

## Stakeholder consultation in the EU Commission Guidelines

### SUMMARY

A common reproach that has long been levelled at the set-up of European governance has concerned its 'democratic deficit'. In particular, this has encompassed the idea that the European integration process has traditionally strengthened the executive power at the expense of national parliaments, and pointed to the relatively modest powers initially granted to the European Parliament. Strengthening the democratic quality of EU decision-making became a central concern in the 2001 White Paper on European Governance which identified openness, participation and accountability among the principles of good governance. Against this background, the Commission has gradually developed and formalised numerous mechanisms aimed at broadening participation in order to increase legitimacy, transparency and effectiveness of its policies. While the Commission's consultation framework does not remain without its critics, it has undergone significant improvements. The current Article 11 TEU, introduced by the Lisbon Treaty, aims to give a new boost to 'participatory democracy' in the EU, alongside 'representative democracy', and mandates the Commission to carry out broad consultations with parties concerned. The Commission's Better Regulation Package, adopted in May 2015, incorporates new consultation guidelines which, inter alia, expand the scope of stakeholder input throughout the policy cycle, further open up the impact assessment process to stakeholders' comments and signal renewed commitment to providing adequate feedback to stakeholders.

It should also be mentioned that EU institutions, including the Commission, have developed a variety of mechanisms aimed at improving dialogue with wider society, formal stakeholder consultation being one of them. The following pages do not aim at providing a taxonomy of all of these mechanisms, but give a brief overview of the Commission Consultation Guidelines, which are yet to be implemented in practice.



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## Participatory democracy in the EU

### Starting point: provisions on democratic principles

The Treaty on European Union (Article 10) provides that the functioning of the Union shall be based on **representative democracy**. European citizens are directly represented in the European Parliament, while Member States are represented in the European Council and the Council by their Heads of State or Government, and at ministerial level, respectively. Those representatives are themselves democratically accountable either to their national Parliaments, or to their citizens. (Article 10(2) TEU).

**Article 11 TEU** lays down a complementary principle of '**participatory democracy**', albeit the term is not used explicitly. Article 11 sets out the essentials of citizens' involvement in EU decision-making and provides that the EU institutions shall 'give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action'. It further obliges the institutions to 'maintain an open, transparent and regular dialogue with representative associations and civil society' and mandates the Commission to 'carry out **broad consultations** with **parties concerned** in order to ensure that the Union's actions are coherent and transparent'. [Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality](#) underlines this duty and specifies that the Commission, when carrying out such consultations, has to take into account the **regional and local dimension** of the action envisaged. The duty to consult broadly does not apply in cases of exceptional urgency (Article 2).

**Representative democracy** is generally understood as a system of government in which citizens choose their representatives in elections.

There is no commonly accepted definition of **participatory democracy**, but it generally envisages an active role of non-state actors (individual citizens and civil society organisations) in public life and emphasises various forms of citizens' participation in the decision-making process, going beyond representation.

### Background: democratic deficit and beyond

The introduction of Article 11 TEU by the Lisbon Treaty signalled increased willingness of the EU to engage more actively with its citizens and was meant to give a new boost to 'participatory democracy' in the EU. This, in turn, was a response to the argument of the 'democratic deficit', commonly associated with EU decision-making. While the concept of democratic deficit has many aspects and lacks a common definition, the core of the argument is that the system of European governance lacks several elements commonly associated with democratic government. This in particular refers to the fact that the transfer of competences to the EU level has generally strengthened the national executives at the expense of national parliaments: the Council, for example, consisting of government representatives, is one of the main legislators at EU level. It also points to the relatively modest powers initially granted to the only directly elected EU institution – the European Parliament.<sup>1</sup>

Against this backdrop, for the EU – and especially for the Commission, as the main initiator of legislation – citizens' involvement became a crucial means to increase the democratic **legitimacy** of EU policies.<sup>2</sup> The link between participation and legitimacy was already made in the 2001 [White Paper on European Governance](#), which elevated **openness** and **participation** to principles of good governance and identified them among the means to improve confidence in EU institutions. In addition, wide participation throughout the policy cycle was considered to improve the quality, relevance and effectiveness of EU policies.

