



EUROPEAN RISK FORUM – COMMUNICATION 17

OECD BEST PRACTICE PRINCIPLES ON STAKEHOLDER ENGAGEMENT IN REGULATORY POLICY

March 2017

EXECUTIVE SUMMARY

Stakeholder engagement, like all forms of 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, affected entities, and other stakeholders throughout the legislative cycle helps governments to enhance the quality, credibility and legitimacy of public policy.

In 2017, the OECD published draft principles designed to provide policy-makers and officials in both OECD and partner countries with a practical instrument to better design their stakeholder engagement strategies. The principles complement the OECD's 'Recommendation on Regulatory and Policy Governance', published in 2012.

This note identifies ways in which the draft principles might be further improved. In general, however, the principles are to be welcomed.

Specific ideas for improvement include:

- Highlight the need to differentiate between stakeholder engagement, and the procurement of scientific expertise and other forms of expert evidence. Scientific assessments and the evidence they generate is not the equivalent of lay 'opinion' and this should be stated more clearly in the principles;
- Require all stakeholder engagement exercises to include an open public consultation phase, including public expert hearings;
- Revise and up-date the definition of 'conflict-of-interest' to recognise comprehensive understanding of bias;
- Link the standards for stakeholder engagement more explicitly with widely-accepted principles of good administration (transparency and consistency; public participation; public record; and accountability);
- Define more explicitly the scope of the principles to recognise the use of regulation, substantive guidance, standards, and administrative decisions to implement primary laws, including those used to manage risks; and,
- Require all contributors to consultations to disclose fully the extent of financial support they receive from governments.

1. INTRODUCTION

This is a contribution by the European Risk Forum (ERF, www.riskforum.eu) to the public consultation launched by the OECD on its draft Best Practice Guidelines on Stakeholder Engagement in Regulatory Policy.¹

Stakeholder engagement, like all forms of 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, affected entities, and other stakeholders throughout the legislative cycle helps governments to enhance the quality, credibility and legitimacy of public policy. Specifically, high quality consultation processes, including stakeholder engagement, 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;
- Respond to calls from citizens for greater transparency, predictability and accountability

Since 1995, the OECD has taken a series of steps to sharpen the focus of its members on the quality of regulatory decision-making². This has included encouraging the use of consultation as one of a number of interlinked regulatory process management tools, including regulatory impact assessment and ex post evaluation. Members of the OECD have adopted many of these tools, helping to improve the quality of regulatory decision-making.

The European Risk Forum welcomes the opportunity to comment on the draft principles and expresses its full support for the efforts made by the OECD to persuade member countries to upgrade their regulatory process standards in general and stakeholder engagement principles and practices in particular.

¹ The consultation document can be retrieved from <http://www.oecd.org/regreform/regulatory-policy/public-consultation-best-practice-principles-on-stakeholder-engagement.htm> (last accessed on 13 March 2017).

² The most important commitments to improve regulatory quality made by members of the OECD are set out in: OECD 'Recommendations of the Council on Improving the Quality of Government regulation' (1995); OECD 'Guiding Principles for Regulatory Quality' (2005); and OECD 'Recommendation of the Council of the OECD on Regulatory Policy and Governance' (2012).

2. PRINCIPLES – IMPORTANT CLARIFICATIONS

In overall terms, the proposed principles represent a significant step forward, and are to be welcomed. The draft contains a rich collection of examples and extensive supporting explanations that will help member state governments apply the non-binding principles effectively. This provides, in our view, an excellent starting-point for successful implementation of good practice, whilst respecting national constitutional, legal, and political arrangements.

Detailed clarification of the role, purpose, and limitations of stakeholder engagement within the regulatory cycle is also provided within the draft principles, and is to be supported. On too many occasions, stakeholder engagement has been viewed as an alternative to representative democracy, providing an opportunity for participatory decision-making through the weight of response to consultation procedures and hence a mechanism for recognising social concerns. This is not its purpose, as the draft principles make clear.

