



Council of the  
European Union

Brussels, 24 May 2018  
(OR. en)

8900/18

LIMITE

IA 127  
BETREG 7  
POLGEN 69  
COMPET 301  
ECOFIN 417  
MERTENS 5

## REPORT

From:	General Secretariat of the Council
To:	Permanent Representatives Committee (Part 1)
Subject:	Impact assessment within the Council - 2018 Annual Report

Delegations will find below the 2018 Annual Report on Impact Assessment within the Council, prepared by the Bulgarian Presidency with the assistance of the General Secretariat of the Council.

## I. INTRODUCTION

1. This annual report follows on from the report on Impact Assessment (IA) within the Council endorsed by the Competitiveness Council on 29 and 30 May 2013<sup>1</sup>. The 2013 IA report recommended that the Presidency, assisted by the General Secretariat of the Council (GSC), monitor the implementation of the measures set out in that report and report back annually to Coreper. The first annual report dated June 2014<sup>2</sup> included a number of recommendations on further strengthening the Council's work on IA, which were confirmed in the Council Conclusions on Smart Regulation of 4 December 2014<sup>3</sup>. Annual reports on IA within the Council aim to implement the recommendations of the 2013 and 2014 IA reports, to assess potential shortcomings in existing procedures and to update them as necessary.
2. The 2015<sup>4</sup>, 2016<sup>5</sup> and 2017<sup>6</sup> annual reports provide a comprehensive account of impact assessment-related developments within the Council and on the state of implementation of the recommendations of the 2013 and 2014 IA reports within the Council, for the respective periods of July 2014-May 2015, June 2015-May 2016 and June 2016-May 2017.
3. The 2016 and 2017 reports included recommendations aimed inter alia at exploring possible scenarios for follow-up to the provisions of the Inter-Institutional Agreement (IIA) on Better Law-Making of 13 April 2016. The reports further recommended continuing with awareness-raising measures and actions about applicable procedures for the handling of IA within the Council and related commitments, including on the best use of the Guidance for Working Party Chairs and the indicative Checklist to inform the Council's decision-making process.

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<sup>1</sup> 8406/13, the '2013 IA report'  
<sup>2</sup> 10882/14, the '2014 IA report'  
<sup>3</sup> 16000/14  
<sup>4</sup> 8749/15, the '2015 IA report'  
<sup>5</sup> 9786/16  
<sup>6</sup> 9865/1/17 REV 1

4. This year's report takes stock of the implementation of procedures on the handling of IA within the Council between June 2017 and May 2018, and provides an overview of the new tools and procedures developed to follow up on the provisions of the 2016 IIA, in particular its paragraph 15, which includes the commitment of the Council to carry out IAs on its substantial amendments when it considers this to be appropriate and necessary for the legislative process.
5. The Mertens group at its meetings on 8 and 24 May 2018 examined the draft report and agreed on the following main conclusions and recommendations.

## **II. USING IA AT AN EARLY STAGE OF THE LEGISLATIVE PROCESS**

6. The 2014 IA report recommended extending the checklist-based examination procedure to all IAs accompanying legislative proposals. An Indicative Guidance for Working Party Chairs, including a checklist, was introduced in the 2013 IA report<sup>7</sup> to ensure the effective consideration of Commission IAs at an early stage of discussions on a given proposal in the relevant Council Working Party (WP). It was first updated in June 2016<sup>8</sup> following the entry into force of the new IIA on Better Law-Making of 13 April 2016. It was last revised in March 2018<sup>9</sup> to take account of Coreper decisions on a pilot project for an IA capability of the Council, a triggering procedure for an IA request by the Council and a template outlining general terms of reference for an IA request by the Council.

