



The Consumer Voice in Europe

Commission public consultations on Impact Assessment Guidelines and Stakeholder Consultation

BEUC response

Contact: **Monique Goyens** – directorsoffice@beuc.eu

Ref.: BEUC-X-2014-071 - 29/09/2014

Contents

Executive summary	3
Introduction	4
Smart regulation tools to be welcomed – where they are well-designed and properly implemented	5
<input type="checkbox"/> Smart regulation not restricted to benefit business	6
<input type="checkbox"/> Impact assessment and stakeholder consultation to be considered as just yet another tool for policy-makers	6
<input type="checkbox"/> The respect of the guidelines	7
Responses to the consultation on impact assessment guidelines (IAGs)	9
<input type="checkbox"/> Impact assessment report to be completed by institutional context	9
<input type="checkbox"/> The need to be comprehensive: costs and benefits, quantitative and qualitative, examination of impacts across the economic, environmental and social areas (Answer to question 1).	10
<input type="checkbox"/> Scope of proposals requiring an impact assessment (answer to question 2)	10
<input type="checkbox"/> Are the appropriate questions being asked in the IAG? Are there other issues that the IA should examine? (answer to question 3) ...	11
<input type="checkbox"/> Suggestions on how to improve the guidance provided to Commission services carrying out IA and drafting IA reports. (answer to question 4)	11
<input type="checkbox"/> Response to question 5: problem analysis	14
<input type="checkbox"/> Response to question 8: option identification	14
<input type="checkbox"/> Response to question 9: impact identification	16
Responses to the Consultation on stakeholder consultation guidelines ..	17
<input type="checkbox"/> General assessment	17
<input type="checkbox"/> Are expert groups a tool for stakeholder consultation or not?	19
<input type="checkbox"/> Response to question 1: exhaustiveness of the SCG	19
<input type="checkbox"/> Response to question 2: identification of right target audience	20
<input type="checkbox"/> Response to question 3: how to improve participation by stakeholders	20
<input type="checkbox"/> Response to question 4: risk of over-consultation	21
<input type="checkbox"/> Response to question 5: need to explain limits of consultations in this guidance document	22
<input type="checkbox"/> Response to question 6: analysis of results and assessment of representativeness of responses – feedback to stakeholders	22
<input type="checkbox"/> Response to question 7: additional steps in consultation	22
<input type="checkbox"/> Response to question 8: adequacy of tools	22

Executive summary

This document is based on and develops the responses by BEUC to the Commission's questionnaires for its consultation on Impact Assessment and Stakeholder Consultation.

BEUC welcomes the public consultations on Impact Assessment (IA) and Stakeholder Consultation (SC) launched by the Commission.

This is particularly timely in the context of the "better regulation" approach adopted by the new Commission, whose structure reflects the wishes of the Juncker Commission to provide strategic filtering of regulatory initiatives within the College.

BEUC welcomes smart regulation, where it is well-designed and properly implemented. This concept should benefit all EU citizens and not equate to a mere reduction of costs for industry that linked to regulation. The cost to society of non-regulation must be equally taken into account.

It is crucial that IAs and SCs be considered as just a tool of policy makers, and they then need to take responsibility for their policy actions or inaction.

The guidelines outlined in the consultation documents are to be welcomed, although it is important to stress that their respect needs to be enhanced within the Commission services. However it is key to not engage in over-consultation and use impact assessments as an excuse to delay regulatory action. This would be the case in the context of implementation of regulatory cooperation provisions in trade agreements such as TTIP, where trade impact assessments and prior consultations with trade partners might more than overlap with internal impact assessment procedures providing analysis of the impacts on trade.

Several elements are highlighted in the BEUC response:

- The need to provide a comprehensive impact assessment, across the economic, environmental and societal aspects, including not only the costs of regulation, but also the costs linked to non-regulation.
- The need for smart regulation to be based on the risk itself that needs to be regulated, not the size of the company who potentially creates the risk.
- The need to train officials on data search and processing and to be clear about sources of evidence.
- The need to engage in assessment of difficulty measurable factors, such as consumer expectations and attitudes.
- The risks related to over-reliance on self and co-regulation.

More specifically, on the stakeholder consultation it is important to restore balance to stakeholder input and therefore BEUC calls for the introduction of positive discrimination measures to assist less affluent stakeholders, i.e. public interest groups, to more effectively participate in the process. In this context, it is crucial also to extend the application of the guidelines to the process of preparation of delegated and implementing acts.

