



30 September 2014

BETTER REGULATION IMPACT ASSESSMENT GUIDELINES STAKEHOLDER CONSULTATION GUIDELINES

1. INTRODUCTION

BUSINESSEUROPE welcomes the Commission's consultation on possible revisions to the Impact Assessment and Stakeholder Consultation Guidelines. Impact assessments and comprehensive consultation are crucial to assess the cost-effectiveness of proposed regulation which enables policy-makers to make well-informed decisions for growth and jobs. BUSINESSEUROPE is pleased that these important tools are used increasingly frequently and that significant emphasis is put on improving the quality of the assessments.

On several occasions, BUSINESSEUROPE has made concrete suggestions which in its view would help further increase the effectiveness and credibility of the impact assessment and consultation system. We have been pleased that the Commission addressed some of the points raised by BUSINESSEUROPE. We particularly welcomed:

- the guidance and quality support on issues such as stakeholder and expert input;
- the analysis of specific impacts such as those on the internal market, regions, SMEs and competitiveness,
- the guidance on quantification of those impacts.

The EU must improve its competitiveness to hold its own against both developed and emerging economic blocs around the world. Taking a smart approach to regulation will enhance growth and investment. The EU should avoid legislative proposals with a disproportionate impact on competitiveness that add no real value to the single market and growth. Proper impact assessments must be carried out on all legislative and non-legislative initiatives of major impact and throughout the legislative process. It is key that when the European Parliament and/or Council introduce amendments that substantially change the impact of draft legislation, that these amendments are also subjected to an impact assessment. Realistic modeling and sound science should be applied and account taken of the cumulative effects of different rules and implementation and enforcement aspects.

BUSINESSEUROPE is pleased to participate in discussions on how to further improve the Community impact assessment and consultation system and its views and recommendations are set out below.



2. REVISED GUIDELINES

Scope

BUSINESSEUROPE believes that an impact assessment should be carried out for all legislative and non-legislative proposals which have economic, social and environmental impacts. This should include delegated acts and implementing measures, notices, guidelines and decisions regarding international agreements. The reason for this broad scope is that the costs of regulation are often hidden in these underlying documents that support, explain or implement the 'main law'. Furthermore, impact assessments should also be carried out for initiatives with significant indirect effects.

In this context, BUSINESSEUROPE is pleased that the revised guidelines confirm the inclusion of non-legislative initiatives and delegated acts and implementing measures but regrets that the guidelines no longer specifically mention the different non-legislative initiatives (such as white papers, action plans, expenditure programmes, negotiating guidelines for international agreements, communications, recommendations, and strategy papers) whilst providing detailed guidance on how to carry out an assessment for those different types of initiatives.

This reduced focus on procedure could create questions on how to carry out an assessment and even lead to confusion and uncertainty as to whether those initiatives would need an impact assessment in the first place. Especially as the revised guidelines introduce new conditions for deciding whether an impact assessment will be required, namely that the Commission has to decide whether EU action is needed and that there are choices among noticeably different policy alternatives.

The criteria for making this decision are not very clear and transparent and could give rise to uncertainty and debate. For example, often routine implementing legislation, such as defining standardisation mandates, decisions on Best Available Techniques in the context of the Industrial Emissions Directive, the calibration of a technical standard in the area of financial legislation, or the evaluation of technical standards for listing with directives under the “New Approach” to give presumption of conformity with Essential Requirements in directives, involve policy decisions with significant impacts. There should not be any discussion whether such measures should be accompanied with an impact assessment.

BUSINESSEUROPE thus questions the need for new conditions for application of the impact assessment guidelines considering that the principle of “proportionate level of analysis” already ensures that initiatives that are preliminary or vague, or not clearly asking for the definition of future policies, are not over-assessed. The issue of policy alternatives will and should be addressed in the assessment itself, under the question of possible policy options.

Impact assessment requirements should not be waived for initiatives because Commission departments believe that there are no noticeably different policy alternatives or no real decisions to be taken. As stated, the principle of



“proportionate level of analysis” already ensures that resources are not wasted and that unnecessary efforts are avoided. Decisions to carry out a limited assessment should then be fully documented and motivated so that they can be reviewed by stakeholders, who should also be given the opportunity to give their views, and the Impact Assessment Board.

