

HOUSE OF LORDS

European Union Committee

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4th Report of Session 2009–10

# **Impact Assessments in the EU: room for improvement?**

Report with Evidence

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## CONTENTS

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	<i>Paragraph</i>	<i>Page</i>
<b>Summary</b>		5
<b>Chapter 1: Introduction</b>	1	7
The Better Regulation agenda	4	7
<b>Chapter 2: Production of Impact Assessments</b>	6	9
Impact Assessment Guidelines	6	9
Impact Assessment Board	10	9
<b>Box: The Rights of Ship Passengers Regulation</b>		10
How an Impact Assessment is produced	20	12
Which proposals should be accompanied by an IA?	26	13
Consultation	36	15
The SME Test	50	18
Administrative burdens	55	18
<b>Chapter 3: Use of Impact Assessments</b>	62	20
Influence on Commission thinking	62	20
Influence on UK Government thinking and the production of UK IAs	67	21
Impact Assessment of amendments to proposals	71	22
European Parliament	74	22
Council of Ministers	90	25
<i>Ex-post</i> evaluation	99	27
<b>Appendix 1: Sub-Committee B (Internal Market)</b>		28
<b>Appendix 2: List of Witnesses</b>		29
<b>Appendix 3: Call for Evidence</b>		30
<b>Oral Evidence</b>		
<i>Professor Claudio Radaelli, Centre for European Governance</i>		
Written Evidence		1
Oral Evidence, 19 October 2009		5
<i>Federation of Small Businesses (FSB)</i>		
Written Evidence		13
Oral Evidence, 26 October 2009		15
<i>European Commission</i>		
Written Evidence		23
Oral Evidence, 23 November 2009		31
<i>Health and Safety Executive (HSE)</i>		
Oral Evidence, 30 November 2009		38
<i>Department for Business, Innovation and Skills</i>		
Written Evidence		42
Oral Evidence, 14 December 2009		45
Supplementary Evidence		53

## **Written Evidence**

British Chambers of Commerce (BCC)	55
Business Europe	57
City of London Corporation	58
Mr Malcolm Harbour MEP	59
Open Europe	61

NOTE: References in the text of the report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of written evidence

## **SUMMARY**

This inquiry was launched in summer 2009 in order to investigate the progress of the EU Better Regulation agenda. The agenda has been running since 2005 with the aim of cutting red tape, reducing administrative burdens and improving the legislative process by means of impact assessment. In January 2009, new Impact Assessment Guidelines were issued, which, among other things, introduced the inclusion of an “SME test”, that is, an assessment of the particular impact any likely legislation would have on small businesses, to the standard Commission impact assessment.

This report focuses to a large extent on the impact assessment process, in particular how IAs are produced, the role of the Impact Assessment Board in monitoring their quality, and their subsequent use by the European Institutions.

The intention of this report is to take the views of various stakeholders in EU better regulation and to suggest areas where further examination might be necessary. We therefore make very few firm conclusions. However, it does seem to be the case that the Council of Ministers and the European Parliament are not making as full use of impact assessments as they might.

Certain other areas have been highlighted where the situation is unclear and further investigation might be warranted. These include the conformity of IAs to the Guidelines, the production and use of IAs on comitology proposals, the adequacy of consultation exercises in the preparation of assessments, whether the SME test is working and the use of *ex-post* evaluation.



# Impact Assessments in the EU: room for improvement?

## CHAPTER 1: INTRODUCTION

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1. The European Union's Better Regulation agenda, running since 2005, is intended to simplify legislation which is already in existence, to cut red tape and to reduce administrative burdens for businesses. In 2005 this Committee published a report on the agenda<sup>1</sup> and since then the initiative has developed. The time is right to reassess the agenda. This report focuses in particular on the production and use of EU impact assessments as the majority of the evidence we received highlighted their importance. This was an exploratory inquiry, intended to discover the views of key stakeholders on the current functioning of the impact assessment regime and to identify areas where further, more detailed, examination, either by this Committee or others, would be valuable.
2. This report was prepared by Sub-Committee B, whose members are listed in Appendix 1, with their declared interests. They received evidence from the witnesses listed in Appendix 2, to whom we are grateful.
3. We make this report to the House for debate.

### The Better Regulation agenda

4. The Better Regulation agenda comprises a number of measures to simplify existing EU law and to ensure that new law is introduced only where necessary and proportionate. These measures have included a codification of the EU law, a focus on reducing administrative burdens for businesses, greater emphasis on consultation and the use of impact assessments as a fundamental part of the lawmaking process. In January 2009 the Commission issued its Third Strategic Review of Better Regulation in the European Union<sup>2</sup>. It reported that between 2005 and early 2009 the Commission's codification programme had resulted in the simplification of 142 acts, reducing the *acquis* by about 10%.<sup>3</sup> Open Europe warned us that "this does not tell us anything about the content of the removed pages, nor if the content had an actual impact on businesses in the first place" (Open Europe, p 63).
5. With regard to reducing administrative burdens (the costs to businesses of collecting and transmitting information purely as a result of legislation), the Commission introduced a target, endorsed by the European Council in 2007, of reducing burdens to businesses by 25% by 2012. To this end, they have recently issued a Communication on the Action Programme for Reducing Administrative Burdens<sup>4</sup> studying the impact of 72 acts. The

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<sup>1</sup> European Union Committee, 9th Report (2005–06): *Ensuring Effective Regulation in the EU* (HL Paper 33). See also European Union Committee, 22nd Report (2007–08): *Initiation of EU Legislation* (HL Paper 150), which also discusses the use of impact assessments.

<sup>2</sup> 5791/09, COM (09) 15. There appear to be no immediate plans for a fourth review.

<sup>3</sup> *Ibid.* p 3

<sup>4</sup> 15019/09, COM (09) 544

Communication states that, since 2005, 33 proposals have been adopted with a potential saving to businesses of €5.7bn. The Commission estimates that a further 18 measures awaiting adoption could save a further €30bn. Part of the attempt to reduce burdens is the principle of “Think Small First”, enshrined in the Small Business Act<sup>5</sup> of 2008, that is, in framing legislation, to take particular account of the position of small and medium-sized enterprises (SMEs). The Third Strategic Review highlights mechanisms for achieving this, including the exclusion of micro-enterprises from the scope of EU accounting directives and a revision of the VAT Directive to allow electronic invoicing.<sup>6</sup>

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<sup>5</sup> 11262/08, COM (08) 394

<sup>6</sup> *Op. Cit.* p 4. A “micro-enterprise” is an enterprise employing fewer than 10 people and with an annual turnover or balance sheet of less than €2 million.

## CHAPTER 2: PRODUCTION OF IMPACT ASSESSMENTS

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### Impact Assessment Guidelines

6. The Third Strategic Review reaffirms the Commission's commitment to an "integrated approach" to impact assessments (IAs). This approach is intended to produce a balanced assessment, taking into account the benefits and costs of the economic, social and environmental impacts of initiatives. All legislative proposals included in the Commission's annual Legislative and Work Programme which are likely to have significant impact are supposed to receive a full impact assessment.
7. In January 2009 the Commission issued new Impact Assessment Guidelines<sup>7</sup>, designed to assist the various services in the production of IAs. The Guidelines explain that IA is "a process that prepares evidence for political decision-makers on the advantages and disadvantages of possible policy options by assessing their potential impacts" to be taken into account by the College of Commissioners when deciding on which legislation to adopt.
8. Dr Alexander Italianer, Chair of the Impact Assessment Board, summarised the changes:

"We introduced an explicit subsidiarity test, if you like. Also improvement of consultation was an important topic. And finally the services, through the guidelines, received improved guidance on how to measure certain impacts like social impacts, consumer impacts, impacts on small and medium-sized enterprises, competition and so on" (Q 60).
9. As to whether the new Guidelines had improved the quality of IAs, he suggested that the required standard of IAs had been raised yet the rate of resubmission requests<sup>8</sup> had remained the same, and reasoned that "if the rate of resubmissions stays the same then, mathematically speaking, the quality of the reports should have increased, but that is nothing more than a mathematical inference!" (Q 60).

### Impact Assessment Board

10. In order to monitor the work of the Commission services in the production of IAs, the Commission set up in 2006 the Impact Assessment Board (IAB), operational from 2007, under the chairmanship of Dr Italianer. The IAB is part of the Commission, but independent of the individual services which produce both legislation and IAs. Dr Italianer explained to us that the IAB

"is a group of high-level Commission officials that is independent with respect to the other services. It works directly under the authority of President Barroso. My four other colleagues are directors and are all appointed in a personal capacity but they come from the various strands in the Commission that also form the various components of a typical impact assessment" (Q 56).

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<sup>7</sup> SEC (09) 92

<sup>8</sup> If the IAB is unsatisfied with the quality of an impact assessment, it requests that the Commission service responsible resubmits an improved version for consideration.

11. The IAB examines all IAs and issues opinions on their quality, often requiring the service concerned to resubmit an improved version. In 2008 32% of IAs required resubmission.<sup>9</sup>

## BOX

### The Rights of Ship Passengers Regulation

While we were conducting this inquiry, we also scrutinised a proposed Regulation on the Rights of Ship Passengers. We took this as a case study into how an impact assessment is produced and then assessed by the Impact Assessment Board.

In 2005–06, DG TREN commissioned a study on the level of protection of passenger rights in the EU maritime sector. This study identified problems with regard to passenger rights across Europe. This was particularly the case with passengers of reduced mobility (PRMs).

The Commission then launched a public consultation, and a stakeholder meeting was held. There was “virtual unanimity” concerning the need for minimum standards for the protection of passengers’ rights. DG TREN then commissioned a preparatory study from PricewaterhouseCoopers. This examined the economic, social and environmental impacts of four policy options: no action, EU legislative action, national legislation and sector-specific voluntary agreements. The results of this study were fed into the impact assessment.

A draft IA was submitted to the IAB in September 2008. They found that it was “well-structured, written in a clear and non-technical language and accessible to the non-specialist reader”. However, they recommended that a clearer justification was needed of the scope of the initiative and the extent to which passengers were already covered at national level. They also recommended that a more developed analysis of the various options was necessary, along with a more accurate assessment of the costs and the impact on SMEs. The draft IA was resubmitted to the Board a further two times, and finally released along with the proposal on 4 December 2008.

We asked Dr Italianer whether IAs were often resubmitted three times and he told us that it was extremely rare: “I think this has happened only in four cases in 2008 and in 2009 it never happened” (Q 58). His explanation of why this dossier was so problematic is as follows:

“One cause may be insufficient scoping ... In the first instance, it was not at all clear if a certain number of the rights that were being looked at in this particular proposal were already covered by all passenger transport activities that were covered by public service obligations, so it was not even clear to which type of activities the initiative was supposed to apply. Secondly, there was a scoping issue as regards the extent to which there was cross-border activity involved because many passengers are being shipped ... Then there was an issue of substance on the costs, which were not sufficiently elaborated and on which we had to come back” (Q 59).

<sup>9</sup> *Op. Cit.* p 6

12. We asked Dr Italianer what the IAB does when it receives an impact assessment. He explained:

“We check whether the draft has a well-formulated, what we call problem definition, that the objectives that are being sought by the initiative are well-specified, that the options that are being studied are realistic; that there is indeed a case for EU intervention and subsidiarity is being analysed. Then our scrutiny focuses on the measurement or the assessment of the impact of the various options, there is comparison, and at the end of the process there are arrangements for the monitoring and evaluation” (Q 58).
13. Many of our witnesses thought that the IAB was doing a good job, although some expressed concerns about the structure of the Board. Claudio Radaelli, Professor of Political Science at the University of Exeter Centre for European Governance, described it as “like a clumsy bumble bee that should not fly according to the logic of physics, yet it flies” (p 4). He went on to praise Dr Italianer’s chairmanship of the Board, stating that “it is hard to imagine how the next Chair of the Board will be able to match Alexander Italianer’s skills” (p 5). This was echoed by the Government, who argued that the “success of the IAB has, to a large extent, been the result of the quality of its board members” (p 44).
14. Institutionally, the IAB is part of the Commission, and its board members are drawn from the Commission services, that is, the departments producing the impact assessments. The Commission explained that board members must declare any conflict of interest and that this happened on six occasions in 2008. The resubmission rate for IAs produced by services with members on the board was 33%, compared to 32% for those without (p 27). Dr Italianer argued that:

“The main evidence of our independence is the fact that the opinions that we write on the draft impact assessments are publicly available. It is quite rare that inside a public administration body dissenting opinions come out publicly, but this is one of the cases where this happens” (Q 56).
15. We received evidence from several witnesses criticising the IAB for a lack of independence. Open Europe argued that the appointment of board members by the President of the Commission stripped the Board “of the vital independence it would need to seriously pick up the fight against the steady stream of new regulations” (p 64). Business Europe also argued in favour of an independent Board (p 58), while the Government suggested that “a couple of non-executives could be added to its members to reinforce its independence” (p 44).
16. Witnesses also thought that the Board might be tasked with “assessing whether the final legislative proposal properly [met] the results of the impact assessment” (Malcolm Harbour, p 60), that individual stakeholders should be able to address their opinions directly to the Board (Business Europe, p 57), and that the opinions of the Board should be binding (Business Europe, p 57; Open Europe, p 66).
17. On the question of whether IAB opinions should be binding, Professor Radaelli argued that the current system of sending draft IAs back for resubmission is “precious learning. We may lose that kind of learning with a more adversarial posture of the Impact Assessment Board” (Q 12).

The Government suggested that the role of the Board could be strengthened by its commenting on the draft IAs earlier and that “when it is unhappy with the quality of an assessment, even after revision, this should trigger an oral procedure with the College of Commissioners” (p 44).

18. **We are encouraged by the apparent success of the IAB so far. However, there are concerns that this has been the result of the quality of its current board and that this may not continue. Any move to increase the independence of the IAB, for instance by including non-executives, should be done carefully to ensure that the expertise of the Board is preserved.**
19. **Purely measuring resubmission rates is not sufficient to determine the quality of impact assessments, and an independent assessment of their conformity to the Guidelines may be warranted.**

### **How an Impact Assessment is produced**

20. Impact Assessments are produced by the lead service for each proposal, in consultation with the IAB and interested parties from other services, through an impact assessment steering group (IASG). Dr Italianer described this as “a fairly elaborate process” (Q 58). The Impact Assessment Guidelines recommend that the steering group should be set up early in the legislative process. Every proposal envisaged as forming part of the Commission Legislative and Work Programme (CLWP) should be accompanied by a “Roadmap” setting out the scope and methodology of the impact assessment (or an explanation of why one is unnecessary), and addressing issues such as timing and the composition of the steering group. This should be done before the CLWP is produced in order to allow the production of the IA itself in a timely fashion.<sup>10</sup>
21. With regard to the involvement of several Directorates General in the IASG, Professor Radaelli argued that it had “made a virtue out of a vice. The vice is the natural suspicion that each DG has for what the other DGs are doing. The virtue is that with an impact assessment procedure they have to speak the language of evidence-based policy” (Q 6).
22. The Commission places great importance on the production of the IA by those who are also developing the policy. Dr Italianer explained that it “is done in parallel with the development of the proposal so there is a kind of cross-fertilisation between the analysis and development of the proposal” (Q 58).
23. Dr Italianer was keen to stress that “[t]he idea behind an impact assessment is that it is an aid to decision-making although it should not replace decision-making ... The objective is to give an overview of the various possible policy options and their impact so that the decision-makers, the policy-makers if you like, can take an informed decision” (Q 58).
24. On the content of the IA, Professor Radaelli suggested that “there is little point in pushing towards predictive impact assessments, something where everything is costed to the last euro, because we know that regulation at the EU level is a hypothesis ... that has to be implemented by the Member States via transposition and then via administrative action” (Q 6). A practical

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<sup>10</sup> *Op. Cit.* p 8

example of this, in relation to the current proposed Regulation on Biocides, was given by Steve Coldrick of the Health and Safety Executive:

“there is a lack of transparency about how some of their figures are estimated ... [We also] have doubts about the credibility of some of the baseline assumptions from which cost savings are estimated ... For example, cost savings in data sharing are based on investments in animal testing of somewhere between €7 billion and €13 billion, which seems implausible when you consider that the total size of the market is around €1.5–3 billion per year ... Then thirdly, although there is a mention of small and medium sized enterprises in some policy areas and examples of individual level impacts, there is not enough information to gain an overall picture of how small and medium sized enterprises will be affected by all policy areas, and so by the regulation as a whole” (Q 80).

25. Taking a wider view, the Minister for Better Regulation, Ian Lucas MP, told us that “There are impact assessments that have been made that have been very helpful to us ... but I do not think that all of the impact assessments that have been made at the present time are of sufficiently high quality” (Q 90).

### **Which proposals should be accompanied by an IA?**

26. The Impact Assessment Guidelines do not define specifically which proposals are liable to an IA: this is decided by the Secretariat General each year. However, they do state that IA will, in general, be necessary for “all legislative proposals of the Commission’s Legislative and Work Programme (CLWP) and for all non-CLWP legislative proposals which have clearly identifiable economic, social and environmental impacts ... and for non-legislative initiatives ... which define future policies”.<sup>11</sup> IAs should also be produced for comitology measures<sup>12</sup> likely to have significant impacts.
27. Some of our witnesses claimed that these principles were not being observed. The Government stated that “there have been occasional examples where an impact assessment has not accompanied a significant proposal” (p 43). The Minister explained in his oral evidence that they were referring in particular to a proposal on electronic VAT invoicing “that we think is a significant proposal which could actually bring about savings of €18 billion across the European Union” (Q 91).
28. Professor Radaelli said that “[s]ome proposals that are in the annual legislative programme escape impact assessment whilst others are added on. Thus, there is no purpose in having some criteria that then you do not use in real life” (Q 2). Dr Italianer defended the performance of the Commission, claiming that “as far as I know, the only items that escape impact assessments are those items that are either some kind of report without any policy proposals or that are consultative documents like Green Papers which, by definition, are the start of the consultative process” (Q 69). The

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<sup>11</sup> *Op. Cit.* p 6

<sup>12</sup> Measures adopted by the Commission under a power given in a legislative act of the Council or Council and Parliament, for the purpose of making detailed subordinate provisions. A comitology measure is subject to scrutiny by a committee of the representatives of the Member States. Following the coming into force of the Lisbon Treaty “delegated legislation” is no longer subject to a comitology procedure, but for the purpose of this report the same considerations apply to it.

Commission would like to see IAs performed on any proposal with a “significant impact or that is sensitive in a political sense” (Q 69).

29. With regard to IAs being performed on items which were not included in the CLWP, Dr Italianer suggested that this might be necessary “for instance in the area of financial regulation, which is a very hot topic and which we could not foresee when the work programme for this year was being prepared” (Q 69). Other witnesses have criticised the Commission for not having produced adequate IAs of proposals arising out of the recent financial crisis (City of London Corporation, p 58; Sharon Bowles MEP<sup>13</sup>).
30. Professor Radaelli suggested that the fault lay with the principle itself, of trying to determine which proposals require an IA by reference to their inclusion in the CLWP: “There is little point in doing impact assessments of an average study, or to look in detail at costs and benefits of pilot projects, white papers, and framework communications” (Q 2). The need for an IA is meant to be determined according to the principle of proportionate analysis, that is, the depth of the assessment should reflect the significance of the proposal. Professor Radaelli criticised the revised Impact Assessment Guidelines on this issue:

On pages 15 and 16 they seem to argue that it is the legal nature of the option that suggests the level or depth of analysis, whereas proportionality should be impact driven and cost-benefit driven. The guidelines seem to suggest that if you have a comitology issue, then you have this kind of analysis; if it is self-regulation, you need another type of analysis—the legal nature of the instrument seems to dictate the depth of analysis, which does not make much sense in an IA framework” (Q 10).

31. In their written evidence the Commission argued that
- “the need for an impact assessment on a European initiative [cannot] be easily established on the basis of objective ex ante (quantitative) criteria ... The Commission’s integrated approach to impact assessment requires that even impacts that cannot be easily quantified/monetised, or may be limited in their total size, should nevertheless be fully considered and analysed if they have important repercussions for specific groups, sectors or regions” (p 24).
32. The broad consensus among our witnesses was that IAs should be produced wherever there was likely to be a significant impact, but they differed in the details of their suggestions. Tina Sommer of the Federation of Small Businesses (FSB) thought IAs should be for both legislative and non-legislative proposals, pointing to the CE standard<sup>14</sup> on enhanced supply-chain security: “It is not a law; it is a standard which is supposed to be voluntary but as such it does not have an impact assessment and as such it does not measure what it does to small business” (Q 17). She suggested that the test should be whether there would be an impact on small business and, if so, “we definitely need an impact assessment” (Q 17). By contrast the British Chambers of Commerce argued that “Impact Assessments

<sup>13</sup> European Union Committee, 3rd Report (2009–10): *Directive on Alternative Investment Fund Managers* (HL Paper 48), QQ 375–384

<sup>14</sup> The “CE” marking, which stands for “Conformité Européenne”, may be placed on products conforming to certain standards.

should be targeted only at legislative instruments: regulations and directives” (p 55). Business Europe suggested impact assessments should be conducted on “all initiatives, including decisions taken by comitology committees, notices and guidelines and decisions regarding international agreements” (p 57). The Minister hoped that the Commission would “ensure that, in every significant case, in every proportionate case, the assessments are made” (Q 91).

33. Of particular interest was the application of IA to comitology proposals. Professor Radaelli suggested that this was important because “in comitology we get a bit closer to the specificity of the rule, the particular features of the regulatory regime, and so on; and therefore it is easier then to reason in terms of cost-benefit and look at who is affected and how” (Q 2). Most witnesses, as described above, argued that the main consideration should be the significance of the proposal, rather than its origin. For instance, the Minister said “I think that any significant proposal that comes forward should be subject to impact assessment, whether it is through the comitology process or through the Commission itself” (Q 95).
34. Dr Italianer referred to the Framework Directive on Ecodesign as resulting in comitology proposals which “have an economic impact where it would be useful to do an impact assessment”, but he warned that “it would be going a bit too far if all comitology proposals were accompanied by an impact assessment given their sheer number. In 2008, for instance, we had 1,258 comitology proposals” (Q 69). The Commission said it was “currently examining how to identify where such proposals would benefit from impact assessment” (p 24).
35. **We agree that impact assessments should be performed wherever a proposal is likely to have a significant impact. Particularly with regard to comitology proposals, there would be value in further work to determine which measures are, and are not, accompanied by an impact assessment, and whether, in practice, the selection is appropriate.**

### Consultation

36. The 2009 Impact Assessment Guidelines suggest Commission services should base their IAs on
 

“information gathered from stakeholders (hearings, conferences), and results of consultation documents such as Green Papers. In many cases you will have to rely on data available at national or regional level in the Member States. You may need the support of Member States and/or stakeholders to identify and use these data, and you should seek this support as early as possible.”<sup>15</sup>
37. The Guidelines call for Roadmaps to be produced as soon as it seems likely an item will be included in the Commission Legislative and Work Programme (CLWP), and “[a]s the Roadmaps for CLWP items are published in parallel to the CLWP, i.e. at a relatively early stage in the planning process, you should encourage stakeholders to examine these and to give early feedback on your plans for the IA.”<sup>16</sup>

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<sup>15</sup> *Op. Cit.* p 17

<sup>16</sup> *Op. Cit.* p 18

38. Consultations are supposed to include the following key elements<sup>17</sup>:
- Clear, concise consultation documents
  - Unambiguous questions and problems
  - Consultation of all relevant target groups
  - Sufficient publicity
  - Sufficient time for participation: not just the minimum eight-week period
  - Published results
  - Acknowledgment of responses
  - Feedback
39. Four themes emerged in our discussion of consultation: the deadline, publication of draft IAs, the ability of SMEs to engage with the process and the weight given to responses from various bodies.
40. The Minister suggested that the eight-week consultation period “is very short ... it is a very demanding deadline for small businesses” (Q 115). The British Chambers of Commerce suggested that the minimum period should be extended to 12 weeks (p 56). The Commission said that departments should extend the deadline for “complex or sensitive proposals” (p 26), but we have not seen evidence as to how often this actually occurs.
41. Professor Radaelli suggested that there was a problem with the publication of the IA simultaneously with the proposal. It was only available for consideration (beyond the Impact Assessment Board) “when the College of Commissioners gives the green light to a proposal” (Q 6). The Government agreed. They argued that “there is scope for greater stakeholder engagement with the development of impact assessments, particularly by allowing the opportunity to comment on draft versions” (p 44).
42. Open Europe and Business Europe both argued that draft IAs should be made available, on the grounds that this would enable interested parties to establish which stakeholders had been consulted (Open Europe, p 65) and enable stakeholders to address concerns directly to the Impact Assessment Board (Business Europe, p 57).
43. However, Professor Radaelli warned that publication of draft IAs might result in “some European Parliament quarters representing special interests (and many pressure groups of course) [abusing] procedures for negative political reasons” (p 3).
44. Another common theme was the difficulty of engaging with the consultation process, particularly for small businesses. The FSB pointed to SMEs’ “difficulty understanding regulatory language and Euro-jargon” (p 14). Tina Sommer of the FSB suggested that proposals themselves were “extremely difficult to read” but that a proposal, rather than an IA, “probably has to be in a legal language” (Q 17). Open Europe described as “laughable” the idea that members of the public would be able to understand an EU IA (p 65).
45. The FSB told the Committee that they produced summaries of the consultations for the benefit of their members and that their members were

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<sup>17</sup> *Op. Cit.* p 19

able to submit their own responses (QQ 29, 31). But this raises a further problem for small businesses. Dr Italianer told us that “[t]he idea is that all relevant stakeholders are involved” in the consultation process (Q 32) but it was not clear how feasible this was. Tina Sommer raised a concern over the use of responses from individual businesses and business representatives: “If an organisation does not consult with its members, the actual small businesses, they can say what they like. How does the Commission know that they are really representative?” (Q 31) The new Impact Assessment Guidelines advise that “[n]ot all interest groups are equally able to take part in consultations or express their views with the same force ... you may need, therefore, to make specific efforts to ensure that all relevant stakeholders are both aware of and able to contribute to the consultation.”<sup>18</sup>

46. Dr Italianer told us that the Commission “actually distinguish between two types of contributions. One is individual contributions, and this can be an individual SME or it can be a multi-national company, or there could be a contribution from an organisation that claims to be representative of a group of stakeholders, like for instance a business organisation” and that “the only thing we require is that when in an impact assessment the consultation is being discussed a balanced view is given that covers all the stakeholders” (Q 72).
47. The burden of participating in consultations was also a concern to some of our witnesses. The FSB said that “small businesses do not have time to respond to consultations” (p 14). In relation to regulation generally, Steve Coldrick of the HSE argued that the provision of data is expensive and that streamlining the process will not automatically “enable small and medium sized enterprises to succeed in a regulated environment that requires a lot of data” (Q 87).
48. The Government also produce impact assessments of EU proposals, designed to assess the impact on the UK, rather than the EU as whole. The Health and Safety Executive has had particular problems in gathering data for the UK impact assessment on the Biocides Regulation, which we discuss in greater detail in paragraphs 67–70. When we asked why the consultation had proved problematic, Robin Foster suggested that IAs might be too “high level” for SMEs engage with, that is, they deal with EU or UK-wide issues and do not always obviously apply to the concerns of a particular small enterprise (Q 83). We put this to the Minister who agreed and added that “it is very difficult for a small business to keep abreast of what all the proposals that are going around are from legislative bodies” (Q 114). He went on to suggest that the SME Envoy<sup>19</sup> has an important role in helping SMEs to engage with “the behemoth that is the European Union” (Q 115).
49. **Further work could be undertaken to establish, for a representative sample of proposals, the length of consultation period actually applied to each proposal, at what stage in the process it was launched, how widely it was disseminated, how many responses were received, and from whom.**

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<sup>18</sup> *Op. Cit.* p. 19

<sup>19</sup> The SME Envoy has been appointed by the Commission to facilitate communication between the Commission and small businesses. The Envoy is currently Françoise Le Bail, who is also Deputy Director-General at DG Enterprise and Industry.

### The SME Test

50. Our discussion of consultation was focussed on the experience of small businesses, mainly because it seems that they have more trouble engaging with the process than larger organisations. Another aspect of the IA system relating to small businesses is the “SME test” in which “[t]he IA should analyse whether SMEs are disproportionately affected or disadvantaged compared to large companies, and if so, options should cover alternative mechanisms and flexibilities in approach that might help SMEs to comply.”<sup>20</sup>
51. Dr Italianer explained that the IAB “look at this systematically. You will also find in the annual reports of the Board that this is one of the items that is being looked at, but the proposals do not always lend themselves to really single out SMEs” (Q 70).
52. The Minister thought “the fact of the SME test is a very positive step forward. It is very early to assess it as far as the EU is concerned” and “I cannot come up at this stage with concrete examples of what it has been able to achieve” (Q 112).
53. Tina Sommer of the FSB also welcomed the introduction of the test (Q 30), but written evidence from the BCC warned that “its effectiveness will depend on the extent to which it is able to quantify or even identify additional cost” (p 56).
54. **We welcome the SME test, but it is too early to assess how well it works. We recommend that the inclusion of the test is assessed in the near future to determine whether it adds value.**

### Administrative burdens

55. As part of the Better Regulation agenda, the Commission has been pursuing a policy of reducing administrative burdens, that is, the costs to businesses of complying with EU information requirements. In 2007 the European Council endorsed a target of 25% administrative burden reduction by 2012.
56. An assessment of the anticipated administrative burden should be included in the impact assessment. The Commission Impact Assessment Guidelines explain that
 

“[t]he assessment of ... administrative burden ... should begin with a full mapping of information obligations for each of the options. This mapping should show how policy options differ in terms of information obligations. You should then determine which are likely to impose significant administrative burdens (usually through a qualitative assessment of the likely number of entities concerned as well as the frequency and complexity of required actions).”<sup>21</sup>
57. EU impact assessments are intended to be “integrated”, that is, to take into account the likely environmental, social and economic costs and benefits. Professor Radaelli expressed concern that the focus on administrative burdens could undermine the “integrated” nature of IAs. He warned that the “emphasis on administrative burdens ... pushes us back to the old logic of special assessments. It disintegrates the logic of integrated impact

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<sup>20</sup> *Op. Cit.* p 39

<sup>21</sup> *Op. Cit.* p 41

assessment” and risks the creation of a “legal kebab” in which the various areas of assessment are included separately in the IA but not considered as a whole (p 2 and Q 4). He argued that administrative burdens should be assessed in an IA “only when and how they are relevant to the overall appraisal of the impact of the proposal, they are not a separate category of costs” (p 2).

58. The Minister disagreed. “I do not accept it. I think that administrative burden reductions are very, very important” (Q 103). With regard to the 25% reduction campaign, he warned that “[t]he steps forward that the Commission have made in recent years have begun to be taken on board by the European Parliament but perhaps less so by the Council, and I think that the progress that the European Union will make will be constrained by the lack of buy-in right across the board” (Q 108).
59. Dr Italianer defended the “integrated” nature of IAs, saying that “[w]e are generally satisfied that [the economic, environmental and social] aspects are being covered, although we are trying to improve the assessment of the social and environmental impacts because this is not always easy to quantify” (Q 62).
60. Evidence from some of the business representatives argued that costs to businesses should be taken more seriously in IAs. The FSB argued that “regulatory pressure throughout the entire regulations chain should be taken into account. This means that as well as administrative burdens there should be attention on the compliance costs” (p 14). The British Chambers of Commerce argued that IAs should “take into account the cumulative burden that regulation can impose in areas like employment” (p 55).
61. **The administrative burdens campaign is worthwhile and the inclusion of an administrative burdens section in EU impact assessments is a positive move. We recognise that an over-emphasis on burdens might affect the balance of an integrated impact assessment but we have seen no evidence to suggest that this is actually happening.**

## CHAPTER 3: USE OF IMPACT ASSESSMENTS

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### Influence on Commission thinking

62. The justification for the production of impact assessments by the service which is also developing the associated proposal is that the two processes can feed into each other and policy development can take account of findings from the IA at an early stage. The Government raised a concern about the production of IAs by consultants, rather than in-house. They argued that it “brings risks, as it separates the development of an impact assessment from the development of the associated policy proposal. The Government believes that more should be done to ensure that the two processes (IA and policy development) are brought closer together” (p 44).
63. The Impact Assessment Guidelines suggest that policy leads “should use [their] IA actively when presenting the merits of the proposal during the legislative process.”<sup>22</sup> The Commission described how “[a]s Commission services become increasingly aware of the necessity to start the impact assessment work early, the influence of the impact assessment process on the content and quality of the proposals will increase accordingly” (p 25). Professor Radaelli argued that IAs are produced early enough to “stimulate learning among the different Directorates General” (p 2).
64. As to the type of learning and influence stimulated by an IA, Professor Radaelli described “a kind of a trade-off between impact assessment as the document that contains only evidence and objectivity and impact assessment as support and justification for what an organisation wants to do” (Q 2). Malcolm Harbour MEP argued that “many impact assessments seem to be moulded to fit the Commission thinking rather than the other way around” (p 59).
65. As early drafts of legislative proposals and impact assessments are not published, it is difficult to determine exactly how a proposal has been changed in the light of the IA. However, some of our witnesses suggested that the IA rarely leads to a proposal’s being dropped. Open Europe said that they “have identified only three cases where an EIA [European Impact Assessment] has actually led to a proposal being aborted” (p 64). Professor Radaelli suggested that often “the ‘do nothing’ option and the ‘non regulatory’ option are sandwiched and superficially appraised only to show the superiority of the chosen regulatory option” (Q 6). The Government suggested that “there is little evidence that inclusion of the do-nothing option leads to its selection as the preferred policy option” (p 44). However, the Commission pointed to a proposal regarding witness protection, which had been included in the 2007 CLWP, in which the IA concluded action was not advisable, the findings of the IA being subsequently published as a Commission Working Document<sup>23</sup> in November 2007 (p 26).
66. **Analysis of the effect of IAs on Commission thinking would be difficult given that early drafts of IAs and legislative proposals are unpublished. The “do nothing” option will inevitably lead to a proposal’s being dropped only rarely, due to the parallel production**

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<sup>22</sup> *Op. Cit.* p 11

<sup>23</sup> COM (07) 693

**of the impact assessment and draft legislation. A comparison of Roadmaps and adopted draft legislation might shed some light on the issue, as would a comprehensive assessment of the weight given to the “do nothing” option in Commission IAs.**

### **Influence on UK Government thinking and the production of UK IAs**

67. In addition to the EU impact assessment, the Government also produce their own, targeted at the impacts at UK level. These are a vital part of the process of parliamentary scrutiny. While we were conducting this inquiry we also scrutinised a proposal for a Regulation on Biocides, for which the UK impact assessment seemed to have been produced in an unusual way. That IA calculated the costs and benefits to the UK by using the figures provided by the Commission divided by six (because the UK has a sixth of the EU biocides market). We invited officials from the Health and Safety Executive to give evidence to this inquiry to explain why they had produced the IA in such a way, and, more generally, how they are normally produced, and subsequently used, at UK level.
68. Steve Coldrick explained that the UK assessment was produced using those figures because the proposal “came forward a lot quicker than we actually anticipated, in the context of the intelligence we had had at that time” and that the IA was intended to inform a UK-level consultation exercise aimed at producing a more developed IA (Q 78). The consultation invited comments on those extrapolated figures and Mr Coldrick explained “the use we have made of the impact assessment firstly is in fact to help us get out as comprehensive a consultative document as possible, within the short time that we had. Secondly, to gauge the validity of the Commission’s position and its assumptions”. Within the HSE, such direct extrapolation from Commission figures had not been used for around 10 years.
69. The production of the final UK IA on the Biocides Regulation is in hand, and we look forward to seeing it. However, the consultation process has not been straightforward, as Lord McKenzie of Luton, Parliamentary Under-Secretary of State for Work and Pensions, explained in his letter to us of 13 November<sup>24</sup>. We asked Robin Foster of the Health and Safety Executive why he thought the consultation had proved difficult. He said:
- “We elicited views from our stakeholders in two separate ways. We had a consultation exercise, and we had an open meeting of stakeholders, which was actually very positive and very useful ... When it came to the section on impact assessment, I was there really trying to encourage people, ‘Tell us what you think, give us information that we can use to improve it’. Although they had been really helpful throughout the rest of the meeting, in contributing to issues about the biocides directive, we just could not enthuse them, they had very little to say” (Q 83).
70. **We recognise that the Biocides Regulation was something of an unusual case and welcome the fact that the Health and Safety Executive are currently gathering their own evidence in preparation of the UK impact assessment. Clearly, the EU assessment should inform the Government’s own impact assessment; but it is crucial that the Government assess the quality of data in the IA and gather**

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<sup>24</sup> EU Sub-Committee B, *Correspondence with Ministers*: <http://www.parliament.uk/hleub>

**their own data where appropriate, rather than simply taking the Commission’s data and shrinking them to fit.**

### Impact Assessment of amendments to proposals

71. The 2005 Inter-Institutional Common Approach to Impact Assessments, which is currently under review, states that the European Parliament and the Council will take into account the Commission impact assessment when examining proposals and that they will “carry out impact assessments, when they consider this to be appropriate ... prior to the adoption of any substantive amendment”.<sup>25</sup>
72. Almost all our witnesses suggested that the European Parliament and the Council are not taking impact assessment as seriously as they should. The Government said “[b]oth Institutions have committed to assessing the impact of their substantial amendments, however this is not happening consistently in the Parliament, and not at all in the Council” (p 43). Professor Radaelli said that “[a]t the moment the common approach to IA of the three main EU Institutions is not working well. It is there in terms of desire but implementation is random, I would say” (Q 5).
73. The Minister told us that, while the Commission had developed expertise in producing impact assessments, “I do not think that capacity is particularly there within the European Parliament as yet” and, in regard to the Council, “I am not sure whether the individual Member States would be seen as sufficiently impartial to be able to produce their own impact assessments, although I think that is better than having no impact assessment, quite frankly. So I think the source of the impact assessment is perhaps less important than the fact of the impact assessment” (Q 117).

