

## CONTRIBUTION TO THE EUROPEAN COMMISSION CONSULTATION ON THE IMPACT ASSESSMENT GUIDELINES REVISION

policy paper: reaction

.....  
SEPTEMBER 2014

The Impact Assessments (IAs) are an important instrument for evidence based policymaking and for preventing at the earliest possible stage the adoption of incoherent, development unfriendly policies within the EU system. Article 208 of the Lisbon Treaty provides that “The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries”. The key mechanism by which the EU can currently ‘take into account’ development objectives in its decision-making is the impact assessment that it performs prior to any new legislative initiative.

While the 2009 IA guidelines revision did put more focus towards the external impact of EU policies, still quite some loopholes exist in relation to identifying incoherencies. Why are IAs in their current form not working for Policy Coherence for Development (PCD) purposes?

In practice IAs are carried out by the lead Directorate General in the European Commission, sometimes drawing on external expertise for specific studies, and are released together with the policy proposal assessed. No dedicated support is provided to help the IA drafters to address development issues in their analysis. A quality check of all IAs is carried out by a Board composed of high level civil servants appointed by the Commission president, acting in their own name. The members’ development expertise is rather limited (none of the members come from DG DEVCO). It is not surprising that no IA has ever been rejected and sent back for improvement on the sole ground of inadequate assessment of its impact on developing countries.<sup>1</sup> This is borne out by an IA screening carried out by CONCORD Denmark, which showed that in the period from 2009 to June 2011, only 9% of IAs that were relevant from a development perspective actually assessed or mentioned the impacts on developing countries. In the entire period since the introduction of the new IA guidelines in 2009, up to June 2013, the ratio rises to 19%, this remains a rather unsatisfactory record.<sup>2</sup>

Besides the unsatisfactory record of development implication measurements in the IAs, CONCORD has more concerns. The decision whether or not to execute an impact assessment is often not transparently taken, nor presented. Why was it decided that a policy proposal does not need an IA?

**CONCORD** is the European NGO confederation for Relief and Development. Its 28 national associations, 18 international networks and 2 associate members represent 1,800 NGOs which are supported by millions of citizens across Europe. CONCORD leads reflection and political actions and regularly engages in dialogue with the European institutions and other civil society organisations. At global level, CONCORD is actively involved in the CSO Partnership on Development Effectiveness, Beyond 2015 campaign and the International Forum of NGO platforms.

<sup>1</sup> CONCORD Spotlight on EU Policy Coherence for Development; the real life impact of EU policies on the poor, 2013

<sup>2</sup> <http://www.concorddenmark.dk/?type=page&id=448&itemid=1919>

There are also concerns in relation to the objectiveness and inclusiveness of the impact assessments. Objectiveness in the sense that the execution of the IA is the sole responsibility of the European Commission, under the supervision of the Impact Assessment Board (IAB). In spite of the provisions in the current IA Guidelines, civil society participation in IA is extremely limited. Though in light of the principle of proportionality, it is clear that Article 208(1) TFEU requires the EU to ensure that its measures are based on all relevant information. It is difficult to see how this can be done without the involvement of civil society and developing countries, as well as the population in developing country specifically affected by the policy at issue.

In its 2010 report the EU Court of Auditors formally criticised the lack of systematic consultation of external stakeholders, stating that the IA process should be transparent and draw on the expertise and views of others.<sup>3</sup> One might even go so far as to say that if this procedure is not followed, it will be difficult for the EU institutions to argue that they have taken all relevant considerations into account, as required under Article 208(1) TFEU.

Additionally, when impact assessments are undertaken, this is frequently at a point when they are too late, practically speaking, to have any effect on the regulatory process.<sup>4</sup> The experience of the IA practice under the current 2009 guidelines shows that quantitative methodology have been favoured, although it fails to capture non-economic effects, and even sometimes economic effects too<sup>5</sup>. Operational Guidance and appropriate methodology for the development objectives at issue must be developed using both quantitative and qualitative data. Essentially, Commission staff carrying out the impact assessments must be properly trained in appropriate methodologies.

To fail to properly assess development impacts is much more than simply the failure to use a policy instrument: it is the failure to comply with a legal obligation, i.e. article 208 TFEU. More explicitly this means that a measure that is not based on a proper consideration of all relevant considerations (in our case, development objectives) is liable to annulment. How this would work can be seen in some recent judicial cases in which EU measures have been annulled for failing to take into account relevant considerations, and thereby violating the fundamental EU principle of proportionality in public decision-making.<sup>6</sup>

Article 208(1) TFEU imposes a positive duty on the EU to ensure that it has relevant information. This means that the EU has to take the initiative to obtain this information; it is not enough to be open to information. Additionally, from the language of *Spain v Council*<sup>7</sup>, it appears that the burden is on the EU institution at issue (the European Commission for IA) to demonstrate that it *has* taken all relevant considerations into account.

