

Making Better Regulation better – ClientEarth's recommendations

Executive summary

The European Commission's (the Commission) Communication 'Better regulation for better results – An EU agenda' (the Communication) sets a new EU regulatory agenda to improve EU legislation. In its role as the Guardian of the Treaties, the Commission should resist an agenda that will provide new opportunities for business lobbying and prevent legitimate protection of environment and human health through EU and national legislation by the European Parliament and Member States. In summary, our key concerns and recommendations are that:

- 1. The Commission's guidance on **'gold-plating'** undermines the right of Member States to pass national measures aimed at complementing and going beyond the level of protection set by EU legislation. The Commission should not interfere with Member States' competence, and should refrain from attempting to delegitimize Member States' right to pass stricter measures at national level.*
- 2. The **REFIT platform** has a strong focus on removing or improving regulation, and neglects citizens' need for additional regulation. There is a danger that this could favour representation of special interests over the EU general interest, for instance by carrying out consultations online and in only one language. The Commission should ensure that the REFIT platform also addresses the need for more legislation and that it is balanced, ensuring, taking equal measure of environmental, social and economic interests.*
- 3. The Commission's call for **impact assessments on amendments made by the EU legislators** could unnecessarily slow down the legislative process and would interfere with the democratic role of the European Parliament and the Council of Ministers. ClientEarth urges the Commission to refrain from requesting the EU legislator to make impact assessments for any substantial amendments.*
- 4. The potential exemptions for small and medium sized enterprises (**SMEs**) from regulation based on their size is – at least in isolation – a bad indicator for the necessary level of regulation. The Commission should confirm that the level of regulation will be determined by the hazard an activity creates for human health and the environment, not by reference*

to the size of an undertaking.

5. *ClientEarth is concerned that the way the Commission carries out its **consultations** lacks transparency and legitimacy, and effectively denies large groups of EU citizens the effective right to participate in the consultations. The Commission should make additional efforts to make its consultation tools more widely available and accessible for EU citizens and improve its efforts in explaining how it has or has not taken into account responses.*
6. *As proposed the **Regulatory Scrutiny Board** could be the subject of undue influence from business interest. The Commission should put in place rules to guarantee the Regulatory Scrutiny Board will have sufficient regard to social and environmental interests, and that members will be independent and have appropriate expertise on sustainability.*
7. *The Communication does not address some significant weaknesses regarding transparency and a failure to properly consider the public interest in the Commission's current practice on **impact assessments**. ClientEarth urges the Commission to ensure that impact assessments are more transparent and balanced.*
8. *The Communication does not address the opaque nature of **Trilogues** and seeks to expand the use of **delegated and implementing acts**, at the expense of regulating through legislative acts. ClientEarth urges the Commission, the Council and the European Parliament to legislate more transparently and on the basis of the legislative procedures and provisions of the EU Treaties.*

Introduction

On May 19th 2015 the European Commission published its Communication on 'Better regulation for better results – An EU agenda' as part of its Better Regulation Package.¹ The Communication seeks to set a new EU regulatory agenda for the coming years to improve EU legislation by increasing transparency, improving impact assessments and consultations, reviewing existing legislation and creating an independent 'Regulatory Scrutiny Board'.

Despite the stated intentions to better listen to citizens' concerns in the legislative process, ClientEarth is concerned that the specific proposals set out in the Communication would strengthen business lobbying at the expense of citizen interests. Taken as a whole, the Communication suggests the Commission is aiming at deregulation rather than improving legislation.

1 'Gold-Plating'

In its Communication the Commission raises concerns over so-called 'gold-plating', a practice whereby Member States seek higher or additional levels of protection compared to those offered

¹ The package can be found on http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm

by a particular piece of EU legislation where EU law so permits. The Commission urges Member States to refrain from 'unjustified' gold-plating and to give reasons when they do introduce additional requirements.

