

16 September 2015

Better regulation for better results – An EU agenda

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, boosting competitiveness and developing the single market through the use of better regulation tools to cut red tape and devise proportionate legislation should be a mindset of all policy- and decision-makers. All EU Institutions must work together to achieve better regulation for better results in the EU.

KEY MESSAGES

- 1 Agree the proposal for an inter-institutional agreement on better regulation.** The Council and European Parliament should make better use of impact assessments which should be updated to assess the impact of burdensome amendments. There should be increased transparency about the reasons and impact of any Member State decisions to add requirements that negatively affect the single market, competitiveness and growth when they are transposing EU legislation.
- 2 Reduce burdens through an effective REFIT agenda and the REFIT platform.** Channel information about burdensome rules through the REFIT platform and ensure that stakeholder suggestions are subject to a response based on a comply-or-explain principle delivered by the Commission. There should be a net target to reduce costs defined for the totality of regulatory costs in all policy areas and a fast-track procedure to make sure that burden reduction proposals are approved quickly without adding new burdens through amendments.
- 3 Increase transparency to ensure effective stakeholder involvement throughout the legislative process.** All stakeholders affected by possible EU action should have the opportunity to give their views about initiatives and the evidence and information that is used to support them, not only at an early stage when policy concepts are not yet precisely defined, but also later when more detailed provisions are drafted. The Commission should publish final draft texts and the draft impact assessments before the initiative is adopted and there should be more transparency about trilateral negotiations between the three Institutions.



16 September 2015

BETTER REGULATION BETTER REGULATION FOR BETTER RESULTS – AN EU AGENDA

1. INTRODUCTION

BUSINESSEUROPE welcomes the Commission's new EU better regulation agenda, which is comprehensive and ambitious. Taking a smart approach to regulation, boosting competitiveness and developing the single market through the use of better regulation tools to cut red tape and devise proportionate legislation should be a mind-set of all policy- and decision-makers, whether in the Commission, Council or European Parliament. Better regulation will ensure that policy decisions can be made on the basis of evidence-based sound information and we commend the Commission for its determination to deliver better rules for the EU. All EU institutions must now work together to implement the new agenda and we call on them to swiftly agree the proposal for an inter-institutional agreement on better regulation. It is essential that the Council and European Parliament make better use of impact assessments and update them when the legislator introduces burdensome amendments.

On several occasions, BUSINESSEUROPE has made concrete suggestions which in its view would help further increase the effectiveness and credibility of the better regulation agenda. We are pleased that the Commission addresses some of the points raised by BUSINESSEUROPE. We particularly welcome:

- the establishment of the REFIT platform;
- the guidance and quality support on issues such as stakeholder and expert input throughout the legislative process;
- the special consideration given to impacts on competitiveness and small and medium-sized businesses and the assessment tools for specific impacts such as those on the internal market, trade, sectoral competitiveness and innovation;
- the guidance on quantification of those impacts;
- the strong emphasis of the “evaluate first” principle and performance assessments of existing legislation;
- and the proposals to avoid unjustified “gold plating” of EU rules.

In our view transparency is one of the key components of an effective better regulation agenda. It is essential that all stakeholders affected by possible EU action should have the opportunity to give their views about initiatives and the evidence and information that is used to support them, not only at an early stage when policy concepts are not yet precisely defined, but also later when more detailed provisions are drafted.



In this context, we are pleased that the Commission clearly supports more openness and transparency, not only during the impact assessment process but throughout the legislative process. All Commission departments should commit to this objective and actively involve stakeholders. We regret though that the Commission does not go further and publishes final draft texts and the draft impact assessments before the initiative is finalised and adopted. BUSINESSEUROPE firmly believes that this would greatly enhance the effectiveness of the impact assessment review process leading to better quality outcomes. This would not be a new and separate consultation but simply another step in the consultation process which the Commission rightly describes as not a one-off event but a dynamic process that may need several steps to ensure that initiatives are based on the best available evidence and analysis.

2. THE ROLE OF THE COUNCIL AND THE EUROPEAN PARLIAMENT: PROPOSAL FOR AN INTERINSTITUTIONAL AGREEMENT ON BETTER REGULATION

For better regulation to deliver better results, it is essential that each of the European Institutions assumes its responsibility. Cutting red tape and devising proportionate legislation should be a mind-set of all policy- and decision-makers. The Council and European Parliament should make better use of impact assessments and impact assessments should be updated if the legislator introduces burdensome amendments.

The EU should not make any important decisions without having assessed the impacts. It 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 commends the Commission for acknowledging that it cannot deliver better regulation alone and for making concrete proposals that would lead to a shared commitment from all EU Institutions. The responsibility to take account of the impacts of amendments lies with the European Parliament and the Council and they should accept the offer from the Commission to cooperate so that decisions can be taken on the basis of evidence-based information.

