

PRAISING THEIR OWN WINE? EU LEGISLATORS AND NON-FALSIFIABLE STATEMENTS IN IMPACT ASSESSMENTS

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Abstract

Impact Assessment is nowadays a prevalent element of the EU policymaking landscape and its importance in the legislative process is growing. It is supposed to disclose information and by doing so to help governing the principal-agent relationship between the legislators – European Parliament and European Council – and the European Commission. Nevertheless, a large part of its informational content consists of non-falsifiable statements, for example on legislative impacts which are expected in 30 years and forecasts whose verification is almost impossible given the lack of meaningful counterfactuals (e.g. on impacts on marginal GDP growth). While it is rational for the agent to express these statements given the informational asymmetry, the lack of credible sanctions and the length of the time-horizon, the willingness of the principals, i.e. the legislators, to accept these statements seems *prima facie* questionable. This paper explores this subject through the lenses of economic analysis, including principal-agent and game theoretic reasoning, to understand whether agents' behaviour is sensible and the reasons behind it. Moreover, we also consider phenomena revealed by behavioural economics to check whether they better explain the observed reliance on non-falsifiable statements.

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1 Introduction

Impact Assessment (IA) is nowadays a stable element in the EU political landscape. The European Commission (EC), upon thrust of several member states, succeeded in mainstreaming this instrument into the European policymaking. This was acknowledged by the Commission itself in its latest Communication on Smart Regulation (EC 2010), where IA was recognized as playing a central role in the management of the policy cycle.

Italians would say “don’t ask the winemaker whether his wine is good”,³ meaning that one should not excessively trust the Commission’s own judgment. Still, several authors and other institutions also recognise that the EU IA system is to a certain extent a success story, although with several *caveats* and recipes for improvement (ECA 2008, House of Lords 2010; Renda 2011; Frisch *et al.* 2012).

Turnpenny *et al.* (2009) encourage researchers to climb the ladder of research on policy appraisal systems. Whilst most scholars and practitioners focus on how policy appraisal systems are or should be designed as well as on their effectiveness, these authors claim that more research should be devoted to understanding the mismatch between appraisal and utilisation of appraisal in politics (type 3-research) and the underlying motivation to appraise (type 4-research). Our paper takes as a given the underlying motivation to appraise. Following a large stream of literature, discussed in details in Section 4.1, IA is considered as a tool to structure the political dialogue among political actors, reducing informational asymmetry and enhancing the coherence of the policy cycle. Therefore, this paper deviates from the mainstream economic approach to regulatory analysis, considering IA, and its American counterpart – Regulatory Impact Analysis – as a tool to promote efficiency, i.e. some measures of cost-minimisation and/or benefit-maximisation.

To us, the present research belongs to type-3 category, as it focuses on how and why certain elements of policy appraisal are employed by political actors. The present paper would like to investigate an aspect of IAs which has so far escaped focused research: the use of non-falsifiable statements. As explored in Section 2.3 below, the term

³ The German part of the authors agrees but wants to substitute “wine” with “beer”.

“non-falsifiable statements” refers to a class of information included by the drafter in the IAs, that are *ex ante* forecasts of expected impacts which are not or hardly falsifiable *ex post*. In the present paper, we try to build a theoretical framework to answer the research question, that is why the legislators accept appraisals whose truth content cannot be tested.

The conduct of the European Parliament and Council indeed puzzled us, as it is at first sight in contrast with established economic thinking. If IA in the EU is a tool to address the informational asymmetry between the Commission – the technical bureaucracy in charge of drafting legislative proposals – and the legislators, the use of non-falsifiable statements is likely to worsen the functioning of the IA system. When non-falsifiable statements are involved, EU legislators believe Commission’s own judgments about the effects of its own proposals, without the Commission facing any verification or sanction mechanism. In other words, the legislators do listen to the winemaker praising his own wine.

The paper is structured as follows: Section 2 develops the research question, i.e. the EU IA system and how the European Parliament and Council use IAs in the legislative process, and then defines what non-falsifiable statements are. After Section 3 introduced some methodological issues, Section 4 suggests an economic perspective on the EU IA system and the use of non-falsifiable statements. Section 5 proposes explanations of why legislators accept non-falsifiable statements, and Section 6 draws policy conclusions from the previous positive analysis.

2 The Problem in context: the IA system and non-falsifiable statements

2.1 The EU IA system

IA is the key pillar of the EU Smart Regulation strategy (EC 2010a; Renda 2011). Smart Regulation, also known as Better Regulation, is an overarching regulatory policy originated in the US, and transplanted since the late 80’s in Europe (Mandelkern 2001; EC 2002; Renda 2006). From a theoretical perspective, Smart Regulation is a strategy aimed at managing the lifecycle of laws, from drafting to rulemaking to enforcement (Radaelli and Meuwese 2009).