**EU as a 'laboratory' for participation<sup>3</sup>**

Accordingly, the Commission has gradually developed and formalised a number of mechanisms to involve the wider citizenry more actively in decision-making and broadened consultation.<sup>4</sup> In 2000, the Commission introduced **online consultations** as a tool to reach out to a wide variety of actors and to increase participation.<sup>5</sup> The use of online consultations increased over the years<sup>6</sup> and such consultations now figure prominently in the Commission's current consultation framework. In 2002, the Commission adopted the general principles and minimum standards for consultation set out in its Communication '[Towards a reinforced culture of consultation and dialogue: General principles and minimum standards for consultation of interested parties by the Commission](#)'. The current Consultation Guidelines discussed below build on and complement these minimum standards.

The initiatives described above did not remain without their critics, however. The Commission's approach in particular has been criticised for its lack of **inclusiveness**, **representativeness**, **transparency** and for the lack of sufficient **feedback**. For example, while online consultations are open and were shown to reach out to a broad spectrum of actors at different levels,<sup>7</sup> engagement was nevertheless shown to be uneven. Research suggested that the consultation processes tend to be dominated by market-related interests or interests from older Member States.<sup>8</sup> Some have questioned the Commission's commitment to genuine consultation and openness and dismissed its approach as an additional administrative hurdle to overcome.<sup>9</sup> Further substantial criticism relates to the fact that 'being heard' in public consultations does not inevitably translate into '**being listened to**'.<sup>10</sup> It has repeatedly been suggested that, after input collection, stakeholders often remain unclear whether, and in how far, this input has been taken into account in the decision-making and, if it was not, for what reasons. While Article 296 TFEU does establish the duty for the institutions to **state the reasons** upon which a legal act is based, this duty has been considered not a far-reaching one in terms of giving account.<sup>11</sup> The Commission has thus been criticised for not being responsive enough to stakeholders, contributing to what has been called 'participation fatigue'.<sup>12</sup> For example, its synthesis reports summarizing the views expressed during consultations were commented upon as being too descriptive and lacking information on how these views have influenced the Commission's decision.<sup>13</sup>

Over the years, the Commission has partially responded to (some of) these criticisms by gradually improving, expanding and upgrading the existing mechanisms in order to improve their openness, inclusiveness and transparency.<sup>14</sup> Nevertheless, the public consultation which the Commission carried out on its own consultation guidelines in 2014 still highlighted, among other things, the need to give better feedback and to better target stakeholders in order to ensure balanced participation.<sup>15</sup>

The latest [Guidelines on Stakeholder Consultation](#) form a part of the [Better Regulation Package](#) presented by the Commission in May 2015 and should be read in the above context.<sup>16</sup> It is too early to comment on their effectiveness at this early stage.

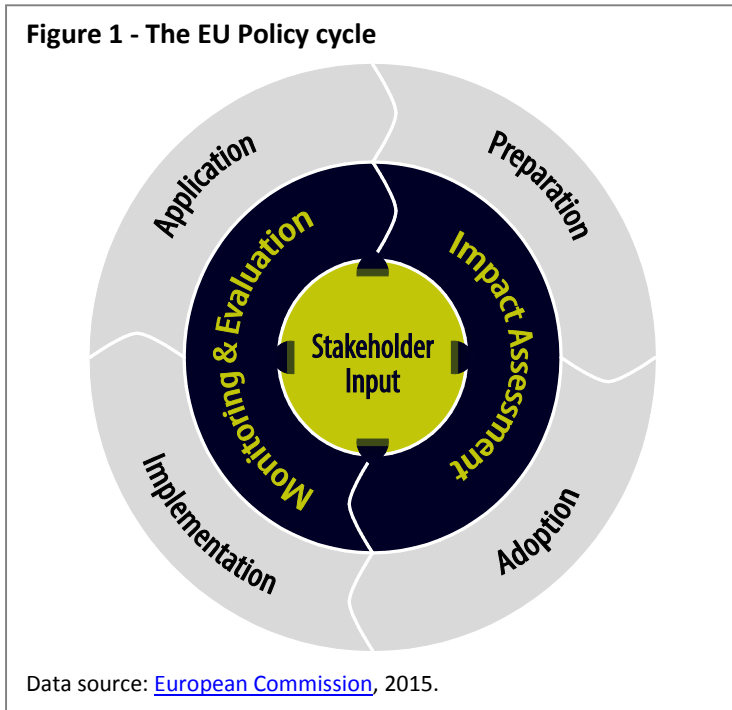
## Commission guidelines on stakeholder consultation: 'when', 'who' and 'how'?