Major clarifications set out in the draft include:

- **Good governance** – the principles demonstrate clearly how well-planned, high quality stakeholder engagement contributes to better governance by strengthening accountability and enhancing public trust. Over time, this helps buttress the legitimacy of regulatory decisions.

Governance of the highest standards is of increasing importance as OECD member governments seek to promote political engagement and social cohesion.

- **Purpose of stakeholder engagement** – contributions made by stakeholders to public consultations are not, the principles explain, a replacement for political debate by elected officials nor are they an indication of the ‘consensus’ of public opinion. They are neither a form of opinion poll or an exercise in participatory democracy.

Instead, their instrumental purpose is to provide regulators with access to additional sources of evidence, as well as providing opportunities to test, on an ex ante basis, the reasoning, evidence, and intervention logic of proposed measures, and to identify, after the event, regulatory failure should it occur.

- **Limitations of government expertise** – the principles recognise that the public administration does not hold the monopoly of expertise. Good governance requires decision-makers to make an informed assessment of the costs and benefits of regulatory decisions both before and after implementation.

Stakeholder engagement provides an additional mechanism for increasing the information available to governments on which to base decisions throughout the policy cycle. This is of particular importance when governments make decisions about the best way to manage risks posed by technologies and lifestyle choices to citizens and the environment. In a mature regulatory environment, risk management decisions need to take account of complex unintended consequences including risk-risk trade-offs and impacts on incentives to innovate, if regulatory failure is to be avoided. Stakeholder engagement, particularly with affected entities, provides an additional means of understanding these potential impacts.

It should be recognised clearly, however, that ideas generated through stakeholder engagement exercises are not a substitute for, or equivalent to, evidence derived from scientific assessments.³ All proposals designed to manage risks to human health, public safety, or the environment should be based on a scientific assessment of risk, providing the principal evidence to support the intervention logic.

- **Interest group capture** – there is increasing awareness amongst policy-makers of the risk of capture of stakeholder engagement exercises by organised interest and pressure groups. This problem is recognised explicitly by the principles.

This marks a step forward. In the past, this issue has been overlooked or considered solely in terms of contributions by affected entities. There has been an anachronistic understanding of the concept of “regulatory capture”. These principles begin to reverse this, widening the definition of interest groups to include organisations, associations, and individuals motivated by beliefs, concerns, and ideologies. This is a balanced and mature perspective, reflecting recent experience throughout the OECD area.

All of these important clarifications should be reflected in the better regulation strategies adopted by OECD members, including the European Union.

3. PRINCIPLES – FURTHER IMPROVEMENTS

Consistent, rigorous application of the new principles will help to improve the effectiveness of stakeholder engagement processes throughout the OECD area. They are to be supported. Despite these improvements, there are a number of areas where the proposed principles could be further enhanced. Specific reforms include:

- **Highlight the need to differentiate between stakeholder engagement, and the procurement of scientific expertise and other forms of expert evidence** – the two processes serve different purposes and are grounded in different logics and rationales. Governments seek expert input, so as to ensure that the best available evidence is used to support decision-making throughout the cycle. Expert evidence can take many forms including scientific assessments, social science analyses, and insights from ethicists. All evidence is not of an equal standard of quality, relevance, or impartiality. Evidence from scientific assessments, for instance, is not the equivalent of lay ‘opinion’, when considering risks posed by technologies and lifestyle choices to citizens and the environment.⁴ *(These ideas could be reflected in revisions to Points 29, 46, and 62 of the draft text.)*

³ Scientific assessments are evaluations of a body of scientific or technological knowledge that typically synthesizes multiple factual inputs, data, models, assumptions, and/or best professional judgements to bridge uncertainties in the available information. These assessments include, but are not limited to state-of-science reports; technology assessments, weight-of-evidence analyses, meta-analyses; health, safety or ecological risk assessments; toxicological characterizations of substances; integrated assessment models; hazard determinations; or exposure assessments. (Source: US Office of Management and Budget).

