

The impact of EU policies in the world

Seeing the bigger picture - one year on

November 2018 – revised paper

Introduction

With less than one year to go, the Juncker Commission is preparing for close of business. One of the flagships of this Commission was the Better Regulation Package, an ambitious set of reforms to improve the quality of EU policies and regulations under the leadership of Commission First Vice-President Frans Timmermans. As 2018 draws to a close, Mr. Timmermans is inviting all interested people to reflect on the impact of the reforms. The seeds of Better Regulation have been sown, and now, what is the harvest? CONCORD is taking this opportunity to, once more, reflect on a specific element of Better Regulation: to what extent the impact of new Commission proposals on developing countries has been considered.

In 2017, CONCORD published the report ‘The Impact of EU Policies in the World: Seeing the Bigger Picture’¹ which looked at the ways in which the Better Regulation Package has resulted in improved compliance of new Commission proposals with the principle of policy coherence for development (PCD). This principle is based on article 208 in the Lisbon Treaty which states: ‘The Union shall take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries.’² The report examined the impact assessments that accompanied the proposals issued by the European Commission in 2016. In addition, the report introduced the concept of policy coherence for sustainable development (PCSD).

This new brief report elaborates further on the previous findings and investigates the impact assessments and proposals issued by the Commission in 2017 and the first half of 2018. It aims to discover whether there are improvements in the impact assessments when it comes to compliance with PCSD, focusing however on one particular aspect of PCSD, namely the impact of policies on developing countries. As well as the fact that it is relevant to see if the Commission followed up on the recommendations in our 2017 paper, this new report also serves as input in the ongoing consultation of the Commission on the Better Regulation Package which aims to: “assess how well the various better regulation tools used by the Commission work in practice and contribute to achieving the objectives of its better regulation policy”.³

The report contains (1) a brief description of the system of impact assessments; (2) a quantitative analysis of the impact assessments conducted in 2017 and the first half of 2018; (3) a qualitative analysis of three cases which show different impact assessments and various ways of how the Commission treats the possible impacts of a proposal on developing countries; (4) a conclusion that discusses if there is any improvement compared with the last year’s analysis and some recommendations.

Methodology

In the Better Regulation Package (BRP), the key instrument for producing well-informed, evidence-based decisions is the impact assessment, whose aim is to inform decision makers about the likely

¹<https://concordeurope.org/2017/10/12/impact-eu-policies-world>

²<http://www.lisbon-treaty.org/wcm/the-lisbon-treaty/treaty-on-the-functioning-of-the-european-union-and-comments/part-5-external-action-by-the-union/title-3-cooperation-with-third-countries-and-humanitarian-aid/chapter-1-development-cooperation/496-article-208.html>

³https://ec.europa.eu/info/consultations/public-consultation-stocktaking-commissions-better-regulation-approach_en

consequences of projects, plans, policies and regulations.⁴ Its underlying rationale is that opening up draft proposals for input by stakeholders and citizens – as well as taking into account a wide range of policy options and weighing them before making the final policy decision – will improve the quality of the decision-making process and will, thereby, lead to better regulation.

Are there improvements in the impact assessments when it comes to compliance with the PCSD principle? And if we compare the Commission's most recent performance on impact assessments with CONCORD's recommendations made in 2017, do we observe any improvements? To answer these questions, this report builds upon the methodology developed by CONCORD's Danish member, Globalt Fokus. From 2009 to 2015, Globalt Fokus carried out annual screenings of the Commission's impact assessments, checking whether the impacts on developing countries had been adequately taken into account.⁵ The paper also examines three Commission proposals in depth, going beyond a statistical approach to include a qualitative analysis and recommendations.

Quantitative analysis

The quantitative analysis of the 128 impact assessments carried out by the European Commission in 2017 (52) and the first half of 2018, until 1 July (76), provided 5 assessments in 2017 and 7 in 2018 which were judged relevant from the perspective of possible impact on developing countries.⁶ The relevance of the assessment to developing countries and the adequacy of the impact assessment's analysis of the consequences for developing countries is determined on the basis of screening guidelines developed by Globalt Fokus Denmark and further clarified by CONCORD, allowing us to compare over time.⁷ Some of the impact assessments judged to be relevant for developing countries do not fully meet the guidelines, but they cover subjects that also indirectly concern developing countries. In these cases the impact assessment does give some attention to this, even though it is sometimes only in passing.