According to the EU IA Guidelines (EC 2009: 4),

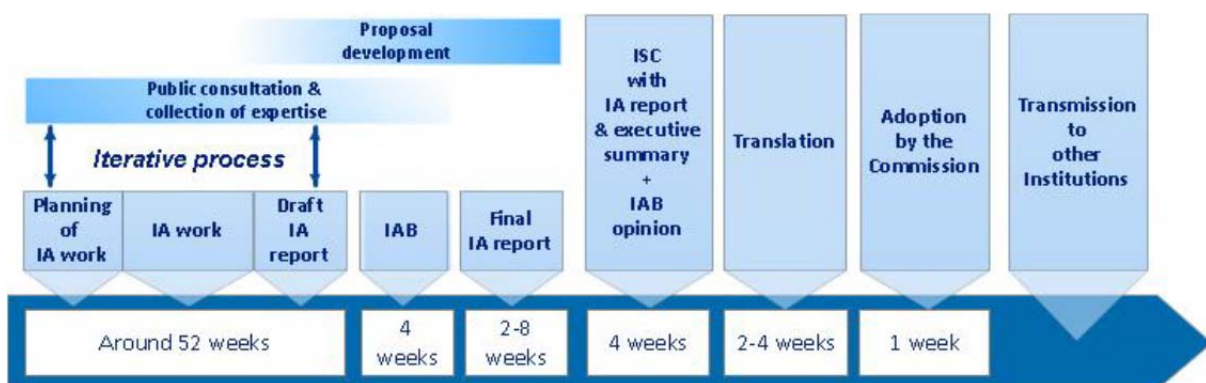
[i]mpact assessment is a set of logical steps to be followed when you prepare policy proposals. It is a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts.

The Guidelines also clear out what IA is not: a substitute for political decision-making. The logical steps of IA are defined as the following:

- 1) Identification of the Problem;
- 2) Definition of the Objectives;
- 3) Development of the Policy Options;
- 4) Analysis of the Impacts of the Policy Options;
- 5) Comparison of the Options;
- 6) Outline of the Policy Monitoring and Evaluation.

EU IAs must appraise three kinds of impacts: economic, social, and environmental (EC 2009). They are to comply with the principle of proportionate analysis: the depth and scope of the analysis must be appropriate to the magnitude of the impacts, the political sensitivity of the act, and the type of act (i.e. a white paper, a binding act, or a delegated provision) (EC 2010a: 13-17). Policy options are assessed according to three criteria: effectiveness, efficiency, and coherence (EC 2009). Quantitative analysis is to be carried out to the extent possible, but the Guidelines include no duty to quantify costs and benefits. The procedure to draft and approve an IA is illustrated in Figure 1

Figure 1 - IA procedure



Source: EC Impact Assessment Guidelines

The scope of the EU IA system is very broad compared to e.g. the US or EU Member States (ECA 2010: 9). According to the Guidelines, all major binding and non-binding initiatives, that are those included in the Commission Legislative Work Programme or any other with

clearly identifiable economic, social and environmental impacts, must undergo IA. From the launch of the IA system in 2003 to 2011, an impressive 703 IAs have been carried out. Most prolific Commission Directorate Generals (DGs) have been Energy; Mobility and Transport; Justice, Fundamental Rights and Citizenship; Industry and Entrepreneurship; Environment; Internal Market and Services.⁴

IAs are carried out by the lead DG, which is sole responsible for the act and the assessment. This requirement does not prevent part of the work to be outsourced to external consultants, such as for data collection and analysis, as long as the DG retains the ownership of the final document.

When the IA is finalised, it must be submitted to the Impact Assessment Board (IAB), which is an oversight body established in 2007 under the authority of the President of the EC (EC 2011). It is chaired by a deputy Secretary General and composed of 8 top-level officials, acting in their personal capacity, 2 per each macro-policy areas of the Commission: macroeconomics, microeconomics, social and environmental. The composition of the body is indeed aimed at being representative of the main impacts to be assessed. On a rotating basis, one member per area participates to the IAB meetings.⁵ After assessing each draft IA, the IAB enacts an opinion, usually recommending changes. If weaknesses are minor, the lead DG revises the IA and therein acknowledges the modifications undertaken. If the weaknesses are serious, the IAB requires re-submission, and issues a new opinion on the second draft. If the IA draft is still unsatisfactory, the IAB issues a second negative opinion. It is then the responsibility of the College of Commissioners to possibly adopt the IA and the related act despite of the negative opinion of the IAB.⁶

⁴ Centre for European Policy Studies Impact Assessment Database, on file with the authors.

⁵ Cf. 'Rules of Procedure of the Impact Assessment Board', available at http://ec.europa.eu/governance/impact/iab/docs/iab_rules_of_procedure_final_en.pdf (last accessed on May 2012).

⁶ In the Communication on Smart Regulation (EC 2010a: 6), it is stated that "in principle a positive opinion from the IAB is needed before a proposal can be put forward for Commission decision."

2.2 Use of IA by EU Parliament and Council

Official sources and academic research seem to agree on the fact that neither the European Parliament nor the Council of the European Union make full use of Commission IAs in the legislative procedure (Meuwese 2008; ECA 2008; House of Lords 2010; Van den Abeele 2010).⁷ Especially in case of the Parliament, there is still reluctance to examine Impact Assessment in Committees, where most of the legislative activity takes place (House of Lords 2010: 23). The Commission is seldom convened by Committees to present the findings of the IA (ECA 2008: 21), and a direct survey of Parliamentary officers shown that accompanying IAs are “rarely read” (Meuwese 2008: 131).

