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REPORT

From: General Secretariat of the Council

To: Permanent Representatives Committee (Part 1)

Subject: Impact assessment within the Council - 2017 Annual Report

Delegations will find below the 2017 Annual Report on Impact Assessment within the Council, prepared by the Maltese Presidency, assisted by 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 2013¹. 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 2014² 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 2014.³
2. While annual reports on IA within the Council aim to implement the recommendations of the 2013 and 2014 IA reports, they also provide an opportunity to assess potential shortcomings in existing procedures and to update them where necessary.
3. The 2015⁴ and 2016⁵ annual reports both provided 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 from July 2014-May 2015 and from June 2015-May 2016.
4. The 2016 report included a number of recommendations, aimed *inter alia* at ensuring a proper reflexion on possible follow-up to the relevant provisions of the Inter-Institutional Agreement (IIA) on Better Law Making of April 2016. The report also recommended to further increase awareness about the importance of IA work within the Council and related procedures, not least by continuing to promote the best possible use of the Indicative Guidance for Working Party Chairs and the related Checklist to inform the Council's decision-making process.
5. This year's report takes stock of the implementation of existing procedures on the handling of IA within the Council between June 2016 and May 2017, and provides an overview of the reflection process carried out within the Council to follow up on the provisions of the new IIA on IA.

¹ 8406/13, the “2013 IA report”
² 10882/14, the “2014 IA report”
³ 16000/14
⁴ 8749/15, the “2015 IA report”
⁵ 9786/16

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. The Indicative Guidance for Working Party Chairs, including its checklist, was introduced in the 2013 IA report⁶ and updated in June 2016⁷ 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). An evaluation of the general use of the checklist, as requested in the 2014 IA report, was last presented in the 2016 report.

Use of the IA checklist

	June 2016 May 2017	Remarks
Commission IAs examined with the checklist	32 ⁸	<i>Including:</i> COMPET (European services e-card; procedure for authorisation schemes; proportionality test before adoption of new regulation of professions; geo-blocking; European business statistics; copyright in the Digital Single Market; proposal to empower MS competition authorities; PRIMA), Taxation (Common Corporate Tax Base), ECOFIN (extension of European statistical programme 2013-17; recovery and resolution of central counterparties; money laundering or terrorist financing; Risk Reduction Measures Package; coordination of social security systems; protection of workers), ENVI (hazardous substances; limitations of scope for aviation activities; greenhouse gas emissions), TRANS (certification system for aviation security screening equipment; initial qualifications and periodic training of drivers), TTE (rules for wholesale roaming markets; cross-border parcel delivery services; Governance of the Energy Union; protection of personal data in electronic communications), JHA (preventive restructuring frameworks; preventive restructuring frameworks, second chance and measures).

⁶ 8406/13 EXT1

⁷ 9790/16

⁸ European services e-card (5283/17, 5284/17); procedure for authorisation schemes (5278/17); proportionality test before adoption of new regulation of professions (5281/17); geo-blocking (9611/16); European business statistics (7169/17); copyright in the Digital Single Market (12254/16); proposal to empower MS competition authorities (7621/17); **PRIMA** (13296/16); Common Corporate Tax Base (13730/16), extension of European statistical programme 2013-17 (12056/16); recovery and resolution of central counterparties (14835/16); money laundering or terrorist financing (10678/16); Risk Reduction Measures Package (14775/16, 14776/16, 14777/16, 14778/16, 14779/16); coordination of social security systems (15642/16); protection of workers (5251/17); hazardous substances (5708/17); limitations of scope for aviation activities (5968/17); greenhouse gas emissions (11483/16, 11494/16); certification system for aviation security screening equipment (12090/16); initial qualifications and periodic training of drivers (5671/17); rules for wholesale roaming markets (10329/16); cross-border parcel delivery services (9706/16); Governance of the Energy Union (15090/16); protection of personal data in electronic communications (5358/17); preventive restructuring frameworks, second chance and measures (14875/16); protection against dumped imports (14249/16).

