



European Trade Union Confederation
Boulevard du Roi Albert II, 5
1210 Brussels
Belgium
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ETUC reply to the Commission Stakeholder Consultation on Smart Regulation in the EU

I. Enhancing the quality of EU legislation

The ETUC agrees that enhancing the quality of EU legislation is an important objective, but contrary to the Commission, does not believe that the goal to “reduce regulatory burden as much as possible” will lead to an improvement in the quality of the legislation. Reducing legislation to a question of “burdens” is a misconception. Rules and regulations serve a purpose. The Commission should consider how they can best be designed to meet their objectives, not setting up artificial targets to reduce the number of legislative acts.

The ETUC agrees that evaluation should play a greater role in the policy process, but in order to do so, the Commission must have the appropriate tools at its disposal. The Commission “fitness checks” are a new tool intended to assess “whether the overall regulatory framework for a whole policy area is fit for purpose”. However, these fitness checks have not proven to be a useful and efficient tool for evaluating existing legislation.

The ETUC was invited to participate in the Working Group on Information and Consultation of Workers that was established to deal with the fitness check in the area of employment and social policy. However, the Commission had already decided to evaluate three directives regarding the right of workers to information and consultation without first consulting the social partners. The ETUC not only regrets the choice of the directives, but fails to understand why they were selected. It is also misleading to claim that an evaluation of these three directives could decide whether the whole policy area is fit for purpose. All in all, it has been a time-consuming and costly exercise, the purpose of which remains vague.

Questions

Collecting evidence and monitoring results

1. Smart regulation requires monitoring results and collecting high quality data over time. This is neither easy nor free of costs:

(i) How can the Commission best organise this process?

(ii) Do you have concrete suggestions on how to minimise the resulting administrative burdens?

Evaluation

2. Stakeholder involvement can benefit the quality and focus of evaluation even before this is actually carried out:

(i) Do you have good practice examples of how stakeholders can contribute to the definition of evaluation priorities?

(ii) Do you find the planning of Commission evaluation accessible and useful?

No, the planning of Commission evaluation is not easily accessible.

(iii) How do you usually become aware of planned EU evaluations?

3. Do you find particular shortcomings in any of the following areas in the Commission evaluation approach and/or practice:

The Commission evaluation approach/practice is difficult to follow because it is not sufficiently transparent. The different steps as outlined below are not easily identifiable. For example, how does the Commission select the subject of a consultation?

The question is extremely pertinent since this consultation comes after the revolutionary decision to exclude micro-enterprises from the scope of new legislation. Why did the Commission not organise a consultation on this important issue? It is a reform that will have far-reaching consequences. Instead of improving the quality of legislation, it will most likely undermine it. For example, exempting small enterprises from new legislation in the area of health and safety at work would constitute a serious threat to workers' health and safety. The worst health and safety problems are usually to be found in small enterprises.

Creating special rules for micro-enterprises is likely to lead to more bureaucracy and thereby increase the administrative burdens. Moreover, the Commission has not explained how it will assess whether micro-enterprises are to be excluded or if lighter regimes are to be applied.

(i) Planning

(ii) Extent and timing of stakeholder consultation

(iii) Scope/comprehensiveness

(iv) Assessment of ex post costs

(v) Assessment of ex post benefits

(vi) Focus on concrete impacts/achievement of objectives

(vii) Assessment of stakeholder and/or Member State specific impacts

(viii) Final quality of the evaluation

Many of the studies commissioned by the Commission are conducted by the same consulting firms. Sometimes they do not have any particular expertise in the area covered by the study and the research may be limited to a questionnaire sent to the social partners. In such cases, it would perhaps be more efficient if the Commission asked the social partners directly to provide the information requested.

Another problem is that the methods used in the studies are usually not described and therefore lack the transparency needed to establish how the conclusions have been reached.

Questions also arise as to the independence of some of the consultancies and how the Commission defines the work to be done. By formulating the task, the Commission will of course influence the result. Therefore, the social partners should be consulted already before the tendering procedure takes place, so that they can contribute to the formulation of the questions put to the tenderer.

