

## Opinion of the European Economic and Social Committee on the Consultation on the draft Commission impact assessment guidelines

(2009/C 100/05)

On 29 May 2008, the European Commission decided to consult the European Economic and Social Committee, under Article 262 of the Treaty establishing the European Community, as part of the

*Consultation on the draft Commission impact assessment guidelines.*

On 8 July 2008, the Bureau of the European Economic and Social Committee instructed the Section for the Single Market, Production and Consumption to undertake the preparatory work.

In view of the urgency of the matter, the European Economic and Social Committee, at its 448th plenary session held on 21, 22 and 23 October 2008 (meeting of 22 October 2008), appointed Mr RETUREAU as rapporteur-general and adopted the following opinion by 83 votes to none, with four abstentions:

### 1. Introduction

1.1. In its Annual Policy Strategy for 2008 <sup>(1)</sup> the Commission stresses that 'simplifying and improving the regulatory environment for EU business and citizens has been a major priority ... (and that) 2007 will see improvements to the system of impact assessment, the launch of an Action Programme to eliminate unnecessary administrative burdens arising from legislation at EU and Member State levels, and implementation of the updated simplification programme.' Steps were also to be taken to monitor the application of Community law <sup>(2)</sup>. 'Realisation of these actions will be the core goal for 2008.'

1.2. This strategy is reflected in the work programme, where each measure or proposal is subject to a road map that sets out a range of very specific questions, together with generally brief answers. These reflect the initial findings of the impact assessment (IA) or preliminary impact assessment and indicate the estimated budget impact of each individual measure or proposal.

1.3. Following the 2007 external evaluation of the impact assessment system put in place in 2002 and upgraded in 2005, and taking due account of the experience and lessons to be drawn from the work of the Impact Assessment Board, the Commission has now produced a draft setting out a range of internal impact assessment guidelines <sup>(3)</sup>. These are now the subject of the present opinion. The Commission is seeking to improve the overall methodology, so that it is well-defined, predictable and quantifiable in its impact on the Community budget. (Depending on the complexity of the issues involved, an impact assessment can take between five and thirteen months to complete. The Commission intends to make available to the appropriate departments the resources and facilities required for

this purpose in a bid to meet the objectives of the Better Lawmaking programme as they relate to impact assessments).

1.4. The revised guidelines are designed to give overall pointers for conducting impact assessments – from the preliminary IA right through to the final options for submission to Commission by the directorate-general conducting the assessment. In this way, the Commission can exercise its right of legislative initiative with proper awareness of the facts or can even propose alternative legislation or decide, at the preliminary IA stage, either to take no action at all or to issue a communication which is, by definition, non-regulatory.

1.5. Each impact assessment is unique, specific to the individual case and reflective of the objectives to be met under the annual Commission work programme. The guidelines thus set out procedures and working methods that (i) are flexible enough to adapt to the diverse range of circumstances and issues that arise, (ii) are consistent with the Community's remit and policy objectives under the treaties, and (iii) also comply with the proportionality and subsidiarity principles.

1.6. Impact assessments may be drawn up in one of three official Community languages: English, French or German. In practice, they are almost always drafted in English for ease of communication both internally, within and between the various DGs, and externally, not least during the stakeholder consultation stage. Annexes containing the full impact assessment and an executive summary are, as a matter of course, attached, in English, to each piece of draft legislation under the annual work programme. These are referenced as [SEC(year), number]. Any proposed legislation is thus underpinned by an impact assessment and by reasoned explanations of the Commission's choice of approach.

<sup>(1)</sup> COM(2007) 65 final, February 2007.

<sup>(2)</sup> See Committee opinion CESE, OJ C 204, 9.8.2008, p. 9.

<sup>(3)</sup> COM, May 2008, as-yet unnumbered working document ([http://ec.europa.eu/governance/impact/consultation/ia\\_consultation\\_en.htm](http://ec.europa.eu/governance/impact/consultation/ia_consultation_en.htm)).

## 2. General comments

2.1. Any piece of proposed legislation involves a preliminary assessment procedure that may consider, at certain points and stages of the process and from various different vantage points, whether the legislation is actually necessary and what its potential internal and external impact will be.

2.2. Formal legislative process – the (applied) science of lawmaking that seeks to determine the best way to draft, word, enact and apply the relevant provisions<sup>(1)</sup> – does not place national legislators under the same constraints as the Community legislator. The Community legislator operates at a greater distance from the public and sometimes appears further removed from their immediate concerns. The European legislator needs to clearly set out the reasons underpinning all proposals and to encourage various forms of public information and involvement in order to strengthen the participatory dimension of European citizenship which is indelibly linked to national citizenship. Against this quite specific political backdrop, it is clear that impact assessments are becoming an integral part and a key component both of the Commission's regulatory work and of its other activities.