### European Parliament

74. There are two aspects to the European Parliament’s use of impact assessments. The first is the attention they give to the Commission assessment of each proposal. The second is the production of their own assessments of amendments they might wish to propose.
75. Sub-Committee A of this Select Committee took evidence on the Alternative Investment Fund Managers proposal from Sharon Bowles MEP, Chair of the European Parliament Economic and Monetary Affairs Committee. That committee had examined the Commission impact assessment and found it wanting. They therefore commissioned their own assessments of the original, unamended, proposal. The first IA dealt with marketing and distribution issues, while the second was a cost-benefit analysis of the changes proposed by the draft Directive. Ms Bowles explained that her committee were not satisfied with the Commission IA as it had clearly been prepared in haste: “Several people mentioned this when we debated it in committee and because there was enough money in the budget<sup>26</sup> we decided that we would have an impact assessment of our own”<sup>27</sup>. Ms Bowles explained that the

<sup>25</sup> *Inter-Institutional Common Approach to Impact Assessment* (2005), paras 13–14:

[http://ec.europa.eu/governance/better\\_regulation/documents/ii\\_common\\_approach\\_to\\_ia\\_en.pdf](http://ec.europa.eu/governance/better_regulation/documents/ii_common_approach_to_ia_en.pdf)

<sup>26</sup> In 2006 a specific budget line was created, initially allocating €500,000 to European Parliament committees to fund impact assessment-related activities. Since 2008, this has been subsumed into an “expertise budget”, totalling €7,500,000 that year.

<sup>27</sup> *Op. Cit.* Q 375

assessments did not take into account any amendments by the committee (which, at that point, had not been proposed) but suggested that “nevertheless it may well point to the way forward in terms of what those changes should be”<sup>28</sup>.

76. Malcolm Harbour, Chair of the Internal Market Committee (IMCO), reported similar activity:
 

“IMCO has undertaken Impact Assessments, where the Commission have failed to produce one. For example, on the Consumer Credit Directive, the committee commissioned a study on the ‘broad economic impact’ of the proposal<sup>29</sup>, because the Commission had refused to provide a new impact assessment for their modified proposal” (p 60).
77. However, Mr Harbour argued that European Parliament committees are not consistently taking account of Commission impact assessments. He told us that “Parliament committees are still not taking their commitment to better regulation seriously” (p 60) and that “there is still some reluctance by all Committee Chairs to examine an impact assessment” (p 61). Although we have seen evidence that Mr Harbour’s and Ms Bowles’s committees are examining Commission impact assessments, it is not clear to us how often this happens across the Parliament as a whole.
78. Mr Harbour suggested that the Parliament should not even consider proposals for which a comprehensive cost-benefit analysis had not been carried out by the Commission (p 61). The Federation of Small Businesses made a similar suggestion that any document which had not received an adequate impact assessment “should be sent back to the previous stage” and not considered by the Parliament (p 13).
79. The Government argued that “the Council and the European Parliament should play a greater role in holding the Commission to account when it fails to comply with its guidelines and produce an impact assessment of sufficient quality” (p 43).
80. In the Inter-Institutional Common Approach, the Parliament committed to carrying out assessments of its own substantive amendments, although it was left to the Parliament to determine, at a political level, which amendments it regarded as “substantive”.
81. The Parliament may commission an impact assessment at any stage of its consideration of a proposal. At first reading, this could be done before amendments have been adopted in a committee, between committee adoption and adoption by the plenary, or after adoption by the plenary. Assessments of amendments could also take place at second reading.
82. Malcolm Harbour reported that IMCO had carried out such IAs, giving as an example the Nominal Quantities for Pre-Packed Goods proposal (p 60)<sup>30</sup>.

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<sup>28</sup> *Op. Cit.* Q 380

<sup>29</sup> Study requested by the European Parliament’s committee on Internal Market and Consumer Protection, *Broad Economic Analysis of the Impact of the Proposed Directive on Consumer Credit*, April 2007: [http://www.europarl.europa.eu/comparl/imco/studies/0704\\_consumercredit\\_en.pdf](http://www.europarl.europa.eu/comparl/imco/studies/0704_consumercredit_en.pdf)

<sup>30</sup> Impact assessment was requested by the European Parliament’s Committee on Internal Market and Consumer Protection, *Impact Assessment: Parliament’s Amendments to a Commission Proposal on Nominal Quantities for Pre-packed Products*, November 2: <http://www.europarl.europa.eu/activities/committees/studies/download.do?language=en&file=22172>. This was carried out before amendments were adopted by IMCO.

However, it seems that this is a rarity. By December 2008, it seems that only seven such assessments had been carried out<sup>31</sup>. Professor Radaelli pointed out that the European Parliament had previously not had the capacity to carry out assessments, although “some capacity has been built ... over the last two or three years or so” (Q 5). Currently, it seems that EP impact assessments are almost exclusively commissioned from external consultants, as in the in the examples cited by Malcolm Harbour and Sharon Bowles.

83. Dr Italianer explained the Commission’s position: “we think that when there are important amendments ... it would also be of use for members of the Parliament and for Council ministers, for that matter, to use the same techniques to analyse what the impact of the various amendments would be” (Q 63). The Minister agreed that it is “hugely important” that IAs are performed on significant amendments because “the assessments have to be made on the proposal that is actually going to be implemented” (Q 116).
84. Professor Radaelli spoke of the scale of the task assigned to the Parliament, saying it “is supposed to perform a task that is much more ambitious than the task asked of other parliaments of the EU, like the national parliaments. Note that we are asking the EP to perform an impact assessment of its own substantive amendments. That is a tall order” (Q 7). He suggested that the need was not for the EP to replicate the IAs of the Commission, “recalculating costs and benefits when the EP introduces substantive changes: I would say the EP would do this IA only to its own advantage”, but that assessments should be performed on “whether the overall logic of intervention has been modified, whether the regulatory logic behind the option has been altered by the amendments” (Q 8).
85. There was some suggestion that the Commission could make use of its capacity for producing IAs to assess certain of the Parliament’s amendments. Dr Italianer thought this might be feasible, particularly where amendments touch on technical matters. He said that “[t]he Commission has already offered to look at such requests ... Where for instance the changes in the Parliamentary process are changes in certain parameters that can be easily simulated with economic models, then that could certainly be done” (Q 64). He suggested that the other Institutions were not inclined to take advantage of this offer, because “they might perhaps have had the idea that the analysis might not be completely unbiased” (Q 64).
86. The Minister made the same point, noting that “the suggestion may be made—certainly not by me—that [the Commission] might try to defend their earlier position rather than give informed advice on an amendment” (Q 116). However, the Government would welcome it if the Commission could play such a role (Q 116). Professor Radaelli warned about a “confusion of roles” which might be created if the Commission started undertaking such assessments “especially for amendments that go against the initial proposal of the European Commission; it would be either legal contortionism, a kind of torture, or a fiction for the policy officers of the Commission” (Q 8).

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<sup>31</sup> These were, at first reading, Priority Substances in Water Directive, Working Time Directive, Interoperability of the Community Railway System II Directive, Air Quality Directive, Nominal Quantities for Pre-Packed Products Directive; and at second reading, Waste Framework Directive and Batteries and Accumulators Directive. As reported in *Impact Assessment: The European Parliament’s Experience: A Stock-Taking Report of the Common Approach to Impact Assessment* produced by the European Parliament Conference of Committee Chairs in December 2008.

87. **We welcome the actions of certain European Parliament committees in commissioning impact assessments where they feel the Commission assessment is inadequate. This would constitute a “political” holding to account, in addition to the role of the Impact Assessment Board in assessing the adherence of IAs to the Guidelines. The relationship between the two may warrant further study.**
88. **We are, however, concerned to hear that the Parliament may not be consistently taking the Commission IA into account when considering proposed legislation.**
89. **The European Parliament does not seem to be adhering as fully as possible to its commitment in the Inter-Institutional Common Approach to perform impact assessments of substantive amendments. We recognise that this is an ambitious task and that the Parliament may not have the resources to do this consistently. However, we would encourage the Parliament to perform assessments in a proportionate manner where appropriate.**

### **Council of Ministers**

90. As with the Parliament, the Council is also supposed to produce assessments of its proposed amendments. The Government told us that this is not happening at all (p 43). Given that the Council does not currently produce impact assessments of its amendments, we wondered what use Member States made in Council of the Commission impact assessment and of their own assessments.
91. The Commission’s written evidence referred to “the recent initiative by the Czech Presidency to promote the use of IA in Council Working Group discussions, following a similar initiative by the Austrian Presidency in 2006. The current Swedish Presidency has also indicated that it will make greater use of Commission impact assessments” (p 25). Other witnesses suggested that there is little discussion of IAs in the Council and working groups. The Government said that “[i]n Council working groups and committees of the European Parliament, debates regarding impact assessments remain the exception rather than the rule” (p 43), while Professor Radaelli said “working parties are too focused on negotiation and bargaining to switch to the evidence-based logic of impact assessment and take it seriously” (p 3).
92. Robin Foster of the Health and Safety Executive confirmed this opinion. In regard to the negotiations on the Biocides Regulation he reported that:

“[t]he Swedish Presidency invited comments [on the Commission IA], the UK submitted a six-page document, broadly critical of the impact assessment, but acknowledging all the work that had been done. Denmark submitted a one-page document broadly supportive of what the UK said ... and that was it. When it came to discussing the impact assessment in the Council Working Group, this is the Environment Council, there was very limited discussion” (Q 78).
93. As some Member States produce their own national impact assessments of proposals, we were interested to know whether these could, in some sense, be regarded as *de facto* assessments of certain amendments the Member States

wished to propose. Dr Italianer said that to the extent it serves as a “*pars pro toto*”<sup>32</sup> ... it could give a good indication of an amendment and so in that sense I think it could help the decision-making in the Council” (Q 65). He warned, though, that “there are some policy proposals where there is a distribution issue between Member States”. Citing a proposal to reduce CO<sub>2</sub> across the EU he continued:

“there was a distributive issue involved there: who is going to bear the cost; who has to achieve which CO<sub>2</sub> reductions? In that case it is a little bit of a zero sum game. If one Member State has to reduce more than another Member State ... in that case an individual impact assessment would perhaps be of less use because it would be to the detriment of another Member State” (Q 66).

94. In reality, it seems that neither Commission nor Member State impact assessments are much discussed in Council. Robin Foster told us that “[w]e will certainly use [the UK IA] to formulate our amendments” but “we will be rather cautious about deploying cost-benefit assessment in the negotiating meetings themselves, and the reason for that is experience, which says that there are many Member States who will visibly recoil if the UK advances pure cost-benefit arguments in the meetings” (Q 81).
95. When we asked the Minister for Better Regulation if impact assessments should be discussed in working groups and the Council he said, “I would be concerned if they did not” (Q 120). The Government subsequently provided us with two recent examples of the use of IAs in working groups: the Implementing Measures for External Power Supplies and for Simple Set Top Boxes (p 53). The Minister did, however, acknowledge that it is not always easy to discuss a proposal in such terms, stating that “I think that that creates some disagreements sometimes with other European countries because they do not think that that numerical cost-benefit analysis is as valuable as we think it is” (Q 99).
96. The Minister told us that the Government had been trying to promote greater use of impact assessments in the Council and working groups and that he had been in contact with his German counterpart with regard to working more closely on Better Regulation. He also told us that the Government had met with European Parliament committee chairs (QQ 102 & 109).
97. **We conclude that the Council should produce impact assessments, but understand the political hurdles involved. With regard to Member State impact assessments, with due caution about their possible applicability Europe-wide, we would be interested to see how they might be used to assess amendments proposed by Member States in Council.**
98. **We are concerned about the apparent lack of discussion of impact assessments in working groups and the Council. We urge the Government to promote their use further.**

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<sup>32</sup> Part for the whole.

### *Ex-post* evaluation

99. The impact assessment process takes place at the beginning of policy formulation, but better regulation should also take into account the evaluation of regulation once it has been implemented. The Council of Ministers acknowledged this in May 2009, when it called for the Commission to provide for *ex-post* evaluation and “undertake comparison of intended and actual effects of approved EU legislation”<sup>33</sup>.
100. The FSB argued that “[p]ost implementation reviews of EU legislation should therefore happen in every Member State” (p 14) while Malcolm Harbour stated that “[l]egislation should be viewed by the European Commission as a circular process, in which *ex-post* audits should be an indispensable requirement” and that “the Parliament’s committees should make better use of their resources, by providing some of the qualitative and quantitative evidence needed to review the impact of legislation” (p 60).
101. The Minister told us that *ex-post* evaluation is not “happening as much as it needs to” but also suggested that “[i]t is something that we in the UK Parliament do not do very well, and that is assess the legislation that we have already passed<sup>34</sup> and really ensure that the effect that it was intended to have it has had and, if it has not, why not. I think our culture is such that we do not really think as politicians in those terms” (Q 122).
102. Dr Italianer told us that the Commission are “strongly encouraging our departments to engage in *ex-post* evaluation because whenever they are reviewing legislation for which they are responsible, the natural starting point should be *ex-post* evaluation before they go into a new impact assessment” and that “I would expect that several years from now many of [the impact assessments] would be the subject of an *ex-post* evaluation when it comes to the policy review process” (Q 74). He also spoke of completing the “policy circle” in order to “get into place this chain of *ex-ante* and *ex-post* evaluations” (Q 76).
103. **We welcome the Commission’s commitment to carrying out *ex-post* evaluations as they are crucial to improving legislation. However, it was not clear how often the Commission was carrying them out. We recommend that further work be done to determine their current use and how they are integrated into the legislative cycle. We urge the Government to promote the further use of *ex-post* evaluation and encourage the Commission to disseminate their evaluations more widely.**

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<sup>33</sup> Council conclusions on Better Regulation: 2945th Competitiveness Council Meeting, 28 May 2009: [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressdata/en/intm/108145.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/intm/108145.pdf)

<sup>34</sup> There are, however, proposals for better post-legislative scrutiny in the UK. See, for instance, *Post-legislative Scrutiny—the Government’s Approach*, Cm 7320 2008: <http://www.official-documents.gov.uk/document/cm73/7320/7320.pdf>

## APPENDIX 1: SUB-COMMITTEE B (INTERNAL MARKET)

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The Members of the Sub-Committee which conducted this inquiry were:

Lord Bradshaw  
 Lord Dykes  
 Lord Freeman (Chairman)  
 Lord James of Blackheath  
 Lord Mitchell  
 Lord Paul  
 Lord Plumb  
 Lord Powell of Bayswater  
 Lord Rowe-Beddoe  
 Lord Ryder of Wensum  
 Lord Walpole  
 Lord Whitty

### Declarations of Interests:

Lord Freeman

*Chairman, Pricewaterhouse Coopers Advisory Board*  
*Chairman, Thales Holdings UK plc (and chairman or director of a number of wholly owned subsidiaries of Thales Holdings UK plc including pension trustee companies)*  
*Chairman, Parity Group plc*  
*Chairman, Big DNA Ltd*  
*Director, Thales SA*  
*Director, Global Energy Development plc*  
*Director, Chemring Group plc*  
*Director, Savile Group plc*

Lord Powell of Bayswater

*Chairman, LVMH (Moët-Hennessy Louis Vuitton) UK*  
*Director, Caterpillar Inc*  
*Director, LVMH (Moët-Hennessy Louis Vuitton)*  
*Director, Textron Corporation*  
*Director, Schindler Holdings*  
*Chairman, Rolls-Royce International Advisory Board*  
*Member, International Advisory Board of ACE*

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

## **APPENDIX 2: LIST OF WITNESSES**

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The following witnesses gave evidence. Those marked \* gave oral evidence.

- British Chambers of Commerce (BCC)
- Business Europe
- City of London Corporation
- \* Department for Business, Innovation and Skills (BIS)
- \* European Commission
- \* Federation of Small Businesses (FSB)
- Mr Malcolm Harbour MEP
- \* Health and Safety Executive
- Open Europe
- \* Professor Claudio Radaelli, Centre for European Governance, University of Exeter

### APPENDIX 3: CALL FOR EVIDENCE

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On 28 January 2009, the Commission published the *Third Strategic Review of Better Regulation in the European Union*. The House of Lords European Union Select Committee published a report on entitled *Ensuring Effective Regulation in the EU* which commented in detail on the progress of the Commission's Better Regulation agenda.

The Internal Market Sub-Committee of the European Union Select Committee has now decided to conduct another inquiry into the progress of aspects of Better Regulation.

The Sub-Committee invites you to submit written evidence to their inquiry. The Sub-Committee would find it helpful if, in addition to any general issues you may wish to raise, you would focus on a number of specific issues:

- (a) Whether the right proposals are chosen to be subject to impact assessment or whether all legislative proposals should be accompanied by an impact assessment;
- (b) Whether impact assessments are produced early enough in the legislative cycle to influence the proposals adopted by the Commission; whether they are suitably updated following negotiations so that the impact of legislation agreed between the Council and European Parliament is properly understood; and, if they are not, how the process could be changed;
- (c) Whether members of the Council and MEPs use the impact assessments during negotiations; and, if not, how this could be encouraged;
- (d) How effective the inclusion of a "do-nothing" option in impact assessments is; whether impact assessments actually influence policy formulation; or whether they are used to justify a decision already taken;
- (e) Whether stakeholders are properly consulted; whether the concerns of SMEs and the principles of the Small Business Act are properly taken into consideration; how could consultation be improved; and to what extent consultation affects on policy formulation;
- (f) Whether the Impact Assessment Board is sufficiently resourced and independent to ensure that the Commission produces useful and accurate impact assessments;
- (g) Whether the Commission is sufficiently active in providing support to Member States during implementation and using its enforcement powers to ensure proper implementation.

The Committee would particularly welcome submissions with reference to energy, transport and telecommunications proposals.

# Minutes of Evidence

TAKEN BEFORE SELECT COMMITTEE ON THE EUROPEAN UNION  
(SUB-COMMITTEE B)

MONDAY 19 OCTOBER 2009

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Present	Bradshaw, L	Plumb, L
	Freeman, L (Chairman)	Rowe-Beddoe, L
	James of Blackheath, L	Walpole, L
	Paul, L	Whitty, L

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## Letter from Professor Claudio Radaelli, Centre for European Governance, University of Exeter

The inquiry into the better regulation agenda of the European Union provides a timely opportunity to discuss the achievements of the Barroso Commission and the challenges facing the new team. The pan-European better regulation movement that emerged from the Mandelkern Report and the White Paper on Governance is now being redefined in its objectives and tools.

I am pleased to respond to the call for evidence, drawing on research carried out in the context of the following projects: Regulatory Impact Assessment in Comparative Perspective (ESRC, Principal Investigator, Feb 2005–Feb 2009), Evaluating Impact Assessment, (EVIA) European Network for Better Regulation (ENBR), Better Regulation for Growth (promoted by FIAS-World Bank, with funding from DFID and the Dutch Ministry of Foreign Affairs). Most of my research papers and presentations are available in political science journals and on my website (<http://centres.exeter.ac.uk/ceg/research/riacp/index.php>). In consequence, in this short submission I will address directly the questions posed by the call, knowing that more detailed evidence can be easily found on my website. I also wish to add that I would be delighted to provide oral evidence, should the subcommittee intend to pose specific questions and know more about my findings. Most of my empirical research is based on original fieldwork in a limited number of countries (Canada, Denmark, the Netherlands, Sweden, the UK and USA) and of course the EU. I think it is useful to benchmark the EU with the international experience, but it should be noted that I covered only some of the member states in my previous research. Equally useful is to look at better regulation as a shared responsibility between the EU and its member states—my research sheds some light on it, again with the caveat that I have covered only some member states.

The questions posed by the call are in italics, followed by my answers:

(a) *Whether the right proposals are chosen to be subject to impact assessment or whether all legislative proposals should be accompanied by an impact assessment;*

According to the current guidelines of the European Commission, all items included in the annual Commission legislative and work program (CLWP) are subjected to impact assessment (IA). There are two problems with this. First, the Commission does not follow this criterion. We know that several items in the annual work program “escape” IA and that IAs are performed on some comitology proposals and other items outside the annual program. One may wonder what is the wisdom of having a criterion and not follow it? Second, a broad requirement like this may hinder a cost-effective use of IA. Proposals differ in terms of their visibility, the number of stakeholders and economic sectors that are affected, and also in terms of their time-plan (some have a long history of policy formulation, others are relatively new and unexplored and require much more analysis).

International experience shows that targeting and selection criteria enable governments to spend more IA resources on those proposals that really deserve the most in terms of consultation and economic analysis. The selection criteria are often monetary—but problematic for the Commission, given that (tentative) monetary values of impacts on 27 jurisdictions are hard to quantify at an early stage. But there are more legal-political criteria. The Commission should *target* IA, by not wasting too many resources on appraisals of white papers, pilot projects, and items that are not-regulatory.

This is not to deny that some appraisal should accompany all items in the annual work program. But good regulatory management means being able to recognize priorities and focus the efforts on these priorities—ie, targeting. IA costs time and resources, and the opportunity costs of extensive IA should be acknowledged.

This is of course the well-known issue of proportional analysis within IA—we should not start from the assumption that “more” analysis of any proposal is always better since we live in a world of scarce resources. A possible solution to the status quo is to adopt threshold criteria based on substance instead of the formal inclusion in the CWLP. More importantly still, the Commission should present an annual regulatory agenda to the European Parliament (EP) and the Council, so that the Commission and the assembly can debate the priorities for IA every year, as well as receive input from the Council.

Going back for a moment to the theme that better regulation is a shared responsibility between the EU institutions and the member states, it is fair to say that the campaigns of countries like the Netherlands, Germany and the UK on administrative burdens have not helped the Commission’s IA. The latter should be based on an even analysis of different components—the official position of the Commission is that environmental, economic and social impacts should be treated equally. The emphasis on administrative burdens, instead, pushes us back to the old logic of special assessments. It disintegrates the logic of integrated impact assessment. This is not desirable since the methods to calculate administrative burdens are very poor, much poorer than standard cost-benefit analysis, and the entity of the bias introduced by administrative burdens calculations into an IA is not known. Hence they can bias the whole IA. Politically, administrative burdens analysis leads to focus on some categories of cost and some stakeholders—obviously resources invested in administrative burdens assessments are not invested in other areas of appraisal. Administrative burdens should be included only when and how they are relevant to the overall appraisal of the impact of a proposal, they are not a separate category of costs that should be flagged up everywhere and in any case—otherwise we will return to the world of “special” and disintegrated IAs: environmental, health, gender, trade assessment, and so on. . .

(b) *Whether impact assessments are produced early enough in the legislative cycle to influence the proposals adopted by the Commission; whether they are suitably updated following negotiations so that the impact of legislation agreed between the Council and European Parliament is properly understood; and, if they are not, how the process could be changed*

(c) *Whether members of the Council and MEPs use the impact assessments during negotiations; and, if not, how this could be encouraged;*

Let me treat these two as a single, complex question. I will start with some general statements that provide the background for addressing this question—and then zoom in the specific issues. The first general remark is that the Commission has learned how to *produce* IA, but the next challenge is how to *use* IA (internally and in relation to the other institutions and the member states). The second general remark is that the Commission has learned better regulation and IA, but it is not clear what has been learned *because of* IA and better regulation practices. For example, we still do not have enough evidence to answer the question whether IA has led the Commission to a more systematic usage of responsive and smart regulation. Better regulation should be a means to these ends (that is, smart, responsive regulation) but it is often treated as an end to itself.

Now the specific issues. The IAs of the Commission are produced early enough to stimulate learning among the different Directorates General and to enable the Secretariat General of the Commission to coordinate the policy formulation process—when necessary, by making the priorities of the President heard to the desk officers in the Directorates General. Although it is hard to establish causality, evidence seems to suggest that the process of performing IA has generated more administrative capacity and some joined-up mechanisms in the Commission. Arguably, this means that there is a trend towards an enhancement of the administrative role of the Commission. Perhaps the Commission is in decline as an engine of integration. Yet its administrative role has been strengthened by IA, possibly in connection with other reforms that have increased coordination from the top of the Commission, that is, from the Secretariat General. The administrative silos and “collection of baronies” that beleaguered the Commission at the time of the interviews carried out by other researchers like Hussein Kassim have not disappeared, but are less powerful than in the past. The IAs of the Commission are therefore much less symbolic and ritualistic than Danish, Swedish and Dutch IAs. However, they do not provide (as yet, at least) a tool for effective policy planning of the legislative cycle.

There are two problems here, and not so much about the issue of “when does the IA start” since most EU thinking on proposals does not start from IA—it starts from previous White Papers, reflection groups, conferences of stakeholders etc. so the whole notion of a “start date of an IA” is somewhat misleading. What are the two problems then? First, the Commission does not publish the IA for notice and comment. The IA is made public at the same time of the draft proposal agreed in the College of the Commissioners and sent to Parliament and Council. Canada and the US, instead, follow the notice and comment practice. Experience shows that the publication of the IAs increases public scrutiny and the overall quality (not just in terms of economic analysis) of the appraisal process. The risk of publishing the IA for notice and comment is that the

some EP quarters representing special interests (and many pressure groups of course) can abuse procedures for purely negative political reasons—forgive me for this expression. Thus we need a mature behavior from lobbyists and pressure groups before we move to notice and comment in the EU—I will go back to this in a minute, talking about a dialogic culture.

Second, case-study evidence shows that both the Commission and the EP are still learning how to use IAs properly in the legislative process. We should have more debate on what sorts of incentives should the EP have to spend attention to the IA? Experience shows that agencies and government departments care about judicial review. One may reason that in a sort of hypothetical scenario in which the European Court of Justice were to look at the IA in the context of broader judicial review of regulations (not a review of the policy appraisal, but broader reviews of directives in which the IA is however considered by the Court), the IA would be taken more seriously by all players, including the EP.

And we should reflect on how the Commission could avoid using the IA to water-proof its own proposals (“the IA is the best possible evidence-based rationale for our proposal, so the EP should not touch the proposal now that it has been armored with the IA”). I do not even mention the Council, since my interviews with Council officers who are not directly championing IA (I mean the classic officers who handle policy files in working parties, not the handful of Council officers who feel strongly about better regulation) show that working parties are too focused on negotiation and bargaining to switch to the evidence-based logic of impact assessment and take it seriously. Overall, the major challenge for the inter-institutional agreement on better regulation is one of using IA *dialogically*. Regulation is always an incomplete contract when it is designed. In the case of the EU, the real impact of regulation depends on how it will be implemented by domestic administrations, how 27 markets will respond, and how the Courts will decide in the future. In these circumstances, the role of IA is not to perform the perfect calculations but to provide the platform for evidence-based policy dialogue and planning.

This is also a challenge for the member states (with reference to your question c): they have not learned how to use the IA to engage in regulatory conversations and policy dialogue with the Commission. There is confusion as to whether the preparation of the IA is yet another opportunity to make the interests of the member states heard, to produce counter-IAs, or to respond to domestic pressure groups that feel harmed by the IA of the Commission. Most member states simply do not have enough administrative capacity to engage with the Commission’s IA dialogically. It is not their fault, the fact is that they do not know how to handle IAs at home, so the best they can hope for is to build capacity by engaging with the Commission’s IA, but often this engagement is quite messy.

Faced with these challenges, the Commission has responded defensively, using legal arguments about the treaty right to initiate policy to keep the member states at bay when the IA is being prepared. The result is lack of effective dialogue between the Commission and the national administrations during the phase of IA preparation—although there are cases that buck the trend, and we should learn from them. Those are cases in which IA has provided an opportunity to build or to sustain multi-level networks between Brussels and domestic administrations. Some countries like Germany have also codified their approach to IA with guidelines. This is a useful step, although if there is limited capacity to carry out evidence-based exercises at home, even the best guideline won’t help much.

Further, the issue of updating the IA following negotiations in the legislative process is really critical. There is no capacity in the Council and the EP to carry out this sort of updating. The so-called IAs of the EP are often studies carried out by third parties, not reflective exercises carried out within the EP. Yet again, we should devise incentives that would make these updating exercises “real” and not simply window-dressing changes to support political decisions. We should also be aware that there is no country I am aware of where elected assemblies perform systematic IAs of their substantive amendments. Neither do I know of executives that at the end of a parliamentary debate revise the IA. This is to say that we are expecting from the EU an extraordinary performance in better regulation. If, however, we really want the EU to perform much better than even the best member states, (1) IA should be used more dialogically by the Commission and the other institutions—to increase trust in the Commission (2) IA should be less an instrument to make predictions (about costs and benefits that will be largely determined later by the behavior of member states, citizens, firms and perhaps courts at the stage of implementation) and more a planning document with some questions/critical points that will be addressed/monitored at different stages (and hopefully responsively) of the policy cycle. There should be an IA “custodian”, possibly the Commission, throughout the cycle. The custodian should go back to the IA during the negotiations, and even more importantly at the stages of transposition and implementation—including the crucial phase of comitology decisions. The idea is to use the IA to re-calibrate calculations of costs and benefits that are necessarily vague before transposition, and when necessary to re-calibrate some aspects of how policy is implemented, following the logic of responsive regulation.

(d) *How effective the inclusion of a “do-nothing” option in impact assessments is; whether impact assessments actually influence policy formulation; or whether they are used to justify a decision already taken;*

Comparatively speaking, the inclusion of the do-nothing option is at least as effective as in the IA systems of countries that champion IA, such as the UK. The problem for the Commission is compounded by the two issues of subsidiarity and proportionality. Often the real discussion behind the “do-nothing” option is also and eminently a discussion about subsidiarity and whether the EU intervention follows the legal principle of proportionality (to be distinguished by the economic principle of proportionate analysis). These discussions cannot be limited to evidence-based reasoning—they are also political—and therefore make the assessment of “do-nothing- options very difficult.

The second part of the question is whether the IAs influence policy decisions or support pre-fabricated decisions. My research in the USA and Canada suggests that this a typical European question. We are obsessed with the notion that we should think rationally, and we theorize that we should take political decisions on the basis of evidence-based arguments—otherwise the verb “to influence” has no real meaning in this context. We know that there is no real distinction in the politics-administration continuum, but we have faith in this myth of rational decision-making separated by “political” (and non-rationally formed?) decisions. The North-American experience tells us something different. It tells us that when IAs are openly challenged, they perform useful functions such as enabling elected politicians to control bureaucracies and to enhance the empirical basis of decision-making. I am sure that all members of the sub-committee would agree that the main function of IA is to understand and challenge our prior policy thinking. The aim in IA is to generate Bayesian learning, that is, to use evidence to modify our prior probabilistic conjectures about the world. Research on the learning function of IA shows that learning was limited in the early days of IA, between 2002 and 2005, but now it is not too difficult to find examples in which IA has enabled policy makers to understand and challenge their prior thinking. The situation seems better than in the member states, where I have seen a lot of poor IAs, ritualistic IAs, and IAs fabricated ex-post to fit previous decisions. This has something to do with the fact that the most active pressure groups and some member states watch carefully what the Commission does with IA.

(e) *Whether stakeholders are properly consulted; whether the concerns of SMEs and the principles of the Small Business Act are properly taken into consideration; how could consultation be improved; and to what extent consultation affects on policy formulation;*

We should not have unrealistic expectations about what consultation can do in a large jurisdiction like the EU, especially in relation to the varieties of SMEs across the member states. The 2009 report of the European Court of Auditors is rightly critical of some aspects of consultation, and makes some sensible suggestions on how to improve on it. A thorny issue is how to move from the old but still well-established culture of lobbying the Commission to open and diffuse consultation—especially considering the very uneven distribution of administrative capacity across member states and resources among stakeholders. Logic tells us that the territorial size of the EU is such that listening to every stakeholder and empowering all SMEs (and why not NGOs?) would simply produce over-loading. The internet simply amplifies the overloading problem and consultation fatigue. Simple bureaucratic logic leads the Commission officers to listen “more” to those federations who speak authoritatively on behalf of their national members and those NGOs and special interest groups that have been cultivated by the Commission since the days of the Single European Act.

What should be done then? The opinions of the Impact Assessment Board often focus on the way arguments from the consultation exercises are presented in the IA; this should increase the quality of consultation—it is too early to say whether this is already happening, but the Board has started pressing on this. Further, the Commission has good guidelines on consultation and the usage of expertise and science—more should be done on the implementation of the principles and standards. It would also be useful to think not so much of consultation in quantitative terms—“let us consult more people”; “let us look at what the majority of people sending input via the internet say”—but in quality terms: are all “discourses” and scientific inputs represented in consultation and addressed by the Commission in its final IA—see the point made on the IAB earlier on? Are we treating them fairly? Are we giving resources to “discourses” and ideas that tend to be under-represented? Recent research on deliberative democracy and discursive representation by political philosopher John Dryzek has led me to think that we should spend more political energy in making sure that consultation be quality-oriented and represent “discourses” fairly.

(f) *Whether the Impact Assessment Board is sufficiently resourced and independent to ensure that the Commission produces useful and accurate impact assessments;*

It is fair to say that the IAB has somewhat surprised (positively for once) the skeptical observers. It is like a clumsy bumble bee that should not fly according to the logic of physics, yet it flies. Most people see all sorts of problems with the fact that the Secretariat General supports the IAB—how can the Secretariat General work within IA formulation teams within the Commission one day and the next day draft an opinion for the

IAB? Yet the whole system has worked relatively well. My impression is that this has been the result of the determination of Vice-President Verheugen and President Barroso and the formidable link between the President and Mr. Italianer at the Secretariat General. It is hard to imagine how the next Chair of the Board will be able to match Alexander Italianer's skills and capacity to deal with the details of each individual case. The challenge for the IAB is institutionalization—it certainly needs more resources and expertise, and a secretariat. If the tandem President-Sec General is not a viable option for the future, I suggest creating an IAB secretariat and a board of five to six external experts.

I have not evidence that would lead me to provide an answer to your last question (g).

15 September 2009

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### Examination of Witness

Witness: PROFESSOR CLAUDIO RADAELLI, Centre for European Governance, University of Exeter, examined.

**Q1 Chairman:** A very warm welcome to you, and thank you very much indeed, if I might say so, for the very clear written evidence, which was a delight to read. Your command of English is obviously very impressive. Would you like to introduce yourself for the record and describe your responsibilities at Exeter?

*Professor Radaelli:* I am Professor of Political Science at the University of Exeter, where I direct the Centre for European Governance. I have been involved in research on better regulation and impact assessment over the last ten years, mostly with a comparative perspective, looking at different countries. The countries I know something about are Denmark, the Netherlands, the UK, and the EU as a political system, the US and Canada. So when I say that I know about European countries, I know about some of the European countries but not all of them. I hope I will say something useful to this Committee. I appreciate that it is an honour and a privilege to speak to this legendary Select Committee of the House of Lords.

**Q2 Lord Bradshaw:** We are very interested in what you say about impact assessments because there is a lot of criticism that they generate a lot of bureaucracy and do not actually shed light on the issues that are most pertinent. You make reference to too many resources being used on appraising White Papers and pilot projects, which are not regulatory. How would you concentrate resources on those impact assessments that really are going to have an impact, rather than a theoretical impact?

*Professor Radaelli:* I realise that the question is quite complex, and I would say that there is always a bit of tension in impact assessment in its own nature. There are some important trade offs at work in the practice of policy appraisal via impact assessment. This explains why it is very difficult to find a "perfect" impact assessment. At the outset, there is tension between impact assessment as a tool to monitor and control bureaucracies and as a tool for experimentation, learning and exploration of alternatives. There is also a kind of a trade-off between impact assessment as the document that

contains only evidence and objectivity and impact assessment as support and justification for what an organisation wants to do. Finally, there is tension between creating trust and dialogue via impact assessment and using it "to speak the truth to power"—no matter what the political consequences are. In this connection, essentially the idea of a targeted impact assessment—because that is what your question was about—is particularly important. We obviously do not want to waste resources on ritualistic appraisals that look like tick-box documents. We have seen too many of these!. I guess your question is also about targeting impact assessment by dint of proportionate analysis. Bearing in mind the tensions I referred to, it is in any case useful to focus impact assessment on regulation or on legislative action. There is little point in doing impact assessments of an average study, or to look in details at costs and benefits of pilot projects, white papers, and framework communications. I have seen impact assessments of pilot projects on home state taxation. Those are projects to help companies to pay their taxes in the EU environment, so why should the EU not decide to do a pilot exercise on home state taxation without going through all the elaborate impact assessments. I also think that comitology issues, if we move down the chain of lawmaking in the EU, are quite important items to look at through impact assessment. This is because in comitology we get a bit closer to the specificity of the rule, the particular features of the regulatory regime, and so on; and therefore it is easier then to reason in terms of cost-benefit and look at who is affected and how. Back to your question: At the moment we do not have a screening tool for targeting. Recent work done by the European Court of Auditors shows that the formal criteria to subject to IA all items in the annual legislative and work programme of the Commission (CLWP) are not used *de facto*. Some proposals that are in the annual legislative programme escape impact assessment whilst others are added on. Thus, there is no purpose in having some criteria that then you do not use in real life. Perhaps in order to target resources, apart from focusing on regulation, one could look into a form of triage whereby the

19 October 2009

Professor Claudio Radaelli

directorates general (DGs) involved, on the one hand, and the Secretariat General and the Impact Assessment Board, on the other, can sign off early on impact assessments establishing that no further analysis is needed, and then concentrate resources on the major IAs. I have seen this at work to some extent in Canada. It is a good idea that you sign off minor regulatory proposals. Obviously the risk is that we would place a lot of trust in these three entities that all belong to the European Commission: the Impact Assessment Board, the Secretariat General and the individual DGs. An alternative option, which is more political, would be to get the European Parliament involved in a session every year on the regulatory agenda of the EU. At this session, the EP could make clear its interest in some impact assessments and agree with the Commission that they really deserve a lot of analysis. In this way we could also have the European Parliament stating very clearly where major analysis is needed and where perhaps this is not needed.

**Q3 Lord Bradshaw:** Can I follow it up very slightly? We have a debate on Friday about the First Railway Package. It does seem to me, looking at it, that the Commission in undertaking the work is focusing very narrowly on that part of the international traffic which is conveyed by the railways without having regard to what happens in shipping, inland transport, road transport, which carries far more. So there is a tendency in the organisation to focus very narrowly, sometimes only on the competition issues.

*Professor Radaelli:* This is true. This is why (at least major) impact assessments should always be integrated in the sense of raising questions about other sectors. Sometimes this idea works in practice—like in the Commission’s documents on the thematic strategies that are very broad and encompass several dimensions of appraisal, and in some other cases this does not happen yet. Your question also alerts us to the danger of scrutinising rules one by one via impact assessment, forgetting that for a company, for a bank, for a real-life economic entity what matters is not the single rule but the regulatory regime. That is why we should commend the Commission for having started doing broader *ex ante* reviews of, for example, the thematic air strategy, in which not a single route but a whole strategy was looked at in terms of cost and benefits.

**Q4 Lord Plumb:** The second question is equally interesting, I think. You mentioned that the United Kingdom administrative burdens campaign has not helped the Commission in impact assessment. To what extent does the emphasis on administrative burdens press on the old logic of special assessment? I would be interested to know if the situation is similar in other countries; or how does it vary

particularly in the countries you mentioned, which I think is the important part of the question. Also, how is the logic of integrated impact assessment helping the Commission to promote a better regulation agenda?

