

AmCham EU Response to the Commission Consultation on the Impact Assessment Guidelines and Stakeholder Consultation Guidelines

Executive summary

AmCham EU believes that taking measures to make Commission Impact Assessments an objective, independent and rigorous science-based support for political decision-making would have wide-ranging benefits for European policy-making. We would urge the Commission to perform impact assessments on Implementing and Delegated Acts with substantial impacts and fully consider the implications of all proposals on trade and innovation.

With regard to Stakeholder Consultations, we encourage the Commission to hold consultations on delegated and implementing acts that could have substantial environmental, economic, social or innovation impacts, thereby improving the quality of the proposal, facilitating the subsequent adoption process and keeping stakeholders informed of changes that could affect them.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €2 trillion in 2013 and directly supports more than 4.3 million jobs in Europe.

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IMPACT ASSESSMENT GUIDELINES

- 1. In line with international best practice, the Commission's Impact Assessment system is an integrated one, covering costs and benefits; using qualitative and quantitative analysis; and examining impacts across the economic, environmental and social areas. Do you agree that this is the right approach?**

AmCham EU welcomes the significant progress that the EU has made in using impact assessments (IAs) in the preparation of new legislation and the evaluation of existing legislation. Establishing the concrete costs and benefits of legislative proposals improves the overall quality of proposals and provides a realistic basis for the decision-making in the Commission, Parliament and Council. It is crucial for the credibility of Commission IAs that their analysis is substantiated by a sound and objective methodological approach. The stronger the factual basis, the better IAs can serve as an objective aid to political decision-making.

We nevertheless believe that there is significant scope for further improvement of the process, as outlined in this consultation response. Given that the Commission performs IAs for such a broad range of EU actions, aligning the guidelines correctly could have a hugely positive impact on European policy. In particular, we believe IAs should have a stronger focus on the adoption of an evidence and science-based approach, and that they should better address the impacts of a proposal on innovation and on business models.

The Impact Assessment process could be made more independent and thus more rigorous and credible by drawing from the best-practice of systems employed in the United Kingdom and Sweden, which emphasise providing input that is independent from political decision-making.

As a body that is transatlantic in nature, we cannot ignore the fact that conducting IAs is not an EU-exclusive exercise and that there is scope to learn from countries outside the EU. Other regions and countries possess useful knowledge and experience and this information should be tapped. Stakeholders with real-world experience should be included in the Commission's international regulatory cooperation activities.

AmCham EU also believes that the role of the Commission's Chief Scientific Adviser in providing independent, science-based analysis of policy options to policy-makers should be strengthened. It is critical that politically driven decisions are appropriately balanced with the type of neutral and objective input that the Chief Scientific Adviser can provide. In this regard, AmCham EU welcomes President Juncker's appointment of a First Vice-President responsible for Better Regulation; we are hopeful that this appointment will improve the adherence of all Commission initiatives to the Better Regulation agenda.

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2. Do you agree with the scope of coverage of proposals requiring an impact assessment? If not, why not?

The guidelines stipulate that “an IA is required when the Commission has to decide whether EU action is needed and there are both (1) choices among noticeably different policy alternatives; and (2) Significant direct economic, environmental or social impacts expected”. We believe that the scope of coverage of proposals requiring an impact assessment could be improved with some slight adjustments. It is crucial that the guidelines ensure that all IAs are an objective aid to political decision-making rather than a means of justifying policy decisions. This will underpin their credibility with all stakeholders. With regard to the conditions set out by the guidelines, we believe that an impact assessment should be carried out also when there is no choice among policy alternatives, as an evaluation needs to be carried out in any case to assess costs and benefits.

More specifically, the current guidelines should require that an impact assessment be conducted when there are significant impacts on innovation by all actors (private entities, public bodies and civil society) as a result of European policy. Although Europe remains a world leader in innovation, regulation needs to be modernised to strike the right balance between addressing potential risks and encouraging innovation. Retooling IAs to ensure that regulation actively supports innovation would help to encourage the development and investment in innovative products and services that would benefit consumers and all economic actors.

Furthermore, the Commission should conduct ongoing market surveillance on EU legislation to ensure that the majority of companies that do comply with regulations are not placed at a competitive disadvantage when competing against those that do not.

