



European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

European Commission Stakeholder Consultation on Smart Regulation

ETUC RESPONSE

Introduction

The European Commission has launched an internet consultation open to all stakeholders aiming to collect input for a Communication on smart regulation planned for the autumn. It will build on the work that has already been carried out by the Commission under the name of better regulation, and present the priorities for the future.

According to the Commission, smart regulation is about “delivering results in the least burdensome way” and “quality of new initiatives is an essential part of the better regulation agenda”.

However, shifting responsibilities or costs to other actors, or giving priority to lighter forms of regulation does not lead to a better regulatory framework. The problem is not too much regulation, it is rather the sometimes poor quality in terms of clarity, consistency and accessibility, followed by a lack of compliance with legal acts in Member States.

The financial crisis has highlighted the lack of regulation of the financial sector and the BP oil spill accident in the US has also raised questions about the regulatory framework. Both examples show the need for effective regulation.

Instruments such as impact assessment can be helpful in reaching a better regulatory framework, but should not be used as an excuse to impose a business-focused, deregulatory agenda. Smart regulation should be about qualitative legislation that can and will achieve its aims, but smart regulation requires sufficient administrative capacity. Member States must ensure that implementing and enforcing authorities possess such capacity at all levels. The effects of the current cuts in public sector jobs and wages on the quality of regulations and administrative capacity will need to be closely watched.

ETUC replies

- 1. Do you think that the Commission’s approach to improving existing legislation is appropriate, or do you believe that there are more effective ways of doing so? Could you give us practical examples?**

The ETUC does not believe that the Commission's approach to improving existing legislation is appropriate. First, we consider that the language applied by the Commission is too negative – regulation is associated with burdens, costs and red tape. Administrative costs are inevitable in order to fulfill regulatory needs.

The starting point for improving legislation should be to evaluate its impact – did the legislation fulfill its objective?

With the purpose of improving existing legislation, the Commission should examine the enforcement of the acquis. It is essential to look at the content and the quality of transposition of European legislation and the application at national level. If there are lapses in this respect, the Commission should identify and publicise them, and launch infringement proceedings against those countries. Furthermore, the crucial role played by trade unions and labour inspectors in the enforcement of labour and social legislation should be recognised.

The Commission states itself that *“Member States appear to pay much less attention to transposing and then applying those directives correctly: the number of infringement proceedings for incorrect transposition or incorrect application of directives or violation of Treaty rules has increased year after year and continues to rise”* (European Commission, Internal Market, Scoreboard, July 2007 no. 16).

The Commission has applied a piecemeal approach, which include various programmes such as the Action Programme for Reducing Administrative Burdens, Impact Assessment, Ex-post Evaluation and Simplification. Initially, the Commission identified 13 priority areas for reducing administrative requirements covering 42 legal acts. Since then, the number of acts has grown as well as proposals to add new priority areas. The Commission Work Programme for 2010 contains plans to review legislation in the areas of environment, transport, employment and social policy, and industrial policy.

As to the mandate of the High Level Group of Independent Stakeholders on Reducing Administrative Burdens, it was originally limited to advise the Commission on the Action Programme for Reducing Administrative Burdens. However, the High Level Group has been given additional tasks and President Barroso is now seeking to involve it in impact assessment and simplification of existing legislation. There is a lack of transparency in how these issues are being handled and how they relate to each other. It is not clear how the priority areas, legal acts and simplification measures have been selected and the role played by the High Level Group, which has organised its own stakeholder consultations in which individual businesses can make complaints about different pieces of legislation.

The responsibility for the better regulation services has been transferred to Barroso's own cabinet, but this has not helped improving transparency. The lack of transparency is the more

serious given the dominance of business interests in the High Level Group. The ETUC is of the view that the High Level Group either should be reformed in order to have a more balanced representation of stakeholders or replaced by consultations with the social partners. Furthermore, the members have been appointed in their personal capacity by the chair person Mr Stoiber and the Commission. The ETUC believes that this should be left to the participating organisations to decide.

The ETUC is also concerned about the uncritical approach towards the use of the Standard Cost Model to calculate the costs of administrative “burdens”. Several of the calculations were carried out by a consortium of consultants, which have only given vague and imprecise information about the data used. Moreover, the Standard Cost Model has never been subject to independent scientific validation. It has a number of flaws that have not been taken into account in the work of the High Level Group.

