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## How does ex-ante Impact Assessment work in the EU?

Ex-ante impact assessment (IA) represents an attempt to provide, in advance of legislating, a coherent analysis of the reasoning that lies behind, and the foreseeable effects of, any proposed measure or policy initiative. Initially launched at European Union level in 2002, an impact assessment text, often running to several hundred pages, is now routinely attached by the European Commission to every significant legislative proposal it presents. Between 25 and 135 such impact assessments have been examined by the Commission each year since 2007, with more than 700 in all produced since that date.

### Brief history of the EU impact assessment process

Impact assessment originates in a general debate about how to improve the general coherence and quality of EU legislation, and to look at policy-making in the round. Initial discussion in Europe was inspired in part by the experience of public administrations in other jurisdictions, notably the work of the Office for Information and Regulatory Affairs (OIRA) in the US Executive Office of the President. In September 2003, OIRA issued the landmark [Circular, A-4](#), which provided guidance on how to conduct IA on administrative law and standardised the way cost-benefit analysis was conducted by US regulatory agencies. In Europe, EU ministers of public administration tasked a high-level advisory group in November 2000 to look at this issue, in the context of the Lisbon Strategy adopted by the European Council in March that year. The recommendations of the so-called [Mandelkern Group on Better Regulation](#), adopted in November 2001, fed into work on the subsequent [Inter-Institutional Agreement \(IIA\) on Better Law-Making](#) - concluded in 2003 between the European Commission, European Parliament and Council of Ministers - which contains a section on impact assessment.

Under the Inter-Institutional Agreement, the three EU institutions recognise the potentially positive role of impact assessment in underpinning and improving the quality of legislation. For major items of draft law, the Commission committed itself to combine in one single 'integrated' evaluation, the impact assessment relating to social, economic and environmental effects; to make the results of its analysis fully and freely available; and to indicate in the explanatory memorandum to any proposal how the IA has influenced it. Reference is also made to the possibility of the Parliament and Council choosing to conduct impact assessments on their own amendments. In the subsequent 2006 [Inter-Institutional Common Approach to Impact Assessment](#), the Parliament and Council 'undertake to carry out impact assessments, when they consider this to be appropriate and necessary for the legislative process, prior to the adoption of any substantive amendment' (Paragraph 14).

Over the ensuing years, the European Commission has continued to develop its integrated IA system, with texts that seek to identify the problem being addressed, the options considered (including non-legislative solutions), the rationale for the option chosen, any subsidiarity and proportionality implications, and the foreseeable consequences of the proposal, looking at an increasingly wide range of possible effects. The creation in 2007 of the 'Impact Assessment Board', the Commission's own internal quality assurance body,

marked a step-change in the sophistication of the process, improving the quality and coherence of the institution's IAs. According to the European Court of Auditors<sup>1</sup> and other external analysts, notwithstanding some remaining shortcomings (see below), the IA work by the Commission to date is generally considered to have improved significantly in quality over time, to have brought positive results, and to operate on a level comparable to that of comparable national systems. Among concerns expressed, however, are that there is a tendency for the Commission to consider too few options and to highlight findings which may support a pre-determined option, a weakness compounded by a lack of consistency in the methodology applied between different IAs, so making comparisons more difficult.

## Impact assessment in the European Commission

According to the Commission's current internal rules, IAs should be prepared for a broad range of initiatives, including all legislative proposals appearing in the institution's Annual Work Programme, as well as other legislative and non-legislative initiatives, together with delegated acts or implementing measures, likely to have significant impacts. In 2013, the Commission examined 97 IAs. In 2014, encompassing the end of one five-year EU institutional cycle and the start of the next, only 25 were examined.

In-put into the IA process within the Commission operates through a hub-and-spoke structure. The hub is the central Secretariat-General of the Commission, whose staff chair and organise the work of the Impact Assessment Board and ensure application of the [Commission's internal Impact Assessment Guidelines](#). These guidelines - the current version of which was issued in 2009 and currently subject to updating and revision - set out the areas and types of impact that IAs should address, and the basic standards that they should respect. The 'spokes' in the structure are the Commission's individual Directorate-Generals (DGs). The unit within the DG in charge of a particular proposal drafts the relevant IA, usually assisted by an IA unit in that DG, which provides advice on general issues, such as methodology. This lead DG is supported by an ad hoc, inter-DG 'IA Steering Group', made up of representatives of all services affected and always including the Secretariat-General. In-put into this process on substantive issues may be outsourced, on a case-by-case basis, to external contractors, selected by public tender. Public consultation of all stakeholders concerned is supposed to play an important role at all stages. As a result of these various procedures, preparing an IA now takes at least several months, and frequently much longer.

