



EUROPEAN RISK FORUM – COMMUNICATION 15

EUROPEAN COMMISSION PUBLIC CONSULTATION ON COMMISSION GUIDELINES FOR STAKEHOLDER CONSULTATION

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Rue de la Loi 227, B – 1040 Brussels, Belgium
Telephone + 32 2 613 28 28 Facsimile + 32 2 613 28 29
www.riskforum.eu email: info@riskforum.eu

EXECUTIVE SUMMARY

Consultation is a two-way process, involving dialogue and feedback between governments and citizens. Used well, it lies at the heart of better regulation and is an essential pre-condition for high quality regulatory decision-making. Consultation with citizens and stakeholders throughout the legislative cycle helps governments to enhance the quality, credibility and legitimacy of public policy.

Between 2002 and 2014, the Commission has taken major steps to improve its consultation practices, reflecting a Treaty obligation to consult widely with parties concerned so as to ensure the actions of the European Union are coherent and transparent.

In June 2014, the Commission published draft guidelines designed to support application of the minimum standards for stakeholder consultation. This note identifies ways in which the minimum standards might be further improved, as well as highlighting ideas for strengthening the draft guidelines. In general, however, the guidelines are to be welcomed.

Specific ideas for improvement include:

Minimum standards

- Make the Commission's minimum standards for consultation legally binding;
- Widen and tailor the scope of the Commission's minimum standards for consultation to include all major implementing decisions taken by the Commission and the EU agencies;
- Require all draft impact assessments to be published and subject to public consultation prior to the development of a final proposal, adhering to the Commission's minimum standards for stakeholder consultation;
- Encourage greater use of formal public hearings, as a mechanism for enhancing the transparency and effectiveness of consultation by all Commission Services and Agencies;
- Improve compliance with minimum standards by requiring each Commissioner to report publicly;
- Undertake a formal, independent evaluation of the effectiveness and application of the Commission's minimum standards. Results of the evaluation should be published;
- Expand the minimum standards to require consultations to take place as early in the policy process as possible; and
- Widen the minimum standards to define clearly the respective roles of citizens (providing inputs) and governments (making decisions and protecting the public interest).

Guidelines

- Require all stakeholder consultations to include an open public consultation phase;
- Strengthen the distinction between the gathering of evidence and the consultation process, especially for risk management measures, and formally recognise that they are not equivalent;
- Limit the use of closed question, multiple choice questionnaires; and,
- Publish the results of all evaluation exercises;

1. INTRODUCTION

This is a contribution by the European Risk Forum (ERF, www.riskforum.eu) to the public consultation launched by the European Commission on its Guidelines for Stakeholder Consultation. The draft document has been published for public comments from 30 June 2014 to 30 September 2014.

Consultation is a two-way process. It involves dialogue and feedback between governments and citizens. Used well, it lies at the heart of better regulation and is an essential pre-condition for high quality regulatory decision-making. Consultation with citizens and stakeholders throughout the legislative cycle helps governments to enhance the quality, credibility and legitimacy of public policy.

Specifically, high quality consultation processes enable policy-makers and regulators to:

- Tap new sources of policy-relevant ideas, information, and resources, improving the evidential base for decisions;
- Integrate public input into policy-making, giving citizens, economic operators, and organised interests more of a stake in decision-making;
- Strengthen public trust, building confidence in the quality and openness of policy-making processes;
- Ensure greater acceptance of legislative and regulatory decisions, improving compliance and legitimacy; and
- Respond to calls from citizens for greater transparency, predictability and accountability.

Since 2002, the European Commission has taken major steps to improve its consultation practices, through the implementation of minimum process standards.¹ This has contributed to an improvement in transparency and predictability within EU-level policy-making processes. Standards were further improved in 2012 when the minimum period for public consultation was increased from eight to twelve weeks. At the same time, the Commission committed to strengthening the application of the minimum standards by establishing improved support mechanisms.² This has been implemented through the development of draft stakeholder consultation guidelines, designed to strengthen the quality, scope and targeting of consultations.

The ERF welcomes the opportunity to comment on the draft guidelines and expresses full support for the efforts made by the Commission to upgrade regulatory process standards in general and stakeholder consultation in general.

Three types of comments are included in this note: general reflections on the Commission's process standards for stakeholder consultation, including recommended reforms; comments on the strengths of the draft guidelines; and ideas for improving the guidelines.

¹ See COM(2002) 704.

² See COM(2012) 746 and accompanying SWD(2012) 422.