BUSINESSEUROPE thus calls on the Institutions to swiftly agree the proposal for an inter-institutional agreement. It is essential that an impact assessment is carried out on any substantial amendments that the European Parliament or Council propose and that, when they find an agreement that is significantly different from the initial proposal, the likely economic, social and environmental impact and regulatory burden are assessed. This, and increased transparency of trilateral negotiations between the three Institutions, e.g. through publication of a timeline for trilogue meetings and publication of the results of the different meetings, is crucial for stakeholders who depend on good law-making. The setting-up of an



independent panel to carry out such assessments is a positive step which complements our suggestion for an inter-institutional scrutiny body to review the impact assessments (see further below).

Apart from that, the Council and European Parliament should also agree a true fast track procedure so that simplification and administrative burden reduction proposals can be dealt with quickly without adding new and additional burdens on business.

And lastly, the Council and European Parliament should urge the Member States, when transposing EU legislation, to explain the reasons and impact of any decisions to add requirements that negatively affect the single market, competitiveness and growth. Often, burdens are also added during the implementation phase when the Member States are transposing EU Directives. These Directives may give national governments room to exceed the minimum level that is required to implement the Directive correctly ('gold-plating'). While authorised under EU law, decisions to 'gold-plate' legislation can lead to increased costs, unnecessary regulatory burdens and competitive disadvantages for business, as well as a fractured single market and uncertainty about what rules apply. This will lead to negative impacts on companies' competitiveness.

Effective implementation of EU legislation does however not start at implementation stage. The legislator must work to ensure that legislation adopted at EU level is fit for purpose and effective and can be implemented at national level in a way that supports the functioning of the single market, creating growth and jobs. Better regulation tools will ensure that this can be done, on the basis of the best information, for the best results.

3. THE REFIT PROGRAMME AND PLATFORM

BUSINESSEUROPE is pleased with the setting up of the REFIT platform to channel information about burdensome rules and give input to the REFIT exercise. The new EU better regulation agenda rightly entails further stakeholder involvement allowing stakeholders to put forward proposals for better regulation. It is positive that these proposals should be subject to a response based on a comply-or-explain principle delivered by the Commission, i.e. the Commission publishing its responses, clearly stating which proposals it intends to pursue, and explaining why some proposals will not be subject for further consideration. Full transparency again is the key to success and this approach should also be followed when addressing problems with "gold-plating" in some Member States. In this way the platform will ensure valuable input from businesses and other stakeholders by bringing the EU closer to the stakeholders and the stakeholders closer to the EU. It is important though that careful consideration is given to guarantee timely procedures and avoid harmful stalemates through dissenting opinions.



The consultation regarding the top 10 burdensome EU laws which the previous Commission carried out at the end of 2012 has also proven to be a valuable and effective way to identify SME-irritators. In each area where businesses, including BUSINESSEUROPE, have registered the greatest concerns, such as legislation on chemicals, waste, and public procurement, the Commission has reviewed these concerns whilst sometimes referring to proposals to ease the regulatory burden. These were however mostly not new proposals. For example in the area of data protection and public procurement, reference was made to legislative proposals that were already being discussed by the legislator.

Although welcoming new initiatives to reduce burdens in the area of public procurement and business statistics and to carry out an evaluation and assessment of reporting obligations, BUSINESSEUROPE would welcome more ambitious proposals than the actions the Commission has hitherto taken and announced. It will therefore re-submit its list of most burdensome EU laws. It would be good to have concrete proposals which aim to have tangible effects in a relatively short time. Previously, it was not always clear that proposals would be truly aimed at reducing burdens. It is thus unclear if and when businesses can expect tangible results from REFIT also as the repeals and withdrawals have been sometimes merely of a technical nature not having any effect on businesses' operations. Or they can easily be undone when the Commission tables a new proposal in the same policy area as is likely to happen with respect to maternity leave for example. Although welcoming the fact that the Commission tries to focus more on evaluation, integrating this in REFIT and the annual work program whilst using this information to feed into impact assessments to follow the life cycle of a legislative act which could potentially create more coherence, unfortunately, a review or recast of all the legislation of a certain policy area does often lead to the introduction of new burdens in practice.

Proposals to change legislation to remove excessive burdens, inconsistencies, obsolete or ineffective rules, must deliver a real difference on the ground for businesses and citizens. It is of vital importance that any proposals for change really reduce costs and burdens. The changes introduced during the legislative process should thus not add any further requirement on businesses and citizens. The European Parliament and Council should therefore agree a fast-track procedure to make sure that burden reduction proposals are approved quickly without adding new burdens through amendments. The Commission should be prepared to withdraw proposals if it is likely that the end result will be more burdens and it is important that constant dialogue with stakeholders takes place throughout the legislative process. This should also avoid the withdrawal of proposals which are positive from a burden reduction point of view such as has happened with the proposal for a Regulation on the statute of a European private company.