### Consultation throughout the 'policy cycle'

As the name suggests, the 'Better Regulation' strategy is essentially aimed at achieving rules of better quality, meaning well designed, evidence-based measures that will deliver tangible and sustainable results. This is to be achieved, inter alia, by drawing on society's input when preparing, adopting and evaluating EU policies. According to the [Better Regulation 'Toolbox'](#), 'stakeholder consultation helps EU law making to be transparent, well-targeted and coherent and increases credibility and acceptance'. Accordingly, and in line with Article 11 TEU, participation and openness for stakeholders' views are among the principles of Better Regulation and stakeholder input is to underpin the entire 'policy cycle' (Figure 1).

There are different 'points of entry' for stakeholders to comment on EU policies, both before and after the adoption of an EU measure. The new [Better Regulation Package](#) further expands these 'points of entry' and broadens the scope of stakeholder participation. For example, the Commission has further opened up parts of the impact assessment process to stakeholder comments, by enabling stakeholders to provide feedback on, for example, initial

'roadmaps' and 'inception impact assessments'<sup>17</sup> at the very start of a new initiative. The Guidelines also envisage giving stakeholders further opportunity to provide feedback during an eight-week period following the adoption of a Commission proposal. It remains to be seen how this will function in practice. Stakeholder **'feedback'** is a new and less formalised tool being developed by the Commission, the initial contours of which are outlined in the [Consultation Guidelines](#). Consultations are referred to by the Commission as 'more structured engagement with stakeholders', subject to the minimum standards. **Open internet-based public consultations** are mandatory for initiatives with impact assessments, evaluations, fitness checks<sup>18</sup> and green papers.<sup>19</sup> Stakeholder input is thus not limited to the preparation phase of EU legislation but is applicable both ex ante and ex post, as Figure 1 shows.



Mandatory open internet-based public consultations on:	Feedback on:
<ul style="list-style-type: none"> <li>• Initiatives with Impact Assessments</li> <li>• Evaluations</li> <li>• Fitness Checks</li> <li>• Green Papers</li> </ul>	<ul style="list-style-type: none"> <li>• Roadmaps</li> <li>• Inception Impact Assessments</li> <li>• Draft delegated &amp; implementing acts</li> <li>• Legislative proposals</li> </ul>

Finally, the Better Regulation package for the first time envisages stakeholders' comments on draft delegated and implementing acts.<sup>20</sup> The issue of stakeholder consultation in the preparation phase of delegated acts has also been covered in negotiations on the new Interinstitutional Agreement on Better Law-making, which is being finalised at the moment of writing.

### **Stakeholder consultation: scope, general principles and minimum standards**

The [Better Regulation Guidelines on stakeholder consultation](#) set out the **scope** and principles of stakeholder consultations to be carried out by the Commission services. Stakeholder consultation is understood as a 'formal process whereby the Commission collects input and views from stakeholders about its policies'. It does not apply to, for example, interinstitutional consultations, opinions from national parliaments or specific frameworks of consultation provided for in the Treaties (such as consultation of the consultative bodies – the European Economic and Social Committee and the Committee of the Regions – on the basis of Articles 304 and 307 TFEU). Similarly, consultation of social partners on the basis of Articles 154-155 TFEU, as well as opinions provided by committees under 'Comitology' procedures, fall outside the definition of 'stakeholder consultation'. The same applies to input from citizens within the context of the European Citizens' Initiative (Article 11(4) TEU), which is subject to a specific set of rules and procedures.<sup>21</sup>

The guidelines build on and complement the **principles** and minimum standards set out in the [2002 minimum standards for consultation](#) mentioned above. For example, the principle of **participation** requires an inclusive approach, by consulting as widely as possible, while the principles of **openness and accountability** require making both the consultation process and its impact on decision-making transparent to those involved. According to the principle of **effectiveness**, consultations should take place at a time when they can still make a difference, while the principle of **coherence** requires consistency of consultations across the Commission services.

The **minimum standards** applying to all consultations include the requirement that all communication in consultation documents should be clear and concise ('**clarity**') and that adequate feedback should be given on how the consultation results have been taken into account ('**feedback**'). The latter also includes the requirement to acknowledge the receipt of a contribution and the publication of contributions. The guidelines further provide that the Commission should make sure that all relevant parties are given an opportunity to express their views ('**targeting**') and that **sufficient time** for responses should be provided. Finally, adequate publicity should be ensured and open public consultations should be published on the '[Your Voice in Europe](#)' portal ('**publication**').

