

Impact Assessment in the European Union



By Craig Robertson*¹

Integrated Impact Assessment (IA) – the ex-ante examination of potential social, economic and environmental impacts – lies at the heart of the European Commission’s Better Regulation programme. By making a commitment to systematically consider the potential consequences of its major legislative and policy-defining proposals, the European Commission has put itself at the forefront of a wider move towards evidence-based policy-making. The approach it has adopted follows a set of logical, analytical steps and is underpinned by a set of procedural requirements which are now being rigorously enforced by the recently-established Impact Assessment Board. Responsibility for preparing and using impact assessments is also shared by the Council of Ministers and the European Parliament.

Introduction

In June 2002, the European Commission announced that it would replace its previous sector-based impact analyses with an integrated Impact Assessment (IA) process, which would require the ex-ante examination of potential social, economic and environmental impacts of European Commission proposals. It would also involve a test against the principles of subsidiarity and proportionality, as well as a requirement to consult with stakeholders as part of the overall analysis. Since then, IA has become the cornerstone of the European Commission’s efforts to deliver on its commitments to the shared objectives (shared by the Member States and institutions of the EU) to simplify and improve the regulatory environment for Europe’s citizens and businesses.

The Commission decision to introduce the new approach to IA was taken in the context of the EU Lisbon and Sustainable Development Strategies, and the debate on “Good Governance” within the Member States and Institutions of the European Union. This means that IA ought to be seen not simply as a means of ensuring that EU entrepreneurs are not burdened with unnecessary “red-tape”, but also as a means of better informing political decision-makers about potential trade-offs between the social, economic and environmental dimensions. It is also important in promoting “good governance” by, for example, the systematic consultation with stakeholders as part of the IA process.

One of the most important and key founding principles of the IA approach in the Commission is that the results of the IA are considered as part of, but do not determine, the final political decision. As the 2002 Communication on Impact Assessment² made clear:

“Impact Assessment is an aid to decision-making, not a substitute for political judgement.”

The Commission IA Approach

Each Commission IA should follow certain analytical steps. In the first instance, it ought to examine the policy problem or challenge, including consideration of how it will evolve and the impacts of any actions already taken or in the pipeline. It also needs to consider at this stage whether the EU has the right to act, and is the most appropriate level for action to be taken.

Full consideration of the policy challenge should then allow for clear policy objectives to be set which will be directly related to the specific problem. Essentially the policy objectives are the “desired impacts”, and they ought to be specific enough to allow for effective monitoring and evaluation as to whether they are subsequently being achieved. This stage in the IA process is also the point at which explicit consideration needs to be given to the consistency between the policy objectives in this particular initiative and other policy areas, and with wider EU policies or strategies, such as Lisbon and/or Sustainable Development.

The next analytical step is to develop a range of alternative policy approaches or options, each with the potential to meet the policy objectives. There are few absolute requirements in the Commission’s Guidelines, but the need to include the option of “No EU Action” is one of them (unless there is an explicit Treaty obligation for EU action to be taken). There is also strong encouragement to include policy options or approaches which fall into the category of alternatives to traditional forms of regulation. This could include systems of co- or self-regulation, or Open Method of Co-ordination, or market-based

instruments, etc.

Each of the policy options identified as being feasible in meeting the set objectives (normally anything between 3-6 options) should then be analysed in terms of their potential economic, social and environmental impacts. Direct and indirect, positive and negative impacts ought to be considered for each option, with the analysis also examining if these impacts will have consequences beyond the borders of the EU. In line with the principle of proportionate analysis, in some instances it will be considered acceptable for the impact analysis to be entirely descriptive and qualitative in nature. However, where there are likely to be more significant or controversial impacts, greater efforts ought to be made to assign quantitative or monetary values to the impacts.

Each of the analysed options or approaches can then be compared in terms of their potential impacts and against the evaluation criteria of "effectiveness" in meeting the objectives, "efficiency" in terms of meeting the objectives while minimising direct costs, and "consistency" with other policies or strategies. It ought also to be possible to assess each option's compatibility with the principles of subsidiarity and proportionality. At this point it is important to underline that there is no requirement in the Impact Assessment Guidelines for a full Cost-Benefit Analysis to be carried out.