Not only should there be a strong focus on follow-up, which indeed should cover achieved cost reductions, but there should also be another overall EU target to reduce costs following on the initial 2007-2012 target.

Targets should be defined for the totality of regulatory costs (both for administrative and compliance costs) and targets must be net targets so that regulatory costs due to new legislation are offset by reductions in existing regulatory costs in a given policy area. Targets should be set in 'amounts' rather than percentages to avoid having to measure the total costs of EU legislation and they should be set for all the different policy areas as these will not only make the efforts of the Commission measurable, they will also focus the efforts of all the relevant Commission services in achieving real reductions of burdens.

4. DETAILED ASSESSMENT OF THE BETTER REGULATION PACKAGE: GUIDELINES

Scope

The Better Regulation Guidelines, and especially the accompanying Better Regulation "Toolbox", contain comprehensive guidance on how and when to carry out an impact assessment, consult stakeholders, measure impacts on growth and jobs, competitiveness and smaller and medium-sized companies, and on how to plan legislative initiatives and seek political validation.

Impact assessments and consultations should be carried out for all legislative and non-legislative initiatives which affect stakeholders and have potentially significant economic, social and environmental impacts for them. This should include delegated and implementing acts, and also notices, communications, 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 and consultations should also be carried out for initiatives with significant indirect effects.

In this context, BUSINESSEUROPE is pleased that the guidelines confirm the inclusion of non-legislative initiatives and delegated acts and implementing measures whilst specifically mentioning the different non-legislative initiatives and providing detailed guidance on how and when to carry out consultations and assessments for those different types of initiatives. There should be no confusion and uncertainty as to whether those initiatives would need to be subject to a stakeholder consultation or an impact assessment in the first place. Especially as the guidelines contain conditions and exceptions for deciding whether an impact assessment or consultation will be required. The criteria for making these decisions are not very clear 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, 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. BUSINESSEUROPE recommends that the Commission always justifies decisions not to perform a stakeholder consultation or impact assessment.



In this context, BUSINESSEUROPE would also like to point out the importance that agencies and authorities with significant regulatory powers such as the EBA, ESMA or EIOPA also apply the guidelines and that the Commission supplements any sub-standard assessment by these bodies.

Scrutiny

Scrutiny is an important part of the Commission's impact assessment system to ensure that the guidelines are being properly followed. The main challenge in improving EU legislation, making it better, is not so much the guidelines themselves but their actual application, compliance with the principles. In our experience, these principles have not always been respected in the past: 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.

BUSINESSEUROPE therefore supports the Commission's decision to strengthen the scrutiny of its impact assessment system and evaluations. It is especially important that the more independent Regulatory Scrutiny 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. Scrutiny should not be limited to procedural matters but involve checking whether the retained options are the right ones or whether conclusions are valid. 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.

The Board should ask for resubmission of the assessment and further work in the Interservice Group if there are shortcomings or if there are significant changes to the objectives, options or conclusions. The Board should be able to request a review or detailed analysis, not only of the process, but also of the content of an assessment. The initiative should not be put forward to the college of Commissioners unless there is a positive opinion of the Board. It is key that the impact assessment report explains how the recommendations of the Board have been incorporated.

As said, BUSINESSEUROPE supports the decision to set up the Regulatory Scrutiny Board and is confident that it will further contribute to better quality assessments, but it is also conscious of the risk that this control function could be insufficient, considering that the opinions of the Board are not formally binding and that the Board is not truly independent as it is still partly comprised of Commission officials. Given the importance of critical oversight, we therefore believe that an independent agency for quality control is needed to ensure that the guidelines are properly followed.



There are currently two groups assessing the quality of Commission impact assessments: the Regulatory Scrutiny Board and the Impact Assessment and European Added Value Directorate within the European Parliament. As stated, BUSINESSEUROPE agrees that important changes resulting from amendments during the legislative process should be assessed. There should be strong commitments from the Council and Parliament that they will carry out an impact assessment of their substantive amendments. The setting-up of an independent panel to carry out such assessments is a positive step, but it is however equally important that such impact assessments are also subject to scrutiny. In our view, this should be a task for a new inter-institutional body given the importance of separating the review from the actual carrying out of the assessment.

