



The Consumer Voice in Europe

# Smart Regulation (Impact assessment)

BEUC response to the stakeholder consultation

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## Summary

BEUC welcomes the progress made by the European Commission over the last few years in promoting better regulation, but more needs to be done in order to improve transparency, accountability and evidence-based policy making. Moreover, the recent push towards voluntary tools and mechanisms as opposed to “ordinary” regulation is particularly concerning. The current economic, social and environmental challenges we face make it all the more important than ever to ensure EU policies are effective and efficient in minimising costs while bringing about valuable outcome. Smart regulation should not only be restricted to businesses benefits, but should be seen as generating well thought-out, effective and proportionate measures to increase consumer welfare and move faster towards a green economy.

In our response to the consultation we focus on the following main concerns: The European Commission should urgently re-consider its increasing tendency to rely on business self-regulation and “optional” legislation, which according to our experience and analysis are tools that do not provide the necessary results in the field of consumer protection.

Likewise, the recent exclusion of micro-enterprises from the scope of newly proposed legislation will have negative consequences for consumers which clearly outweigh the benefits of any potential reduction of the ‘regulatory burden’. Consequently this approach should be urgently reconsidered.

Methods and analysis of data collection to generate evidence for policy should be more transparent and unbiased.

*Ex-post* evaluation is necessary to ensure EU policies demonstrably serve the needs and goals of the people of Europe, not only the markets. We support the Commission’s commitment to more *ex ante* and *ex post* evaluation, including the introduction of “fitness checks”. Impact assessments are a valuable tool for policy making, but they need to be improved by taking more into account the implications of given legislation on consumers’ daily lives and redressing the balancing between economic figures with less easily measurable factors such as the impact on people’s health and safety.

Public consultation documents should be more ‘reader-friendly’ and responses to the consultations should be weighted according to the nature of the respondents (e.g. individual citizen, EU umbrella organisation).

Regulation can be smart, but if it is not properly implemented it has no use. National authorities should be given adequate resources to enforce the legislation and consumers should be given greater means to seek redress and compensation.

## 1. General remarks (Answer to questions 5-21-22)

BEUC, the European Consumer Organisation, welcomes the efforts made by the European Commission in recent years to promote the design and application of better regulatory tools, including impact assessments and stakeholder involvement. We are glad that many of our comments to the previous consultation<sup>1</sup> were reflected in the Commission Communication on smart regulation<sup>2</sup> and we support all measures which aim to increase transparency, accountability and evidence-based policy making.

However, much more needs to be done in relation to smart regulation in order to reach the Commission's main political aim, namely to put citizens' welfare centre stage.

The current economic, social and environmental challenges we face make it more important than ever to ensure EU policies are effective and efficient in minimising costs while bringing about valuable outcome.

Smart regulation should not be restricted to benefits for business, but should be seen as a way to introduce well thought-out, effective and proportionate measures which increase consumer protection, improve the quality and safety of goods and services and move us faster towards a green economy.

With regard to regulation, we are particularly concerned about the European Commission's increasing sympathy with and reliance on self-regulation, which the recent consultation by DG Connect called "Open consultation on a Code for Effective Open Voluntarism: Good design principles for self- and co-regulation and other multi-stakeholder actions" is a symptom of. This trend raises substantial questions and legitimate concerns: while self-regulation can be a useful additional tool under certain conditions, our experience shows that many such initiatives fail to deliver to consumers and fall short of being smart alternatives to regulation by the legislators. The area of financial services is one of the major sectors where over-reliance on self-regulation has shown to be disastrous for consumers.

Similarly, there is a steep increase in the number of policy areas in which the European Commission chooses or considers "optional regulation": Apart from the Commission's top priority proposal for the introduction of an optional regulation for sales law (see our more detailed criticism below in relation to impact assessments), similar initiatives have been announced for insurance contract law, cloud computing (expected in the upcoming EU strategy for cloud computing) and in the field of copyright for example. In all these fields the added value of an optional instrument has not been demonstrated convincingly, let alone the impact of parallel optional EU law with non-optional EU law and 27 national laws been taken into account.