Notable from the analysis of the impact assessments executed in 2017 is that the percentage of impact assessments with an adequate analysis is significantly higher than percentages in previous years. The reason for this is that three of the five impact assessments judged relevant to developing countries were recommendations for a Council Decision to authorise the opening of negotiations for Free Trade Agreements with the Republic of Chile, Australia and New-Zealand respectively. The impact assessments explicitly calculated the consequences for trade with Least Developed Countries (LDCs). In every impact assessment it is stated that the trade negotiations would have minimal impact on LDCs. In the case of Chile for example, the impact assessment states that, under the ambitious scenario, the export from LDCs would increase by 0,001%. Under the conservative scenario it would stay the same. A specific tool for this kind of trade proposals is the obligatory sustainability impact assessment (SIA). SIAs provide the Commission with in-depth analysis of potential impacts of trade negotiations and do also investigate the impact on LDCs⁸, though mostly looking at economic indicators, with limited or sometimes no attention to the social and environmental impacts. In conformity with its own Guidelines on human rights impacts of trade policy initiatives,⁹ the Commission has also studied these impacts, however focusing first and foremost on direct human rights impacts for the EU and the trading partner, not for developing countries - probably because the overall indirect impact on developing countries was considered to be minimal.

⁴ https://ec.europa.eu/info/law/law-making-process/better-regulation-why-and-how_en

⁵ <http://www.globaltfokus.dk/in-english>

⁶ Annex

⁷ See annex 1.

⁸ http://ec.europa.eu/trade/policy/policy-making/analysis/policy-evaluation/sustainability-impact-assessments/index_en.htm

⁹ http://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153591.pdf

In contrast to IAs, SIAs are undertaken after the adoption of the negotiating mandate for EU trade agreements. The findings of an SIA therefore do not inform the content or scope of the trade negotiations but only the flanking measures that may be required to address potential negative impacts on sustainable development.

Even though one may disagree with the Commission on the analyses and their outcomes, the very fact that the Commission deliberately looked into the impact of its proposals on LDCs, brings the percentage of 2017 to 80%. In other words, out of five proposals with a possible or likely impact on developing countries, the Commission has in four cases made an explicit reference of that impact. In 2018, there were seven proposals relevant to developing countries. However, only in one case the Commission made an adequate analysis of the impact on developing countries. The percentage of proposals with an adequate analysis therefore declines to 14%.

While it is the Commission’s own responsibility to investigate the impact of a proposal on developing countries, the Regulatory Scrutiny Board (RSB) has the task to check whether the impact assessments of the Commission meet the quality criteria of the Better Regulation framework. The RSB has to formulate “(...) an opinion on the draft IAs carried out by the European Commission, and can make recommendations to improve them, or to supplement certain aspects, before they are approved and considered final”.¹⁰ Because of this role, the RSB has to verify (among other things) that all proposals that are likely to have impact on developing countries have been preceded by an impact assessment which looks adequately to those probable impacts. From the 7 proposals in 2017 and the first half of 2018 which did not consist of an adequate analysis of the probable impact on developing countries, the RSB did not intervene once on developing country impact, even though the sustainable finance proposal (case 3) failed the RSB’s scrutiny twice and was exceptionally given a third RSB session.

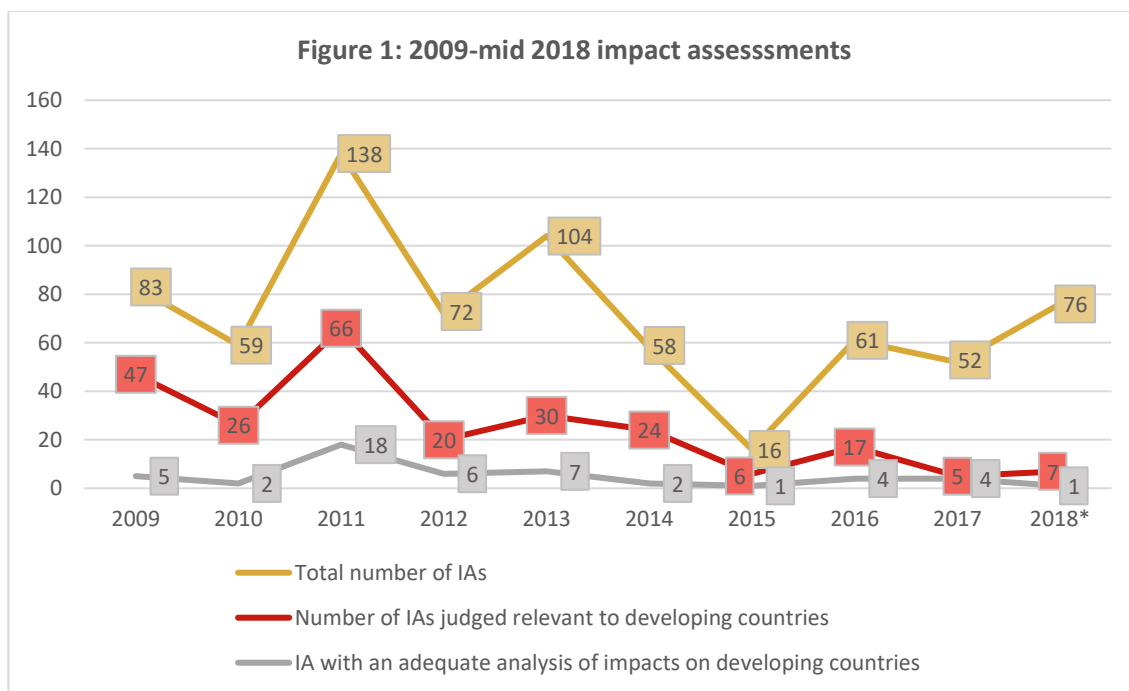
Table 1: 2009-mid 2018 impact assessments and their analysis of impact on developing countries