2.3. Any detailed consideration of the wide range of theoretical and practical issues involved in EU lawmaking are outside the scope of this opinion, which is focused on legislative practice within the EU. That said, it should at least be pointed out that legislators are inescapably bound by certain 'constraints', i.e. the founding treaties and the overall legal principles underpinning the economically developed democratic societies that make up the Union (or are seeking to join), including their constitutional principles and the case-law interpretations of primary and secondary legislation<sup>(2)</sup>.

2.4. All the peoples of the Union aspire to democracy, the peaceful resolution of conflicts, greater cooperation and solidarity, the promotion of individual and collective rights, and realistic, high-quality legislation that is clearly in line with the treaties and the overall principles of law applicable in all the Member States. Political decisions – and legislation – are part and parcel of this overall framework, which can only be described as 'constitutional', given that it lays down the democratic nature of the political institutions and establishes the limits placed on the powers of the political, legislative, admin-

istrative and judicial bodies. This 'constitutional framework' makes a distinction between Community policies in areas of exclusive competence and areas in which competence is shared with the Member States. It lays down procedures to be followed as part of law-based governance, thereby securing the production of legislation and regulatory provisions. Its purpose is to assess compliance with legislation, to check its effectiveness, and to determine whether proper use has been made of financial and other available resources. The framework also makes it possible to reassess legislation from time to time and to make any adjustments or changes that are deemed necessary, or to confirm that the declared objectives have in fact been met.

2.5. Without going into all the details, this simple outline makes clear the complex nature of the competences, responsibilities and remits incumbent on the various players in the EU.

2.6. From their very inception, the purpose of impact assessments was to improve the quality and coherence of lawmaking in a bid to help secure an efficient and effective regulatory environment. They are also designed to ensure that sustainable development policy is consistently applied. Impact assessments are an aid to, not a substitute for, responsible policy making. They seek to identify the probable pros and cons of a specific piece of legislation and to reconcile competing objectives. In practice, impact assessments were initially carried out on the most important pieces of draft legislation and subsequently on all those set out in the Commission's annual political strategy and work programme. The Annexes to the June 2002 communication set out the main *modus operandi* of impact assessments. The technical details were issued separately in the autumn of that year<sup>(3)</sup>. The guidelines were revised in 2005 and again from the end of 2007 onwards, culminating in the current draft, which dates from May 2008.

2.7. From the very start, the European Economic and Social Committee (hereinafter referred to as the Committee) has supported the Commission's proposals for better legislation. It also broadly backs the proposals to improve the way in which the impact assessments are drawn up and presented. These assessments have become increasingly important in the preparatory work for draft legislation and in other areas such as the codification, simplification (as far as possible), drafting and above all quality and clarity of the legal concepts used. The Committee also notes that the sound translation of the texts and the monitoring of application of Community law are vital, in order to improve harmonisation and boost compliance with the legal provisions in place.

<sup>(1)</sup> Chevallier, J. (1995), *L'évaluation législative: un enjeu politique*, in Delcamp A. & al., *Contrôle parlementaire et évaluation*, Paris, 1995, p. 15.

<sup>(2)</sup> Account must also be taken of the different and tragic historical background involved, where notions of law in general and personal rights in particular were trampled underfoot, in some cases with unimaginable savagery.

<sup>(3)</sup> COM(2002) 276 final, 5.6.2002.

2.8. Three main impacts are covered:

- social impacts,
- economic impacts, and
- environmental impacts.

The Committee notes that the 'social impacts' category covers such a vast range of issues that it would be better to split into two subcategories: (i) social impacts *per se* and (ii) impacts that have a bearing on society (such as anti-terrorism measures, security, justice, etc.). Social impacts *per se* have to do with economic issues and relate to the social partners, collective bargaining and working and employment conditions. Society-related impacts cover other areas (justice, police, etc.). They particularly engage the political players and are of importance for society as a whole.

2.9. Economic impact assessments make it possible to take greater account of cost-benefit analyses and of competition. However, given the need for sustainable development, the Committee feels that a long-term approach is required in any consideration of qualitative and economic impacts. The Committee notes that competition is a means, not an end. Attention must also be paid to the imperatives of industrial policy and the need for economic and financial players of an international calibre who are able to withstand global competition. Economic and financial impact assessments must be seen in the overall context of the global economic situation and in the light of economic cooperation with non-EU countries.