AmCham EU has noted a proportional increase in the number of implementing and delegated acts passed by legislators, many of which have significant impacts. We therefore feel that the scope of IAs should also be extended to delegated acts that could have substantial environmental, economic, social or innovation impacts. Where appropriate, for example in the field of financial services where there is an extensive international programme of regulation under the auspices of the G20, these IAs should consider the impact of the proposal on global regulatory convergence. While, in certain circumstances, there may be justifiable reasons for the EU to take an approach from that being proposed by regulators in other parts of the world, the impact assessment process should assess the effects of this so that EU legislators and stakeholders are fully informed.

3. Are the appropriate questions being asked in the Impact Assessment guidelines? Are there other issues that the impact assessment should examine? How would this help to improve the quality of Commission policy proposals?

As a trade association representing 161 member companies with substantial trade and investment between the EU and the US, AmCham EU believes IAs must address whether policy initiatives could act as trade barriers.

As described above, we also very much welcome that IAs already consider the effect proposed policy solutions have on innovation. However, we believe that, given the central importance of innovation to Europe's economic success, the addition of a number of further

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questions would be merited. Potential questions to screen options could include:

(i) Does it facilitate the introduction and dissemination of new production methods, technologies, products *and services*?

(ii) Does it facilitate the introduction of digital products and services or contribute to the completion of the digital single market?

More specifically with regard to Section V, we would also suggest the following improvements when determining the regulatory fitness of legislation:

- (a) if it has been determined that proposed legislation could negatively impact innovation, a more in-depth assessment should be conducted to assess how that negative impact could be minimized without affecting the overall achievement of the legislation's objectives.. In particular, the legislation should guarantee the right balance between precaution and innovation, avoiding excessively prescriptive regulation which would stifle innovation. In this respect, we suggest considering the introduction of a systemic analysis of the impact on innovation (the 'Innovation Principle'¹); and
- (b) we consider it extremely relevant to 'take into account the challenges and opportunities implied by on-going technological developments', and therefore believe that more guidance should be given identifying which elements should be addressed in this respect. At present, the guidelines only refer to the 'growth of internet', which is just one item among many other developments.

4. Do you have any other suggestion on how to improve the guidance provided to Commission services carrying out an impact assessment and drafting an impact assessment report?

IAs should be conducted without any preconceptions about the resulting legislation. The Commission should ensure that IAs are objective rather than subject to bias as an excuse for a legislative proposal. They should provide an empirical framework for the assessment of policy options leading up to a legislative proposal. Stakeholders should be consulted on methodology and facts, not on the political desirability of any proposal. Stakeholders should respect the same standards to provide factual information.

The Commission is and remains responsible for IAs and needs to act independently from any external interests, including stakeholders. However, expert stakeholders should not be hindered in their access to the impact assessment team. The Commission should judge information provided by stakeholders on its quality alone.

Key steps of the impact assessment process should be published on the Commission's website to allow stakeholders to anticipate, react and assess the type of input that would be useful to the Commission and at what stage. Stakeholder engagement could be improved by providing stakeholders with feedback on their submissions to impact assessment teams.

¹ For more details on the 'Innovation Principle':
http://www.riskforum.eu/uploads/2/5/7/1/25710097/innovation_principle_letter.pdf

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Most importantly, the Commission should share draft IAs with stakeholders in order to validate the soundness of their methodological approach and to ensure that all relevant facts, data and analysis are properly taken into account.

Given that the Impact Assessment process may encounter research difficulties or surprising findings, the Commission should build flexibility into the process to allow for changes to the initial planning calendar and consult stakeholders on such changes. Insufficient or inconclusive evidence for a particular policy's impact should not lead to inconclusive Impact Assessment reports, but should instead be a reason for further research and fact-finding.

Specific questions (annex II)

- 5. Problem analysis: do you think the draft text in annex II.B provides a clear description of the issues to be taken into account when analysing a problem? If not, how should it be improved?**

We would reiterate that the impact of European action on innovation should be revised to reflect the key importance of innovation to the future of the European economy when analysing policy solutions.

We agree that policy-makers must consult with those who would be affected by a new policy initiative as part of every Impact Assessment process.

- 6. Subsidiarity: do you think the draft text in annex II.C provides a clear description of the issues to be taken into account when verifying compliance with the subsidiarity principle? If not, how should it be improved?**

N/A

- 7. Objectives: do you think the draft text in annex II.D provides a clear description of the issues to be taken into account when setting out objectives? If not, how should it be improved?**

N/A

- 8. Option identification: do you think the draft text in annex II.E provides a clear description of the steps to be followed when identifying alternative policy options? If not, how should it be improved?**

Stakeholders' opinions and support or opposition for given policy options should be taken into account when formulating policy options is. In addition, AmCham EU would emphasise that it is essential that there is not merely the presentation of a "pre-selected preferred option" and a "straw man" option. All policy options must be considered in an open and objective way.