The scope and nature of these Commission statements contradict the EU Treaties. Under EU law, Member States are often permitted to adopt more stringent measures; to adopt additional rules; and to choose the form and the method of transposing EU directives. Moreover, the Treaties mandate the Member States to implement EU legislation. Therefore, ClientEarth calls upon the Commission *to refrain from attempting to delegitimize Member States' right to pass stricter or additional measures at national level.*

1.1 'Unjustified' gold-plating, subsidiarity and article 193 TFEU

The Communication opposes gold-plating as it can 'add unnecessary costs for businesses' and 'may also impose significant extra burdens'. The Commission, however, does not make clear when and under which circumstances it considers gold-plating to be 'unjustified'. In most cases a policy to oppose gold-plating contradicts Member States' right to regulate under the EU Treaties. It is clear that EU law permits Member States to adopt more stringent rules in a number of core EU policy areas, including environmental protection², social policy³ and public health.⁴ Article 193 TFEU on environmental protection, for instance, stipulates that 'the protective measures adopted pursuant to Article 192 shall not prevent any Member State from maintaining or introducing more stringent protective measures.'⁵ Even in the internal market policy area, Member States may maintain or introduce stricter measures, albeit under stricter conditions.⁶

Also, EU law does not prevent Member States from exercising their competence even where the EU has exercised its competence in the field of development cooperation and humanitarian aid⁷ and in the areas of research, technological development and space.⁸ In addition, Member States maintain the competence to regulate in areas of shared competence (the vast bulk of EU competences) to the extent that the EU has not exercised its competence.⁹

The Commission can therefore simply not prohibit Member States from introducing additional rules to the extent that those rules are not covered by EU legislation in areas of non-exclusive EU competence to the extent that these rules are not contrary to the EU Treaties.

In addition, the Commission's opposition goes against the principle of subsidiary, as Member States would be barred from adding provisions to EU legislation addressing local needs that can be sufficiently addressed at local level. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.¹⁰ As a corollary, the EU may not act when certain objectives can better be achieved at local level. Therefore, there may be situations in which a

² Article 193 TFEU

³ Article 153 (4) TFEU

⁴ Article 168 (4) (a) TFEU

⁵ Article 193 TFEU

⁶ Article 114 (4) and (5) TFEU

⁷ Article 4 (4) TFEU

⁸ Article 4 (3) TFEU

⁹ Article 2 (2) TFEU

¹⁰ Article 5 (3) TEU

Member State wants to go beyond what is required at EU level and add local rules complementing EU rules. To object to such a practice would simply be a denial of Member States' right to regulate in areas of shared competence, and, as such, part of a deregulatory agenda.

The vague and broad nature of the Commission's objections to gold plating is also problematic in light of how EU legislation operates in practice. Directives are specifically intended to give Member States room to manoeuvre when transposing EU legislation into national law. Article 288 TFEU explicitly provides that directives are 'binding, as to the result to be achieved, upon each Member State to which it is addressed, but *shall leave to the national authorities the choice of form and methods*' (emphasis added). Opposing gold-plating therefore risks going contrary to the intentions of the Treaty drafters which devised the use of this particular legislative instrument to give Member States sufficient flexibility when implementing EU law.

1.2 Justifying implementing powers

The Commission requests the Council of Ministers and the European Parliament to urge Member States to 'explain the reasons for any such gold plating'. Again, requiring Member States to justify their actions goes against the EU's constitutional division of competences. As explained above, Member States have the *right* to regulate in areas of shared competence to the extent that the EU has not exercised its competence, and can often go beyond the level of protection offered by EU rules.¹¹ Only in a limited set of circumstances does the Treaty already require Member States to notify measures intended to go beyond EU levels of protection.¹²

Moreover, it is principally for the Member States to implement EU law.¹³ Article 291 TFEU stipulates that 'Member States shall adopt all measures of national law necessary to implement legally binding Union acts'. It would be absurd for Member States to explain their actions other than where the Treaties explicitly require the Member States to do so.¹⁴ Moreover, it would also be overly burdensome and impractical for Member States to identify, justify and communicate each and every change made to national legislation that can be linked to EU legislation.