A Commission IA should follow a standard format. It should start by defining the problem in need of possible action, backing it up with evidence. Then it should set the policy objective, elaborating different strategic options for achieving it, and also analysing whether EU action is justified (subsidiarity) and whether it goes beyond what is necessary (proportionality). The IA should then analyse and weigh up, in a balanced and neutral way, the likely economic, social and environmental impacts of each option. Both quantitative and qualitative methodology may be used for this purpose. Specific guidance is provided for certain dimensions, for instance, the potential impact of legislation on small and medium-sized enterprises (the so-called 'SME test'), territorial issues and fundamental rights. In the light of the findings, a preferred course of action is usually identified, although this is not, strictly speaking, a requirement. Finally, the IA should consider future monitoring arrangements and use of indicators to assess whether the action taken corresponds to what was intended.

Draft Commission IAs, which are not made public at that stage, are scrutinised by the institution's internal Impact Assessment Board. The latter's members are currently appointed by the Secretary General of the Commission, subject to approval by the President, for a two-year, renewable term. During the term of office of the last Commission, for each IA, the Board initially consisted of five members, including the chair (the Deputy Secretary General) and, from 2012 onwards, four rotating members, sitting on the Board in addition to their regular duties. The rotating members are drawn from a permanent pool of eight Commission directors, who are required to act independently, in a personal capacity. They are responsible

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<sup>1</sup> European Court of Auditors, [Impact Assessments in the EU institutions: Do they support decision-making?](#), 2010.

for different areas of expertise: macro- and micro-economics account together for half of the Board's rotating Members, the rest being shared between the social and environmental areas. The functioning of the Board is governed by its mandate and [rules of procedure](#). The Board, supported by its staff, has approximately four weeks to analyse a draft IA and then to send to the lead DG an initial assessment of its compliance with the internal guidelines, together with any other questions concerning essential quality issues. A non-public meeting is then usually held, at the end of which, *in camera* and normally by consensus, the Board issues a positive or negative opinion, pointing out areas in need of improvement. Sometimes this process is conducted by written procedure. A negative opinion means that the draft IA should be revised and scrutinised again by the IAB, before the Commission's inter-service consultation can be launched. Internal Commission rules require that that all initiatives likely to have significant direct economic, social or environmental impacts should be accompanied not only by an IA, but by a positive opinion from the IAB.<sup>2</sup> However, on at least three occasions in 2014, the Commission appears to have tabled proposals without receiving a positive opinion from the Board on the accompanying IAs.

The IA itself, and IAB's opinion on it, accompany the corresponding proposal when it is submitted for adoption by the College of Commissioners. They are published alongside the proposal once it has been adopted by the Commission. Occasionally, a decision to restrict or delay the publication of the IA is taken, for instance, when certain information it contains is confidential or sensitive. Although the IA Guidelines stipulate that an Impact Assessment should be no longer than 30 pages, in practice, IAs, including their annexes, are often several hundred pages long. A two-page executive summary is now usually provided.

## **Impact assessment in the Council of Ministers and European Parliament**

The Council, which has traditionally paid rather limited attention to impact assessment, has recently seen some positive developments. Following a number of pilot projects, Council working parties should now, at an early stage of the debate on specific legislative proposals, consider the relevant Commission IA on the basis of an indicative check list.<sup>3</sup> However, pressure from at least a third of Member States for the Council secretariat to go further and to install a small impact assessment unit has so far been resisted.