*Professor Radaelli:* Certainly the emphasis on administrative burdens, Lord Plumb, is common to several European countries and indeed is one of the most successful export products in the area of better regulation in Europe. This emphasis on the burdens shows that for good or for worse what the European Commission does depends very much on the Commission as a complex organisation as well as on the Member States, and in some cases the European Parliament too. The European Commission started a systematic assessment of the burdens—and I can talk about the quality of the assessments later—exactly in response to joint initiatives by the Netherlands and the United Kingdom, and recently Germany, which wanted more attention given to this type of assessment because they felt they were already engaging other European countries on this topic and wanted the Commission to join the bandwagon. So in a sense it is part of the EU and the Member States being on the same wavelength, and (politically speaking) it could not be otherwise. Although I appreciate that it is always important to look at some items of cost when they really matter, there is a danger of misunderstanding the function of the impact assessment. The function is to make explicit the logic of the intervention behind the different policy options. Personally, I think this is more important than having some very specific cost information because it is only by looking at the logic of a given policy option and the regulatory logic behind another option—for example self-regulation—it is only by doing that that we can answer the question whether the benefits justify the costs of that option. The Commission started indeed with very partial assessments in the 1990s as a response to pressure from very different stakeholders—the environmental stakeholders, the business community, and this is why gender impact assessment, health impact assessment, trade appraisal and so on emerged in the 1990s. Now we have a logic of integrated impact assessment precisely because there is a need to avoid what I would call the phenomenon of “legal kebabs”. The kebab has all the diverse little pieces of meat and vegetables on the same stick, and the old assessments in the 1990s of the European Commission taken together would have just composed a legal kebab, and not a particularly tasty one! We can criticise, perhaps, how the Commission goes about its own integrated impact assessment in practice—because they repeat many times in the official documents (and in the training sessions, and the guidelines, etc) that “integrated” means economic, environmental and social.

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19 October 2009

Professor Claudio Radaelli

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Obviously, we know that a cost is a cost is a cost. It could be a social cost, an environmental cost or an economic cost. If we monetise, it does not really matter. But even beyond monetisation and quantification, it is just a matter of logic. We know that environmental benefits trigger economic costs and vice versa. This is perhaps where we can talk a little bit about political marketing in the European Commission. They IA designers just wanted to please all the major building units within the European Commission when they crafted the procedure, making sure that it will not be “too” economic or “too biased towards the environment”—so to get the consensus of those who care about the social dimension of Europe and those who care about sustainability and those who care about competitiveness these dimensions are all integrated, and that does not exist anywhere else in the world. It is only at the EU level that we talk about “integrated” environmental, social and economic assessment. Beyond this act of political marketing, however, the underlying logic is strong—because it is useful to have a single tool to integrate different dimensions of assessment to avoid the silos mentality of not looking at the second order effects and what will happen outside the narrow circle of first order effect. In this sense integration is a good thing and should be preserved against the compartmentalisation of the cost assessments and the legal kebabs.

**Q5 Lord Plumb:** You mentioned the role of the European Parliament in the answer to the first question. Having had 20 years in the growth of the European Parliament, and since you make reference to the promotion of a better regulation agenda, is it not now time that that relationship is improved between the Parliament and the Commission in the context of building up that agenda that you are recommending?

*Professor Radaelli:* Yes. You have rightly referred to the early days of the Graham Mather’s report of the European Parliament, and clearly that was the initiative of a few MEPs who were interested in the topic, whereas now better regulation has become more important. If we care about issues like quality we have to reflect that quality of legislation will become more important with the new political agenda that is shaping up as a result of the most likely entry into force of the Treaty of Lisbon. With the Treaty in force, we will have a cocktail of majority voting and co-decision—with the Parliament taking more roles in lawmaking. Here the better regulation agenda is a tool, or a toolbox, that may support effectively and efficiently this phase of institutional development with more responsibilities for the Parliament. The results of EP-Commission interaction on impact assessment, so far at least,

however, are not very encouraging. Although in 2003 an inter-institutional agreement on better regulation was signed, and documentation on the common approach to impact assessment emerged later on, we have seen exactly what you said, Lord Plumb, a lack of dialogic culture between how to handle sensibly and not politically—in the bad sense of “politically” this time—the agenda of better regulation. I would say, drawing on research carried out by Dr Anne Meuwese, there is eminently a problem of *using* impact assessment rather than one of *producing* it. It is a problem of being sensible in managing IA between the Parliament and the Commission. The Commission, obviously, often cannot resist the temptation of saying, “With the best evidence laid down in the IA”—I go back to the “speaking the truth to power” model—so the idea becomes one of creating an IA armour around the proposal—and the European Parliament becomes suspicious of this, rather than engaging with impact assessment. Probably one step forward would be to have an EP involvement not only at the level of the single IA but also on the regulatory agenda of the European Commission. This is an important scrutiny function that in due course may assist the EP and the Commission in agreeing around what they want from IA. We have seen some useful reports of the EP on the overall aims and scope of the better regulation agenda. Obviously, here is where the Parliament can take the example of the Riksdag in Sweden and of the House of Lords / the House of Commons in the UK and make the European Commission accountable for the overall better regulation agenda.

Unless there is a specific question on this later on, it is useful to add that some capacity has been built for impact assessment and better regulation at the European Parliament over the last two or three years or so, so there is something there. They have been training officers. This is much better than other parliaments across Europe I have not seen (with the exceptions I mentioned and Denmark and to some extent the Netherlands)—but the other parliaments of the Member States have not seen this increase in the capacity to work with impact assessment. But my feeling is that for the EP to develop more attention, the better regulation agenda should be linked to one of the major goals of the next European Commission. In the recent past better regulation has raised its political visibility thanks to the Lisbon agenda for growth and jobs. The better regulation agenda has been Lisbonised, as it were! Obviously, if better regulation becomes linked to one of the major issues or problems of the next Commission and more widely to the EU political agenda, then the Parliament will pay attention to IA. At the moment the common approach to IA of the three main EU institutions is not working well. It is there in terms of desire but implementation is random, I would say.

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*19 October 2009*Professor Claudio Radaelli

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**Q6 Lord Paul:** Professor Radaelli, first of all may I add my congratulations for a very clear paper. To what extent is the Commission's impact assessment system meeting its key objective of improving the quality of Commission proposals; providing a tool for effective policy planning and an aid to decision-making; and serving as a valuable communication tool?

*Professor Radaelli:* Thank you, Lord Paul. At the outset let us not forget that there is tension in impact assessment between the objectivity aim, on one side, and, on the other side, the need to create support (via IA) for what an organisation has decided to do. The European Commission is always very keen on insisting on the fact that the impact assessment procedures belong to its treaty right to initiate legislation. They see themselves as the masters of the house (of initiating legislation), and in this context of a Treaty right, so they argue, the impact assessment procedure makes sense. Given the caveat of the Janus-face of impact assessment (objectivity and persuasion/support), the good news is that we have seen a change in terms of the role of the Secretariat General of the European Commission. There are more SecGen opportunities for strategic management of policy formulation than in the past. All the baronies of the policy officers in the DGs of the European Commission have been somewhat tamed by the role of the Secretariat General in providing the antidotes to a silo mentality by using inter-service groups on impact assessment. In consequence, the SecGen triggers the impact assessment procedure by getting people from different DGs to look at the subject matter. Secondly, I have seen several DGs—not all of them but certainly some of them—developing a new type of professional officer that knows about impact assessment and cost-benefit analysis; so there is now more capacity for evidence-based appraisals of proposals. I think the fact that different DGs are involved in the same impact assessment has in a sense made a virtue out of a vice. The vice is the natural suspicion that each DG has for what the other DGs are doing. The virtue is that with an impact assessment procedure they have to speak the language of evidence-based policy and they have to cooperate in the context of preparing an individual impact assessment. These natural tendencies to “DG hair-splitting”, that is, to raise a number of sophisticated questions about whatever comes out of the neighbour (the other DG), have been beautifully exploited by saying “okay, show me the evidence; in what sense are we not looking at this or that cost or this or that benefit that is so important for you?” Lord Paul, you asked me a concrete question, and here is where the bad news comes perhaps! First, I think that the logic of reasoning in the European Commission's impact assessment, particularly the

logic of the intervention behind the policy option, is not always clear. We see too many examples in which essentially the “do nothing” option and the “non regulatory” option are sandwiched and superficially appraised only to show the superiority of the chosen regulatory option. That is not a crystal-clear logic, especially if you think that on average the costs and benefits of the chosen interventionist option are analysed much better than the costs and benefits of the “do nothing” or “non-regulatory” option (the data are in a recent study by Cecot-Hahn-Renda-Schrefler). This again depends on what we are asking the impact assessment to do, whether it is very specific cost information or exploring alternatives to traditional regulation. If we are after the latter, the ‘alternatives to traditional regulation’ or ‘thinking outside the box’ should be where the real value for money of the EU impact assessment is. This leads me to another point: I feel very strongly that there is little point in pushing towards predictive impact assessments, something where everything is costed to the last euro, because we know that regulation at the EU level is a hypothesis or a designed hypothesis that has to be implemented by the Member States via transposition and then via administrative action. So issues like enforcement and compliance are often a big question mark at the EU level. We have seen too much discussion on the accuracy of cost estimates and prediction, and not enough on planning IAs (as opposed to predictive IAs). Planning IAs should facilitate planning through the policy cycle, raising the key questions and choosing the indicators to look at after a rule has been agreed by the legislator—this is what Professor Robert Baldwin has recommended over the years. Those “planning IA” documents should help the policy officers to plan the regulatory cycle, ask relevant questions that the Parliament, the Council and later on the Member States should keep an eye on. This is at the moment an objective that has not been achieved. Again, I want to be fair—I do not think most of the Member States of the EU have done so, so it is a very tall order for both the Member States and the European Commission. Finally, you said about communication: I think there is room for improvement especially in the way the Commission relates to the stakeholders and to the European Parliament. Obviously, the fact that we see the impact assessment only when the proposal is published is perceived by stakeholders as a constraint. They would like to have a system like the American one or the Canadian one where the RIA itself, the regulatory impact assessment, is published for notice and comment. The Commission obviously performs consultation and communicates and poses questions, but the first moment in which people out there consider the full impact assessment is when the College of Commissioners gives the green light to a proposal. That is the moment when you see the logic

19 October 2009

Professor Claudio Radaelli

of intervention and all the things that really matter to the stakeholders rather than specific cost information or a specific question raised in consultation.

**Chairman:** Thank you very much. So far there have been very comprehensive answers to our questions, but if we are going to get through the remaining questions perhaps we can try and compress both the questions and the answers, otherwise we will be keeping you here all evening.

**Q7 Lord James of Blackheath:** Professor, the question as it is written is: how could the better regulation agenda be taken more seriously in the Council and in the Parliament? That seems almost to say, should the better regulation agenda be taken more seriously?

**Professor Radaelli:** I think the European Parliament should take it seriously because of the most likely entry into force of the Treaty of Lisbon with increased responsibilities for law-making, better regulation and majority voting. The European Parliament will be more responsible for the overall quality of legislation. The question is whether the better regulation agenda is there to achieve an objective in terms of quantity—more or fewer rules—or an objective of quality—simple, efficient, and effective laws and rules. I think the quality issue should be pressed on more than the quantity issue. We spoke a bit about this earlier on. Perhaps now it is useful to add that the European Parliament is supposed to perform a task that is much more ambitious than the task asked of other parliaments of the EU, like the national parliaments. Note that we are asking the EP to perform an impact assessment of its own substantive amendments. That is a tall order. We are also asking the Council to carry out an IA of substantive changes to legislative proposals. A powerful incentive to raise the profile of IA in the Council and the EU, which is a kind of nuclear option, would be a scenario where the European Court of Justice during judicial review of regulation considers the IA. In this scenario, the ECJ could start defining some criteria for impact assessment, and say things like “this rule did not provide crystal-clear reasons because there was no decision criterion set in the impact assessment”—something like that would move the legal questions in a direction similar to the US, where the courts, not just the Supreme Court but the courts in general, have *de facto* implemented and expanded the “giving reasons” requirement of the Administrative Procedure Act.

**Q8 Lord James of Blackheath:** Could you give us a very quick reaction to the sub-question here, which is whether the Parliament should undertake impact assessments for amendments to a proposal.

**Professor Radaelli:** The question is clear, and the formal answer is provided by the inter-institutional agreement that says that “they should”. A more sophisticated way of thinking about it is whether we are thinking of the European Parliament replicating the impact assessments of the European Commission, and therefore recalculating costs and benefits when the EP introduces substantive changes—I would say the EP would do this IA only to its own advantage. Or perhaps we should think differently about the IAs performed by the EP. I mean we should ask the EP to state very clearly (in its own IAs of the amendments) whether the overall logic of intervention has been modified, whether the regulatory logic behind the option has been altered by the amendments, and so on.. I am also not in favour of the proposal put forward by some observers that the substantive amendments of the EP should be impact assessed by the European Commission, because there would be confusion of roles, especially for amendments that go against the initial proposal of the European Commission; it would be either legal contortionism, a kind of torture, or a fiction for the policy officers of the Commission.

**Q9 Lord James of Blackheath:** I think I am hearing you say that it is possibly a current omission of the Parliament that it does not do so.

**Professor Radaelli:** The Parliament is bound in principle by the 2003 agreement but they do not perform many impact assessments. Many are performed externally by giving contracts for impact assessment studies. Again, if we think the aim is to create learning and capacity to appraise regulation within the EP, this is not a good solution, and the idea of having the impact assessment studies done outside the EP is not a good solution.

**Q10 Lord Rowe-Beedoe:** Professor Radaelli, I was much taken in your excellent paper by your reference to quality and quantity. However, there are two questions that I think are related, and it may be helpful for you to deal with them together: first, your assessment please of the revised impact assessment guidelines; and, second, the common approach to impact assessment is currently being reviewed: how could it be improved in your opinion?

**Professor Radaelli:** Thank you for this question. The impact assessment guidelines, comparatively speaking, are of good quality and they also provide a useful reference for countries in the Balkans, for Turkey and for new Member States that are looking at the EU as a point of reference, either because they are seeking accession or just because they have aid from, and trade with, the EU. There are however some problems, and I will be very concise. These guidelines, in contrast to, for example, the Office for

19 October 2009

Professor Claudio Radaelli

Management and Budget guidelines in the US, do not set crystal clear decision criteria. They say that options can be compared on the basis of (a) effectiveness, (b) efficiency, and (c) coherence with the overarching objectives of the EU. With these three you can justify anything, depending on how you navigate between one and the others. They also fit in well with the tendency to juxtapose, sandwich-like—as I said—the “do nothing” option, the preferred option, and the alternatives. The most mature impact assessment of the Commission showed that complex regimes always contain a bit of self-regulation and regulation, so they are complexities that are ignored by the guidelines. Also, the guidelines could have been clearer on the topic of the “proportionality” of analysis. On pages 15 and 16 they seem to argue that it is the legal nature of the option that suggests the level/depth of analysis, whereas proportionality should be impact driven and cost-benefit driven. The guidelines seem to suggest that if you have a comitology issue, then you have this kind of analysis; if it is self-regulation you need another type of analysis—the legal nature of the instrument seems to dictate the depth of analysis, which does not make much sense in an IA framework. Finally, there is lack of precision on analytical methods. The guidelines have much improved on this, but they are not as effective as they could be. Currently they suggest cost-benefit analysis, cost effectiveness or multi criteria, but practically the choice—the guidelines suggest—will depend on whether this type of method or that type of method is feasible/appropriate or not, and there is not much guidance on these different techniques. So someone who wants to do cost-benefit analysis has to find guidance elsewhere. I would have liked to see some handbooks complementing the guidance, telling people exactly how to do cost-benefit analysis (like in Canada, where specific handbooks accompany the more general RIA guidelines). When a consultancy firm, in the context of the first evaluation of the IA, asked the policy officers of the Commission if their criteria for analysis and proportionality of analysis were clear, only 20 per cent said they felt they had clear guidance from these documents. But—we should acknowledge this—that questions was asked when the previous set of guidelines was in force—the situation could be clearer now. The second question was about the common approach.

**Q11 Lord Rowe-Beddoe:** The common approach to impact assessment and how it could be improved. I understand it is under review.

*Professor Radaelli:* It is difficult to argue exactly in one direction or the other. There are some options like the ECJ jurisprudence that would raise a lot of interest

for the common approach. The Council at the moment is driven by the logic of composing different bargaining deals, and therefore the impact assessment part of the common approach that takes place at the Council clashes with the bargaining culture of the Council’s working parties. It is very difficult to go by the book in terms of the common approach. I think that before getting into the specificities of a new Utopian common approach, perhaps we should think seriously about more political solutions, like for example an annual regulatory agenda where the big priorities and the big areas of simplification are discussed so that some commitment is created at the level of the Council and the European Parliament. Essentially, the idea of climbing the mountain from the foothills of individual impact assessments that create the right IA culture has not worked well for the Council. Maybe the Council needs to climb the mountain from the top, with a big political commitment and discussion of the regulatory priorities and simplification priorities, and then develop an appetite for the individual impact assessments.

**Q12 Lord Walpole:** Professor, I have been absolutely fascinated by this. What do you think are the main achievements of the Impact Assessment Board, and should the opinions of the Board be binding, and should an independent agency for quality control be set up to ensure that the guidelines are properly followed? There are a lot of things in those questions that are very, very, very important. “Quality” is a very curious word anyway, and what does it mean there? Secondly, surely what we have been talking about today is why some people think the EU is a good thing and other people think it is the most dreadful thing? Is that not true? Is this not one of the nubs of complaints about the EU?

*Professor Radaelli:* Certainly this line of thinking boils down to the question of what should the better regulation agenda “do” for Europe, for the Member States and for the business community and the citizens. Let us look at the US; it is exactly the same set of issues. Some people there say the better regulation agenda is there for the President to control the executive agencies. We have seen Reagan and Bush playing with deregulation, and possibly a distinctive regulatory style during the Clinton years, for example. A similar desire of the Member States to control the Commission via IA is undeniable. Yet some think that better regulation is there for the quality aims of creating a different type of European governance open to the stakeholders, dialogic, evidence-based, less bureaucratic. That is yet again the Janus-face of this topic. You will find people of both camps using the same agenda, EU better regulation, for different purposes. The result is that at the EU level so we do not have the clarity that, for

19 October 2009

Professor Claudio Radaelli

good or for worse, we have in the Netherlands and the UK. We know (almost exactly . . .) why we have a better regulation agenda in the UK—we hope so, we certainly know it much better than those looking at the EU instead. On the Impact Assessment Board—your question—clearly it is one clear case where we cannot have the cake and eat it! Take your question, you asked me should the opinions be made binding. Sure, we could do that, but that would stymie the learning/advice function, the helping hand that the Board gives when, according to its own data, it asks for 32 per cent re-submissions. Maybe that is an indication of the IAB sending the officers of some DGs back to the drawing board. This is—we may argue—precious learning. We may lose that kind of learning with a more adversarial posture of the Impact Assessment Board—that is, binding opinions and more hard powers. We could also make the Board more independent from the European Commission,—as some people want. That independent IA office or redesigned Board would be a good thing if we wish to distinguish the function of steering the Community legislative agenda towards some goals—and that is what the President of the Commission should do in any case—and the function of increasing the quality of analysis before a proposal is made. However, I think that bodies similar to the IAB tend to report to an elected figure like the President or Vice President in the US or are within the organisation. In a sense, if the model is the Office for Management and Budget we have to reflect on the fact that this body reports to the Vice President and ultimately to the President, and it is there to carry out the presidential agenda on regulation and check on the agencies. It is the same debate in the US where people say the OMB cannot provide quality and carry out the presidential agenda and therefore we should have a totally independent Regulatory Analysis Office. This is a bit of a technocratic dream, because where do we find all these “apolitical” experts? And why would people take them so seriously, don’t people take more seriously a body that reports to the President instead? I kind of like the way the Board has worked up until now, but I think it is contingent on some strong personalities at work. If this cannot be replicated—and it is difficult to be sure that the right people are there all the time—perhaps the Board should develop some internal expertise. It is too dependent for content on the Secretariat General. If it has to become more institutionalised, the IAB should hire not just a handful of advisers for methods questions, but hire its own economists, policy analysts, and socio-legal experts in policy appraisals.

**Lord Walpole:** You had better tell them that in the House of Lords we have Crossbenchers.

**Q13 Lord Whitty:** Have you looked at international comparisons, and would the Commission enhance the agenda if we did look at what is happening in

other countries and other international organisations? What should your priorities be when the new Commission is in place?

*Professor Radaelli:* I will answer a little bit through bullet points. Obviously there is a lot of work that the Commission and the OECD should do together, and they have done that. They do peer reviews of the RIA systems of the Member States, and that is important. For the Commission a good way to bind the Member States and Brussels on better regulation goals would be to adopt a common set of regulatory quality indicators. Since we do not know what quality is, one way of getting people to be specific about what they mean by quality is to say, “What are the quality measures we, as a group of countries, want to stick to?” I am not speaking of targets, but of indicators. Specifically, I am thinking of having a process of co-ordination on the better regulation policies through which there is a common understanding of how to measure progress or lack of progress via regulatory indicators. It is a funny thing that over the years, for all the Presidencies’ conclusions on better regulation, there has not been a meaningful commitment to regulatory indicators. That shows the ambiguity about what is meant by the “better regulation” and “regulatory quality” agendas. Turning to another bullet point. From the US and Canada the main lessons are: (1) use these IA tools to focus on rule-making or perhaps primary legislation, but not the White Papers and all the other stuff, so targeting IA is a great lesson to learn; and (2) create professional communities around better regulation. You need the experts to set the quality standards, and then they can tell the Commission, “We would not accept that thing you have done as a cost-benefit analysis; we have never seen something that bad.” (3) be clear on standards, criteria and methods in your guidelines. The guidelines should tell one story and not three different stories about efficiency, effectiveness and ‘coherence’ with the EU goals. (4) insist on the benefit-cost principle for the better regulation agenda instead of looking at this category of cost or that category of cost. We have to rebuild legitimacy and trust in regulation in Europe and elsewhere, so it is very important to think about quality in terms of regulations that have benefits that justify the costs to the community. Priorities for the next Commission is the next bullet point—I think one priority is regulatory indicators –; then stop looking at better regulation tools and look more at the value for money of the whole better regulation agenda, and bind the Member States into some kind of joint commitment to an agenda, via indicators and measures. Finally, we should learn from Canada, the US, Australia and New Zealand, that we should give ownership of the better regulation agenda not to the 100 people in Europe who “do” better regulation in central units, but to the networks that develop policy

19 October 2009

Professor Claudio Radaelli

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in the different sectors—gas, water, audio-visual markets, the media, electricity. Those are the networks that should use the tools of better regulation for their dialogic agenda, for reaching out to the stakeholders and structure their governance relations with the world out there. We have come a long way at the EU level and in the UK but more ownership of policy sectors is needed. Obviously, when we talk about multi-level issues, there are many—in the European Union the better regulation agenda is still very much a hobby horse of 20 or 30 people per country, whereas all the people who develop the legislation, the lawyers, and ultimately the policy teams that formulate policy in specific sectors may have never heard of better regulation tools! Yet it is exactly those people who should use the tools and not the designers of the better regulation agenda.

**Q14 Chairman:** Professor, thank you very much. This has been a collective tutorial of the highest order. May I just ask one favour? If you could reflect on one question which we have not had time to go into, that is *ex post* validation of cost-benefit exercises. I ask that as a former auditor and accountant, used to checking *ex post* what has happened—so if you would let the Clerk know your thoughts and suggestions on that. On behalf of the Committee thank you very much indeed. We will make sure you are given plenty of notice as to when we are going to publish our report.

*Professor Radaelli:* Thank you very much for the great questions and for listening. It has been a great pleasure and a privilege.

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MONDAY 26 OCTOBER 2009

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Present	Bradshaw, L	Powell of Bayswater, L
	Dykes, L	Rowe-Beddoe, L
	Freeman, L (Chairman)	Walpole, L
	James of Blackheath, L	Whitty, L
	Paul, L	

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### Memorandum by the Federation of Small Businesses

#### INTRODUCTION

1. The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the Sub-Committee B (Internal Market) of the House of Lords EU Select Committee inquiry into the Commission's Better Regulation agenda.
2. The Federation of Small Businesses is the UK's leading non-party political lobbying group for UK small businesses existing to promote and protect the interests of all who own and/or manage their own businesses. With over 215,000 members, the FSB is also the largest organisation representing small businesses in the UK.
3. The FSB is supportive of the principles driving the better regulation agenda and agree with the link between regulatory burdens and its impact on business growth/costs. The FSB's own research demonstrates that legislation is disproportionately burdensome to micro businesses and is perceived as a serious barrier to growth.<sup>1</sup>
4. The FSB welcomes the news that Commission President Barroso has taken ownership of the Better Regulation Agenda and that he is keen to pursue this throughout the next term of the Commission.

#### SCOPE OF IMPACT ASSESSMENTS

1. Each year the Secretariat General/Impact Assessment Board decide which Commission initiatives need to be accompanied by an Impact Assessment (IA). These include at least all legislative proposals of the Commission's Legislative and Work Programme (CLWP). However, IAs also take place for non-legislative initiatives such as white papers and action plans. The FSB is of the opinion that for reasons of efficiency only *legislative proposals* should be subject to an impact assessment, so that time is not wasted assessing documents that have little or no impact.
2. It has been proven that the impact of any legislation on small and micro businesses, (which represent the overwhelming majority of all businesses and employment) is very much greater than that on large businesses. Therefore, all legislative proposals that have demonstrable economic, social and environmental impact, and that add costs for small businesses, should at least be subject to an IA which gives due emphasis to the impact on small businesses.

#### THE TIMING OF IAS

3. Legislative proposals from the Commission alter significantly when travelling through the decision-making process. This means that they are only useful if they take place during any stage of the legislative process where amendments have been made: from Commission proposal until after implementation in UK law. Any EU document that has not had a full impact assessment and that will influence the life of small businesses, should be sent back to the previous stage. This emphasises the importance of IAs during passage through Parliament (see below).
4. After the proposal stage the Commission may update the IA report on request of the Council or the EP. The FSB requests that in addition to asking the Commission for an update of the IA, the EP and Council can both undertake IAs themselves. This should be a standard procedure for legislative proposals that add costs for small and micro businesses when their own amendments make significant changes to the proposed legislation. In this light the FSB asks the three institutions to go forward with the development of a common methodology for IAs.

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<sup>1</sup> "Better Regulation ... is it better for Business?" p8 written for the FSB by Professor Robert Baldwin, 2007

### THE ROLE OF MEPS

5. The Commission is rather good at Impact Assessments. If legislation is later modified by the Parliament a subsequent impact assessment is very rarely made. However, they are accountable towards their voters and they should not legislate until they know the consequences of their actions. The IA is a suitable instrument to support negotiations. They should make use of IAs as much as possible and they should reject any proposal put to them that has not had full impact assessment and that has a cost implication for businesses. The FSB asks that MEPs honour their promise made in 2003 to conduct impact assessments when they amend proposals in their committees.

6. MEPS could play an active role in overseeing the legislative process, also on national level. For example, they could make sure IAs are brought to the attention of MPs when they consider a Commission proposal in their Select Committees.

### IMPORTANCE OF IAS

7. Impact assessments are an extremely important part of the learning process when formulating policy. Not only do IAs inform the decision making process but post implementation reviews show the real effects of legislation after implementation. Therefore IAs not only need to be done at all levels and during each stage of the decision making process, they also need to be conducted across the EU so that a more complete and powerful picture of the impact of legislation on businesses is presented. Post implementation reviews of EU legislation should therefore happen in every member state. They could be part of a regulation or a directive, either they could be mentioned in the guidance notes for implementation of directives.

8. The “do nothing” option in IAs is useful as it shows the necessity for legislation (“what would happen if we didn’t take action”). However, the “do nothing” option should be extended to “non-legislative” instruments or the use of market-based instruments as an alternative to legislation. This would show that everything has been done to avoid legislation and that legislation is the only solution to solve the problem.

9. When conducting an IA, the regulatory pressure throughout the entire regulations chain should be taken into account. This means that as well as administrative burdens there should be attention on the compliance costs. These are the costs of measures businesses have to take as a result of new legislation. For example, environmental legislation not only creates administrative burdens but also compliance costs, such as the costs of greener equipment.

### CONSULTATION OF STAKEHOLDERS

10. Small businesses do not have the time to respond to consultations. Few small business owners have law degrees. They have difficulty understanding regulatory language and Euro-jargon. This is where the FSB comes in: we put their opinions across on their behalf. If they would like to respond individually to consultations—and this is what the Commission is very much in favour of—the threshold to do so is very high due to jargon and regulatory language. A good example is the recent consultation on the Green Public Procurement Criteria. The text describing the criteria and specifications which were the subject of this consultation posed a long and difficult read. They were not easily accessible for small businesses and non-specialists. This meant that the consultation missed out on important input. The fact that the documents were extremely “off-putting” for important stakeholders goes entirely against the spirit of the “think small first” principle. The FSB urges the Commission to cut out the Euro-jargon and technical language, and to keep consultations short and simple so that it is easier for small businesses to contribute.

11. It is often not the policy principle behind a regulation but the subsequent administration for small businesses that proves expensive and time consuming. Consultation with outside bodies (like FSB), both during the policy formulation phase, and during both the evaluation of IAs and the period after legislation, when evidence from the field enables informed review and amendment, is therefore indispensable.

### THE ROLE OF THE COMMISSION

12. Implementation of directives by member states leaves room for different interpretation and over-implementation, the latter is known as “gold plating”. Concordance and conformity tables could prevent differences in implementation between the member states as they would show extra requirements in one country compared to the other country. Conformity tables therefore contribute to a uniform implementation of directives across the EU, creating a level playing field for businesses throughout the EU. The FSB calls on the Commission to oversee that EU member states abide by their 2003 agreement to publish concordance and conformity tables when transposing EU directives. As set out in the agreement between the Council of Ministers, the Commission and the European Parliament in 2003, concordance or conformity tables should be compulsory and should be communicated to the European Commission.

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**CONCLUSION**

1. In conclusion, the FSB supports the Commission's Better Regulation Agenda and its principles to improve the regulatory environment for the business community. However, evidence to date demonstrates that there is still some way to go as far as small businesses are concerned.

2. With regard to progress on the Commission's Better Regulation Agenda, the FSB has the following messages:

- Only legislative proposals that have an impact on businesses should be subject to Impact Assessments;
- Impact Assessments should take place at all levels and at each stage of the decision-making process;
- MEPs have an important role overseeing this and should lead by example;
- Post implementation reviews for legislation that affects businesses should take place in every EU country;
- The Commission should see to it that member states publish conformity tables when implementing EU directives;
- Consultation with outside bodies (like FSB) is a necessity, in order to have the business point of view on the potential administrative burden of legislation;
- Documents for consultations should be written in plain English, avoiding EU jargon and technical language.

25 September 2009

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**Examination of Witnesses**

Witnesses: MRS TINA SOMMER, EU and International Affairs Chairman, FSB and Ms SIETSKA DE GROOT, Senior EU and International Affairs Policy Adviser, FSB, examined.

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**Q15 Chairman:** May I, first of all, thank you both very much for coming. We are in the early stages of this inquiry and we are hoping to publish some conclusions in January. We have a number of other evidence sessions yet to come including our own Minister and the Commissioner. Without more ado perhaps I could turn to you both to introduce yourselves before we start the questions.

*Mrs Sommer:* My name is Tina Sommer. I am the Chairman for International Affairs for the Federation of Small Businesses. I am also a member of FSB and, therefore, a small business: I run a company in Wales.

*Ms de Groot:* I am Sietske de Groot. I am the Senior Policy Adviser EU and International Affairs for the Federation of Small Businesses. I started in June and, as you can see from my name, I am not British but I am Dutch.

**Q16 Chairman:** We are all Europeans!

*Mrs Sommer:* I am actually German but I now have British citizenship and am very proud of it.

**Chairman:** Thank you again to both of you for coming. We will make sure you see the draft of the oral evidence and do feel free to correct any misunderstandings on our part or the part of the Shorthand Writer.

**Q17 Lord Bradshaw:** Thank you very much for your evidence. I find there is a slight contradiction in it in that in argument you say only legislative proposals

should be subject to an impact assessment and then you go on to say further down, and others no doubt will take it up, that small businesses find it very difficult to understand and they get very taken up with the small print of the regulations which are published. I know from my own experience that people in small businesses, as it were down at the bottom, who are busy running the business find it very difficult to understand the language. Will you clarify what you actually mean by only legislative proposals?

*Mrs Sommer:* I have to clarify that because I think there is perhaps a slight misunderstanding. We had another chat about it so let me clarify the way we think now to make this absolutely clear. We believe an impact assessment has to be done for legislative and non-legislative proposals. I will give you a very practical reason why we think that now. I am heavily involved in CEN standards. I know that we had proposals for what was called the enhanced supply chain security which was rebuffed by the Parliament, it did not go further as a proposal but it has now turned up as a standard. It is not a law; it is a standard which is supposed to be voluntarily but as such it does not have an impact assessment and as such it does not measure what it does to small business. I believe it will impact greatly on small businesses and I am fighting that in a different corner. Thinking about that example, we really need to see what the proposal is, whether it is legislative or non-legislative, could there be an impact on small business and, if so, we

26 October 2009

Mrs Tina Sommer and Ms Sietske de Groot

definitely need an impact assessment. With regard to understanding proposals, that is a slightly different issue in my mind in that proposals are extremely difficult to read. I totally agree with you. I have to read them because half my time is as a business person and half my time I am a delegate for the FSB and a small business. I have learnt a lot over the years how to understand the jargon. I think the proposal itself probably has to be in a legal language. It is a legal document and in the end if there is a dispute it will be fought out in a court and, therefore, it has to be in legal language. The FSB, for instance, spend a lot of time explaining to our members what it means provided there is not too much legal implication and then we have to talk to lawyers. In the explanation of what it does, and these proposals do have explanations beforehand, these explanations can be kept very simple so we know what it is about, what it is trying to achieve and then it can be understood.

**Q18 Lord Bradshaw:** Can the impact assessment you are talking about be done also in a very simple way or is it going to take months and lots and lots of work to do it?

*Mrs Sommer:* Again, I think there are two different things here. It can be done in a simple language so we understand what the impact is. Why it takes so long is if you want to look at all aspects and you want to get the actual figures and you have to speak to people, to consult with them, that will take time.

**Q19 Lord Bradshaw:** That is why lots of small businesses actually end up getting legislation and other things thrust upon them and feel they have not been adequately consulted.

*Mrs Sommer:* Just to clarify, if I was not in the FSB as an activist interested in this I would not read any of this ever. I would look at the two dates we have in the UK which tell me in April and October there are new laws coming in. I will check out which ones may apply to my business and that is all that interests me. By that time it is all far too late. The train starts in Brussels and when it comes to the UK it is already half-way in the station so there is not much room for manoeuvre. Because I have chosen to look into these things, obviously I have to look at it, but to get feedback from our membership we simplify, we write it up into one page or we do a survey in simple terms.

*Ms de Groot:* What I have to add to this on impact assessments is I know that the UK is trying to keep it at one format, a fixed format, with key information in it so that would be understandable for everybody. That would be good to try for the European Commission as well because now there are very long documents that nobody reads.

**Q20 Lord Dykes:** One of the witnesses was saying a while back that the UK administrative burdens campaign has not helped the Commission's impact assessment system because it punches the logic of integrated impact assessments. How would you comment on that?

*Mrs Sommer:* I cannot because I do not know what they are on about to be totally honest. I can tell you what we think about it. The way we understand it is that integrated means that you look at the economic impact, the social impact and the environmental impact. From this point of view, if it is done right I think it is a good way of doing it because I believe, especially on the environment, there is a lot of environmental legislation that is going to come in the next couple of years and we do not know what the impact will be, possibly indirect, to small businesses unless we do an impact assessment. It will make it more complicated because you have to look at different areas, not just on the business economic side but also the social and environmental side, but in the interests of all of us the more comprehensive it is the better will be the outcome of the law in the end.

**Q21 Lord Dykes:** What was the fifth element?

*Ms de Groot:* Another interpretation of integrated impact assessment could be that you not only look at administrative burden, administrative costs, but also at policy compliance costs. Currently the Commission's Better Regulation agenda is now starting to look at the latter.

**Q22 Lord Dykes:** That is policy compliance both from central government and other branches of it and the regulators? The compliance costs are obliged to come out of legislation inflicted by both the regulator and government.

*Ms de Groot:* Yes, the compliance costs that are in the final regulation that comes out, actually what it means in practice for a small businesses no matter where that comes from.

**Q23 Chairman:** Perhaps you would comment on whether the proposals made from comitology should also be covered?

*Mrs Sommer:* I do not see where the difference is between whether it is done under comitology or not. In the end what we want to know is what it is going to do to small businesses whichever way you choose to do it. The impact is what we want to measure and whichever way it comes in I do not mind.

**Q24 Chairman:** Sometimes the European Union language could use words that are not immediately understood by half the population.

*Mrs Sommer:* I had to look this up. I did not know what it means.

26 October 2009

Mrs Tina Sommer and Ms Sietske de Groot

**Chairman:** Perhaps, Lord Powell, for the record for those reading our proceedings if you could give us a definition of comitology.

**Q25 Lord Powell of Bayswater:** It is basically the internal workings between of the Commission and the Member States rather than the formal Council legislation. I agree with you; it is entirely irrelevant to you. Whatever comes out of Brussels you have to comply with and that is what you want to know the impact of.

*Ms de Groot:* We have now understood that the question of what needs an impact assessment and what does not is a very complicated one. There is a whole plethora of documents coming out of the Commission including comitology documents but also studies, action plans, green papers, white papers and this is really a difficult question that we cannot really answer at this moment. Even if we have written in our written evidence that we prefer legislative proposals, we realise the question is actually quite difficult to answer.

**Q26 Chairman:** It is the overall impact on business.

*Ms de Groot:* That is what counts.

**Q27 Lord Paul:** We believe that there are two objectives on the impact assessment: providing an effective tool for effective policy planning and an aid to decision making and serving as a valuable communication tool. To what extent do you think the Commission's impact assessment system has achieved these objectives and are there any other objectives?

*Mrs Sommer:* I think it has to a degree because if a new proposal comes out and there is an impact assessment it is the impact assessment I look at first because it has to look at all the pros and cons, the dangers, the benefits and that gives me an instant idea what it is about. I think from our point of view it is useful. We just spent time with some Conservative MEPs across the road and they also read the impact assessment first so that is a good way of saying this is a document which will help the decision-making process right from the start if it is done correctly. I have had not such good experience with an impact assessment when they disappear off the website and are replaced by something else which is not so good.