Underpinning each of the analytical steps outlined above, is a set of procedures that need to be followed by the Commission DG responsible for preparing the IA. Since 2005 there is a general rule that all items included in the Commission's Annual Policy Strategy (APS) and Legislative and Work Programme (CLWP) are subject to IA. However, in addition to this requirement, IAs are also being carried out on important items that do not feature in these key annual policy documents, including some implementing measures under Comitology procedures.

Preparation of the IA is the responsibility of the Commission DG which has submitted the item for inclusion in the APS or CLWP. However, in many cases it has been judged necessary to use external assistance in preparing the IA. Although it is possible for the external consultant to do the vast majority of the IA-related work, it is not possible for the DG to present the external study as the final IA Report. This Report, which should be the summary of the full IA process and findings, is a Commission document. The work of the lead Commission DG and/or the external consultant will normally be guided by an Inter-Service Steering Group (ISSG), consisting of representatives of other interested DGs. The ISSG is meant to ensure that the IA takes as wide a perspective as necessary, and that issues of consistency with other policies or strategies are also fully considered.

Failure to start preparation of the IA early enough in the policy development process has been identified by many observers as one key factor in the patchy quality and usefulness of Commission IAs, since it is finalised too late

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to have any real effect on the policy proposal itself. This is in spite of the integration of IA with the Commission's Strategic Planning and Programming cycle, which requires submission of so-called Roadmaps for items included in the APS and CLWP. The Roadmaps are available to other DGs in the preparation of the APS and CLWP, which allows them

to verify that the IA is likely to cover all impacts that they see as relevant or important, and to plan their contribution as part of the ISSG. Once the Commission has adopted the CLWP, the Roadmaps for all those items that eventually were included are made publicly available alongside the CLWP. This allows stakeholders, Member States, European Parliamentarians, etc to examine the Commission's early IA work and its plans for completion of the IA. It will also allow them to prepare for any contribution that they

may wish to make as part of a stakeholder consultation exercise.

At the same time as it adopted the integrated IA approach, the Commission also adopted minimum standards for consultation with stakeholders.³ These also apply for consultations carried out as part of a Commission IA. The minimum standards state that the Commission DG needs to be clear in the aims of the consultation exercise e.g. is it for brainstorming or is it to test opinion. It also needs to consult all relevant parties. The consultations also need to be made available on a single access point, avoiding the need for stakeholders to go looking for consultations in various places. There is also a minimum time limit of eight weeks for public consultations, and a requirement that the Commission provides feedback on the input it has received from stakeholders, either in the IA, the Communication or the Explanatory Memorandum.

As noted earlier, the end product of the IA process is an Impact Assessment Report. This should be a fair summary of the work carried out as part of the IA process, and should be clear in setting-out any uncertainties or assumptions in the analysis. External or separate studies, or results of stakeholder consultation exercises should be annexed to the IA Report (or web links provided to where the documents can be found). The IA Report is required to be completed in all cases, even when a decision has been taken not to proceed with the proposal. This is particularly important if the decision not to proceed is based upon consideration of the evidence gathered as part of the IA. Until recently there had been no instances of an IA Report being prepared for an aborted policy initiative. However, the work of the recently-established Impact Assessment Board or IAB (see below) has made its presence felt in this respect, and there are now IA Reports which set out clear reasons as to why a decision has been taken not to proceed with the proposal.

The IA Report is a Commission Staff Working Document and is given a "SEC" document reference. This is significant for two main reasons. The first, more practical, reason is that SEC documents do not need to be translated into all Community languages. The IA Report can be drafted in any

of the working languages of the Commission, but they tend to be written mainly in English. The decision not to translate into all Community languages was driven by the fact that DG Translation was not in a position to be able to translate all IAs within a timeframe which would not lead to the policy-making process grinding to a halt. This position, however, raised a number of issues in terms of transparency and the effective use of IAs to better inform debate and negotiation in the legislative process. Responding to demands from some Member States (notably Spain and Italy) and some stakeholder groups, the Commission agreed in July 2006 to prepare an Executive Summary of the IA Report. This summary would be of a maximum length of ten pages and would be translated into all Community languages.