Year	Total number of IAs	Number of IAs judged relevant to developing countries (%)	IAs with adequate ¹¹ analysis of the impact on developing countries (%)
2009	83	47 (57)	5 (11)
2010	59	26 (44)	2 (8)
2011	138	66 (48)	18 (27)
2012	72	20 (28)	6 (30)
2013	104	30 (29)	7 (23)
2014	58	24 (41)	2 (8)
2015	16	6 (38)	1 (17)
2016	61	17 (28)	4 (24)
2017	52	5 (10)	4 (80)
2018*	76	7 (9)	1 (14)

* Until 01/07/2018

¹⁰ <https://concordeurope.org/2017/10/12/impact-eu-policies-world/>

¹¹ See annex 1.



Case #1 Establishment of a multilateral court for the settlement of investment disputes

Content of the proposal

In September 2017, the European Commission made a recommendation for a Council Decision authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes. The proposal concerns a reform of the Investor-State Dispute Settlement (ISDS). ISDS ensures that “[foreign] investors are enabled to sue and claim compensation and substantial damages if they believe their existing or future ‘right to profit’ from their investment is adversely affected by changes in policies or regulation”.¹² ISDS allows foreign investors to sue sovereign states directly before ad hoc tribunals which consist of three arbitrators. The judgement of such a tribunal about a case is final and binding.

The European Commission has been reforming ISDS via its bilateral trade and investment agreements where it has introduced what it has called an “Investment Court System” or ICS. In ICS the ad hoc tribunals have been replaced by a permanent tribunal of first instance and a permanent tribunal of appeal. The proposed multilateral investment court or MIC, would not only replace the ICS tribunals set up by each EU trade and investment agreement, but also all ad hoc tribunals foreseen by the existing bilateral investment agreements of the countries that would join the MIC.

The Commission’s proposal therefore envisages a new multilateral framework for the resolution of investor-state disputes which would be permanent and independent . In addition, it would “[be] predictable in delivering consistent case-law; allo[w] for an appeal of decisions; [be] cost effective; [be] transparent . . . and allo[w] for third party interventions (including for example interested environmental or labour organisations)”.¹³ The independence of the court would be maintained by means of stringent requirements.

¹² http://www.actionaid.org/sites/files/actionaid/act_on_it_-_four_key_steps_to_stop_land_grabs.pdf

¹³ <http://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-493-F1-EN-MAIN-PART-1.PDF>

The EU's proposal for a new multilateral framework is relevant from the perspective of developing countries, because most international investment agreements are between developed and developing countries and most ISDS claims so far have been filed against developing countries.

Developing countries are also affected by the proposal in that the EU's current bilateral ICS system brings substantial costs to developing countries. Each bilateral EU trade and investment agreement would indeed require the creation of a separate bilateral permanent tribunal of first instance and ditto tribunal of appeal.

That effect was already recognised by the Commission in the inception impact assessment. It says that especially governments in developing countries are faced with high costs to finance an Investment Court System (ICS) in their bilateral agreements with the EU and with the complexity of operating an ICS. Regarding the establishment of a permanent, efficient and well-functioning Multilateral Investment Court the inception impact assessment states that compared to ICS "[t]here is likely to be a benefit for third countries, in particular developing countries in terms of costs".¹⁴

Concerns put forward by CSOs

Before we discuss the input of CSOs in more detail, it is important to state in advance that many CSOs, both inside and outside CONCORD, fundamentally object to a system that allows foreign private investors to directly sue states and to even challenge laws, regulations and state actions taken in the public interest. Such a system privileges foreign investors' interests over the interests of people and the environment. The Commission proposal fails to rectify that fundamental disequilibrium. Singing up to a convention that creates a Multilateral Investment Court would perpetuate and expand the system including in developing countries. The main financial cost would not be the financing of the MIC, but the financing of the legal defense and the payment of the fines which can run in to billions.

In addition, the opposite is not possible - states cannot sue foreign investors before such tribunals, even if the investments would harm public interests, cause damage to the environment or violate human rights. In the public consultation, several civil society organisations (CSOs) reacted to the Commission's proposal. The organisations explicitly responded to the question on how to take account of the special needs of developing countries within a multilateral reform of investment dispute settlement. A joint response from, amongst others, Milieudefensie and Friends of the Earth Europe states that developing countries need space to find the solutions to the challenges they face. Many developing countries have recognised that this requires terminating existing Bilateral Investment Treaties (BITs). "The EU should support these efforts instead of entrenching a system that reduces developing countries' policy space". Besides this, the CSOs call for international rules that protect human rights and the environment from corporate abuse. The focus of any proposal should be on tackling inequality and averting climate catastrophe. This argument flows directly from the fundamental position of CSOs that the environment and disadvantaged populations deserve as much protection as investors. As one CSO, Traidcraft, clearly states: "Developing countries' concerns should be given prominence in discussions. The priority should be social development for developing countries not protecting corporate interests."