**Q28 Chairman:** Can you give the Committee some examples in your experience over the last few years of proposals that affect business coming from Brussels, agreed also in the Parliament and the Council after a proposal by the Commission, where the impact assessment has either be misleading or was not done correctly and underestimated the impact on business?

*Mrs Sommer:* I can tell you about the enhanced supply chain security because I was very heavily into it. There was an impact assessment which I printed out at the time. It was at least four years ago now. It was a heavy document. I read it and was absolutely horrified because the implication of the cost for small business was something in the range of 100,000 EUR per year. Most of our members do not even have that kind of turnover let alone can afford that kind of cost so that sparked me into action. Then a couple of weeks later I wanted to show this to my colleagues and this original impact assessment was not on the website any more but there was a shorter version which was much more amenable to the proposal which I think was definitely absolutely wrong. I was just starting in this so I did not have much experience. Unfortunately I do not even have the original document any more because I did not understand at the time what the implications were. Having said that, that was four years ago and I do believe it is much better now. You can find impact assessments quite easily and they do give you a much better picture I have to say.

**Q29 Chairman:** What is the mechanism for you to disseminate information to your membership?

*Ms de Groot:* The FSB is a good body to consult with on those issues. What we notice is that we remain the intermediary between the policy makers and our membership. Of course it would be preferable to talk to a small business directly but unfortunately that does not work because it is still too difficult to do that. Our advice to the Commission is to put themselves into the shoes of small businesses and think where they would go, what they would want to know and make the communication better, for example through websites dedicated to impact assessments and/or consultations. We always will be there because policy will remain complicated but a lot could be done to make it much simpler for small businesses. Of course in the first instance you can direct yourself to us and we can refer you to our members.

*Mrs Sommer:* There are also very practical steps we take. Obviously we do a summary. We do surveys on specific issues which we know will come up again and again and that survey information is available to the UK government as much as to the Commission of course. If we have an industry-specific proposal where we need real expertise, which I just had on CE marking and the construction material directive which is another horror, then we need people who work in that industry. The FSB database is extremely good in that we can pinpoint the right industry in various locations. We can contact the members who know about this and they can either feedback on the papers we send them or you take them straight to Brussels. This is where the FSB is perhaps different. I am a business person. I go to Brussels but I am not

26 October 2009

Mrs Tina Sommer and Ms Sietske de Groot

the only one. We get up to 100 or 200 people over there on specific issues for a specific industry because that is the feedback.

**Q30 Lord James of Blackheath:** This question 4 looks deceptively simple but I expect it is not. We would like you to tell us how to ensure that the impact on small businesses is taken into account when preparing IAs and whether you think this is effective. I would like to spin that question slightly differently and ask you whether you consider that the process of IAs, which is brought from a wider form of government, is appropriate for small businesses, whether it asks the right questions and whether or not small businesses are fully equipped to understand and answer correctly.

*Mrs Sommer:* I do not think it has in the past but the SME test may just get us there. It is very early; I have not actually seen an impact assessment with a real SME test personally so I cannot really tell you what it is. What it is supposed to do in the guidelines of the Commission looks pretty impressive to me. It does look at compliance costs and that has always been neglected. It is not just about administration costs; the compliance cost is important. What is also extremely important is does it make you less competitive because that is a fact which has a major impact. If we all of a sudden have supermarkets on every corner, you can safely assume that the retail business will become uncompetitive. It depends what it is but these are questions which I think are absolutely important. It also stipulates that the consultation process has to be much more stringent and much more widespread. They have all kinds of means to use now from on-line surveys to focus groups to the organisations of course. By the way, I may also explain that I am president of a pan-European organisation so I work with organisations throughout the EU and we are heavily involved in the consultation process as a pan-European organisation as well. I think the description seems right to me. We were very pleased to see it when it came out with an SBA but I have to see it in practice.

**Q31 Lord James of Blackheath:** Could you explain because I do not understand this? How far will the process depend upon the answers coming directly from the small businesses themselves or how far will they reflect the opinions of the association on their behalf because that could be a big distortion?

*Mrs Sommer:* That is a very good question. Now I have seen that, I have spoken to the Commission about it, especially DG Enterprise, and I asked exactly the same question. If it is an on-line consultation, they get responses from organisations be it pan-European or be it national but they also get responses from individual businesses. We send these consultations out to our membership and they can

log on and do the survey themselves. They do not need to wait for the FSB to do something. The Commission then ends up with about 500 responses, which seems to be the average roughly from what I hear. Some of them are organisations and some of them are individuals. I had this very argument with another pan-European organisation where they said “We are an organisation and our consultation paper should have more weight than the response from an individual business.” I was not sure what to think of this so I spoke to the Commission, the SME envoy, and I said “How do you treat this?” and they said they treat them all the same and in fact use one as a balance against the other. If an organisation does not consult with its members, the actual small businesses, they can say what they like. How does the Commission know they are really representative? If you then have individual companies from anywhere in the EU who also give a response and that matches roughly with what the business organisations say, you can say that at least they have consulted and this seems to match. Good ideas come from individual companies just the same as from organisations. From that point of view, they say they are giving equal weight. How this translates I cannot tell you because I am not there when it actually happens. How this compares to the voice of large business or other interest groups, I have no idea.

**Q32 Lord James of Blackheath:** Is it possible that because of the complexity of the different trades that the small businesses are engaged in that the overview that you can put upon it does not fully reflect the predominant impact of one group of businesses in one activity and the effect that would be received and experienced by others in parallel but different businesses?

*Mrs Sommer:* We cannot cover everything; we have to focus. We usually focus on legislation that affects as many members as possible. However, we have had instances where a particular group of businesses in an industry heard something that they did not like and then made a lot of noise in the FSB and said we have to look at that. What we then do is we team up with the trade organisation of that particular industry which has the technical knowledge and we give weight by supporting them.

**Q33 Lord Whitty:** In general the impact assessment is produced relatively early in the process by the Commission. It may not be right at the beginning but it is before the proposition goes anywhere else. It then goes into a legislative process which can change a proposition. Is it your case that every time a change is made, whether by the Commission itself or by the Council or by Parliament, we should have a new

26 October 2009

Mrs Tina Sommer and Ms Sietske de Groot

impact assessment and that, for example, MEPs proposing changes or EP Committees proposing changes should have their own impact assessment?

*Mrs Sommer:* Impact assessments measure whether there should be a legislative proposal or not. There are alternative options like non-legislative measures or doing nothing. The impact assessment looks at that; it is one of the first paragraphs you read. You have to have it at the beginning because when you have a proposal you have already decided you are going to have a proposal so I think it needs to be at the beginning. What then happens is when it goes to the Parliament, and they may make substantial changes, like for instance the Services Directive, then I believe that another impact assessment has to be done for that section. It does not mean all of it has to be done; it depends on the case. I have spoken to Malcolm Harbour and asked him exactly that question because the last time I heard the Commission said if the Parliament makes an amendment or many amendments then they should be responsible for doing the impact assessment again. The Parliament used to say to me "It is the role of the Commission to do impact assessments. We do not have any money for this and we have not got the expertise." Today I learned they do have a budget for it and they do impact assessments on amended proposals. I do not know what the reality is; I will have to check it out. One way or the other we do not care that much who does it as long as it is done properly according to the same guidelines and at a speed that actually justifies it. There is an argument going back and forth and I do not know what the reality is at the moment. The same would apply to amendments of the Council of course.

**Q34 Lord Whitty:** In Council you might be able to control the situation because the proposal would be very fairly limited but looking at an average day in the European Parliament there may well be 95 amendments down on that Order paper. Would you expect the MEPs to produce before they were proposed or would you have a filter system and say some are more important than others?

*Mrs Sommer:* I have to make this up on the hoof now. If you have 95 amendments and only 30 go through, these 30 are actually substantive then I would say you have to measure. It is no good measuring before they go through because they may never go through. They do it I learned today and I will see Malcolm Harbour when I am next in Brussels and ask that very question: when exactly is it done.

**Q35 Lord Whitty:** I cannot recall having seen a proper impact assessment. There are occasionally things they call impact assessments.

*Mrs Sommer:* This has to be investigated, yes; I agree.

**Q36 Lord Whitty:** Logically it should be here before the Parliament votes on it.

*Mrs Sommer:* Yes, it should but I do not think that is the case. I would be surprised.

**Q37 Lord Powell of Bayswater:** Have you ever seen an impact assessment which says this is a complete load of rubbish and we do not need legislation?

*Mrs Sommer:* Yes. I cannot remember which one it was but I see that a lot where I think why are they still having this proposal. The argumentation is perhaps where the impact assessment is potentially not really well done because it says this is the reason why we have to have it and the reasons why you have to have it are not always terribly clear to me. Then again I am just a small business. I would challenge that obviously but it is not always clear. At least in an impact assessment you can see something, you have something on the table and you can talk about it. If you do not have that, you have nothing. I cannot find a reason how come we are getting a standard initiated which is no voice for small business, there is no impact assessment, out of 27 standards bodies only five are present and from these five at least two I know do not want it and still the whole thing is going forward. Who is driving this? I have absolutely no idea and I am trying to find out. These are the magic things in Brussels.

**Q38 Lord Whitty:** Can you tell us what standards we are talking about?

*Mrs Sommer:* Enhanced supply chain security standard.

**Q39 Lord Whitty:** An alternative to regulation.

*Mrs Sommer:* Yes. That was a proposal which was rebuked, and we fought very hard for that. Then it came back as a standard at a cost for businesses of 100,000 EUR a year. I am trying to stop the standard obviously. It is considered to be voluntary but if you have a supply chain security standard against terrorism you can only have a chain as secure as all the individual links are. There is nothing voluntary about that link because if two suppliers out of the four in the chain do not do it, you do not have a secure link any more. Where is the voluntarily bit here?

*The Committee suspended from 4.33 pm to 4.43 pm for a Division in the House.*

**Q40 Lord Rowe-Beedoe:** Before we were interrupted and before asking the question I was complimenting you on the wisdom of two choices: one, your university and, two, setting up your small business in Wales. I was very interested in the FSB in Wales at one stage of my life. In your evidence you suggest that

26 October 2009

Mrs Tina Sommer and Ms Sietske de Groot

there is a certain over-complexity in the consultation process with the stakeholders. I think you demonstrated and give examples of the attitude towards these IAs. Do you not think there needs to be some form of complexity in order to ensure we get an accurate feeling rather than a broad brush response to the process of consultation?

*Mrs Sommer:* Yes and no. Yes, in terms of the legal side of a proposal because it is a piece of law, and no because I think it could be simplified in places depending what it is. Let me give you an example where I think things have become overly complex: a proposal that is part of the Construction Material Directive. This proposal states that any kind of construction material has to have some CE marking, which is a certain standard, if it is distributed in the internal market which, on the surface, makes absolute sense. The consumer needs to know what they are buying and whether they are buying it from Finland or Holland or wherever. They have come up with an exemption or making it easier for small businesses instead of having CE marking. I asked the question what if I am a timber merchant in Wales and my timber never leaves Wales; it is for the local market. Why do I need CE marking which is going to add, according to a Finnish organisation's calculation, about 50 EUR per cubic metre to the consumer? Why do I need to add this when it goes absolutely nowhere? Another example of something that is very complex for small businesses are the (voluntary) Green Public Procurement Criteria. We were asked to comment on these but the technical specifications are 30 or 40 pages long. They are so complex that when I had a quick glance at it I could not believe it. I thought nobody, no small business, is ever going to read this. These criteria should help the public procurement process, especially for public purchasers to know what they are buying, but I cannot see any procurers reading that either. That is where it goes too far. There are certain accuracies that have to be done to be absolutely sure what we are talking about but then there are areas, usually attached additional information, where I think it can be easier. It is also the FSB's role to make it easier and translate what is coming out of the Commission for our members. That is exactly what we do.

**Q41 Lord Rowe-Beddoe:** Of your approximately 215,000 members, how many of those do you actually engage on average in a year in consultation?

*Mrs Sommer:* I could not tell you because it is done on various levels. We engage some on a European level, some on a national level and it goes to branch level where they are very local. They sit on local committees and in Wales and Northern Ireland and Scotland they do their own thing with their respective public bodies. I do not know.

**Q42 Lord Rowe-Beddoe:** You do not have a feel for the number.

*Mrs Sommer:* I do not know how many meetings they go to or who is going. There are thousands of activists but they do this on different levels. I do not think there is anybody in the FSB who knows that because members are fairly free to do what they want.

**Q43 Lord Rowe-Beddoe:** I understand that but, on the other hand, you are talking about a substantial membership and I thought it would be interesting to get some feel.

*Mrs Sommer:* We could find out if we go around all the regional organisers and ask how many have you got active but I do not think anybody has done it so I do not know.

**Q44 Lord Powell of Bayswater:** In business when you want to make an investment you make an assessment of the market and the prospects for your product or the service you are offering. Then a year or two later you conduct a post-investment review and decide whether you got it right, whether it is producing the returns you wanted or if it has been a pretty lousy investment. Do you not think there ought to be the same thing in Europe, not just the impact assessment brought forward at the time of the legislation but to look after the event and say is this working and if not we ought to get rid of it?

*Mrs Sommer:* I totally agree.

**Q45 Lord Powell of Bayswater:** Do you think it will happen?

*Mrs Sommer:* The Commission will say they are reviewing legislation every three or five years. This is a good thing, but I think there should also be a post-implementation reviews. I discussed that with my colleague just before we came in if this should be done EU-wide, but we have no opinion on this yet. I cannot give you a policy as such but discussing it we thought it may be a little difficult to do that EU-wide because when you are talking Directives it is implemented differently in different countries. It is not all the same which is the problem with Directives. My former colleague also said it creates the Himalayas; it is not a playing field that is levelled. It is difficult then to assess that. In general I would say yes. We could start with scoreboards, some are available and some are not, just to find out if directives have been implemented properly. Have they been over-implemented or under-implemented? There is a lot of talk about gold plating in the UK—I got a lot of complaints from small businesses -, but when you go to Sweden you have more of a problem with under-implementation. . How to do it in detail I would not dare to answer right now but in principle yes. Scoreboards would be a good starting point if they were everywhere and then extend the

26 October 2009

Mrs Tina Sommer and Ms Sietske de Groot

scoreboards as much as possible to what would be a post implementation review.

**Q46 Lord Powell of Bayswater:** Is it in practice your experience that we do over-implement here, we gold-plate and are much more vigorous than others?

*Mrs Sommer:* We know so because some years ago we looked at it very clearly and there were eight pieces of law which we looked at and five of them were definitely gold plated.

**Q47 Lord Powell of Bayswater:** That is a competitive handicap to you.

*Mrs Sommer:* I can be. It depends on what the over-implementation actually is.

**Q48 Chairman:** One way of ensuring that there is a review of the costs and benefits is to have a sunset provision. Do you have a feeling on that?

*Mrs Sommer:* Sunset clauses we are absolutely in favour of. There is no discussion; that is absolutely perfect.

**Q49 Lord Walpole:** I come for Norfolk and there are an awful lot of your relatives who live there. Presumably they came over in the 17th and 18th Century. Every church you go to you find tombstones to them and that sort of thing. We have been co-operating for many, many years or I hope we have. I was going to ask you a question about whether you thought the IAB in fact was totally clear of party political tendencies. I got the impression from someone else we asked last week about that that he was not happy about it. I have not read the transcript so I do not know exactly what he said but do you think that the IAB is perfectly fair and straight forward?

*Ms de Groot:* I am afraid I cannot answer this question. Where is that referred to in our written evidence?

**Q50 Lord Walpole:** It is not. I am asking for an opinion.

*Mrs Sommer:* What do you mean by IAB?

**Q51 Lord Walpole:** The Impact Assessment Board. Are they OK or not OK?

*Ms de Groot:* The IAB decides which proposal is going to have an impact assessment or not and usually that includes the Commission working programme. Because it includes that programme most proposals are included. For everything that is outside the working programme, because it has come up in a later stage I cannot answer this as I have no experience with this yet. The IAB is quite good but they only look at procedures and not always at content. They do not look at the rationale of a

proposal. At the moment that is their limit. We will see if that is going to change.

**Q52 Lord Walpole:** That is a helpful remark. What priorities should there be for the Better Regulation agenda for the new Commission once in place?

*Mrs Sommer:* I have set the priorities and they actually agree with all of them. Mainly I would say if I have to pick one I would say “think small first” because that is really key that affects us. Whatever you do, think small first, and that applies to any government in the EU and the world I would say. Whatever you do, think is it going to be good for the small ones or are they going to struggle and if they are going to struggle and we still have to have it for safety reasons or terrorists or whatever then we have to make it simple so they can actually comply. We are in favour of exemptions which I think the Commission is considering. The SME test is good from a description but we have to see how it works out. Commencement dates throughout the EU: two a year would be nice if that is possible. The UK is well ahead of this which is really helpful to small business because finding out what you have to do is one of the biggest headaches we have. Scoreboards to compare implementation of the directives in the EU27 would be good. It is all well and good for us to be whiter than white and implement—I am not talking gold plating but just implementing—and you have other countries where not much happens at all. That is not fair and is basically distorting competition especially for the internal market for companies who do go around and I think that needs to be rectified. Maybe lastly what I would like to mention is not to just look at administration costs but at compliance costs because they are usually much higher.

*Ms de Groot:* One point which is very important is communication: communication between the Commission and small businesses. The Commission have expressed several times that they want to reach small businesses, but they have to adapt their communication strategies for that. The place where you advertise your consultation or where you can find impact assessments is very important.

**Q53 Chairman:** Thank you very much indeed. Are there any closing comments or points that you would like to emphasise? We have an evidence session with the Commission in due course. Are there any particular points that with your knowledge of the system you think we should be pursuing further? You can judge by our questions what our concerns are but have we missed anything?

*Mrs Sommer:* I do not think you have. The one thing I do not know, which you may know, is I am being told that every proposal now whether legislative or non-legislative has an impact assessment and I do not think that is the case. I would ask that question.

26 October 2009

Mrs Tina Sommer and Ms Sietske de Groot

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**Q54 Chairman:** That will be our first question.

*Mrs Sommer:* I am getting different messages. To be honest, I do have a business to run and my colleagues have lots to do and we cannot check all this out because that will take days and days.

**Q55 Lord Powell of Bayswater:** It should be the case but it is not the case.

*Mrs Sommer:* Yes, and that answer is not good enough.

**Chairman:** On that note we will conclude the formal session. Thank you very much.

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MONDAY 23 NOVEMBER 2009

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Present	Bradshaw, L	Paul, L
	Dykes, L	Rowe-Beddoe, L
	Freeman, L (Chairman)	Walpole, L
	James of Blackheath, L	

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### **Memorandum by the European Commission**

#### GENERAL INTRODUCTION

Improving the quality of new policy initiatives, especially of regulatory proposals, is the essential aim of the EU Better Regulation agenda. In line with international best practice, the Commission believes that the most effective way of creating a better regulation culture is by making officials who are responsible for policy development also responsible for assessing the impacts of what they propose. This has been a key feature of the impact assessment system which the Commission has been developing and implementing since 2002, and which it believes has changed, and is still changing fundamentally, the working culture of the institution. This has been reflected in both the quality and the number of IAs. Since 2002, the Commission has completed over 400 impact assessments. In 2008, 135 were carried out. The system has a number of characteristics worth highlighting.

First, the Commission is convinced that an integrated approach to impact assessment is the most appropriate way of ensuring that the measures it proposes are necessary, pertinent and cost-effective; and of high quality. Impact assessments therefore analyse both benefits and costs, and aim to address in a balanced way all the significant economic, social and environmental impacts of a possible initiatives, including the administrative burdens they may generate for businesses, citizens and public authorities. This approach ensures that all relevant expertise within the Commission is used, together with inputs from stakeholders during the consultation process. It helps to enhance the coherence of initiatives across policy areas.

Second, to help to ensure that impact assessments conform to quality standards and procedures, the Commission set up an Impact Assessment Board (IAB) which operates under the authority of the President and is independent of the policy making departments. Its task is to control the quality of Commission impact assessments based on Impact Assessment Guidelines drawn up for the Commission services and which are also publicly available. The IAB has examined and issued opinions on all the Commission's impact assessments since it became operational in early 2007. It has improved policy quality by providing detailed recommendations, also requesting resubmissions of a significant proportion of impact assessments (32 per cent of cases in 2008), and through the general advice it has offered to the College to further improve the quality of impact assessments.

Finally, the Commission has put in place a system which is transparent. It promotes greater transparency in the process of policy making by involving stakeholders extensively in the preparation of Commission proposals, and all impact assessments and all opinions of the IAB are publicly available once the Commission has adopted the relevant proposal.<sup>1</sup> The IAB produces an annual report on its activity.

While the Commission believes that it has put in place an impact assessment system which compares favourably with international best practice, it is conscious of the need to continue to improve the system, the quality of the impact assessment reports themselves and, ultimately, the corresponding initiatives. As indicated above, the IAB is playing a key role in improving quality and in stimulating learning in the Commission's services. The Commission will continue to complement this system with measures to strengthen further the culture change brought about by the IA process, to increase the sense of ownership of the system, and to strengthen the necessary skills and on-the-job training.

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<sup>1</sup> [http://ec.europa.eu/governance/impact/practice\\_en.htm](http://ec.europa.eu/governance/impact/practice_en.htm)

## QUESTIONS

1. *Whether the right proposals are chosen to be subject to impact assessment or whether all legislative proposals should be accompanied by an impact assessment;*

The Commission made a commitment in 2005 to carry out IAs for the initiatives on its work programme (known as the Commission Legislative and Work Programme or CLWP), as this contains the major policy defining proposals with the most far-reaching impacts. There are certain minor exceptions to this commitment, for example Green Papers (which by their nature come early in the policy-making process), and recurrent decisions and reports. For 2008–09, the Commission has broadened the scope of application to cover all legislative and quasi-legislative proposals with significant impacts, ie also to those important proposals which are not on the CLWP.

The principle underlying the Commission’s approach is to focus resources on those initiatives which are likely to have significant impacts (what in the jargon is known as the principle of proportionate analysis). The amount of work and the depth of analysis should also be balanced against the significance of the proposal and its timing.

The decision on whether a proposal should be subject to an impact assessment or not is made on a case by case basis. In autumn of year n-1, the Secretariat-General screens systematically all the initiatives planned for year n to identify those initiatives which have potentially significant impacts or which are particularly politically sensitive. (The initiatives are contained in a data base known as Agenda Planning). The final list, agreed with all of the policy departments, is sent to the services by the end of January of year n. In case of disagreement, the Impact Assessment Board may prompt a policy department to submit an assessment. From 2010 on, this list will be made public.

In addition, as important policy initiatives start to take shape in the course of the year, decisions are taken on a case by case basis as to whether an impact assessment will be appropriate. It is increasingly the case that the Annual Policy Strategy agreed in the early Spring of year n-1 acts as a green light for departments to start work on impact assessments that will come to fruition the following year.

Finally, the Commission recognises that secondary legislation (“comitology” proposals) can have an important impact. It is therefore currently examining how to identify where such proposals would benefit from impact assessment.

The Commission does not believe that the need for an impact assessment on a European initiative can be easily established on the basis of objective ex ante (quantitative) criteria, as is the case in the US or the UK. The Commission’s integrated approach to impact assessment requires that even impacts that cannot be easily quantified/monetised, or may be limited in their total size, should nevertheless be fully considered and analysed if they have important repercussions for specific groups, sectors or regions. It is therefore not feasible to develop an operational set of ex ante criteria to reflect sufficiently the degree of diversity of the various policy initiatives, including in areas such as justice and home affairs, taken by the Commission, and the fact that impact assessments are carried out for both legislative and non-legislative initiatives.

2. (i) *Whether impact assessments are produced early enough in the legislative cycle to influence the proposals adopted by the Commission;* (ii) *whether they are suitably updated following negotiations so that the impact of legislation agreed between the Council and European Parliament is properly understood; and, if they are not, (iii) how the process could be changed.*

(i) The Commission’s impact assessment system is designed in such a way to ensure that assessments interact with the design of policy proposals. As mentioned above the fact that impact assessments are prepared by the same officials who prepare the policy proposals is important in ensuring that this is the case. In most cases the actual drafting of the impact assessment report is the last stage of a much longer process that includes in-depth evaluations of current policies, broad consultations on Green Papers and background studies. The Commission’s IA Guidelines emphasise the importance of this “process” character of impact assessment.

The Commission is nevertheless aware that if the preparation period for IA reports is too short, this may limit the benefits they have for policy preparation. The IAB identified this in its Reports for 2007 and 2008, and the Commission has taken measures to improve the situation (3rd Strategic Review). The revised Impact Assessment Guidelines of 2009 stress the need for sound planning.

(ii) An impact assessment is not intended to be a substitute for political decision but should present the problems and options to address them in a transparent way to inform the political decision makers and the general public. The Council and the EP acknowledged in 2003 that the proper use of impact assessment throughout the policy-making process is a joint responsibility of the three Institutions. The three institutions (Commission, Parliament and Council) agreed a “Common Approach to Impact Assessment” in 2006. The

Commission remains convinced that the provisions of paragraphs 13 and 14 of this Common Approach are essential, for example “The European Parliament and the Council will take the impact assessment of the Commission into full account when examining the Commission’s (...) proposals (...) they undertake to carry out impact assessments, when they consider this to be appropriate (...) prior to the adoption of any substantive amendment)”.

(iii) The Common Approach is currently being reviewed. The Commission is of the view that it provides a sound basis for each of the institutions to develop their approaches to impact assessments, and that efforts should focus on identifying concrete ways of improving implementation. The Commission is always ready to share its impact assessment methodology with the other institutions, in particular through the Guidelines, and to support the other Institutions in developing their capacity to deal with the Commission’s impact assessments and to carry out their own additional analysis on the substantive amendments they make. As stated in the Second Strategic Review of Better Regulation, the Commission will also respond constructively and on a case by case basis to requests by Council and Parliament to expand on aspects of its original impact assessments. The Commission will also continue its efforts to ensure that impact assessments anticipate better the issues that are likely to be raised in Council and Parliament, for example on the choice of instrument for EU action.

3. (i) *Whether members of the Council and MEPs use the impact assessments during negotiations; and, if not, (ii) how this could be encouraged*

(i) The primary responsibility for the use of impact assessments lies with the institutions themselves, and the Commission does not keep a systematic overview of the situation in Council and the European Parliament. However, there are indications of a growing awareness in Council and Parliament of Commission IAs, and both institutions have submitted technical inputs on the state of play to the review of the Common Approach. The Commission has accepted invitations from EP committees to appear before the committees to present an impact assessment.

(ii) In terms of encouraging further use of IAs in Council, the Commission refers to the recent initiative by the Czech presidency to promote the use of IA in Council Working Group discussions, following a similar initiative by the Austrian Presidency in 2006. The current Swedish Presidency has also indicated that it will make greater use of Commission impact assessments.

The Commission is aware that it too can facilitate use of impact assessments in the other institutions by ensuring that they are of high quality, and are clearly presented and accessible. It has taken a number of measures in this direction: changed format of executive summaries to make the information accessible to a wider group of users, aiming at shorter main reports (the Guidelines recommend a 30 page limit). Executive summaries should present a clear overview of any quantified benefits and costs of the various options including administrative costs for businesses and citizens, other compliance costs, and costs for administrations, as well as the main issues that can only be qualitatively assessed.

4. (i) *How effective the inclusion of a “do-nothing” option in impact assessments is; (ii) whether impact assessments actually influence policy formulation; or (iii) whether they are used to justify a decision already taken;*

(i) The problem definition must include a clear baseline scenario as the basis for comparing policy options. The aim of the baseline scenario is to explain how the current situation would evolve without additional public intervention—it is the “no policy change” scenario. The IA Guidelines emphasise that the baseline scenario is a key element in the analysis, and that it is always required to present a properly defined baseline scenario. It is important to note that it may also be relevant to include separate consideration of a “do-nothing” option (ie discontinuation of current interventions), which is obviously not the same thing as the “no policy change” or “do-nothing new” option. The importance of a proper baseline in the problem definition is reflected in many of the most recent IAB opinions.

(ii) As indicated earlier, the officials carrying out the impact assessment are also responsible for developing the proposal. This ensures that the evidence which is gathered and the analysis which is carried out during the impact assessment process are elements in the formulation of the final proposal. As Commission services become increasingly aware of the necessity to start the impact assessment work early, the influence of the impact assessment process on the content and quality of the proposals will increase accordingly. An example was the package of measures on climate change and energy proposed by the Commission in December 2008 and now agreed by the Council and the European Parliament: the impact assessment report, based on state-of-the-art modelling, was critical in determining the architecture of the proposals, in showing how they were based on a thorough examination of the real impact, and in making a convincing case that the ambition of the proposals was based on sound analysis.

The IA work is a key element in the development of Commission proposals, and the College of Commissioners takes the IA report into account when taking its decisions. The IA supports and does not replace decision-making—the adoption of a policy proposal is always a political decision that is made only by the College.

It should also be noted that impact assessments are a means to an end—the aim is not just to improve the quality of impact assessments, but to ensure that these impact assessments help to improve the quality of the policy proposals. Assessing the extent to which this is the case is not straightforward. It is worth recalling, however, that the external evaluation of the Commission's impact assessment system<sup>2</sup> in 2007 examined how impact assessments are carried out and used by the Commission services, whether they are of sufficient quality, and what their role is in the policy or legislative process that follows once the Commission has adopted the related legislative proposal. It concluded that around two-thirds of Impact Assessments improved the quality of the proposals they accompanied as well playing an important role in increasing transparency.<sup>3</sup> On this basis it is reasonable to assume that the increased attention paid to impact assessments throughout 2007 and 2008 is continuing to improve the quality of proposals. However, as it is not known what the proposal would have looked like in the absence of impact assessments and scrutiny by the Board, there is no way to prove this hypothesis.

(iii) (This question is already largely covered under (ii)). In all political systems it can happen that politicians, institutions, and stakeholders have a preference for or against a policy initiative, and have early views on the form it should take. This is a challenge which is common to all impact assessment systems. The Commission is of the view that even where this might be the case, IA can play a key role in determining the policy content of the instrument by, for instance, assessing different sub-options which vary the ambition level or the timing of the introduction of specific elements or measures. By ensuring that any preferred approach is compared against a number of alternative policy options, it also provides transparency on the justification for the final choice and its corresponding impact.

The Commission would also point to the fact that there are examples of where the IA process has led to the planned initiative being abandoned. For instance, in 2007 an impact assessment carried out on a European legislative proposal in the area of protection of witnesses and collaborators with justice concluded that at that point in time it would not be advisable to proceed with legislation at EU level. The impact assessment was subsequently published as a Commission Working Document.<sup>4</sup> In other cases some planned measures have been significantly adjusted: impact assessments on biomass, the urban environment, and copyright in the online music sector led to the conclusion that binding measures were not necessary.

5. (i) *Whether stakeholders are properly consulted;* (ii) *whether the concerns of SMEs and the principles of the Small Business Act are properly taken into consideration;* (iii) *how could consultation be improved;* and (iv) *to what extent consultation affects on policy formulation;*

(i) and (iii) Consulting interested parties is an obligation for every IA and it must follow the Commission's minimum standards.<sup>5</sup> The need to make further improvements to how consultations are carried out was one of the issues most frequently raised by stakeholders in the public consultation on the new Impact Assessment Guidelines that was held in 2008.<sup>6</sup> As a result, the Commission has strengthened the provisions on public consultations in the 2009 revision of the Guidelines. Commission Departments must (a) plan consultations early, (b) ensure that all affected stakeholders are able to participate, using the most appropriate timing, format and tools to reach them, (c) ensure that stakeholders comment on a clear problem definition, subsidiarity analysis, description of the possible options and their impacts, (d) maintain contact with stakeholders throughout the process and provide feedback, (e) analyse stakeholders' contributions for the decision-making process and report fully in the IA report on how the input was used.

For complex or sensitive proposals, Commission departments are encouraged to go beyond the eight week minimum consultation period

(ii) The 2009 Guidelines also reinforced the guidance on impacts on SMEs which should be assessed in line with the Small Business Act (through a so-called "SME test"). The Commission has made a commitment in the Small Business Act to implementing the "Think Small First" principle in its policy-making, to assess the impact of forthcoming legislation and administrative initiatives on SMEs (the "SME-test"), and to take the results of this analysis into account when designing proposals. The IA should reflect this in each of the analytical steps. The IA should analyse whether SMEs are disproportionately affected or disadvantaged

<sup>2</sup> The Evaluation Partnership: Evaluation of the Commission's impact Assessment System, April 2007; available at: [http://ec.europa.eu/governance/impact/key\\_en.htm](http://ec.europa.eu/governance/impact/key_en.htm).

<sup>3</sup> In 13 cases out of a sample of 20 the evaluation found significant influence of the IA on the final proposals. Over the last two years the timing of the IA has improved, which leads to a further increase in this influence.

<sup>4</sup> COM(2007) 693

<sup>5</sup> "General principles and minimum standards for consultation of interested parties by the Commission" COM(2002)704.

<sup>6</sup> [http://ec.europa.eu/governance/impact/consultation/ia\\_consultation\\_en.htm](http://ec.europa.eu/governance/impact/consultation/ia_consultation_en.htm)

compared to large companies and if so, options should cover alternative mechanisms and flexibilities in approach that might help SMEs to comply. Specific guidance is provided in the annex to the IA guidelines (“SME test”). The IAB plays close attention to these issues when carrying out its analysis of the impact assessments.

(iv) Consultation provides a key input for evidence-based policy making and for the assessment of impacts on the most affected stakeholders. It is essential for the assessment of the problem that needs to be addressed, for discussion of realistic policy objectives, and to provide policy makers with feedback on policy options that are considered in the impact assessment process.

6. (i) *Whether the Impact Assessment Board is sufficiently resourced and (ii) independent to ensure that the Commission produces useful and accurate impact assessments;*

In 2008 the Board examined and issued an opinion on 135 impact assessments. This marks an increase both in the overall number of impact assessments the Board examined (up from 102 in 2007) and in the use of the oral procedure (75 per cent in 2008 up from 56 per cent in 2007). In spite of this increase, the Board was able to continue its practice of examining all impact assessments produced by the Commission, rather than examining only a selection of them as it announced might be necessary in its report for 2007. While the Board’s capacity was at times stretched to the maximum, it is sufficiently resourced to carry out its tasks. It should be noted that these situations arose not so much as a result of the total number of impact assessments that the Board had to examine, but rather of the irregular “flow” of impact assessments which created a number of peaks in work load. On the basis of recommendations from the Board, the Commission has strengthened guidance to the Commission services on how they plan their impact assessment work and the interaction with the Board. This should help to increase the predictability of the workflow which in turn should facilitate the Board’s work. There will of course always be unexpected and urgent political issues which have to be treated at short notice, and which cannot be anticipated.

The Board is supported in its work by a secretariat which is provided by the Secretariat-General of the Commission. Members also receive support from their alternates and from staff within their own services. In total, a support staff of (an estimated equivalent of) 15 full-time posts supports the Members and assures the daily operation of the Board. The Secretariat-General provides the Board with financial resources to engage external experts in specific cases to contribute to its opinions and to carry out studies to be commissioned in its quality support function. The Chair can ask any Commission service to provide expertise on specific issues as input to the Board’s examination of an impact assessment.

(ii) The President appoints the Members of the Board in a personal capacity. They do not represent the views of their own services on the impact assessments they examine, and their services cannot give them instructions on the position to take. Their role is to provide expertise on the quality of the impact assessments independently of the Commission service preparing the proposal. Members must inform the Chair of any interest which might affect their independence in relation to an impact assessment and, if appropriate, transfer his/her vote to the alternate.<sup>7</sup> In 2008, Board Members declared a conflict of interest in six cases and abstained from the discussions on these impact assessments. An analysis of the cases where the Board requested a resubmission shows that the Board applies similar standards to impact assessments that are produced by the services of the Board Members to those produced by all Commission services: the resubmission rate is 33 per cent and 32 per cent respectively. The Board also interprets independence in the sense that it does not discuss individual impact assessments or its opinions with external stakeholders, with the exception of experts who are invited by the Board to provide advice in confidentiality.

7. *Whether the Commission is sufficiently active in providing support to Member States during implementation and using its enforcement powers to ensure proper implementation.*

In its Communication “A Europe of results—Applying Community law” [COM (2007) 502 final], the Commission set out a range of suggestions designed to improve the application of Community law. These cover: preventive action through increased attention to implementation aspects in the introduction of new legislation; improved information-exchange and problem-solving between the Commission and Member States in the interests of citizens and business; improved enforcement through prioritisation and acceleration in infringements management; and enhanced dialogue and transparency.

<sup>7</sup> Cf. Rules of Procedure of the Impact Assessment Board, Art 3(2); available at: [http://ec.europa.eu/governance/impact/iab\\_en.htm](http://ec.europa.eu/governance/impact/iab_en.htm).

In this context, the Commission's revised Impact Assessment Guidelines of January 2009 put increased emphasis on the need to take implementation issues into account when preparing new legislation, from the earliest stage of consultations to facilitate the development of implementation plans once the proposal has been adopted and its exact legal form is known.<sup>8</sup>

The Commission also provides support to Member States during the implementation phase so as to anticipate and solve potential problems, thus avoiding the need to launch infringement procedures at a later stage. The Commission organises transposition workshops for new directives, such as the legislation on regulated professions, insurance, banking, accounting and auditing in the Internal Market. It also holds transposition expert group meetings and bilateral transposition workshops with individual Member States in different areas, (for example in the implementation of the Services directive), it prepares guidelines to assist the implementation and application of new legislation (as has been extensively the case under the REACH regulation), it posts on the internet lists of answers to frequently-asked questions, (such as on the directives concerning dangerous preparations, explosives and fertilisers), and sets up networks of responsible officials in the Member States for transposition of new directives.

In addition to these preventive measures, the Commission actively pursues a very active policy of management of Community law through over 250 committees and over 1,000 expert groups that meet each year. It works with the Member States to answer the questions and resolve the problems raised by citizens and business through a variety of instruments including the Citizens' Signpost Service, FIN-NET, SOLVIT and the recently introduced EU PILOT project.

