

25/09/2015**Decision
of the Bundesrat**

Communication of the Commission to the European Parliament, the Council, the European Economic and Social Committee and the European Committee of the Regions: Better regulation for better results – An EU agenda**COM(2015) 215 final**

At its 936th meeting on 25 September 2015, the Bundesrat adopted the following opinion pursuant to Sections 3 and 5 of the Act on Co-operation between the Federation and the Länder in European Union Affairs (EUZBLG):

1. The Bundesrat welcomes the EU agenda for better regulation, with which the Commission is making a further contribution towards attaching greater importance to this subject.

The Bundesrat also welcomes the Commission's intention to use the EU agenda to make a significant contribution towards a better way of working at a European level, and its desire to ensure that European regulation provides concrete and sustainable benefits to its citizens, to the economy and to society as a whole.

The Bundesrat views it as positive that the new integrated better regulation guidelines for the work of the Commission are intended to ensure that economic, social and ecological consequences, together with fundamental rights, will continue to be given equal consideration in all the Commission's analyses in future, and that the guidelines are intended to ensure that the competitiveness and sustainable development of the EU will continue to take priority in all its activities.

The Bundesrat sees this as offering opportunities for more growth and employment.

2. The Bundesrat shares the Commission's view that it is essential to make the regulation process more open and transparent (through more consultations, amongst other things), to explain the need to regulate and to pass laws that citizens are able to make sense of. The Bundesrat believes that care should be taken during the consultation process to give equal hearing to all relevant

stakeholders (such as economic, environmental and consumer protection organisations, scientific institutions, and trade unions). The interests of all EU citizens should be placed at the heart of all considerations of proposals for regulation.

3. Furthermore, the Bundesrat shares the view that increased participation during the development stage by those affected by a European regulation can produce greater acceptance of the planned regulation. Important elements here are the consultation process already alluded to, and the impact assessment – including the social, health and ecological impact – right at the start of the regulatory process.
4. The Bundesrat therefore considers it an important step that the Commission intends to expand the consultation options for the purposes of more openness and transparency, so that stakeholders and affected parties can be involved already at the drafting stage of legislative proposals and delegated acts. More transparency and accountability are required on the part of the Commission, particularly with regard to delegated and implementing acts. The planned internet platform could allow affected parties to get involved at an early stage and throughout the whole of the legislative process, and to track each legislative initiative. Here, it is important to always set appropriate deadlines for the participation of affected parties in civil society and the national parliaments.
5. The Bundesrat welcomes the Commission's announcement that a focus of the agenda for better regulation and the programme to ensure regulatory fitness and performance (REFIT) will be to reduce bureaucracy and lower costs. The Bundesrat also recognises the need for better and more effective impact assessments of planned regulation to be conducted.
6. The Bundesrat therefore welcomes the planned expansion of impact assessments, which is intended to ensure that economic, social and ecological consequences, together with fundamental rights, are given equal consideration in all of the Commission's analyses.
7. In this context, it is also important to utilise the possibilities of the horizontal social clause of the Lisbon Treaty more effectively and to attach more importance to the social impact assessment.

The impact assessments carried out by the Commission in its efforts to achieve better regulation would appear to require improvement; they should give equal consideration to social, ecological, health and economic consequences and not give priority to the burden on businesses. The long-term impact of not regulating, or of an alternative regulation, should also be considered.

8. The Bundesrat also believes that it is especially important to assess regional impact, and would point out that the administrations of the federal and regional subdivisions of the Member States, and the German Länder in particular, have specific expertise and a broad knowledge of the execution of EU law.