Another comment from Traidcraft is: "For a multilateral system to reduce developing country costs the funding of a system including running costs for disputes would need to be borne by wealthier states." However, respondents representing business platforms argued that the existing mechanisms to support developing countries are sufficient and these respondents therefore prefer to stick to the existing procedures.

The impact assessment states: "While it is true that most if not all states allocate budget lines to dispute settlement, many of them are affected by financial and human resource constraints that do not affect developed countries. Mechanisms allowing for assistance seem therefore to be worth

¹⁴ http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_024_court_on_investment_en.pdf

exploring”. This implies that it would be helpful for developing countries to have access to specific procedures and that it is worthwhile to explore which kind of mechanisms could support developing countries.

While it is positive that, the Commission acknowledges that developing countries are affected by financial and human resource constraints and is prepared to weigh different options to help developing countries with regard to costs of proceedings, the Commission leaves the more fundamental objections of CSOs untouched.

Responses from the Commission in the impact assessment

In the final impact assessment, when the Commission considers different policy options, the impact of the proposal on developing countries is discussed. Different considerations resulted in the choice for the Commission between the option to pursue its current policy (of bilateral ICS) or to establish a multilateral investment court. Eventually, the Commission chose the second option. However, other, more fundamental options, like e.g. reviewing existing bilateral investment treaties and investment provisions in trade agreements, were not considered by the Commission.

The impact assessment addresses a common critique in relation to investor-state dispute settlement, namely that it puts developing countries in a disadvantaged position in comparison with investors as they would lack expertise and the financial means to afford the expensive legal defense.¹⁵ The question is raised in the impact assessment whether there should be a support mechanism for developing countries so that they can better defend themselves in the Multilateral Investment Court. This would ensure a more legitimate system, but it would be costlier for the developed countries. The impact assessment says that such support could also be through legal advice and training and refers to the example of the of the Advisory Centre for WTO Law (ACWL). The impact assessment is in favour of granting some sort of special assistance to developing and least-developed countries but says that the specific features of that assistance will however have to be negotiated. That leaves the question what the developing countries need to give in return. If offering support may entice them to join the MIC, they may find that the loss of policy space and the height of the fines outweighs the support received.

Conclusion

Strengths	Weaknesses
<ul style="list-style-type: none"> - At a secondary, more technical level, the impacts on developing countries have been taken into account from the start and therefore throughout the entire policy-making process. - Feedback given by NGOs has been analysed and processed in the impact assessment. - The Commission considers different options that would ensure the access of developing countries to the Multilateral Investment Court. 	<ul style="list-style-type: none"> - Neither the impact assessment nor the final proposal make clear how developing countries would get support from the Commission for costs of proceedings. - It is not clear in general how developing countries benefit from the proposal. The impact assessment has a limited scope and only looks into the pros and cons of pursuing the current ISDS system, or replacing it with a multilateral court. It leaves out the option to review all bilateral investment treaties and investment provisions in trade agreements.

¹⁵ <http://ec.europa.eu/transparency/regdoc/rep/10102/2017/EN/SWD-2017-302-F1-EN-MAIN-PART-1.PDF>

Case #2 Unfair trading practices in global food supply chains

Content of the proposal

In April 2018 the Commission tabled a proposal for a Directive of the European Parliament and of the Council on unfair trading practices in business-to-business relationships in the food supply chain. The proposal aims to reduce the occurrence of unfair trading practices (UTPs) in the food supply chain by introducing a minimum common standard of protection across the EU that consists of a short list of specific prohibited UTPs. The protection covers small and medium-sized suppliers in the food supply chain insofar as they sell food products to buyers who are not small and medium-sized.¹⁶

This proposal is relevant from a developing countries' perspective, because it also touches upon UTPs in food supply chains that start in those countries and end in Europe. Some examples of UTPs given by the European Commission are: unilateral changes of contracts, last minute order cancellations and upfront payments to secure contracts.¹⁷ The suppliers in developing countries are part of the food supply chain of EU supermarkets and they are at the remote end of the supply chains. The proposal to do something about the unfair trading practices could therefore have an impact on developing countries.

The inception impact assessment does not discuss the impact on developing countries. Several organisations reacted to this inception impact assessment. The organisation Feedback stated for example: "(...) it is crucial that an effective legal mechanism can be accessed by all suppliers in the food supply chain, whatever their geographical origin (...)".¹⁸ Later on, Feedback mentioned that the nature of supply chain is international and therefore it includes suppliers outside the EU. With these statements Feedback implicitly stated that the proposal should also address the position of suppliers from developing countries. In a report attached to the consultation, Feedback discussed the impact of UTPs on developing countries more explicitly. In this report the organisation states that, because of cosmetic specifications, the export potential of food from Senegal is reduced.¹⁹ The research demonstrates the negative impact of the cosmetic specifications which is seen by Feedback as an unfair trading practice. In their feedback to the proposal the organisation therefore states: "(...) we also urge the Commission to consider the use of cosmetic specification criteria as an element of unfair trading practices (...)".²⁰ With an example of a developing country (Senegal) which is affected by an unfair trading practice and the request to the Commission to include this practice in the proposal, Feedback tried to alert the Commission on the impact of UTPs on developing countries. The Commission did not consider the request of Feedback in the impact assessment and the final proposal.