Commission IAs examined without checklist	18 ⁹	<p>Media (copyright and related rights applicable to certain online transmissions; provision of audiovisual media services in view of changing market realities), Taxation (rates of value added tax applied to books; VAT e-commerce package, controls on cash entering or leaving the Union), TTE (use of energy from renewable sources, energy performance of buildings, energy efficiency, internal market in electricity, Energy Regulators, risk-preparedness in the electricity sector, protection of personal data in electronic communications, European Electronic Communications Code, Body of European Regulators for Electronic Communications), JHA (freezing and confiscation orders), Fisheries (multi-annual plan for small pelagic stocks, multi-annual plan for demersal stocks in the North Sea).</p>
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⁹ Copyright and related rights applicable to certain online transmissions (12258/16); provision of audiovisual media services in view of changing market realities (9479/16); rates of value added tax applied to books (14823/16); VAT e-commerce package (14820/16,14821/16,14822/16); controls on cash entering or leaving the Union (15819/16); use of energy from renewable sources (15120/16); energy performance of buildings (15108/16); energy efficiency (15091/16); internal market in electricity (15150/16, 15135/16); Energy Regulators (15149/16); risk-preparedness in the electricity sector (15151/16); European Electronic Communications Code (12252/16); Body of European Regulators for Electronic Communications (12257/16); freezing and confiscation orders (15816/16); multi-annual plan for small pelagic stocks (6575/17); multi-annual plan for demersal stocks in the North Sea (11636/16).

Commission legislative proposals without an IA	29 ¹⁰	The vast majority of these proposals relate to ECOFIN (financial rules applicable to the general budget; specific measures to provide additional assistance to MS affected by natural disasters; extension of the duration of the European Fund for Strategic Investments; Guarantee Fund for external actions; EU guarantee to the European Investment Bank against losses; macro-financial assistance to the republic of Moldova), Internal market (Union programme to support specific activities enhancing the involvement of consumers; key information documents for packaged retail), ENVI (environmental reporting), Education (Europass), Culture (European year of Cultural Heritage), Shipping (reporting formalities for ships; port State control; safety rules and standards for passenger ships), Telecom (promotion of internet connectivity in local communities; ETIAS), Schengen (use of the SIS for the return of illegally staying third-country nationals), Migration (standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection; common procedure for international protection; standards for the reception of applicants for international protection; Union Resettlement Framework), Justice (money laundering; processing of personal data), Development (European Fund for Sustainable Development).
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¹⁰ Protection of tourists (6197/17); financial rules applicable to the general budget (12187/16); assistance to MS affected by natural disasters (15058/16); European Fund for Strategic Investments (12201/16); Guarantee Fund for external actions (12193/16); EU guarantee to the European Investment Bank against losses (12197/16); macro-financial assistance to the republic of Moldova (5383/17); Union programme to support specific activities enhancing the involvement of consumers (10509/16); key information documents for packaged retail (14298/16); environmental reporting (15716/16); Europass (12947/16); European year of Cultural Heritage (11856/16); reporting formalities for ships (9964/16); port State control (9965/16); safety rules and standards for passenger ships (9953/16); promotion of internet connectivity in local communities (12259/16); ETIAS (14082/16); SIS (15812/16, 15813/16, 15814/16); standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection (11316/16); common procedure for international protection (11317/16); standards for the reception of applicants for international protection (11318/16); Union Resettlement Framework (11313/16); money laundering (15782/16); processing of personal data (5034/17); European Fund for Sustainable Development (12290/16); spirit drinks (15121/16).

