



Brussels, 3 April 2017
(OR. en)

7582/17

LIMITE

POLGEN 31
IA 50
INST 147
COMPET 206

NOTE

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| From: | General Secretariat of the Council |
| To: | Permanent Representatives Committee |
| No. prev. doc.: | 5249/17 + COR 1 |
| Subject: | Follow-up to the IIA on Better-Law Making - Impact assessment within the Council |

1. The Inter-Institutional Agreement (IIA) on Better Law-Making of 13 April 2016¹ contains a number of provisions with regard to impact assessment (IA)². In particular, the IIA provides that '*The European Parliament and the Council will, when they consider this to be appropriate and necessary for the legislative process, carry out impact assessments in relation to their substantial amendments to the Commission's proposal*'. These provisions led to discussions on a possible follow-up within a number of Council fora, in particular the Mertens Group³, in the run-up to the '2016 Annual report on IA within the Council'⁴.

¹ OJ L 123 of 12 May 2016

² See, in particular, paragraphs 12 to 18 of the IIA.

³ The WP on Competitiveness and Growth also discussed the matter and their deliberations were incorporated into the Council Conclusions on 'Better regulation to strengthen competitiveness' as set out in 9580/16.

⁴ 9786/16 of 9 June 2016

2. Following questions raised by a number of delegations as to the role and tasks that might possibly be fulfilled by the GSC to follow through on these IIA provisions, the GSC services held internal consultations to assess possible scenarios, based on an analysis of institutional, political, legal, organisational, financial, practical and human resources considerations.
3. On 3 February and 16 March 2017, the joint Antici/Mertens Group examined the arrangements proposed by the General Secretariat of the Council (GSC) on setting up a capacity to carry out impact assessments within the Council (5249/17) and had a first exchange of views on core elements of a procedure for triggering a request for a Council impact assessment.

Arrangements on setting up a capacity to carry out impact assessments

4. The GSC examined options aimed at ensuring, should the Council agree to the proposed approach, that the Council was in a position to carry out IAs in relation to its substantial amendments⁵ 'when it considers this to be appropriate and necessary for the legislative process', and bearing in mind that 'the definition of a substantial amendment should be for the Council to determine'.⁶⁷
5. A decision to set up an IA capacity for the Council is without prejudice to the Council's future recourse to IAs. At the same time, the number and frequency of requests for an IA that the Council is likely to make in future are unpredictable.

⁵ Substantial amendments are defined as such on a case-by-case basis, as decided by Coreper in June 2016 when endorsing 9786/16 and 9790/16.

⁶ See paragraph 15 of the IIA on Better Law-Making of 13 April 2016.

⁷ See also the reference on page 9 of 9790/16, under Chapter III 'Handling amendments proposed by Council': 'The definition of a "substantial amendment" is for the Council to determine on a case-by-case basis.' Paragraph 22 of the 2016 Annual report on IA (9786/16) further states that 'as is currently the case, a flexible and pragmatic approach, on a case by case basis, could be taken for the definition of substantial amendments by the Council, which does not exclude the option to work out a set of indicative criteria for a substantial amendment by the Council and the way in which the Council, with the GSC's support, is to handle these.'

6. Following an in-depth analysis, it is being proposed that an IA capability should be secured for the Council through a public procurement procedure⁸, whereby the IA would be outsourced to external contractors. A pilot phase for setting up an external IA capacity for the Council would allow the Council and the GSC to gain experience before deciding on a longer-term set-up for carrying out IAs and ensure that the capacity in place was commensurate with the Council's actual needs.
7. For the pilot phase, a 'low-value' negotiated framework contract⁹ involving a minimum of three contractors¹⁰ ('cascade contract'¹¹) for an amount estimated between EUR 25 000 and EUR 50 000, and for a 1+1-year period starting in 2017, would ensure that the amounts committed potentially remained within the limits of 'available resources', as favoured in the 2016 Annual report on IA.¹²
8. The added value of IAs to be carried out within the proposed framework would be evaluated over time. The evaluation of the pilot phase would provide the basis for a longer-term solution. The evaluation should be prepared one year after the pilot phase is operational.

⁸ Other institutions (the Commission and the European Parliament) have also chosen to outsource most of their capacity for carrying out IAs. However, both the Commission and the Parliament have in-house capacity.

⁹ This tendering procedure offers increased flexibility, and its estimated duration is shorter than other arrangements based on an open procedure.

¹⁰ Given the uncertainty as to the number of requests for IAs to be made by Council, and given the wide-ranging expertise potentially needed, the framework contract should be concluded with at least three selected contractors to allow for a better coverage of potential IA needs; this condition would be met by a 'low-value contract' of an estimated value of between EUR 25 000 and EUR 50 000, which should involve a minimum of three candidates.

¹¹ A 'cascade contract' is a framework contract with multiple contractors, which provides for the selection of the most appropriate contractor on the list for a given purchase order (in this case an IA). Specific contracts can take different forms, such as the reopening of the competition between contractors, whereby each has the opportunity to make an offer and the best is selected; or alternatively, requesting an offer from one contractor at a time from a ranked list of contractors, whereby the first contractor that makes an acceptable offer is selected.

¹² A number of qualitative and quantitative criteria will need to be clarified, *inter alia*:

- the level of proven experience on IA to be required and the criteria for assessing this;
- a checklist of the elements to be part of any IA (including elements of the Checklist for Working Party Chairs in the Annex to the Handbook);
- the methodology to be used by the contractors (consultations, panels of experts, etc.);
- the level of human and other resources that will be needed by contractors and the profile of their experts;
- other conditions (related, for example, to the need to avoid 'undue delays in the legislative process').

9. The evaluation of the pilot phase will also help establish the potential need for additional human and financial resources for handling IAs within the Council, depending on the frequency of IA requests on substantial amendments that the Council makes, as well as the related financial costs and the GSC's workload.

Procedure for triggering a request for a Council IA

10. The joint Antici/Mertens Group underlined the Commission's primary role in carrying out IAs on its legislative proposals and in complementing the information therein. The Council accepted the principle of carrying out its own IAs under specific conditions when it signed up to the IIA; it did not, however, commit to any specific arrangements for their implementation, and these therefore remain for the Council to determine.
11. Such arrangements should promote good IA practices and ensure, in particular, that IAs conducive to undue delays in the legislative process are avoided.
12. A decision to trigger a request for an IA should therefore be accompanied by provisions ensuring *inter alia* that IAs to be carried out by the Council do not lead to 'undue delays in the law-making process or prejudice the co-legislators' capacity to propose amendments', in line with the IIA, and should hence be made conditional on an appropriate level of support by delegations within the Council.

Conclusion

13. In view of the above considerations, it is suggested to proceed in the following three phases:
 - a) subject to Coreper's endorsement of the approach set out in this note for establishing an IA capability for the Council for the cases foreseen under the IIA, Coreper instructs the GSC to launch a procurement procedure for establishing the Council's own IA capacity, as set out under point 7 of this note;

- b) the joint Antici/Mertens Group is invited to examine a draft procedure for triggering a request for an impact assessment by the Council, and to present this draft procedure to Coreper and the Council for approval;
 - c) the Working Party on Competitiveness and Growth is invited to contribute to the finalisation of the setting-up of a system allowing the Council to carry out IAs on its own amendments, including the terms of reference for a Council request to carry out a given IA.
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