The situation is different in the Council, where IAs are used more often and have a deeper influence on the legislative activity. According to the European Court of Auditors, 53% of the participants to the Council Working Parties consider that IAs play a role in informing the legislative procedure (ECA, 2008: 22). The Austrian Presidency of the Council drafted a guidance document setting the basic rules about how to treat Commission IAs in Council⁸ and the rotating presidencies may, and routinely do, require Working Parties to discuss and take into account IAs findings. Some presidencies mentioned the number of times in which Commission IAs were examined by the working parties: 12 under the British Presidency; 24 under the Finnish Presidency (Meuwese 2008: 142-143); 25 under the German Presidency. The Competitiveness Council issues every 6 months the conclusions on Better Regulation, where it constantly calls the Commission for intensifying the efforts to produce good IAs. Interestingly, the Council regularly calls for more thorough an assessment of a series of verifiable issues, such as the impacts on competitiveness, on SMEs, on administrative burdens. It never asks for an analysis of non-falsifiable issues, e.g. on GDP.⁹

⁷ We are not referring to the institutional commitment to carry out impact assessments on their own amendments.

⁸ “Handling IAs in council: indicative Guidance for Working Party Chairs”.

⁹ Council Conclusions on Better Regulations under the presidencies of: Germany (2007-I), Slovenia (2008-I), France (2008-II), the Czech Republic (2009-I), Sweden (2009-II), Hungary (2011-I), Poland (2011-II), Denmark (2012-I).

2.3 Non-falsifiable statements in IAs

In a perfect world, IAs would measure all expected impacts of a policy. In the real world, however, this is not the case and the Commission appears to enjoy discretion in deciding what impacts should undergo measurement.

For example, the IA on a directive on the creation of the European Natural Reserves could assert the following statements:

1. in 2016, 6000 km² of endangered habitats will be under the protection of the European Natural Reserve scheme;
2. in 2017, the European Natural Reserves will be homing 2000 eagle couples and 6000 bears, 50% more than in the baseline scenario;
3. tourism will increase in the regions where the European Natural Reserves are created. We expect that for each 10€ of public expenditure, one additional pax/night will be created.
4. in regions where the European Natural Reserves are located, GDP will increase by 1.5% and 15,000 additional jobs will be created in the period 2016-2021.
5. in 2030, the level of biodiversity in the European Natural Reserves will be comparable to that in 1990.

When an *ex post* assessment is to be carried out, the analyst will be confronted with the different degrees of falsifiability of these statements on impacts. Both statements no. 1, on a policy output, and no. 2, on a policy outcome, are easily falsifiable, as long as relevant data have been collected. Falsifying statement no. 3 and 4 is more a complex issue. The analyst will need to disentangle the effect of the norm on the European Natural Reserves from other factors which could impact on the number of tourists, GDP and employment. The task looks more difficult in case of GDP and employment, as these two outcomes are affected by a myriad of other variables whose effects is likely to be larger than that of the norm under analysis. Finally, assuming that the *ex post* assessment will take place in the usual timeframe compatible with the timing of the policy cycle, the analyst will likely have to assert that it is too early to deliver any judgment on the truth of the statement no. 5.

This hypothetical example actually mirrors the evaluation patterns of EU law. Luchetta (forthcoming) illustrates the case of the 7th

Framework Programme for Research and Development.¹⁰ This programme is undergoing *ex post* monitoring, and related reports are delivered on a yearly basis. *Ex post* monitoring is very important also because the scheme for the next successor Framework Programme is soon to be drafted. The IA on the 7th Framework Programme¹¹ assessed i.a. its effects in terms of GDP and employment. Nevertheless, *ex post* monitoring pays scant attention to these large societal impacts and focuses on a long list of other outputs and outcomes, some of them where neglected in the IA. The EC (2010b: 9) clearly admits that:

[f]urther questions arise about how to ensure that the undoubted achievements of science are translated into impacts – whether economic or social – that benefit society at large. [...] [I]t is far too soon to attempt any comprehensive assessment of the outcomes of impact of research which is still in progress from the very first calls of FP7.

Progressing from fictional and real examples to a tentative definition, the term “non-falsifiable statements” refers to a class of information included by the drafter in the IAs, that are *ex ante* forecasts of expected impacts which are not or hardly falsifiable *ex post*. Non-falsifiability of statements on expected impacts, which for simplicity includes also negligible falsifiability, is mostly due to two reasons:

1. the impossibility to build a counterfactual, i.e. to identify the marginal effect of a given norm. When it comes to macro variables with multiple causation, such as GDP or unemployment, impacts of a single norm are likely to be relatively small. In addition, it is usually impracticable to measure these impacts *ex post* because it would require building an impossible counterfactual of the state of the world in the absence of the approved norm (Coglianese 2002);
2. the time-hiatus between the *ex ante* assessment and the verification of the impacts is too long compared to the duration of the political cycle, e.g. 30 years.

¹⁰ Decision No 1982/2006/EC of the European Parliament and of the Council of 18 December 2006 concerning the Seventh Framework Programme of the European Community for research, technological development and demonstration activities (2007-2013) (OJ L 421, 30.12.2006, p. 1).

¹¹ Commission staff working paper – Annex to the Proposal for the Council and European Parliament decisions on the 7th Framework Programme (EC and Euratom) Main Report: Overall summary - Impact Assessment and Ex Ante Evaluation, SEC(2005)430.

Following the description of the EU IA system and our definition of non-falsifiable statements, we now proceed to model the EU legislative process in a principal-agent setting, and seek to understand the effects of non-falsifiable statements on the EU legislative process.