In this context, BUSINESSEUROPE would also like to point out the importance that agencies and authorities such as the EBA, ESMA or EIOPA apply the impact assessment and consultation guidelines and that the substantive amendments introduced by the legislator during the legislative process are subjected to an impact assessment. Again, the principle of “proportionate level of analysis” allows for a pragmatic approach to be taken if necessary.

Impact Assessment Board

As part of the Commission’s impact assessment system, the Impact Assessment Board should ensure that the guidelines are being properly followed. The main challenge in improving EU legislation, making it smarter, is not so much the guidelines themselves but their actual application, compliance with the principles. In our experience, these principles are not always respected: documents are unclear and questionnaires leading or ill-designed, relevant stakeholders are excluded or their views misrepresented, impacts are not properly assessed, legislative options ignored. It is therefore regrettable that the revised guidelines no longer make reference to the Board clarifying its role. It should be made clear how and why the Board will check whether the guidelines are properly followed and whether the findings of the assessment are supported by the evidence. It is especially important that the Board checks whether impact assessments are not biased, mainly justifying the preferred option by overstating the scale and scope of the problem and relying on selective evidence and controversial assumptions whilst ignoring information that supports contradicting arguments. It is key that positive impacts are not overstated and negative impacts neglected and that policy options are presented objectively. Summaries of public consultations should also represent results fairly and objectively. Relevant stakeholders should not be ignored or their views misrepresented and account should be taken of differences within stakeholder groups, such as companies from different countries. The Board should play a key role reviewing all this.

It should be made clear that the Board can and will ask for resubmission of the assessment and further work in the Steering Group if there are shortcomings or if there are significant changes to the objectives, options or conclusions so that timing can be planned realistically. It should be required that the impact assessment report explains how the recommendations of the Board have been incorporated.

BUSINESSEUROPE appreciates and supports the work of the Board which has contributed to better quality assessments. However, it is conscious of the risk that this control function is insufficient, considering that the opinions of the Board are not binding on the Commission services and that the Board is not truly independent as it is comprised of high-level Commission officials. It should



therefore be clearly stated that the Board will stop a proposal going to the college of Commissioners for approval if there are shortcomings regarding the assessment. To ensure that sound science and reliable data are used, the Chief Scientific Adviser of the European Commission should be allowed to review data. Given the importance of critical oversight, we also believe that an independent agency for quality control is needed to ensure that the guidelines are properly followed. This would help to embed the oversight function firmly in the system.

Steering Group

Setting up an Impact Assessment Steering Group which includes the different Commission departments whose policies are likely to be affected by the planned initiative is essential for taking a broader view and trying to avoid adverse effects on horizontal EU objectives such as competitiveness. It is important that the Group is involved at an early stage so that it also takes part in the preparation of consultation strategies. In this respect, BUSINESSEUROPE welcomes the guidance on organising the work of such groups set out in the revised guidelines.

We regret however that it is no longer specifically prescribed that the Group should review the final draft of the impact assessment report before it is submitted to the Impact Assessment Board. Similarly, that it is no longer prescribed that the minutes of the last Steering Group meeting should be attached to the report. These are important safeguards for ensuring a meaningful involvement of other Commission services and allowing the Board to check whether the assessment was indeed conducted in cooperation with other services. We also recommend always including representatives from the Commission Secretariat General in the Steering Groups.

Length of impact assessment and executive summary

BUSINESSEUROPE welcomes the revised guidelines confirming that the impact assessment report should be no more than thirty-four pages and that an executive summary of maximum 2 pages should be provided. Such a summary should as a minimum contain a clear presentation of any quantified benefits and costs of the various options in an objective and transparent manner.

The use of a template such as the one developed in the UK would be sensible solution to providing a simple and easy to understand summary sheet, which should be produced consistently across the Commission. This approach would not only encourage clarity of thought and expression, but it would also make it much harder for more difficult outcomes to be overlooked, i.e. by being buried within the body of the document.