2. CONSULTATION PROCESS STANDARDS

Between 2002 and 2014, the Commission has taken major steps to improve its consultation practices, reflecting a Treaty obligation to consult widely with parties concerned so as to ensure the actions of the European Union are coherent and transparent. Major reforms include the introduction of mandatory minimum standards in 2002 (subsequently reformed in 2007 and 2012); an expansion of the scope of the minimum standards to include all delegated and implementing acts subject to an impact assessment; the development of detailed guidelines for the application of process standards, and a commitment, set out in the latest REFIT report, to bring ex post evaluations and 'Fitness Checks' within the scope of the consultation standards.³

Although the Commission's minimum standards meet many of the good practices for effective consultation identified by the OECD and others, there are important gaps in a number of areas. These gaps limit the effectiveness, impact, and consistency of the implementation of the minimum standards.

There are a number of areas where improvements could be made. Specific ideas for improvement include:

- **Make the Commission's minimum standards for consultation legally binding**, creating enforceable rights for affected parties and creating powerful incentives for regulators to comply with agreed requirements. One way in which this could be done is to include a legal requirement to consult within an EU-level Law of Administrative Procedures, recognising such a requirement as one of the principles of good administration.
- **Widen and tailor the scope of the Commission's minimum standards for consultation to include all major implementing decisions taken by the Commission and the EU agencies.** Implementing decisions subject to consultation should include substantive technical or scientific guidelines drawn up by the Commission or the EU agencies; case-by-case decisions which embed risk management assumptions; and all implementing and delegated acts for which an impact assessment is carried out, so that where impacts have not been properly assessed there is an opportunity to alert regulators.
- **Require all draft impact assessments to be published and subject to public consultation prior to the development of a final proposal, adhering to the Commission's minimum standards for stakeholder consultation.** Special emphasis should be placed on ensuring that officials account publicly and specifically for the use of inputs received through the consultation process, including explaining why criticisms and recommendations provided by stakeholders have been rejected.
- **Encourage greater use of formal public hearings, as a mechanism for enhancing the transparency and effectiveness of consultation by all Commission Services and Agencies.**
- **Improve compliance with minimum standards by requiring each Commissioner to report publicly.** Moreover, the Secretariat-General should monitor, using appropriate performance indicators, how well each directorate and agency complies with the Commission's minimum standards for consultation. The results should be reported annually in the Commission's Better Law-making report.

³ See COM(2014) 368.

- **Undertake a formal, independent evaluation of the effectiveness and application of the Commission’s minimum standards.** Results of the evaluation should be published.
- **Expand the minimum standards to require consultations to take place as early in the policy process as possible.**
- **Widen the minimum standards to define clearly the respective roles of citizens (providing inputs) and governments (making decisions and protecting the public interest).**

3. GUIDELINES – IMPROVEMENTS

In overall terms, the proposed guidelines and annexes represent a significant step forward, and are to be welcomed. Major improvements in the consultation process set out in the draft include:

- **Structured approach** – the guidelines establish a structured, multi-step process for carrying out stakeholder consultations. This should help standardise the application of the Commission’s minimum process standards. Work by the OECD suggests that consultation processes should, as far as possible, be standardised.
- **Broad consultation** – the guidelines encourage officials to engage with the widest possible range of stakeholders and to take additional steps, where relevant, to try and include groups which might be overlooked. By taking this approach, the legitimacy of the process will be enhanced.
- **Publication and transparency** – it is a clear requirement of the guidelines that all written contributions should be published. This provides transparency and encourages contributors to submit high-quality, evidence-based contributions, contributing to better law-making.
- **Feedback** – it is a requirement of the guidelines that contributors to consultations be made aware of how, and to what extent, their views have been taken into account, and why certain suggestions have not been acted upon. Clear, comprehensive feedback contributes to greater transparency and accountability in law-making, and is to be welcomed.
- **Evaluation** – consultations are to be evaluated to assess effectiveness and to identify ways of improving future exercises. Over time, this should contribute to ‘organisational learning’, leading to further reforms of the guidelines and, ideally, the minimum standards. This is consistent with global good practice and with the Commission’s emphasis on improving governance through greater use of ex post evaluation.

4. GUIDELINES – FURTHER IMPROVEMENTS

Consistent, rigorous application of the new guidelines will help to improve the effectiveness of stakeholder consultation processes at EU-level. They are to be supported. Despite these improvements, there are a number of areas where the proposed guidelines could be further enhanced. Specific reforms include:

- **Require all stakeholder consultations to include an open public consultation phase** – whilst it is important to include an element of tailoring in consultation exercises, so as to target relevant stakeholders, it is vital to ensure that the process is

seen to be open to comments and contributions by all stakeholders, even those not identified by officials. Through this approach, the legitimacy and effectiveness of the process is enhanced: any suggestion of 'favoured' or 'insider' groups is negated, and the possibility of impacts being overlooked is limited.