ClientEarth's recommendations on gold-plating:

Complementing and going beyond the level of protection set by EU legislation is a regulatory right Member States have under the EU Treaties. ClientEarth therefore calls upon the Commission not to interfere with Member States' competence, and refrain from delegitimizing Member States' right to regulate.

2 REFIT platform

¹¹ Article 2 (20 TFEU

¹² Article 193 TFEU and article 114 (4) and (5) TFEU.

¹³ The Commission's implementing powers are from a constitutional perspective an exception, albeit widely used.

¹⁴ Article 193 TFEU

The Commission seeks to establish a new 'REFIT Platform' alongside the new website 'Lighten the Load – Have Your Say' intended to enable citizens and other stakeholders to express their concerns about the EU regulatory framework. The stakeholder platform 'will involve high level experts from business, social partners, and civil society [...] as well as experts from all 28 Member States, the European Economic and Social Committee and the Committee of the Regions.'¹⁵ The idea of the platform is to give stakeholders the possibility to voice concerns on the impact of EU laws and make suggestions to the Commission on how legislation can be improved.

ClientEarth is concerned that the purpose of the website, as well as the REFIT Stakeholder Platform, is oriented principally towards increasing the number of complaints about supposed burdens and costs for businesses and national administrations resulting directly or indirectly from EU legislation. It does not provide any scope for stakeholders to examine the need for additional EU rules, or for any real opportunity to investigate the value and benefits of new EU legislation. There is a serious mismatch between the stated intention to improve EU legislation and this proposal.

The Communication and accompanying documents do not provide details on the way the REFIT Platform will assess information obtained through the 'Lighten the Load – Have Your Say' website. Questions and uncertainties come up on whether assessments will be objective enough and take into account the general interest in the EU. EU common standards, while considered low by some Member States (and consequently, by actors established in these countries), nonetheless require effort from other Member States and can be perceived by them (and their businesses) as burdensome. An overly narrow approach, listening to concerns from some Member States but ignoring others and to some sectors over others, could be detrimental to the general interest.

The Communication and additional documents provide information on the composition of the Platform but do not indicate how environmental, social and economic interests will be balanced. In our view, it is crucial to ensure balanced representation of these three interests. The assessment of new legislation occurs through evaluation of these three elements, and we believe that the same criteria should also be used for the assessment of existing legislation.

In addition, the REFIT stakeholder platform's composition is unbalanced. The European Parliament is not represented, while Member States have a significant say in the platform. This creates inter-institutional imbalance, because the Council through Member State representatives will get the possibility to evaluate EU legislation while the European Parliament is left out of the process.

ClientEarth's recommendations on the REFIT platform:

ClientEarth is concerned that the aim of citizen and stakeholder consultation in the context of the Communication is too much focused on removing or improving regulation, and neglects citizens' need for additional regulation. As such, the Commission should ensure that REFIT specifically addresses the need for more legislation. Moreover, ClientEarth urges the

¹⁵ 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, p. 13

Commission to take the necessary precautions to ensure that the operation of the REFIT stakeholder platform is balanced ensuring that all voices in the EU can be heard and taking equal measure of environmental, social and economic interests.

3 Assessment of any substantial amendments by the EP and the Council in the legislative process

In its Communication, the Commission calls upon the European Parliament and the Council to '[c]arry out an impact assessment on any substantial amendments that the European Parliament or the Council propose during the legislative process.'¹⁶

We understand the Commission's concerns about the quality of legislation and, related to that, the quality of amendments to the Commission's proposals. However, the idea of quasi systematic assessments of substantial amendments made by the European Parliament and the Council sounds unrealistic. That would slow down the already slow legislative process. Moreover, similar to what happens at national level, the adoption of legislation is also a political process. Therefore, the role of the Commission, which is to make legislative proposals, should not be mixed with the political role of the European Parliament and de facto that of the Council. We do not understand how the assessment by an independent panel of the work of legislators is legitimate, nor how the independence of experts could be ensured in practice. These ideas seem very much theoretical and quite impractical. They could also be understood as an attempt by an executive body to control the legislators.