Developing countries are neither mentioned nor discussed in the proposal and in the impact assessment. It is notable however that in the consultation several responders asked for special attention for developing countries.

Concerns put forward by CSOs

From 25 August to 17 November 2017, the Commission launched an open public consultation. The consultation received 1.432 responses in total. Among those were responses from organisations such as Oxfam International and Fair Trade Advocacy Office (FTAO). Both mentioned developing countries by answering the question whether the respondent had more ideas concerning unfair trading practices (UTPs) and possible action that should be taken. Oxfam reacted that the legislative action to

¹⁶ <http://ec.europa.eu/transparency/regdoc/rep/1/2018/EN/COM-2018-173-F1-EN-MAIN-PART-1.PDF>

¹⁷ <http://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-92-F1-EN-MAIN-PART-1.PDF>

¹⁸ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3735471/feedback/F6760_en?p_id=40090

¹⁹ https://feedbackglobal.org/wp-content/uploads/2017/05/Causes-of-food-waste-in-international-supply-chains_Feedback.pdf 7

²⁰ https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-3735471/feedback/F6760_en?p_id=40090

address UTPs should be designed in a way “that they offer redress against UTPs to actors of the food supply chain located outside of the EU but producing for the EU market.” Oxfam stated that specific attention is required to protect the weakest actors at the end of the food supply chain which suffer most from the UTPs. These actors are labourers and small-scale producers in developing countries.

FTAO reacted that the Fair Trade Movement, to which it belongs, is especially concerned about the application of UTPs by European businesses onto producers and exporters from countries outside the EU and in particular the most vulnerable actors in developing countries. The organisation stated that the EU has to take credible steps towards effective and fair enforcement that also take into account the specific situation and the climate of fear in which the concerned producers and exporters operate.

In a joint position paper, Oxfam, FTAO, SOMO, Feedback, Traidcraft and IFOAM EU Group made recommendations to increase the effectiveness of the proposal. The CSOs recommended to “(...) protect the vulnerable actors inside and outside the EU from UTPs”.²¹ Explicitly, the CSOs thus asked attention for developing countries concerning the issue of UTPs.

Responses by the Commission

The CSOs make clear in their reaction on the consultation that many actors in developing countries are also involved in food supply chains and that a reduction of UTPs in the chain therefore would affect people in developing countries. The concerns expressed by the organisations were not addressed in the impact assessment nor in the Commission’s proposal. However, the impact assessment concludes that suppliers in third countries should be protected and this is also phrased in the proposal.²²

The Commission’s Joint Research Centre (JRC) initiated an academic workshop on UTPs in the food supply chain. One of the conclusions of the workshop was that “the transnational nature of supply chain systems implies that the impacts of UTPs can have cross-border effects, including with third countries”.²³ Besides that, the JRC stated: “many companies that engage in UTPs also conduct business with companies and farmers located outside of the European Union, many of them in the developing world”.²⁴ It addresses that the problem of UTPs is even more severe for the suppliers in developing countries. The impact assessment does come back on the relevance of UTPs for third countries, but it does not discuss developing countries explicitly. Likewise, the Commission does not mention developing countries in the final proposal. Despite the fact that two CSOs and an academic workshop pointed out to the Commission that UTPs can also affect developing countries, this potential impact is not addressed in the impact assessment or the proposal.

How to avoid skewed consultations?

We observed that not many NGOs and CSOs responded to the consultation. Oxfam and FTAO were the only two organisations that indicate that the proposal could have impact on developing countries in the open public consultation. With a total amount of 1.432 responses, it is imaginable that the Commission decided to focus on recommendations and feedback that occurred more often in the consultation.

This raises the question how the Commission weighs different arguments and perspectives brought forward in public consultations. If only numbers of submissions count for the Commission, then the prospects for addressing likely impact on developing countries are not bright. In quite a few cases, sheer numbers of private sector contributions outnumber those of CSOs - and experience shows that businesses do not always or automatically address development impacts in their submissions. Still, CSOs and NGOs often speak on behalf of large constituencies within Europe, and on behalf of large

²¹ <https://www.somo.nl/wp-content/uploads/2018/07/NGO-briefing-on-UTP-Directive-FINAL-18-07-09.pdf>

²² <http://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-92-F1-EN-MAIN-PART-1.PDF> (p. 864)

²³ <http://ec.europa.eu/transparency/regdoc/rep/10102/2018/EN/SWD-2018-92-F1-EN-MAIN-PART-1.PDF>

²⁴ http://publications.jrc.ec.europa.eu/repository/bitstream/JRC108394/jrc_report_utps_final.pdf

networks of people in developing countries. The Commission should take that into account. The current Better Regulation Toolbox addresses this point insufficiently. In Tool #10 it alerts Commission officials: ‘You should keep in mind that not all interest groups are equally able to take part in consultations or express their views with the same force.’ But then Tool #10 fails to elaborate on the problem that consultations might become skewed because some interest groups are more vocal, better organised and resourced than others, and that this might influence the Commission’s preferred policy option. Particularly for proposals with an impact on vulnerable groups, the Commission should be keen that they are consulted, if necessary even proactively, to make sure their voice is heard and their concerns are addressed.