---

<sup>3</sup> European Court of Auditors, Special Report No. 3 on Impact Assessments, 2010

<sup>4</sup> European Parliament, Report on the EU Policy Coherence for Development and the 'Official Development Assistance Plus' Concept (Rapporteur: Franziska Keller), A7-0140/2010, para 71; European Economic and Social Committee, Opinion on Sustainability impact assessments (SIA) and EU trade policy (Rapporteur: Evelyne Pichenot), REX/313, 5 May 2011, para 1.2; New trade agreements negotiations (Rapporteur: Jonathan Peel), REX/248, 22 April 2008, para 5.11.

<sup>5</sup> See the notorious case of the sustainability impact assessment that failed to account for the effects of an EU free trade agreement on 92 per cent of the population of India, simply because this large 'informal sector' could not be captured by quantitative methods: European Economic and Social Committee, Opinion on the role of civil society in the free trade agreement between the EU and India (Rapporteur: Madi Sharma), REX/316, 27 October 2011, paras 4.6-4.10.

<sup>6</sup> As expressed in Article 5(4) TEU, '[u]nder the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of end.' See, in this context, Alberto Alemanno, 'A Meeting of Minds on Impact Assessment: When *Ex Ante* Evaluation Meets *Ex Post* Judicial Control' (2011) 17 European Public Law 485.

<sup>7</sup> C-310/04, *Spain v Council* [2006] ECR I-7318.

Considering the above, CONCORD would like to recommend the following (*which is also reflected in the answers to the formal consultation questions*):

- **The new IA guidelines should make explicit reference to the PCD obligation, and development impacts should be made a 4<sup>th</sup> key section of the assessments, alongside the present economic, social and environmental assessments;**
- **CSOs' inputs - both qualitative and quantitative - should be systematically included in all stages of the IA process, as a matter of ensuring diversified evidence and transparency;**
- **In order to deliver better on its objectiveness and inclusiveness, the IA Board should be opened up to other stakeholders outside the European Commission, coming from the European Parliament, civil society and the business sector. Together with the high ranking EC officials of the IA Board, they shall review the IA processes;**
- **The IA Board should include development specialists, in order to increase the development expertise on that body;**
- **The capacity of DG DEVCO to give input and support to the other DGs in assessing development impacts should be strengthened institutionally, e.g. by establishing a DEVCO helpdesk on IA matters and ensuring capacity building programmes focusing on development impacts and policy coherence for development for all Commission staff carrying out impact assessments.**

## General questions on the draft Impact Assessment Guidelines (annex I)

**1. In line with international best practice, the Commission's Impact Assessment system is an integrated one, covering costs and benefits; using qualitative and quantitative analysis; and examining impacts across the economic, environmental and social areas. Do you agree that this is the right approach?**

Article 208 of the Lisbon Treaty (“The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries”) implies an obligation to investigate the development impact of relevant EU policies. Ex-ante impact assessments carried out by the European Commission are the single most efficient tool for such investigation in the earliest stage of policy-making. Therefore, in the new Guidelines, PCD should be referred to more strongly as a legal obligation and not as a mere “relevant horizontal EU objective and principle” (p.28 of the proposed new Guidelines).

Moreover, while, at the most general level, the current Guidelines suggested flexibility in the methodology used for impact assessments, this was not reflected in the detailed Guidelines on taking into account effects of policies on developing countries, which, have been preferring a quantitative methodology. However, quantitative methods fail to capture non-economic effects, and they can even fail to capture economic effects<sup>8</sup>. These are lessons learned and something to avoid in the new Guidelines and in subsequent practice. Rather than seeing the matter in strictly economic terms, the EU should get inspiration from its own Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments<sup>9</sup> in order to adopt an appropriate methodology for the development objectives at issue.

**2. Do you agree with the scope of coverage of proposals requiring an impact assessment? If not, why not?**

In general, CONCORD agrees with the scope of coverage, but would like the Commission to state transparently why it was decided not to deliver an Impact Assessment. Also it should be made possible to challenge this decision.

**3. Are the appropriate questions being asked in the Impact Assessment guidelines? Are there other issues that the impact assessment should examine? How would this help to improve the quality of Commission policy proposals?**

In order to meet EU policy coherence for development obligations, the proposed approach for IA must include specific questions relating to the potential impacts on the development of developing countries, in different sectors and affecting different categories of the population, including the poorest and most vulnerable. As to date, in spite of existing questions in the current IA guidelines, the implications of the policy proposals on developing countries are most of the time not being taken into account, as demonstrated by studies executed by CONCORD Denmark.<sup>10</sup>

CONCORD views that the current approach that is mainstreaming the questions about the impacts on development has literally failed and put the EU at risk not to comply with its legal obligation relating to

---

<sup>8</sup> See the notorious case of the sustainability impact assessment that failed to account for the effects of an EU free trade agreement on 92% of the population of India, simply because this large ‘informal sector’ could not be captured by quantitative methods: European Economic and Social Committee, Opinion on the role of civil society in the free trade agreement between the EU and India (Rapporteur: Madi Sharma), REX/316, 27 October 2011, paras 4.6-4.10.