3 Methodological Approach

If IA is an essential part of the drafting of legislative proposals and the IA guidelines instruct the Commission to use this tool to provide evidence to policy makers, it immediately suggests to investigate whether the Commission properly abide by its duties, i.e. to analyse the effectiveness of the IA guidelines. A suitable methodological toolbox for such analysis is provided by the approach of New Institutional Economics (NIE). NIE considers the effects of formal or informal rules and their respective enforcement mechanism (institutions).

NIE is based on the standard economic bundle of assumptions: scarcity of resources, self-interested rational behaviour, and methodological individualism. New Institutional Economics qualifies this bundle in three ways. First, economic agents are assumed to act in a world of systematically incomplete information. This creates the ever-present threat of opportunistic behaviour. Moreover, transaction costs – information costs, contracting costs, and enforcement costs – exist. As a consequence of these qualifications, agents are not assumed to act hyperrational but only boundedly rational (Furubotn and Richter 2005: 2-12). From this perspective, the preferences of decision makers are recognized as incomplete and unstable over time (Williamson 1975: 4; North 1978: 972ff.; Kreps 1990: 745).

In NIE, the modification of this assumption from perfect towards bounded rationality is implicit, i.e. a consequence of the assumption of systematically incomplete information and the existence of transaction costs. Seeking more comprehensive understanding as well as the need to take into account non-intended consequences (compare Merton 1936) requires also paying attention to new insights from behavioural sciences. Few NIE scholars venture here. We supplement the framework of NIE with behavioural science to close this blind spot. The methodological bridge is apparent in the

rationality assumption. The move from perfect to bounded rationality then becomes explicit.

4 Economic Classification: Principals and Agents

In this section, we propose a construction of the EU policymaking system in a principal-agent framework. In this framework, IA is a mechanism to govern agency relationships among the political actors (McCubbins, Noll and Weingast 1987; Epstein and O'Halloran 1999; Adler and Ponsler 1999, 2000; Radaelli *et al.* 2010; Radaelli and Meuwese 2010; Renda 2011). We recognise that this is not the only possible modelling approach or analytical framework applicable to the use of IA (Turnpenny *et al.* 2009). Still we base our choice upon a deep stream of literature, and use this instrument to explore the effects of non-falsifiable statements.

4.1 IA in a principal-agent setting

The governments of the member states, i.e. directly or indirectly legitimised democratic bodies, have endowed the Commission with the competencies to put forward legislative proposals – despite its executive powers. In fact, the Commission is the only institution enjoying the right of initiative in the EU legislative process in all but marginal cases. The legislators, i.e. the members of the European Parliament and Council have no or negligible right of initiative (Piris 2010: 191). Therefore, in a principal-agent-setting, the Commission is the drafting agent who acts on behalf of his principals: the European Parliament and Council.

The choice to delegate competencies for legislative drafting can be seen as a “make-or-buy” – market or hierarchy – decision, and thus be analysed within the framework of transaction cost analysis (Williamson 1973; Epstein and O'Halloran 1999). In case of delegation, one political actor (principal) “buys” legislative proposals from the other (agent). Political principals will delegate if, from a self-interested perspective, the benefits of delegation are higher than costs. In this context, the following agency costs arise:

- 1) monitoring costs;
- 2) the risk that the delegated body pursues different goals (opportunistic behaviour);

- 3) the impossibility to reward constituencies or stakeholders via lawmaking.¹²

Benefits mainly consist of:

- 1) the possibility to use specialised assets, such as the knowledge of the drafting body;
- 2) “political relief”, i.e. the opportunity to eventually switch responsibility, accountability, and therefore any political stigma to the delegated body;
- 3) freeing political resources, i.e. avoiding opportunity costs.

As usual, the relationship between the agent and the principal is characterised by a serious informational advantage of the former. This information asymmetry in turn allows for *ex ante* and *ex post* modes of opportunistic behaviour.

One possible response to asymmetric information in such a setting is monitoring by the principal. Monitoring strategies, however, require information transmission from the agent towards the principal, e.g. by means of information rights.

From this perspective, the IA Guidelines contain information rights for the principals. As such IA evolves as a structure of dialogue between the Commission on one side and the European Parliament and Council on the other. If carried out in accordance with the Guidelines, it reduces the information asymmetry between the Commission, acting as the agent in charge of drafting the legislative proposals, and the legislators, which are the principals in charge of the approval process and the ultimate possessor of the legislative power in the EU. The IA is an information mechanism (Adler and Posner 2000) which discloses information helping the principal to establish whether the draft regulation pursues the goals it is intended to, thereby reducing the cost of monitoring the agent behaviour. Therefore, IA can be seen as aiming at reducing monitoring costs.

4.2 Effect of Non-falsifiable Statements

Non-falsifiable statements run contrary to the character of IA as information device simply because their substance, i.e. their truth content, cannot be assessed and therefore not be refuted by the principal. Evidence for policy making in the sense of the IA

¹² This is not a cost for the society, but only for the delegating body.

guidelines is not established. The use of non-falsifiable statements hence increases monitoring costs (Milgrom and Roberts 1992; De Geest 2010). This stresses the agency relationship. At the limit, agents cannot be monitored at all, i.e. infinite monitoring costs are imposed on the agency relationship.