The Commission has also recently developed its method of enforcing Community law through infringement proceedings brought against Member States. The Commission is currently handling around 3,200 complaints and infringement files. The latest published figures show that around 70 per cent of complaints are closed before the first formal step in an infringement proceeding; around 85 per cent before the reasoned opinion stage and around 93 per cent before a ruling from the Court of Justice. The Commission actively manages these files, taking hundreds of decisions each year. The Commission also organises a standard procedure every two months to initiate infringement proceedings on the late transposition of directives. In its 2007 Communication, the Commission explained its priorities in this work and has started to indicate how these priorities are being implemented through its Annual Reports.

28 September 2009

## ANNEX

### Data on IAs carried out, opinions issued (including number of resubmissions) for transport, energy and telecommunications in 2008.

#### I. TRANSPORT AND ENERGY (TREN)

##### A. Submitted cases:

- 24 IA-cases were submitted by TREN in 2008.
  - For 11 of the 24 cases a single re-submission was requested.
  - For two of the 24 cases a second re-submission was requested.

#### ENERGY AND TRANSPORT

<i>Adoption date</i>	<i>Commission proposal</i>	<i>IA final report + summary</i>	<i>Proposal reference</i>	<i>IAB Opinion</i>
2008/01/01	Proposals aiming to modernise and reinforce the organisational framework for inland waterway transport in Europe	SEC(2008)23 + SEC(2008)24	Initiative aborted	Final IAB Opinion
2008/01/23	Communication on supporting early demonstration of sustainable power generation from fossil fuels	SEC(2008)47 + SEC(2008)48	COM(2008)13	SEC(2008)51
2008/01/23	Proposal for a Directive on the promotion of the use of energy from renewable sources	SEC(2008)85	COM(2008)19	SEC(2008)84
2008/02/06	Communication on multi-annual contracts for rail infrastructure quality	SEC(2008)132 + SEC(2008)133	COM(2008)54	

<sup>8</sup> Impact Assessment Guidelines, pp 42–43 ([http://ec.europa.eu/governance/impact/commission\\_guidelines/docs/iag\\_2009\\_en.pdf](http://ec.europa.eu/governance/impact/commission_guidelines/docs/iag_2009_en.pdf)),

<i>Adoption date</i>	<i>Commission proposal</i>	<i>IA final report + summary</i>	<i>Proposal reference</i>	<i>IAB Opinion</i>
2008/03/19	Proposal for a Directive facilitating cross-border enforcement in the field of road safety	SEC(2008)351/2 + SEC(2008)350/2	COM(2008)151	SEC(2008)352
2008/06/25	Proposal for a Regulation amending Regulations (EC) No 549/2004, (EC) No 550/2004, (EC) No 551/2004 and (EC) No 552/2004 in order to improve the performance and sustainability of the European aviation system (Revision of the “Single European Sky”)	SEC(2008)2093 + SEC(2008)2094	COM(2008)388	SEC(2008)2095 + IAB Opinion 1st IA
2008/06/25	Proposal for a Regulation amending Regulation (EC) No 216/2008 in the field of aerodromes, air traffic management and air navigation services and repealing Council Directive 06/23/EEC	SEC(2008)2086 + SEC(2008)2087	COM(2008)390	SEC(2008)2088
2008/07/08	Communication on rail noise abatement measures addressing the existing fleet	SEC(2008)2203 + SEC(2008)2204	COM(2008)432	SEC(2008)2205
2008/07/08	Communication on a strategy for the internalisation of external costs	SEC(2008)2208 + SEC(2008)2209	COM(2008)435	SEC(2008)2210 + IAB Opinion 1st IA
2008/07/22	Community guidelines on state aid for railway undertakings	SEC(2008)517 + SEC(2008)516	OJ 2008/C 184 p. 13	Final IAB Opinion + IAB Opinion 2nd IA + IAB Opinion 1st IA
2008/10/15	Proposal for a Directive amending Directive 2002/15/EC on the organisation of the working time of persons performing mobile road transport activities	SEC(2008)2632 + SEC(2008)2631	COM(2008)650	SEC(2008)2634 + IAB Opinion 1st IA
2008/11/13	Proposal for a Directive imposing an obligation on Member States to maintain minimum stocks of crude oil and/or petroleum products	SEC(2008)2858 + SEC(2008)2859	COM(2008)775	SEC(2008)2785
2008/11/13	Proposal for a Directive on the indication by labelling and standard product information of the consumption of energy and other resources by energy-related products	SEC(2008)2862 + SEC(2008)2863	COM(2008)778	SEC(2008)2802 + IAB Opinion 1st IA
2008/11/13	Proposal for a Directive on labelling of tyres with respect to fuel efficiency and other essential parameters	SEC(2008)2860 + SEC(2008)2861	COM(2008)779	SEC(2008)2805
2008/11/13	Proposal for a Directive on energy performance of buildings (recast)	SEC(2008)2864 + SEC(2008)2865	COM(2008)780	SEC(2008)2822 + IAB Opinion 1st IA
2008/11/26	Proposal for a Directive (Euratom) setting up a Community framework for nuclear safety	SEC(2008)2892 + SEC(2008)2893	COM(2008)790	SEC(2008)2894 + IAB Opinion 1st IA
2008/12/04	Proposal for a Regulation concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws	SEC(2008)2950 + SEC(2008)2951	COM(2008)816	SEC(2008)2952 + IAB Opinion 2nd IA + IAB Opinion 1st IA

<i>Adoption date</i>	<i>Commission proposal</i>	<i>IA final report + summary</i>	<i>Proposal reference</i>	<i>IAB Opinion</i>
2008/12/04	Proposal for a Regulation on the rights of passengers in bus and coach transport and amending Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws	SEC(2008)2953 + SEC(2008)2954	COM(2008)817	SEC(2008)2955 + IAB Opinion 1st IA
2008/12/10	Proposal for a Regulation amending Regulation (EC) No 1692/2006 establishing the second “Marco Polo” programme for the granting of Community financial assistance to improve the environmental performance of the freight transport system (Marco Polo II)	SEC(2008)3021 + SEC(2008)3022	COM(2008)847	SEC(2008)3023 + IAB Opinion 1st IA
2008/12/11	Proposal for a Regulation concerning a European rail network for competitive freight	SEC(2008)3028 + SEC(2008)3029	COM(2008)852	SEC(2008)3030
2008/12/16	Proposal for a Directive laying down the framework for the deployment of Intelligent Transport Systems (ITS) in the field of road transport and for interfaces with other transport modes	SEC(2008)3083 + SEC(2008)3084	COM(2008)887	SEC(2008)3082 + IAB Opinion 1st IA
2008/12/17	Commission Regulation of implementing Directive 2005/32/EC with regards to ecodesign requirements for standby and off mode electric power consumption of electrical and electronic household and office equipment	SEC(2008)3071 + SEC(2008)3070	C(2008)8424	SEC(2008)3072 + IAB Opinion 1st IA

## II. TELECOMMUNICATIONS AND INFORMATION SOCIETY (INFSO)

### A. Submitted cases:

- Six IAs from INFSO were examined by the IAB in 2008.
- For one of the six cases a re-submission was requested.

### INFORMATION SOCIETY AND MEDIA

<i>Adoption date</i>	<i>Commission proposal</i>	<i>IA final report + summary</i>	<i>Proposal reference</i>	<i>IAB Opinion</i>
2008/02/27	Proposal for a Decision establishing a multiannual Community programme on protecting children using the Internet and other communication technologies	SEC(2008)242 + SEC(2008)243	COM(2008)106	SEC(2008)244
2008/09/23	Proposal for a Regulation amending Regulation (EC) No 717/2007 on roaming on public mobile telephone networks within the Community and Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services	SEC(2008)2489 + SEC(2008)2490	COM(2008)580	SEC(2008)2494
2009/01/09	Proposal for a Decision establishing an audiovisual cooperation programme with professionals from third countries MEDIA Mundus	SEC(2008)3098 + SEC(2008)3097	COM(2008)892	SEC(2008)3101 + IAB Opinion 1st IA

The number of published impact assessments can differ from the number of cases brought before the Board because of delays in the further adoption process.

All impact assessments and the IAB opinions are published on the Europa website [http://ec.europa.eu/governance/impact/ia\\_carried\\_out/cia\\_2008\\_en.htm](http://ec.europa.eu/governance/impact/ia_carried_out/cia_2008_en.htm) after adoption of the proposals by the Commission.

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### Examination of Witnesses

Witness: DR ALEXANDER ITALIANER, Chair, Impact Assessment Board, European Commission, (via video link), examined.

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**Chairman:** Good afternoon once again. Thank you very much indeed for coming. We plan to finish on the hour. As a matter of courtesy, before asking you, Dr Italianer, to introduce yourself, and perhaps also you would be kind enough before we go through the prepared questions and just to talk a bit about how the Impact Assessment Board is structured, I am going to go round the table and the television will follow and ask each of my colleagues to say who they are, their political persuasion (although that is not a factor in our Select Committees; we are definitely seeking to reach a considered, non-partisan view in our reports) and perhaps just a brief word about their background.

**Lord Rowe-Beddoe:** Good afternoon. David Rowe-Beddoe. I am an independent cross-bencher. I have a business background and the cultural performing arts.

**Lord Paul:** I am Swraj Paul. I am a Labour member and my background is manufacturing industry.

**Lord James of Blackheath:** David James, Conservative backbencher. Principally my career was with Lloyds Bank and Ford Motor Company.

**Chairman:** Perhaps I ought to say by way of my background that I used to be, a long time ago, the Minister for Better Regulation!

**Lord Walpole:** Robin Walpole, cross-bencher. I have been here for 20 years. Before that I was mainly in local government but I have been farming and looking after the countryside.

**Lord Dykes:** I am Lord Hugh Dykes in the House of Lords, the EU spokesman for the Liberal Democrat Party, the third party, with a financial and City of London background originally.

**Lord Bradshaw:** My name is Bill Bradshaw. I am mainly concerned with transport. I am a Liberal Democrat.

**Q56 Chairman:** Dr Italianer, for the record and our shorthand writer, would you like to introduce yourself and perhaps talk a bit about the Impact Assessment Board before we turn to question one?

**Dr Italianer:** Absolutely. Good afternoon, my Lords. It is a pleasure to be with you. The weather here in Brussels is absolutely dreadful and I think this is a very efficient way of communicating. I am accompanied by John Watson, who is the head of the Impact Assessment Unit in the Secretariat General and is also my Secretary in the Impact Assessment Board. I will say maybe two words about myself. I am

an economist by training. I have a PhD in econometrics. I did a lot of econometric work on the benefits and the costs of the Single Market and of the Single Currency, which are not unfamiliar to you. I have had various jobs in the Commission since I joined in 1985. I became the Chairman of the newly set up Impact Assessment Board at the end of 2006. The Board became operational in early 2007. It is a group of high-level Commission officials that is independent with respect to the other services. It works directly under the authority of President Barroso. My four other colleagues are directors and are all appointed in a personal capacity but they come from the various strands in the Commission that also form the various components of a typical impact assessment. That is to say they come from the industry department, from the economics department but also the social and employment department and the DG for environment, so although they speak in a personal capacity they have this professional background. We meet approximately every two weeks or as often as is necessary. We go through the various impact assessments that are being submitted to us. Since we started we have been looking at something like 300 impact assessments, so it is quite a lot, and, effectively, although each of us has a small staff, we invest quite a lot personally in the analysis of the impact assessments. The main evidence of our independence is the fact that the opinions that we write on the draft impact assessments are publicly available. It is quite rare that inside a public administration body dissenting opinions come out publicly, but this is one of the cases where this happens. Once the Commission decides on a policy proposal --- (video link interrupted)

**Q57 Chairman:** We lost a bit of the transmission there. Do you think you would be kind enough to repeat the last 30 seconds?

**Dr Italianer:** The last 30 seconds were a description of why the Impact Assessment Board can be seen to be independent. That is to say because of the publication of the opinions it gives on draft impact assessments. They are put on our website so that the interested public can see the critical analysis of the draft impact assessment in its early versions.

**Chairman:** We now proceed to questions and the first question is from Lord Rowe-Beddoe.

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23 November 2009

Dr Alexander Italianer

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**Q58 Lord Rowe-Beddoe:** Good afternoon again, Dr Italianer. This Committee has recently scrutinised the proposed legislation on the rights of ship passengers<sup>1</sup>. We note in the dossier that the draft impact assessment was submitted to the Board three times. This is a three-part question. Could you explain to the Committee how an impact assessment is normally produced; what the Impact Assessment Board is looking for when assessing the draft; and, lastly, whether the rights of ship passengers dossier was a typical example of the process?

*Dr Italianer:* Thank you very much for this question, my Lord. I will say one brief word about how an impact assessment is normally produced because it is a fairly elaborate process. I would say that the most important characteristic is that an impact assessment is being produced by the service or the department that is also responsible for the corresponding policy initiative. The idea behind an impact assessment is that it is an aid to decision-making although it should not replace decision-making. Sometimes people confuse these two roles and they think that an impact assessment will determine what the policy proposal should be. That is not the objective. The objective is to give an overview of the various possible policy options and their impact so that the decision-makers, the policy-makers if you like, can take an informed decision. Very briefly, the stages that are being run through before arriving at an impact assessment are in the very first instance through a document that is called a roadmap, which is a kind of scoping paper that in a few pages sets out what the problem is about. It is a seminal version of the impact assessment, if you like. This is followed by a consultation process. I know that you want to ask some questions about consultation so I will not give too many details at this stage. The idea is that all relevant stakeholders are involved. This consultation can take various forms and the idea is that this can also be done repeatedly. Some impact assessments are in fact the result of very elaborate consultation with stakeholders. The next stage is that the service puts together a group of interested departments in the Commission and starts drafting an impact assessment. That is done in parallel with the development of the proposal so there is a kind of cross-fertilisation between the analysis and development of the proposal. Before it comes to the finalisation of the proposal—and this is all at the level of services—the draft of the impact assessment is being submitted, ideally several weeks before a meeting of our Impact Assessment Board, but if need be we can operate very quickly, for instance through a written procedure. We then analyse the content of the impact assessment. That brings me to the second part of your question. We check whether the draft has a well-formulated, what we call, problem definition, that the objectives that

are being sought by the initiative are well-specified, that the options that are being studied are realistic, that there is indeed a case for EU intervention and subsidiarity is being analysed. And then our scrutiny focuses on the measurement or the assessment of the impact of the various options, there is comparison, and at the end of the process there are arrangements for the monitoring and evaluation of the initiative, and this is related to the question of ex-post evaluation, which is I know something you would like to discuss. What may happen in this scrutiny process is that the Board after discussion with the relevant department may come to the conclusion that the draft is of insufficient quality on one or more of the various aspects that I enumerated, and in such a case the Board may ask the relevant service to resubmit another version which is then analysed to see to what extent the recommendations that the Board puts in its written opinion are being taken into account. Very rarely that may happen and it really is the exception to the rule that we ask the service to come back for a third time. I think this has happened only in four cases in 2008 and in 2009 it never happened. So in that sense the example that you mentioned in your question, the rights of passengers, was an exceptional case. Although we are quite scrupulous in our Board and we ask for resubmissions in about one third of the cases, and that rate has not changed this year as compared to previous years, it is very rare that we ask for a third resubmission.

**Q59 Lord Rowe-Beddoe:** Thank you very much. Could I ask one supplementary? Therefore in this instance and normally when you seek resubmissions is it because the scoping work and the consultation process had not been clearly understood or was it more in the method of evaluation?

*Dr Italianer:* There may be various causes for asking for resubmission. One cause may be insufficient scoping. In this particular example on the rights of ship passengers there were various issues at hand. In the first instance, it was not at all clear if a certain number of the rights that were being looked at in this particular proposal were already covered by all passenger transport activities that were covered by public service obligations, so it was not even clear to which type of activities the initiative was supposed to apply. Secondly, there was a scoping issue as regards the extent to which there was cross-border activity involved because many passengers are being shipped, if they are at all, inside Member States, so these two elements were two of the main reasons why we had to come back to it. Then there was an issue of substance on the costs, which were not sufficiently elaborated and on which we had to come back. This was in that sense quite an exceptional case.

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<sup>1</sup> Council document (11990/08)

23 November 2009

Dr Alexander Italianer

**Q60 Lord Paul:** Dr Italianer, in January, new impact assessment guidelines were issued. To what extent have these new guidelines improved the quality of impact assessment? Have your staff encountered some difficulties in following these guidelines?

*Dr Italianer:* Thank you for your question, my Lord. I will maybe say one word about the changes that were being introduced in these guidelines. In fact, they were the result of a very long consultation process and also an evaluation process, so we applied the procedures that we ask others to do to our own improvements. In fact, I think the changes that were introduced were quite consensual. They concerned improvements in internal procedures and also procedures in relation to third parties. They concerned improvements in the way the problem definition is being looked at, in particular as regards subsidiarity. We introduced an explicit subsidiarity test, if you like. Also improvement of consultation was an important topic. And finally the services, through the guidelines, received improved guidance on how to measure certain impacts like social impacts, consumer impacts, impacts on small and medium-sized enterprises, competition and so on. It was a step up towards better quality of impact assessment. Our impression—but this is no more than an impression—is that these improvements in the guidelines have been generally welcomed by the staff. They have made it easier for them to live up to the standard that is being looked for. You should remember that not everybody who is preparing impact assessments does so on a regular basis. Some services are doing this for the first time and although they get assistance, I think the better the guidelines are the easier this is. I would say that, generally speaking, through the new guidelines we have tried to raise the standard. As you know, I have a mathematical background. If one raises the standard and if the rate of resubmissions stays the same then, mathematically speaking, the quality of the reports should have increased, but that is nothing more than a mathematical inference!

**Q61 Chairman:** Thank you. I am going to ask questions three and four which I am going to link. One of our previous witnesses argued that there was both some tension and also a lack of completeness in looking at what we have listed in the questions as five different aspects of an impact assessment to take account of the economic, environmental and social impacts, the on-going administrative burdens involved and the one-off initial compliance costs. My question is: are you satisfied (video link interrupted) that you are able to ensure that all these various aspects are taken account of in an impact assessment?

*Dr Italianer:* I assume that your question also covers the compliance costs issue?

**Q62 Chairman:** I am sorry, obviously by compliance costs we mean the initial costs as opposed to the on-going administrative burdens?

*Dr Italianer:* I think this is a very good question. There are many people who think that administrative burdens should have a prime role when deciding on legislation and also in proposing this at European level they draw the parallel with national systems where sometimes departments have objectives in terms of administrative burdens and so on. In fact, in the impact assessment we try to take a broader view by not only looking at the administrative aspects but also the economic, environmental and social aspects and also looking at the benefits as opposed to the costs. We are generally satisfied that all these aspects are being covered, although we are trying to improve the assessment of the social and environmental impacts because this is not always easy to quantify. For instance, in the field of environment, often the benefits are made visible over a longer time period and they have to be expressed in quality of life and so on. There are techniques for doing so. However, a comprehensive picture cannot always be expressed in euros or in pounds if you want. Compliance costs are certainly also being looked at, perhaps more than people know from the outside, but compliance costs can come in various sorts. They can relate to investment, they can relate to opportunity cost, there is a time dimension in there, there can be distributional issues, so it is not easy to express costs and benefits on the basis of one single denominator, but I would say that, generally speaking, even proposals that have very little quantification use non-quantitative techniques that allow you to get a good assessment of all these aspects at the same time.

**Chairman:** Thank you. We will now move to question five. Lord James of Blackheath?

**Q63 Lord James of Blackheath:** Dr Italianer, this question comes in three parts and I think it will be easier if you take each part separately. The European Parliament is supposed to be going to produce impact assessments of their proposed amendments but this does not seem to be a very regular practice. How effective do you think this could be and what could be done to encourage it?

*Dr Italianer:* Thank you very much for your question. I think it is a very relevant one because I would say that impact assessments in the Commission have a double role. They are part of a culture change whereby all our staff are made more aware through the impact assessment process of assembling good evidence for good policy, but the policy proposal from the Commission is not the end of the process, it is the start of a legislative process, so when it comes to the European Parliament we think that when there are important amendments (and it should not be for each and every amendment but

23 November 2009

Dr Alexander Italianer

when there are important amendments) it would also be of use for members of the Parliament and for Council ministers, for that matter, to use the same techniques to analyse what the impact of the various amendments would be. We have an arrangement with Council and Parliament that in principle they would make these assessments. The Parliament has started doing so in a limited number of cases. This arrangement is coming to an end and we are reviewing it and we hope that with the new College, the new Commission, and with the two other institutions, we will be able to arrive at an agreement that would lead to the greater use of these techniques in the legislative process.

**Q64 Lord James of Blackheath:** That probably leads to the second part quite nicely which is what do you think concerning the possibility that the Commission should produce an impact assessment of European Parliament amendments when they significantly modify the original text of the proposal? It sounds like a question with only one answer to me!

*Dr Italianer:* The Commission has already offered to look at such requests, and in particular when it comes to very technical economic modelling, that is something that we could do. Where for instance the changes in the Parliamentary process are changes in certain parameters that can be easily simulated with economic models, then that could certainly be done. However, I think to do this on a systematic basis would require a policy decision. From our contacts with Council and Parliament until now, I know that both institutions were not much inclined to ask the Commission to make this analysis of their amendments because they might perhaps have had the idea that the analysis might not be completely unbiased given the role the Commission itself plays in the legislative process. However, if these issues can be overcome, I am sure that we can find a way forward.

**Q65 Lord James of Blackheath:** That takes us to the third part which seems to me to be quite complicated in that sense. Could the impact assessments of individual Member States be regarded as a useful assessment of amendments that they would like to negotiate in Council? To that I would like to add: should the European Parliament or the Council on receiving these approaches actually stimulate an approach from the Member States to produce a negotiation for an amendment that would meet their case, or is that complicating the issue too far?

*Dr Italianer:* It would complicate the case but on the other hand we have seen in the evaluation of our impact assessment system that there is a huge request for regional and national impact assessments of policy proposals, so from the Commission's perspective we very much welcome it if Member States do impact assessments. I would say to the

extent that an impact assessment done by one or several Member States serves as a *pars pro toto* in a sense, it could give a good indication of an amendment and so in that sense I think it could help the decision-making in the Council.

**Q66 Lord James of Blackheath:** I am wondering if there is a sort of subtext to this question that if the Member State does not like what it is getting, should the impact assessment be the occasion for them to be encouraged to seek something which is more modified to their terms?

*Dr Italianer:* A Member State is always entitled to make a proposal in the context of the Council process that is more to its liking. However, I think it would be useful in a national context if the Member States can also demonstrate what would be the impact of that proposal. For instance, if it went against the objectives of the initiative I think the case would be more difficult than if it went in the direction of better achieving the objective that is being looked for. I should not hide from you that there are some policy proposals where there is a distribution issue between Member States which also forms part of the negotiations. For instance, there was a very ambitious proposal, and it has now been concluded, on the reduction of CO<sub>2</sub> in the European Union. Clearly there was a distributive issue involved there: who is going to bear the cost; who has to achieve which CO<sub>2</sub> reductions? In that case it is a little bit of a zero sum game. If one Member State has to reduce more than another Member State, as with communicating vases, in that case an individual impact assessment would perhaps be of less use because it would be to the detriment of another Member State.

**Lord James of Blackheath:** Dr Italianer, thank you for those answers. I will pass you back to the Chairman.

**Chairman:** Lord Dykes has a supplementary.

**Q67 Lord Dykes:** Thank you, Dr Italianer. Just coming back to the middle subject area of the three that we have been considering and that is the question of impact assessments on EP amendments. Can I ask you for a brief clarification of that because presumably the difficulty would be that if the EP was not specifically requesting that from the Commission on a particular piece of legislation from time to time, that would be, as it were, direct interference in the EP's own constitutional position in deciding its response and its proposals for legislation. That might be very awkward anyway but also it would be something that would arise probably only rarely, very infrequently. How do you feel about that?

*Dr Italianer:* My Lord, you are absolutely right, and I think this is one of the reasons, to my knowledge, there have been no, or at least very few, requests to the

23 November 2009

Dr Alexander Italianer

Commission. Of course the Parliament has to remain the master of its own prerogatives. However, that does not mean that in a very technical proposal or on a technical aspect of a proposal, which like I said required modelling or something, we could not put at the disposal of the Parliament the methods that we have used. We could even use a consultant to run a particular simulation with the parameters that the Parliament would like to look at, but that would be some kind of technical assistance, if you like.

**Q68 Lord Dykes:** Even then only if the Parliament says, "Would you please do that for us"?

*Dr Italianer:* Of course, there is no reason why the Commission would interfere.

**Chairman:** Can we now move to question six and Lord Bradshaw.

**Q69 Lord Bradshaw:** Good afternoon. It is a simple question really. The work programme contains several items which escape impact assessment and impact assessment is performed on some comitology proposals and on other items outside the annual programme. Should all the proposals made by comitology be subject to impact assessments?

*Dr Italianer:* Thank you, my Lord. That is a very relevant question because if I look at the statistics over the past years, what I note is that more and more impact assessments are actually being done outside the annual work programme from the Commission. You are asking why there are several items that escape impact assessment. We could perhaps have a written correspondence about this question because, as far as I know, the only items that escape impact assessments are those items that are either some kind of report without any policy proposals or that are consultative documents like Green Papers which, by definition, are the start of the consultative process. As far as we have been able to check, there is hardly any item in the work programme that escapes an impact assessment, but we can perhaps clarify that in writing if you want to. Secondly, on the comitology proposals, why have we started to ask services to make impact assessments? The reason is that the Commission would like impact assessments to be performed on any proposal that has either a significant impact or that is sensitive in a political sense. There are items outside the work programme, for instance in the area of financial regulation, which is a very hot topic and which we could not foresee when the work programme for this year was being prepared, or there are important comitology proposals that do have an economic impact where it would be useful to do an impact assessment. Let me give you an example. We have framework legislation which is called the Ecodesign Directive and it is a very broad framework Directive that allows us to take measures for individual items like refrigerators in

terms of their environmental characteristics. It is very useful when a particular measure is being proposed, such as on refrigerators, to have an impact assessment to know what this means for the refrigerator industry. On the other hand, I think it would be going a bit too far if all comitology proposals were accompanied by an impact assessment given their sheer number. In 2008, for instance, we had 1,258 comitology proposals. In this year for the first ten months alone we have had almost 800, so it is not really practical. What we are trying to do is to spot those proposals that really have an economic impact such as the refrigerator example that I gave you.

**Chairman:** We now have approximately 20 minutes left so I am going to ask my colleagues to be as concise as they can. Lord Walpole is going to group questions seven, eight and nine.

**Q70 Lord Walpole:** Dr Italianer, these three questions are very much on the same subject and they are the ones that really matter to the small and medium-sized industries that we get in the countryside and around small towns and market towns and that sort of thing. The SME test is intended to encourage the Commission to "think small first" when developing draft legislation. Do you think this has been effective?

*Dr Italianer:* Thank you for your question, my Lord. Small and medium-sized enterprises are of course the backbone of the economy and they are extremely important. It is one of the reasons why the Commission has put forward the Small Business Act and the "think small first" principles. That being said, I must say that the nature of the initiatives that the Commission is taking is very broad and in some cases it has no business-related impact whatsoever, so in actual fact you will not find the SME component being looked at in particular. But I must say as the Impact Assessment Board we look at this systematically. You will also find in the annual reports of the Board that this is one of the items that is being looked at, but the proposals do not always lend themselves to really single out SMEs. Let me give you one example. It is perhaps somewhat of an exotic example but quite appropriate for the countryside. In the countryside we have a lot of what we call non-road mobile machinery. It is the kind of things that you put behind a tractor when you go onto your land. We have certain environmental requirements there and maybe looked at this --- (video link interrupted)

**Chairman:** We are back on air.

**Q71 Lord Walpole:** Sorry about that. This is one of the things you expect to go wrong in the countryside, not in the middle of London and Brussels, I would have thought! You were talking about heaving farm machinery around the countryside and that is

23 November 2009

Dr Alexander Italianer

something that I feel very strongly about. (video link interrupted) What we have got out of the small business representatives is they have argued that the consultation process is unnecessarily complex and that therefore small businesses are unable to respond adequately. Do you think this is a fair assessment and, if so, is there scope for making the process more accessible?

*Dr Italianer:* Thank you for your question, my Lord; it is an extremely relevant one. I think there is one part of the complexity about which we cannot do much and that is the fact that EU legislation of course comes very often in the form of Directives and will then be translated into national legislation, so this means that if they look at a draft Directive, for instance, it will be very hard for them to visualise what it actually means for them. That can only be done at the national level so there is not much we can do about that. Where we can do something is about streamlining the consultation process and we have now, in the Commission at least, centralised this. There is one single website and it is called Your Voice in Europe and there you will find all the consultations grouped. I just had a look this afternoon. This ranges from the interconnection of business registers to reform of the fisheries policy. So at least on our side we are trying to streamline this to a one-stop shop in terms of consultation.

**Q72 Lord Walpole:** My final question then is with regards to the consultations we understand that responses are received from individual small businesses, from large businesses, from representative bodies, NGOs, et cetera. What weight does the Commission give to responses from each of these types of organisation? Or do we have to get someone extremely good to write our applications, or whatever it is, so that we get it right?

*Dr Italianer:* That is again a very good question. We actually distinguish between two types of contributions. One is individual contributions, and this can be an individual SME or it can be a multi-national company, or there could be a contribution from an organisation that claims to be representative of a group of stakeholders, like for instance a business organisation. That is actually the only distinction we make in terms of the volume when it comes to the weight. Apart from that, the only thing we require is that when in an impact assessment the consultation is being discussed that a balanced view is given that covers all the stakeholders. Sometimes we criticise services for not having consulted one group of stakeholders, so what matters is whether the stakeholders are representative, not how big or small they are, because, as you know, political sensitivity can matter very much for individuals or even for SMEs.

*Lord Walpole:* That is very helpful, thank you.

*Chairman:* We will now turn to questions 10 and 11, Lord Dykes?

**Q73 Lord Dykes:** Dr Italianer, you mentioned a while back in your presentation the question of ex-post impact assessments, and putting that altogether, if I may, just to keep it brief as well, you will remember the Council conclusions on better regulation at the end of May this year saying that there should be an ex-post evaluation of relevant pieces of legislation in place. Have you managed so far to really get going with the procedures and programmes to respond to that, if you think that is a good idea, as I assume you do? How can the actual benefits of ex-post impact assessments be maximised? (video link interrupted)

*Dr Italianer:* I take it that your question was to what extent we have been able to implement the conclusions?

**Q74 Lord Dykes:** How can the benefits of ex-post impact assessment systems be maximised and—because it is a bit puzzling for outsiders—how would the ex-post impact assessment differ from evaluation? (video link interrupted)

*Dr Italianer:* Ex-post impact assessment, in our jargon, we would call ex-post evaluation but I think it is basically the same thing. We are actually strongly encouraging our departments to engage in ex-post evaluation because whenever they are reviewing legislation for which they are responsible, the natural starting point should be ex-post evaluation before they go into a new impact assessment. In fact, this has already been done in a couple of important cases. For instance, there is an evaluation of the so-called IPPC Directive which has to do with the pollution prevention and control measures that are imposed on industry. The new proposal that the Commission made, and the impact assessment, was based originally on an ex-post evaluation and there are now several ex-post evaluations going on. (video link interrupted) I was mentioning several ex-post evaluations that were on-going including in the environmental area and in the food legislation area. Given the hundreds of impact assessments that have been made in the past couple of years, I would expect that several years from now many of them would be the subject of an ex-post evaluation when it comes to the policy review process.

**Q75 Lord Dykes:** Thank you for your great forbearance and patience. We need an impact assessment on this video system we have got here!

*Dr Italianer:* I can promise you the next time I will come to London!

*Chairman:* Our last two questions, 12 and 13, Lord Rowe-Beddoe?

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23 November 2009

Dr Alexander Italianer

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**Q76 Lord Rowe-Beard:** We will take 12 and 13 together, Dr Italianer. They are to do with the priorities of the Better Regulation agenda and what you think they should be for the new Commission once it is in place. Then the second part is how do you view the intention of Commissioner Barroso to move the better regulation portfolio out of DG Enterprise to his direct control? What do you think would be the benefit of that arrangement?

*Dr Italianer:* Thank you, my Lord, for this forward-looking question. I think what is very important for President Barroso is to complete the policy circle and to get into place this chain of ex-ante and ex-post evaluations that we just discussed, and I expect this to gain in importance in the coming years. The second most important future aspect I would say is delivery, to actually implement the system in a successful way. If I may give you an example from your own country. Your Government published last month the forward regulatory programme in which 430 measures are being announced. Out of those measures, as far as I can see, there were only some 40 or so that contained assessment of costs and benefits and, out of those 40, three-quarters are EU legislation (but that is not so important!) Only to indicate that even a government like your own Government, which is one of the most advanced governments in terms of doing impact assessments, still faces enormous challenges here, and these challenges are also important for us. I think to actually deliver on this agenda for us is very important for new legislation but also for the body of existing legislation. This also explains why President

Barroso has brought together all these elements under his own authority because he has not only integrated the services of DG Enterprise, which was dealing with simplification of legislation and administrative burden, but he has also recently put the ex-post evaluation assessment unit from the budgetary department under his own services here in the Secretariat General. I would say that all the services that are important for better regulation are now grouped under his authority and that gives him all the instruments from his central position to steer this agenda, which is very much a horizontal agenda, through the whole Commission.

**Q77 Chairman:** I think that concludes our session unless any of my colleagues have got any pressing questions. I do not see anyone round the table wishing to ask any more. Thank you very much indeed, Dr Italianer, and also Mr Watson for his support to you I am sure. We hope to produce our report in the new year and we will make sure that we send you an autographed copy!

*Dr Italianer:* Thank you, Lord Chairman, and my Lords. I appreciate the interest you have taken in this subject, which is very important for President Barroso, and on which I think we have made big strides forward in the past years. However, there is still a lot to do and with your help I am sure that we will be able to have a successful agenda in the coming years.

**Chairman:** Thank you. The public session is now closed.

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MONDAY 30 NOVEMBER 2009

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Present	Bradshaw, L Freeman, L (Chairman) James of Blackheath, L	Powell of Bayswater, L Walpole, L
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**Examination of Witnesses**

Witnesses: MR STEVE COLDRICK, Head of Long Latency Health Risks Division, Health and Safety Executive, and MR ROBIN FOSTER, Head of International Chemicals Unit, Health and Safety Executive, examined.

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**Q78 Chairman:** I think, in the interests of time, I am going to ask the questions for the record, but any colleagues that have supplementary questions or further comments to make, perhaps you would permit them, or agree with me that this is the most efficient way of proceeding. I want to just preface my remarks by saying we are two thirds of the way through into an inquiry into Better Regulation, and we have evidence that will be taken from the Minister for Better Regulation in two weeks' time, and we would hope to produce a report some time in the New Year. Therefore, to get some practical examples of how the procedure works is going to be very helpful, and the chairman of the relevant board in Brussels was extremely helpful last week on our videolink. Therefore, unless there are any other procedural questions, may I commence by asking for the record the first question, of which you have had notice, I hope. Your Explanatory Memorandum reached us as we were embarking on an inquiry into Better Regulation, and the Explanatory Memorandum was, of course, concerning health and safety. We were therefore interested to note that the impact assessments supplied with that explanatory memorandum was based on figures extrapolated from the Commission's impact assessment on the dossier. As far as you are aware, does this happen often? I will just add two more questions if I may before you respond: what use have you made of such an impact assessment, and was there ever an intention to use this impact assessment as a negotiating tool in working groups? Perhaps for the record, before we commence, you could introduce yourselves.

*Mr Coldrick:* Thank you, My Lord Chairman. My name is Steve Coldrick, I am head of HSE's Long Latency Health Risks Division.

*Mr Foster:* I am Robin Foster, Head of International Chemicals Unit, HSE.

*Mr Coldrick:* My Lord Chairman, this does not happen often, and if I may explain, it reflects actually the context. The potential for this piece of work coming forward has been around for some time, and obviously HSE has to make best use of the resources it has. To put it succinctly, that which we thought was the position as to when it was going to come forward turned out to be misplaced, and it came forward a lot

quicker than we actually anticipated, in the context of the intelligence we had had at that time. So the position we were in was that in June, they announced this, so in the context that we had to move swiftly, given the speed at which the Presidency wanted to work at, what we did was a matter of a few weeks later issue a consultative document where we made use of the device of taking a proportionate amount of the figures in the impact assessment as a means of giving as much information as we could, but also in the consultative document did actually invite consultees to comment on what they thought about the figures in the impact assessment. In terms of their response, if this is helpful, My Lord Chairman, with regard to what they thought about the figures, whether they thought they were reasonable or otherwise, we received 45 responses. 20 thought they were reasonable, and 25 thought not. That tended to support our own views about the impact assessment in that sense, so the use we have made of the impact assessment firstly is in fact to help us get out as comprehensive a consultative document as possible, within the short time that we had. Secondly, to gauge the validity of the Commission's position and its assumptions, and they were the two main purposes. In terms of the intention to use this impact assessment as a negotiating tool, absolutely not. It was a means of allowing us to get that initial position, and in the meantime, we wanted to gather our own data for an impact assessment, and it is that impact assessment, when that is complete, that will be the basis of our approach in terms of the negotiations. I do not know if there is any more you want to add to that?

*Mr Foster:* No, I think that is it. I mean, clearly we will use the Commission's impact assessment, sometimes to challenge them a little bit, but not overtly in the negotiations themselves typically. It might be of interest, My Lord Chairman, to know what happened in the Council Working Group in regard to the impact assessment. The Swedish Presidency invited comments, the UK submitted a six-page document, broadly critical of the impact assessment, but acknowledging all the work that had been done. Denmark submitted a one-page document broadly supportive of what the UK said, the Czech Republic submitted the usual pro forma,

30 November 2009

Mr Steve Coldrick and Mr Robin Foster

and that was it. When it came to discussing the impact assessment in the Council Working Group, this is the Environment Council, there was very limited discussion.

**Q79 Chairman:** So as you have advised us, this particular procedure, with this particular dossier, was unusual in the sense that there was great pressure of time. Could you help the Committee by indicating whether this was a one in 10 or a one in 20 example or occurrence of using the Commission's impact assessment for consultation in the UK?

*Mr Coldrick:* My Lord Chairman, I can only speak with some certainty in the context of the work of the Health and Safety Executive, I cannot really speak more widely across Government. Our recollection is that this was last used I think about ten years ago, that is the sense of how often this is done; ironically, with the Biocidal Products Directive, but you should not read any more into that, I think it was circumstantial rather than, if you might like, a cultural attitude. Our history is quite the reverse.

**Q80 Chairman:** If I could move to question two, looking back on the Commission's impact assessment, would anything have made it more useful on this particular dossier?