(ix) Extent and transparency of follow-up

The Commission spends a lot of resources on various studies, but it is not clear what the result is and how they are followed up. The posting of workers is one example. More than one million Euros was spent to provide the Commission with useful information and research concerning the issues that have arisen in the context of the posting of workers. However, the result, the proposed Enforcement Directive, only addresses a fraction of the problems that have been identified.

Impact Assessment

4. The Commission impact assessment system aims to support well informed policymaking by providing an integrated, transparent and accountable analysis of all the significant economic, social and environmental costs and benefits of possible new initiatives. In your view:

(i) Are these the right aims?

(ii) What can be done to better achieve these aims?

(iii) What use do you make of Commission impact assessment reports?

Impact assessment reports are potentially useful, but the quality has often been poor. Social and environmental costs and benefits appear to be taken less seriously than economic costs and benefits. Another problem is that they are not always publicly available or available only after the Commission and the European institutions have passed legislation.

One example of this is the revision of the Working Time Directive. The Commission has only published a study by Deloitte on the impact assessment, but not the impact assessment itself. A question linked to this is how the impact assessment reports influence the policy process given that the conclusions in the second stage consultation paper did not really reflect the findings of the Deloitte study.

Furthermore, it is not clear how the Commission decides whether an impact assessment is necessary or not. The ETUC is not aware of any impact assessment prior to the decision to

exempt micro-enterprises from new legislation. The social and environmental costs and benefits of this initiative should have been calculated before the decision was made. Another example is the Temporary Agency Work Directive (2008/14/EC). Again, the ETUC is not aware of any impact assessment. Was it carried out and, if so, was it made public?

One way of improving the impact assessment system would be to involve the social partners, primarily with regard to the social consequences of a particular piece of legislation.

Strategy

5. Do you have other recommendations how the Commission's overall approach to enhancing the quality of EU legislation could be further improved?

It is important to ensure that the aim of legislation is achieved. This can best be done by conducting proper impact assessments and evaluations. The Commission should also recognise that its deregulatory agenda focusing on the reduction of administrative burdens has reduced the quality of legislation. Excluding micro-enterprises from new legislation per se will lead to discrimination between companies and workers. It is a breach of the Treaty provisions on equality and thus undermines the quality of legislation instead of improving it.

II. Ensuring the effective implementation of EU legislation

In order to ensure the effective implementation of EU legislation, the Commission should improve transparency by making all the information concerning the transposition of EU legislation public. It is not enough to just publish the summaries of the implementation reports.

The Commission should make available to the public not only the implementation report, but also the staff working document providing detailed information on the situation in the Member States, as was the case in the Working Time Directive.

Facilitating implementation and compliance

6. Knowledge about the way in which EU law is implemented on the ground in the Member States should play a greater role in the process of policy evaluation and design. From your experience:

(i) Which specific implementation issues should be looked at when evaluating existing legislation?

(ii) What issues should be taken into consideration when designing new legislation so as facilitate subsequent implementation and compliance? Please explain citing specific examples.

7. Do you find current Commission assistance regarding the implementation of new legislation sufficient? If not, how could it be further improved?

It is important that the Commission involves the social partners in experts groups and the drawing up of guidelines on the transposition and implementation of EU law.

8. Should the availability of information from Member States explaining how they implement EU legislation be further improved, and if so, how?

Informing the public

9. *Do you get all the information you need on the application of EU law? If not, please specify which improvements are needed using concrete examples.*

Improving enforcement

10. *Do you have concrete ideas on how the Commission could make better use of the instruments that are at its disposal to ensure timely and correct implementation of EU legislation by the Member States (e.g. shorter transposition periods, financial sanctions, other)?*

The Commission should improve enforcement by systematically launching infringement proceedings as soon as it becomes aware of incorrect national transposition.

The Commission should also introduce a notification system so that the social partners are informed of any legal proceedings concerning the implementation of EU law.

III. Consulting the public

As a starting point, the Commission should ensure that all the Directorates-General abide by the same rules. The current set of general principles and minimum standards do not apply to all initiatives.