I. Introduction

At the end of June, the Commission launched two different, but combined public consultations:

- One consultation on its Impact Assessment Guidelines, to review the Guidelines previously consulted in 2012 and to which BEUC contributed¹;
- One consultation on the Commission's Stakeholder Consultation Guidelines. The public consultation, which is the first to work on the basis of published guidelines, stresses that these guidelines are for internal use only by Commission services, but that stakeholder inputs are an essential element in ensuring the quality of the final product.

Both consultations were open until 30 September 2014.

BEUC welcomes the opportunity to participate in these consultations. This document is based on and develops the responses that have been introduced by BEUC to the questionnaires prepared by the Commission in the context of its consultations on Impact Assessment and Stakeholder Consultation.

Therefore it provides a summary of our analysis of the Commission approach, based on our above-mentioned 2012 document, duly updated and complemented by additional developments.

¹ BEUC, Smart Regulation – BEUC response to the stakeholder consultation, X/2012/070 – 21 September 2009.

II. Smart regulation tools to be welcomed – where they are well-designed and properly implemented

The European Consumer Organisation (BEUC) in principle 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.

While in theory one can only welcome more outreach on impact assessment and stakeholder consultation, it must be acknowledged that in practice, because of the discrepancy of resources of different categories of stakeholders, there is a **structural bias in the consultation process**. More and more filters are being put in place, certainly by the 2014-2019 Commission, before a decision is taken by the Commission to propose a regulatory initiative and this multiplication of filters advantages business stakeholders, who have additional avenues to influence the decision making process and delay regulatory changes².

The Commission should not lose sight of its task to promote the general interest, and its role to counterbalance this structural imbalance.

To this end, we ask the Commission to address this problem in the guidelines: Commission staff should be advised to make a positive effort to seek a wide range of views and especially to ensure that diffuse general interests are consulted.

As a second step, the Commission should study the range of submissions received and evaluate if the full range of relevant views has been received. For example, it might turn out that there are only few submissions on behalf of consumers, the elderly, the disabled or some particular group. In such cases positive action must be taken to hear these voices.

Much more needs to be done in relation to smart regulation to reach the Commission's main political aim - namely to put citizens' welfare at the centre stage. This is true both when it comes to improving the guidelines and applying them in practice. Indeed, several Commission initiatives taken over the last years fall short of respecting the provisions included in the guidelines.

Moreover, the current discussion about smart regulation too often refers to smart regulation as equivalent to *less* regulation and a reduction in administrative costs, without taking into account why the respective regulation or administrative requirements have been put in place or why they would be put in place.

The new Commission structure established by President Juncker includes a new portfolio for "Better regulation". In addition to this specific portfolio, all 7 Vice-Presidents are tasked with strategic filtering of regulatory measures. BEUC is concerned that these additional structures and procedures, combined with a general deregulatory climate associated with the economic crisis, to trade negotiations and their later implementation, will lead to a 'regulatory chill', where the cost of regulation for business will not be sufficiently weighted by the costs for society of non-regulation.

² These filters then add up to those that are linked to the normal legislative process within the European Parliament and the Council.

We ask the Commission to take a holistic and society welfare oriented approach to the work in this respect, rather than focus only on promoting business activities.

The current economic, societal and environmental challenges we face make it more important than ever to ensure EU policies are effective and efficient while bringing about valuable outcome for all European citizens.

Smart regulation not restricted to benefit business

Smart regulation should not be restricted to benefits for business, but should be seen as a way to introduce well considered, 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.

However, both the Impact Assessment Guidelines (IAGs) and the Stakeholder Consultation Guidelines (SCGs) are designed in a way that disproportionately favours business, for reasons that we will detail below. Among the reasons for this, it is clear that business have more tools to be involved in those procedures and therefore it is crucial for the Commission to **restore balance by introducing tools for positive discrimination in favour of non-industry stakeholders**.

A broader societal approach is needed to provide smart regulation. A trend is emerging of **dismissive attitudes towards societal aspects** of problems and their regulation, leading to focus on business-related assessments. However, regulation is only truly smart if it does not limit itself to assessing costs for industry, but also the **cost of non-regulation** for all stakeholders, including society at large and the environment.

Impact assessment and stakeholder consultation to be considered as just yet another tool for policy-makers

Policy decisions have to be made by policy-makers, in the context of a democratic framework. **Policy makers have to take responsibility for their decisions and must be accountable for their choices**. In this context, it must be clear that IAs and SCs are only policy tools and not a substitute for political judgment. They can inform a political decision, but should not replace it. In the recent past we have witnessed some examples of the Commission taking responsibility against an impact assessment:

- In 2008, the Commission rejected the initial Impact Assessment about the proposal to extend the copyright term of protection, which had concluded that there was no need for extensions of copyright terms. The European Commission commissioned a new study which reached the opposite conclusion. The latter 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 for consumers of extension. In the end, the term was extended from 50 to 70 years.