ClientEarth's recommendations on EP and Council impact assessments:

ClientEarth is concerned that the Commission's call for impact assessments on amendments made by the Council of Ministers or the European Parliament will unnecessarily slow down the legislative process and interfere with the political role of the European Parliament and the Council. We urge the Commission to refrain from requesting the EU legislator to make impact assessments for any substantial amendments.

4 The role of small and medium sized enterprises

The Communication addresses how 'Better Regulation' should take into account the interests of small and medium sized enterprises (SMEs). This is a valid issue, but ClientEarth is concerned that the Commission intends to base its drive for so-called better regulation on a criterion that is irrelevant, when it is 'envisaging a lighter regime' for SMEs and 'an outright exemption' for micro-businesses (p. 7). The size of a company is – at least in isolation – a bad indicator for the

¹⁶ 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, p. 8

necessary level of regulation. The level of regulation should mainly be determined by the hazard and impact an activity creates for human health and the environment.

In fact, '[e]vidence shows that there are major shortcomings in complying with *essential elements* of EU health and safety legislation among SMEs, especially micro- and small enterprises [emphasis added].'¹⁷ In the chemical sector, 82 per cent of all reported occupational injuries occur in SMEs. In addition, the fatal accident rate in companies with less than 50 workers is around double that of larger companies.¹⁸ Consequently, experts have strongly agreed that the risks resulting from the poor control of chemical risks in SMEs are increasing.¹⁹ The Commission itself has stated previously that some SMEs 'tend to be more affected by the negative impact of health and safety problems'.²⁰ When the Commission launched a public consultation to seek stakeholder views on the implementation of its occupational safety and health (OSH) strategy in 2013, the majority of respondents indicated that a high level of compliance with OSH principles should be maintained, '*regardless of the size of the company [emphasis added]*'.²¹ Similarly, a study commissioned by the Commission on SMEs and the environment in the EU found that SMEs 'contribute approximately 64% to the industrial pollution in Europe'.²²

The Commission alludes to these issues when it concedes that a worker in an SME 'has the same right to health and safety protection' as the employee of a larger company, and foresees situations where a 'lighter regime' would not allow for an effective achievement of the social, environmental and economic objectives of EU legislation. However, the qualifier provided ('whenever it is possible and makes sense') is overly vague, leaving the door open for lowering the level of protection just for the sake of lightening a perceived regulatory burden. We are concerned that the Commission will resort to doing just that whenever it will not be possible to provide an appropriately high level of protection without stringent regulation.

Exactly because of the important and still increasing role SMEs play in our economy, representing more than 99 per cent of all enterprises and employing two thirds of the workforce in the private sector, hazards to human health and the environment resulting from their activities need to be resolutely addressed. The Commission has already concluded elsewhere that *simple solutions*, such as guidance, can help SMEs to implement legislation in a more cost-effective way²³ and sets out 'to help them comply with EU requirements' (p. 12). In order to protect their employees and customers as well as the general public, SMEs need this kind of support in order to achieve the level of protection provided for in EU legislation, not exemptions from it.

In any case, exempting SMEs from environmental legislation in particular would go against the fundamental principles of EU environmental law and policy, which is based on principles such as the precautionary principle, the polluter pays principle, the principle of preventive action and that environmental damage should as a priority be rectified at source, and not based on the size of

17 European Agency for Safety and Health at Work, EU-OSHA Multi-annual Strategic Programme 2014-2020, p. 12 (with further reference).

18 European Agency for Safety and Health at Work, Expert forecast on emerging chemical risks related to occupational safety and health (2009), p. 77.

19 *Ibid.*, p. 34.

20 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Improving quality and productivity at work: Community strategy 2007-2012 on health and safety at work, COM(2007) 62 final, p. 4.

21 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on an EU Strategic Framework on Health and Safety at Work 2014-2020, COM(2014) 332 final, p. 3.