⁴ See European Risk Forum ‘Scientific Evidence and the Management of Risk’ (2016).

- **Require all stakeholder engagement exercises to include an open public consultation phase, including public expert hearings** – 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. Public hearings provide additional benefits. They enable opinions and ideas to be tested through an open process of discussion and debate. Through this approach of public consultation, 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. *(These ideas could be reflected in revisions to Points 38-40, 46, and 49.)*
- **Revise and up-date the definition of ‘conflict-of-interest’ to recognise comprehensive understanding of bias** – too many OECD members continue to focus on financial conflicts of interest as the principal source of bias. It is a welcome improvement in the OECD’s framework of good practices for regulatory management that the draft principles do not endorse this approach. Instead, they highlight the potential for bias that may result from non-material factors, such as social concerns, values or ideologies. The draft could, however, go further and recognise the findings of the latest research in this area.⁵ It suggests that biased behaviour, whereby impartiality is challenged, results from a wide range of conflicts of interest. These include economic factors, as well as non-material considerations including values, experience, status, power, personal commitments, and professional ambitions. This suggests that the causes of bias may be more widespread than has been considered traditionally and that future policies for stakeholder engagement and for the selection of scientific and other experts should reflect this. *(These ideas could be reflected in revisions to Points 26 and 61.)*
- **Link the standards for stakeholder engagement more explicitly with widely-accepted principles of good administration** – inputs to stakeholder consultation, and the response of the government to them, should be included in the ‘public docket’ of information used to inform decision-making. Many OECD member countries have established legally binding standards of due process for the implementation of laws by the executive function that can be subject to judicial review and which embed the principles of good administration. Such provisions ensure predictability and the rule of law. Key principles of good administration are transparency and consistency; public participation; public record; and accountability. All evidence relied on by regulators is included in the public record. *(These ideas could be included in revisions to Points 47 and 60.)*
- **Define more explicitly the scope of the principles** – whilst the draft suggests that the principles should be applied to all phases of the regulatory governance cycle, it could be improved by recognising the emerging complexity of the mechanisms used to implement primary legislation. In most OECD member countries, governments are increasingly focused on the implementation of primary laws. One consequence of this has been the growth of the so-called “Administrative State”. Tools used by regulators include regulation

⁵ See for example, Shalvi S., Gino F., Barkan R., and Ayal S. ‘Self-serving justifications: doing wrong and feeling moral’ (Current Directions in Psychological Science, 2015)

(implementing legal measures), substantive guidance,⁶ technical standards, and administrative decisions, such as derogations or exemptions. Better regulation programmes should encompass the use of all of these tools. *(These ideas could be included in revisions to Points 24, 28, and 36.)*

- **Require all contributors to consultations to disclose fully the extent of financial support they receive from governments** – whilst the principles further enhance transparency by requiring all written submissions to be published, they do not require contributors to highlight explicitly the extent to which they or their organisations are supported financially by governments. To maintain confidence in the legitimacy of the process and to maximise accountability, it is important to prevent the emergence of perceived conflicts of interest. Officials, stakeholders and citizens should be able to distinguish clearly between the contributions of organisations that are fully independent from governments from those that receive public money. *(These ideas could be included in revisions to Point 27.)*

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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.

⁶ Derived through administrative processes, substantive guidance decisions are a form of 'soft law'. These non-binding decisions are made by the executive function when implementing complex legislation. They define technical, scientific, or regulatory requirements needed to meet statutory obligations. Substantive guidance also includes detailed interpretations of statutory rules by officials. They tend to have general applicability and to apply in the future. For most affected entities, they provide in practice a detailed definition of the legal requirement. Failure to adhere to substantive guidance is, all too often, seen to be 'prima facie' evidence of non-compliance with the law. Most OECD member governments and the European Commission make extensive use of substantive guidance, particularly when implementing risk management laws.

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);
- 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
dirk.hudig@riskforum.eu