- In 2013 the Commission proposed a Directive on payment accounts against the conclusions of the impact assessment.

Even if in such cases, decisions are not necessarily taken in the right direction from the consumer perspective, BEUC considers it key for the legislator to keep this responsibility and we are concerned that the Commission increasingly refers to IAs and SCs results to refrain from action or to engage itself into an approach that does not comply with global societal needs, such as tackling climate change³, due to concerted pressure from specific stakeholders.

Also, IAs and SCs should not be overused on a given issue, as this would lead to decisional paralysis: while there is an impression of outreach to civil society and a strong search for evidence-based decision making, exaggerated reliance into IAs and SCs can lead to delaying urgently needed actions.

This is even more the case now that in the EU regulatory environment, more and more filters to regulation have been or will be put in place, both internally (new Commission structure and procedures) and externally (trade impact assessments, regulatory cooperation proposals under TTIP), which threaten to lead to **regulatory chill**.

In this context we also underline that we are not in favour of outsourcing impact assessments to third parties as suggested by the European Parliament in its report⁴. Furthermore, we do not support the release of draft impact assessments for public consultation before submitting a proposal to the co-legislators. We are worried that an additional consultative step on draft impact assessments would risk delaying the decision-making process and lead to a Commission even more exposed to political pressure.

Instead, the Commission should ensure that the traditional consultation tools such as preliminary public consultation procedures via Green Papers etc. are done in a timely and most efficient and well-prepared manner with outreach to all stakeholders.

The respect of the guidelines

While BEUC welcomes the guidelines, both on impact assessment and stakeholder consultation, the experience in the past, but also in more recent years, indicates that many initiatives taken by the Commission do not take account of the provisions of these guidelines.

The need to regulate on basis of risk and not the size of a business: the case of micro-enterprises

Another regrettable development is the decision to exclude micro-enterprises *a priori* from the scope of newly proposed legislation unless the impact assessment

³ See the interview at: <http://www.euractiv.com/climate-environment/eea-chief-scientific-uncertainty-interview-518183>

⁴ <http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2011-0159&language=EN>

process ascertains a need to include them (see IAG page 24). This is presented as a positive example of smart regulation, while we believe the potential 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.

In the area of economic or legal consumer protection, this approach might also lead to unacceptable risks, where micro-enterprises would not have to respect certain information requirements or legal protections (on cooling-off periods, guarantee rights, right to return, etc. 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 problematic for public 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.

➤ ***How to enforce smart regulation and provide redress when rights are violated***

The other main problems our members consider particularly relevant to consumer protection⁵ are national competent authorities' lack of power or resources to enforce legislation and the difficulty for consumers in asserting their rights.

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 of legislation.

The financial crisis and consequent budget cuts are causing problems for national authorities tasked with enforcing legislation. Even where smart regulation does exist, in practice there is an acute lack of effective enforcement throughout the EU and rights are widely violated as a consequence.

In addition there is a lack of easy access to justice.

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

➤ ***Impact assessment and stakeholder consultation in the context of trade***

As TTIP negotiations continue⁶, the issue of trade impact assessments has been repeatedly raised. Regulatory cooperation between the two trade partners could

⁵ BEUC EU Consumers 2020 Vision, X/33/2012.

imply more room would be left via “cooperation” for each partner in impact assessments and consultation procedures to analyse problems and implications of responding measures. While not a lot is known about the exact content of such tools, BEUC considers such a privileged treatment to be totally redundant: the current guidelines already provide for an impact on trade among the list of issues to be addressed. A parallel procedure would lead to the US industry having yet another tool with which to influence EU policy making and would **take yet another slice of the EU’s regulatory sovereignty away from it.**

III. Responses to the consultation on impact assessment guidelines (IAGs)

✚ Impact assessment report to be completed by institutional context

In addition to the responses to the specific questions raised in the public consultation, it must be mentioned that the IAGs provide guidance to services that must then prepare an IA and draft the report. However, it is not only Commission services who read those reports. Other policy makers and stakeholders also do. Therefore, it is important to include in this consultation the institutional and procedural framework applicable to impact assessments. This framework could then be made available on the relevant Commission webpage with a link to it in all Impact Assessment Reports.

In particular, the following questions should be addressed:

- Who decides that an IA needs to be carried out?
- What is the exact role of the IAB in monitoring the methodology and presentation of an IAR? Is its composition balanced? In particular, we think that a representative of the Commission services entrusted with the preparation of EU consumer policy should have a seat on the IAB.
- How is the quality control of concrete IAs guaranteed?