Not only monitoring costs in particular, but agency costs in general are increased, since if the quality of the agents acts cannot be assessed, the risk of opportunistic behaviour is higher in turn. In this sense, non-falsifiable statements increase the irresponsibility of the drafter, who does not fear any risk of ex-post assessment of the outcomes (Luchetta forthcoming).

4.3 Non-falsifiable Statements as *ex post* Opportunism

In a world with systematically incomplete information, the potential for opportunistic behaviour – both *ex ante* and *ex post* – is a given. Any principal can hence generally presume that the agent will have the basic tendency to act opportunistically. The agent in turn has any incentive to preserve the information asymmetry in order to create rents from the very opportunism the principal seeks to limit. This holds true especially when the agent has no reason to anticipate a non-cooperative response to this strategy, i.e. when the risk of retaliation is limited.

In the context of IA, the political principals rely on information by the political agent. But information rights alone do not help overcoming the information asymmetry because the political agent can provide information opportunistically, e.g. by using non-falsifiable statements in IA. The political agent has an incentive to do so in order to avoid accountability and loss of reputation and to escape *ex post* assessment. A vicious circle emerges. Since the information provided cannot be falsified, systematic monitoring is impossible.

But even if the political principal were aware of such opportunistic provision of information, a credible sanction mechanism would be required to incentivise agents not to deviate, but rather to stick to their promises. In case of Commission IAs, such an enforcement mechanism seems to be non-existent. On the basis of the available information, in very few cases the Commission has been faced with a thorough scrutiny of its impact analysis which resulted in a sanction,

e.g. political blame or heavy amendments by the legislators to the original proposal.¹³

Furthermore, the political principals face free rider problems among the two of them. Taking action to control the agent is costly. Still, the benefit of such control is equally distributed among the principals, such that those who do not take initiative have a larger benefit because they do not bear the costs. Controlling the political agent is a public good here, which benefits everybody and not only the individuals who share the cost of production (non-excludability). It is hence rational not to incur the costs, leading to a situation of rational apathy. In essence, this is a collective action problem. Note that this situation is not only given among the principals as structural entities, but also among members of these structures, because they consist of a multitude of individuals. Hence we can speak of internal and external free rider problems.

Altogether then, the political agent is not exposed to any consequence for opportunistically providing non-falsifiable information. It is only beneficially to do so from the agent's perspective.

One part of a solution might then be for legislators to resort to another source of information outside of the principal-agent-setting. This can be achieved by some form of outside expertise. Indeed, both the Council and the Parliament repeatedly stress the opportunity to carry out their own IAs, either internally or through outsourcing, but so far rarely resorted to this opportunity in practice (ECA 2008; Meuwese 2008; House of Lords 2010). But close attention has to be paid, however, to ensure that the possibility of collusion between outside experts and the agent is minimal. In addition, some kind of enforcement mechanism would need to be established.

5 The awkward Tolerance of Non-Falsifiable Statements

In the previous section, we have carved out the effect of the use of non-falsifiable statements in IA by the political agent. The agent's

¹³ See e.g. the cases of REACH and of the pre-packed food directive (Meuwese 2008). It is to be underlined that the Commission retains the right to withdraw a proposal at any time of the legislative process, and may use this power as a veto threat against upturning amendments.

choice to employ such statements has also been shown to be quite expectable, as it is an opportunistic behaviour which can basically not be sanctioned due to the lack of a proper enforcement mechanism. At this point, the question evolves to why legislative principals still appear to rely on non-falsifiable elaborations instead of demanding increased effort from the agent or employing proper sanction mechanisms. Economic explanations as well as behavioural aspects come to mind when searching for answers.