Conclusion

Strengths	Weaknesses
<p>- The proposal of the Commission protects all the suppliers in the food supply chain, irrespective whether they are based in the EU or not (article 2)</p>	<p>- Even while theoretically the proposal protects all suppliers in the chain, the Commission did not give special attention to the impact on chain actors in developing countries, despite the fact that different CSOs addressed the need to take this into account.</p> <p>- The Commission has not carried out further research on the impact on people living in developing countries, and small-scale farmers in particular, despite the conclusion of the academic workshop.</p> <p>- The Commission did not adopt the abuse of cosmetic specification criteria as an element of an unfair trading practice despite the fact that Feedback demonstrated since years that this element directly affects the export of food from developing countries.</p>

Case #3 A framework for sustainable investments

Content of the proposal

In May 2018, the Commission proposed the establishment of a “taxonomy” framework to facilitate sustainable investment, as part of a wider package on sustainable finance. The taxonomy proposal is meant as an EU framework which puts “(...) Environmental, Social and Governance (ESG) considerations at the heart of the financial system to support the transformation of Europe’s economy into a greener, more resilient and circular system”.²⁵ In particular, the proposal aims to set out uniform criteria which determine whether an economic activity is environmentally sustainable. To do so, the proposal formulates a unified EU classification system which is based on specific criteria to determine which economic activities are considered sustainable.

This proposal is relevant from a development perspective, because it is about EU financial actors who take decisions concerning investment projects globally, including in developing countries. The aim of the second proposal in the package (“disclosures relating to sustainable investments and sustainability risks”) is to ensure that financial actors will integrate ESG considerations in their internal processes and inform their clients in this respect.

The inception impact assessment of the package does not discuss the impact on developing countries. It only discusses likely economic, social, environmental impacts in general and impacts on fundamental rights and on simplification and administrative burden, depending on where the investment is done. In the considerations the main focus is on the impact on the investors, investee companies (including non-EU companies) and financial intermediaries and not on third countries.

²⁵ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018PC0353>

Developing countries are neither mentioned in the impact assessment nor in the proposal. The impact on people living in developing countries in the context of the proposal is brought to attention by Global Witness, Friends of the Earth Europe and ActionAid. Those organisations reacted to the open public consultation in the form of a joint submission.

Concerns put forward by CSOs

In the public consultation on institutional investors' and asset managers' duties regarding sustainability (which became the second proposal on disclosures) the joint submission of the CSOs mentioned earlier mentions developing countries in the context of the Sustainable Development Goals (SDGs). In response to the question whether uniform criteria to perform sustainability risk assessments should be developed at EU level the CSOs reacted: "(...) EU and Member State financial supervisors should develop a methodology for embedding these criteria in sustainability risk assessment regulations, comprising of robust due diligence, improved disclosure and effective accountability. Such an approach supports the delivery of the SDGs in developing countries, by ensuring that increasing private investments benefit the wider community and do no harm".²⁶ With this answer, the CSOs underline the relevance of the proposal for developing countries. They anticipate that embedding the right criteria in the internal process of the investors would support the achievement of the SDGs in developing countries.

The Commission asked in another consultation question which entities should consider sustainability factors in their investment decision-making. The CSOs respond that "[a]ll institutional investors and fund managers should be required to consider broadly defined sustainability factors in investment decision-making".²⁷ In their answer the CSOs incorporate examples of European investor involvement in projects causing environmental and social harm. One example is a project in 2013 of Vietnamese plantation companies which leased vast tracts of land in Cambodia and Laos with disastrous social and environmental consequences. At the time, the Deutsche Bank invested a lot of money in the Vietnamese companies, which implies that the Bank should be held accountable for the consequences. The Bank had no environmental or social investment safeguards. Another example is the financing of a palm oil company called Wilmar by Dutch pension funds and European banks. Research revealed that Wilmar was responsible for burning forests in Indonesia and Uganda in order to create land for its plantation. These examples show that projects of companies can have bad social and environmental consequences in developing countries.²⁸

Responses from the Commission

The Commission does not discuss the impact of the proposal outside Europe or on developing countries in the impact assessment or the legislative proposals. Despite the fact that CSOs asked attention for possible impacts on developing countries and provided examples of European investor involvement in projects to substantiate this claim, the Commission did not give special attention to the impact of the proposal on those countries. In particular, people in developing countries have a higher chance of being the victim of consequences of investment projects, because of a weaker regulatory environment.