### **Use of IA checklist**

7. An evaluation of the use of the checklist, as requested in the 2014 IA report, was last presented in the 2017 report. During the period between June 2017 and May 2018, 23 Commission proposals which were accompanied by an IA were examined in the Working Party with the checklist and 23 were examined without using the checklist. In the 2017 IA report, 32 Commission proposals which were accompanied by an IA were examined in the Working Party with the checklist and 23 were examined without using the checklist. 26 Commission proposals did not have an impact assessment (see Annex). 29 Commission proposals were not accompanied by an IA in the previous period.

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<sup>7</sup> 8406/13 EXT 1

<sup>8</sup> 9790/16

<sup>9</sup> 6270/18

## Handling of IAs within the Council

8. All IAs accompanying a proposal published by the Commission were discussed at Working Party level. The opportunity to examine the Commission's IA at Working Party level is highly appreciated by delegations as a means to facilitate a well-informed discussion on the proposal.
9. Delegations were consistently informed of the upcoming IA examination and provided with the indicative checklist one to three weeks in advance of the scheduled WP meeting, in line with the recommendations of the 2014 IA report. Yet in practice, arrangements for the actual use of the checklist vary. The checklist was usually used as a voluntary tool to support delegations' own analysis of the Commission's IA, but was rarely used in the WP discussion on the IA as such. This was the case either because delegations - although having received the checklist in time - did not fill it in and send it back as a support to the WP discussion, or because the WP chair did not hold a discussion on the basis of the checklist, which they saw as too detailed and overly elaborate.
10. The discussion, its duration (usually one WP meeting but on occasion up to three WP meetings) and the level of delegations' participation vary considerably according to the importance, specifics and political sensitivity of the proposal and the quality and scope of the related IA.
11. Most Commission IAs were well received, although concerns were sometimes raised by delegations. As in previous years, these concerns related inter alia to the accuracy and completeness of the analysis, the methodology and the insufficient quantification of impacts, the lack of specific data or evidence that would better support the proposed legislative/policy options and/or the legal basis of a proposal; inconsistent links between calculations and policy choices, insufficient coverage of certain impacts, or insufficient differentiation of impacts at Member State level and insufficient consideration of different options for EU action.

12. In a number of instances, delegations considered that the evidence set out in the IA was not consistent with the proposed legislation, or that the IA did not adequately reflect the outcome of public consultations, or that it did not address the real issues at stake, or that it did not address certain key impacts (e.g. the impact of the proposed legislation on the administrative burden borne by national administrations, or on SMEs). Some delegations asked in certain cases to be given access to all documentation used for the preparation of the IA, or to be provided with additional information on the impact of the proposal.
13. As in the previous period, about a third of all Commission proposals tabled over the period were not accompanied by an IA (26 out of some 85 proposals<sup>10</sup>). In some instances, the absence of an IA was explained by the Commission as due to the very nature of the proposal (technical updates, limited scope, etc.), the underlying political consensus behind the proposed options, and/or its urgency. In some cases, other analytical documents building on previous IAs were provided instead of an IA. In other cases, the Commission proposal was based on an ex-post review process of a previous item of legislation.
14. In another instance, the absence of an IA that could have provided evidence to support the new policy options proposed by the Commission caused some delays in the examination of the proposal, and resulted in the Working Party asking the Commission to provide the required data and evidence in a different format (study, data collection, etc.)<sup>11</sup>.

### **III. OTHER RECOMMENDATIONS OF THE 2013 AND 2014 IA REPORTS**

15. This section outlines the state of play of implementation of some additional recommendations on Council procedures for handling IAs contained in the 2013 and 2014 IA reports.

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<sup>10</sup> 13 out of the total number of the 85 proposals tabled have not yet been examined in a Working Party during the reporting period.

<sup>11</sup> 14884/1/17 REV 1

## **Impact assessment at national level**

16. There are no reported cases of national IAs being presented in Council preparatory bodies, despite the 2013 IA report encouraging delegations to present their own IAs at the same time as the Commission IA is being examined.
17. In some instances, the information directly provided by Member States to the Commission's services was the basis used to establish the Commission's IA.

