

Proposal for an Interinstitutional Agreement on Better Regulation – ETUC position paper

Key messages

- The primary objective of the interinstitutional agreement ('the IIA') should be to strengthen democratic law-making.
- The IIA should commit to delivering quality legislation to European citizens. It must not lead to undermining existing workers' rights or prevent from further improvement of social legislation.
- The prerogatives of the European Parliament ('the EP') should be strengthened with a view to influence the orientation of the legislative programming.
- The ETUC is against lighter regimes for SMEs and outright exemptions for microenterprises.
- Second reading agreements should remain the norm and trilogue negotiations must not take place where it appears that the EP and Council positions are very much apart. The Council should commit to a reasonable time limit to deliver its common position.
- Impact assessments must address the social impacts of a new initiative as well as the costs of non-legislation. It is not for the Regulatory Scrutiny Board, a non-elected body, to decide whether a new proposal should go ahead.
- The ETUC firmly opposes the setting up of independent panels for impact assessments in the course of the legislative procedure and the introduction of additional impact assessments on "substantial" amendments.
- Public consultations must not be considered as a substitute for social partner consultations. Furthermore social partner agreements should not undergo any impact assessment.
- The ETUC objects to Member States being required not to go beyond what is necessary when they implement EU legislation.
- The Commission should commit to give more consideration to the EP first reading before withdrawing a legislative initiative.
- The three institutions must commit to the respect and promotion of fundamental rights in their legislative activities.

Background

In May 2015, the Commission published a proposal for a new Interinstitutional Agreement ('IIA') on Better Regulation to be finalised by the end of 2015. It is intended to replace the 2003 Interinstitutional Agreement on Better Law-Making. The IIA is a binding agreement between the EP, the Council and the Commission which contains arrangements for their cooperation, particularly in the course of the legislative procedure.

The Commission's proposal puts into practice the principles contained in the better regulation agenda. The recitals of the IIA underline the competitiveness and sustainability of the Union economy. They affirm the Commission goals of simplifying

Union legislation and reducing the regulatory burden, the overall objective being to safeguard the integrity of the single market.

The ETUC is very critical of the better regulation package. It adds bureaucracy, slows down progressive change and de-democratises Europe. The question of what constitutes good regulation should not be solely dependent on whether the rules are associated with administrative or economic costs.

Consequently, the IIA should not focus on simplification and reducing regulatory burdens. Rather, its primary objective should be to strengthen democratic law-making and to provide more legitimacy to EU rules. The IIA should take a positive approach to regulation instead of describing regulation as a burden.

The ETUC is concerned that the draft IIA brings little added value compared to the current IIA. Innovations essentially relate to the so-called “Better regulation tools”, which the ETUC views critically. The provisions relating to the status and power of the co-legislators (Council and EP) are very close to the status quo.

The need to increase democratic legitimacy

The ETUC acknowledges the Commission’s role as Guardian of the Treaties as well as its sole right of legislative initiative. However, the legitimacy of the EP as the only directly elected institution should also be given strong consideration. Yet, the draft IIA takes a “Commission-centred approach” thereby raising a lot of concerns as to the democratic legitimacy of European law-making.

Programming and planning legislative activities (paragraphs 2-6)

According to paragraphs 2 to 6 of the draft IIA, the Commission would retain a leading role in the programming and planning of EU legislative activities. The role of the EP would be restricted to being informed and participating in exchanges of views. Paragraph 4 states that the Commission will merely give “serious consideration” to the EP requests to legislate.

These provisions simply codify existing practice. The ETUC believes that the EP should have a genuine possibility to influence the orientation of the legislative programming. The Commission promises to give serious consideration to the requests made by the EP or the Council for the submission of legislative proposals.

Paragraph 5 proposes that the three institutions annually agree on a list of proposals to receive priority treatment, including proposals to update or simplify existing legislation and reduce the regulatory burden, especially for small and medium enterprises. The ETUC is of the opinion that it is instead new legislation e.g. in important policy fields such as occupational health and safety, which needs to be prioritised.