It would have been reasonable, on the grounds of likely impact on developing countries, for the Commission to initiate special research on the possible impact of the framework on developing countries. The discussion of social and environmental impact remains very general in the impact assessment and does not focus on specific categories of countries or population groups. What is even more problematic, while the Impact Assessment explicitly addresses the pros and cons of mandatory

²⁶ <https://ec.europa.eu/eusurvey/publication/investors-duties-sustainability-2017?surveylanguage=en>

²⁷ <https://ec.europa.eu/eusurvey/publication/investors-duties-sustainability-2017?surveylanguage=en>

²⁸ https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC_List_ODA_Recipients2018to2020_flows_En.pdf

due diligence for investors on ESG risks, an option that has been proposed by many CSOs, the Commission does not elaborate on that in its final proposal.

It should be noted that the RSB studied the proposal three times, and sent it back to the Commission twice for substantial improvements. These improvements however did not have anything to do with impact on developing countries, but focussed on aspects like subsidiarity, the legal basis for the proposal, the justification of the intervention logic, and the heavy amount of delegation.

Conclusion

Strengths	Weaknesses
<p>- The proposal explicitly mentions the United Nations (UN) 2030 Agenda for Sustainable Development and the 2016 Paris agreement on climate change and provides arguments why it contributes to realizing the commitments under the 2030 Agenda and the Paris Agreement.</p>	<p>- The link between high-level policy ambitions (meet the Paris and SDG commitments) and the actual initiatives presented in May 2018 remains weak. The taxonomy itself does not make finance greener but only defines what “green” is; and the disclosure and benchmark proposals are limited in scope rather than applying to all investment products and benchmarks. Furthermore, the ‘social’ (S) dimension of the ESG criteria deserves special attention; not only labour rights, but human rights more broadly should be addressed by investors in their due diligence process.</p> <p>- Despite an exceptionally high number of DGs involved in the Inter-Service Group, DG DEVCO was not involved and did not respond to the inter-service consultation.</p> <p>- The Commission did not consider the impact of the proposal on developing countries, despite the fact that Global Witness, Friends of the Earth Europe and Action Aid argued that there is sufficient reason to expect significant negative impact on developing countries in particular.</p>

Conclusion and recommendations

Notable from the quantitative analysis is that from the 76 impact assessments of 2018 only 5 assessments were relevant to developing countries. From these 5 assessments only one assessment presented an adequate analysis of the impact on developing countries. This proportion of 20% shows a decline relative to 2016 (24%). However, in 2017 the proportion of impact assessments with an adequate analysis of the impact on developing countries was 80%, 4 of the 5 relevant assessments included an explicit analysis. This shows that the Commission analysed the impact on developing countries in most cases in 2017, even though we didn’t analyse in this briefing note whether this analysis is sufficient to capture all the likely impacts on women and men in developing countries. To sum up, the results imply that PCD seems to remain a marginal element in the EU decision making processes.

Even though as CONCORD we often strongly disagree with the content of their proposals, DG TRADE performed relatively well, compared with other DGs. Proposals relevant to developing countries coming from them as leading DG normally presented an analysis of the economic impact of developing countries. The underlying reason for this is that DG TRADE is obliged to do a Sustainability Impact Assessment and a Human Rights Impact Assessment when it comes to proposals for trade negotiations. This is important since it means that almost by definition that DG TRADE will address

impact on developing countries, in cases where an impact is expected. However, the simple fact that the impact on developing countries is looked at in DG TRADE's impact assessments does not say anything about the quality and sufficiency of those assessments. Another paradox is that the Multilateral Investment Court proposal is a direct threat to developing countries since it further entrenches the power foreign investors exert upon their right to regulate. In this analysis, we count it as an IA that took into account impacts on developing countries because there have been some considerations on making this new mechanism accessible to them in terms of the procedural costs involved. However, ultimately, this system will simply allow to more easily condemn such countries to heavy fines in favour of corporates – this illustrates the limitations of the exercise.

Across the board, proposals with a cross-border character must be preceded with an adequate analysis of their impact on developing countries. This goes as much for DG TRADE as for other DGs, e.g. DG CLIMA and DG AGRI, when it concerns subjects like climate change and agriculture.

