

Better Regulation, Cost-Benefit Analysis and Evidence Based Legal Design: A Critical Inquiry

Abstract

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Policy makers are increasingly turning to economic and behavioural science (‘BES’) to address complex policy challenges such as improving education systems, increasing private savings, promoting energy and resource conservation, increasing productivity, improving sanitation practises, strengthening public institutions, reducing corruption, etc. It aims to implement evidence-based policies based on people's actual behaviours and cognitive processes. The importance of context for responsible and effective/efficient decision-making is highlighted. It is considered essential to examine a wide range of individual and collective aspects at the empirical level, taking into account the social, psychological and economic factors that influence people's thoughts and actions. The approach applied to the political process BES examines the functioning of bureaucracies and technologies in order to find creative solutions to historical problems and to achieve a better and more robust design of future societies. This approach is widely used around the world, as demonstrated by the activities of the World Bank and its Mind, Behaviour and Development Unit, as well as the Organisation for Economic Co-operation and Development and the Inter-American Development Bank. In the European context, Better Regulation (‘BeReg’) is becoming increasingly important. In 2016, on the one hand, the European Commission published the document *Behavioural Insights Applied to Policy*, summarising BES policies and programmes in Europe; on the other hand, the *Interinstitutional Agreement on Better Law-Making* (OJ L 123, 12.5.2016, p. 1-14) was signed, becoming a key moment for the institutionalisation of BES and BeReg within EU policies and, by extension, within Member States. In terms of multi-annual planning, there are three better regulation instruments: “impact assessment”, “public and stakeholder consultation” and “ex-post evaluation of existing legislation”. The objectives are to “promote simplicity, clarity and coherence in the drafting of legislation” and to “maximise transparency in the legislative process”; legislation should be “understandable and clear”, “avoid over-regulation and administrative burdens and be practical to implement”. For the Commission’s *2017 Better Regulation Guidelines*, the “essentials” of BeReg are “Forward planning and political validation”, “Stakeholder consultation”, “Evaluation/fitness checks”, “Impact assessment”, “Quality control” and “Implementation support and monitoring”. The *Better Regulation ToolBox 2021 Edition* lists a number of “key dimensions”, including “high quality”, “strategic/forward-looking”, “participatory/open to stakeholder's views” and “respect for the principle of subsidiarity and proportionality”, but legislation should also be “comprehensive”, “coherent/conducted collectively”, “proportionate”, “transparent”, “independent”, “appropriately resourced and organized,” and “sustainable”. The European Commission’s Communication of 29 April 2021 *Better Lawmaking: joining forces to produce better laws* (COM (2021) 219, 29.4.2021) states that in order to improve the overall quality of legislation and ensure its clarity, readability and comprehensibility, better lawmaking’ should adopt a “one in, one out” approach, pursue the objectives of sustainable development and implement the principle of “do no significant harm” and the principle of “digital by definition”. On 28 June 2022, the OECD published *the Better Regulation Practices across the European Union Report 2022*, which points to the adoption of alternative, non-binding behavioural management tools to promote policies that can improve people's economic and social well-being. The aim of this paper is to analyse BeReg and, in particular, the state of the art in the Italian context. Particular attention is paid to the models transferred from economics and organisational theory to the so-called legislative cycle and to the broader approach of cost-benefit analysis underlying BeReg, including those related to *ex-ante* and *ex-post* impact assessment. The study intends to reflect on the communication methods used within BeReg and explores the symbolic, persuasive and self-legitimising aspects also pursued institutionally through the innovative techniques of so-called legal design.