs) and price competitiveness. While many factors could be considered, some could include:

1. *Product or service utility*: are the benefits that consumers derive from the product or service in any way affected, for example relating to factors including product desirability, ease of use, convenience, or security?
2. *Business practices*: Are there business practices or strategies currently used that could become legally prohibited, restricted, or discouraged? (For example, how might businesses be affected if some ways they currently process personal data become prohibited?)
3. *A revamped innovation test*: This could proactively consider possible ways that a regulation's provisions could be in tension with socially beneficial innovation and should include consideration of how business strategies and technologies could adjust and change.

7. Reviewing and reapplying technological-neutrality and the size-based approach

As was outlined earlier, there can be good reasons to depart from the technological-neutrality principle which the Commission generally endorses in theory. However, currently, policymaking may be departing from the principle in too many cases. The technology-neutral principle could be reevaluated, to determine when it should and should not be applied. A 'future-proofing' technology change test could be applied based on predicted likely technological changes and could be balanced with a 'past-proofing' principle which seeks to make sure that older technologies are not neglected in policymaking. Finally, there may be scope to reassess the nature of the "SME" category and to differentiate between different types of businesses within the category, such as between small-sized businesses and medium-sized businesses.

8. Balancing better-regulation: Setting realistic thresholds of evidence

It is important that the above recommendations improve the process of making regulations – not prevent it. It is therefore important to set realistic thresholds of evidence when considering the adoption of new regulations, based on the probabilistic estimations of whether benefits outweigh costs. It may be necessary to accept that a degree of uncertainty will always be involved. The same thresholds of evidence could also apply to the deregulation or the repeal of regulations. Generally, deregulation could also involve impact assessments and consultation activities if these would be employed in equivalent scenarios involving new regulations.

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