The specific reference to SMEs should be removed. The ETUC is indeed opposed to the choice of one sector of society, business, as the primary beneficiary of “better regulation”. Legislation should have a societal benefit and the needs of businesses should not come above those of workers, or the environment. The ETUC recalls that 85% of EU employment is in SMEs. The ETUC also stresses that large companies are often able to artificially modify their structure with a view to fit lower thresholds, thereby further deepening unfair competition to the detriment of genuine smaller sized undertakings.

Coordination of the legislative process (paragraphs 24-29)

Paragraphs 24-29 deal with the coordination of the legislative process between the three institutions. In particular, a jointly agreed timetable will include the “appropriate use of second reading agreements”. It is also envisaged that the three institutions agree to accelerate the legislative process.

The ETUC is very critical of the increased use of trilogue negotiations. Such negotiations take place over a hasty timetable, outside the normally more balanced committee debates. The MEPs are then presented with a “take it or leave it” compromise, leaving no possibility to improve the deal. The trilogue negotiations therefore raise serious concerns with regard to better regulation principles: the rapid output from the co-legislators is favoured over careful consideration of legislative amendments.

The ETUC recommends substantial rewriting of section VI. Second reading agreement should remain the norm and trilogue procedures must not take place where it appears from the internal preparatory steps that the EP and Council positions are still very much apart.

Where trilogue does occur, considerable efforts should be made as to the transparency of the process. The ETUC welcomes that under the current EP rules of procedure, the EP negotiator is given a formal negotiating mandate by the responsible committee. The EP negotiator is also under the duty to systematically report to its fellow MEPs. This model of transparency is however not followed by the two other institutions. The ETUC recommends that paragraph 28 is significantly strengthened in this regard. In particular, the Commission should be more transparent about its mandate and activities during the trilogue negotiations.

As far as timetables are concerned, it should be recalled that the Council does not work within a specific time frame to deliver a common position, which explains that legislative initiatives can be stuck for several years (for example the Temporary Agency Work Directive, or more recently the revision of the Maternity Protection Directive). The ETUC therefore recommends that paragraph 26 is modified to include a Council commitment to a reasonable time limit to deliver a common position.

Delegated and implementing acts (paragraphs 21-23)

The draft IIA underlines the role of delegated and implementing acts. The three institutions are to refrain from adding procedural requirements, procedures or additional roles for committees than those foreseen in Regulation 182/2011.

The risks of overrepresentation of industry interests in the comitology procedures are well known. It is therefore important to ensure that recourse to delegated and implementing acts is limited to cases of highly technical issues, which cannot reasonably be handled directly by the co-legislators.

Better regulation tools?

The most substantive section of the draft IIA relates to the application of “Better regulation tools”. The Commission is proposing to carry out impact assessments of its initiatives expected to have significant economic, environmental or social impacts. The co-legislators would then be required to conduct an impact assessment for any “substantive amendment” to the Commission’s proposal.

In addition, the draft IIA is consecrating the principle of stakeholder consultation as an integral component of better regulation. Such consultation should take place during an eight week period following the adoption by the Commission of its proposal and related impact assessment. The opinions collected are to be presented to the co-legislators at the start of the legislative process.

Finally, the three institutions agree to establish monitoring, evaluation and reporting requirements in legislation, including, where appropriate, “measurable indicators”. The three institutions commit to consider the use of review clauses.

Impact assessments – putting business needs above others (paragraphs 7-13)

The ETUC does not accept that impact assessments are necessarily a neutral technical instrument. Instead they are frequently used as a political tool, not only by delaying legislation, but also by making recommendations based on a model biased towards economic costs with little consideration for social and environmental benefits as well as potential long-term benefits.

The Commission must commit in the IIA to have recourse to all-encompassing impact assessments. The social and environmental impacts both in the short and long term must be taken into serious consideration. The cost of non-regulation should be clearly exposed in the impact assessment.