## **Examination of IAs in other relevant Council bodies**

18. The 2013 IA report introduced two possibilities for examining an IA in another WP:
  - 1) invitation by Coreper to a relevant WP to analyse specific elements of an IA;
  - 2) invitation, by the Presidency, to a preparatory body of the Competitiveness Council to hold an additional discussion on an IA.

There were no reported instances of Commission proposals (including IAs) or their state of play being presented in other Council preparatory bodies.

## **Role of Coreper**

19. There were no reported cases of the Commission presenting its IA on a major legislative proposal directly to Coreper<sup>12</sup>, or of a report to Coreper/Council on an IA discussion at WP level giving rise to a discussion in Coreper. However, during the reporting period, Coreper endorsed three IA-related items<sup>13</sup>. In one instance, a number of delegations tabled a joint written statement in Coreper highlighting their concerns about the IA not adequately addressing certain issues or impacts<sup>14</sup>, but these concerns were addressed in the context of the discussion on the proposal in the WP.

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<sup>12</sup> or, mutatis mutandis, to the Special Committee on Agriculture

<sup>13</sup> 6270/18, 9865/1/17 and 15842/17

<sup>14</sup> 13848/17

#### **IV. INITIAL FINDINGS AND ISSUES FOR FOLLOW-UP**

20. The Council, with the GSC's support, took a number of initiatives over the period of the report to streamline its IA procedures, taking due account of the new IIA:
21. The Council's Guidance for Working Party Chairs on IA within the Council ('Handbook') was last updated in March 2018<sup>15</sup> in the light of the new IA capability and the most recent Coreper decisions on:
  - a pilot project for an IA capability for the Council<sup>16</sup>,
  - a triggering procedure for an IA request by the Council<sup>17</sup>,
  - a template outlining general terms of reference for an IA request by the Council.<sup>18</sup>
22. The updated Guidance for WP Chairs was made available in all official languages.
23. The use of the IA acronym within the document management system continues to be encouraged as a means of facilitating the monitoring of the Council's IA work.
24. A new 'BETREG' acronym was established to improve follow-up of developments related to Better Law-Making within the Council.

##### **Pilot project for setting up an IA capability for the Council to carry out IA of its own**

25. On 5 April 2017, Coreper endorsed a proposal for a two-year pilot project aimed at providing the Council with the capability to carry out IAs on its substantial amendments when it considers this to be appropriate and necessary for the legislative process, in compliance with point 15 of the IIA. The Commission has the primary role in carrying out impact assessments on its legislative proposals and in complementing the information therein. Hence, before deciding to carry out an IA on its substantial amendment, the Council will consider all alternatives, including whether to invite the Commission to complement its IA, and all information and documents at its disposal.

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<sup>15</sup> 6270/18  
<sup>16</sup> 7582/17  
<sup>17</sup> 8680/17  
<sup>18</sup> 15842/17

26. The pilot project will be evaluated after one year of operation.<sup>19</sup>
27. The preparation by the GSC services of the tender specifications for procurement was completed in August 2017. The process of selection of the contractors' offers was finalised in December 2017. Following the signing of the framework contracts with the selected contractors in January 2018, the Council's IA capability is now operational.
28. The WP on Competitiveness and Growth (Better Regulation) was regularly informed of progress of the implementation of the pilot project. It finalised work in December 2017 on a template outlining general terms of reference for an IA request by the Council, which were then endorsed by Coreper.

#### **Impact assessment on Council's amendments**

29. There were no reported cases of requests for IAs of Council substantial amendments. The above-mentioned IA capability has been in place since January 2018.

#### **Use of the Guidance for Working Party Chairs and Indicative Checklist**

30. The Guidance for Working Party Chairs ('Handbook') with the attached checklist provides a comprehensive and at the same time flexible tool for WP Chairs and delegations aimed at making the Council's examination of Commission IAs more thorough and systematic. Yet evidence reflected in this report shows that differences remain in the level of attention devoted to IAs across Working Parties, and there continues to be scope for further increasing awareness of IA procedures within the Council.