22 Danish Technological Institut

e and PLANET S.A 'SMEs and the environment in the European Union' (2012)http://ec.europa.eu/enterprise/policies/sme/business-environment/files/main_report_en.pdf p. viii, accessed on 3 July 2015.

23 *Ibid.*, p. 15.

companies.²⁴ Moreover, EU laws on pollution, waste, environmental assessments, hazardous substances, chemicals, industrial safety and others generally regulate activities by reference to the level of hazard they pose, not the size of an enterprise.²⁵

ClientEarth's recommendations on the role of small and medium sized enterprises:

The determining criterion for legislation should be the hazard an activity creates for human health and the environment. During the design and implementation of legislation, the capacity undertakings have for coping with the hazard should be taken into account to determine the best way to achieve the desired environmental or health outcome. The right solution is not lowering the level of protection according to the size of a business but support for SMEs that face difficulties to live up to the appropriate standards.

5 Consultations

The Commission states that its proposals on consultation have the objective of reaching all stakeholders and would allow a broad discussion of any planned measure.²⁶ Yet, the details of Communication show several serious omissions or deficiencies. The most important ones are:

5.1 Consultation in one language only and only online

EU legislation is of concern to some 500 million people in 28 Member States. There are 24 official languages in the EU. Yet, the consultations take place in one, very rarely in two languages. This means that the vast majority of persons concerned by the regulations – individuals, organisations and associations, companies and administrations alike – will be consulted in a language that is not their language, which is, for most of them, not understandable and not a language in which they can express themselves. This is neither a fair nor a democratic way of consulting the public.

The European Parliament and the European Ombudsman have both declared in the past that the Commission must change its practice of consultation, so that citizens can be informed of the planned regulations in a language that is accessible to them.²⁷ This is a right of citizens that the Commission cannot simply ignore.

The fact that consultations are only conducted online adds to these linguistic problems. Numerous people in the EU do not have online connections and are thus not capable of

²⁴ Article 191(2), TFEU.

²⁵ See for example all the laws listed in Annex III of Directive 2004/35/EC on environmental liability with regard to prevention and remedying of environmental damage, as well as Directives 2011/92/EC on the assessment of the effects of certain public and private projects on the environment and 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.

²⁶ 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, p/ 3

²⁷ European Ombudsman, Declaration of 4-10-2012 Case 640/2011/AN; European Parliament, Resolution of 14 June 2012 on public consultations and their availability in all EU languages P7_TA (2012) 0256

exercising their right to comment. They cannot either be asked to regularly and systematically consult the Commission's website in order to find out about consultation processes that are of interest to them. The Commission clearly has an obligation to find a way of actively approaching citizens in the whole of the EU and inform them of consultation procedures.

The effect of this double restriction – consultation in one language and online – is that participation in Commission consultations is easier for large companies or larger European vested interest associations than for SMEs, citizens, smaller organisations and public interest groups, which are practically disadvantaged and cannot make their voice heard.

5.2 Transparency

The Commission does not appear to intend to change its present practice of only mentioning the results of a public consultation in a short passage of the explanatory memorandum for the relevant legislative proposal. This normally happens in a quantified form ('the majority of stakeholders agreed'). Explanatory memoranda do not differentiate between the different groups of stakeholders (producers and traders, social groups, environmental organisations etc) at all, or do so only in a very summary form.

The simple counting of the majority of approvals or disapprovals does not do justice to the substantive arguments of the different groups. As the vested interest groups of the business sector are well organised and financially very powerful at EU level, their opinions may receive unjustified attention by the Commission and, indeed, the other institutions. The environment itself has no voice; therefore, it is all the more important to carefully weigh and reproduce the opinions that are presented in the general environmental interest.

ClientEarth's recommendations on consultations:

ClientEarth is concerned that the way the Commission carries out its consultations lacks transparency and legitimacy. The Commission only carries out consultations in one or two languages and does so via the internet. Therefore, large groups of EU citizens are denied the effective right to participate in the consultations. The Commission should therefore make additional efforts to make its consultation tools more widely available and accessible for EU citizens.