- **Strengthen the distinction between the gathering of evidence and the consultation process, especially for risk management measures, and formally recognise that they are not equivalent** – within the guidelines it is recognised that consultation cannot be a substitute for rigorous gathering of evidence. The comments need, however, to be generally strengthened and to recognise the particular requirements of risk management measures. Within the structured decision-making model set out in the IA process standards, the 'Problem Definition' phase requires structured, credible evidence to justify government action. Consultation processes are not, in general, designed to provide such evidence. In the case of measures designed to manage risks, evidence to support state intervention should always be based on a scientific risk assessment process that meets globally-accepted standards. Opinions obtained from consultation processes should not be considered as the equivalent of the outcomes of a formal risk assessment process. This should be emphasised.
- **Limit the use of closed question, multiple choice questionnaires** – this method of gathering information is primarily designed to identify attitudes and behaviours, and works best when dealing with well-established issues, when questions provide for a full range of answers and when the structure of the questionnaire does not 'lead' respondents towards particular outcomes. These criteria are unlikely to be met when officials undertake consultation exercises. A further problem is that, through their design, they exclude qualitative insights: one of the most important contributions of a well-designed consultation exercise. Finally, they may encourage a tendency to focus on the quantity rather than the quality of responses. Consultation should not be seen as a form of participative democracy, using questionnaires as a way of assessing the representativeness of support, or opposition, for proposed measures.
- **Publish the results of all evaluation exercises** – although the guidelines require consultations to be evaluated, they fail to explicitly require the outcomes of ex post reviews to be published. Publication will enhance the transparency of the process, as well as strengthening accountability. It will also make it easier for stakeholders to participate in the process of independent oversight of the application by the Commission of the guidelines and minimum standards.

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Richard Meads and Lorenzo Allio, the Rapporteur and a Senior Policy Analyst respectively at the European Risk Forum, wrote this Communication. However, the views and opinions expressed in this paper do not necessarily reflect or state those of the European Risk Forum or its members.

European Risk Forum

The European Risk Forum (ERF) is an expert-led and not-for-profit think tank with the aim of promoting high quality risk assessment and risk management decisions by the EU institutions, and raising the awareness of the risk management issues at EU-level.

In order to achieve this, the Forum applies the expertise of a well-established network of experts to 'horizontal', cross-sectoral issues. In particular, it addresses regulatory decision-making structures, tools and processes, as well as the risks and benefits of new and emerging technologies, of climate change, and of lifestyle choices.

The Forum believes that:

- High quality risk management decisions should take place within a structured framework that emphasises a rigorous and comprehensive understanding of the need for public policy action (risk assessment), and a transparent assessment of the workability, effectiveness, cost, benefits, and legitimacy of different policy options (risk management);
- Risk management decision-making processes should ensure that outcomes are capable of meeting agreed social objectives in a proportionate manner;
- Risk management decisions should minimise negative, unintended consequences (such as new, unintended risks, economic losses, reduced personal freedoms, or restrictions on consumer choice); and
- The way in which risk management decisions are made should be structured, consistent, non-discriminatory, predictable, open, transparent, evidence-based, legitimate, accountable, and, over time, subject to review.

Achieving these goals is likely to require extensive use of evidence (especially science); rigorous definition of policy objectives; clear and comprehensive description and assessment of problems and their underlying causes; realistic understanding of the costs and benefits of policy options; and, extensive consultation.

The Forum works with all of the EU's institutions to promote ideas and debate. Original research is produced and is made widely available to opinion-formers and policy-makers at EU-level. As an expert group, the Forum brings together multiple sources of evidence (such as the experience of practitioners and policy-makers; non-EU good practices; and academic research) to assess issues and to identify new ideas. Indeed, direct engagement with opinion-formers and policy-makers, using an extensive programme of conferences, lunches, and roundtables, is a feature of the Forum's work.

The ERF is supported principally by the private sector. The ERF does not seek to promote any specific set of values, ideologies, or interests. Instead it considers high quality risk assessment and risk management decisions as being in the public interest. An advisory group of leading academics supports the ERF's work.

For more information visit www.riskforum.eu or contact:

Dirk Hudig
Secretary-General
European Risk Forum
Rue de la Loi 227
B-1040, Brussels
Belgium
Tel: +322 613 28 28
Fax: +322 613 28 49
Mobile: +32 477 510834
dhudig@riskforum.eu