The IA report should include the different steps that have been undertaken in the preparation and finalisation of the IA for a given issue. In particular, it should systematically mention whether the IA has been accepted at first submission or needed to be re-submitted and if so, for what reasons.

We welcome the Commission’s policy of not passing 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 has made an enhanced use of this tool and that its Directorate for Impact Assessment and European Added Value established in 2012 provides detailed assessments of the quality and independence of Commission impact assessments, thereby providing institutional quality control and complementary information for policy makers.

⁶ Beyond TTIP negotiations, such provisions linked to trade impact assessment and regulatory cooperation might become standard provisions in EU trade agreements.

On the other hand, while the Council also committed to do so, we have not seen the publication of any impact assessments carried out by the Council. If such IAs are carried out, it is key for they be made public.

✚ **The need to be comprehensive: costs and benefits, quantitative and qualitative, examination of impacts across the economic, environmental and social areas (Answer to question 1).**

BEUC fully agrees that IAs must be comprehensive and must analyse not only costs, but also the benefits of different policy alternatives. Not just quantitative elements, but also qualitative aspects have to be described and analysed.

The implications of a given measure must be analysed in their different areas, directly or indirectly anticipated. In this respect, while we welcome that the IA goes far beyond cost/benefit analysis, we still consider the wording used by the IAG and referring to “economic, environmental and social areas” to be **too restrictive**, as it is not clear whether it includes elements such as health, safety, consumer protection, and other important societal issues, like gender equality, privacy, etc.

We would suggest a broader wording to highlight the needed comprehensiveness of IAs (see also below, response to question 4).

✚ **Scope of proposals requiring an impact assessment (answer to question 2)**

It is indicated in the Commission procedures that only proposals expected to have direct economic, social or environmental impacts are subject to an impact assessment. If this is not the case, there will be neither a roadmap, nor an impact assessment. This leads to the following concerns:

- It is unclear what the internal decision making procedures are within the Commission to decide whether or not a proposed measure is to have an impact or not. It would be good to clarify this.
- The fact that IAs would be limited to only those measures which have direct impact is also worrying, as there might be situations where indirect impact needs to be taken fully into consideration. There also seems to be a contradiction within the Commission guidelines:
 - There will be an IA only if a proposal has a direct impact;
 - However, once an IA is decided, this assessment needs to also take into account indirect impacts (see guidelines, p. 17).
- In general, on the distinction between direct and indirect impact, only a circular, and therefore unhelpful, definition is provided in the guidelines⁷ on the difference between a direct and an indirect impact. It would be good to provide more guidance on this, also in giving example of what is considered a direct/indirect impact. Also, one observes that most questions in the impact assessment refer to indirect impact.
- As mentioned above, the wording of “economic, social or environmental” is

⁷ A direct impact according to the guidelines is an impact directly generated by a measure... however, later in the document, one refers to “direct impact on macro-economic stabilisation”, while by definition, a macro-economic change is the result of different elements.

too restrictive and should be made **more comprehensive in order to explicitly tackle health, safety and legal consumer protection implications or other** societal issues.

There seems to be a contradiction on the Commission website:

- On the one hand, it mentions that the roadmap will explain why an IA is not carried out;
- On the other hand it says that if a measure is not expected to have any direct impact, there be neither a roadmap nor an IA...if there is no roadmap, will there be no justification then for an absence of IA?

✚ **Are the appropriate questions being asked in the IAG? Are there other issues that the IA should examine? (answer to question 3)**

We welcome the approach reflected in the guidelines that the IA must reflect the whole policy cycle, including *ex post* evaluation. *Ex post* evaluation is key in assessing whether the options taken in a given sector have addressed effectively and efficiently the identified problem. Therefore, better and the more timely involvement of stakeholders in the definition of evaluation priorities are needed.

✚ **Suggestions on how to improve the guidance provided to Commission services carrying out IA and drafting IA reports. (answer to question 4)**

- ***The need to train officials on data search and processing and to be clear about what evidence is referred to***

Smart regulation should be inspired by, based on and informed by an accurate knowledge of the factors at play and sharp awareness of its potential impact on society. EU policies should be evidence-based: **evidence collection methods should be improved** and become more transparent. If there is sound evidence available then it should be used consistently as a basis for political decisions. Regulators should be accountable when they take decisions unaligned with the evidence.