The Commission should further improve its efforts in explaining how it has or has not taken into account responses. The Commission should therefore present in detail in a specific document, annexed to every regulatory proposal, the opinions of the different stakeholder groups and explain why it followed or did not follow this or that opinion. In this way, its regulatory proposals will be better explained, more transparent and more easily accepted by the other EU institutions and the general public.

6 The new Regulatory Scrutiny Board

The Regulatory Scrutiny Board will replace the former Impact Assessment Board from 1st July 2015. It will not only assess new proposals made by the Commission but also perform evaluations of existing legislation. The Regulatory Scrutiny Board will be part of how the Commission carries out its impact assessments of proposed and existing legislation.

We have concerns about the new Regulatory Scrutiny Board, which will have a different composition and an expanded scope of action compared to the current Impact Assessment Board. The Commission will appoint three external members who will be employed for a fixed term of three years. However, the Communication and related relevant papers do not provide information as to who these members will be nor from which sector of society they will be chosen. The only information provided is that their expertise will cover economic, social and environment policy. There is therefore an unaddressed risk that vested interests will be over-represented within the Regulatory Scrutiny Board. The fact that these members will have contracts of three years leads to concerns that their independence and impartiality may be compromised by future employment opportunities.

ClientEarth's recommendations on the Regulatory Scrutiny Board

ClientEarth urges the Commission to take all the necessary measures to ensure that the members of the Regulatory Scrutiny Board are independent and carry out their tasks in an impartial manner. The Commission must ensure that the members are not under undue influence from business interests.

7 Impact assessments

Before the Commission proposes a new piece of legislation, it carries out a study on the social, economic and environmental impact of the different policy options available in what are known as impact assessments. Impact assessments are an important tool for the Commission to assess its own proposals before formally submitting them to the EU legislature. The Better Regulation Communication does not address two important shortcomings of how impact assessments have been carried out in the past. Indeed, these shortcomings will be accentuated by the establishment of the new Regulatory Scrutiny Board.

First, ClientEarth considers that the Commission's current impact assessment process, particularly for proposals related to the environment, gives undue weight to short-term economic considerations at the expense of long-term social and environmental goals. The Commission's refusal to adopt a directive on access to justice in environmental matters is a pertinent example. The EU is obliged to ensure that its citizens have access to justice in environmental matters under the UN Aarhus Convention. DG Environment's impact assessment on a possible directive to achieve this goal was rejected twice by the Impact Assessment Board. The reason for rejection was that the impact assessment lacked evidence on the impact of the proposal on

investment and distortions of competition in the internal market. In effect, considerations regarding the economic impact of giving access to justice outweighed the environmental and human rights gains to be achieved, as well as the EU's obligation under international law. These negative opinions have unduly prolonged the process. As of yet no legislative proposal has been put forward to the legislature more than a year after the board adopted its opinion and all of the discussions that took place within this process are still confidential.

Second, ClientEarth considers that the impact assessment process is insufficiently transparent contrary to the EU's commitments on transparency, especially since the Lisbon Treaty entered into force in 2009. Information on the meetings of the Impact Assessment Board is withheld; the agendas and minutes are not published or made available upon request. Impact assessments and the opinions of the Impact Assessment Board are kept confidential until the Commission decides whether or not to adopt the legislative proposal in question. In the case of certain proposals, this can take years.

In the meantime, EU citizens have no way of knowing the evidence upon which the Commission is deliberating, who has provided the evidence, and the reasons why the Commission has not yet put forward a proposal. This lack of information precludes EU citizens from participating in the Commission's decision-making process. The Decision of the President of the Commission confirms that this lack of transparency will continue once the Regulatory Scrutiny Board is established.²⁸ Decisions will continue to be taken behind closed doors. The process should be made more transparent to ensure the impartiality of the Regulatory Scrutiny Board (see also section 7 above). Keeping this confidential is contrary to the very purpose of having external members on the board.

ClientEarth's recommendations on Impact Assessment

ClientEarth urges the Commission to take measures to ensure that Impact Assessments are carried out in a balanced way taking into account economic, environmental and social interests in an even-handed manner.