2.10. Environmental impact assessments also need to be underpinned by a series of indicators based on regular observations and information gathered under comparable technical conditions and against a similar backdrop (urban air quality, global warming etc.) The specific aim is to combine qualitative analyses with an analysis of the particular costs and benefits associated with this type of impact. The Committee feels that it is not essential to place any greater emphasis on cost-benefit analyses than on other qualitative findings. Scope must be provided to submit two types of findings and to establish priority criteria, for instance as regards the health impact of certain types of pollution. It is practically impossible to put a monetary figure on the number of years that the proposed measures might add to a human life, but such data do enable comparisons to be made over time, albeit, in reality, many factors have an impact on health, and time-based comparisons always involve significant margins of error, not least because of

the health impact of factors other than air quality (lifestyles, nutrition, prevention etc).

2.11. It is extremely important to consult the stakeholders and their representative European organisations, not least the Committee of the Regions and the European Economic and Social Committee, which represent organised civil society and the political expression thereof at local level. The short time-frames involved and the fact that impact assessments are usually drawn up in one language only are problematic for many organisations, not least those operating at national level. Hence the European consultative bodies have a particular responsibility for ensuring high standards of impact assessment and for securing consultation that is in line with the interinstitutional cooperation agreements. It is important that initial consultation of this kind does not hinder the more political consultation on drafts actually submitted to the legislator at a later stage.

2.12. The Committee endorses the multifaceted nature of the impact assessments and welcomes the fact that their approach is both horizontal (i.e. they involve a number of different DGs) and time-dependent (i.e. they cover short, medium and long-term impacts). An appraisal of *ex post* impact assessments was carried out in 2007, as a result of which the Impact Assessment Board may well introduce *ex post* evaluations into the procedures for drawing up IAs in a bid to ensure that greater consideration is given to indicators and their relevance and the validity of the assessments, be they cost-benefit analyses or qualitative appraisals. In particular, the Committee feels that the impact assessment guidelines<sup>(1)</sup> should pay more attention to indicators developed using statistical Eurostat data or on the basis of specific surveys conducted by the Commission. The same goes for indicators drawn up by other organisations, not least UN agencies such as the United Nations Development Programme (UNDP), and indicators based on research conducted in ministries or universities in the Member States.

2.13. Broad and cross-cutting issues are duly looked at in the second part of the draft guidelines. Assessments are to be 'time-dependent' and administrative burdens kept to a minimum. Care is to be taken not to underestimate impacts that do not appear immediately relevant to cost-benefit analyses or the fact that different factors influencing impacts interact with one another. It is important to take account of the impact of other legislative proposals, whether already adopted or currently undergoing impact assessment, not least in the case of a legislative package or where overarching Community goals are involved (the Lisbon strategy, respect for fundamental rights, the European energy strategy and the goal of sustainable development). External impacts must also be borne in mind too.

<sup>(1)</sup> IAG.

2.14. Particular consideration must be given to the impact on SMEs and SMIs since, because of their size, the potentially higher costs and administrative burdens involved in any regulatory provisions weigh more heavily on small companies than on large ones. The Committee welcomes the specific account that is taken of impacts on SMEs and SMIs and endorses the Commission recommendation that steps be put in place to reduce these impacts where the impact assessment shows that they would be disproportionate or excessive.

2.15. Any solutions outlined in impact assessments must not appear artificial or forced, but must be genuine, credible and operational alternatives that may be selected should they prove to be the most appropriate political choice.

### 3. Critical considerations

3.1. The Commission sets out in detail the procedures and timeframes involved in all kinds of impact assessments but these are nonetheless are flexible enough to cover the many specific situations that are encountered.

3.2. Each impact assessment is a one-off *ad hoc* exercise, albeit a certain number of rules and restrictions are unavoidable. This applies to both preliminary and full-blown impact assessments. Examples include inter-departmental consultation, the timeframe involved in outsourcing a study to an external consultant, budget planning and the European Commission work programme.

3.3. The body most frequently involved in drawing up impact assessments is the Joint Research Centre (JRC), whose researchers often work in collaboration with a university or with experts and who base their findings on Eurostat data. However, in certain cases, these researchers also collect available data themselves in order to identify a specific problem or make use of mathematical or budget methodology and common indicators. They may also conduct polls or surveys to supplement the standard consultation procedures.

3.4. One notable feature of the impact assessments is that they increasingly also give an indication of the financial impact of the various available options, which then, in turn, becomes a criterion for decision-making. This ties in with the methodological requirements set out in the annex. (What we have here, in fact, is a new manual or guide for drawing up impact assessments).

