



EUROPEAN
COURT
OF AUDITORS

Background paper



Consulting the public when preparing EU law

May 2018

Before the Commission proposes new legislative initiatives, it assesses the potential economic, social and environmental consequences that they may have. The Commission also consults interested parties such as citizens, businesses and other organisations, which may express their views by means of participation in a public consultation procedure.

We are currently conducting an audit on public participation in EU law-making and, in particular, on whether the Commission's public consultations make an effective contribution to the process. In particular, we will assess the effectiveness, appropriateness, transparency and openness of the Commission's public consultations.

We will review the Commission's framework for public consultations and examine a sample of Commission's public consultations.

If you wish to contact the audit team, you may do so at the following email address: ECA-public-participation-audit@eca.europa.eu

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BETTER REGULATION – THE EU APPROACH TO LAW-MAKING

“Better Regulation”, in an EU context, means designing policies and laws so that they achieve their objectives at minimum cost. It is not about regulating or deregulating. In fact, “Better Regulation” is a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed by comprehensive stakeholder involvement.

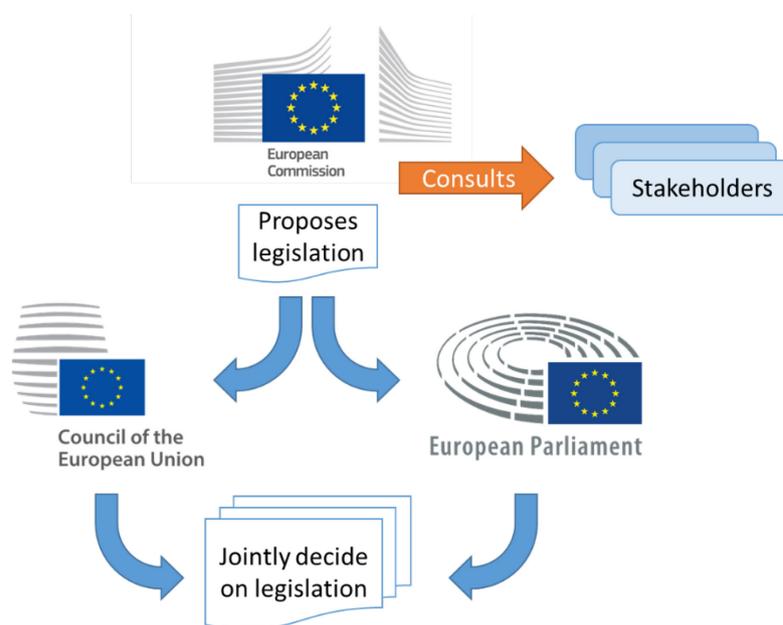
This also helps to ensure that EU interventions abide by the overarching principles of subsidiary and proportionality i.e. that the Commission proposes legislation only where necessary and in a way that does not go beyond what is needed to resolve the problem¹.

“Better Regulation” in the EU covers the whole policy cycle: policy preparation, adoption, implementation (transposition, complementary non-regulatory actions) and application (including enforcement).

For each phase of the policy cycle, there are a number of principles, tools and procedures which aim to ensure that the EU has the best regulation possible².

For example, before the Commission proposes new legislative initiatives, it assesses their potential consequences. It does this by preparing 'Impact assessments' that set out the anticipated consequences of planned actions³. The Commission also invites interested parties such as citizens, businesses and other organisations to participate in stakeholder consultations (see ***Figure 1***).

Figure 1: Schematic presentation of the EU legislative process



Source: European Court of Auditors.

Under the EU's ordinary legislative procedure, the new EU legislation must then be adopted by the directly elected European Parliament (EP), together with the Council representing the 28 Member States. This generally involves modifying the Commission's proposal. If the Commission considers that the modifications requested by the European Parliament and/or the Council make it impossible to achieve the initial objective of its proposal, it may decide to withdraw its proposal.

2015 BETTER REGULATION AGENDA

On 19 May 2015, after the 2014 European elections, the Commission adopted a "Better Regulation Agenda"⁴. This agenda was aimed at reviewing the EU's law-making practices to ensure that they meet modern requirements and citizens' expectations of maximum transparency and wide consultation⁵. It also advocated offering additional opportunities for interested citizens and other stakeholders to participate throughout the entire lifecycle of policy development and implementation (see [Figure 2](#)).

Figure 2 - Stakeholder input throughout the policy cycle



Source: European Commission, Better Regulation Guidelines SWD(2017)350 final, page 5.