#### **Increasing awareness on new IA procedures**

31. Awareness should continue to be raised by the GSC notably on the flexibility offered by the Handbook for adjusting the procedures to the specific nature of each legislative proposal and on the possibility, upon invitation by Coreper/Presidency, for examination of IAs in other relevant Council bodies. Working Party chairs are invited to use the checklist with the appropriate flexibility, using the sections that are relevant to the proposal they are examining.

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<sup>19</sup> 5249/17 + COR 1 and 7582/17



32. The GSC consistently provides briefings to incoming WP Chairs on Council IA procedures, both in the Permanent Representations and in the capitals of the Member States concerned, as part of the seminars organised to prepare incoming Presidencies. During the period covered by this report 40 IA-related briefings were organized. The GSC will continue to raise awareness of IA procedures among Working Party chairs, including on the new IA capability and procedure to trigger an IA request where appropriate as part of the briefings provided to Council Presidencies.
33. Within the GSC, staff awareness-raising measures and initiatives to facilitate and enhance information exchange on the handling of IA within the Council and on implementation of Council's IA procedures included:
- meetings, information and further development of the dedicated network of contact points;
  - the setting up of an electronic platform to collect information within the GSC;
  - a 'peer-to-peer' training session on IA;
  - information articles on the GSC's intranet on new developments such as the new capability to carry out IA on substantial amendments by the Council and relevant Coreper decisions.
34. The GSC services are considering and preparing further initiatives towards increasing awareness on IA procedures and the rationale behind them.

### **Cooperation with the Commission and Parliament**

35. Cooperation and exchange of information with the Commission and Parliament's services on IA developments and related issues have developed at staff level over the period, in particular to increase mutual information on IA developments and facilitate the exchange of IA-planning information. Such cooperation should be further extended as recommended in the IA 2017 report by enhancing the dialogue between the Council and the Commission with the aim of further improving the quality of the Commission's Impact Assessment and their relevance for the Council's legislative decision-making process.

**Use of the indicative checklist**

<b>23 Commission IAs examined <u>with the checklist</u></b> <b>- June 2017 / May 2018 -</b>		
<b>COUNCIL AREA</b>	<b>SHORT TITLE OF THE PROPOSAL</b>	<b>REF. DOCS</b>
<b>COMPET</b>	Undertakings to provide information in relation to internal market;	9765/17
	Single digital gateway to provide information, procedures, assistance and problem solving services	8838/17
<b>ECOFIN</b>	European Crowdfunding Service Providers [ECSP] for Business	7049/18
	Markets in financial instruments;	7048/18
	Certain charges on cross-border payments in the Union;	7844/18
	Exposures in the form of covered bonds;	7066/18
	Minimum loss coverage for non-performing exposures	7407/18
	Cross-border distribution of collective investments funds (Regulation proposal)	6987/18
	Cross-border distribution of collective investments funds (Directive proposal)	6988/18
	European Supervisory Authority;	12420/17
	Pan-European Personal Pension Product [PEPP])	10654/17
<b>JHA</b>	Visa Code	7173/18
	Interoperability between EU information systems (police and judicial cooperation)	15729/17
	Interoperability between EU information systems (borders and visa)	15119/17
<b>ENV</b>	Hazardous substances	5708/18
<b>TRAN</b>	Promotion of clean and energy-efficient road transport vehicles	14183/17
	Posting drivers in the road transport sector	9671/17
	Vehicles hired without drivers	9667/17
	Port reception facilities for the delivery of waste from ships	5454/18
	Safeguarding competition in air transport	10146/17
<b>TELECOM</b>	Free flow of non-personal data in the EU	12244/17
<b>EMPL</b>	Work-life balance for parents and carers	8633/17
<b>SAN</b>	Health technology assessment	5844/18