The ETUC has serious doubts about the usefulness of the Standard Cost Model, especially with regard to health and safety at work. First, the fact that a poll of a small number of companies can be extrapolated to an entire country without taking into account the specific characteristics of different industry sectors. Secondly, that the cost of substantive compliance with the law can be distinguished from the administrative costs generated by that law. Thirdly, the administrative cost share of the administrative regulation is identified by asking employers what part of an activity they would continue to carry out if a regulation were removed. Thus, the cost savings are based on a purely subjective approach.

The ETUC is in favour of improving existing legislation, such as eliminating information requirements which are no longer relevant, eliminating overlaps by not requesting the same information several times and replacing paper-based reporting with electronic and web-based reporting (which requires sufficient administrative capacity and access to internet across Europe). However, several of the proposals that have been made would lead the ETUC to conclude that instead of improving existing legislation, the aim is to reduce legislation.

Cutting red tape for business must not lead to the lowering of standards or affect the aim of legislation. Yet, these are the consequences of some of the proposals put forward by the Commission and the High Level Group.

The ETUC is therefore calling on the Commission to establish a proper consultation process for initiatives to improve existing legislation. In particular, any review of legislation concerning employment and social policy must involve the social partners as provided for by the Treaty. The views of labour, health and safety inspectors should also be sought.

Finally, the revision of the Working Time Directive is a case in point – it shows that the Commission does not have a coherent approach towards smart regulation. While the

Commission has yet to publish its implementation report based on court cases relating to the definition of on-call time, it has nevertheless proceeded with two revision proposals. The first one was rejected by the European Parliament. Despite this, the Commission has recently issued a revised proposal similar to the previous one. In our view, this approach is not compatible with smart regulation.

2. What can be done to ensure that businesses feel the benefits from simplification and administrative reduction programmes? Do these programmes focus on the right issues? How can stakeholders, including SMEs, better indicate which pieces of legislation should be simplified? Could you give us practical examples?

First, it should be noted that not only businesses can benefit from simplification, but citizens too, notably in the area of diplomas recognition or work/residency permits.

The Commission, however, is only focusing on the benefits for business. Moreover, a number of the proposed measures are contrary to the objective of the legislations that they claim to improve.

According to the Commission Communication 2009, most of the administrative “burdens” arise from a limited number of information obligations in the areas of taxation and company law. In spite of this, the Commission has targeted several other areas including health and safety at work. Some of the proposals constitute a serious threat to workers’ health and safety. Among other things, the Commission wants to exempt small companies carrying out so called “low risk” activities from producing a written risk assessment, but it has not proposed a definition of what is meant by “low risk”. An activity may be low risk in terms of accidents, but high risk in terms of psychosocial factors. Nearly 160000 people are killed every year because of inadequate workforce prevention. Instead of spending too much time on health and safety at work, companies do not spend enough.

The ETUC believes that the programmes should focus on technical issues and not try to change policies through the back door, in a non-transparent manner. Workers’ health and safety must be considered more important than reducing administrative requirements for companies.

Targeted support and advice from public authorities, in cooperation with social partners, to small businesses on how to comply with health and safety requirements should be part of a smart regulation agenda.

3. Which good practices of ex-post evaluation in the Member States or elsewhere do you consider that the Commission should use in developing the evaluation approach? For example, is there a way to improve the involvement of Member States and stakeholders in the evaluation exercise?

It is not clear to what extent ex-post evaluation is linked to the implementation reports laid down by certain legislative acts. It would probably be more useful to build on the evaluation that is already taking place than creating a new process.

The ETUC considers that it is important to improve the involvement of the social partners in the evaluation exercise, but in order to do this, the implementation reports have to be made public, which is not always the case.

Furthermore, different policy areas and different legal acts should be seen in relation to each other. It does not make sense to evaluate the impact of the simplification of one piece of legislation or one isolated policy area. All changes made to a certain legal framework have consequences for other areas. For instance, a legal simplification in the area of Health and Safety, may have consequences on the Working Time Directive or legislation in the field of Gender Equality. Any evaluation process must take cross-consequences into account so that workers' conditions do not deteriorate.