Moreover, we urge the Commission to make the impact assessment process more transparent by:

- *Publishing the agendas and minutes of meetings of the Regulatory Scrutiny Board;*
- *Publishing each impact assessment as and when it is submitted to the Regulatory Scrutiny Board;*
Publishing each opinion of the Regulatory Scrutiny Board as and when it is submitted for inter-service consultation and/or to the College of Commissioners.

This will allow for public scrutiny of the evidence gathered in order to avoid biased analysis and allow EU citizens and civil society to participate in the Commission's decision-making process.

²⁸ Article 6 of the Decision of the President of the European Commission C(2015) 3263 of 19 May 2015 on the establishment of the independent Regulatory Scrutiny Board [2015] available at http://ec.europa.eu/smart-regulation/better-regulation/documents/c_2015_3263_en.pdf (accessed on June 15 2015).

8 Respecting EU legislative procedures and transparency

The Commission's Communication and its proposal for an inter-institutional agreement do not address the opaque nature of Trilogues. Under the Trilogue system, representatives of the European Parliament, the Council and the Commission informally (without clear procedural rules and behind closed doors) discuss legislative proposals with the view of reaching a compromise on the text that is then formally adopted through the Council and the European Parliament.

This system undermines provisions in the Treaties requiring the EU legislator to act in a transparent way and thereby prevents scrutiny of the EU legislators by the public. Article 10 TEU requires that decisions 'shall be taken as openly and as closely as possible to the citizen'. Articles 16 (8) and 233 TFEU demand that the Parliament and the Council deliberate and decide in public. By making deliberations a mere formality and devoid of substance, Trilogues create serious issues of accountability and legitimacy. EU citizens cannot properly scrutinize the decision making process because information is not adequately available nor who is responsible for textual changes to legislative proposals.

In addition, Trilogues undermine Treaty procedures and provisions as well as the respective and distinct roles of the different institutions involved. The Treaties set out clear procedures to be followed when the EU legislates.²⁹ Because the most important debates and decisions are taken in the Trilogues, the actual procedures are only followed as a matter of formality.

Moreover, the Commission in the proposal for an inter-institutional agreement advocates the increased use of delegated and implementing acts. The Commission proposes that the inter-institutional agreement should underline 'the important role played by delegated and implementing acts in legislation'. ClientEarth is concerned that the Commission is seeking to regulate more through non-legislative acts and less through legislative acts. This will unduly remove legislation from democratic scrutiny and approval, since the powers of the Council and the European Parliament are more limited under comitology and delegated acts.

ClientEarth's recommendations respecting the EU legislative procedures

ClientEarth urges the Commission, the Council and the European Parliament avoid the informal Trilogue meetings as much as possible and, where they do happen, to make these meetings publically accessible. Agenda's should be published in advance, there should be clear rules on who attends the meetings, meetings should be available on live stream and minutes should be published afterwards.

ClientEarth also urges the Commission, the Council and the European Parliament to respect the importance of legislative acts and not to resort unnecessarily to delegated and implementing acts.

²⁹ The ordinary legislative procedure is outlined in article 293 TFEU, special legislative procedures can be found throughout the TFEU.

9 Conclusion

The Commission's Better Regulation initiative has been described as 'weaken[ing] or undermin[ing] essential regulations and subordinat[ing] the public good to corporate interests' and as 'essentially a deregulation measure'.³⁰ ClientEarth shares these concerns and urges the Commission to take on board our recommendations. The Commission is right to try to listen more closely to citizens' concerns. This is essential to improving the work and legitimacy of the EU. However, such a process should be inclusive, impartial and transparent and must not provide a tool for deregulation and organised lobbying taking place behind closed doors.

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ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

ClientEarth is funded by the generous support of philanthropic foundations and engaged individuals.

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³⁰ Comments made by several civil society organisations, <http://www.euractiv.com/sections/health-consumers/ngos-launch-watchdog-keep-eye-commissions-better-regulation-314644> (accessed on 25 June 2015).