Scholarly literature, however, has noted that the exact scope of application of the (2002) minimum standards is far from clear and that they have been applied inconsistently. As noted above, there is a broad variety of tools deployed to organise civil dialogue (stakeholder consultation being one of them) and different sets of rules governing it. Certain groups participate in a number of them in parallel and in different capacities. For example, while consultation of the Committee of the Regions on the basis of the treaties or 'outlook' opinions<sup>22</sup> of the Committee at an early stage fall outside the definition of stakeholder consultation, actors represented in the (networks of the) Committee can at the same time provide input on identical issues within the framework of stakeholder consultation subject to minimum standards. The same

argument applies in parallel with regard to the social partners and the European Economic and Social Committee. According to some, this contributes to some degree of confusion among stakeholders regarding the scope of minimum standards.<sup>23</sup> It is debatable whether the new guidelines rectify this lack of clarity, especially given the new distinction between formal consultation (subject to the minimum standards) and informal feedback.

### Definitions: stakeholder 'types' and 'categories'

The [guidelines on stakeholder consultation](#) define stakeholder as 'any individual or entity impacted, addressed or otherwise concerned by an EU intervention'.<sup>24</sup> In line with Article 11(3) TEU, the Commission's aim is an '**inclusive approach** by consulting as broadly as possible' in order to ensure that the entire spectrum of views is taken into account. In identifying relevant stakeholders in a given case, the Commission will in particular target those who have an interest in, expertise on or technical knowledge in a policy area. The guidelines provide a non-exhaustive list of stakeholder categories (see table below), which takes a broad approach and includes among stakeholders, inter alia, EU institutions, national governments and parliaments, regional, local and municipal authorities, research institutions, and others. As noted above, a party's status as stakeholder does not exclude other (further-reaching) institutional roles of participation in other capacities.

From the Better Regulation Guidelines it also becomes clear that a consultation strategy 'is always **case-specific**' and the group of 'relevant' stakeholders to be consulted in a given case will depend on the nature of the problem. Besides the stakeholder 'categories', the guidelines further speak of identifying the different 'types' of stakeholders, such as those **affected** by the policy, those having a **stated interest** in it or those who will have to **implement** it.<sup>25</sup> The Better Regulation Guidelines underline the importance of targeting those public authorities ultimately entrusted with application and enforcement tasks in order to incorporate the relevant implementation expertise into the initiative.<sup>26</sup> This is another illustration of the increased attention paid in the Better Regulation package to **implementation** issues (as also evidenced in, for example, the Commission's intention to provide 'implementation plans'<sup>27</sup>).

According to the guidelines, a successful stakeholder mapping includes targeting groups which run the risk of being excluded from the consultation process, aiming at comprehensive coverage, avoiding 'regulatory capture' and, in targeted consultations, using clear selection criteria.

In the (qualitative) analysis of received contributions, the Commission will take into account, inter alia, whether respondents reply 'on their behalf' or 'represent specific interests'. It is noted that those engaging in activities aimed at influencing EU decision-making are expected to register in the [EU Transparency Register](#). If they do not, in analysing replies their contributions will be treated as individual contributions.<sup>28</sup> The EU

The concept of '**stakeholder**' originates from management studies and refers to 'any group or individual who can affect or is affected by the achievement of an organization's purpose' (Freemann, 1984). This concept is at the core of the so-called 'stakeholder theory' of the firm, which was aimed at challenging the traditional emphasis on '**shareholders**' to include a firm's employees, customers, suppliers, society and others. The concept was later developed in a theory of business ethics and is central in, for example, the field of corporate governance and Corporate Social Responsibility (CSR).

In this context, a distinction is often made between so-called **internal** and **external** stakeholders: those *affected* by an organisation's actions ('external' stakeholders) and those *affecting* them ('internal' stakeholders).

Transparency Register, based on an [Interinstitutional Agreement](#) (IIA) between the European Parliament and the European Commission, is a voluntary scheme which covers activities 'carried out with the **objective of directly or indirectly influencing** the formulation or implementation of policy and the decision-making processes of the EU institutions' (par 9).