*Mr Coldrick:* Yes, My Lord Chairman, we could talk at length on this one, but I am going to confine myself to three points. The Commission's impact assessment: basically, in general terms, there is a lack of transparency about how some of their figures are estimated. Secondly, we have doubts about the credibility of some of the baseline assumptions from which cost savings are estimated, and perhaps if I can give you an example, some of them just do not seem realistic. For example, cost savings in data sharing are based on investments in animal testing of somewhere between €7 billion and €13 billion, which seems implausible when you consider that the total size of the market is around €1.5-3 billion per year. So there is an example of that. Then thirdly, although there is a mention of small and medium sized enterprises in some policy areas and examples of individual level impacts, there is not enough information to gain an overall picture of how small and medium sized enterprises will be affected by all policy areas, and so by the regulation as a whole. We have a document which we can submit which gives further particulars if my Lords would find that helpful.

**Q81 Chairman:** I think it would be very helpful, particularly in the preparation of the first draft of our report on Better Regulation which hopefully will arrive some time in January from the clerks. Perhaps I could move on to question three of which you have had notice: the progress of negotiations in the

working groups on this particular dossier, you have alluded already in part to what is going on, do you think that the final impact assessment will be ready in time to influence those negotiations? That is the amendment coming from the Commission. Do you propose to use the United Kingdom's impact assessment as a means to discuss proposed UK amendments to the proposal itself?

*Mr Foster:* I am going to answer that, My Lord Chairman, as I am actively on the frontline of this. In fact, after this meeting, I go to St Pancras Station to catch the Eurostar for a negotiating meeting in Brussels tomorrow on this biocides regulation as proposed by the Commission. So what is the state of play? The Swedish Presidency has picked up the proposal with enthusiasm, we have had about one meeting every three weeks or so, they have taken a very sensible thematic approach to looking at issues. Negotiations are still at a very early stage, I would say, but we have talked about Community authorisation, and with that low risk products; we have talked about treated materials and articles; we have talked about comparative assessment and exclusion criteria for active substances, in other words when should they not be allowed. The discussions, although still at an early stage, are working towards a policy debate at the end of December in the Environment Council. We envisage negotiations will continue through the Spanish Presidency at least, and well into 2010. So to answer your question, do you think the final impact assessment will be ready in time to influence the negotiations? Yes, we will have an impact assessment in final form by the end of February, but clearly, we will be in touch with the emerging outcomes before then, so it will be helpful to us in formulating our negotiating lines. Then the question: do you propose to use the UK IA as a means to discuss proposed UK amendments? We will certainly use it to formulate our amendments. Maybe this surprises your Lordships, I do not know, we will be rather cautious about deploying cost-benefit assessment in the negotiating meetings themselves, and the reason for that is experience, which says that there are many Member States who will visibly recoil if the UK advances pure cost-benefit arguments in the meetings themselves. So trying to be good negotiators, you do not use that sort of language. In short, My Lord Chairman, the currency of the debate in the Environment Council is very rarely cost-benefit. The currency of the debate might be risk, proportionality, coherence, consistency, but very rarely direct cost-benefit, and that is our experience.

**Q82 Chairman:** In your experience, is the United Kingdom in a very small minority in terms of looking at cost-benefit?

30 November 2009

Mr Steve Coldrick and Mr Robin Foster

*Mr Foster:* Yes, at least taking it as seriously as we do, because we do take it seriously, the UK certainly does, and I do not want anything I say to be interpreted otherwise, because we do take it seriously, but in the European context, the culture is very different. I have seen people recoil when we talk about things which imply monetisation of life, putting a value on life, or putting a value on animals or earthworms or any other parts. The biocides dossier is very interesting, in that it covers people, both the public and employees, and the environment in all its various forms.

*Mr Coldrick:* My Lord Chairman, if I may supplement to perhaps explain a little further, you may be aware that the basis of health and safety law has this concept of "so far as is reasonably practicable", which implicitly brings in costs. That is not a concept which is recognised in the rest of Europe, and indeed, we had a long argument, if I may summarise it that way, which came from our perspective to a successful conclusion that we were able to keep our concept of reasonable practicability as a test. So in that sense, that underlines the real difference in approach; so in that sense, one should not be surprised if the rest of our European partners have real difficulty with a concept they never use.

**Q83 Chairman:** That is very interesting, and I anticipate that that might well be something that we will look at very carefully in our report. Could I ask a final question, and then perhaps if any of my colleagues wish to follow up anything that you have said or add any questions, please may they do so. We note from Lord McKenzie's letter of 13 November that your consultation process has provided little hard evidence that might help inform the final impact assessment; we would be interested to know why this is so, and are there any other ways of gathering data in order to produce the final impact assessment?

*Mr Foster:* I will start off, My Lord Chairman. We elicited views from our stakeholders in two separate ways. We had a consultation exercise, and we had an open meeting of stakeholders, which was actually very positive and very useful, I chaired that. When it came to the section on impact assessment, I was there really trying to encourage people, "Tell us what you think, give us information that we can use to improve it". Although they had been really helpful throughout the rest of the meeting, in contributing to issues about the biocides directive, we just could not enthuse them, they had very little to say. I have been thinking about this, I have no great insights really, but what I have been able to say so far, in my own mind at least, is the impact assessment is done for the UK as a whole, it is a high level document, it has to be, because when we look at cost and benefits, it is to the UK as a whole. But when you gather together individual duty holders, who are responsible for

complying with the requirements of the law, in any of the 23 product types in the directive, it is very difficult to get them to relate to the UK impact assessment, because it appears very high level, and they cannot really see anything in there to get excited about. They may agree or not agree with the total figures, that is absolutely fine, it is just too high level. It is very difficult for them to relate to, notwithstanding our best efforts to elicit a response. It is too remote, I think. So that is the main reason that we can think, because our stakeholders, they have plenty to say on other things, there is no holding them back in other ways, but when it comes to inputting, as we would dearly like them to do, to help us refine the impact assessment, we find not very much comes forward. That is how it is.

*Chairman:* That is also another very useful insight into the whole process, and perhaps the example we have picked, which was timely for us, may not be typical of many of the dossiers that would pass through Whitehall.

**Q84 Lord Walpole:** There is just one thing I would like to ask: many years ago, I seem to remember there was a chemical directive, was there not?

*Mr Foster:* Are you talking about REACH?

*Mr Coldrick:* Chemicals agents directive.

**Q85 Lord Walpole:** A long time ago, was there not, which took all chemicals and said they had to be approved; do you remember that?

*Mr Foster:* REACH is talking about registering all chemicals for sure, but all chemicals approved, no, because approval is a very intensive process, where regulators get very much involved, so it is only reserved for things like pesticides and biocides or medicines.

**Q86 Lord Walpole:** No, I think that is probably the answer I wanted to hear actually, because one wondered how on earth they would ever work out what chemicals were safe to use, and that sort of thing.

*Mr Foster:* Absolutely, yes.

*Lord Walpole:* We started off by knowing that washing powders or washing detergents are not -- no one had ever done any work on them. They have now, of course, and I suspect several of them are biocides as well, which they jolly well should not be, at least I do not think they should be. That is only my opinion. No, I found this actually very interesting, My Lord Chairman, and I am adding to my knowledge.

*Lord Bradshaw:* I will just add that I am extremely sceptical about cost-benefit analysis, I think it is deployed far too frequently in this country, it is a totally inexact science, and it depends on some very dubious econometrics, but I will leave it there.

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30 November 2009

Mr Steve Coldrick and Mr Robin Foster

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**Q87 Chairman:** Well, it is interesting, there are passions that arise on the subject of Better Regulation, but unless my colleagues have further questions, any further pieces of advice or any additional points that you think would help us?

**Mr Coldrick:** My Lord Chairman, there is one, I am not certain just exactly whether it is totally germane, but I would think it would be remiss of me if I did not say this: one of the concerns that we are aware of are small and medium sized enterprises being caught up in this particular process. The progeny of this process was almost using the model that was applied to pesticides; what characterises pesticides are usually large companies, large volume of products, but the same thinking and process was then applied to biocidal products, which I might summarise as being -- it is euphemistically described as a bit of a cottage industry, you are talking typically of smaller content. When you are talking about the need to assure people about the safety to either human health or to the environment, that requires data. Data costs, and I think one of the issues, which is inescapable, is that we can streamline as much as you like with some of our negotiating positions on being proportionate, you do not apply the same handle turning approach to low risk materials that you do to high risk materials, but nevertheless, data costs, and therefore it would be disingenuous of us to leave you with an impression that seeking to streamline this will then automatically enable small and medium sized enterprises to succeed in a regulated environment that requires a lot of data. So in that sense, it was just what I might describe, My Lord Chairman, as a reality check.

**Q88 Chairman:** Thank you for that cautionary statement, and I think you have, in this very brief session, helped us enormously to shed light on some of the practical problems of producing not only impact assessments but better regulation.

**Mr Foster:** I was going to add one thing, as my Lords are showing a keen interest, it complements what I was saying about the cultural and political aspects of value of life, or value of aspects of the environment; impact assessment is one part of a picture, and I recognise from what you say, sometimes the assumptions are heroic in doing impact assessments, but it is one part of the picture, and unless you have the whole picture in terms of regulating risks, whether it is from chemicals or indeed from anything else, it is always going to have a feeling of insufficiency. You have to have, as a regulator, a picture of where risks are so high that the chemical or activity has to be banned, and you have to have a view about the level of risk where regulators do not need to interfere any more, you back off, because the risks are acceptably low. So that you can apply, if you are going to apply, a cost-benefit assessment to the bit in between, because that is the only bit that it actually relates to. Of course, you have to be able to do this in the context of biocides for the people, public and the workers, and those levels will not necessarily be the same, and you have to be able to do it for the environment in all its diversity. So this is quite difficult. Now HSE, in terms of regulating risks at work, and to the public from work activities, has that sort of picture. The UK Government is working towards it, I would say. That framework does not exist at European level at all really, and to my mind, this is another reason why pure cost-benefit considerations are difficult to input in European negotiations, because you do not have the rest of the framework of which cost-benefit assessment is a part. I hope that was helpful, and sorry to delay.

**Chairman:** Yes, and of course it will depend on the dossier. There are some where that can be a crucial determinant, and others, as you have just indicated for me, HSE, where there are many other issues, some which cannot be objectively measured. Thank you very much, the session is closed.

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MONDAY 14 DECEMBER 2009

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Present	Bradshaw, L Dykes, L Freeman, L (Chairman) James of Blackheath, L Plumb, L	Powell of Bayswater, L Rowe-Beddoe, L Walpole, L Whitty, L
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**Memorandum by the Department for Business, Innovation and Skills**

**INTRODUCTION**

1. There has been significant progress made on the EU's better regulation agenda over the past ten years and we would commend, in particular, the critical role played by the Commission in driving the agenda forward.
2. The commitment of President Barroso, Commissioner Verheugen and Commission staff to better regulation has been central to the on-going effectiveness of the agenda. The Commission has lead many of the key developments in better regulation and with the cooperation of the European Parliament and the Council, has been able to establish a stronger framework of better regulation.
3. However, there remains much that needs to be done to ensure the effective delivery of the agenda. All three institutions must reaffirm their commitment to better regulation, set ambitious objectives for the future and place better regulation at the heart of our response to the economic crisis and other pressing challenges faced by the EU.

**DEVELOPMENT OF BETTER REGULATION IN THE EU**

4. The EU's better regulation agenda has undergone a number of significant developments during the past ten years, with programmes covering administrative burden reduction, impact assessment and simplification of Community legislation.
5. Guidelines on consultation were introduced in 2002 and require all Directorates General to carry out inclusive, transparent, coherent and timely consultations.
6. In 2003 the Inter-Institutional Agreement was agreed by the Commission, Council and the European Parliament with the aim of establishing a shared strategy for better law-making throughout the legislative process.
7. The Commission also established a comprehensive Impact Assessment system in 2003, intended to assess the economic, social and environmental impacts of legislative and non-legislative proposals.
8. In 2005 the Commission began its simplification programme designed to update, modernise and simplify the body of Community legislation (the "acquis").
9. The Impact Assessment Board was established in 2006 with responsibility for improving the quality of Commission Impact Assessments.
10. In 2007 the Commission began its programme to reduce administrative burdens by 25 per cent by 2012. President Barroso set up the High Level Group of Independent Stakeholders on Administrative Burdens—known as the Stoiber Group—to support this process.
11. By adopting the Small Business Act for Europe in 2008 the EU committed the Commission to implement the "think small first" principle as part of its wider policy development that seeks to ensure that unnecessary burdens are not imposed on small and medium sized enterprises.
12. Finally, new impact assessment guidelines were introduced in 2009, which made more stringent the requirements relating to impact assessments.
13. These developments have established a framework for better regulation in the EU, but more needs to be done to ensure the effective delivery of the agenda.

#### SCOPE OF THE IMPACT ASSESSMENT PROCEDURES

14. The UK was at the forefront of efforts to extend the scope of the Commission's impact assessment procedures and ensure that the right proposals are chosen to be subject to an impact assessment.

15. The new Commission guidelines extended the scope of the impact assessment procedures to all legislative proposals included in the Commission's Legislative Work Programme (CLWP), non-CLWP proposals that have clear economic, social or environmental impacts, non-legislative initiatives (such as white papers) that define future policy and comitology measures that are likely to have significant impacts.

16. The Government welcomes the Commission's decision to extend the scope of its impact assessments procedures and believes that this allows for a better selection of proposals to be subject to an impact assessment.

17. However, the Government would like the Commission to ensure that all Directorates-General comply with the provisions in the impact assessment guidelines and note that there have been occasional examples where an impact assessment has not accompanied a significant proposal.

18. The Government also believes that the Council and the European Parliament should play a greater role in holding the Commission to account when it fails to comply with its guidelines and produce an impact assessment of sufficient quality.

#### DEVELOPMENT OF IMPACT ASSESSMENTS

19. The Government believes that the development of impact assessments should be a continuous process designed to help policy-makers fully think through the consequences of regulatory interventions. As such, we believe that impact assessments should be produced as early as possible and updated throughout the policy development and legislative processes.

20. We believe that all Directorates-General should begin developing impact assessments as soon as a policy is being considered and that over time indicative monetised assessments of social, environmental and economic impacts should be included alongside policy commitments made in the Commission's Annual Work Programme to give decision-makers an overview of the impact of legislation being proposed for an entire year.

21. More must also be done to ensure that substantial amendments introduced in the Council and the European Parliament are accompanied by an impact assessment.

22. Both institutions have committed to assessing the impact of their substantial amendments<sup>1</sup>, however this is not happening consistently in the Parliament, and not at all in the Council. We believe that, in the event of the Inter-Institutional Agreement on Better Law Making being renegotiated in 2010, this matter should receive urgent attention.

#### USE OF IMPACT ASSESSMENTS IN THE COUNCIL AND EUROPEAN PARLIAMENT

23. In the Common Approach to Impact Assessment (2005) both the Council and the European Parliament committed to examine the Commission's impact assessment alongside policy proposals. However, there is limited evidence of this commitment being applied in practice.

24. In Council working groups and committees of the European Parliament, debates regarding impact assessments remain the exception rather than the rule. The Government is working closely with other member states, including the Presidencies, and MEPs to address this.

25. We have provided training to working group chairs under both the Czech and Swedish presidencies, so as to bring about full awareness and understanding of the importance of impact assessments and the need for these to be discussed during working groups.

26. We welcome the approach taken by some committee chairs in the European Parliament, who have insisted that all debates include a discussion of the Commission impact assessment. We would strongly encourage all committee chairs to follow this example.

27. We also believe that the introduction of a 1-page summary sheet would make impact assessments more accessible and encourage a focused debate on the key aspects of the Commission's analysis, whilst also providing greater clarity for national parliaments if these were to be attached to Explanatory Memoranda. The Government continues to press for the introduction of summary sheets.

<sup>1</sup> *Inter-Institutional Common Approach to Impact Assessment* (2005), [http://ec.europa.eu/governance/better\\_regulation/documents/ii\\_common\\_approach\\_to\\_ia\\_en.pdf](http://ec.europa.eu/governance/better_regulation/documents/ii_common_approach_to_ia_en.pdf)

#### INFLUENCE OF IMPACT ASSESSMENTS

28. The extent to which Commission impact assessments influence policy development is unclear. However, some stakeholders have expressed concern that impact assessments do not adequately influence the thinking of policy makers, but are used to justify policy decisions that have already been made.

29. The Commission's use of consultants to carry out impact assessment studies brings risks, as it separates the development of an impact assessment from the development of the associated policy proposal. The Government believes that more should be done to ensure that the two processes (IA and policy development) are brought closer together so that all Commission impact assessments influence policy development.

30. With regards to the inclusions of the "do-nothing" option in impact assessments, this is now required by the impact assessment guidelines and as of 2007 only 16 per cent<sup>2</sup> of impact assessments did not include the do-nothing option in their analyses. However, there is little evidence that inclusion of the do-nothing option leads to its selection as the preferred policy option.

#### CONSULTATION ON IMPACT ASSESSMENTS

31. While the Impact Assessment Guidelines advise that Directorates-General reserve time for public consultation and the collection of expert information, it is rare that stakeholders are offered the opportunity to comment on a draft impact assessment. We believe that there is scope for greater stakeholder engagement with the development of impact assessments, particularly by allowing the opportunity to comment upon draft versions.

32. This could also assist the Commission in gathering the data required to effectively assess the impact of proposals on small and medium sized enterprises (SMEs).

33. The UK welcomed the introduction of the Small Business Act for Europe and the EU's commitment to "think small first". It is now essential that the Commission implements and embeds an effective test for the impact of proposals on SMEs so as to demonstrate its commitment to the "think small first" principle.

#### THE IMPACT ASSESSMENT BOARD

34. The Government welcomes the role of the Impact Assessment Board (IAB) in scrutinising Commission impact assessments and while there are calls for it to become fully independent, we do believe that it works in its current position.

35. However, there is much that can still be done to increase the influence of the IAB and its ability to raise the quality of impact assessments, particularly in the area of quantifying costs and benefits across all three pillars.

36. We believe that the IAB should comment on impact assessments earlier in their development so as to maximise their ability to influence the quality of an impact assessment.

37. We also believe that more should be done to maintain the prominent position currently enjoyed by the IAB. The success of the IAB has, to a large extent, been the result of the quality of its board members. The Commission should ensure that the IAB is always populated by officials with sufficient seniority and influence to ensure that it is not sidelined or its independence undermined.

38. The IAB's influence could be strengthened with two measures. First, a couple of non-executives could be added to its members, to reinforce its independence. Second, when it is unhappy with the quality of an impact assessment, even after revision, this should trigger an oral procedure with the College of Commissioners.

#### COMMISSION SUPPORT DURING IMPLEMENTATION

39. The Commission does provide support for Member States during implementation. For example, the Commission has provided ongoing support to Member States during the implementation of the Services Directive.

40. In particular, the Commission has facilitated a series of meetings between Member States which have been valuable in ensuring a shared understanding of the Services Directive.

41. The Commission has also been quick to respond to any questions regarding interpretation or implementation of the directive.

42. We believe that the Commission should, as far as is possible, support Member States so as to ensure timely and effective implementation.

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<sup>2</sup> [http://ec.europa.eu/governance/impact/key\\_docs/key\\_docs\\_en.htm](http://ec.europa.eu/governance/impact/key_docs/key_docs_en.htm)

## CONCLUSION

43. The development of the better regulation agenda at the EU level has been impressive. However, there remains much that needs to be done to ensure the agenda's on going success.

44. All three institutions must re-emphasise their commitment to better regulation and in particular, prioritise the effective use of impact assessments during policy making and decision taking.

45. The Council and the European Parliament must meet their commitment to produce impact assessments on substantial amendments and more should be done to ensure that committees in the European Parliament and Council working groups discuss Commission impact assessments.

46. Finally, the Commission must ensure that the quality of its impact assessments continues to improve, particularly in the area of quantifying costs and benefits across all three pillars, and using impact assessments to shape proposals.

23 September 2009

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**Examination of Witnesses**

Witness: IAN LUCAS, Member of the House of Commons, Parliamentary Under-Secretary of State, Department for Business, Innovation and Skills, examined.

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**Q89 Chairman:** Let us begin officially by welcoming the Minister, Ian Lucas MP, Parliamentary Under-Secretary of State, Department for Business Innovation and Skills. Thank you very much indeed for, not only your written evidence, but also for coming and joining us. I should say that we hope to discuss a draft report the second Monday we come back in January and we are hoping to publish our conclusions, with the approval of the Select Committee, some time in February, early February, I would have thought. We have been focusing on impact assessments, as opposed to the wider issues of better regulation. With that brief introduction, could I ask you whether you would like to make an opening statement or shall we go straight into the questions?

*Ian Lucas:* I think we should just go straight into the questions, if that is okay with you.

**Chairman:** Good. Thank you. Lord Bradshaw.

**Q90 Lord Bradshaw:** Good afternoon. There are new impact assessment guidelines and I think we are very interested to know about the quality of what has been done, whether you think that the costs and the benefits which are included in them are reliable and are the bases for the figures used transparent? Are we getting something worth having or is it just a lot of bureaucracy winding round?

*Ian Lucas:* I think that we are getting something worth having, but not in all cases. There are impact assessments that have been made that have been very helpful to us and very helpful to UK Government departments in particular areas and, if impact assessments can be made at a European level in respect of European Directives, then that could be very helpful in preparing impact assessments for consideration in delegated legislation within the UK Parliament, so those are very, very valuable, but I do not think that all of the impact assessments that have been made at the present time are of sufficiently high quality. It is a relatively novel process within the

European Union, and I think therefore that is not altogether surprising, but it is a valuable process. There are examples of it having been done very well. There is an example in air quality, for example, that has been very helpful. It will improve. We want to push ahead our agenda making it improve at a European level to assist us in legislation here.

**Q91 Lord Bradshaw:** In your written evidence you go on to suggest the Commission is not producing impact assessments on all measures with significant impacts, but the Impact Assessment Board think that they are producing these. What are your thoughts generally on whether the impact assessments are yet addressing the most significant things, and do you know of any or think there are some things which should have been impact assessments and have not been?

*Ian Lucas:* There is one particular impact assessment that has not been made on VAT electronic invoicing that we think is a significant proposal which the Commission estimates could actually bring about savings of €18 billion across the European Union. We think that is an example of there not having been an impact assessment done when it ought to have been done. We accept that there will not always be a compelling case for making an impact assessment where a relatively trivial amount is involved, but where there is a very significant impact we do think it is valuable. We accept that the impact assessments are being made in most cases, and they are very valuable and I think real progress is being made by the Commission in this regard, but there are still individual cases where the assessments have not been made and I think that is unfortunate. We hope to continue to persuade the Commission to take this agenda forward and ensure that, in every significant case, in every proportionate case, the assessments are made.

14 December 2009

Ian Lucas

**Q92 Lord Bradshaw:** Can I pick you up on electronic preparation of invoices?

*Ian Lucas:* Yes, VAT electronic invoicing. The Commission adopted a proposal to amend its VAT Directive in January 2009. Firstly, the measure did not appear in its annual work programme and an impact assessment was not actually produced, despite it having significant impacts—as I say, at an estimated saving of €18 billion—and, therefore, we think that was an example where the position was not as we would have liked it to have been.

**Q93 Lord Bradshaw:** The economy is in the actual collection of value added tax.

*Ian Lucas:* That is right.

**Q94 Chairman:** When Lord Adonis came to give evidence on infractions of the first railway package, he very kindly, subsequently, sent us a list of those countries who are not fully implementing the freight package. The reason I mention this is that it would be very helpful if you have in the department a list, say, over the last few years of absent impact assessments. It would greatly help the Committee to attach that as an annex to our report.

*Ian Lucas:* I am sure that we would be very happy to investigate that and produce a list for the purposes of the report. I think it would be very valuable too.

*Chairman:* Thank you very much.

**Q95 Lord Whitty:** We have been talking about the Commission producing impact assessments. Do you also think that the whole range of proposals that come up in comitology should also be subject to the full impact assessment proposition?

*Ian Lucas:* I think that any significant proposal that comes forward should be subject to impact assessment, whether it is through the comitology process or through the Commission's proposals for regulations and directives. Comitology is, essentially, delegated legislation which can be carried forward by the Commission, and it is important, therefore, that anyone who is scrutinising those proposals should be in a position to assess the impact of those proposals. I think, in those circumstances, it would be valuable to have impact assessments made, again, where it is proportionate and where the impact of the particular proposal is significant.

**Q96 Lord Whitty:** They use the same process as the Commission use; they use the same resources as the Commission for drawing up the assessment.

*Ian Lucas:* Yes, I think, essentially, it would be the Commission that would draw up the assessment in that particular case, as it would be with any other proposals.

**Q97 Lord Whitty:** I think we are going on later to proposals which come up through the European Parliament, for example, which is a completely different process, but I will delay that one. The other thing I am interested in is the relationship between the European process and the British process of which, I think, our first take was there was not much. We did have an example from the HSE, who showed us that they prepared their impact assessment for UK regulation by directly extrapolating the figures from the one that the Commission had done at a European level, but they also said this was an extremely rare occurrence with the HSE. I am not really aware that this is a very frequent occurrence in any part of government, your own department or others. Is there a relationship between the work done at a European level and what might be followed through either in transposition or in British level directives?

*Ian Lucas:* I sincerely hope there is, because, obviously, the proposals that are made at a European level directly impact on the UK in due course, and the earlier that one can engage with that process, then the more appropriate the legislation through the form of Directives coming from the EU will be. So I think early engagement when a draft proposal of whatever kind is made in the European Union should be facilitated by the UK Government. We want to be involved in that process because frankly, we take the rap when that comes through at the end of the day and the Directive or the proposal is unsatisfactory for UK business, UK consumers. In my job, the principle of engagement at every stage of regulation is very important and European regulation is no exception to that.

**Q98 Lord Whitty:** I think the problem that is identified for me anyway, I am not sure about my colleagues, is that partly because the Brits have been earlier in the process of drawing up impact assessments (and there is a certain sniffiness about the European level, some of which you have reflected yourself) that actually most government departments want to use their own material and their own ways of drawing up impact assessments even if there has already been some work in Brussels.

*Ian Lucas:* If that is the case, then I do not think it makes sense. Clearly, the proposals coming forward from the European Union will have a direct impact on the departments and, in due course, on businesses, consumers within the UK, and we cannot have people singing from different song sheets in respect of the same proposal. The engagement needs to happen between the European Union and the UK Government to make sure that when the implementation takes place at UK level we have got a sensible, overall cohesive proposal that is implemented in legislation within the UK.

14 December 2009

Ian Lucas

**Q99 Chairman:** Could you help us? It is not necessarily a request for written information, but can you share with us your impression about how other countries prepare their own impact assessments? I know the Commission, for instance, produces its own, but are the Brits almost unique in the thoroughness and the extent of impact assessments that departments produce for the UK Government?

*Ian Lucas:* I think there is a different culture as regards UK impact assessments and I gather there are complaints about this sometimes. We are very figures driven in that we think that cost-benefit analysis in numerical terms is very important, and I think that that creates some disagreements sometimes with other European countries because they do not think that that numerical cost-benefit analysis is as valuable as we think it is, and that is partly a cultural difference, I think, and a difference in the way that draft legislation is proposed. I suppose, from our point of view, the creation of impact assessments is a relatively novel process and it is a discussion that we are still having with other European countries to try and bring them on board. We have allies in this regard, but we have some people who do just not agree with it.

**Q100 Lord Bradshaw:** You are the second person who has sat there in the last month who has cast doubt on the way the British Government puts a lot of emphasis on cost-benefit analysis and other countries in Europe do not. Have you any idea of the proportion of countries which hold out the cost-benefit analysis as a sort of totem and how many people do not? Are we in a very big minority?

*Ian Lucas:* I cannot give you a proportionate approach, because I think it will differ in different individual cases, but I do not think we are in the majority in this. I think that is the furthest I can go.

**Q101 Lord Dykes:** I see that, quite unusually, you speak German.

*Ian Lucas:* Ein bisschen!

**Q102 Lord Dykes:** I wondered if you had had a chance to discuss with German colleagues the *Wirkungsabschätzung*, the impact assessments, and the way they use them?

*Ian Lucas:* Strangely, I did meet with Eckart von Klaeden, who is the new minister in Germany (who was appointed, I think, last month) earlier this month. I did not specifically discuss with him impact assessments, but I did discuss working more closely with the Germans in terms of the Better Regulation Agenda as a whole. Certainly, we regard impact assessments as very important within the UK. We had a very constructive meeting and we talked about perhaps organising a seminar together to talk about better regulation and, as part of that, we would want

to be talking about impact assessments and the progress we might be able to make within the European Union. We are always seeking to attract friends.

**Q103 Lord James of Blackheath:** Minister, we have been getting some reports coming to us that the focus both of the UK and some other Member States on administrative burden reductions is disintegrating the logic of integrated IAs. Does that ring any bells with you?

*Ian Lucas:* It rings bells with me. I do not accept it. I think that administrative burden reductions are very, very important. When I talk to business and many other individuals within the UK, when they think about the stock of regulation they think very, very hard and make strong representations to me about the importance of administrative burden reductions, and I think that it is important that is in my mind when I am looking at the issue of regulation. I think it is in my mind but it does not dominate what I do.

**Q104 Lord James of Blackheath:** I think I am hearing you say you disagree with the thrust of the question. So why do you think we have been getting such strong representations along those lines? What is the misapprehension that is being given?

*Ian Lucas:* I think it is the misapprehension that that dominates the approach that we have to regulation, because I think what we want to do is improve the regulations brought forward. With regulations we, therefore, look at cost-benefit analyses, we also look at environmental, social and economic impacts of regulation. We do have a broad consideration of the various impacts of regulation, but, as far as existing regulation is concerned, we are conscious of the representations that we get from business, for example, about administrative burden, and that is important. We want to try and reduce burdens for business as far as we can.

**Q105 Lord James of Blackheath:** Do you think it is possible that people are reporting what they expect to see rather than the reality that they find?

*Ian Lucas:* I do not quite understand the question.

**Q106 Lord James of Blackheath:** I am wondering whether people are projecting their belief in what might be happening rather than reporting on the firm evidence of what they have seen?

*Ian Lucas:* Do you mean the bit that is representative of organisations from business?

**Q107 Lord James of Blackheath:** I only put it that way because you are quite at variance with some of the reports that we have had, so I am just trying to find out why we may have had such different reports.

14 December 2009

Ian Lucas

*Ian Lucas:* For example, we asked for evidence of regulations with which business was dissatisfied recently. The Institute of Directors came forward with 300 regulations, or something approaching that<sup>1</sup>—I speak from memory—asking us why these particular regulations were in place. Some of them, because we carry a broad approach to the regulations, we regarded as necessary and defensible, and we said so, but with a number of them we took on board what the IoD had to say and actually were acting on them. A number of them we were actually acting to limit the regulatory impact already. So we have an approach to regulation that is broader than narrow cost-benefit economic impacts but we do regard reducing administrative burdens as very important.

**Q108 Lord James of Blackheath:** That is very helpful as background to what may still be something of a conundrum for us, but, moving on, the Commission has recently published a Communication on the action programme for reducing administrative burdens. What is your assessment of the Commission's progress in meeting the target of a 25 per cent reduction in administrative burdens by 2012?

*Ian Lucas:* Firstly, we greatly welcome the Commission Communication, because I think that shows the extent of the culture change within the Commission, the fact that such a challenging target is being pursued. But it is very challenging and it is going to be very difficult to achieve. I also think that it will be some time before businesses within the European Union will actually feel the benefit of the proposals, because the Commission alone cannot deliver the target; there has to be a buy-in by the Parliament and by the Council too. The steps forward that the Commission have made in recent years have begun to be taken on board by the European Parliament but perhaps less so by the Council, and I think that the progress that the European Union will make will be constrained by the lack of buy-in right across the board.

**Q109 Lord James of Blackheath:** Thank you for that. I think that goes to some part of the answer to the final bit of the question here, but there is one bit I will ask you. If, indeed, the Government's claim that they have been working to promote the benefits of better regulation with the MEPs and Member States' representatives in the Council, as I think you are referring there, could you give us an account of the actions that you have been undertaking in this respect of support?

*Ian Lucas:* As I mentioned earlier, I personally have met with the German Better Regulation Minister to discuss with him our Better Regulation Agenda in the UK and how we can meet with the Germans and

discuss the way that we are going to take matters forward. My colleague, Lord Davis, has met with several key German and UK committee chairs, including Sharon Bowles, who heads up the Economic and Monetary Affairs Committee, and Herbert Reul, who chairs the Industry Research and Energy Committee, and better regulation featured prominently in those discussions; and I am going to the European Parliament in the New Year to promote this agenda too. I also understand that we have contact at official level with UK and German committee chairs and their assistants.

**Q110 Lord James of Blackheath:** Beyond the early New Year, what are the other major objectives that you have coming?

*Ian Lucas:* As far as better regulation is concerned?

**Q111 Lord James of Blackheath:** Yes, so far as this process.

*Ian Lucas:* What I would like to be doing is trying to broaden the focus of impact assessments and trying to extend the idea of the Commission producing impact assessments. For example, as regards any proposal being brought forward by the European Parliament or the Council, to try and embrace impact assessments from them too so that we have a more informed assessment.

*Lord James of Blackheath:* Thank you, Minister. That is very helpful.

**Q112 Lord Plumb:** I think my question follows closely the question you have just been answering from Lord James. You used the phrase earlier to Lord Whitty when you said, "Government takes the rap when developing legislation", and I would suggest none more so than with SMEs. It is the SMEs who perhaps are more critical of general legislation because they find it more difficult to get to grips with it, whilst there are people in perhaps larger companies who can the better cope. But in this, of course, dealing with the Commission, it is supposed by the test that is already set by the Commission for the SMEs to encourage the Commission to think small first when developing that legislation. Do you think that is so? Do you think they are doing that and does it adequately reflect in the impact assessment?

*Ian Lucas:* I feel very strongly about this small business aspect, because I used to run a high street solicitor's firm as a sole practitioner in Oswestry in Shropshire and I am very conscious of the wide burdens imposed on small enterprises of all sorts. Therefore, I think the fact of the SME test is a very positive step forward. It is very early to assess it as far the EU is concerned, but we were encouraged by the Commission actually adopting a proposal to exempt micro-enterprises from more complex EU accounting requirements, which we strongly support,

<sup>1</sup> The actual figure is 269

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14 December 2009

Ian Lucas

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and we are also lobbying ourselves, the UK Government, to mitigate the disproportionate cost of regulation on SMEs. So we think it is now on the agenda in a way that it has not been before, and it is a very powerful tool in terms of having it there to use in argument as far as taking positions with other Member States is concerned. We are early in the process as far as the impacts of that are concerned, and I cannot come up at this stage with concrete examples of what it has been able to achieve, but I think it is very prominently on our own agenda and the recognition by the EU institutions of its importance will be helpful in putting the case forward from now on.

**Q113 Lord Plumb:** I think a lot of people would welcome that answer, but at the same time they would immediately come back and say, “We will believe it when we see it”, because they have heard this so many times over recent years. The other question that concerns them is they say—it may not be true but nevertheless they say—“We obey the law but does every other country? Does the same impact assessment apply in all other countries?” If you can explain to them that other countries do obey the law, or at least give them that satisfaction, that may help at the same time, of course, as reducing the amount of legislation and the impact that that legislation has on their business.

*Ian Lucas:* I think there is a perception, which I hear in my surgeries, that we abide by these regulations and other countries do not. It is a difficult trick for me to pull to say that other countries do not abide by EU regulations. I am sure that they would say that they do and that they do enforce them. But I think the fact that this is now on the agenda as far as respecting the position of smaller enterprises and the fact that the European Commission has adopted a proposal to exempt micro businesses—all of that is positive as far as smaller businesses are concerned. You can be assured that I want (to use that dreadful phrase) a level playing field as far as the EU is concerned, because we want to be able to compete with all other Member States on an equal footing and I do not want anything in place that is going to prevent UK business from doing that.

**Q114 Lord Rowe-Beattie:** Following on, if I may, on this whole question of SMEs, actually Lord Plumb dealt with the question of perception, but, in general, I was greatly encouraged by your written responses because I think that you were highlighting areas that are of great concern to the SME sector. At least we have heard that in evidence. The previous evidence that we have heard argued, for example, that the EU consultations are too complex for SMEs—that is something which came through—as well as they are

too high level for individual stakeholders to engage with. What are your comments to that?

*Ian Lucas:* I probably agree with that, but that is too short an answer. I agree. I was talking about engagement earlier on. One of the real dangers of any proposed legislation is when it really adversely affects a particular business. It is very difficult for a small business to keep abreast of what all the proposals that are going around are from legislative bodies, whether they be the Welsh Assembly Government, whether they be the UK Government, or whether they be the European Union. I think that the representative organisations do a very good job in this respect—people like the Federation of Small Businesses and the Institute of Directors—and they try to keep an eye on matters, and it is important that we make that as easy a process as we can for them. I think that in government what we need to be pressing for is as early highlighting of any legislation, or draft legislation preferably, that comes forward as possible. We need to have a close relationship with those representative organisations and we need to encourage them to shout out loud if there is something on the horizon, even, that is going to cause difficulty or needs to be looked at in a different way. I also think that we need to be as accessible as we possibly can to business directly. We have tried to do that through organisations like the Better Regulation Executive and using the website routes as far as we possibly can, but I think more business needs to be aware of the existence of that and the fact that they can contact government.

**Q115 Lord Rowe-Beattie:** Thank you. The other thing is, again, in support generally of what you wrote—and you used the disagreeable phrase of the level playing field—there does seem to be an enormous lack of joined-up thinking between the three parts of the European Union—the Council, the Commission and the Parliament—where you are getting all this conflict, in fact. However, I have got a last question. How could the system be improved in so much as the cost of producing data that is required at times during this consultation period is something, we have heard, which discourages SMEs from participating? How can we address that and what are the UK’s comments?

*Ian Lucas:* I think, firstly, one of the difficulties is that the consultation period that the EU uses is very short. It is only eight weeks, which is shorter than you normally use at the UK government level, and is a very demanding deadline for a small business that is particularly affected by a proposal to actually respond to, devote the attention to and then submit information to. So I think that we need to think about extending that. We think the SME envoy from the EU has a role in this and really needs to promote the importance of engagement between smaller

14 December 2009

Ian Lucas

business and the European Union: because I suspect that it is a much more difficult task for a smaller business to engage with the behemoth that is the European Union than perhaps some of the larger organisations and multinational companies. We have got a small firms consultation database, and we do use the Better Regulation Executive website and encourage contact as far as we possibly can with any proposals. I am a great believer in draft legislation as well. I think it is important that any ideas that are coming forward should be put forward in draft, if at all possible, and that maximum consultation takes place, because the more consultation that takes place the better for legislation at the end of the day.