The inter-institutional body that we are advocating could be similar to existing national better regulation bodies/control mechanisms in the Netherlands, UK, Sweden, Germany and the Czech Republic bearing in mind that some of those national better regulation bodies lack both true independence and are unable to issue binding opinions. We need a stronger inter-institutional body than an advisory board. A new body should guarantee quality throughout the legislative procedure. BUSINESSEUROPE acknowledges that political decisions about which legislative proposals should be put forward rests with politically appointed officials but the impact assessment process should be about an objective and factual analysis of possible impacts of legislative proposals, not about political considerations.

Considering that an impact assessment should identify the economic, social and environmental impacts of a proposal, those put in charge of monitoring impact assessments must have expertise in these areas. To support independence and avoid special interests gaining influence, members of the inter-institutional body should be recruited from across the EU institutions, Member States and civil society including academia and business to ensure a proper review. It would be important that they are appointed in a personal capacity and on the basis of their expert knowledge, also about relevant European and national markets.

Interservice Group

Setting up an Interservice Group which includes the different Commission departments whose policies are likely to be affected by a 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 guidelines and especially that the Group should review the final draft of the impact assessment report before it is submitted to the Regulatory Scrutiny Board and that the minutes of the last Interservice Group meeting should also 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 support always including representatives from the Commission Secretariat General in the Interservice Groups.



Length of impact assessment and executive summary

BUSINESSEUROPE welcomes the 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. We support the use of the prescribed template as it is a sensible solution to providing a simple and easy to understand summary sheet. It should be produced consistently as it 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 guidelines and the toolbox 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. BUSINESSEUROPE also welcomes the guidance about the assessment of positive or negative effects and their quantification, for example regarding administrative burdens placed on business and the use of the EU Standard Cost Model, and also with respect to measuring cumulative costs and compliance and enforcement costs. BUSINESSEUROPE also welcomes the 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.

It is also very important that a digital dimension is part of the guidelines to ensure that all new legislation is fit for the digital age and does not hinder digitalisation. Innovations and new business models should not be unduly burdened so that European companies can effectively compete at global level. For this reason, it is important to further develop indicators on the impact of regulation on innovation.

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 guidelines 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. The latter should be always be considered as an "equal" possible option. 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 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 not only at an early stage when policy concepts are not yet precisely defined, but also later when more detailed legislative provisions are drafted. Transparent and accessible information about impact assessments are key to raising awareness amongst stakeholders, who must be invited to feed into the process, throughout the process. Feedback should also be given to those who provide comments and suggestions. 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 guidelines strongly emphasise the importance of stakeholder consultations in the impact assessment process whilst setting out important general principles and minimum standards for consultation. In our experience, these standards have not always been respected in the past: 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 Regulatory Scrutiny 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. BUSINESSEUROPE thus regrets that the Commission does not intend to publish draft texts and draft impact assessments before the legislative proposal is adopted as is the case in the US and as also recommended by the Court of Auditors and the High Level Group on Administrative Burdens. To avoid delays, this could easily be undertaken during the four weeks that are 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.

In this context, BUSINESSEUROPE welcomes the development and publication of Inception Impact Assessments as a Roadmap for initiatives that are subject to an impact assessment. However, it should be noted that previously the lack of well-defined policy ideas in the Roadmaps did not allow them to be an appropriate tool for consultation. Inception Impact Assessments are also unlikely to allow stakeholders to comment on the initial assumptions made and the methodology applied to impact assessments. In order to be useful, Inception Impact Assessments should contain in greater detail than the Roadmaps the description of



the problem, policy objectives, options and also a description of the assessment methodologies. They should be updated on a regular basis if necessary.

BUSINESSEUROPE is concerned about the new policy regarding post adoption comments. The Commission will give stakeholders the opportunity to provide feedback on either the initiative or the impact assessment during a period of 8 weeks following their transmission to the European Parliament and the Council. The lead Directorate Generals should prepare a synthesis of these views which will be communicated to the Parliament and Council and it is set out in the toolbox that the Commission will take account of the stakeholder comments in formulating its positions during the legislative procedure. To avoid misunderstandings, it should be clarified that this new procedure does not undercut the opportunity of stakeholders to always, at any time, provide comments on Commission proposals to the Parliament, Council and Commission to feed into the legislative debate. Any refusal on the side of the Commission to take account of stakeholder comments that have not been provided within the 8 week period would be a serious setback for good law-making, significantly affecting the ability of stakeholders to be involved throughout the legislative process, negating the Commission's overall objectives.

Furthermore with respect to consultation, BUSINESSEUROPE regrets that the use of closed questionnaires is not more discouraged. BUSINESSEUROPE favours open consultations as 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.

Lastly, BUSINESSEUROPE recommends that consultations by agencies and authorities such as the EBA, ESMA or EIOPA, e.g. on delegated acts, are also published at 'Your Voice'. This should become the place where all consultations are published.

* * *