In June 2011, the European Parliament adopted an own-initiative report (Niebler report) on 'guaranteeing independent impact assessment', which welcomed the on-going development of the impact assessment process within the EU institutions as an important aid to better law-making during the whole policy cycle.<sup>4</sup> The following year, with a view to strengthening the capacity of the parliamentary committees to engage in ex-ante work of various kinds, the Parliament's Bureau established a dedicated Directorate for Impact Assessment and European Added Value. The latter's Ex-Ante Impact Assessment Unit routinely summarises and appraises the strengths and weaknesses of Commission IAs accompanying legislative proposals and is available to provide, upon request from the relevant EP committee, more in-depth IA-related services, such as complementary or substitute impact assessments, in cases where certain aspects have been dealt with inadequately or not at all in the original Commission IA, and impact assessments of substantive amendments. Between June 2012 and December 2014, the unit has prepared more than 90 initial appraisals of Commission IAs for parliamentary committees, six detailed appraisals, four complementary or substitute IAs, and four impact assessments on substantive EP amendments, encompassing a total of 21 amendments. IAs on amendments may help support the institution's position in trialogue negotiations, as well as improve advance knowledge of likely effects. Guidance for committees in using these EP impact assessment services are set out in the Parliament's internal 'Impact Assessment Handbook',<sup>5</sup> adopted by the Parliament's Conference of Committee Chairs, and most recently updated in November 2013.

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<sup>2</sup> The Working Methods of the European Commission, 2014-19, [C\(2014\) 9004](#), p. 7.

<sup>3</sup> Competitiveness Council conclusions on Smart Regulation, 4 December 2014.

<sup>4</sup> [EP Resolution of 8 June 2011 on Guaranteeing independent impact assessments, P7\\_TA\(2011\)0259](#).

<sup>5</sup> [EP Impact Assessment Handbook: Guidelines for Committees, November 2013](#).

## Future reform of the impact assessment system

The European Parliament has called for a number of improvements in the IA process. In its most recent annual resolution on Better Law-Making, adopted in February 2014, it welcomed the Commission's efforts to cover a 'wide and comprehensive range of potential impacts' in its IAs, but argued that the system could still be strengthened by improvements in, for example, the prior consultation of stake-holders and in the use of indicators of outcomes, by the inclusion of a stronger analysis of the territorial dimension of proposals, and by ensuring 'complete consistency between the impact assessment published by the Commission and the contents of the legislative proposal as adopted by the College of Commissioners'. In the latter context, it requested specifically that 'any impact assessment for a proposal that is amended by the College be automatically updated to reflect the changes made by the Commissioners'.

In July 2014, the Commission launched a process of revising its internal Impact Assessment Guidelines. This has renewed the debate on the quality and effectiveness of the IA process in general, and attracted interest, not only from outside organisations and some citizens, but from Member States, 11 of which have submitted written public contributions, and the Parliament. In adopting a resolution in November 2014 on this issue,<sup>6</sup> the Parliament asked the Commission to ensure that the members of the IAB were no longer 'subject to political control' and that no proposal could be adopted without a positive opinion by the IAB on the accompanying IA. It also suggested that the Commission should establish a Better Regulation Advisory Body, consisting of stake-holder representatives and national experts, nominated with the involvement of Parliament and Council. As well as calling for Commission IAs to be updated, whenever necessary, to ensure that they correspond to the proposals actually adopted by the College of Commissioners, it advocated the more explicit definition of the type of initiatives subject to impact assessment, rather than leaving room for interpretation to DGs as to whether IAs may be required, and more active use of the SME test.

The inclusion of Better Regulation in the portfolio of the Commission's new first Vice-President, Frans Timmermans, is a strong indication that impact assessment may play an enhanced role within the Juncker Commission. In his hearing in the EP, he stressed that he is keen to review the 2003 IIA on Better Law-Making, which includes provisions on impact assessment. He also committed himself to continuing to improve the current Commission IA system, for instance through the guidelines, as 'only top quality, evidence-based impact assessments can lead to proposals that deliver the results we are striving for'.<sup>7</sup> In December 2014, Mr Timmermans announced that the IAB would be re-shaped as a Regulatory Scrutiny Board, composed of four permanent, full-time members, and two external members, retained on a temporary basis, and with a new mandate to perform *ex-post* evaluation too. He has also spoken of the Commission continuing to undertake IA at successive stages of the legislative process, following its formal tabling of proposals.

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<sup>6</sup> EP resolution of 27 November 2014 on the revision of the Commission's IA guidelines/SME test, P8\_TA(2014)0069.

<sup>7</sup> [Questionnaire to the Commissioner-Designate Frans Timmermans: Answers to the European Parliament, p. 5.](#)