*Lord Rowe-Beedoe:* Thank you.

**Q116 Lord Dykes:** We are dealing with a system of the separation of powers, which is new for British citizens but is very familiar to Americans, and sometimes the Americans understand those processes more than many citizens in European countries. Can I turn your attention briefly, Minister, to the Inter-institutional Agreement, which does provide that there should be impact assessments done on the significant amendments to legislation by both the Council and the Parliament, particularly when it is a major change, or a fairly major change at least, suggested in the proposed draft legislation. We are disturbed to learn that that is not apparently happening as much as we might have expected. What is the Government's view about that, and is there anything that might be done to alleviate that problem?

*Ian Lucas:* We think it is hugely important, because if impact assessments are to work, then, clearly, the assessments have to be made on the proposal that is actually going to be implemented. It is no use having an impact assessment on an original proposal that is then going to be amended substantially and is, therefore, implemented on an entirely different basis to the calculation on which the impact assessment was made. So we think it is very important indeed that this should develop. The European Parliament has begun to do some work in this area, and we would like to see the Commission, perhaps, play a role in this. I think that was highlighted in some of your earlier evidence. There might be a slight degree of scepticism about the impartiality of the Commission in this in that the suggestion may be made—certainly not by me—that they might try to defend their earlier position rather than give informed advice on an amendment, but I am not sure that that is a particularly valid criticism. I think that it would be very helpful for there to be a developing culture, not just in the European Parliament, but also in the Council for any significant amendments that are proposed at that stage to be supported by impact assessments.

**Q117 Lord Dykes:** Would there be a danger that, if the Commission did do that off its own bat, as it were, that would be regarded as slightly *ultra vires* to say the least? Although everyone is getting entry around the Lisbon Treaty procedures now, that will only unfold as time passes, basically, and we are only just starting. So should the Commission intervene with further assistance on IAs if the EP requests it, or if the Council does as well, but mainly the EP, I suppose, or should it just do it off its own bat anyway?

*Ian Lucas:* The Commission is developing some expertise in producing the impact assessments. I do not think that capacity is particularly there within the European Parliament as yet. I am not sure whether the individual Member States would be seen as sufficiently impartial to be able to produce their own impact assessments, although I think that is better than having no impact assessment, quite frankly. So I think the source of the impact assessment is perhaps less important than the fact of the impact assessment. Initially, at least, we should have the information to try to have a more considered and informed debate about substantive amendments.

**Q118 Lord Dykes:** Would it be legitimate for a national impact assessment, both from a government or a national parliament, to be made on the basis of representations from one or more trade associations or lobby groups and just taken as evidence of a problem which the government or parliament would then pass on, or should it examine the arguments itself before doing that?

*Ian Lucas:* I think we must examine the arguments. I do not think any government should be simply relying on a lobby briefing in order to make a proposal.

**Q119 Lord Dykes:** After all, those groups can always lobby direct to the European Parliament, as will happen more and more now.

*Ian Lucas:* Yes.

**Q120 Lord Dykes:** Finally, there was an earlier witness in the evidence we took who said that impact assessments were not really the currency of the debate in the working groups. Do you find frequently that HMG does use the UK impact assessment, the particular detail of a particular piece of negotiation, as a strong negotiating tool in the working groups and in the Council and in COREPER?

*Ian Lucas:* I will be expecting them to do so, but what I will do is look into to what extent they do rely on the impact assessments in the working groups, because I would be concerned if they did not.

**Q121 Lord Dykes:** Could you give an example for the Committee in due course?

14 December 2009

Ian Lucas

*Ian Lucas:* Yes, of course.

**Q122 Lord Powell of Bayswater:** Minister, first of all, I do apologise for being late; I was caught up. This is really the last aspect of the questions, and that is the question of ex-post evaluation and legislation. As you know, I am sure, it is a regular business practice to have a post-investment review; it is actually rather useful. The general conclusions on better regulations last May provided for this. Is it happening?

*Ian Lucas:* I do not think it is happening as much as it needs to. I may be quite a sad individual, but this is a little hobby horse that I had before I came into this House. It is something that we in the UK Parliament do not do very well, and that is assess the legislation that we have already passed and really ensure that the effect that it was intended to have it has had and, if it has not, why not. I think our culture is such that we do not really think as politicians in those terms; we look at new legislation as being the only answer to the question. I think we need to do much more work on this and also promote the benefits of it, both in terms of effective use of parliamentary time, whether in this Parliament or any other parliament, and try to develop a culture of looking at every piece of legislation that is passed to see whether it is having an impact. I do not think we are doing that at the moment.

**Q123 Lord Powell of Bayswater:** How do you think we can do it more? Is it just a question of the UK lobbying, or do you think you can find like-minded Member States who would join in this? Should the First Secretary of State descend like an avenging angel on the Council and demand that it happen?

*Ian Lucas:* I am not sure that that would be the most effective way of proceeding. We are always trying to build alliances. It may not be the most high profile of issues, but as politicians we are beginning to get more and more criticisms of producing too much ineffective legislation, and I think its time has come and I think we need to do something about it. I am sure that it is not just in the UK that this happens as far as legislation is concerned—there will be examples from the European Union of ineffective Directives coming down. It is an area that I do not think will be massively contentious; it is a question of securing the attention to the issue that will enable it to be taken forward. So I think we do need to persuade people to take it on board, then to make the arguments and to try to ensure that much less ineffective and annoying, therefore, legislation is introduced.

**Q124 Lord Powell of Bayswater:** You would agree with me that a cultural change is needed. Just as powers given to Europe never come back, so

legislation passed by Europe is never withdrawn, only more is added on top of it.

*Ian Lucas:* I think we need always to be analytical and sceptical about the legislation that we pass and think whether this was the best way of doing it. Legislation is not always the best way of approaching things—I try and encourage that view as the Better Regulation Minister—and I think we need to be more critical of ourselves and accept that it is not always the best thing to do, to pass a new law to solve a problem.

*Lord Powell of Bayswater:* I am very encouraged by your approach. I wish you every success with it.

**Q125 Chairman:** One request and one question. The request is that it would help the Committee if you could tell us now what your understanding is of the capacity of the European Parliament to produce impact assessments on significant amendments that are passed. My recollection is that external consultants are used and, if that is not universal, perhaps some organisational change is needed to create a capacity within the Parliament to do the work. So any observations on that point would be helpful.

*Ian Lucas:* I will certainly do that.

**Q126 Chairman:** Unless my colleagues have got any supplementary questions, perhaps I could ask for your personal experience dealing with fellow ministers. Impact assessments in departments are not exactly the world's most exciting subject for ministers to devote time on a Saturday night to—sometimes their boxes can be quite full and very detailed (impact assessments and proposed Directives and Regulations)—but could you tell the Committee about how you go about proselytising amongst your fellow ministers the importance of impact assessments?

*Ian Lucas:* I am relatively new in post—I have only been here since June—but it is quite interesting that I write to other ministers sometimes and point out various things, but I am beginning to get a bit of feedback, and I think that is very positive, because it makes them stop and think about the general principles of the regulations that they are bringing forward. I think the UK's Forward Regulatory Programme has been very useful in this respect, but, specifically on impact assessments, I always emphasise that they are a very important part of the process and that they should be taken very seriously. I think that is a message that I have to pass across government and be persuasive about because, as you say, it is not what most people want the EU looking at before *Match of the Day*, but it is important because it is about effective legislation at the end of the day and, therefore, if we are going to do things that are worth our while doing, we have got to show what the benefit is going to be, and that is what an impact assessment

14 December 2009

Ian Lucas

is all about: that its benefits are going to outweigh the damage it will cause. I think getting that simple message across in a more strategic principled approach to any proposals that are being carried forward is very important.

**Q127 Chairman:** I am sure the Committee supports and agrees with what you have just said, and I hope our report will be helpful within government.

*Ian Lucas:* I am sure it will.

**Q128 Lord Bradshaw:** Coming out from what you have said in answer to the last four questions about the difficulty of getting small and medium-sized enterprises to engage in the whole process, my experience of them is that they have not got time to get involved in it, and the trade associations in many professions do not themselves consist or actually take account of the people underneath them because they are usually dominated by the big players. What does the Government do, or what do you or the departments do, to try to get underneath the trade associations to actually find out what a real small, medium sized enterprise thinks? Even a few phone calls would help.

*Ian Lucas:* Actually there is one group, who we have not mentioned, who I think are very important in terms of engaging small business, and that is members of Parliament. If a small business comes to me and says, "There is this dreadful new proposal coming out", as a member of Parliament—and I think members of Parliament play a really positive role in engaging with the department—I think one of the things that we should be encouraging through my department is contact with members of Parliament and getting them to engage (because very often they do not) with chambers of commerce and present themselves as an avenue through which to convey their concerns to the Government. I think that would be very useful.

*Lord Bradshaw:* I think that would be useful. May I say, I am taking three small businessmen to see a minister just after Christmas. The businesses concerned are small but very vital businesses and they cannot get their voice heard through the trade associations. So even the feeble House of Lords sometimes can actually act as a conduit through which to move. So I fully endorse what you have said about members of Parliament.

**Q129 Lord Dykes:** But, of course, in your earlier answer specifically to me as well as to others you did say that government could not possibly just take the views of a lobby or an interest group like that; it would have to exercise an intellectual and quantitative/qualitative right to make a judgment.

MPs are much more likely to represent them just because they have been approached by them.

*Ian Lucas:* It is more the fact that they highlight the issue. We do not necessarily agree with it and take it on board, but the fact is there will be occasions where an issue does not come to our attention unless someone does raise it, and obviously we need to exercise a judgment about the validity of the complaint, but we will at least know of it. Thank you.

**Q130 Lord Plumb:** A third body, I think, that the Minister might like to comment on or think about are those that are actually distributing the legislation to the people themselves, who often, in this country, I hear, are not very popular because they are going to add to the burden that the small and medium sized enterprise has already got. If I could use an example, I had a friend who set up a business in France three years ago now and, after he had been there for a few months, I telephoned him one Sunday evening and I said, "Tell me, what is the difference between an inspector calling at your business and telling you what to do and what you are doing wrong compared with an inspector calling at a business in Britain?", and he knew because he had been an inspector himself in this country. I said, "Answer me in one sentence." He said, "I will answer you in one word: attitude." He said, "The attitude of the French calling to the business is so totally different. The first time, I had two men call to the business and when they came in I had the feeling they wanted to pull off their jackets and help—totally different from the way that a lot of people approach businessmen here." I thought it was a very good example. It is a matter of changing attitudes of the many people here.

*Ian Lucas:* You should raise that, because last week I had a dinner with the Trading Standards Institute where we were talking about cultural change in the relationship between regulators and regulated people and how it was important for there to be a more constructive relationship and that we should not simply view regulators as people who came in like the Flying Squad, do a hit and then duck out again: there needs to be a continuous relationship. Interestingly, this was raised in the context of the engagement discussion that we were having. I think you are right: I think that they are a very useful body through which we could communicate with small business, and that is another one that should be added to the list, because we want to use as many avenues as we possibly can.

**Q131 Chairman:** Thank you very much indeed, Minister, it was very helpful and all power to your elbow.

*Ian Lucas:* Thank you very much

### Supplementary memorandum from the Department for Business, Innovation and Skills

*Does the government use UK Impact Assessments in Council working group discussions?*

It is Government policy that departments develop a UK impact assessment as early as possible and that departments should include it in an explanatory memorandum to Parliament on a Commission proposal.

It is also Government policy that impact assessments must accompany any proposal to clear cross-Government negotiating lines on Commission proposals.

Two recent examples where impact assessment informed were used by the UK in Council working groups are:

1. Implementing Measure for External Power Supplies—this measure aims to reduce power consumption of power supply units; and
2. Implementing Measures for Simple Set Top Boxes—this measure aims to reduce power consumption of devices that connect to a television and an external source of signal.

To further encourage the use of Commission impact assessments in Council working group debates, the UK is hoping to work with like-minded member states to present a two-page summary of Commission impact assessment to ensure discussion starts with the Commission's views of potential costs and benefits. The aim is that illustrating the costs and benefits in a condensed format will make data more accessible and therefore increase evidence-based discussion in Council.

To reinforce this, internal Government guidance on negotiating Commission proposals, also encourages UK officials to ask for a discussion of the Commission impact assessment in Council working groups.

*Can you provide examples of where Commission proposals were not accompanied with an impact assessment?*

The Better Regulation Executive conducted informal consultation with a number of key EU facing UK departments and agencies in preparation for the Committee's inquiry. This showed that since the Commission extended its scope of measures subject to impact assessment at the beginning of the year, it more systematically produces impact assessments on measures in its annual work programme.

Nonetheless, further improvement is undoubtedly necessary and we are working closely with both the Commission and like-minded Member States to ensure that more and more Commission proposals do have robust impact assessments. Three recent examples where the Government found a Commission impact assessment missing are:

- A proposal on rules for VAT electronic invoicing—the Commission adopted a proposal to amend its VAT directive in January 2009. The measure did not appear in its annual work programme and an impact assessment was not produced despite it having significant impacts. The UK estimates this proposal could bring substantial annual savings to businesses.
- A proposal on “clean cars”—in 2007 the Commission adopted a proposal promoting clean and energy-efficient road transport vehicles without an impact assessment.
- A regulation agreed through comitology implementing part of the Official Feed and Food Controls Regulation came into force in January and created burdens on food businesses that import certain foods from third countries. No impact assessment was conducted by the Commission but the UK estimates this could bring total costs of between £10.2 million and £21.6 million with total benefits of between only £2 million and £2.3 million.

Despite the obvious improvement in the quantity of impact assessments being produced by the Commission, the UK is working hard with like-minded Member States to encourage the Commission to go further in the following key areas:

- ensuring that the Commission better quantifies costs and benefits;
- ensuring impact assessments are produced on more comitology items with significant impacts by holding the Commission to its promise to do this;
- ensuring that measures developed in response to the financial crisis are not rushed through without proper evidence of the costs and benefits. Here for instance we are working hard with Treasury to feed into the proposal to regulate hedge funds and other alternative investment funds;
- ensuring that Commission Roadmaps and impact assessments better quantify costs and benefits;
- ensuring that impact assessments are produced in a user-friendly format through the help of impact assessment summary sheets like we do here in the UK, containing the key information from the main impact assessment eg intervention options, costs and benefits; and

- ensuring measures do not disproportionately affect SMEs by making sure the principles of the EU Small Business Act are applied in practice.

*What evidence do we have of the European Parliament and Council conducting impact assessments on substantive amendments to Commission proposals?*

It is fair to say that the European Parliament and the Council do not have a good record of producing impact assessments on their own substantive amendments to Commission proposals.

However it is worth noting that the Parliament has done more recently. It has produced seven impact assessments on its own substantive amendments. An example is of the Internal Market and Consumer Protection (IMCO) Committee requesting an impact assessment on substantive amendments to the proposal for a Directive on nominal quantities for pre-packed products. This impact assessment (1) clearly contradicted some of the Commission's claims, (2) helped to better understand and better explain to third parties the available policy options, and (3) was explicitly used by several Member States to reach a better compromise in the Council.

Embedding the use of impact assessment in both the Parliament and Council is imperative and the UK is looking at ways to further this aim.

The Government is working with like-minded MEPs to get formal agreement by key Committee Chairs to use Commission impact assessments at first committee meetings to discuss new proposals. In the Council, the UK is working with like-minded Member States to use a two page summary of the Commission impact assessment for a proposal as a basis for first discussion on a proposal.

We are also working with upcoming presidencies to highlight why impact assessments should be discussed during working groups. The Government works closely with a number of other key Member States, including some who joined in 2004 to reiterate the importance of using impact assessments in the Council. At official, the UK has also sent better regulation secondees to work in the Slovenian, Czech and Spanish Presidencies to prioritise this work

The upcoming review of the Inter Institutional Agreement on better law-making presents an opportunity to get renewed commitment from both the Council and Parliament to make more use both of Commission impact assessments and impact assessments on their own substantive amendments.

*8 January 2010*

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# Written Evidence

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## Memorandum by the British Chambers of Commerce

1. The British Chambers of Commerce is the national body for a powerful and influential Network of Accredited Chambers of Commerce across the UK; a Network that directly serves not only its member businesses, but the wider business community.

2. Representing 100,000 businesses that together employ more than five million people, the British Chambers of Commerce is the Ultimate Business Network. Every Chamber sits at the very heart of its local community working with businesses to grow and develop by sharing opportunities, knowledge and know-how.

3. The BCC would like to thank the Committee for the opportunity to submit written evidence to their inquiry into the EU's Better Regulation agenda. Below are the BCC's responses to the specific questions identified in the call for evidence. In addition, BCC members believe that the Commission must ensure that:

- European legislative instruments are properly assessed—so that they do not have adverse impacts on business competitiveness in the UK and across the EU.
- Impact Assessments take into account the cumulative burden that regulation can impose in areas like employment—as costs often pile up on top of each other when multiple pieces of legislation come through at once.
- The SME test becomes an effective part of the EU Impact Assessment. If used properly the SME test will be particularly important to the business community over the next few years, as costly regulation could prevent smaller businesses from growing during the recovery.

(a) *Whether the right proposals are chosen to be subject to impact assessment or whether all legislative proposals should be accompanied by an impact assessment.*

4. Impact Assessments should be targeted only at legislative instruments: regulations and directives. For 2008 the Commission's IA Board records 43 IAs targeted at directives, 33 at regulations and 44 were not connected to any legislative proposal at all. The total number of directives for 2008 was 120 and in the same period there were 1,008 regulations;<sup>1</sup> this leaves a large proportion of legislative instruments apparently without adequate analysis. The EU IA requires Commission officials to conduct a more elaborate assessment than is necessary for the equivalent UK process. The remit of EU IAs includes social and environmental impacts in addition to the economic effects on business, government and consumers. The Commission's IA guidelines<sup>2</sup> ask officials to follow a three step process:

- Identification of economic, social and environmental impacts.
- Qualitative assessment of the more significant impacts.
- In-depth analysis of the most significant aspects.

5. Since the Commission's chosen methodology is very complex, it would be sensible to target limited resources at legislative instruments, as they will result in a direct impact.

(b) *Whether impact assessments are produced early enough in the legislative cycle to influence the proposals adopted by the Commission; whether they are suitably updated following negotiation so that the impact of legislation agreed between the Council and European Parliament is properly understood; and, if they are not, how the process could be changed;*

6. The Commission's contribution to EU Impact Assessment, while not without flaws, compares favourably to the Council and Parliament, where the nature of proposals can change dramatically. The Council, to our knowledge, has never conducted an Impact Assessment, and examples from the Parliament are few and far between. The ideal would be for the Council and the Parliament to use Impact Assessments to cost amendments to Commission proposals. The Inter-Institutional Agreement (2003) and the Common Approach to Impact Assessment (2005) commits the EU's legislators to do precisely this.

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<sup>1</sup> Worlds Apart: The EU and British Regulatory Systems, Tim Ambler and Francis Chittenden, p 12

<sup>2</sup> Worlds Apart, Ambler and Chittenden, p 13

(c) *Whether members of the Council and MEPs use the impact assessments during negotiations; and, if not, how this could be encouraged;*

7. Both the Council and the Parliament should spend more time scrutinising the Commission's original Impact Assessment. Changes proposed under the Lisbon Treaty to the timing of Council Working Groups prevent them from convening on the day that a proposal is made by the Commission. National officials will have to wait six weeks before negotiating with their EU counterparts; this cooling off period should be earmarked for a serious review of the Impact Assessment.

8. In the Parliament, scrutiny of impact assessment has varied on an individual basis with some members using it to inform discussions, but nothing structured has been established. However, the changeover in Committees has prompted some fresh thinking; for example, the new chair of the Internal Market Committee, Malcolm Harbour MEP, has reserved the first exchange of views on any new dossier for a discussion of the Commission's Impact Assessment. Approaches like this are to be commended and should be used as best practice.

(d) *How effective the inclusion of a do-nothing option in impact assessments is; whether impact assessments actually influence policy formulation; or whether they are used to justify a decision already taken;*

9. According to BCC research EU IAs do routinely consider alternative policy options, the majority of the sample that we surveyed considered between two and five.<sup>3</sup> The influence of an assessment will depend largely on the quality of its analysis and in particular the extent to which it can accurately quantify the cost of a particular proposal. Quantification in EU IAs is often weak, in 2008 only 7.8 per cent<sup>4</sup> of EU IAs analysed by the BCC quantified the impact of proposals. The proportion of EU IAs quantifying the impact on business has never exceeded double figures. Quantification can only be improved if member states align their own IA processes with the EU and contribute to the data collection process.

(e) *Whether stakeholders are properly consulted; whether the concerns of SMEs and the principles of the Small Business Act are properly taken into consideration; how could consultation be improved; and to what extent consultation affects policy formulation;*

10. Consultation can be an important part of the policy process; it should complement economic analysis carried out in impact assessment with "real world" insights provided by those affected by a new proposal. They should not be limited to closed question online surveys, but should employ a diversity of tools and approaches to elicit information which will form part of a final impact assessment.

11. For open public consultations, the Commission should ensure that there is adequate time for stakeholders to prepare responses, particularly if they are serious about engaging with small firms; the current period of eight weeks should be extended to 12.

12. The Commission's IA guidelines<sup>5</sup> ask officials not to think of consultation as, "a one-off event, but a dynamic process that may need several steps" and we would wholeheartedly agree; it is not always clear from the final analysis that this principle has been adhered to.

13. The Commission must place greater emphasis on encouraging timely member state consultation. Commission guidelines make reference to the use of member state data,<sup>6</sup> but should identify it as a priority for officials seeking to quantify cost and benefit. There should be a clear link between impact assessment and consultation at a member state level and the process in the Commission. In the UK, detailed work can often be carried out too late to feed into policy development at the EU level, a proposal from the Commission should trigger UK activity: initial consultation and a partial IA.

14. The commitment, made under the Small Business Act, to include an SME test as part of the Commission Impact Assessment is a welcome development, it is important that SMEs are treated separately by any analysis. However, its effectiveness will depend on the extent to which it is able to quantify or even identify additional cost. Regulation always carries an additional cost to small firms, but they have often been overlooked in EU IAs. As a result, the introduction of an SME test may prove challenging for officials.

<sup>3</sup> The British Regulatory System, Tim Ambler, Francis Chittenden and Stefano Iancich, p 15

<sup>4</sup> Worlds Apart, Ambler & Chittenden, p 14

<sup>5</sup> EU Impact Assessment Guidelines, January 2009, section 4.3, p 18.

<sup>6</sup> EU IA Guidelines, Section 4.1 p 17

(f) *Whether the Impact Assessment Board is sufficiently resourced and independent to ensure that the Commission produces useful and accurate impact assessments;*

15. The Commission's Impact Assessment Board (IAB) appears to be a positive influence on the IA process. According to its own annual report, the proportion of IAs examined for a second or third time rose from 10 per cent in 2007 to 32 per cent in 2008, a reasonable benchmark of effectiveness.<sup>7</sup> It acknowledges in the same report that this increased activity stretched its capacity "to the maximum".

16. Despite some good work from the IAB, there is still an urgent need to improve the quality of analysis in IAs. BCC research based on a sample of IAs from 2007 found that only 12 per cent quantified costs to business.<sup>8</sup>

(g) *Whether the Commission is sufficiently active in providing support to member states during implementation and using its enforcement powers to ensure proper implementation.*

17. Practice varies by Directorate-General, but in general the Commission could be quicker to use its enforcement powers. It is very important for the maintenance of the internal market that member states implement legislation correctly and in a timely fashion.

1 October 2009

### **Letter from Business Europe**

1. BUSINESSEUROPE is pleased to submit evidence to the inquiry into the progress of aspects of EU Better Regulation.

2. In BUSINESSEUROPE's view, impact assessments should be conducted on all initiatives, including decisions taken by comitology committees, notices and guidelines and decisions regarding international agreements. Unfortunately, it is not guaranteed that all these initiatives will be accompanied by an impact assessment. Instead, the Secretariat General/Impact Assessment Board and the concerned Commission departments will decide every year which Commission initiatives need to be accompanied by an impact assessment or not. The criteria for this decision are not very clear and transparent. BUSINESSEUROPE regrets this and questions the need for this discretion considering that the principle of "proportionate level of analysis" already ensures that initiatives with only limited impacts are not over-assessed.

3. The new impact assessment guidelines offer better guidance and quality support on issues such as stakeholder input, problem definition, objectives, options, and impacts. These improvements will have to be followed in practice to be of true value and should ensure that impact assessments influence the proposals adopted by the Commission.

4. The Impact Assessment Board should ensure that the guidelines are respected and better planning of the review process should ensure that the Board correctly identifies shortcomings and that recommendations of the Board are followed-up. Opinions of the Board should be binding on the Commission services and the Board should have the power to stop a proposal going to the college of Commissioners for approval if there are shortcomings regarding the assessment.

5. In order to assist the Board to identify shortcomings, stakeholders should have the opportunity to address these directly to the Board before the proposal and the assessment is finalised. Draft impact assessments and draft opinions should thus be made public before the legislative proposal is adopted. This could be undertaken during the four weeks that are available between the submission of the draft assessment and the Board meeting where it will be discussed.

6. The Council and European Parliament should make better progress with respect to systematic impact assessments on substantive amendments to Commission proposals and the review of the Common Approach to Impact Assessment should reflect this.

7. To facilitate the use of impact assessments, an impact assessment report should be no more than thirty pages and an executive summary should be provided of no more than two pages, which, as a minimum, should contain a clear presentation of any quantified benefits and costs of the various options. In this summary, the costs and benefits should always be stated in an objective and transparent manner. The use of a template such as the one developed in the UK would be a sensible solution to providing a simple and easy to understand summary sheet, which should be produced consistently across the Commission. This approach would not only encourage clarity of thought and expression, but it would also make it much harder for more difficult outcomes to be overlooked, ie by being buried within the body of the document.

<sup>7</sup> Worlds Apart, Ambler & Chittenden, p 13

<sup>8</sup> The British Regulatory System, Ambler, Chittenden and Iancich, p 11.

8. Draft policy cannot, and should not, mean a prior commitment to legislate and thus it is important that all options, including the ‘do nothing option’, are properly considered in the analysis. The revised guidelines and their annexes—which stress that options are to be analysed in depth and must include the “no policy change” baseline scenario—must be followed and the Impact Assessment Board should check this.

9. The revised impact assessment guidelines emphasise that stakeholder consultations in the impact assessment process must be carried out according to the Commission’s general principles and minimum standards for consultation so all relevant stakeholders should have the opportunity to participate in consultations during the impact assessment process and to contribute information. In our experience, these standards are not always respected: documents are unclear, relevant stakeholders are ignored or their views misrepresented, there is insufficient publicity or time afforded to the process, and feedback is not provided. In order to assist the Impact Assessment Board to identify these shortcomings, stakeholders should have the opportunity to address these directly to the Board before the proposal and the assessment is finalised. Draft impact assessments and draft opinions should thus be made public before the legislative proposal is adopted.

10. Regarding the Impact Assessment Board, **BUSINESSEUROPE** appreciates and supports the work of the Board which has contributed to better quality assessments. However, we are conscious of the risk that this safeguard is insufficient, considering that the opinions of the Board are not binding on the Commission services and that the Board is not truly independent as it is comprised of high-level Commission officials. Given the importance of critical oversight, we therefore believe that an independent agency for quality control is needed to ensure that the impact assessment guidelines are properly followed. This would help to embed the oversight function firmly in the system and has to be assessed in accordance with the conclusions of the 2007 Spring European Council and European Parliament resolutions.

11. All Member States should carry out effective impact assessments on national legislative proposals along the lines of the Commission’s impact assessment guidelines. In order to monitor progress on this, developments should be reported in the National Reform Programmes. In cases where evaluation of the Programmes shows that Member States are not making enough progress, the Commission should put pressure on those countries to improve but also offer assistance and support if needed. There should also be an ex post evaluation to assess whether EU measures really achieved their objectives in a cost-effective manner.

*24 September 2009*

#### **Letter from the City of London Corporation**

This letter responds to the Committee’s call for evidence as part of the inquiry into the Better Regulation Agenda.

Although not dealing with the specific questions, it is hoped that it may provide background information of interest to the Sub-Committee.

Whilst the City of London maintains an interest in all aspects of the regulatory reform agenda, its efforts have more recently focused on the European sphere as the volume and significance of legislation emanating from Brussels in this area has grown considerably under the Financial Services Action Plan. The City Corporation has for some time been involved in facilitating contact between the City and the EU institutions, primarily the European Parliament and European Commission. At the same time, many City firms, institutions and trade bodies have been playing an active part in helping to achieve a single European market for financial services from their sectoral standpoints. The City of London has consistently sought to encourage the adoption of a more co-ordinated approach to these activities and the wider acceptance of the value of this approach has led to the establishment of the City Office in Brussels, and an Advisory Group to steer this work.

The European Union’s current legislative term is drawing to a close during a period where there remains uncertainty in global financial markets. In the last 12 months or so, governments and central banks have been forced to make unprecedented interventions in support of markets and of financial institutions. Despite these attempts to restore market stability and limit the negative impact on the wider economy, the outlook continues to be very uncertain and, on most expert forecasts, this will probably last for the remainder of this year at the very least.

Under the Swedish Presidency there has been considerable political pressure to introduce new financial regulation. The City believes that reform of the EU financial services sector should be undertaken carefully and proportionately, with constant vigilance for unintended consequences, and in the context of global initiatives. It should also be recognised that significant steps have already been taken by industry, in the wake of the financial turmoil, to reduce risk, in particular in the securitisation and OTC derivative markets.

The City argues that full consultation and in depth impact assessments, should underpin all new proposals, apart from exceptional cases where there is a cast iron case for emergency action. The current crisis should not be allowed to be used to validate poorly thought out rushed proposals that ultimately will damage the ability of the financial sector to be again an engine for economic recovery and growth in the EU.

The consequences of the failure to undertake appropriate consultation, contrary to its own agreed better regulation principles, has been highlighted in respect of the Commission's recent consultation on the Alternative Management Fund Managers Directive. This Directive has important implications for private equity and hedge funds which predominate in London and is one of the greatest competitive threats that the UK financial services industry faces at the present time. The initial consultation was released in such a way that interested parties, including trade bodies, had minimal opportunity to input into the consultation process, but there are still opportunities for further discussion. This should take place in keeping with EU's own better regulation principles.

14 October 2009

### **Memorandum by Malcolm Harbour MEP<sup>9</sup>**

#### **OVERVIEW**

In 2002, the European Commission launched a comprehensive programme to simplify and improve the regulatory environment. In 2003, the EU institutions agreed to an Inter-institutional Agreement on Better Law-Making, setting down how they can work together to legislate better.

These programmes have done much to improve the quality of legislation but more needs to be done by all the EU institutions to better meet the commitment to Better Regulation. Firstly, the aims and objectives of better regulation need to be more effectively communicated. There are still many people involved in European policy-making, including MEPs and civil servants, who do not understand the value of better regulation or how to employ it in their work. Therefore, the European Commission could, for example, considering supplying all MEPs with their *Better Regulation—simply explained* booklet which can be found on their website but has not been widely disseminated. Secondly, with a new commission appointed, it is important that better regulation stays on their list of priorities. All the commission designates have now been sent their lettre de mission ([http://ec.europa.eu/commission\\_designate\\_2009-2014/mission\\_letters/index\\_en.htm](http://ec.europa.eu/commission_designate_2009-2014/mission_letters/index_en.htm)), outlining their objectives for the next term. It is concerning that the letters refer simply to the “smart regulation agenda” since this does not seem to reinforce the commitments and guidelines established in the last Commission. A lot of progress has been made in encouraging the better regulation agenda within the Commission and it would be important to seek assurances for President Barroso that he is still committed to the agenda.

#### **THE ROLE OF THE EUROPEAN COMMISSION**

##### *Pre-legislative process:*

An important part of making better laws is having a comprehensive understanding of their impacts. However, although the Commission has extended the requirement to do impact assessment beyond initiatives in the annual Legislative and Work Programme, there is still no mandatory requirement on the Commission to carry out an Impact Assessment before the introduction of a legislative proposal.

An impact assessment is a crucial part of the legislative process. Without one, the European Parliament, Council and stakeholders are unable to see the Commission strategy behind the proposal or the implications for legislation. It is also important in determining whether there is a need for EU legislation in the first place, if it is consistent with the principle of subsidiarity and whether there is real “EU value added.”

There are also concerns with the quality of the impact assessment. An impact assessment can only add real value if it comprehensively analyses both the costs and benefits of a proposal. But, on too many occasions, an impact assessment is used as the “end” of the process rather than as a means to the end. Therefore, many impact assessments seem to be moulded to fit the commission thinking rather than the other way around. This is simply not a basis for better regulation.

That said, since 2006, the Commission's internal Impact Assessment Board (IAB) has done much to improve the quality and methodology of Commission impact assessments. Their work should be welcomed. However it should be noted that the IAB only has a role in determining the conformity of the impact assessments, in line with the Commission's IA guidelines, rather than assessing whether the final legislative proposal properly

<sup>9</sup> This evidence is submitted by Malcolm Harbour, Chairman of the European Parliament's internal market and consumer protection committee, on behalf of the Conservatives in the European Parliament.

meets the results of the impact assessment. Therefore it could be worth investigating whether value would be added by extending the remit of the IAB in this way.

There have also been suggested proposals to make the Impact Assessment Board truly independent, operating outside the institutional structure of the European Union. This could better objectively audit the better regulation agenda. For example, the legal affairs committee in the European Parliament (JURI) have recently requested authorisation to draw up an initiative report on *Guaranteeing independent impact assessments*.

Better stakeholder consultation should also be encouraged as an important principle of a good impact assessment. In the past, many DGs have stuck rigidly to the 8 week minimum consultation period but often without adequate dissemination. This means that stakeholders, particularly small and medium enterprises can not prepare themselves in time to make a formal response. The more stakeholders involved in the original consultation, the more comprehensive the impact assessment and the less need for substantive amendments to the final legislative text.

Impact Assessments should also take account of specific impacts. This is already the case for impacts on SMEs through a so-called “SME test” but this idea could be developed in other areas. For example, the European Commission could look into new ways to eliminate remaining barriers to a complete Single Market by introducing a “Single Market Test.” In this case, the smooth functioning of the Internal Market depends on the policies and legislation not just from DG Markt but for many different DGs in the European Commission and a “Single Market Test” could be a useful principle to ensure coherence and strategy from the Commission.

Therefore, it is very clear that whilst a lot of progress has been made by the Commission to improve the pre-legislative process, a lot more can and should be done.

#### *Post legislative process*

The European Commission also have an important part to play in the post legislative process, which forms an important piece of the Better Regulation jigsaw.

Legislation should be viewed by the European Commission as a circular process, in which ex-post audits should be an indispensable requirement. The audits will show whether the legislation meets or surpasses the original impact assessment and if not, identifying where it requires amendments or recasts to ensure that it meets its original objectives.

This evaluation technique would help the Commission in undertaking their ambitious simplification programme, by helping to identify where legislation is overly complex in certain areas and needs to be reviewed or repealed.

We are pleased that the Commission President’s political guidelines for the next Commission ([http://ec.europa.eu/commission\\_barroso/president/pdf/press\\_20090903\\_EN.pdf](http://ec.europa.eu/commission_barroso/president/pdf/press_20090903_EN.pdf)) included an explicit reference to this post implementation audit process.

#### *The European Parliament*

The European Parliament, like the European Council, also needs to play their part in ensuring that quality legislation emerges at the end of the legislative process.

However, Parliament committees are still not taking their commitment to better regulation seriously. Firstly, there is no obligation under the inter-institutional agreement for the Parliament to scrutinise Commission Impact Assessments. Secondly, MEPs frequently table amendments to legislative texts without fully understanding their impact. This is against principles of better regulation laid out in the Inter-Institutional agreement.

However, there is scope for the Parliament to take initiatives if it chooses to do so. For example, the Internal Market and Consumer Protection Committee (IMCO), chaired by Conservative MEP Malcolm Harbour, has been at the forefront of the better regulation agenda in the Parliament. IMCO has undertaken Impact Assessments, where the Commission have failed to produce one. For example, on the Consumer Credit Directive, the committee commissioned a study on the “broad economic impact” of the proposal, because the Commission had refused to provide a new impact assessment for their modified proposal. The Committee have already carried out impact assessments, where substantive amendments have been made to a Commission proposal. For example, when MEPs in the committee tabled changes to the Nominal Quantities for Pre-Packaged Goods proposal, the committee commissioned an impact assessment of their amendments. In this mandate the IMCO committee have asked the Commission present the full Impact Assessment of any legislative proposal to the committee, at the meeting when the proposal is first introduced and before MEPs examine detailed proposals. This has now happened on 4 occasions, and has led to MEPs demanding more detailed information and questioning a number of issues.

However, these techniques have not yet been adopted by all committees in the Parliament and there is still some reluctance by all Committee Chairs to examine an impact assessment. Unfortunately, some accept the Commission argument that there is sometimes not enough time to draw up an Impact Assessment. However, if the Commission cannot carry out a comprehensive costs and benefits analysis, then the Parliament shouldn't be working on the proposal. MEPs have duties as policymakers to properly understand all the implications of the legislation and not to rush into the unknown, and produce bad laws.

Although the European Parliament is not formally involved in the enforcement of legislation, MEPs should also play a role in the post-legislative process. Committees have resources at their disposal to carry out post-implementation reviews through strategic own-initiative reports, public hearings, workshops and studies. Since the post-legislative process plays an important part of the better regulation and simplification agenda, the Parliament's committees should make better use of their resources, by providing some of the qualitative and quantitative evidence needed to review the impact of legislation.

Therefore, although the Parliament plays a crucial role in delivering the better regulation agenda, much more can be done. MEPs still have a limited understanding of the principles of better law-making and how they can employ it in their committee work.

#### *The European Council/Member States*

The European Council have often neglected their duty to better regulation. It seems that only a few Member States are committed to the better-law making agenda, with many others failing to see its added value. Like the European Parliament, the European Council have agreed to do impact assessments should they ask for substantial amendments to Commission proposals but are yet to fulfil on this commitment.

With a possible renegotiation of the inter-institutional agreement in 2010, the fact that better regulation is not a priority for many Member States is worrying. Although many of the principles have not been followed by Member States, the economic crisis has shown just how important principles of better regulation have become to stakeholders. A renegotiation of the inter-institutional agreement should signal it's relaunch with more pragmatic examples of how the European institutions can see the agenda through.