Minimum standards

11. *In your view, are the current set of general principles and minimum standards appropriate or are there any changes you would like to see?*

12. *Are they applied to the right types of initiatives? If not, could you explain why and provide specific examples?*

Scope

13. *Stakeholders should be consulted on the right issues and in the right ways. From your experience:*

(i) *Are you generally consulted on all relevant elements of impact assessment (i.e. problem definition, objectives, policy options and their impacts)?*

(ii) *Are consultation documents clear and complete?*

(iii) *Is the mix of targeted and open consultations used by the Commission appropriate? If not, could you explain why and provide specific examples?*

The ETUC is deeply concerned about the increasing use of public/open consultations as a means of replacing targeted consultations, e.g. the consultation on quality traineeships.

According to the Treaty of the Functioning of European Union (Articles 153-155), the social partners have a special role to play and should be consulted on issues relating to social policy. Many new initiatives of the Commission also have consequences in the area of social policy without the social partners being consulted including the draft directive on conditions of entry

and residence of third-country nationals in the framework of an intra-corporate transfer and the draft directive on the conditions of entry and residence of third-country nationals for the purposes of seasonal employment.

The ETUC believes that the Commission should invite the social partners to targeted consultations in all policy areas where social considerations are at stake.

Timing

14. Early consultation has the greatest potential to influence policy reflections but suffers from the lack of well-defined policy ideas. Conversely, when policy reflections are advanced, stakeholders can be consulted on the specificities of a proposal but may be unable to exert much influence on its overall need and design. From your experience:

(i) Do Roadmaps facilitate your involvement? What use do you make of them?

(ii) Are your views usually sought at the right moments in the process of policy formulation?

In the ETUC's experience, views are usually sought too late in the process, which makes it more difficult to have any influence over the final proposal. As has already been indicated, this consultation comes after the Commission has taken many important decisions concerning smart regulation on which we should have been consulted. Another example is the decision to introduce fitness checks (see the introduction). The ETUC was never consulted on the need for fitness checks nor which pieces of legislation to evaluate.

(iii) Should open consultations preferably take place in one go or in separate stages? In the latter case, how could excessive costs (for the public and the Commission) be avoided and minimum standards respected?

Outreach

15. How do you generally become aware of consultations? Are you satisfied with this? If not, how would you like to learn about upcoming or current consultations?

16. Reaching all affected stakeholders and facilitating high-quality input is essential for ensuring the benefits of consultations:

(i) How do you think the coverage of Commission consultation could be further extended in a cost-effective manner?

(ii) How could consultation channels in Member States be mobilised to this end?

(iii) Can the use of internet-based applications be improved?

17. What is your experience with consultations targeted to specific stakeholders (including public hearings)?

Representativeness

18. Are you aware of any good practices in the Member States or elsewhere on how to assess the representativeness of different respondents to a public consultation?

One important issue is how the Commission weighs the individual contributions to a public consultation. In web-based public consultations, the ETUC is often described as one stakeholder comparable to any other stakeholder, although the ETUC represents about 60 million workers while other stakeholders may represent one individual or one company. The Commission may describe the ETUC position as being held by a minority of the respondents to the consultation, but in fact, it is held by the majority in terms of the number of workers that the ETUC represents. Therefore, contributions from different respondents cannot always be awarded the same weight.

Feedback

19. The Commission provides information on the results of public consultation and their impact on policy choices in its public summary of the consultation, in impact assessment reports and in the explanatory memorandum accompanying final initiatives.

(i) Are you satisfied with the quality and transparency of this information?

No, the Commission should make impact assessment reports publicly available as soon as they have been finalised.

(ii) As a participating stakeholder, would you want to be automatically alerted to the publication of these documents?

Yes.

Results

20. Do you think current consultation practices ensure the effective and transparent participation of all relevant stakeholders? Do they lead to improved policy-making?

There is clearly a risk that the consultation procedure is used to confirm the desired result.

IV. Progressing together

21. Smart regulation is a shared responsibility: what more can be done to advance this important dimension of the agenda?

So far smart regulation has been synonymous with deregulation and cutting red tape and reducing perceived burdens for businesses. Smart regulation should focus on the quality of legislation, if and how it achieves its aims, and if not, how to improve the implementation of legislation.

The Commission should also ensure that any new legislative proposal is in accordance with international law such as the ILO Conventions and Recommendations.

V. Open questions

22. Is there anything else you would like to comment upon as an input to the Commission reflections on smart regulation?

23. Is there anything you want to comment upon concerning the quality and process of this specific public consultation?