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<sup>1</sup> BEUC response to the public consultation on smart regulation, X/42/2010.

<sup>2</sup> Commission Communication on Smart Regulation.COM (2010) 543.

Optional regulation generates parallel regulation, which per se implies more legal uncertainty but also discrimination of consumers as mandatory legislation becomes optional and consumers are not treated in the same way depending on what regulation the trader chooses. Moreover dual regimes – for example if applicable only to cross-border transactions - create fragmentation and distortion of competition between businesses trading only domestically and those trading both domestically and cross-border; in addition it can create distortion of competition between big businesses who can afford to manage the complexity of a dual regime whereas smaller business may not be able to handle a proliferation of) parallel systems.

How smart can regulation be when it regulates what has already been regulated, doubling existing, traditional EU law, national laws and when most of the affected stakeholders are strongly opposed or highly sceptical about its added value?

Finally, we observe the lack of any strategy of how optional regulation in the various fields should develop in relation to the “traditional ” regulation and what will be its impact on the legal environment in the EU.

Another regrettable development is the decision to exclude micro-enterprises *a priori* from the scope of newly proposed legislation unless the impact assessment process ascertains a need to include them. This is presented as a positive example of smart regulation, while we are of the belief that the possible negative consequences of this provision on consumers’ health and safety outweigh the plusses of reducing regulatory burden. For example, in the food sector many producers fall under the definition of micro-enterprises and in areas like hygiene, the exemption can put consumers’ health at risk. Also in the context of the General Product Safety Directive the exemption can cause problems, as very small scale producers or retailers are responsible for a large number of products and are liable for ensuring safety. We are concerned the reversed burden of proof can be too difficult for authorities, both because it is not easy to collect accurate figures (e.g. number of kiosks selling a category of products) and because the Commission services and the national authorities lack the resources and staff to compile the information.

The other main problems our members consider particularly relevant to consumer protection<sup>3</sup> are the lack of power of national competent authorities to enforce legislation and the difficulty for consumers in asserting their rights (see also point 6). If the EU is to deliver the ambitious objectives set out in the Europe 2020 Strategy, these problems must be addressed by recognising regulation has a positive and necessary role to play by applying the concept of smart regulation to the whole policy cycle, not just the development legislation.

## **2. Collecting the evidence (Answer to question 1)**

Smart regulation should be inspired, based on and informed by an accurate knowledge of the factors at play and by a sharp awareness of its potential impact on society. We understand that monitoring results and collecting high quality data over time is difficult and expensive, but we believe the Commission has adequate resources and multiple sources of data (Eurostat, Joint Research

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<sup>3</sup> BEUC EU Consumers 2020 Vision, X/33/2012.

Centre, EU funded projects, data from Member States etc.) whose use can be maximised. We believe the best way to improve evidence generation is to better train EU officials on how to seek and process data, how to assess the reliability and usability of data (including potential bias especially with regard to evidence coming from academics and directly from stakeholders). Closer collaboration with universities and research centres, including on how scientific data are presented, could help to make sure the available evidence is more accessible for non-experts. We believe EU policies are still far from being evidence-based, as other factors (e.g. politics) prevail over the solid facts. Sometimes there is also a big gap between the clear direction indicated by the available evidence – including the evidence collected by the Commission itself – and the actual political follow up by the Commission.

For example, the Commission conducted several consultations on Net Neutrality and argued that they needed more information and data. The result is that, despite strong evidence showing that legal action is necessary, the Commission continues to conduct public consultations and evidence-gathering – postponing political decisions.

In other cases the Commission seems to seek evidence on a selective basis and this generates the perception that the intention is to seek data to support decisions that have already been made. For example, for the Regulation permitting the low level presence of an unauthorised GMO in food the Commission conducted a sort of “light impact assessment” and took only data and figures from the food industry. We conclude that the opposition the proposal is facing is partly due to the methods used to collect its evidence.