And so we observe that when stakeholder research is shared with the Commission, industry figures seem to be taken for granted, while those that concentrate on consumer attitudes and expectations are either questioned or dismissed because there is no proof that consumers are ready to pay for more protection. However, these broader elements make part of the evidence and need to be duly accounted for.

It is also important to provide a clear definition of an evidence-based approach and it should not lead to regulatory paralysis, as it is the case in several sectors in the US.

One of the basic principles of EU policy making is that of the **precautionary principle**, which leads regulators to act where there is a reasonable suspicion that there is a risk needing prevention or tackling.

Researching valid evidence should not lead to the elimination of this prudent policy-making approach which aims for prevention rather than cure.

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 Centre, EU funded projects, data from Member States etc.) whose use can be maximised.

We believe the best way to improve evidence gathering is to train EU officials better 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 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 such as 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.

Another aspect is the need to have a broad basis of data, of different nature: academic, economic, societal, industrial, etc. It is key that the feedback from different stakeholders be integrated into the impact assessment (see also our response to the public consultation on stakeholder consultation). However, the IAGs only refer to this when it comes to options identification. Stakeholder feedback should be sought not only for options, but as soon as the problem analysis takes place.

- For example in the trade area, it is regrettable that the 2012 public consultation on whether to launch negotiations with the US in what is now TTIP was very confidential and unbalanced in nature: 114 responded, of which 75 were attributable to business interests, only 3 to Member State governments and authorities, 5 NGOs and 8 trade unions. In parallel, the impact assessment focuses in a biased way on the benefits of TTIP without acknowledging the costs which could be linked to it.
- In 2013, the European Commission rushed the adoption of a legislative proposal on the Telecoms Single Market without proper consultation and without a thorough assessment as regards the impact of the legislative proposal on consumers and the market itself. The European Parliament has criticised the Commission for this Impact Assessment.

➤ ***The need to be specific and to list explicitly impact on different sectors: consumers and health***

As mentioned above the analysis of impacts should not be limited to economic, social and environmental issues. It is essential that the impact on consumer interests be granted specific attention in principle with Article 12 of the TFEU.

Dealing adequately with the general and diffuse nature of consumer interests is of key importance for providing tangible benefits to EU citizens. To this end, a clear methodology or indication of how the Commission envisages integrating consumers' interests should be made available.

We also think that a representative of the Commission services entrusted with the preparation of EU consumer policy should sit on the Impact Assessment Board. The implications of an EU proposal on existing consumer legislation in different Member States should be evaluated by the European Commission as a prerequisite for choosing between various policy options.

In addition, in the IA there should be a specific session to measure the impact on health. Despite the fact that Article 168 of the TFEU requires "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. 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 separately assessed.

➤ ***The need to provide guidance on what to measure and how to measure factors that are difficult to measure***

In the current system, one observes in impact assessments a concentration on the costs for industry. There is **no parallel analysis of cost of non-regulation for broader society**, or certain categories of non-industrial stakeholders. Benefits are sometimes difficult to measure and are not counter-balancing potential costs of a regulation. The obvious problem with factors very difficult to measure e.g. impact on health, safety or specific consumer rights like the right to information, must be addressed. The guidelines remain silent about this very crucial issue.

A practical methodology should be developed in order to provide guidance on how to measure non-quantitative data.

➤ ***Transparency on data sources and external expertise***

It is hugely important that the IA provides information with regard to data sources, the selection of external expertise (with special attention paid to possible conflicts of interests). In this context, the notion of evidence-based decision making is also very unclear, especially when there is a reference to science. What science are we talking about? For the sake of transparency, the Commission should, when referring to science and/or evidence, make a clear distinction between:

- Academic evidence validated by in scientific journals submitted to peer reviews;
- Evidence provided by stakeholders;
- Evidence produced by the Commission in conjunction with consultancies. In this case, the terms of reference of the studies should be made public.

The role of the Chief Scientific Advisor, when confirmed in the Juncker Commission, should be made more transparent and any advice produced by the CSA should be clearly reported in the IA report.

Any reference to research results should indicate its funding source.

Response to question 5: problem analysis

Annex IIB provides a clear description of the issues to be taken into account for problem analysis. It would be good to complete this description with guidance on:

- How to prioritise between conflicting effects of a problem over different categories of actors, sectors?
- How to assess the magnitude of a problem, but also its positive sides, e.g. for society, when this is not easily measurable?
- When it comes to the EU dimension of a problem, specify that not only cross-border effects justify for a problem to be tackled at EU level?