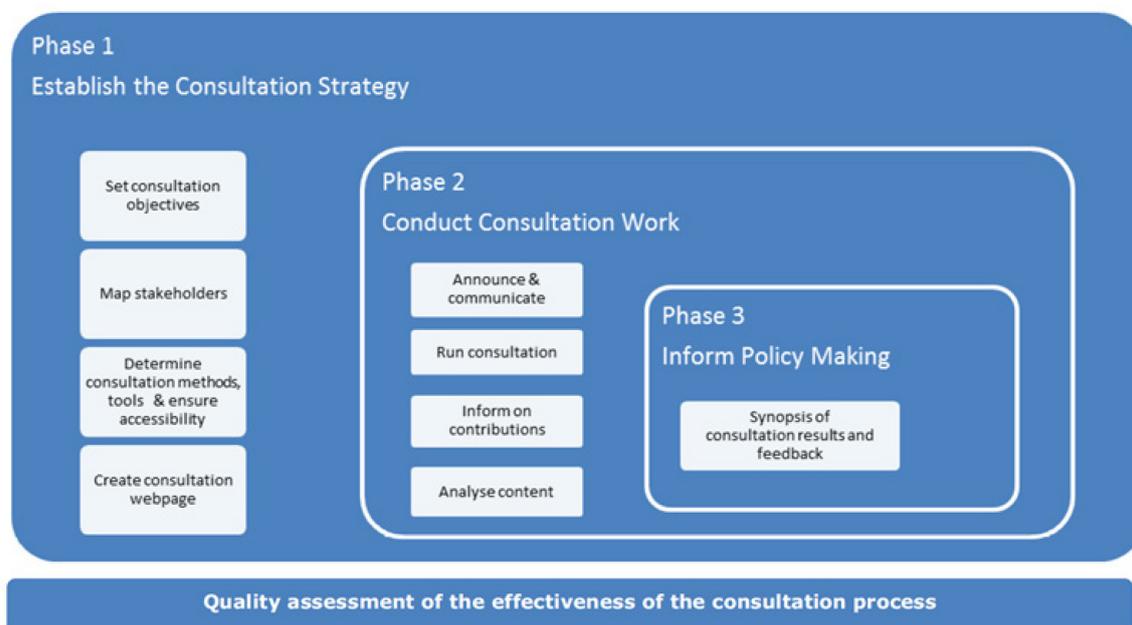
In his 2017 State of the Union speech, Commission President Juncker confirmed the Commission’s commitment to “address long-held scepticism among European citizens about the way the EU functions and to regain trust in our Institution and the EU”⁶.

PUBLIC CONSULTATION IN EU LAW-MAKING

The Commission uses public consultations to collect input and views on different types of initiatives.

When consulting, the Commission proactively seeks evidence (i.e. facts, views, opinions) on a specific issue. **Figure 3** presents the three phases in the consultation process.

Figure 3 - The key steps of the consultation process



Source: European Commission, Better Regulation Guidelines SWD(2017)350 final, page 74.

In contrast to consultations that are targeted at a particular stakeholder group, consultations that are open to the general public are not intended to be representative, as respondents are self-selected. Their aim is to foster transparency and accountability and ensure broad public validation and support for an initiative.

The Commission's main stakeholder categories are set out in **Table 2**.

Table 2 – Stakeholder categories

Categories	Definition
Citizens	Individual persons responding on their own behalf.
Businesses	Large enterprises; SMEs; microenterprises; self-employed individuals.
Trade, business and professional associations	Chambers of commerce; business organisations; trade unions; representatives of professions or crafts.
Non-governmental organisations	Non-governmental organisations, platforms, networks, and similar associations.
Consultancy	Professional consultancies, law firms, self-employed consultants.
Research and academia	Think tanks, research institutions academic institutions.
Organisations representing regional, local and municipal authorities, other public or mixed sub-national entities	Regional, local or municipal structures; other sub-national public authorities; transnational associations and networks of public sub-national authorities; other public or mixed entities, created by law whose purpose is to act in the public interest.
National and international public authorities	National governments; national parliaments; national public authorities or agencies; EU institutions, bodies or agencies; intergovernmental organisations.

Source: European Commission, Better Regulation Guidelines SWD(2017)350 final, page 387.

All Commission public consultations are conducted electronically via a dedicated website⁷. The Commission also publishes a rolling calendar of planned consultations.

In July 2017, following the adoption of the 2015 Better Regulation Agenda, the Commission approved an updated set of guidelines to help its services to use the best-practice tools required to design effective legislative and policy proposals.

These guidelines also confirmed and specified in more detail the general rules on how Commission services should consult stakeholders. For each phase of the consultation process, there are detailed key steps that the Commission staff involved in regulatory activities should apply. The guidelines also include general principles and minimum standards for stakeholder consultation (see **Table 3**).

