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The European Court of Auditors steps out of its comfort zone with an ‘impact assessment audit’

Anne Meuwese¹

I Introduction

*“The Court considers that the Commission should give due consideration to the principles of clarity of objectives, simplification, realism, transparency and accountability when designing new and revising existing interventions.”*²

The ‘Court’ in this citation is the ‘European Court of Auditors’, and the consideration has been taken from its first ever audit on a subject matter as general as impact assessment. The special report ‘Impact Assessments in the EU institutions: do they support decision-making?’ was published on the 28th of September 2010. It is the result of a lengthy review process, which started in November 2007 when the European Court of Auditors identified ‘better regulation’ and ‘impact assessment’ as relevant audit subjects in its annual work program.

The Court’s overall conclusion on the functioning EU impact assessment (IA) is somewhat predictable and is reminiscent of the external evaluation of the Commission’s Impact Assessment system by The Evaluation Partnership in 2007.³ The Court stipulates that the Commission has “put in place a comprehensive impact assessment system”⁴, which is “largely effective” and has become an “integral element of the Commission’s policy development and has been used by the Commission to design its initiatives better”.⁵ However, the Court also identified two main areas for improvement – to be discussed below – and has issued some recommendations that the “European Parliament, the Council and the Commission may wish to consider (...) when revising their inter-institutional agreements on ‘better law- making’ and a ‘common approach to impact assessment’”.

What does this ‘special audit’ add to our insights into the functioning and development of impact assessment in the EU? At least two main messages can be taken from the report; one can be drawn directly from the text of the report, the other is about the significance of subjecting the IA system to ‘audit’. I will argue that the report did not produce any new insights as such, but it did contribute to the consolidation of consensus on the way forward for the EU impact assessment system. The modesty of this success is traced back to the less than perfect fit between the broad scope of the investigation and the concept of ‘audit’.

II The content: consolidation of consensus

¹ Associate professor, Tilburg Law School, Tilburg University, The Netherlands. I was an external expert in the Focus Group that reviewed the preliminary findings of the report discussed here. The current article has been written in my capacity as an academic and relies exclusively on publicly available materials.

² European Court of Auditors, *Impact Assessments in the EU institutions: do they support decision-making?*, Special report No 3/2010 (Luxembourg: Publications Office of the European Union 2010).

³ The Evaluation Partnership, *Evaluation of the Commission’s Impact Assessment System* (2007).

⁴ European Court of Auditors, *supra* note 2, p. 6.

⁵ *Ibid.*

The main message of the Court's observations is that we have reached a point at which there is a high degree of consensus on the strong and the weak points of the European Commission's impact assessment system. In the report one set of critical remarks and suggestions – echoing conventional wisdom – revolves around 'timing', a second around 'communication'.

The European Court of Auditors draws attention to one weakness regarding timing in particular; the inter-institutional dimension of the IA procedure. The Court of Auditors concludes that the European Parliament and the Council found the Commission's impact assessment reports helpful when considering the latter's proposals. However, it is problematic that the impact assessments were not updated to take amendments into account as the legislative procedure progressed. Moreover, the European Parliament and Council rarely subjected their own amendments to an impact assessment. The Court of Auditors acknowledged the high level of transparency of the Commission's IA procedure, but also drew attention to the fact that not all impact assessments were announced to stakeholders in an advance notice. Also, the basis for the selection of the initiatives to be assessed was not always made public. Furthermore, although consultation with relevant stakeholders was widely used for initial input, it was never a part of the draft impact assessment reports. Finally, the quality of impact assessments benefited from the review of the Impact Assessment Board, but in some cases this took place too late in the process.

In order to improve these timing aspects, the report of the Court of Auditors provides the following recommendations. The European Commission should provide an overview of all legislative initiatives it intends to subject to an IA, and it must provide a reasoned justification when no IA is performed. 'Interim documents' (such as roadmaps and a draft version of the IA report) should be published, for the purposes of information and comment. The final recommendation concerning 'timing' is that the Commission should ensure that the IA quality review of the Impact Assessment Board's takes place on a timely basis.⁶

The second set of observations and recommendations focuses on 'communication', or on how to optimize the usefulness of IAs. The Court criticizes the accessibility of the main results and messages of IA reports, including the intervention logic; these are not always easy to gather and it is sometimes difficult for the reader to compare the impacts of the various policy options presented in an IA report. The Court identifies the lack of data availability as the source of difficulties in the quantification and monetization of impacts and considers that the Commission does not yet fully exploit either its own capacities or those of the Member States in this area. The IA's analysis of implementation related aspects is often found to be insufficient, as is the analysis of potential enforcement costs and administrative burdens that result from European legislation.