9. The Bundesrat is prepared to contribute its expertise and carefully examine the impact assessments of the Commission. However, the Bundesrat would point out that the Commission's frequent practice of only producing consultation documents and impact assessments in English is a substantial barrier to the careful examination of Commission proposals by national parliaments. It is also a barrier to meaningful participation from civil society.
10. The Bundesrat shares the Commission's assessment that the Council and the European Parliament share responsibility for high-quality impact assessments in connection with the EU legislative process. The Bundesrat therefore supports, in principle, the assertion that when the Council and the European Parliament make significant changes to documents, the consequences of these changes should be analysed and the impact assessments updated accordingly (c.f. Bundesrat Document 631/10 (Decision), Item 15). However, this should not be allowed to interfere with the institutional structure that is in force, or to curtail the rights and functions of the EU's legislative bodies.
11. The Bundesrat calls upon the Commission to evaluate the contributions submitted during the public consultation process more systematically and to make these public.
12. At the same time the Bundesrat would point out that public hearings are only permitted to be a supplement to, and not a substitute for, the consultation of the social partners which is enshrined in Article 154(2) of the Treaty on the Functioning of the European Union (TFEU). The Bundesrat would also highlight the right established in Article 155 TFEU for the social partners to conclude agreements.
13. The Bundesrat welcomes the Commission's announcement that it will increase its critical engagement with the division of competences and aspects of subsidiarity with regard to legislation. In this context, the Bundesrat appeals to the Commission to use the clauses on competences, particularly those that are broadly worded (for example, internal market competence, Article 114 TFEU) in a cautious, self-limiting way, so that proximity to the citizen is preserved and the scope for regional action is maintained.
14. In this regard the Bundesrat would point out that preserving the principle of subsidiarity is of particular importance against the backdrop of the shared competence in employment and social policy and the differing social systems of the Member States. The Commission's current subsidiarity report (Bundesrat Document 319/15) shows that subsidiarity and proportionality concerns were raised by Member States with regard to numerous proposals.

The Bundesrat therefore calls upon the Commission to allow for a more robust safeguarding of the subsidiarity principle in particular, as part of its new, better regulation.

15. The Bundesrat supports the Commission in its desire to replace the old Impact Assessment Board with a new Regulatory Scrutiny Board which will evaluate impact assessments and also carry out ex-post evaluations. The Bundesrat has criticised the Impact Assessment Board, a body internal to the Commission, on multiple occasions and has called for impact assessments to be independently examined. However, the Commission's current proposal does not go far enough.
16. In this regard the Bundesrat would refer to its earlier proposal for an independent external body to supervise the impact assessments, similar to the National Regulatory Control Council in Germany (c.f. most recently Bundesrat Document 272/14 (Decision), Item 7). Such a body could support the Commission with regard to impact assessments, and also the European Parliament and the Council if they make significant changes to Commission proposals.
17. With regard to the design of the new Regulatory Scrutiny Board, the Bundesrat does, however, believe it to be essential that the subsequent decision of whether and in what form a submission is pursued shall lie with the Commission, the European Parliament and the Council. The Bundesrat believes that both the Council and the European Parliament must be free to find compromises. Transparency, independence, democratic principles and the legitimacy of administrative action must be preserved in the decision-making process. The Regulatory Scrutiny Board should therefore have a purely advisory function. Also, its work must not lead to regulatory processes being delayed.

The Bundesrat believes that care must be taken to ensure that the composition of the Regulatory Scrutiny Board is balanced. It would be sensible to fill the seats in a balanced way from the areas of 'business', 'social issues', and 'the environment', particularly the seats that are intended for representatives from outside of the EU institutions.

In principle, the Bundesrat would encourage the introduction of a waiting period of at least two years that should exist between exercising a representation of interests and working for the Board.

18. The Bundesrat recognises the Commission's need to respond to the criticism that it passes regulation with unforeseeable consequences. However, the Bundesrat does not consider the proposed course of action to be suitable for addressing these concerns. The Bundesrat believes it is necessary for the Commission to explain the process of EU law-making more effectively to its citizens and to interested parties, and to clearly define responsibilities. The Bundesrat believes that this could bring about a fundamental improvement in the acceptance of the EU by its citizens.
19. The Bundesrat notes that the intention is for the Regulatory Scrutiny Board to become involved in the legislative process but also to evaluate the bureaucratic burden associated with existing legislative acts. The Bundesrat believes it is

necessary for current legislation to be constantly examined with regard to its efficacy and efficiency. In particular, an improvement in impact assessments and quality control could be achieved by doing so. The Bundesrat therefore welcomes the evaluation of legislative acts in principle; however, the Bundesrat takes the view that one must also examine whether the regulation was able to achieve its goals. The Bundesrat believes that it would be insufficient to only examine the bureaucratic costs associated with the regulation.