If according to the smart regulation, EU policies should be evidence based, evidence collection methods should be improved and become more transparent. If there is sound available evidence then it should be used consistently as a basis for political decisions. Regulators should be accountable when they take decisions which are unaligned with the evidence.

### **3. Evaluation (Answer to questions 2-3)**

One of the key aspects of the smart regulation approach is the *ex post* evaluation of existing legislation. Proposals which are not delivering for consumers should be reconsidered and amended according to the principles of better regulation. *Ex-post* evaluation is necessary to ensure EU policies demonstrably serve the needs and goals of the people of Europe and not only the markets. We strongly advocated for this and we support the Commission commitment towards more *ex ante* and *ex post* evaluation, including the introduction of the “fitness checks”. We hope that the pilot fitness checks conducted so far will be helpful in identifying the cumulative impact of the legislation in the chosen policy areas and ultimately to improve the existing regulatory framework. We usually become aware of planned EU evaluation during our lobbying activities and also via the European Commission Forward Evaluation Plan, but stakeholders should be better involved in the definition of the evaluation priorities. Tools like the Consumer Market Scoreboard or stakeholders’ statements with supporting valid arguments on the need for an evaluation could serve as a basis for Commission decisions on priorities.

For example, BEUC long been asking for an assessment of the implementation of the Copyright Directive 2001/29 which was never conducted despite the fact the Directive was negotiated at the end of the 1990s before the digital 'revolution' and that the Directive itself requires such an assessment every three years.

#### **4. Impact assessment**

We welcome the Commission's decision not to pass control of its impact assessments to external bodies and the development of specific guidance for assessing the social ramifications and the impact on fundamental rights. We are also particularly pleased that the European Parliament and the Council are committed to enhancing the use of impact assessment and are making progress on this. The European Court of Auditors confirmed that the impact assessment system in the EU as good and effective. Our suggestions for improvement include:

- Improving the integration of consumer interests in a more systematic and regular way would require an internal Commission process reflecting the principle of horizontal application as enshrined in Art. 12 TFEU. Dealing adequately with the general and diffuse nature of consumer interests is of key importance for providing tangible benefits to EU citizens.
- The European Commission recently published a report the integration of consumer policy in other policies. BEUC has been asking for such a report for long time, but we are disappointed with the document as there is no clear methodology or indication of how the Commission envisages the structural integration of consumers' interests. We also think that a representative of the Commission services entrusted with the preparation of EU consumer policy should seat on the Impact Assessment Board. The legal implications of an EU proposal in the different Member States should be evaluated by the European Commission as a prerequisite to choosing between various policy options.
- Introducing a specific session to measure the health impact. Despite the fact that Article 168 of the TEFU requires that "a high level of human health protection shall be ensured in the definition and implementation of all Community policies and activities", until now the health impact assessment has received very limited attention. A review<sup>4</sup> of the 137 impact assessments performed between 2005 and 2006 revealed that the word "health" is mentioned in less than half (Stahl, 2009). So far, health is incorporated under the social and environmental pillar, but we strongly believe that, as an encompassing and overarching principle, it should be assessed separately.
- Addressing the obvious problem of measuring factors which are very difficult to measure e.g. non-economic impacts such as those on health, safety or specific consumer rights, like the right to information.

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<sup>4</sup> Stahl T (2009) Is Health Recognised in the EU's Policy Process? An analysis of the European Commission's impact assessments. European Journal of Public Health.

- Tackling the problem of inequality of resources in terms of submitting data, research and other inputs to impact assessments between stakeholders with specific interests (economic operators) on the one hand, and those with more diffuse, general interests on the other ( e.g. consumer organisations).
- Ensuring more transparency with regard to data sources, the selection of external expertise (with special attention paid to possible conflict of interests) and providing, whenever possible, feedback to those who submitted input.
- Focusing not only on the burdens and costs, but also the benefits of legislation.
- Bearing in mind that an impact assessment is a policy tool and not a substitute for political judgment.