After legislation is agreed by the EU institutions, then Member States need to work in the spirit of better regulation when implementing EU legislation. This means that the Delivery of Better Regulation relies largely on their efforts.

However, it should be noted that the recent competitiveness Council conclusions on Better regulation show some improvement and indicate that Member States are still determined to the agenda. We await the results with interest and hope the Member States meet some of the ambitious targets they set.

9 December 2009

### **Memorandum by Open Europe**

#### **SUMMARY**

The recommendations and conclusions in this submission are based on Open Europe's "Out of Control? Measuring a decade of EU regulation", published in February 2009.<sup>10</sup> The report was based on information derived from over 2,000 Impact Assessments produced by the UK Government between 1998 and 2008, and was arguably the most comprehensive study ever undertaken of the cost and flow of EU regulations introduced in the past decade.

Based on these findings, combined with additional quantitative and qualitative research, as well as interviews with people involved in "better regulation" agendas around the EU, Open Europe also assessed the EU's Better Regulation Agenda and gave various proposals for how the Agenda can be improved.

The evidence submitted is in effect a summary of that report, which also addresses the specific points raised in the Committee's call for evidence.

We estimate the cumulative cost of regulations introduced in the UK between 1998 and 2008 at £148.2 billion. Of this cost, £106.6 billion, or 71.9 per cent, had its origin in the EU.

The annual cost of regulation *introduced since 1998* has gone from £16.5 billion in 2005 to £28.7 billion in 2008—an increase of 74 per cent. The EU proportion of the *average annual* cost of regulations is 71.6 per cent, although the proportion differs from year to year. In 2008 alone, EU legislation dating from 1998 cost the UK

<sup>10</sup> See *Open Europe*, "Out of Control? Measuring a decade of EU regulation" <http://www.openeurope.org.uk/research/outofcontrol.pdf>

economy £18.5 billion—up from £12.2 billion in 2005 when the Commission launched its Better Regulation Agenda.

This illustrates the importance of getting the EU’s Better Regulation Agenda right. It also illustrates that while there have been some positive steps taken in the EU to simplify and cut back on existing regulations, the Commission has failed in addressing the flow and cost of new regulations, which continue to impose unnecessary burdens on businesses and the wider economy.

To address this failure, a radical new approach to regulatory reform is needed both at the EU level and the national level. This approach should *inter alia* include:

A new commitment in the EU to the idea of better *and* less regulation; an independent and powerful European Impact Assessment Board capable of stopping proposals which have not been properly quantified; better targeted and quantified European Impact Assessments; a simple majority in the Council for scrapping proposals, and “€1 in, €1 out” regulatory budgets in the Commission.

Meanwhile, the link between the EU’s and the UK’s better regulation agendas needs to be radically improved. In particular, the UK Government must turn both its Impact Assessments and future regulatory budgets into bargaining tools at the EU level, and push harder for new, sweeping improvements of the EU’s Better Regulation Agenda, possibly by using its contribution to the EU budget as negotiation leverage.

## 1. THE COST OF EU REGULATION

Based on the analysis of over 2,000 Impact Assessments (IAs), the research makes two main types of cost estimates:

- (a) The cumulative cost of regulations between 1998 and 2008
- (b) The annual cost of regulations between 1998 and 2008

**1.1 The cost of regulation is going up year on year:** Since the UK launched its “Regulatory Reform Agenda” in 2005, the annual cost of regulation has gone from £16.5 billion in 2005 to £28.7 billion in 2008—an increase of 74 per cent. Meanwhile, the estimated *cumulative* cost of regulations introduced in the UK between 1998 and 2008 is £148.2 billion. This is the equivalent of 10 per cent of GDP.<sup>11</sup>

**1.2 EU legislation is responsible for 72 per cent of the cost of regulations in the UK:** Of the cumulative cost of regulations introduced over the past decade, £106.6 billion, or 71.9 per cent, had its origin in the EU. Similarly, the EU proportion of the *average annual* cost of regulations is 71.6 per cent. Overall, the cost of EU legislation has gone up steadily year-on-year over the past decade. In 2008 alone, EU legislation dating from 1998 cost the UK economy £18.5 billion—up from £12.2 billion in 2005.

**1.3 EU labour market laws account for 21 per cent of the total cost of UK regulations:** Labour market legislation introduced over the past 10 years has cost the UK economy £45 billion. 67 per cent of this—£31 billion—came from the EU. This means that 21 per cent of the overall cost of new regulations introduced in the UK between 1998 and 2008 can be sourced to the EU’s labour market laws alone. The costliest labour market law by far is the EU’s Working Time Directive, costing between £3.4 billion and £3.9 billion every year.<sup>12</sup>

Meanwhile, EU health and safety legislation coming into force in the last decade has cost the UK £6.4 billion. EU agricultural regulations have cost British farmers over £2 billion, and the EU food labelling requirements have cost the UK £1.7 billion over the last 10 years.

Among UK Government departments, BIS (formerly BERR) is the main facilitator of regulation in the UK. In 2008 alone, the department accounted for regulatory costs to the economy of £12.8 billion (for regulations introduced since 1998)—45 per cent of the total cost of regulation in that year. This was roughly £4 billion more than in 2007—or a 45 per cent increase. Over the past 10 years, 72.7 per cent of the average annual cost of the regulation imposed by BIS stemmed from Brussels. For some departments, such as the Food Standards Agency, DEFRA and the HSE, more than 90 per cent of the cost of arising from regulations has its origin in EU legislation.

**1.4 EU regulations cost the EU €1.4 trillion:** We also extrapolated our UK results to reach a cost estimate for the EU as a whole. The cumulative cost of regulation introduced between 1998 and 2008 for all 27 EU member states is €1.4 trillion. Of this, 66 per cent, or €928 billion, is EU-sourced. Since the Commission launched its “Better Regulation Agenda” in 2005, the annual cost of EU legislation across the bloc has gone from

<sup>11</sup> Calculated assuming that UK GDP in 2008 was £1,461,301,000,000, see Eurostat [http://epp.eurostat.ec.europa.eu/portal/page?\\_pageid=0,1136173,0\\_45570701&\\_dad=portal&\\_schema=PORTAL](http://epp.eurostat.ec.europa.eu/portal/page?_pageid=0,1136173,0_45570701&_dad=portal&_schema=PORTAL)

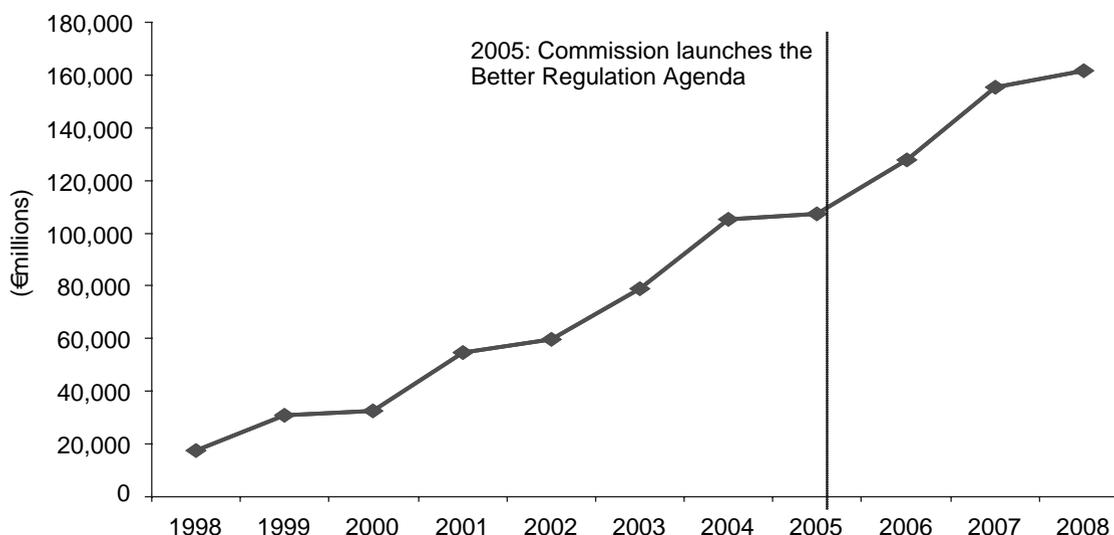
<sup>12</sup> In the original report, Open Europe used the Government’s original estimate of the cost of the WTD, which was put at £2.1 billion (in 2008 prices). However, Open Europe has since revised the cost of the WTD, by using a later Government cost estimate and by adding the cost arising from subsequent amendments, such as those imposed through the ECJ’s Jaeger and SiMAP cases. After these adjustments, we estimate the annual cost of the WTD in the UK at between £3.5 and £3.9 billion, see *Open Europe*, “Time’s Up! The case against the EU’s 48-hour working week”, see <http://www.openeurope.org.uk/research/wtdoptout2.pdf>

€108 billion to over €161 billion—an increase of 50 per cent. However, due to the uncertainties involved in these kind of extrapolations, these figures should be treated with some caution.

### 1.5 Conclusions drawn from these figures:

- (1) The EU's Better Regulation Agenda is failing to curb the increasing flow of new regulations impacting on business and the wider economy, and without reform, the cost of regulations will continue to increase year on year.
- (2) Secondly, the fact that a very high proportion of that cost is coming from regulations negotiated not at Whitehall and Westminster but in Brussels and Strasbourg, shows that any regulatory reform agenda in the UK which does not focus primarily on curbing the flow of EU regulations will continue to fail.

EU 27: Annual cost of EU legislation 1998-2008 (2008 prices)



## 2. THE EU'S BETTER REGULATION AGENDA: TOO MUCH TINKERING AT THE MARGINS

### 2.1 Some improvements have taken place as a result of the Commission's "Better Regulation Agenda":<sup>13</sup>

Although there are clear problems with the EU's administrative burden reduction targets—for example with the baseline measurement—it marked a break with the past in that "better regulation" is now tied to a specific, quantifiable target. By virtue of being quantifiable and open for all to see, these targets do increase transparency and leave more room for scrutiny of regulators—although still falling well short of what we would consider satisfactory levels of scrutiny.

**2.2 Commissioner Verheugen has been a positive influence:** Commissioner Verheugen has broken with the past by emphasising the need to change entrenched attitudes within the Commission's Directorates-General, by criticising the idea of European integration as a process driven by Commission legislation. In 2006 he accused some Commission officials of failing to adapt to "a new political culture", and said: "There is a view that the more regulations you have, the more rules you have, the more Europe you have, I don't share that view."<sup>14</sup> This "cultural change" within the EU must continue.

**2.3 But is the overall situation really improving?** While there have been some progress in the efforts to cut or simplify existing legislation in the EU, the European Commission and the member states have largely failed to curb the cost and flow of new regulations, as illustrated by our figures. This is a major shortcoming, as new regulations usually are more problematic for businesses than existing ones, since the flow of regulations forces businesses to continually adjust and develop new compliance strategies.

**2.4 EU initiatives that are presented as "deregulation" too often appear to be of limited value for businesses:** For instance, counting deregulation in the number of pages axed from the *acquis communautaire* is hardly a meaningful exercise.<sup>15</sup> The Commission claims to have removed thousands of pages from the *acquis* since the

<sup>13</sup> For more details see: *OECD*, "Economic Survey of the European Union 2007", 20 September 2007.

<sup>14</sup> *Financial Times*, "Uphill battle against Brussels bureaucracy", 10 October 2006.

<sup>15</sup> Jacques Pelkmans made these observations during a conference hosted by the Centre for European Policy Studies, "European Network for Better Regulation, Final Conference", Brussels, 11 December 2008.

Better Regulation Agenda was launched—calling it a “radical simplification”.<sup>16</sup> But this does not tell us anything about the content of the removed pages, nor if the content had an actual impact on businesses in the first place.

Similarly, removing obsolete directives is unlikely to make any difference on the ground. In the Commission’s 2008 progress report on the better regulation initiative, removing such acts was identified as one of the achievements.<sup>17</sup> But if these acts are obsolete or “no longer have real effect”, removing them cannot be seen as “deregulation”, since they had no actual impact in the first place.

Likewise the Commission’s efforts to scrap pending proposals have so far had negligible impact. For instance, when the Commission undertook this exercise for the first time in September 2005, it announced it had withdrawn 68 bills.<sup>18</sup> However, 27 of these were more than five years old and looked unlikely to be adopted anyway, and 22 of them concerned the association agreements signed with the then 10 new member states—bills which all became defunct when the states joined in 2004.<sup>19</sup> Removing pending proposals could potentially prove effective in stemming the flow of regulation, but the responsibility for making sure that *meaningful* pending proposals were axed would probably need to fall to some independent body.

**2.5 Ambiguity over what “better regulation” means:** Most importantly, there is still ambiguity over the central objective of the EU’s Better Regulation Agenda. “Better regulation” as a term is meaningless, because it can mean all things to all people. The Commission’s Impact Assessments, the first filter that EU laws face, exemplify this confusion. There needs to be a clear message from bottom to top that regulation should be pursued only when it has been shown to be absolutely necessary and that the benefits outweigh the costs to businesses and individuals. The emphasis must be put on result, not process.

### 3. EUROPEAN IMPACT ASSESSMENTS: MORE PROBLEM THAN PUNCH

3.1 So far, European Impact Assessments (EIAs) have had very limited impact on the final outcome of EU policies.<sup>20</sup> Because of their lack of consistency and varying quality, EIAs were not used in our calculations of the impact of EU regulations. EIAs are also produced for far fewer proposals than in the UK. In the five years since their introduction in 2003, there have been only 413 EIAs.<sup>21</sup>

- **EIAs almost never lead to proposals being dropped:** Since the introduction of EIAs in 2003, we have identified only three cases where an EIA has actually led to a proposal being aborted.<sup>22</sup> Even in these cases it is unclear to what extent this was due to the IA itself or some other reason.<sup>23</sup>
- **The Commission’s Impact Assessment Board lacks autonomy and teeth:** One of the main problems with the EU’s IA system is that the IAB is lacking the mandate to take action. For each EIA produced, the IAB gives an “opinion”. The IAB has often been quite critical of the EIA system. In its 2007 report, for instance, the IAB identified several problems. Most importantly, it stated:

“In a number of cases, there was a bias in the definition of options towards the preferred option, often leading to an analysis of options that was too much focussed on the preferred option while other options should have been explored in greater detail.”<sup>24</sup>

However, even where the Board finds that the EIA is presenting the Commission proposal in a biased manner, its opinion is not binding in any way, making its real impact negligible.

In addition, IAB members—Commission officials—are appointed personally by the President of the Commission, stripping the Board of the vital independence it would need to seriously pick up the fight against the steady stream of new regulations.<sup>25</sup>

- **EIAs have a bias towards the preferred option:** As the IAB has concluded, EIAs often draw biased conclusions in favour of the option the Commission has proposed.

<sup>16</sup> *European Commission*, “Radical simplification of EU law: 5,000 pages of Official Journal removed”, MEMO/08/62, 30 January, 2008.

<sup>17</sup> *European Commission*, “A 2nd strategic review of Better Regulation in the European Union”, COM(2008)32, 30 January 2008, p 3.

<sup>18</sup> *European Commission*, “Better regulation: Commission intends to withdraw one third of screened proposals”, IP/05/1189, 27 September 2005.

<sup>19</sup> *Open Europe*, “Less Regulation: 4 ways to cut the burden of EU red tape”, November 2005, p 12.

<sup>20</sup> For a critique of EIAs, see *The Evaluation Partnership Limited*, “Evaluation of the Commission’s Impact Assessment System Final Report”, April 2007, p 8.

<sup>21</sup> For the number of EIAs between 2003 and 2007, see Andrea Renda, “Advancing the EU better regulation agenda: selected challenges for Europe”, *Centre for European Studies*, (draft at 07 September 2008), p 7; Commission website consulted for number of IAs in 2008, see [http://ec.europa.eu/governance/impact/practice\\_en.htm](http://ec.europa.eu/governance/impact/practice_en.htm)

<sup>22</sup> These are: “Proposals aiming to modernise and reinforce the organisational framework for inland waterway transport in Europe” in 2008; “Directive on the cross-border transfer of registered office” and “Proportionality between Capital and Control in Listed Companies” in 2007.

<sup>23</sup> See the Commission’s website, [http://ec.europa.eu/governance/impact/practice\\_en.htm](http://ec.europa.eu/governance/impact/practice_en.htm), viewed on 13 January 2008.

<sup>24</sup> Impact Assessment Board, Report for the year 2007, SEC(2008) 120, 30 January 2007.

<sup>25</sup> For a discussion in this issues, see Craig Robertson, “Impact Assessment in the European Union”, *eipascope*, 2/2008 (European Institute of Public Administration), 2008, p 19.

- **EIAs are never updated during negotiations to reflect changes in the proposal:** EIAs are almost never updated to reflect amendments made during the often lengthy negotiations in the European Parliament and the Council, making EIAs of limited use once they've left the Commission.
- **“Subsidiarity” is only considered in 50 per cent of cases:** In a 2007 study the OECD found that less than 50 per cent of EIAs considered a proposal's compatibility with the EU's much-vaunted “subsidiarity” principle—the idea that the EU does not take action unless it is more effective than action taken at national, regional or local level.<sup>26</sup> This means that in more than half of cases, EIAs are failing to properly evaluate genuine policy alternatives, including, crucially, the “do nothing” option.
- **Poor quantification of costs and benefits:** Costs and benefits have, until recently, rarely been quantified in EIAs, and are still shaky in many cases. Consistent methods for comparing costs and benefits over time are also lacking.<sup>27</sup>
- **Consultation and transparency are often absent:** According to its own guidelines, when the Commission carries out the EIA, it is supposed to consult business and give them enough time to give feed-back on the proposal that is being assessed. However, this does not always happen. To make matters worse, draft EIAs are not publicly available, making it difficult to find out which of the stakeholders' views have been properly considered.<sup>28</sup>
- **Many costly regulations are not subject to EIAs:** The Commission's IA guidelines are ambiguous about which proposals should undergo an EIA at all. The Commission's draft 2008 IA guidelines state that “usually” any item contained in its Work Programme ought to be subject to an EIA.<sup>29</sup> This is arbitrary as many costly proposals are not included in the Work Programme.
- **Many intangible proposals are subject to EIAs:** Because of the arbitrary selection process, many EIAs simply add no value to policy-making. For example, the EIA on the Commission's 2005 proposal on “EU strategy for Arica” included the policy objective “peace and security”.<sup>30</sup> It was estimated that completing the EIA and Communication for this proposal took the equivalent of seven man-months.<sup>31</sup> This is a terrible waste of the Commission's resources.
- **EIAs are difficult to read:** According to the Commission's own guidelines, “any non-specialist should be able to follow the argumentation and understand the positive and negative impacts of each of the options considered in the IA.”<sup>32</sup> In reality, EIAs are extremely difficult to read, poorly structured, and often exceed the recommended length. It is actually laughable to suggest that non-specialists and members of the general public should be able to understand them.

#### 4. EU REGULATORY REFORM IS POSSIBLE—BUT A NEW APPROACH IS NEEDED

4.1 Our findings on the cost and flow of regulations, and analysis of the EU regulatory reform agenda, illustrate the need for a radically different approach to tackling the problem of burdensome red tape. This involves both reform *within* the EU institutions, as well as a new approach to EU regulations from national governments. As is often the way in the EU, it will fall to the larger member states to push for reform. The UK is well placed to take a leading role.

4.2 **Cultural change: a commitment to less as well as “better” regulation:** Our results show that the primary objective of the Commission must be to reduce the flow of regulation—which in practice means a new, clear commitment to “less regulation”. However, our results also show that it is the *cost* of regulation that imposes the biggest burden, not the *number* of regulations per se. This means that a new commitment to less regulation must imply less cost. As well as stemming the flow, meaningful deregulation also means simplifying and scrapping the most costly existing regulations rather than just “codifying” or consolidating them to make them clearer.

<sup>26</sup> OECD, “OECD Economic Survey: European Union”, 2007, p 107.

<sup>27</sup> A 2007 evaluation found that “while only about 40 per cent of IAs monetised some costs of the proposal in 2003, almost 80 per cent of IAs monetised some costs of the proposal in 2007”, see Caroline Cecot, Robert Hahn, Andrea Renda, and Lorna Schrefler, “An Evaluation of the Quality of Impact Assessment in the European Union with Lessons for the U.S. and the EU”, *AET-Brookings Joint Center for Regulatory Studies*, December 2007, p 8.

<sup>28</sup> For the Commission's guidelines, see *European Commission*, COM(2002)704, 11 December 2002.

<sup>29</sup> *European Commission*, “Impact Assessment Guidelines [Draft version]”, (27.05.08), p 4.

<sup>30</sup> *European Commission*, SEC(2005)1255, Oct 2005.

<sup>31</sup> *The Evaluation Partnership*, “Evaluation of the Commission's Impact Assessment System Final Report”, April 2007, Annexes to the Report, p 97.

<sup>32</sup> *European Commission*, SEC(2005)791, 15 June 2005.

**4.3 An independent and powerful European Impact Assessment Board:** The European Impact Assessments leave a lot to be desired. However, no amount of improvements will make a difference if there is no independent watchdog in place to ensure that the cost-benefit analysis has a real impact on the final decision. This is one of the key lessons from the UK's experience with IAs. The UK produces some of the most sophisticated IAs in the world, and yet regulation is still increasing.

An independent IA Board should be established with the power to veto legislative proposals if its accompanying EIA does not meet the required standards. In other words, the Board should be given the mandate to play “ping-pong” with the Commission over regulatory proposals. If the EIA process is to be taken seriously by businesses and member state governments, there must be an enforceable minimum standard. The fact that the quality of many final EIAs continues to fall short, and that study after study continues to point out similar issues, suggests that the current IA Board does not have the political clout, nor the time and resources required to raise the standard of EIAs to any meaningful level. There is also a case for expanding an independent IA Board's remit to all the EU institutions rather than just the Commission in an advisory capacity for Parliament and Council amendments. In turn, the Board could then be charged with updating EIAs as the proposals change during the course of negotiation.

**4.6 A simple majority for scrapping proposals:** One of the main problems with trying to achieve regulatory reform at EU level is that changing existing EU law involves opening up the whole negotiation process from the beginning, just as if a new law was being created. In practice, member state governments should be able to present a case for EU legislation to be scrapped if it is deemed too costly or best enforced at the national level. If 50 per cent or more of member state governments in the Council vote in favour of scrapping a particular piece of legislation, then it should be abolished. This should apply to existing as well as all new legislation.<sup>33</sup>

**4.7 A robust subsidiarity test:** All Commission proposals should undergo a thorough subsidiarity test to evaluate whether the policy could be better enforced at the national or local level. The need for EU legislation should be justified and the “do nothing” option considered in all cases. The IAB should possess the authority to veto proposals that do not do so. The first step would be to legally define subsidiarity, and give examples of what it does and does not entail.

**4.8 Allowing one quarter of national Parliaments to kill off a proposal:** If a quarter of national Parliaments object to an EU proposal, then the proposal should be scrapped. National Parliaments must be given enough time to actually receive and scrutinise the proposal, to vote on it, and to register their dissatisfaction and find allies in other countries. Recess periods should be accounted for—so an 18 week window should be allowed.

**4.9 A reversed infringement procedure:** The EU could also introduce a reversed infringement procedure, whereby national Governments or Parliaments could block any proposal that does not respect a newly toughened up legal definition of the subsidiarity principle. Should a proposal get through, Governments or Parliaments should be able to take the Commission to the European Court of Justice for failing to respect subsidiarity as legally defined. Currently, the Commission can take member states to court for failure to transpose Directives. EU grievance procedures should become more of a two-way street, forcing the Commission to be far more rigorous in its consideration of the “subsidiarity test” when drawing up new proposals.

**4.10 Improved EIAs:** There are many ways in which EIAs could be improved. However, as said, these will count for very little unless the IAB—or some other independent scrutiniser—is given the mandate to ensure that EIAs are properly used. In combination with such a body, EIAs could help to stem the flow of regulation if the following improvements take place:

- **Clearer objectives.** EIAs should be specifically focused on an overall objective of less regulation.
- **Quantification of all economic costs and benefits.** This should include a standard template for discounting future costs of regulations, and clear presentation of these future costs. The Council and European Parliament should refuse to consider any proposal that does not have a quantified IA attached.
- **More consultation and transparency.** Draft EIAs and the IA Board's opinion on them should be published so that everyone can see who was consulted and whose opinion was taken into account when the Commission formulated the proposal.
- **Clearer presentation of findings.** EIAs should have a clear 1 or 2 page summary, with a table summarising all the costs and benefits. The template which the UK Government introduced for IAs in March 2008 shows that it is possible to summarise the findings of an impact assessment on 1 or 2 pages.

<sup>33</sup> As proposed, for example, in John Tate & Greg Clark, “Reversing the Drivers of Regulation: The European Union”, Policy Unit, *Conservative Research Department*, 2005, p 51.

- **More EIAs and better selection processes.** There must be clearer criteria about what kinds of proposals should be subject to assessment—with a view to making them compulsory for a much greater number of proposals. There should be a threshold for which proposals are subject to IAs, eg proposals with a minimum impact of €30 million across the EU. The IA Board should be responsible for assessing whether the proposal falls under the threshold, and then decide the extent of the IA required.<sup>34</sup>
- **Greater use of EIAs by the European Parliament and Council.** The European Parliament and the Council are not currently making use of EIAs when negotiating proposals. Both institutions should produce an IA for any significant amendments to legislation. Alternatively, a newly independent IAB as described above could be made responsible for updating EIAs throughout the negotiation process.

**4.11 A “guillotine mechanism” for Commission proposals:** Commission proposals should be given an expiry date. If a proposal has not been adopted within a given legislative timeframe, the proposal should be scrapped and started again in a new legislative session. This is described by former German President Roman Herzog as the “discontinuity principle,” and is a system currently employed in Germany.<sup>35</sup> The EU institutions would no longer have to deal with legislative proposals that have been in the pipeline for a number of years, and it would also force the Commission to prioritise its proposals, allowing it to concentrate on the areas where it can add value.

**4.12 Sunset clauses for EU legislation:** An often repeated idea is the “sunset” clause—whereby legislation is reviewed after a given time period. Sunset clauses should be compulsory at the EU level so that EU regulations can be reviewed in the light of experience and evidence.

**4.12 “€1 in, €1 out”—EU regulatory budgets:** If the EIA system were improved, with an independent board to scrutinise it, there is no reason why EU Commission departments (DGs) should not adopt a “€1 in, €1 out” system for regulations. Given the very high proportion of regulatory costs coming from the EU, it would make more sense for the UK to push for regulatory budgets at EU level first, and then to subsequently introduce them in the UK.

**4.13 Sourcing new proposals:** In order to avoid the disproportionate influence of interest groups in EU legislation it should be made more transparent who exactly is responsible for a given legislative proposal. As Commissioner Gunter Verheugen has suggested:

“I think we should also do more to create transparency at the beginning of the process. I would like to know if there is new proposal on the table coming from my colleagues who has asked for that. Start your document with a paragraph saying who has asked for that piece of legislation.”<sup>36</sup>

**4.14 Common commencement dates for EU regulation:** The EU should introduce Common Commencement Dates for regulations—like those in place in the UK. These are fixed dates occurring twice a year, when new regulations come into force, helping businesses to cope and keep track of changes in legislation.

## 5. BETTER LINKAGE BETWEEN THE EU’S AND UK’S BETTER REGULATION AGENDAS

**5.1 Making the link between the UK’s regulatory reform agenda and the EU’s better regulation agenda is vital.** The UK’s reform agenda is ambitious. However, because of the large proportion of regulation stemming from the EU, the UK is losing control of it.<sup>37</sup>

**5.2 UK ministers sometimes sign off on EU proposals despite the costs outweighing the benefits:** In 2007 the Minister of Transport Stephen Ladyman, for instance, approved an Impact Assessment which showed that the estimated costs of an EU Directive were £400 million a year while the benefits were £18.5 million a year. This encapsulates the UK Government’s weak approach to negotiations on EU legislation.<sup>38</sup>

There is clearly an enormous problem if IAs are being signed off on proposals where the cost so clearly outweighs the benefits. This illustrates the need for the UK Government to focus its attention more clearly on Brussels, if its regulatory reform agenda and its system of IAs are to function effectively. Arguably the most serious shortcoming of UK IAs, is their failure to impact on regulations that are being agreed in the EU. This is in no small part due to timing and targeting.

<sup>34</sup> As proposed in Andrea Renda, “Advancing the EU better regulation agenda: selected challenges for Europe”, *Centre for European Studies*, (draft at 7 September 2008), p 43.

<sup>35</sup> *Welt am Sonntag*, “An article on the EU constitution”, 14 January 2007.

<sup>36</sup> Address to the Better Regulation 2008 Conference, *EUX.TV*, 15 September 2008 <http://www.eux.tv/article.aspx?articleId=20421>

<sup>37</sup> There is a clear mismatch between our findings and the Government’s claims to have cut down the administrative cost and burden of regulations in the last few years. In December 2008, the Government said that the administrative burden had been cut by £1.9 billion compared to the 2005 baseline measure.

<sup>38</sup> Final Regulatory Impact Assessment, “Early Availability of Sulphur Free Fuels” (European Directive 2003/17/EC), see p 18 in [http://www.opsi.gov.uk/si/si2007/em/ukciem\\_20071608\\_en.pdf](http://www.opsi.gov.uk/si/si2007/em/ukciem_20071608_en.pdf)

Government guidelines state that:

“In the earliest stages of policy development, it is particularly important that policy-makers should use Impact Assessment to help them understand and define the policy challenge and to analyse the case for Government intervention.”<sup>39</sup>

But in practice, IAs are often produced mid-way through the EU policymaking process, and sometimes far too late to actually have an impact on the resulting piece of legislation. For example, in some cases, the Government’s consultation with businesses is launched only one month prior to the due date for a decision in Brussels—and sometimes even after the proposal has already been approved.<sup>40</sup> Moreover, our research has found that when IAs are prepared on the basis of an original EU proposal, they are not always updated to allow for new developments in the policymaking process.

For example, the Temporary Agency Workers Directive, finally agreed on 19 November 2008, was never subject to an updated IA during the negotiations to accommodate changing circumstances, despite the fact that five years of negotiations took place following the UK’s original 2003 IA, which estimated the cost to business from the new law at a staggering £637 million a year. These problems clearly limit the power of UK IAs—and the UK Government—to play a significant role in the consultation, formulation and negotiation of EU policies.<sup>41</sup>

The Government recently announced that it was committed to “intensive engagement with the EU institutions...to promote the better regulation agenda.”<sup>42</sup> But despite this claim, the Government is not nearly as engaged as it could be. The following, more radical approach could go some way to helping to stem the flow of regulations.

**5.3 Using IAs and regulatory budgets as bargaining tools:** BIS provides an “instruction manual” on how to use Impact Assessments in EU negotiations. It instructs civil servants to lobby “other Member States to win support for the UK position”. This is the right approach. However, the evidence we have collected suggests that the UK Government has not used its bargaining power stemming from its Regulatory Reform Agenda nearly enough.

Negotiation theory holds that in the interaction between domestic and international (EU) politics, governments strengthen their bargaining power if they can convince their negotiation partners that their mandate from voters and business at home is very restricted—and that they are ready to stick to that mandate.<sup>43</sup> This is exactly how the UK Government should approach EU negotiations in the pursuit of better regulation. The UK Government has two main tools at its disposal—Impact Assessments and regulatory budgets, given that such budgets will be established in the future.

**5.3.1 *Impact Assessments:*** First, the quantification of costs and benefits of regulation has vastly improved in UK IAs—although the costs are probably still underestimates. The scope for using IAs in EU negotiations has therefore widened. The UK Government could use its comparative advantage with IAs in several different ways. It could:

- Refuse to negotiate EU proposals for which the Commission has not quantified costs and benefits, but where the UK has, and where the costs are shown to outweigh the benefits.<sup>44</sup>
- Require proposals where the UK IA and the EIA show different estimates to be subject to further assessment before it can be taken forward in the European Council. An example of when estimates differ is “Phase 2 of the European Pedestrian Protection directive”, which is currently in the process of being negotiated. The UK IA put the cost estimate substantially higher than the EIA did.<sup>45</sup>

**5.3.2** For the most costly proposals, a more drastic approach should be taken. Where the UK Government is faced with a possible defeat over a key proposal—either imminent or long-term—it should not be afraid to use a robust IA to “build up its defence.” But this must be combined with a clear message: Due to the high costs potentially imposed by the proposed regulation, the UK Government lacks the mandate from voters and business at home to sign up to the proposal. The robust findings in the IA will be there for everyone to see.

<sup>39</sup> BERR, “Impact Assessment Guidance”, p.2 <http://www.berr.gov.uk/files/file44544.pdf>

<sup>40</sup> See “Progress dates for EU Directives” in Ambler et al. “The British Regulatory System”, *British Chamber of Commerce*, March 2008, p 25.

<sup>41</sup> See: Ambler et al. “The British Regulatory System”, *British Chamber of Commerce*, March 2008, p 24.

<sup>42</sup> *HM Government/Better Regulation Executive*, “Making your life simpler: simplification plans—a summary”, December 2008, p 45.

<sup>43</sup> See for example: Putnam, Robert D, “Diplomacy and Domestic Politics: The Logic of Two-Level Games” *International Organization*, Vol 42, No 3. Summer, 1988, pp 427–460.

<sup>44</sup> For an example of such a proposal, see the IA for European Directive on the Statutory Audit of Annual And Consolidated Accounts (2006/43/EC) on which the Commission did not produce an EIA: [http://www.opsi.gov.uk/si/si2007/em/uksiem\\_20073494\\_en.pdf](http://www.opsi.gov.uk/si/si2007/em/uksiem_20073494_en.pdf)

<sup>45</sup> Compare UK IA to the EIA, see <http://www.dft.gov.uk/consultations/closed/protectroadusers/impactassessment.pdf>, respectively [http://ec.europa.eu/governance/impact/docs/ia\\_2007/sec\\_2007\\_1244\\_en.pdf](http://ec.europa.eu/governance/impact/docs/ia_2007/sec_2007_1244_en.pdf)

And example of where this kind of strategy should be used is with the opt-out from the 48-hour maximum working week, entailed in the Working Time Directive, which the European Parliament almost managed to scrap earlier this year. In fact, extraordinarily, a BERR official told Open Europe that an IA had never been produced on the cost of the loss of the opt-out because “no one expected the opt-out to come up for negotiation.”<sup>46</sup>

The opt-out could well again come up for negotiations before long. This is a clear case of where the Government should have produced a robust IA, and take it to Brussels, arguing that it simply cannot accept proposals for which there is little support at home, and for which the estimated costs are so high. A similar strategy could have been pursued with the Agency Workers Directive.

**5.4 Regulatory budgets:** A similar principle should apply to regulatory budgets. If UK regulatory budgets in future are to reflect realities on the ground they will need to effectively incorporate regulations coming from the EU, which account for the majority of the cost. Rather than merely factoring in the cost of EU regulations to the domestic regulatory budget, budgets should also be used at an early stage in the EU negotiation process.

EU legislation should have to meet the same stringent criteria as domestic legislation. The UK Government should give its negotiators the authority to reject proposals that do not meet its priorities and threaten to break its own regulatory budget.

Without this function UK regulatory budgets will only ever have a very limited impact on reducing the flow of regulation. As with IAs, ministers must make clear that they simply do not have the mandate to sign up to a proposal that will break their departmental budget.

**5.5 A more assertive approach at an earlier stage in negotiations:** The UK Government’s guidelines on using an Impact Assessment in EU negotiations recommend that UK policy-makers should be involved in EU-level policy-making not only once a proposal leaves the Commission but also while it is being formulated inside the Commission. They state that:

“If requested to do so by the Commission, you should consider sharing UK data on the likely impact of a proposal. In cases where you think that the Commission is not sufficiently aware of the impact of a potential proposal on the UK, you should consider taking the initiative to lobby the Commission directly to consider UK data.”<sup>47</sup>

The Commission’s so-called Roadmaps, which outline Commission proposals for the coming 12 to 18 months and their likely impacts, ought to act as an early warning system to the Government of what proposals are in the pipeline. This would allow the Government to provide the Commission with evidence of the impact of the proposal. Even at this stage, policy-makers should indicate that a costly proposal simply will not be accepted in the light of hard evidence. The earlier this dialogue is opened the better.

**5.6 On-going UK impact assessment and consultation throughout the EU decision-making process:** UK IA and consultation need to be used throughout the EU negotiation process, to account for changes that take place at different stages—including changes made by the Parliament or the Council, especially given that neither of these can currently be relied upon to produce their own IAs. It is not acceptable, for instance, that the Temporary Agency Workers Directive was never subject to an updated IA, despite the original IA estimating the cost to the UK at £637 million.

**5.7 EU-Commission style audit trails:** One of the simplest reforms the UK Government could pursue is to publish proper “audit trails” for each new legislative proposal. This would inject instant transparency and help businesses, MPs and others track what is going on with a proposal throughout the often lengthy decision-making process.

**5.8 Source any proposal laid before the Parliament:** Ministers should be made to clarify on Bills and SIs whether or not the legislation is derived from the EU. This will make the origin of UK regulation more transparent and serve to improve the debate about the role of the EU in initiating UK legislation, among MPs as well as the general public.

**5.9 The nuclear option: refusing to agree an EU budget deal without reform:** The UK is in a powerful position to push for reform at EU level—particularly where regulation is concerned. In order to set the wheels in motion, the UK Government should draw up clear proposals for a radical shake-up of the EU’s “Better Regulation Agenda”, calling for new commitments to *less* regulation, and to the idea that state interference can only be justified with conclusive evidence that the benefits of any such interference outweigh costs that have been clearly quantified. It could also propose some of the ideas we explore above. The UK Government should take a tough line and present this ideal to its EU partners, using its veto over negotiations on the

<sup>46</sup> Telephone conversation with a BERR representative on 15 December 2008.

<sup>47</sup> *Department for Business, Enterprise and Regulatory Reform*, “Using an Impact Assessment in EU Negotiations”, available at, <http://www.berr.gov.uk/whatwedo/br/policy/scrutinising-new-regulations/preparing-impact-assessments/toolkit/page44278.html>

Financial Framework—the EU’s multi-annual budget—to help focus minds. The UK is in a better position than most to hold budget negotiations hostage, since it is one of the biggest net contributors to the EU.

*In addition, there’s a huge need to bolster the scrutiny of EU proposals in Westminster—and so promote better regulation in the EU. However, we will not touch on our proposal for reform of the UK Parliament’s scrutiny system in this submission.*

*29 September 2009*

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