The Regulatory Scrutiny Board, which will assess the quality of the Commission impact assessments should only have a purely advisory role and work in a transparent and balanced manner. The ETUC is of the opinion that impact assessments in their entirety should be published as soon as they are finalized and before the Commission has adopted or dismissed the political initiative concerned.

Given the nature of social partner agreements, they should not be subject to impact assessment.

The ETUC is opposed introducing additional impact assessments on "substantial" amendments, as well as the setting up of an "independent panel" composed of members appointed by each of the three institutions. First, it is a clear signal to the EP and Council not to change Commission proposals as it can be convened by any of the three institutions even against the will of the others. Secondly, it will make the legislative process more costly, longer and more bureaucratic. Thirdly, the independence and expertise of the members of such a panel would be difficult to guarantee. Any member would have to be an expert in fundamental social rights. The decision-making must remain with the democratically elected.

Stakeholder consultation and feedback (paragraphs 14-15)

The ETUC is regularly criticising the unreliability of data collected during public consultations. Individual responses from company holders and resourceful industry lobbyists should not be put on an equal footing to an organisation such as the ETUC which is representing of 60 million workers. Strict requirements relating to qualitative methods of assessment should therefore be introduced in the IIA.

Most importantly, public consultations cannot be considered as a substitute for social partner consultations. The ETUC urges the institutions to introduce a paragraph clarifying that public consultations are without prejudice to the specific consultations foreseen in article 155.2 TFEU.

Ex-post evaluation of existing legislation (paragraphs 16-19)

It is not clear how ex post evaluation is different from review clauses. The added value of ex post evaluation compared to review clauses must imperatively be clarified. In addition, the use of "measurable indicators" referred to in paragraph 18 must be further specified so as to ensure that quantifiable and non-quantifiable assessment on social matters are included. Ex-post evaluations are useful only if they take place several years after transposition into national legislation.

The ETUC does not favour sunset clauses, as they suggest that legislation naturally has a limit in time and as they lead to legal uncertainty and discontinuity.

The ETUC proposes to involve the social partners in the review process of legislations in the social policy field.

Improving minimum standards (paragraphs 30-33)

Member States are called upon to make a clear distinction between those aspects that are the necessary consequence of Union legislation and any additional element, whether substantial or procedural.

The ETUC objects to Member States being required not to go beyond what is necessary when they implement EU legislation. Minimum standards would then be turned into maximum standards, leading to a regression in national laws throughout the EU. Member States should strive for social progress, and in doing so they can maintain or introduce more stringent protective measures, as set out in Art. 153(4) TFEU. The ETUC urges the institutions to delete paragraph 31.

Simplification (paragraph 34)

Contrary to an ordinary revision procedure, the recasting technique grants the Commission almost unilateral power to decide on the scope of legislative amendments and therefore the role of the EP is more restricted.

The ETUC regrets that the excessive use of the Commission's right of withdrawal, e.g. in the case of the revision of the Maternity Protection Directive, the proposal for a directive on musculoskeletal disorders and the revision of the Carcinogens Directive, is not addressed in the draft IIA. Withdrawals of pending proposals need to respect the interinstitutional balance and the Commission shall at least provide the co-legislators with detailed justifications for each envisaged withdrawal.

Due consideration should be given to case C-409/13 which establishes that the right to withdrawal is intrinsically linked to the sole right of initiative. This judgment, however, does not stand in the way of the Commission committing to give more consideration to an EP first reading agreement before deciding whether to withdraw legislation. It could for instance be envisaged that the EP is required to reiterate its wish to see a legislation come through before the Commission takes a final decision to withdraw a legislative initiative.

The respect of fundamental rights

The ETUC recommends that the three institutions specifically commit to the respect and promotion of fundamental rights in their legislative activities. Mechanisms should be put in place to monitor the compliance of EU rules with fundamental rights instruments such as the Charter of Fundamental Rights and the European Convention on Human Rights.