Not only the EU institutions, but also stakeholders and the public read and use impact assessments as a source of information and unfortunately we continue to come across impact assessments which, in our views, are neither comprehensive nor fully reliable. For example, the Impact Assessment on the proposed Copyright Term Extension was heavily criticised by academics, commercial users and civil society. The Commission did not even consider the data provided which demonstrated the damaging effects of the copyright term extension and overlooked the financial consequences of extension on consumers. What is more, the Commission rejected it commissioned itself which concluded that there was no need for copyright term extension and then commissioned a new study to prove its case.

We also expressed reservations<sup>5</sup> as to the impact assessment on the Hygiene Package, namely on the criteria used to identify the preferred options and the inconsistent justifications provided by the European Commission during a meeting held March 6th on the state of play of the legislation. We believe the Commission did not adequately assess the public health risks associated with the delegation of certain meat inspection tasks to slaughterhouse staff and the impact on consumers' perception of the proposed changes on products labels.

Also the Commission's Impact Assessment for the regulation on a Common European Sales Law (hereafter CESL) was seriously flawed<sup>6</sup>. The Commission has neither delivered clear evidence showing this optional instrument is necessary for the further development of the Single Market nor that it would bring about the claimed benefits for consumers and business. Basic premises of the Impact Assessment were dubious, major actual issues were omitted and the economic growth argument was not proven.

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<sup>5</sup> BEUC comments on the revision of the Hygiene Package L/2012/113.

<sup>6</sup> BEUC's comments on the European Commission's impact assessment for the proposal of a common European sales law X /2011/119).

## **5. Consulting the public (Answers to questions 11-12-13-14-15-16-17-19-20)**

Increasing transparency of how decisions are taken is necessary to gain consumer confidence and trust in the policy makers of the European Institutions. Consultation processes which are transparent, open and sufficient in duration, complement formal mechanisms for input to policy and decisions, as well as bring expertise and diverse opinions from the spectrum of stakeholders.

A commitment to accountability, involving elected representatives as well as representatives of groups and interests, would bring greater returns in terms of governance as well as contributing to bridging the gap between Brussels and people living in Europe.

Stakeholder involvement is a pillar of the Smart Regulation concept. Wide and equal access of all categories of stakeholders is a crucial element in ensuring truly democratic and legitimate policy making. As stakeholders, we welcome this approach as long as a balanced representation of interests is guaranteed. Stakeholder involvement requires transparency by both sides. Stakeholders should disclose their goals, activities and funding. The EU lobby register is a first step in the right direction, but for it to be meaningful, it should be made mandatory and the information requirements stricter. The Commission and the other relevant EU institutions should list in a publicly accessible and user-friendly register all their committees and working groups, including the members, aims and activities, minutes of the meetings and documents discussed in these groups. Proliferation of committees hinders policy consistency and may work against the full participation of civil society organisations when they have few staff and limited resources.

We welcome the Commission decision to gather opinion on consultation methods themselves and - as we advocated for long time - to extend the minimum eight weeks consultation period to twelve weeks. This give the opportunity to many EU umbrella organisations like BEUC to better consult their member organisations at national level.

In the case of individual citizens, the Commission should be clear as to the nature of their submissions and differentiate these from submissions of bodies which represent a whole community or a group of stakeholders. For example, in the recent consultation on Tobacco products the system collapsed because of the artificially high number of individual responses (85,000) co-ordinated by the tobacco industry.

BEUC contributes to a high number of public consultations every year and we have examples of both good and poorly conducted consultations.

Among the good examples we can mention the two public consultations which preceded the adoption of the proposal for the revision of the Data Protection Framework and which aimed to identify the main issues needing addressing. The results of the first consultation were discussed extensively with key stakeholders during a series of expert meetings organised by the Commission. As best practice, we also refer to the always well-organised, systematic and transparent public consultations of the Council of European Energy Regulators.



Other consultations and in particular those using structured online questionnaires – such as those on e-commerce, the Internet of Things, and Notice and Action - made it more difficult for us to express our views and in general we think the standardised format does not allow for a thorough analysis of the different issues.