The second, more fundamental, reason for the SEC document reference is to underline that the IA Report is not a political document and, as such, never receives political endorsement by the College of Commissioners. This is meant to reinforce the point that IA is prepared as a means of better informing political discussion and debate, and not as a way of dictating a political outcome.

At least one month before the planned date for the launch of the formal process of Inter-Service Consultation,⁴ the draft IA Report is submitted by the lead DG to the Impact Assessment Board for its scrutiny and opinion on its overall quality. The IAB was established to work under the direct authority of the Commission President, and independently of DG influence. It was the Commission's response to an intensifying call from some stakeholders, MEPs, and Member States (most notably Germany during its Presidency of the EU) for the setting-up of an external body to examine the quality of Commission Impact Assessments. Some observers went even further and demanded that an external body be given responsibility for preparing the IAs. Both suggestions were felt to raise uncomfortable issues for the Commission in terms of its exclusive right to propose legislation. Nevertheless, the high-level political support that they enjoyed in some quarters was enough to convince the Commission that its previous mechanisms of quality control and support were not enough to ensure a uniformly high standard in its IA work.

The IAB consists of five senior officials drawn from the areas of the Commission with the most direct link to the three dimensions required to be addressed in any Commission IA i.e. Economic, Social and Environmental. It is chaired by the Deputy Secretary General, and the members come from DGs Economic and Financial Affairs (ECFIN), Enterprise and Industry (ENTR), Environment (ENV), and Employment and Social Affairs (EMPL). All members are nominated by their DGs, but are appointed *ad personam* by the President. As such they are expected to be independent of influence from their DG and to excuse themselves from consideration of any draft IA Report where there could be a conflict of interest.

The IAB will examine the draft IA Report and offer recommendations on areas where it believes further work may be necessary. At present there is no authority for the

IAB to veto an IA Report, although it can ask for it to be resubmitted for further scrutiny. However, there is an implicit understanding that failure by the lead DG to fully take on board the IAB's opinion will be used as a justification by the SG (and possibly other DGs) for a suspended or negative opinion in Inter-Service Consultation.

Once the Board has scrutinised the draft IA Report and the lead DG has completed its remedial work, the IA Report accompanies the draft proposal into Inter-Service Consultation. As already made clear, it is perfectly possible for weaknesses in the IA Report to be used as justification for a suspended or unfavourable opinion in this process. This can also be the opportunity for DGs who have not been as involved in the preparation of the IA as they would have liked to have been, to give a suspended opinion until such time as their concerns about the IA have been taken into account.

A further possible step prior to the IA and related proposal appearing on the Commission agenda is for the IA to be discussed by one or more of the Groups of Commissioners, established under the Barroso Commission. This is most likely to be the Group of Commissioners on Competitiveness and Growth, but it is also possible that the Group of Commissioners on Fundamental Rights will examine the IA to see if it has adequately considered the issue of fundamental rights as part of its analysis. Although there is certainly scope for greater use of IAs at the political level in the Commission,⁵ some Impact Assessments accompanying high-profile proposals have been subject to intense debate at Cabinet level and/or in the Group of Commissioners on Competitiveness and Growth e.g. the Clean Air for Europe Directive. As the IAB continues to drive-up the overall quality and comprehensiveness of the analysis in individual IAs, it is to be expected that their usefulness in political discussions will become more widely appreciated.

Once the proposal is adopted by the College; it is published together with the IA Report and the IAB opinion on the draft IA Report on the Commission's Impact Assessment web pages on the Europa website.⁶ The proposal, Explanatory Memorandum and IA Report are then transmitted to the Council of Ministers and the European Parliament.

The Inter-Institutional Dimension

The shared responsibility for considering the consequences of new legislation was first formally recognised in the December 2003 *Inter-Institutional Agreement [IIA] on Better Lawmaking*,⁷ in which the Council, Commission and European Parliament all recognised the value of IA in terms of improving the quality of EU legislation. The IIA went on to state that:

"...Parliament and Council may [emphasis added], on the basis of jointly defined criteria and procedures, have impact assessments carried out prior to the adoption of any substantive amendment, either at first reading or at the conciliation stage".

The IA Report is required to be completed in all cases, even when a decision has been taken not to proceed with the proposal.