Stakeholder categories (non-exhaustive list)	
Citizen/individual	
Industry/business/workers' organisations	<ul style="list-style-type: none"> <li>• Multi-national/global</li> <li>• National</li> <li>• Small and medium-sized enterprises</li> <li>• Business organisation</li> <li>• Trade union</li> <li>• Chamber of commerce</li> </ul>
EU platform, network, or association	<ul style="list-style-type: none"> <li>• Representing for-profit interests</li> <li>• Representing not-for-profit interests</li> <li>• Representing professions/crafts</li> </ul>
Organisation/association	<ul style="list-style-type: none"> <li>• National organisation representing for-profit interests</li> <li>• National organisation representing not-for-profit interests</li> <li>• National organisation representing professions/crafts</li> <li>• International/Inter-governmental organisation</li> </ul>
Public authority	<ul style="list-style-type: none"> <li>• EU institution</li> <li>• National government</li> <li>• National parliament</li> <li>• Regional/ local/municipal authority</li> <li>• National competent authorities/agencies</li> </ul>
Consultancy	<ul style="list-style-type: none"> <li>• Think-tank</li> <li>• Professional consultancy</li> <li>• Law firm</li> </ul>
Research/academia	<ul style="list-style-type: none"> <li>• University</li> <li>• School and education establishment</li> <li>• Research institute</li> </ul>
Other	

Data source: [European Commission](#), 2015.

### Consultation methods, tools and time limits

There are different consultation tools and methods, the selection of which will depend on a given case. Generally, the guidelines make a distinction between **open public consultations**, aimed at reaching out to a wide spectrum of actors, and **targeted consultations**, aimed at focusing on specific stakeholders. The latter seeks to strike a delicate balance between targeting relevant input more efficiently without, however, granting privileged access. The consultation 'tools' include, inter alia, public online consultations, stakeholder meetings, workshops, conferences, surveys, interviews,

online discussion fora and others (they are elaborated in Chapter 7 of the [Better Regulation 'Toolbox'](#)). For example, the Toolbox suggests utilizing networks of the Committee of the Regions whenever an initiative is likely to have significant regional impacts in order to collect input from regional and local authorities. Generally, stakeholders should be given a minimum of twelve weeks to comment on initiatives with impact assessments, evaluations, fitness checks and green papers. The period to provide feedback is shorter (four weeks) in cases of, for example, evaluation roadmaps and draft delegated and implementing acts. The tools in a given case will be chosen by the respective Commission services responsible for running the consultation in question.

### **Consultation: and then? Providing feedback to those who contributed**

As mentioned above, the requirement to provide adequate feedback to stakeholders who provide input, and explaining how such input was taken into account in decision-making, was already among the requirements set out in the [2002 general principles and minimum standards for consultation](#). Yet, its implementation, as discussed above, was often claimed to be inadequate. The current Guidelines signal a new commitment to **providing adequate feedback** to stakeholders to help them understand how their input has been taken into account and/or why certain suggestions could not be incorporated. Current Guidelines also provide that consultation work 'should' close with a **synopsis report**, documenting every consultation activity, and provide feedback regarding how stakeholder input has influenced policy. In cases of initiatives with impact assessments (IA) or evaluations, a synopsis report should be annexed to the respective IA/evaluation reports which are submitted to the Regulatory Scrutiny Board. The guidelines further provide that an **explanatory memorandum** accompanying legislative proposals should reflect on how stakeholder input has fed into the initiative and, if it did not, why. It remains to be seen to what extent these measures will lead to genuine improvements compared to practice to date.

### **EP stakeholder dialogue**

As mentioned, the (formal) stakeholder consultation conducted by the Commission, is only one among the many ways for the EU institutions to interact with stakeholders and wider citizenry. Article 11(2) TEU obliges **all** EU institutions to 'maintain an open, transparent and regular dialogue with representative associations and civil society'. The European Parliament too has established various links connecting it with the wider society and is in the process of intensifying these. EU citizens do not only directly elect Members of Parliament; they also have the right to petition the Parliament (Article 227 TFEU) and may further contact the Parliament by making citizens' enquiries. Currently, the Parliament is intensifying [dialogue with stakeholders](#) at the national level through the [EP Information Offices](#) (EPIOs) in various Member States. This new form of cooperation aims at involving stakeholders at the national level more actively in the legislative work through organising events on legislative initiatives **with the participation of EP rapporteurs**. This is intended to become a tool for rapporteurs to reach out to national stakeholders by consulting directly at the national level on ongoing EP work. A number of such events on various topics have been carried out already and the project is on-going at the time of writing.



## Main references

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## Endnotes

<sup>1</sup> See in particular Weiler, J., Haltern, U. and Mayer, F. (1995), '*European Democracy and its Critique*', in: *West European Politics*, Vol. 18, No. 3, p. 4.

<sup>2</sup> For example, Quittkat, C. and Finke, B. (2008), 'The EU Consultation Regime', in: Kohler-Koch, B., Bièvre, D. and Maloney, W. (eds.), *Opening EU-governance to civil society: gains and challenges* (Mannheim, CONNEX Report Series 05), p. 189.