For example, in the public consultation on e-commerce the Commission had pre-selected the relevant questions depending on the nature of the stakeholder and BEUC could not respond to the questions related to the liability of Internet Service Providers, which was one of the most controversial points.

We contend that the European Commission does not always take into account that BEUC expresses the views of all its members, and thus of 41 consumer organisations, not just the views of one single organisation. It is important that an umbrella organisation is given its adequate weight as its 'raison d'être' is to express with one single voice the joint concern of all its members.

As for the wording used in consultation documents, we believe it is in most cases very technical and complex, therefore incomprehensible by non-experts. The Commission should make more effort to simplify consultation documents and ensure they are more reader friendly. The same effort should be made for the legislative texts themselves. Legislation should be more understandable.

We usually become aware of public consultations during our lobbying activities or via the EU portal. We also take into account the European Commission Road Maps, but the timing is often unreliable and this makes it difficult to plan our work and contribute effectively to the decision making process. For example, for the revision of medical devices legislation three different Road Maps were published and the adoption of the proposal has been postponed several times for almost a year. The proposal on nutrient profiles was due to be put in place for January 2009. In March 2012, the Commission announced that they still have to conduct an impact assessment and have no concrete timeline.

The publication policy of public consultation results should be more consistent because sometimes only the summary of the responses and not all contributions are published. In some cases the summaries do not faithfully reflect the results of the consultation and the information is not presented in a comprehensive and unbiased manner. As a matter of principle, all policy submissions, regardless of whether they are made in the framework of a public consultation or not, should be published.

The outreach programme of the Commission has improved, but more robust governance mechanisms and incentives are also necessary to ensure that contributions are effectively taken into account.

Another aspect of the regulatory framework which often remains non-transparent is comitology. Comitology procedures are particularly complex and it is difficult for stakeholders as well as for institutions other than the Commission to really follow the process.

In this context we also emphasise that the Commission should not privilege certain stakeholders or interlocutors in relation to consultations. In a letter to President Barroso we raised concerns as regards the continuation of the mandate of the Commission's 'High Level Group of Independent Stakeholders on the Reduction of Administrative Burdens' – the 'Stoiber group', which advises

the Commission on avoiding unnecessary burdens of (adopted) EU legislation. The mandate of this group is currently being renewed and we have highlighted that this group should not be involved in commenting on draft proposals for legislation under internal discussion and review within the Commission. Consultation processes should not be divided and must remain open to the entirety of civil society. There is no reason why a specific Group should be accorded a privileged position in this process.

## **6. Improving implementation and enforcement**

Regulation can be smart, but if it is not properly implemented and enforced it has no use.

Member States are primarily responsible for ensuring EU legislation is properly implemented. To increase awareness about the rights and obligations stemming from the EU, Member States should more proactively involve stakeholders for example as explicitly required in recent pharmacovigilance legislation (Directive 2010/84/UE and Regulation 1235/2010). For the entry into force of this piece of legislation the European Commission and the European Medicines Agency conducted dedicated stakeholder meetings to explain and discuss the details of the legislation. They also developed questions and answers documents as well as a video for the general public.

More generally, consumers should be better informed about how national governments implement EU legislation, for example via the portals of the public authorities. DG SANCO is currently preparing a harmonised system for consumer complaints which will facilitate the EU to take actions in those areas where more complaints arise. This system could be integrated within the methods of impact assessments or other evaluation instruments.

The financial crisis and consequent budget cuts are causing problems for national authorities in charge of enforcing legislation. Even where smart regulation does exist, in practice there is an acute lack of effective enforcement throughout the Union and rights are widely violated as a consequence. In addition there is a lack of easy access to justice. Individual consumers are deterred from going to court by the high costs and general bureaucracy of judicial systems, while various forms of non-judicial enforcement, such as ombudsmen services, arbitration or mediation services can be patchy and uncoordinated.

National authorities should be given adequate resources, including trained staff, to perform the tasks required by the legislation and consumers should be given better means to seek redress and compensation, including an EU collective redress mechanisms.

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