20. Furthermore, the Bundesrat would point out that European regulation, particularly consumer protection regulation, already contains extensive reporting obligations on the part of the Member States to the Commission. In the opinion of the Bundesrat, the introduction of new mechanisms for public participation and new boards for the purposes of evaluation and monitoring must not be allowed to create additional bureaucratic hurdles that would work counter to the goal of streamlining.
21. The Bundesrat appeals for the Commission to consider not only the costs of regulation, but also the possible costs and/or consequences of not having passed regulation. Particularly in the areas of environmental, nature and consumer protection, the direct economic benefits of regulation cannot always be clearly specified. At the same time it is beyond dispute that, for example, the loss or curtailment of ecosystem services has severe negative consequences. If insufficient regulation allows equilibriums to be disturbed or irreparable losses to be risked, then these consequences can only be averted at great expense at a later point in time. Therefore, when balancing interests overall, it must be remembered that the benefit to society as a whole can be greater than the direct, short-term costs for the economy.
22. The Bundesrat welcomes the announcement that more consideration will be given to the needs of small and medium-sized enterprises (SMEs). As SMEs represent by some margin the largest share of businesses and employees (in Germany 99.7 % of all businesses and 75.9 % of all employees subject to social insurance contributions), the Bundesrat appeals the Commission to consider the impact on the SME sector in all its legislative proposals.

With regard to the particular attention that is to be paid to SMEs in the Better Regulation package under the slogan of 'Think small first', as well as the unconditional exemption of micro-enterprises, the Bundesrat would point out that employment protection rules and the rights of employees are a tremendous asset that must be preserved. The Bundesrat is of the opinion that when freeing SMEs from excessive bureaucratic regulation, one must also ensure that good working conditions in this area are upheld. Good working conditions are not an end in themselves; they help to attract and retain qualified, skilled employees.

The Bundesrat shares the Commission's view that an employee at an SME has the same individual right to appropriate, safe and healthy working conditions as an employee at a large firm.

With regard to reducing costs for the economy, the Bundesrat would emphasise that greater attention should be paid to the positive long-term financial effects, and the positive long-term effects on society as a whole, of regulation that protects employees.

23. The Commission's criticism that Member States often go beyond what was set out by the EU when they implement EU legislation at a national level is too sweeping in the opinion of the Bundesrat. The Bundesrat is in favour of implementing on a 1:1 basis whenever possible, and only going beyond the standards in the EU Directives when objective and technical reasons so demand. This is not, therefore, a matter of 'gold plating', but rather that the Member States must continue to be able to decide, in each individual case, what is required for meaningful implementation. The Commission's proposal that Member States should justify their 'gold plating' in each case could help to bring about greater transparency; however, increased accountability obligations with regard to national and regional implementation must not be allowed to cause interference in the internal administrative organisation and processes of Member States.
24. The Bundesrat emphatically reaffirms its position that a reduction in bureaucracy, for example through the REFIT programme, while it should be welcomed in principle, must not lead 'through the back-door' to a reduction in social standards or prevent new, necessary legislation being passed in this area.

The Bundesrat would also refer to its previous opinions on the Commission REFIT programme, Bundesrat Document 272/14 (Decision) of 10 October 2014, Bundesrat Document 718/13 (Decision) of 19 December 2013, and Bundesrat Document 771/12 (Decision) of 1 February 2013.

The Bundesrat restates its view that Better Regulation measures must not call into question existing or future standards in the areas of environmental, nature, consumer, health, occupational and social protection, or with regard to employment law or public participation.

The Bundesrat would point out that the issue of setting standards within the regulated EU legislative process needs to be clarified.