4. Which sectors do you think should be subject to a pilot policy evaluation?

Before discussing specific sectors, the Commission should identify the criteria for evaluation.

The ETUC is deeply concerned about the “fitness checks” and “pilot exercises” in the areas of environment, transport, employment and social policy, and industrial policy that the Commission has announced in its Work Programme without providing any further information on how this will be carried out.

Nevertheless, the financial crisis has clearly showed the need to evaluate financial regulation, which could be subject to a pilot policy evaluation.

5. Within the integrated approach, where all relevant impacts are assessed side by side, are there any specific issues on which the Commission should reinforce its analysis? If so, why and how?

The ETUC believes that the Commission should reinforce its analysis regarding social impacts. Any initiative to improve existing legislation must consider the social impacts and the costs of non-social regulation. The social partners should be involved.

Already in the resolution of 4 September 2007 on Better Regulation, the European Parliament pointed out “that the assessment and quantification of economic impacts have been emphasised at the expense of environmental, social and international impacts, that the costs of legislation are assessed far more than the benefits”. The ETUC supports this view.

For example, the calculations of the reductions in administrative requirements for companies do not consider the social consequences nor do they include the increased costs for society or the transfer of administrative costs to public authorities. This can be illustrated by the proposal to exempt small enterprises from risk assessment. According to the Commission, this measure would lead to cost savings of 135 Million Euros. However, it would also lead to increased costs in terms of more absences from work, more accidents or illnesses, but they have not been included in the calculation.

Social impacts must be given the same weight as other impacts, thus taking into account the three pillars of the Lisbon Treaty: social, economic and environmental. However, to what extent these impacts relate to the requirement of gender equality mainstreaming in all EU policy areas remains unclear. We would also urge the Commission to assess policy proposals against the principles set out in the Protocol on Services of General Interest of the Lisbon Treaty in order to ensure equal access to high quality public services.

6. Do you have concrete ideas on how the Commission can improve its assessment of social impacts? Do you have examples of best practice in dealing with this issue in Member States or elsewhere?

Any assessment, ex-post or ex-ante, of social impacts must be carried out in full co-operation with the social partners and be made public. The criteria of social impact assessment should be defined in cooperation with the social partners. It is also important that the costs of non-regulation are included.

The Commission must ensure that the provisions for the consultation of the social partners are applied. In the annexes to the Commission's impact assessment guidelines, these provisions are explained. The social partners should be consulted "regarding initiatives in the field of social policy e.g. health and safety in the workplace, working conditions, social security and social protection of workers, and information and consultation". Furthermore, Commission Decision 98/500/EC stipulates that each sectoral social dialogue committee, for the sector of activity for which it is established, "shall be consulted on developments at Community level having social implications".

Yet, the sectoral social partners in the area of electricity and gas have not been involved in any impact assessment.

At national level, a number of Member States, including Finland, conduct ex-ante impact assessment with the involvement of parliaments, administration officials and social partners. In Germany, the impact assessment of legislation is within the competence of the protection of fundamental rights (French Economic and Social Committee, 2007). Denmark, which is among

the countries with the best record in terms of transposition of EU directives, manages extensive consultations prior to the adoption of a legal act.

The Commission mentions the needs to make further improvements concerning the assessment of social impacts and impacts on jobs. The ETUC would suggest that the Commission also includes the impact on the quality of working conditions and gender equality.

7. What concrete improvements could the Commission make to ensure that all relevant stakeholders are aware of and able to participate in consultations? Are there particular forms of consultation which you found useful when taking part in the Commission consultations (open internet questionnaires, stakeholder meetings, public hearings)?

There are both advantages and disadvantages with the suggested forms of consultations. Most importantly, they should take better account of the representativeness and legitimacy of the respondents.

As far as the ETUC is concerned, on-line consultations and stakeholder consultations must not replace specific consultations with the social partners as provided for in the Treaty of the functioning of the European Union.

8. Given that smart regulation can only be delivered if all institutions and Member States act together, what steps should be taken to ensure that this happens?

The Commission should ensure that the objectives are such that all parties support them. The European Parliament has for example expressed its strong support for the process of better regulation on the condition that the process does not entail lowering the standards in current legislation. The ETUC shares this view. We are in favour of smart regulation that does not undermine the objective of the legislation and workers' rights to information. However, this is not the case today.