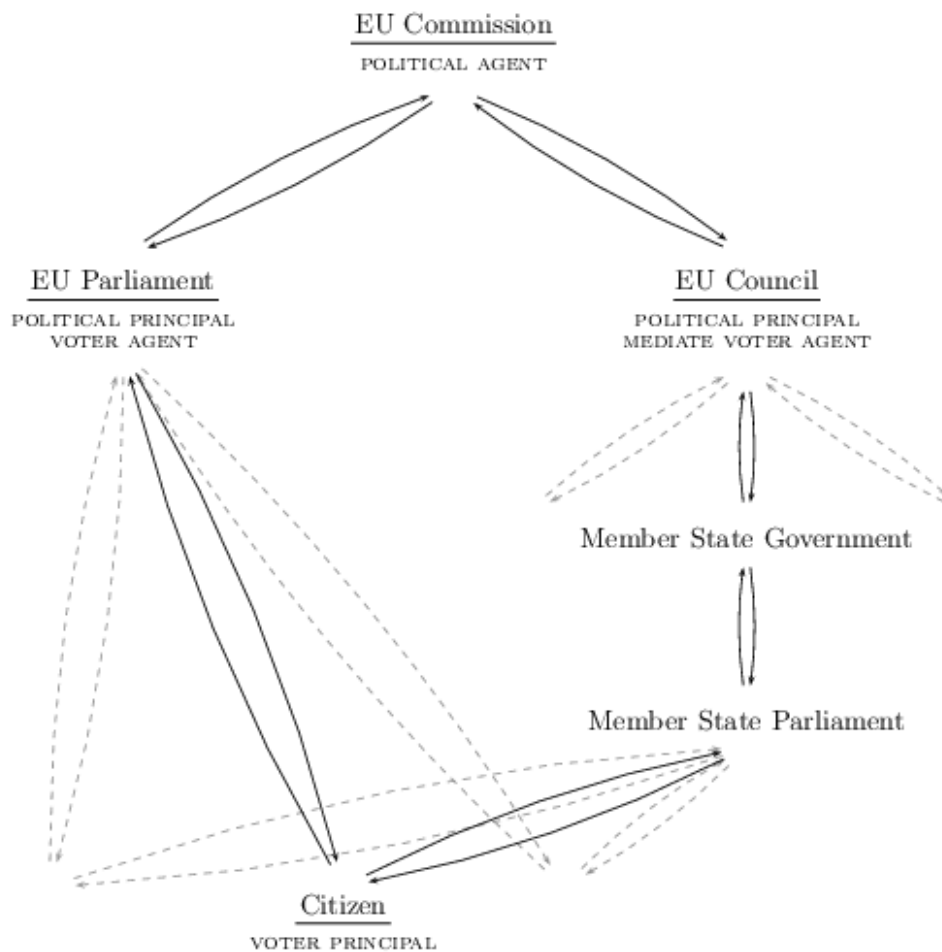
5.1 Economic Explanation

One answer, we think, is that the true, comprehensive principal-agent-setting is much more complex than sketched so far. It is true that the Commission is the political agent of European Parliament and Council, respectively. But European Parliament and Council are agents themselves. In case of the European Parliament the principals are the individual voters. In case of the Council, the direct principals are not the individual voters, but the national governments, which in turn merely are agents of individual voters. Thus, European Parliament and Council are ultimately voter agents, the former directly and the latter indirectly, endowed with competencies through supra-national delegation of power. The comprehensive principal-agent-structure is illustrated in Figure 2.

In general, the problems of why the political agent can safely use non-falsifiable statements re-occur here and possibly explain why voter agents accept the Commission's statements. At each stage, the downstream principals suffer from incomplete information. Informational asymmetries exist in favour of EU Parliament and Council compared to voters. But information is costly to acquire. In addition, the risk of retaliation or sanction is limited. Generally, the voter principal can respond to opportunistic behaviour - if detected - with "voice" or "exit". The exit strategy (Tiebout 1956) - leaving the EU -- is quite costly for the individual principal. Unfortunately, the voice strategy, namely voting, is less costly but also appears to be less effective for control purposes. Not only is EU voter turnout significantly lower than on national levels (Steinbrecher and Rattinger 2007). Individual voters might also not sanction opportunistic behaviour of their agents. Within multilevel governance structures, the effectiveness of economic voting has been found to be limited indeed (Anderson 2006). Lastly, collective action

problems make control difficult. All in all then, the incentive chain that should in principle incentivise the political principals to control the Commission is very thin indeed. There is a lot of leeway for the Members of the European Parliament and Council without having to face voter control. This facilitates opportunistic – or in other words: careless – decisions, and ultimately makes legislative control on Commission IAs less likely.

Figure 2 – Complex EU P-A-Structure



Another peculiarity is – in game theoretic tongue – the endgame problem (e.g. Selten 1978). In a repeated but finite game, players have an incentive to deviate from cooperative behaviour in the last round of the game. This deviation can well be anticipated by rational players and the non-cooperative behaviour unravels the game through backwards reasoning, such that the players will act non-cooperatively, or opportunistically, from the very beginning. If IA is focused on long term as in the examples above, the subgame in

which individual officers or politicians in the principal bodies might be sanctioned ends. Then, there is no incentive to opt for a subgame perfect strategy but only to choose such strategies that are best responses in the subgame. Simply put: politicians who cannot be held liable for future events, i.e. the truth content of information provided, which occur long after the political decision might not consider such possible events while making this decision.

Altogether then, relying on, or not opposing, non-falsifiable statements provided by the Commission appears to be an opportunistic strategy of the political principals (that are the legislators, i.e. voter agents) vis-à-vis the voter principals. To the extent that no sanction is to be expected, this opportunistic behaviour evolves to a dominant move.

5.2 Behavioural Aspects

In governance research, the dominant grip of agency theory has been challenged. Part of the scientific attention should instead be shifted to actual governance processes and dynamics (compare e.g. Roberts, McNulty, and Stiles 2005). Here, behavioural approaches come into play. Regarding our explanatory goal to discuss why individuals in the EU Parliament and Council tolerate or ignore non-falsifiable statements in IA, we focus on specific – empirically established – patterns of human behaviour. Moreover, since both organisational structures are decision-making groups, we tap into research on group dynamics.

In light of the gap between the specific requirements of a prudent IA according to the IA Guidelines (evidence function) and the actual IA outcome, the observation that individuals in the EU Parliament and Council tolerate the use of non-falsifiable statements suggests either that the individual inferences about the standards of IA are off, i.e. that expectations about the requisites of IA are meager, or that the perception of the IA outcome is exaggerated. Both variants lead to a biased perception of accountability on the principals' part in the sense that the task of the agent is likely to be considered well fulfilled.