Response to question 8: option identification

➤ ***Handle failure of EU initiatives with precaution***

In this section, reference is made to alternative policy options. The Commission refers to the option of “doing less” or even repealing an initiative which has not delivered the expected results. If, in theory, this option should be open for policy-makers, due precaution should be paid to such a process, as there may be many reasons that explain failure, one of which being cited in the guidelines themselves: unsatisfactory enforcement of EU legislation by national authorities.

➤ ***Support cooperation with Member States to achieve goals***

BEUC welcomes the possibility envisaged by the IAGs to facilitate improved action by Member States to achieve the objectives of given legislation. Indeed, and certainly with consumer protection, many of the shortcomings of the regulatory framework set by the EU are explained by lack of adequate implementation/enforcement at national level.

➤ ***Risk of over-reliance in self and co-regulation***

This section also refers to alternative policy instruments, such as non-regulatory instruments (self and co-regulation).

We are particularly concerned about the European Commission's sympathy for and over-reliance upon self-regulation within the EU. This trend raises substantial questions and legitimate concerns: while self-regulation can be a useful tool under certain conditions, our experience shows that several initiatives fail to deliver for consumers and fall short of being smart alternatives to regulation.

The area of financial services is one of the major sectors where an over-reliance on self-regulation has in the past shown to be disastrous for consumers. In the area of Ecodesign requirements, the use of voluntary agreements to define these requirements has also and continues to give rise to numerous discussions, notwithstanding the fact the Commission did not wait for the Consultation process on voluntary agreements to be final to go ahead with the internal procedures for validating a voluntary agreement prepared by the industry on game consoles. This disregard of consultative processes creates a lack of trust in the Commission's willingness to take consultation seriously.

It is important, in the case of self or co-regulation that specific attention is granted to the stakeholders involved in the alternative regulatory process. Sufficient safeguards must be presented by those who will prepare, adopt, implement and enforce alternative regulation in terms of representation and power to enforce the rules adopted under such a system.

➤ ***Optional regulation far from smart***

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 and copyright.

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 28 national laws been taken into account.

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.

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

Response to question 9: impact identification

➤ ***Trade impact assessment already standard – no need for additional tools***

BEUC welcomes the fact that the IAGs explicitly provide for trade impact assessments at different places of the document. This puts into perspective the current discussions in the framework of the TTIP negotiations striving for more cooperation in the preparatory phase of adoption of regulatory measures in the EU – and that are among the stumbling blocks of these negotiations, as their magnitude might lead to a loss of regulatory sovereignty of the EU.

The IAGs clearly instruct that account must be taken of the impact on trade of the analysed measures and their options.

This is one element among others to guide policy-makers to their preferred option, but it already provides trade partners and non-EU industry with a tool for participation in the EU decision making process.

Therefore, there is absolutely **no need for an additional, redundant, trade impact assessment tool that would only cater for the additional influence of industrial lobbying.**

➤ ***Different types of impact to be fine-tuned and specified***

We already cited above the limitations of impact identification on economic, social and environmental effects as too narrow a vision on implications a measure might have. Fortunately, the key impact identification questions in the IAGs reflect a broader perspective on the variety of potential impacts: consumer choice, information, privacy, health and safety:

- We reiterate the suggestion that the concept of “social impact”, at the risk of misinterpretation as meaning “labour”, should be replaced by “societal” impact.
- We also reiterate the suggestion to extend the list of headline impacts referred to in such a way to explicitly include health and consumer protection.
- We suggest to explicitly refer – in the row related to “consumers and households” to **consumer rights** rather than consumer protection. The former concept is more specific than the latter, which can include elements like information, redress, etc., tackled elsewhere in the IAGs.

- We are surprised the issue of food safety is listed under “animal welfare” rather than public health and safety.

In addition, while this is not listed as such in the guidelines themselves, Annex II of the IAB report 2013 provides for a summary template sheet that indicates that a specific paragraph of the summary must be dedicated to how businesses, SMEs and micro-enterprises will be affected. While this is understandable, we see no good reason for excluding consumers from the list of specific impact description and strongly suggest their inclusion in the list of potentially affected stakeholders.

IV. Responses to the Consultation on stakeholder consultation guidelines

✚ General assessment

➤ *Balanced stakeholder involvement key for legitimate decision making*

BEUC welcomes the Stakeholder consultation guidelines as a valid framework for creating the right policy approach towards stakeholder involvement in policy and law making.

We also welcome the fact the Commission has taken into account several requests made by BEUC in 2012 related to the duration of consultation periods and the strong signal sent by organised duplicate responses, at least when they originate spontaneously from individual citizens.

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 other formal mechanisms for input to policy and decisions, as well as bring expertise and diverse opinions from the stakeholder spectrum.