Again, the recommendations are the mirror images of the points of criticism. The Court suggests that the Commission prepares IA reports in a way that facilitates the comparison of alternative options in terms of their estimated impacts by improving the quantification and monetization of impacts and the presentation of qualitative analysis. Furthermore, a strategy to improve the quality of data available for IA should be developed, taking into account the specific situations in individual Member States. Additionally, the Commission should put more emphasis on implementation aspects and ex post evaluations of the implementation of EU legislation should be used as an input for the IA process. Finally the Court would like to see that more attention is paid to enforcement costs and administrative burdens, the latter in line with the Standard Cost Model.⁷

It is hard to disagree with these statements, many of which confirm findings of earlier evaluations such as the above-mentioned 'official' external evaluation from 2007. Even the European

⁶ *Ibid.*, p. 46.

⁷ *Ibid.*, p. 48.

Commission⁸ does not show that many signs of discontent in its reaction to the report, with the exception of notorious subjects such as the publication of draft impact assessments. This can be explained by the fact that many of the findings listed above have been acknowledged to be difficulties by the Commission itself. They also imply that there are trade-offs in the design of an IA system (e.g. a more specific analysis of certain impacts and an increased quantification could contradict the principle of ‘proportionate analysis’ which is seen as the key to keeping the IA system practicable). Many of the weak points are – widely, not only by the Commission – seen as growing pains and the fact that we are now mainly talking about fine-tuning possible solutions (e.g. ‘what is the best way to present findings to the public?’) is a sure sign of the coming of age of the European IA system.

III The process: finding a format for ‘IA audit’

Even if the content of the report does not contain many new insights as such, an added value can be found in the fact that it is published by an established audit institution. In this case the *institutional position* of the author of the report has certainly contributed to the aforementioned *consolidation* of collective knowledge on EU IA as mentioned above. But after this first experience, the question of what the European Court of Auditors actually *adds* in terms of its *specific professional expertise* as an audit institution remains.

Different parties have encouraged the European Court of Auditors to enter the debate on improved regulation.⁹ The annual reports on regulatory impact assessment by the National Audit Office (NAO) have set a precedent in the UK.¹⁰ There has been a trend towards a broadening conception of what ‘audit’ means, and one prominent member of the international auditing community has even gone so far as to predict that “[p]ublic audit will have an increasing role in the assurance of the quality of regulatory management”¹¹.

Although there was a clear momentum for the Court to take on ‘some role’, this step was still a particularly large one to take. The Court certainly has capacity for and experience in performance audits, but amidst all its special reports on the effectiveness of very specific policies of a non-regulatory nature, Special Report No. 3/2010 really stands out. There were some suggestions on the table concerning the form of involvement the Court of Auditors should take in the quality control of impact assessment, ranging from ‘performance audit’ to ‘compliance audit’ and from a ‘system’ approach to an ‘individual case’ approach. In the past, prior to the creation of the Impact Assessment Board, the European Policy Centre has proposed the establishment of a ‘Regulatory Audit Bureau’ within the Court of Auditors. This Bureau could carry out a yearly review of the implementation of the RIA guideline, and undertake occasional “post-project audits of differences between ‘actual’ and

⁸ *Ibid.*, p. 62 onwards.

⁹ European Policy Centre, *Regulatory Impact Analysis: Improving the Quality of EU Regulatory Activity*, Occasional paper (Brussels 2001). Graham Mather and Frank Vibert, *Evaluating Better Regulation: Building the System*, (London: City Research Series No 9, 2006).

¹⁰ The National Audit Office in the UK has carried out evaluations of the quality of regulatory impact assessments, but each report had a limited scope. And although of course the evaluations were carried out from an ‘audit perspective’, they have not been casts as ‘audits’. National Audit Office, ‘The NAO’s work in regulatory reform’, briefing for the Regulatory Reform Select Committee, October 2010.

¹¹ Tuomas Pöysti, Finnish Auditor General at the European Court of Auditors, Seminar on “The future of public auditing and accountability in the European Union (Luxembourg, 18th October 2007).

‘predicted’ impacts”¹². Mather and Vibert have suggested that the Court “could expand its ability to interpret its audit remit more broadly by involving national audit offices of member states with experience in reviewing IIAs and their systems (as it does in other areas of its work)”¹³. Finally there was the blueprint of the NAO experience, which compromises between performance and compliance audit and hovers between reviewing the ‘system’ and reviewing ‘individual IAs’. It does so while making sure its activities on impact assessment are presented as separate from its core auditing business. The latter approach has led to some criticism of the NAO’s methodology. It also led to exercises which, despite their limited timeframe and resources, have produced very specific insights to use as input for the policy debate.