Individual inferences about the standards of proper IA may be flawed because of the psychological principle of social evidence. It states that individuals, in general, determine what is appropriate

behavior by finding out what other individuals think is correct or how they act (Lun *et al.* 2007). A certain behavior is considered to be correct to the degree other individuals are perceived performing it. Hence the IAs of the Commission, even while using non-falsifiable statements, automatically carry the message that the use of non-falsifiable statements is alright - especially if this is a repeated pattern. Interestingly, the principle of social evidence works particularly well in situations of uncertainty (Sechrist and Stangor 2007; Zitek and Hebl 2007) and non-falsifiability equals uncertainty by definition. People are especially likely to follow the lead of others then. Another working condition of the principle of social evidence is similarity, i.e. homogeneity of the social group (Platow *et al.* 2005). The conduct of peers establishes a close benchmark as to what constitutes legitimate behaviour (Cialdini 2009). Indeed, Commission and Council officials, members of the EU Parliament and Parliament officers can be claimed to be part of the same peer group. They cooperate on an ongoing basis when facing the EU legislative responsibility. They are collectively part of the social group of "Eurocrats", enjoying rather similar salaries and benefits and living in the same circles when residing in Brussels. With the principle of social evidence in mind, it is not surprising that individual members in the EU Parliament and Council follow the lead of the Commission and do not question non-falsifiable statements in IA. However, this leaves us with a dilemma situation. The information that social evidence provides is usually both valid and valuable (Surowiecki 2004). The adverse effect of mindless decision-making is problematic only when the information in social evidence is wrong, e.g. the perception that the use of non-falsifiable statements is justified. The solution then can only be to become sensitive to inaccurate information signals (Cialdini 2009).

Explanations of why the use of non-falsifiable statements by the Commission is tolerated by members of EU Parliament and Council can also start with the idea that the perception of the IA outcome is simply exaggerated. Considering what social psychologists understand as the halo effect, an exaggeration of that kind does not appear to be far-fetched. The halo effect - or exaggerated emotional coherence (Kahneman 2011: 82), high inter-category correlation, or low inter-category variance (Cooper 1981) - describes the tendency to erroneously perceive attributes of an item as interrelated although they are effectively independent or at most weakly correlated. Global

evaluations of single attributes create an initial positive or negative impression. This initial impression dominates the future perception, and, by association, subsequent evaluations of, or presumptions about, other specific yet unknown attributes or interpretation of ambiguous information. The halo effect also alters evaluations of a specific attribute even when relevant information is not ambiguous but sufficient (Nisbett and Wilson 1977). In accordance with cognitive consistency theories (compare Simon, Snow, and Read 2004), people strive to maintain a consistent set of beliefs and attitudes. Inconsistency in the cognitive system is hypothesised to induce adverse psychological tension, i.e. cognitive dissonance (Festinger 1957). Dual Process Theory suggests that due to the two modes of the human mind, people are likely to eschew intellectual effort to actively overcome cognitive dissonance and instead form overall impressions (Stanovich and West 2000; Evans 2008; Evans and Frankish 2009).¹⁴ Based on these findings, we argue that the otherwise perceived and known high-level competence and expertise of the Commission's work – especially in its function as the Guardian of the Treaty and in its being a technical bureaucracy – are also attributed to the legislative tasks and specifically to the results of the IA. Because of the halo effect, individual perceptions of the IA result are exaggerated and non-falsifiable statements are, on average, not recognised as a virulent problem.

Taking further into account group dynamics, both with 25-50¹⁵ and 27 members, respectively, EU Parliament Committees and Council Working Parties can be characterised as decision-making groups. They function only episodically; meetings are sporadic and/or attendance is fluctuating because members have the right to be substituted if they cannot attend. Moreover, individual members face complex tasks, the result of which is often purely cognitive and – because of complementary inputs – of interdependent nature. Decision-making groups of this sort, i.e. large, episodic, interdependent, are particularly vulnerable to what Steiner (1972) calls “process losses”. Process losses are interaction difficulties that prevent decision-making groups from realising their full potential.

¹⁴ Put shortly, Dual Process Theory holds that humans think in two systems. The first one works automatically and triggers intuitive responses with little effort. The other leads to reflective and rational thinking by allocating attention to effortful mental activities.

¹⁵ This figure refers to the number of members of Committees, where most of the legislative activities take place.

These process losses hence might contribute to the reliance on non-falsifiable statements.

It has been proposed in a different – namely the corporate – governance context that, amongst other things, effort norms and the decision-making group’s use of its knowledge and skills are process-shaping and decisive criteria for group-decision effectiveness (Forbes and Milliken 1999). Here is where process losses might trigger adverse effects. Effort norms are social rules on the group level that refer to the group’s shared beliefs regarding the level of effort that each individual group member is supposed to put forward (Wageman 1995). Generally, the impact of social norms should not be underestimated and, *a fortiori*, not lost sight of. The so-called expressive function (e.g. Cooter 1998) as well as the inexpressive function of the law (Carbonara, Parisi, von Wangenheim 2010) serves as but two examples. Not surprisingly then, social norms also exert a strong influence on behaviour of group members (Feldman 1984, Steiner 1972; Wageman 1995). The presence of strong effort norms can hence be expected to enhance the effort of individual group members. However, in the context of the EU Parliament strong effort norms appear to be lacking. At least, the highly heterogeneous attendance rates of parliament members suggest the absence of a respective group norm regarding effort.¹⁶ As a long-term endeavour, clearly visible effort norms should be established.