<sup>3</sup> The term comes from Kohler-Koch, B. (2008), Does Participatory Governance Hold its Promises?, in: Kohler-Koch, B., Larat, F., (Eds.), *Efficient and democratic governance in the European Union*. (Mannheim CONNEX Report Series 09), p. 271.

<sup>4</sup> Kohler-Koch, B. (2008).

<sup>5</sup> Quittkat, C. (2011), '*The European Commission's Online Consultations: A Success Story?*', in: *Journal of Common Market Studies*, Vol. 49, No. 3, p. 654 et seq.

<sup>6</sup> *Ibid.*, p. 658 et seq.

<sup>7</sup> Quittkat, C. and Kotzian, P. (2011), 'Lobbying via Consultation - Territorial and Functional Interests in the Commission's Consultation Regime', in: *Journal of European Integration*, Vol. 33, No. 4, p. 407 and 410.

<sup>8</sup> For example, Kohler-Koch, B. (2008), p. 280; Quittkat, C. (2011).

<sup>9</sup> See in particular Quittkat (2011) and references therein.

<sup>10</sup> The terms come from Chalmers, D., Davies, G. and Monti, G (2014), *European Union Law* (Cambridge University Press), p. 410.

<sup>11</sup> *Ibid.*, p. 408 et seq.

<sup>12</sup> For example, Fazi, E. and Smith, J. (2006), [Civil Dialogue: Making it Work Better](#), Study commissioned by the Civil Society Contact Group, p. 7.

<sup>13</sup> *Ibid.*, p. 409 and references there.

<sup>14</sup> Quittkat, C. and Finke, B. (2008).

<sup>15</sup> This consultation related to consultations carried out in the context of evaluations and impact assessments and took place from 30 June 2014 to 30 September 2014: Results of Public Consultation on the Commission's Draft Stakeholder Consultation Guidelines, [Summary Report](#).

<sup>16</sup> The new Guidelines replace the previous standalone guidelines on impact assessment, evaluation and implementation and complement the existing guidelines on stakeholder consultation as set out in the mentioned minimum standards (BR Guidelines, p. 6).

<sup>17</sup> A 'Roadmap' is a brief document informing stakeholders about planned consultation work, impact assessments, evaluations and fitness checks which is published at an early stage to help stakeholders to prepare input while an 'inception impact assessment' is an 'initial description of the problem, its underlying drivers, the policy objectives, policy options and the economic, social, environmental impacts of those policy options', Better Regulation Guidelines, p. 90 (Glossary).

- <sup>18</sup> A Fitness check is an evaluation of the effectiveness, efficiency, coherence, relevance and EU added-value of a number of related EU interventions in a policy area/business sector. The quality of major fitness check reports is checked by the Regulatory Scrutiny Board, Better Regulation Guidelines, p. 89 (Glossary).
- <sup>19</sup> Green Papers are [defined](#) as 'documents published by the European Commission to stimulate discussion on given topics at European level. They invite the relevant parties (bodies or individuals) to participate in a consultation process and debate on the basis of the proposals they put forward. Green Papers may give rise to legislative developments that are then outlined in White Papers.'
- <sup>20</sup> In this regard, some exceptions apply; see Better Regulation Guidelines, p. 67.
- <sup>21</sup> In particular those set out on [Regulation 211/2011](#) of the European Parliament and of the Council on the Citizens' Initiative.
- <sup>22</sup> As foreseen in par. 8 of the [Protocol on the Cooperation between the European Commission and the Committee of the Regions](#).
- <sup>23</sup> Obradovic, D., Vizcaino, A. (2006), 'Good Governance Requirements Concerning the Participation of Interest Groups in EU Consultations', in: Common Market Law Review, Vol. 43, p. 1054 et seq. See also Fazi, E. and Smith, J. (2006), p. 9.
- <sup>24</sup> Better Regulation Guidelines, p. 91 (Glossary).
- <sup>25</sup> Better Regulation Guidelines, p. 74.
- <sup>26</sup> Better Regulation guidelines, p. 34.
- <sup>27</sup> An implementation plan is 'a SWD [Staff Working Document] that is prepared in order to support the implementation work by the Commission and the Member States of certain new Directives and Regulations. (...) It identifies implementation needs and actions required of different entities to ensure a timely, effective and consistent implementation' (Better Regulation Guidelines, p. 90).
- <sup>28</sup> Better Regulation Guidelines, p. 80.

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[epprs@ep.europa.eu](mailto:epprs@ep.europa.eu)

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