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 what is perceived as ‘Brussels’ and people living in Europe.

Therefore, stakeholder consultation for IAs should put into perspective and be seen by policy makers as a tool to assist the making of well-informed decisions. It should not be a substitute taking responsibility over difficult decisions, nor should it lead to decisional paralysis. Consultations should not be misused and continue endlessly in order to pretend a subject has been dealt with and that activities are underway, while the political will to act is absent.

➤ *Transparency register to be improved*

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. All stakeholders should disclose their goals, activities and funding specifying which part is dedicated to lobbying activities. The EU lobby register is a first step in the right direction, but for it to have credibility it should be made mandatory and the information requirements stricter.

We also welcome the fact the Commission lists all their committees and working groups in a publicly accessible and user-friendly register, 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.

➤ ***Scope of Guidelines: need to ensure stakeholder consultation on implementing and delegated acts***

We welcome the fact that in the June 2014 REFIT Communication, the Commission recommended EU agencies also apply these minimum standards for consultations the agencies carry out.

It is also stated that the Commission currently considers how to improve public consultation on implementing and delegated acts. BEUC strongly advocates a more transparent procedure and improved and balanced stakeholder consultation in “tertiary” legislation, as these initiatives are **often under no or very limited democratic control** and much less than other regulatory initiatives but are often very important and have a big impact on stakeholders.

Consultation cannot probably be undertaken as by default, but we suggest that in cases particularly in delegated implementing acts where collective consumer interests are concerned that consultations be obligatory.

➤ ***The need for a supervisory framework***

As for the IAGs, while we welcome the guidelines themselves as a major step towards more Commission accountability, we still miss information about how it intends to ensure consistency and implementation of these guidelines by its different services.

What is the quality control system that the Commission has put in place to monitor consistent implementation of stakeholder consultation? Indeed, in our experience, the way a public consultation is managed depends widely on the service carrying it out.

We have experienced a number of situations where services far from respect the applicable guidelines and this results in a lack of credibility not only of the services concerned, but the Commission as a whole.

In terms of predictability, common implementation practice must be established. Stakeholders should have an interlocutor within the Commission allowing them to flag incidents or disrespect of the guidelines. Even if this document is for internal purposes, stakeholders must be able to report problematic issues with consultation

processes and to do so with a body not in charge of the consultations concerned, even if not in first line.

Are expert groups a tool for stakeholder consultation or not?

The public consultation document contradicts on whether the establishment of expert groups is among the tools for stakeholder consultation.

On page 4 it indicates that stakeholder consultation must be distinguished from collection of expertise - which is largely done through expert groups for which the Commission has set up a specific framework in 2010. However, on page 29 it widely describes the expert groups among the tools for stakeholder consultation.

There are currently many ongoing discussions in the expert groups set up by the Commission with different missions, compositions and working methods and there seems to be a lack of consistency among those groups when it comes to their functioning principles. For example, the European Ombudsman is currently undertaking a public consultation on these expert groups. Clear rules on a balanced composition of represented interests, the call for and selection of members of expert groups, the transparency of their ongoing work and the results of the work, the publication of dissenting opinions, the reimbursement and compensation for participation and the capacity in which members participate should be established as required by the last European Parliament.

Such clarification and more consistent framework, providing balanced expert groups where no category of stakeholder can capture the work undertaken by the group are urgently needed.

Response to question 1: exhaustiveness of the SCG

➤ ***The need to provide instructions on the drafting of the consultation itself***

The SCGs contain a valuable number of instructions and advice to optimise the legitimacy of stakeholder consultation. However, one crucial **step is missing in the description: the actual drafting of the consultation**. BEUC believes that in the drafting of the questions themselves (be it for a questionnaire, a survey, a workshop, etc.), several instructions can be introduced that would assist stakeholders in managing their responses:

- Abstention from introducing technical barriers to responses: in several consultations BEUC contributed to, limited available space for responding made it very difficult to provide well-argued answers,
- No artificial segmentation of stakeholder responses: while some questions in a given consultation may be more relevant for certain categories of stakeholders. Others should not be prevented from still answering those questions if they wish to do so. In the past this has not always been the case.

- As for the wording used in consultation documents, we believe it is very technical and complex in most cases, therefore rendered 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.
- In several consultations, such as the one organised in spring 2014 by DG ENER on retail energy markets, a high number of closed questions prevent stakeholders from providing their precise views and detailed comments.
- Online questionnaires or open consultation should come with a helpdesk where respondents with difficulties can be assisted.

Response to question 2: identification of right target audience

The Commission has achieved major progress in identifying and fine tuning the diversity of stakeholders and their respective inputs in consultations.