Because of the disappointing results of our analysis, most of the recommendations for the European Commission made by CONCORD in the report 'The Impact of EU Policies in the World: Seeing the Bigger Picture' in 2017 still stand. In addition, the low impact of the responses submitted by NGOs, also on behalf of their counterparts in developing countries, to the public consultations analysed in this brief raises questions. In our view, it is urgent for the Commission to find ways to better take account of such submissions if it does not want to further increase the gap between "Brussels institutions" and citizens, by making it possible for them to get their views effectively taken on board. This implies that:

The European Commission should:

- Make sure that, where an impact on developing countries is likely, it is taken into account from the very start of the policy-making process. It can do so by engaging DG DEVCO early on. Civil society and affected communities should be consulted when proposals and impact assessments are being prepared.
- Put PCD into practice by using the Impact Assessment Guidelines and its tool for developing countries of the Better Regulation Package systematically and carefully. It should ensure that staff throughout the Commission have the expertise and capacity to raise PCD concerns and to formulate PCD-compliant proposals.
- Make clear, if it analyses the impact of the proposal on developing countries, to what extent and in what form developing countries will be affected.
- Set up independent researches which investigate the impact of proposed actions on developing countries and take the results of the research into the impact assessment.
- Improve tool #10 for Stakeholder Consultations in its Better Regulation Toolbox, so as to organise consultations in such a way that capture by one or another interest group which happens to be better organised or resourced, is avoided. This should be done by giving particular attention to less-resourced groups during the process of stakeholder mapping, as well as by introducing a quantitative and qualitative weighting system in the analysis of responses depending on the representativeness of the respondent.²⁹

The Regulatory Scrutiny Board should:

- Take Policy Coherence for Development into account systematically. In-house expertise on development and human rights is a precondition for doing this satisfactorily.

²⁹ This has also been called for by the European Economic and Social Committee in its 2015 Opinion on Evaluation of European Commission stakeholder consultations, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/evaluation-european-commission-stakeholder-consultations>

Annex 1: Screening guidelines

For screening the impact assessments conducted by the European Commission, we have made use of the screening guidelines drawn up by Globalt Fokus Denmark and further clarified by CONCORD.

1. Determining the relevance of an impact assessment

An impact assessment (IA) may be deemed relevant if:

- a) The policy options assessed clearly, and to a significant extent, influence the conditions for the development of developing countries, and
- b) There is no doubt about this influence (matters about which doubts have been raised are deemed to be irrelevant), and
- c) The policy options include a wide variety, and thus offer a wide choice, and d. In cases where the policy options include standardisation policies, or policies to harmonise the standardisation of goods or services relevant to developing countries, the standards of goods and services are considered technical trade barriers.

2. Determining the adequacy of the impact assessment's analysis of the consequences for developing countries

An IA's analysis of a policy's impacts on developing countries is considered adequate if:

- a) The IA mentions the policy's possible impacts, whether positive or negative, on developing countries;
- b) The IA mentions developing countries explicitly in cases in which the policy's influence on them might differ from its influence on third countries in general;
- c) All obvious impacts are assessed and weighed against other impacts and consequences, based on clear justifications.

"Developing country" refers to the countries listed in the OECD DAC List of ODA Recipients. In cases where a proposal deals with specific impacts on one or several countries, for example in the case of fewer EU gas imports, the case has been labelled non-relevant, because it is so specific.

Annex 2: Commission proposals with a probable impact on developing countries (1 Jan 2017 – 1 July 2018)

	Commission proposal	IA with adequate analysis of impacts on developing countries	Regulatory Scrutiny Board opinion	RSB opinion pointing at inadequate assessment of impacts on developing countries
1 (2017)	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021	0	1	0
2 (2017)	Joint Recommendation for a Council Decision authorising the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy to open negotiations and negotiate a modernised Association Agreement with the Republic of Chile. (EU restricted)	1	1	-
3 (2017)	Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Convention establishing a multilateral court for the settlement of investment disputes	1	1	-
4 (2017)	Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Free Trade Agreement with Australia	1	1	-
5 (2017)	Recommendation for a COUNCIL DECISION authorising the opening of negotiations for a Free Trade Agreement with New Zealand	1	1	-
6 (2018)	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 924/2009 as regards certain charges on cross-border payments in the Union and currency conversion charges	0 ³⁰	1	0

³⁰ We were not able in the framework of this paper to analyse into detail the proposal to regulate certain charges on cross-border payments, but Finance Watch considered it as an opportunity to support the SDGs implementation by partner countries. Choosing not to cover money transfers from EU to non-EU countries in the regulation review therefore seems a missed opportunity: The extremely high average money-transfer industry fee of 7% on remittances remains untouched, even though these costs erode much needed financial flows towards developing countries. We therefore considered in the table that there has been no adequate consideration of the impacts on developing countries – for more information, see <https://www.finance-watch.org/publication/finance-watch-policy-brief-on-remittances/>

7 (2018)	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on unfair trading practices in business-to-business relationships in the food supply chain	0	1	0
8 (2018)	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the establishment of a framework to facilitate sustainable investment	0	1	0
9 (2018)	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing 'Erasmus': the Union programme for education, training, youth and sport and repealing Regulation (EU) No 1288/2013	0	1	0
10 (2018)	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the European Maritime and Fisheries Fund and repealing Regulation (EU) No 508/2014 of the European Parliament and of the Council	0	1	0
11 (2018)	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing, as part of the Integrated Border Management Fund, the instrument for financial support for border management and visa	0	1	0
12 (2018)	Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing the Neighbourhood, Development and International Cooperation Instrument	1	1	-
	Total amount	5	11	0