3.5. However, although environmental impacts<sup>(1)</sup>, for instance, can be measured in terms of costs or savings, other qualitative factors of a higher order should also be brought to bear, in spite of the costs involved. These include impact on climate change, respect for fundamental rights, ethical issues and long and short-term impact on health.

3.6. Often, qualitative criteria should prevail as they tie in with EU objectives and policies. These criteria do ultimately involve financial costs (compensation to asbestos victims, for instance) but prevention is an ethical absolute. Indeed, in this specific case, even although asbestos was in its time an effective and cheap way of insulating buildings, machines and pipes, any short-term financial gain is now wholly undone by the cost of asbestos removal. The balance sheet thus reads negative and, decades on, the polluter is not necessarily the one who pays. The impact assessments should place strong emphasis on the precautionary principle, without, however, that being used as a pretext for doing nothing.

3.7. From a distance, it appears that the main problems have to do with stakeholder consultation. Sometimes, the points made, for instance, by small businesspeople or the self-employed may well be deemed personal viewpoints, but this valuable experience should not be pushed to one side in favour of well-established, active lobbies, which are able to provide reports or data that sometimes display a certain bias<sup>(2)</sup>.

3.8. Impact assessments may prove particularly difficult in very complex cases (with regard to the REACH initiative, for instance). Priority was given here to protecting workers and product users, albeit industry did succeed in securing rather powerful political allies to restrict the scope of the legislation.

3.9. Such scenarios are not, however, out of the ordinary. The groups concerned are simply defending their own interests, but it is up to the legislator to ensure that the general interest prevails over short-term individual concerns. Certain short-term 'constraints' may, in the medium term, generate comparative advantages, in cases, for instance, where technological advances mean that European standards go on to gain universal currency (for instance, vehicle engine emission limits and the promotion of cleaner, more sustainable energies).

<sup>(1)</sup> Point 9.3.4 of the Annex (*Environmental Impact Assessment Models*).

<sup>(2)</sup> An example of this is the consultation on the patentability of computer-implemented inventions (consultation document drawn up by the Internal Market Directorate-General, 19 October 2000).

3.10. Green and white papers used in the preparation of legislation are very useful tools in helping promote public debate designed to secure the viewpoints of the relevant stakeholders and, more generally, organised civil society represented either within the EESC or by specialist European NGOs. An internal debate also gives the legislator time to seek dynamic compromises.

3.11. However, the EESC would note that excessive haste or ideological considerations may affect plans that end up being rejected or heavily modified when a less brutal approach could have achieved results acceptable to all concerned. (That was the case for the draft directive on port services which was rushed out by an outgoing European Commission that had not taken the time to consult or to seek compromise).

3.12. The current crisis should encourage greater prudence in dealing with certain 'accepted ideas' and other authority-based principles. Ideas need to be confirmed by practice – and that is a vital component in building up collective experience for impact assessments underpinned by a combination of prudence and creativity. Such an approach runs counter to supposedly scientific concepts – such as the idea that (i) an unregulated market is somehow deemed to be more efficient than a market tailored to secure transparency and prevent malpractice and fraud and that (ii) all state aid is inherently bad. A realistic, balanced vision should prevail over excessively simplistic approaches to the economy and finance.

#### 4. Conclusions

4.1. The Committee feels that impact assessments genuinely help improve legislation and reiterates its willingness to play a

part in the process, as far as it is able under its remit and its material and staffing resources. A key political challenge is to ensure that Community legislation is given the best possible reception in national law. The aim is to ensure that the legislative or regulatory process under hard or soft law can as far as possible be readily understood by grassroots citizens. Moreover, representative non-governmental organisations must be involved in the Community process through the traditional method of questionnaires.

4.2. The Committee feels that the directorates-general involved in the process must give due attention to these consultations, as, in the past, reservations expressed about certain legislative proposals have not been adequately taken on board. This has sometimes resulted in the proposals in question having to be heavily amended or being rejected by the Council or the Parliament which, as legislators, are mindful of the reactions of, and signals from, civil society. Such situations, which are ultimately costly in both political and financial terms, can be avoided through participatory democracy.

4.3. The role of the Community legislator can only be enhanced by modern and effective procedures to devise the relevant provisions.

4.4. Lastly, the Committee hails the efforts made and the resources deployed over the past number of years to secure better legislation – a key issue for a law-based Union – and urges the Commission to continue along that path.

Brussels, 22 October 2008.

The President  
of the European Economic and Social Committee  
Mario SEPI

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