Impacts

The revised guidelines and their annexes ask the appropriate questions to assess the impacts of the different policy options. Especially the regulatory fitness test which should always be done at the end of the process to double-check the effects on issues such as competitiveness, compliance costs, innovation, SMEs is a



welcome additional requirement. However, although the right questions are asked, the revised guidelines contain less guidance about the assessment of positive or negative effects and their quantification. For example, on administrative burdens placed on business, there is no longer a requirement to quantify them using the EU Standard Cost Model. There is also no longer a reference to the ‘SME-test’ and the ‘competitiveness toolkit’ which should be integrated in the guidelines. Although it is mentioned that indirect impacts, cumulative costs and compliance and enforcement costs should be considered, there is little guidance on how to measure and assess these costs even though work on these issues has been carried out at national, EU and OECD level.

BUSINESSEUROPE would welcome more guidance on competitiveness proofing. Competitiveness should be placed at the heart of the impact assessment system and competitiveness proofing should be carried out in a systematic and thorough manner to avoid legislative proposals with undesirable effects on competitiveness. The tools for assessing impacts on competitiveness should be improved to devise sector-specific overviews giving information about cumulative costs, effects on investment and allowing for meaningful international comparisons.

Policy options

Draft policy cannot, and should not, mean a prior commitment to legislate and thus it is important that all options, including the ‘do nothing option’, are considered in the analysis. BUSINESSEUROPE is therefore pleased that the revised guidelines and their annexes confirm that options are to be analysed in depth and must include the “no policy change” baseline scenario. Initial options should include the option of “no EU action” and the option of self- and co-regulation. It is also important that when assessing all potential impact of the options, that this is done for all the different stakeholder groups.

BUSINESSEUROPE also believes that in the case of areas where international standards (such as those created in standardisation organisations) or agreed regulatory approaches exist, using these standards must be included as an initial option. We are pleased with this recognition in the guidelines and the reference to third countries in the Roadmap template but we believe that the guidelines could go further by also encouraging a benchmarking of options with regulatory approaches already in use by the EUs major trading partners.

It is also important that it is emphasised that all options presented must be feasible and credible and that the presented options should avoid solely listing the status quo option-, the extreme option and the preferred option.

Consultation and transparency

All stakeholders affected by the possible EU action should have the opportunity to participate in consultations during the impact assessment process and to contribute information. Transparent and accessible information about impact assessments are key to raising awareness amongst stakeholders, who must be invited to feed into the process. This enhances the Commission’s chances of



receiving and assessing relevant comments from all sectors and businesses concerned.

In this respect, BUSINESSEUROPE is pleased that the revised Impact Assessment and Stakeholder Consultation guidelines strongly emphasise that stakeholder consultations in the impact assessment process must be carried out in accordance with the Commission's general principles and minimum standards for consultation. In our experience, these standards are not always respected: relevant stakeholders are ignored or their views misrepresented, there is insufficient publicity or time afforded to the process, documents are unclear and questionnaires leading or ill-designed so that problems with the proposed measures cannot be presented in the answers.

It should be clear that this constitutes a major flaw in the assessment, and stakeholders should have the opportunity to address such shortcomings directly to the Impact Assessment Board before the proposal and the assessment is finalised. Therefore, the draft impact assessments and draft opinions should be made public before the legislative proposal is adopted to allow stakeholders to address shortcomings (whether related to the consultation process or the analysis in general) directly to the Board.

To avoid delays, part of this could easily be undertaken during the time that is available between the submission of the draft assessment and the Board meeting where it will be discussed. This would not be a new and separate consultation but simply another step in the consultation process which the guidelines rightly describe as not a one-off event but a dynamic process that may need several steps.

Finally, with respect to consultation, BUSINESSEUROPE regrets that the use of questionnaires is not more discouraged. BUSINESSEUROPE favours open consultations and closed questionnaires can be over-simplistic and lead to misinterpretations. They are not a substitute for reliable and representative consultation. Direct discussions with European business organisations and other interested stakeholders are important particularly when the subject matter is a legislative initiative. Equally important is that all replies should not be afforded the same weight; account should be taken of how representative the respondents actually are.

The Commission could encourage or enable stakeholder more to take part in public consultations if a one-stop-shop for all open consultations were to be created and automatic alerts to stakeholder organisations sent. In addition, consultation documents could be made available in national language versions and making them available in Word (*.doc). The purpose of the consultation should be defined in clear and simple language.

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