- 9. Identification of impacts: Is the list of questions included in the 2009 guidelines (see annex II.F) considered complete and up-to-date? Are there any impacts that should be**

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added or taken out?

Please see the answer to question 3, above.

While we welcome the progress the European Parliament has made by setting up its own IAs Unit, we would encourage the Council to do the same to ensure that policy emanating from all EU institutions has a sound basis. It should also be mandatory for the Commission to revise its own IAs in view of the finalised legislation, especially if the original proposal is significantly amended by the legislators, notably in the cases of the RoHS and WEEE recasts.

STAKEHOLDER CONSULTATION GUIDELINES

1. Do you think the Stakeholder Consultation Guidelines cover all essential elements of consultation? Should any of these elements receive more attention or be covered more extensively?

As the amount of EU legislation increases, AmCham EU has noted a proportional increase in the number of implementing and delegated acts passed by legislators, many of which have significant impacts. We therefore feel that open consultations should be made mandatory for delegated and implementing acts that could have substantial environmental, economic, social or innovation impacts. This would allow the Commission to systematically take into account stakeholders' views on improving the quality of the proposal and facilitating the subsequent adoption process. Open consultations would also represent an effective tool to inform stakeholders of upcoming measures that are likely to affect their businesses.

2. Do you think the guidelines support the identification of the right target audiences? If not, how would you improve them?

The identification of different stakeholder categories listed in the guidelines seems to cover an appropriately broad range of stakeholders.

3. Participation by stakeholders in open public consultations is often disappointingly low. How can the Commission encourage or enable more stakeholders to take part? How can the Commission better reach and engage underrepresented groups of stakeholders and assist them in replying to complex issues?

Stakeholders should be given more information on the timeline of proposed pieces of legislation, in particular with regard to those that fall outside the Commission's annual work programme and are not accompanied by roadmaps.

It is important to engage stakeholders from a very early stage of the legislative process to encourage them to join in a reflection on important policy questions and to promote shared analysis and thinking. However, AmCham EU hopes that the Commission will consider sharing draft IAs with key stakeholders to review facts and methodology.

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We would also encourage the Commission to publish consultations at times when stakeholders are likely to have sufficient time and resources to provide concrete examples to corroborate their responses; it is not ideal, for example, for consultations to be held exclusively over the Christmas or summer period.

AmCham EU would stress that simply counting the number of responses in favour of or against a particular policy option is not an appropriate means of justifying a particular approach; instead, the credibility and quality of input should be the main factor when assessing responses.

4. Is there a risk of 'over consultation', making it difficult for you as a stakeholder to distinguish between important and less important consultations?

AmCham EU believes that, once consultations are planned and publicised well in advance and listed with comprehensive background information on the Commission's Your Voice in Europe website, stakeholders should be in a position to identify the consultations that are most important them.

5. Do you see a need to explain the limits of consultations in this guidance document?

Clearly establishing the limits of consultations would seem a useful means of ensuring that stakeholders have realistic expectations from the consultation process. However, AmCham EU also believes that it remains essential that the Commission provide feedback clearly explaining how contributions have been taken into account, and if not, why not.

6. Do you think the guidelines provide enough guidance on how to analyse the results and assess the representativeness of respondents and how to provide feedback to stakeholders participating in a consultation? If not, how could this process be improved?

The guidelines provide adequate guidance in these areas. We are pleased that the Commission is committed to providing effective, adequate feedback in order to ensure its accountability. Furthermore, providing substantial feedback and justification of how contributions have been taken into account will encourage stakeholders to participate meaningfully in the process.

7. Do you agree with the presentation of the different consultation steps (1-10)? Or, do you see additional steps?

N/A

8. Do you think these consultation "tools" are adequate or do you see other tools which should be referred to in the guidelines?

N/A

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9. Do you have any other comments or suggestions, which could help make these Guidelines as comprehensive and clear as possible?

We are concerned that the timing of the consultation process (before the co-legislators have made their, sometimes extensive amendments to the proposal) makes it difficult for stakeholders such as businesses to fully and accurately estimate the impact of the measures under discussion. Therefore the Commission should provide an additional opportunity for stakeholder consultation in cases where the proposal has been substantially changed from the original consultation.