25. The Bundesrat notes that the Commission, contrary to its principle of legislative simplification, has moved away from formulating Directives in important areas for some time now; instead of this, for example in the area of internal market regulation, it is currently only Regulations that are being prepared and passed. In the area of medical devices and in-vitro diagnostics, highly complex draft Regulations containing a large number of delegated and implementing acts have been discussed since the end of 2012.

The Bundesrat fears that the Regulations, which are directly applicable, will contain numerous unclear issues and vague legal terms that cannot be implemented by the authorities or by industry (including SMEs) on a national

level. Moreover, it seems to the Bundesrat that the great number of delegated and implementing acts that are envisaged will make the whole system more opaque and impossible to implement for years to come. The Bundesrat therefore asserts that the frequency with which these instruments are used must be reconsidered and above all, justification must be provided.

26. The Bundesrat notes that the Commission is proposing to expand the REFIT programme through its Better Regulation agenda.

27. In order to encourage the active implementation of gender mainstreaming across the board, the Bundesrat advocates that gender perspectives are taken into account during the continual examination of current legislation.

The Bundesrat calls for gender-differentiated impact assessments under the REFIT programme and the comprehensive impact assessments. As well as impact assessments from an economic, social and environmental standpoint, it is imperative for the effects to be examined from the perspective of gender, at all stages of the European legislative process.

28. The Bundesrat welcomes in principle the Commission's desire, through 'Better Regulation', to simplify the administration of EU funding. A results-oriented EU budget should also consider the differing needs, circumstances and interests of all sexes, and ensure equal rights of participation for all sexes. This can take place through a gender-differentiated evaluation of the funding that is deployed, using suitable indicators.

29. Furthermore, the Bundesrat welcomes the Commission's announcement in its communication that it will put forward new initiatives under the REFIT programme to reduce the burden on citizens and businesses.

30. In terms of the burdens that currently exist, the Bundesrat believes that there is an urgent requirement to simplify the approvals process with regard to the law on chemicals, to reduce the amount of information that is required, and to increase the transparency and predictability of the process, in order to preserve the competitive and innovative nature of European SMEs in particular.

The action plan that was announced to support SMEs in complying with the registration deadline for substances used in small quantities is also very important in the opinion of the Bundesrat.

31. The Bundesrat also welcomes the fact that the Commission continually highlights the importance of industry to Europe, and is striving towards reindustrialisation. The Bundesrat believes that when applying the REACH Regulation, more attention must be paid in future to the balance between the environmental and health protection goals established therein and the need to strengthen the competitiveness of industry.

32. The Bundesrat also welcomes the Commission's intention, with regard to the

European Structural and Investment Funds, to set up a High Level Group to monitor simplification by the Member States in practice, as well as its intention to initiate a number of studies and set up a database in order to identify and highlight further opportunities for cost savings, simplification and a reduction of the administrative burden.

33. However, the Bundesrat notes that the guidelines issued by the Commission for the implementation of the European Structural and Investment Funds still do not take into account the goal of reducing the burden of administration and control. The Bundesrat therefore calls once again upon the Commission, to refrain, when further shaping the administrative and control systems and carrying out audits, from introducing additional measures that further increase the administrative burden for administrators of the Member States and the funding beneficiaries, and that would detract from the potential contribution of the European Structural and Investment Funds towards achieving the goals of the European 2020 strategy.
34. In addition, the Bundesrat suggests that the creation of the High Level Group on simplification should be placed within the context of the efforts under REFIT.

With regard to the topic of ‘de-bureaucratisation’, the Bundesrat sees a need for simplification and improvement in the area of the European Social Fund. In this context, the Bundesrat calls upon the Commission to apply the approaches pursued under the Better Regulation initiative and REFIT to the European Structural and Investment Funds in a consistent manner, and to also take the delegated and implementing acts into account when doing so. The numerous internal Commission guidelines and the process by which they are issued should also be included in this, because these guidelines, while not formally binding in a legal sense, contribute notably to the complexity and bureaucratic burden of implementing the European Structural and Investment Funds locally.

35. The Bundesrat will send this opinion directly to the Commission.