<sup>9</sup> Commission Staff Working Paper, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567.

<sup>10</sup> <http://www.concorddanmark.dk/?type=page&id=448&itemid=1919>

PCD. Ultimately, the danger is that a measure that is not based on a proper consideration of all relevant considerations (in our case, development objectives) could be challenged in court and ends up being annulled.

Therefore CONCORD proposes to set up a separate, additional fourth pillar (area) of analysis focusing on development, next to the economic, environmental and social pillars. In this development pillar, all questions that are proposed in the economic, social and environmental pillars in relations to impact on developing countries may be compiled. More specific questions may be added.

#### **4. Do you have any other suggestion on how to improve the guidance provided to Commission services carrying out an impact assessment and drafting an impact assessment report?**

The objectiveness and comprehensiveness of the EU's impact assessments must be improved by systematically involving in all stages of the IA process relevant stakeholders, including CSOs and people directly affected by the proposed policies, including in developing countries. CSOs can provide both qualitative and quantitative inputs. Thus, if CSOs' inputs are not used, a justification must be provided.

With the view to respect PCD obligations, in cases of a presumption that a policy option may affect developing countries, developing countries governments and their populations should be specifically consulted as they are best positioned to help measuring the magnitude of potential impacts.

It must be well understood that Article 208(1) TFEU imposes a positive duty on the EU to ensure that it has relevant information. In the case of IA, this means that the European Commission has to take the initiative to obtain this information; it is not enough to be open to information. Additionally, from the language of *Spain v Council*<sup>11</sup>, it appears that the burden is on the EU institution at issue (the European Commission for IA) to demonstrate that it *has* taken all relevant considerations into account.

Here, the Commission could get inspiration from WTO trade remedies and Article 12 of the Cotonou Agreement, which provide opportunities for the involvement of affected parties. If this can be done in cases of trade remedies and in the context of a multilaterally negotiated agreement, there is no reason, in principle, why it cannot be done in all cases involving policies likely to affect developing countries.

Moreover, in order to guarantee the best analytical quality and adherence to the guidelines, the assessments should be executed under the supervision of a multi-stakeholder Impact Assessment Board, including experts in the social, economic, environmental and development areas, from institutional, CSO and business backgrounds.

The Commission should publish an operational guidance on how to investigate the external impacts on development and Human Rights in Commission impact assessments, taking examples on the Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments.<sup>12</sup>

European Commission staff carrying out the impact assessments are properly trained in appropriate methodologies, especially in the area of development.

<sup>11</sup> C-310/04, *Spain v Council* [2006] ECR I-7318.

<sup>12</sup> Commission Staff Working Paper Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments: [http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance\\_en.pdf](http://ec.europa.eu/justice/fundamental-rights/files/operational-guidance_en.pdf)

## Specific questions (annex II)

**5. Problem analysis: do you think the draft text in annex II.B provides a clear description of the issues to be taken into account when analysing a problem? If not, how should it be improved?**

To be comprehensive the analysis should consider also relevant development impact of alternative policy solutions in an integrated manner. As stated in the proposed revision, "As far as no one knows more about the problem and about possible solutions than those concerned. Consulting those who will be affected by a new policy or initiative is a Treaty obligation and a mandatory component of all IAs." Developing countries governments and their populations should be specifically taken into account as important stakeholders to help measuring the magnitude of expected impacts.

**6. Subsidiarity: do you think the draft text in annex II.C provides a clear description of the issues to be taken into account when verifying compliance with the subsidiarity principle? If not, how should it be improved?**

**7. Objectives: do you think the draft text in annex II.D provides a clear description of the issues to be taken into account when setting out objectives? If not, how should it be improved?**

**8. Option identification: do you think the draft text in annex II.E provides a clear description of the steps to be followed when identifying alternative policy options? If not, how should it be improved?**

**9. Identification of impacts: Is the list of questions included in the 2009 guidelines (see annex II.F) considered complete and up-to-date? Are there any impacts that should be added or taken out?**

A separate, additional fourth pillar (area) of analysis focusing on development, next to the economic, environmental and social pillars should be set up. In this development pillar, a set of key questions to screen options against possible impacts on developing countries should be added taken into account a human rights based approach to development (see Answer to Question n. 1).

All questions that are proposed in the economic, social and environmental pillars in relations to impact on developing countries may be compiled in this additional pillar. More specific questions may be added.