

Chapter 2 Rulemaking

This is the first draft of the report on rulemaking for the European Union Project of the ABA Section of Administrative Law and Regulatory Practice.

Norm Creation in the European Union

Peter Strauss
Turner T. Smith Jr.
Lucas Bergkamp

New York
Washington DC
Brussels

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I. Executive Summary

This report summarizes the administrative law involved in making generally applicable laws and rules at the European Community (the “EC”) in the European Union (the “EU”). It is based on specific sector reports in the areas of competition, the environment, financial services, food safety, telecommunications, and the workplace. It deals with the participation of the European Commission in lawmaking, both in proposing legislation to the European Council and Parliament and in exercising delegated implementing powers under legislation through various committees (“comitology”) and through interaction with national and EU-level standards organizations (the “new approach” process for setting “technical” standards). It also addresses the evolving role of EC agencies. It does not deal with the legislative processes of the Council or Parliament.

This report is carried out under the auspices of the American Bar Association’s Section of Administrative Law and Regulatory Practice. It is part of a project intended to help Americans understand the administrative law of the European Union. This particular element of it is concerned with activities parallel to what American administrative lawyers know as “rulemaking.” It describes how the European Commission (the EU executive) works to shape legal texts – statutes, regulations, even influential advice – in comparison to American approaches, and in a context in which access, transparency, influence and accountability are increasingly important. (p. 5).

...III. The Process By Which EU Rules Are Made45

...C. Impact assessment 93

93 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 monetisation of anticipated impacts for major proposals. SEC(2005) 790 at 3. (p. 53).

...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 2002,¹⁰⁴ 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.

...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, social and environmental terms,” (emphasis added) with no particular emphasis on quantification or cost-benefit balancing.**¹⁰⁸ “[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.”¹⁰⁹ **American authors have criticized this aspect sharply, urging the EU to “specify[] that the primary objective of regulation is to maximize net benefits.”¹¹⁰**

110 Robert Hahn and Robert Litan, *Counting Regulatory Benefits and Costs: Lessons for the US and Europe* [forthcoming, Joanne Scott]; **Kogan, n. 93 above.** (p. 55).