Handling of the IA examination

7. The opportunity to examine the Commission's IA continues to be highly appreciated by delegations and is seen as facilitating a well-informed discussion on the proposal. However, during the evaluation period of the report, more than a third of all Commission legislative proposals were not accompanied by an IA (29 out of 79).
8. The duration of the discussion (one or two WP meetings) and the level of delegations' participation (many/few/no interventions concerning the IA) continues to vary considerably, depending on various factors, including the importance and specifics of the proposal and related IA and its political sensitivity.
9. The 2014 IA report recommended providing early information to delegations on an upcoming IA examination. In cases where the checklist was used, delegations were usually informed of the upcoming IA examination and provided with the checklist one to three weeks in advance of the scheduled WP meeting.
10. Although arrangements for the use of the checklist still vary, the checklist is used in one way or another in the vast majority of cases, including as a voluntary tool to support delegations' own analysis of the Commission's IA. Delegations are usually familiar with the Council IA procedure/checklist procedure. However, this does not always lead to the active use of the indicative checklist in the WP discussion on the IA.
11. In a number of cases (18 out of 50 cases), the Presidency was reluctant to hold a discussion on the IA on the basis of the checklist, which, although indicative, was sometimes considered overly elaborate for the proposal in question.
12. Most Commission IAs were well received, although concerns were sometimes raised by delegations on varying issues. As in previous years, these usually related *inter alia* to lack of specific data or evidence that would better support the proposed policy options and/or the legal basis of a proposal; outdated data; performance indicators, methodologies, modelling, scenarios and criteria used in the IA; a narrow scope of analysis of the data set out in the IA; inconsistent links between calculations and policy choices, insufficient coverage of certain impacts, such as on competitiveness, insufficient differentiation of impacts at Member State level and insufficient consideration of different options for EU action.

13. In some cases, Member States asked the Commission to provide additional information on the impact of its proposal. This was notably the case with the proposal on binding annual GHG emissions reductions by Member States from 2021 to 2030¹¹. In the case of the lengthy discussion on the coordination of social security systems¹², which involved all Member States' delegations, the delegations criticized the conclusions drawn in the IA on several aspects related to the proposal.

III. OTHER RECOMMENDATIONS OF THE 2013 AND 2014 IA REPORTS

14. 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.

Impact assessment at national level

15. There are still very few 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 examined. Evidence shows that delegations are still rarely able to draw on existing national sources tailored to the proposal.

Examination of IAs in other relevant Council bodies

16. The 2013 Mertens 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.

¹¹ 11483/16

¹² 15642/16

Role of COREPER

17. There was one reported case of the Commission presenting its IA on a major legislative proposal directly to COREPER¹³, and another of a report to COREPER/Council on an IA discussion at WP level giving rise to a discussion in COREPER.

Impact assessment on the Council's amendments in trilogue negotiations

18. There were no reported cases of IAs of Council substantial amendments, nor of requests for such IAs. In some instances, the Commission was invited to provide an additional IA as a consequence of a Parliament proposal for an amendment in the trilogue phase.

Enhanced support tools for Council IA work

19. The 2013 and 2014 IA reports included recommendations related to Council IA tools or the sharing of IA-related information:
- The Council's Indicative Guidance for Working Party Chairs on IA (Handbook) was last updated in June 2016 in Mertens in the light of the new IIA and of the Council conclusions on 'Better Regulation to Strengthen Competitiveness' of 26 May 2016¹⁴;
 - Both the updated Indicative Guidance for WP Chairs and the Checklist included therein have been made available in all official languages;
 - 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. This was last done for the incoming BG and EE Presidencies;
 - Within the GSC, the network of IA contact points set up in spring 2016 was further developed as a means to facilitate and enhance information exchange within the GSC on implementation of Council procedures on IA and other IA-related developments, such as discussions on a pilot project to follow up on the IIA provisions for IAs;
 - The use of the IA acronym within the document management system was further encouraged as a means to facilitate the monitoring of the Council's IA work.