We particularly welcome the fact that the Commission is aware of the risk of regulatory capture by a limited number of stakeholders and warns its services to prevent these situations.

There is however a need in the SCGs to more clearly acknowledge that **a stakeholder consultation is not a referendum** and that there will always be a bias towards those stakeholders who have the means and resources to engage in the consultation process. Even more, the Commission should correct this bias by adapting the target audience accordingly. Therefore, one element that is still not addressed in the guidelines is the way to weight the different inputs from different stakeholders. While some progress has been made to manage duplicate responses in a fair and consistent manner, it is not mentioned how organisations and their different constituencies are counted for. On the need to ensure representativeness: we contend that the European Commission does not always take into account that BEUC expresses the views of all its members i.e. 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 the joint concern of all its members with a single voice.

Response to question 3: how to improve participation by stakeholders

Presently, the timing of public consultations and of events in this context is often unreliable and makes it difficult to plan the work and to contribute effectively to the decision making process. It would be advisable to plan ahead so that stakeholders can organise their response and prepare accordingly. This is especially the case for EU umbrella organisations that must search their constituencies for feedback. We welcome the fact that 12 weeks for questionnaires/open consultations are now the reference period in the guidelines (whilst this is not systematically respected). However, this should be considered a minimum period - for those consultations which are complex, the deadline could be extended. It should also be clarified that the period starts upon translation into the last language of the consultation - where applicable.

We also request that the consultation period be extended when it is launched in specific 'down periods' (e.g. Christmas, Easter, July-August), as these seem to be periods where the Commission services have a tendency to launch consultations.

Similarly, a 20 day deadline for participation in meetings is also too short, certainly when experts not based in Brussels need to provide their input. More advanced planning should certainly be the rule within the Commission, while we have seen examples of notices of one-week.

Another **major problem concerns the resources available for responding to consultations.** Some organisations, such as consumer organisations or environmental NGOs have a broad range of topics to cover, which means that they are more than other stakeholders led to respond to public consultations, while their resources, both in terms of available data, expertise and financial resources (to travel for meetings, etc.) are more limited than for profit stakeholders. The Commission can attract more responses from these type of stakeholders by reimbursement of expenses for their participation in meetings (reimbursement of travel and accommodation costs, where relevant), but also for acknowledging the time spent by their experts in preparing the response, like this is the case for example in the context of the Financial Services User Group set up by DG Markt.

More fundamentally, one has to be aware of the fact that for those stakeholders, even reimbursement of costs will not make it possible to deviate their experts from their core tasks within the organisation, meaning there will always be a bias in favour of business stakeholders who can dedicate sufficient means, and are willing to do so because of their specific interest in a given initiative, or its prevention.

This is even more pertinent from a geographical perspective. Civil society representation is still very weak in those Member States who have joined the EU since 2004. This implies that the results of a consultation could be biased, not only towards industry, but also towards the stakeholders representing the more western/northern Member State perspectives.

Response to question 4: risk of over-consultation

We have observed in some cases, e.g. collective redress or the copyright reform, **a tendency towards over-consultation.**

Each additional consultation multiplies the bias in favour of industry that can put another layer of its more important resources into providing pressure on decision-making.

Therefore, as repeatedly stressed in this response, policy-makers have to be able to put an end to a consultation process and take responsibility for adopting a policy approach. The need not to over-invest in consultation and related impact assessment procedures is also justified by the fact that the more policy-makers devote resources to the preparation of a measure, the less cost-effective the legislative process will be.

✚ **Response to question 5: need to explain limits of consultations in this guidance document**

The limits are explained. While consultation is just one tool among others to provide policy makers with sufficient intelligence to take well-informed decisions – and this must be acknowledged by all stakeholders - it must still be stressed that more robust governance mechanisms and incentives are necessary to ensure contributions are effectively taken into account.

Too often, there is an impression of cosmetics in consultation and a frustration over wasted resources. Also, the reference to feedback and end of process survey referred to in the guidelines does not take place in practice or at least is currently not sufficiently granular to provide a sense of adequate accountability on behalf of the Commission.

We welcome the fact that the Commission guidelines state that all responses must be systematically published.

✚ **Response to question 6: analysis of results and assessment of representativeness of responses – feedback to stakeholders**

See above

✚ **Response to question 7: additional steps in consultation**

See response to question 1.

✚ **Response to question 8: adequacy of tools**

On top of the existing tools which can be improved, Eurobarometer surveys could be tailor-made to be validly used in impact assessments. Currently they are not granular enough, but could be customised for more in-depth analysis.

END