It also called upon the three institutions to consider the possibility of developing a “common methodology” for carrying out IA throughout the policy-making and legislative processes. The outcome of the discussions between the three institutions falls short of being a “common methodology”. Instead it is more a set of “traffic rules” for how IA is to be used throughout the policy-making and legislative processes. This so-called “Common Approach to Impact Assessment” was given political endorsement by the Council and Commission in November 2005, and by the European Parliament in July 2006. It includes a commitment to review experiences and examine how to proceed further after a period of two years. This process of review is presently beginning to get underway.

The “Common Approach” begins by setting out a number of general principles relating to IA. These include an agreement that decisions need to be made “after giving careful consideration to the available evidence”, and that IA should not prejudice the respective roles and responsibilities of the institutions. It further states that each institution will be responsible for its own IA work, and that all such work needs to be integrated and cross-dimensional i.e. giving equal consideration to the economic, social and environmental dimensions. All three institutions agree that IA should not be used to delay the legislative process or to oppose legislation or amendments. It reaffirms that IA – at all stages of the policy-making and legislative processes – is not a substitute for democratic political decision-making.

The Commission’s commitments in the “Common Approach” are much in line with what it had already set out in its June 2005 IA Guidelines. For example, it states that the minimum standards for consultation will apply to IA; and it agrees that “as a general rule” IA will be carried out on all items in the CLWP. Furthermore, it states that the Commission may decide to complement its original IA in the light of previously unavailable data, etc. However, the Commission has made it clear that the main purpose of its IA is as an aid to internal Commission decision-making. For this reason it cannot be forced by the Council or Parliament to re-visit or re-do the IA. Similarly, it cannot be forced by the Council and Parliament to do an IA on a proposal where it has judged it to be unnecessary or inappropriate. Essentially

the Commission has sought to avoid a situation where the IA becomes the focus of the negotiation, rather than the proposal itself. The Commission IA is sent to the other institutions to provide some background data and information, and to allow Member States and MEPs to see the evidence which the Commission considered prior to deciding on how or whether to proceed.

Both Council and the European Parliament agree in the “Common Approach” that they will “examine” the Commission IA alongside the initiative itself. They also agree to go further than the IIA and make a firm commitment to carry out IA on “substantive amendments” to Commission proposals. However, this “commitment” is heavily qualified. The definition of “substantive” is left for the individual institution to determine. Furthermore, such IA on substantive amendments will be carried out only “when appropriate and necessary for the legislative process”. At the time of writing there would appear to be little immediate prospect of an IA on a substantive amendment being carried out by the Council. However, there have been some examples of IAs being carried out by EP committees, and the budget set aside by the EP for such studies is growing on an annual basis (from €500 000 in 2006 to €700 000 in 2007).

Conclusion

Impact Assessment is intended to have direct (and positive) effects in terms of providing a better evidence base for internal Commission decision-making. The extent to which it is leading to improved outputs in terms of “better” proposals for legislation or regulation is still an open question, and perhaps it is unfair to focus attention on the role of the Commission in improving the regulatory environment for Europe’s businesses and citizens, when there is a great deal of potential for poor regulatory outcomes to result from ill-conceived and/or ill-considered amendments to Commission proposals, or from badly-transposed legislation. Nevertheless, there is already clear indications that the introduction and more systematic application of the IA approach is resulting in some important and potentially far-reaching changes in the policy-making and legislative processes of the European Union.

NOTES

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² European Commission, COM(2002)276, *Impact Assessment*, Brussels: June 2002.

³ European Commission, COM(2002)704, *Towards a reinforced culture of consultation and dialogue – General Principles and Minimum Standards for Consultation of Interested Parties by the Commission*, Brussels: June 2002.

⁴ This is the process by which other services or Directorates-General of the European Commission give their approval or otherwise on the proposal from the lead DG.

⁵ The evaluation of the IA system carried out for the Commission by The Evaluation Partnership examined this issue and, although the evidence it presented was largely anecdotal, it concluded that political decision-makers were not using IA as much as it is intended to be used.

⁶ http://ec.europa.eu/governance/impact/practice_en.htm

⁷ 2003/C 321/01.