¹³ or, *mutatis mutandis*, to the Special Committee on Agriculture

¹⁴ 9580/16

IV. INITIAL FINDINGS AND ISSUES FOR FOLLOW-UP

New IIA and Better Regulation

20. The new IIA and the updated Better Regulation approach set out in the Council Conclusions adopted in May 2016 led to an update of the Handbook and Indicative Checklist, in line with the recommendations of the 2016 Annual Report on IA.
21. The 2016 Annual Report also considered 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.'

Setting up a pilot project towards establishing an IA capacity for the Council

22. On 5 April 2017, COREPER endorsed the GSC proposal for a two-year pilot project on establishing an IA capacity for the Council through a public procurement procedure¹⁵. The pilot project is aimed at providing the Council with the capacity to carry out IAs on its substantial amendments when it considers this to be appropriate and necessary for the legislative process. The pilot project will be thoroughly evaluated, with the involvement of the Working Party on Competitiveness and Growth.
23. The GSC has started work on preparing the related public procurement procedure, based on an indicative schedule whereby once the terms of reference for the procurement which are being drawn up by the GSC are finalised, the call for tender will be published in July 2017, so as to allow for the necessary time for the submission of offers, the selection of the offers and the signature of the framework contract by December 2017. The IA capacity is therefore expected to be operational by January 2018.

¹⁵ as set out in 5249/17 + COR 1 and 7582/17

Procedure for triggering a request for an IA on a substantial amendment by the Council

24. On 10 May 2017, COREPER endorsed a draft procedure for triggering a request for an IA on a substantial amendment by the Council,¹⁶ which had been jointly discussed by the Antici and Mertens groups¹⁷. This procedure, which applies to the pilot project on establishing an IA capacity for the Council, should serve as guidance for Working Party chairs when deciding whether to table a request for an IA on a substantial amendment by the Council.
25. The WP on Competitiveness and Growth (Better Regulation) on 19 May 2017 started work on designing a template for an IA request, including some draft Terms of Reference (TOR).

Handling of IA within the Council

26. Some differences persist in the level of attention devoted to IAs across sectors, and there is scope for further increasing awareness of the IA procedures within the Council. Information provided by the GSC to Council Presidencies already addresses the need to increase awareness of these procedures. It should be further enhanced through a more regular and focused exchange of information and briefings to working party chairs and (new) delegates, including on how to use the checklist for examining IAs as well as on ways to ensure that delegations are informed at an early stage about an upcoming IA examination and are provided on time with the necessary material, including the checklist.

Use of the Handbook and Indicative Checklist

27. The Handbook with the attached checklist is a useful tool for making the Council's examination of Commission IAs more thorough and systematic. Awareness should continue to be increased on the flexibility offered by the Handbook for adjusting the checklist procedure to the specific nature of each legislative proposal. 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, as recommended in the Indicative Guidance for Working Party Chairs (Handbook).
28. The Handbook will need to be updated to include information related to the procedure to trigger an IA on a Council amendment and the template for an IA request that is currently

¹⁶ 8397/17

¹⁷ 8680/17

being developed. The indicative checklist may by then also need to be updated. In particular, consideration could be given to including the dimension of Territorial Impact Assessments as appropriate. The GSC will continue to raise awareness and provide information as appropriate to incoming Presidency chairs on how to handle the IA process on substantial amendments.

Cooperation with the Commission

29. Cooperation with the Commission should be further developed, in particular to facilitate a systematic exchange of IA planning information. Such cooperation could be gradually extended to include an enhanced dialogue between the Council and the Commission with the aim to further improve the quality of the Commission's Impact Assessment work so that it can better serve the purpose of informing the Council's legislative decision-making process.
30. The joint register of delegated acts and joint database on the state of play of legislative files are also useful tools in this context.
31. The Regulatory Scrutiny Board is seen as providing a useful contribution towards further streamlining the Commission's work on IA, including by improving transparency on the criteria used by the Commission for deciding to carry out an IA on a given proposal.