Table 3 - General principles and minimum standards for stakeholder consultations

Relations with stakeholders are governed by four general principles	
Participation	Adopt an inclusive approach by consulting as widely as possible.
Openness and Accountability	Make the consultation process and how it has affected policymaking transparent to those involved and to the general public.
Effectiveness	Consult at a time where stakeholder views can still make a difference, respect proportionality and specific restraints.
Coherence	Ensure consistency of consultation processes across all services, as well as evaluation, review and quality control.
These principles are complemented by five minimum standards that all consultations must meet	
Clear content of the consultation process ('clarity')	All communication and the consultation document itself should be clear, concise and include all necessary information to facilitate responses.
Consultation of target groups ('targeting')	When defining the target group(s) in a consultation process, the Commission should ensure that all relevant parties have an opportunity to express their opinions.
Publication	The Commission should ensure adequate awareness-raising publicity and adapt its communication channels to meet the needs of all target audiences. Without excluding other communication tools, (open public) consultations should be published on the internet and announced at the "single access point".
Time limits for participation ('consultation period')	The Commission should provide sufficient time for planning and responses to invitations and written contributions.
Acknowledgement of feedback ('Feedback')	Receipt of contributions should be acknowledged and contributions published. Publication of contributions on the single access point replaces a separate acknowledgment if published within 15 working days. Results of (public) consultations should be published and displayed on websites linked to the single access point on the internet and adequate feedback given on how the results of the consultation have been taken into account.

Source: European Commission, Better Regulation Guidelines SWD(2017)350 final, page 70.

Apart from public consultations, the Commission also uses several other tools to promote dialog, information exchange and participation throughout the policy development and law-making process⁸.

ROLES AND RESPONSIBILITIES FOR PUBLIC CONSULTATIONS

Responsibility for managing public consultation activities is decentralised to the Commission Directorates-General (DGs) leading the relevant initiative. The lead DG chooses the consultation tools and methods based on consultation objectives, target groups and available resources, taking into account the key mandatory requirements set out in the better regulation guidelines. This is documented in a consultation strategy at an early stage in the process of preparing the initiative.

Formal stakeholder consultations can only be launched for initiatives related to new legal proposals or intended revisions of existing legislation which have received political validation at an appropriate level:

- initiatives with significant impact (so called “major” initiatives) also require political validation from the lead Commissioner, the Vice-President and the First Vice-President.
- “other” initiatives are directly validated by the responsible Commissioner or the Director-General of the lead DG.

For major initiatives, an initial reflection on the consultation strategy is already required at the time of the request for validation. After political validation, the consultation strategy should be finalised and endorsed by the Commission inter-service group (ISG) established for the policy initiative. If no inter-service group is established or if no roadmap/inception impact assessment is needed, the consultation strategy is finalised by the Secretariat-General and, where appropriate, by the relevant Directorates-General. The ISG ensures that the consultation strategy and the various consultation activities are in line with the relevant requirements and monitors the quality of consultation activities, including where parts of them are outsourced⁹.

MAIN ISSUES IDENTIFIED WHEN PREPARING THE AUDIT

In February 2018, the European Parliament asked the ECA to evaluate the current scope for EU citizens to directly participate in and contribute to the EU law-making process, and to assess the effectiveness, appropriateness, transparency and openness of tools for promoting such participation. This audit will focus on the Commission's approach to consulting interested citizens and other stakeholders when preparing EU law.

When preparing our audits, we carry out an issue analysis of the policy area or programmes that we intend to examine. Since these issues are identified before the audit work commences they should not be regarded as audit observations, conclusions or recommendations.

In the course of the audit on the Commission's approach to consulting the public when preparing EU law, we will in particular look at the following areas in relation to the issues identified:

- the design of the Commission's framework for stakeholder consultations as compared to international good practice; and
- the way in which Commission implements its stakeholder consultations.

ABOUT ECA SPECIAL REPORTS AND BACKGROUND PAPERS

Our special reports set out the results of audits of EU policies and programmes or management topics related to specific budgetary areas.

Background papers provide information based on preparatory work undertaken before the start of an on-going audit task. They are intended as a source of information for those interested in the audited policy and/or programme.

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- ¹ Better Regulation Guidelines SWD(2017) 350 final, page 4.
 - ² Better Regulation Guidelines SWD(2017) 350 final, page 5.
 - ³ European Court of Auditors, Special Report No 3/2010: Impact Assessments in the EU institutions: do they support decision making?
 - ⁴ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, Better regulation for better results - An EU agenda, COM(2015) 215 final.
 - ⁵ European Commission - Fact Sheet. Better Regulation Agenda: Questions & Answers. Strasbourg, 19 May 2015 http://europa.eu/rapid/press-release_MEMO-15-4989_en.htm
 - ⁶ European Commission, President Jean-Claude Juncker's State of the Union Address 2017, Brussels, 13.09.2017.
 - ⁷ https://ec.europa.eu/info/consultations_en
 - ⁸ The Europe for Citizens Programme; Rights, Equality and Citizenship Programme; Structured Dialogue; Citizens' dialogues; European Citizen's Initiative; targeted consultations; REFIT Platform; 'Lighten the load' web portal; Transparency Register.
 - ⁹ Better Regulation Guidelines SWD(2017) 350 final, page 72.