A second aspect regarding group effectiveness and possible process losses is the use of issue-relevant knowledge and skills (Forbes and Milliken 1999). Where such expertise is not present, its acquisition is required at first. But even presuming the presence of relevant knowledge and skills does not automatically mean that they are properly used. For expertise to matter, it needs also to be processed. This also concerns the occurrence of “cross training” or “collective learning” (Hackman 1987: 327). The use of knowledge is therefore also related to the behavioural dimension of social integration, i.e. the group’s ability to cooperate (Cohen and Bailey 1997). Empirical studies support the idea of the importance of actual use of expertise for group performance (e.g. Weick and Roberts 1993; Wageman 1995). Notwithstanding whether or not relevant expertise is available

¹⁶ The attendance of the members of the European Parliament to Plenary Sessions varies from 100% to 23%. Compare www.votewatch.eu (last accessed on May 2012).

or can be acquired in the first place, cooperation on a proper degree appears to be more than just challenging in the present context given the sheer size of the decision-making groups involved.

To summarize, it was possible to explain the awkward reliance by the legislators on non-falsifiable statements in IAs through economic instruments, i.e. principal-agent reasoning and game-theoretic concepts. Moreover, behavioural aspects – in the form of individual decision patterns as well as group dynamics – could shed further light on the issue. We now propose a set of possible normative conclusions based on the positive analysis carried out so far.

6 Policy Conclusions

Throughout this paper, we tried to establish why non-falsifiable statements stress the political relations between the Commission and the legislators, the incentives for the Commission to use these statements, and the reason why the legislators accept them. In this section, we now aim at analysing several options to address the use of non-falsifiable statements.

First of all, the Commission could restrain its use of non-falsifiable statements. As it has any incentive to continue using them, this would happen only if the other EU institutions and member states pushed the Commission to amend the IA guidelines to prevent the abuse of this class of statements. Alternatively, the IAB could extend its watchdog function to non-falsifiable statements. Although the IAB is not an independent body *de iure*, it has so far proved valuable in improving the quality of EU IAs, and also acted confrontationally *vis-à-vis* the DGs when asking for re-submissions. Therefore, if the IAB deemed that some kind regulation of non-falsifiable statements were to be enforced, it would be in a position to do so.

We are aware that in some areas non-falsifiable statements constitute an important part of the *ex ante* analysis. This is the case for example of environmental policies, for which long-term impacts are of the utmost importance. Indeed, we are not arguing for a ban of non-falsifiable statements, but only for a careful use. For example, when it is necessary to provide long-term forecasts, the Commission could:

1. clearly state what are the short-term verifiable effects alongside of long-term effects. In this way, the legislators could at least

- verify that the policy delivered what it was supposed to deliver in its first years of enforcement;
2. disclose the model on which non-verifiable statements are based. In this way, it is possible to at least monitor the construction of the model whereas it is not possible to monitor its forecasts. This would imply that in the IA, or in the annexes, models are described and discussed at length, and that the legislators seek to hear those who created or implemented the model, which would be in many cases outsourced to external consultants, if any clarification is needed.

On the legislators' side, they should be able to challenge non-falsifiable statements by their own analysis. So far, we have shown that it happened only in very few cases, both in the Parliament and the Council. The Parliament recently decided to create an IA directorate within its administrative structure, and it may have an effect to this respect, but this is yet to be seen. Having an additional *ex ante* analysis would reduce the effect of the principle of social evidence and of the halo effect, as it would de-correlate the social example and the authoritativeness of the Commission from the IA. Of course, this also implies costs, both in terms of carrying out the analysis and of delay in the legislative process, which should be tempered with possible benefits in terms of better policymaking. As a rule-of-thumb, this investment in additional analysis is likely to payoff for policies with large expected impacts, or when the Commission can be suspected to use non-falsifiable statements inappropriately, e.g. as a trump card to win consensus on a proposal.

Both the economic and the behavioural perspective suggests that the tolerance of non-falsifiable statements would be reduced by detaching IAs from the Commission. The analysis that we put forward suggests that if IAs were carried out by external analysts, which so far only provide background analysis whilst the Commission retains full ownership of the final IA, this would increase the likelihood of the legislators challenging it and not accepting non-falsifiable statements. The principal-agent perspective also suggests paying attention to the risk of collusion between external experts and the agent for the strategy to be successful. However, this would prevent the learning process caused by the internal implementation of the IA system. In particular, since the officers who draft the proposal must also carry out (or at least

supervise) the *ex ante* analysis, they become more aware of the intended and unintended consequences of what they are putting forward. Therefore, as stated above, it would probably more advisable to duplicate IAs for important policies than to take this duty out of Commission's tasks.

Finally, to prevent the "process-losses" described above, it is very important that the IA becomes a routine well integrated into the legislative process. Although we have shown that this is already happening to a certain extent in the European Council, this is not yet the case in the Parliament. Through both formal and non-formal constraints, the European Parliament should aim at requiring that IAs are read and discussed in the Committees before a proposal is voted, and that rapporteurs are briefed on the Commission analysis. Members and their assistants could undertake training courses on IAs, to get acquainted with the tool, increase their awareness and use of it, and to be able to spot when the Commission is using it as a trump card rather than an informational device.

If instituted appropriately, the suggested responses are able to tackle the problems exposed above. This would lead to a more effective use of IAs along the lines of providing sound evidence for policymaking. However, we are not arguing that the Commission should never praise its own wine. Rather, we envisage the true legislators to become skilful *sommeliers* as well.

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