**23 Commission IAs examined without the checklist  
- June 2017 / May 2018 -**

<b>COUNCIL AREA</b>	<b>SHORT TITLE OF THE PROPOSAL</b>	<b>REF. DOCS</b>
<b>TRANS</b>	Rail passenger's rights and obligations	12442/17
	Interoperability of electronic road toll systems;	9673/17
	Mobility Package II	14184/17
	Eurovignette	9672/17
	Tachographs	9670/17
	Interoperability of electronic road toll systems	9673/17
<b>JHA</b>	Combating fraud and counterfeiting on non-cash means of payment;	12181/17
	Mutual recognition of freezing and confiscation orders	15816/16
<b>ECOFIN</b>	Measures to strengthen administrative cooperation in the field of value added tax	14893/17
	Corporate taxation of a significant digital presence	7419/17
	Rates of value added tax	5335/18
	Exchange of information in the field of taxation in relation to reportable cross-border arrangements	10582/17
	Harmonising and simplifying certain rules in the VAT system	12882/17
	Common system of VAT as regards special scheme for small enterprises	5334/18
	Venture capital funds;	11303/16
	Common Corporate Tax Base (CCTB)	13730/16
<b>ENV</b>	CO2 emissions from new heavy duty vehicles	9939/17
	CO2 emissions from new light duty vehicles	14217/17
	Quality of water intended for human consumption	5846/18
<b>COMPET</b>	Compliance with and enforcement of Union harmonisation legislation on products;	15950/17
	Mutual recognition of goods lawfully marketed in another MS <sup>20</sup>	15965/17
<b>FISH</b>	Multi-annual plan for the fisheries exploiting demersal stocks in the western Mediterranean Sea	6772/18
	Multiannual plan for fish stocks in the Western Waters and adjacent waters, and for fisheries exploiting those stocks	7245/18

<sup>20</sup> The check list on both files was distributed to the delegations, but no feedback was received.

**26 Commission proposals without IA**  
**- June 2017 / May 2018 -**

<b>COUNCIL AREA</b>	<b>SHORT TITLE OF THE PROPOSAL</b>	<b>REF. DOCS</b>
<b>ECOFIN</b>	Macro-financial assistance to Ukraine, and Georgia	7055/18
	Macro-financial assistance to Georgia	12753/17
	Financial envelope to Structural Reform Support Programme	15663/17
	Harmonisation of GNI market prices	10569/17
	Common provisions to several European Funds	15566/17
	Date of application of MS transposition measures	16012/17
	Prudential requirements of investment firms	16017/17
	Prudential supervision of investment firms	16011/17
	European Systemic Risk Board	12430/17
	Markets in financial instruments (Solvency II)	12422/17
	Changes to the resources for economic, social and territorial cohesion	12963/17
<b>JHA</b>	European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice	10820/17
	Rules applicable to the temporary reintroduction of border control at internal borders	12723/17
	Insolvency proceedings	11667/17
	Centralised system for the identification of MS holding conviction information on third country nationals and stateless persons	10940/17
<b>FAC</b>	Screening of foreign direct investments into the EU	12137/17
<b>Security/ Civil protection</b>	European Defence Industrial Development Programme	10589/17
	Union Civil Protection Mechanism	14884/17
<b>TTE</b>	Common rules for the internal market in natural gas;	14204/17
	Notification to the Commission of investment projects in energy infrastructure within the EU	15962/17
<b>COMPET</b>	Rail transport statistics	11187/17
<b>ENV</b>	Persistent organic pollutants	7470/18
<b>AGRI</b>	Control of Newcastle disease	15540/17
	Inspections carried out in Brazil on fodder plant seed seed-producing crops	14720/17
<b>FISH</b>	Fishing mortality ranges and safeguard levels for certain herring stocks in the Baltic Sea	15789/17
<b>AUDIO</b>	Creative Europe Programme	11733/17