The European Court of Auditors did not follow any of these suggestions and instead carved out its own experiment with ‘auditing regulatory quality control’. The institution deserves credit for sticking out its neck and it has to be noted that the Court did not exactly make it easy on itself when including better regulation in its remit of responsibility. The Court decided to pose a classic, yet difficult ‘evaluation’ question (‘does IA improve decision-making?’), while at the same time sticking to the ‘audit’ concept. This enterprise differs from the NAO approach: the latter got involved in improving regulation on request and does not necessarily see its impact assessment activities as ‘audit’. Also, the question asked in the European report is much broader (and the evaluation criteria are therefore more diverse). The question arises whether the nature of the evaluation activity at hand – both its purpose and its subject matter – and the straightjacket of ‘audit’ are a fruitful match.

In Article 287(4), second subparagraph, TFEU the European Court of Auditors is given a discretionary power to “submit observations, particularly in the form of special reports, on specific questions”. But does this include the power to cast the current exercise as an ‘audit’? One way of reading Article 287 is that paragraphs 1-3 regulate the auditing powers and paragraph 4 deals with the other competences of the Court (hence the word “also” in the second subparagraph). It is true that the power to issue special reports has so far mainly been used for the purpose of rather classical performance audit observations. However, that does not mean the Court was right to stretch the concept of ‘audit’ to the assessment of quality control of regulatory processes. The IA framework as a whole is too heavily embroiled in institutional politics to simply be subjected to certain tests (validity, reliability, effectiveness, value for money) in an audit-like fashion. The few pages on methodology in the report certainly give the impression of a thoroughly executed study,¹⁴ but the methods that this subject matter warrants (international comparison of guidance documents, scorecard analysis, interviews, surveys and case studies) do not allow for the high demands of data quality normally associated with ‘audit’.¹⁵ There is a tension between keeping up methodological auditing norms and saying something new about the European impact assessment system throughout the report. The added value of ‘auditing impact assessment’ may lie in the focus on aspects that require the insight of an auditing institution, rather than in promoting principles for regulatory analysis without a clear basis (see the quote at the top of this article). Audit should remain a very specific form of review. Although its field of application can still be broadened, the cause of improving regulation is not served by a tendency to blur the lines between evaluation, audit, review and oversight.

¹² European Policy Centre, *supra* note 9, p. 5.

¹³ Mather and Vibert, *supra* note 9, p. 31.

¹⁴ European Court of Auditors, *supra* note 2, p. 52.

¹⁵ In this case the quality of the data cannot be checked because the underlying data sets have not been published.

IV Concluding remarks

The second message is therefore that the Court is at a crossroad after this experiment. The Court of Auditors can either (a) substantially narrow down the scope of their future review exercises, (b) join the cacophony of evaluators of the IA system or (c) conclude that its venture into regulation was a one-time occurrence. Of course, the second message is connected to the first: the 'verdict' of the Court does not go much beyond consolidating the consensus on the weak points of the Commission's IA system *because* of the Court's ambivalence towards its own position as a 'special evaluator'. That is why I fear that option (b) is not a viable route. It would also be a pity to waste the experience the Court has built up in the area of regulatory analysis so I hope option (c) does not become a reality either.

I think that the experience of the first ever 'IA audit' – a lengthy process that does not justify the mere confirmatory results, arguably due to an ill fit between the general scope of the study and auditing standards – points to option (a). If the European Court of Auditors is going to pull its weight to influence the better regulation framework in the future, it should enter into a dialogue with the institutions and stakeholders about what it can add that nobody else can. Fine-tuning the system, the reliability of statements, calculations and data (in a more specific sense than can be found in the current report) or the fit between the objects of analysis and the methods chosen in selected IAs; these are all tentative suggestions for suitable topics that could use the Court's observational competence. This would bring the nature of the review closer to the approach of the British National Audit Office, with all its advantages and disadvantages. There would be methodological pitfalls to avoid or simply to acknowledge, since these are inevitable when handling such a contentious and multi-faceted subject matter. However, this is the price to pay to become an influential actor in regulatory reform. The suggestion to carry out 'post-project audits' to see how good IAs were at estimating regulatory impacts (see above) is still an interesting one, as is the suggestion to work with national audit bodies. Future investigations may or may not qualify as 'audit'; this depends on the nature of the investigation and on the development of new auditing standards fit for 'regulatory audits'.

One final suggestion on the 'value for money' front, preferably to be taken into account in relation to the current report: in order to enable secondary analysis by the academic community the Court should publish the valuable, and no doubt costly, data sets at the basis of its report, to the extent that it is legally possible to do so of course.