

Unclassified

English - Or. English

3 August 2022

**PUBLIC GOVERNANCE DIRECTORATE
REGULATORY POLICY COMMITTEE**

Cancels & replaces the same document of 2 August 2022

European Union and Member States' interface

Background paper

13th OECD Conference on Measuring Regulatory Performance: Better Regulation - Meeting the challenges of the 21st Century, Brussels, 28-19 June 2022

This paper provided background to the discussions in Breakout Session 2 of the 13th OECD Conference on Measuring Regulatory Performance, hosted by the European Commission in June 2022. It relies on material from the [Better Regulation Practices across the European Union 2022](#) report and other published OECD work.

It is available in PDF only.

Christiane Arndt-Basclé - Christiane.ARNDT-BASCLE@oecd.org

Paul Davidson - Paul.DAVIDSON@oecd.org

JT03500896



Better Regulation - meeting the challenges of the 21st Century

13th OECD Conference on Measuring Regulatory Performance

Background paper for breakout session #2 – European Union and Member States' interface

Brussels

28-29 June 2022¹

¹ Note by the Republic of Türkiye The information in this document with reference to “Cyprus” relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Türkiye recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Türkiye shall preserve its position concerning the “Cyprus issue”.

Note by all the European Union Member States of the OECD and the European Union The Republic of Cyprus is recognised by all members of the United Nations with the exception of Türkiye. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

European Union and Member States' interface

EU institutional setup and legislative process

The three main institutions within the European Union are the European Commission, the Council of the European Union (henceforth referred to as 'the Council'), and the European Parliament. The right of initiative for EU legislation lies, as a rule, with the European Commission, except for some specific political areas, whether either the European Parliament, the Council or a number of Member States have the right to initiate legislation. While special legislative procedures followed only in certain cases, as per the EU Treaties, provide that the Council can adopt the EU legislative proposal, most EU legislative acts are adopted under the so-called 'ordinary legislative procedure', where it is for the Council and the European Parliament to negotiate, amend, adopt and/or reject the proposals tabled by the European Commission. The European Parliament and the Council are often referred to as "co-legislators" as they are on par with each other under the ordinary legislative procedure.

EU Institutions and Member States interact closely when developing, negotiating, implementing, and transposing EU law. The quality of rules in the EU therefore depends on the quality of the tools available to develop and implement regulations, both in Member States and in the EU Institutions.

Most EU legislative acts are adopted by the Council of the EU and the European Parliament through the ordinary legislative procedure. Throughout this process, the Council and the European Parliament separately review the Commission's legislative proposal. In the Council and its sub-committees, Member States' governments propose amendments and negotiate a common position on the legislative draft. Each Member State may individually undertake stakeholder engagement and regulatory impact assessment to help inform its negotiation position. The Council's role in conducting impact assessments on amendments made in its committees has so far remained limited. The European Parliament can provide further impact assessment work upon request by committees. EU legislation is adopted once the Council and the Parliament agree on a joint text and once the latter is published in the Official Journal of the EU.

The two main types of EU legislative acts are regulations and directives. Both the nature of and processes for these types of EU legislative acts have important differences and the differences are relevant to the regulatory management tools that individual Member States employ when implementing these acts. Member States are required to transpose EU directives, i.e. to incorporate them into their national laws, by adopting dedicated transposition measures. Directives are binding on the Member States to which they are addressed in respect of the result to be achieved but the specific form and methods are left to national authorities to decide. Governments usually transpose directives through domestic legislative procedures and may consult stakeholders and conduct regulatory impact assessment throughout this process. Each directive is required to be transposed to a specific deadline set in each directive. The Commission monitors the timely and legally accurate transposition of directives and can initiate infringement procedures where the transposition of directives is delayed. Unlike directives, regulations are directly applicable to all EU Member States and binding in their entirety, thus do not offer the flexibility to choose the method and form of implementation into national law.

The Indicators of Regulatory Policy and Governance (iREG) survey focuses on the processes of developing laws (both primary and subordinate) that are carried out by the executive branch of the national government and that apply to all policy areas. Results for the European Union apply to all acts (regulations, directives and implementing and delegated acts) initiated by the European Commission, as the executive of the European Union.

Introduction

Regulation is a core government activity that affects all areas of businesses and citizens' lives. It is a crucial determinant of any society's welfare and, when done well, regulation can improve societal wellbeing, improve business competition, and enhance environmental outcomes. However, when done poorly, regulation may unnecessarily increase the burden on both business and regulators and can adversely affect citizens' lives. Regulatory policy is therefore centrally important to ensure that governments make laws that improve welfare. However, from the EU Member States' perspective, the use of impact assessment and stakeholder engagement is not only important in the design and review of domestic laws but also in the development and transposition of EU legislation.

The OECD and the European Union have both long-recognised the potential of regulatory policy. The *OECD Recommendation of the Council on Regulatory Policy and Governance* (2012_[1]) is the product of decades of research at the OECD and sets the normative framework to measure regulatory performance in member countries. Regulatory policy in the European Union was advanced under the Better Regulation Agenda, which played a crucial role in shaping the European Commission's regulatory processes. The OECD Recommendation (OECD, 2012_[1]) and the EU Better Regulation Agenda share the same objectives, approaches and key principles. Both have a particularly strong focus on stakeholder engagement, regulatory impact assessment (RIA), and *ex post* evaluation, regulatory oversight, and international regulatory co-operation as critical pillars of regulatory quality.

In its *Communication on Better Regulation*, the European Commission highlighted the role of EU Member States in improving transparency of evidence-based policy and to reduce the burden of EU legislation (European Commission, 2021_[2]). Legislation and regulatory policy emanating from the EU naturally affects EU Member States, so the regulatory management systems of the EU institutions and of the EU Member States need to be mutually reinforcing in order to operate effectively and efficiently (OECD, 2019_[3]).

The background paper presents information on stakeholder engagement and regulatory impact assessment as they relate to the legislative processes of the European Union. It looks at the extent to which individual EU Member States inform domestic stakeholders of European Commission regulatory proposals of interest. It also examines how EU Member States use the European Commission's stakeholder engagement processes and the results of the European Commission's impact assessments to inform both their negotiating position and on the transposition of EU directives.

Stakeholder engagement during the negotiation and transposition of EU directives/regulations

Facilitating Member States' domestic stakeholders in EU consultations

Summary points

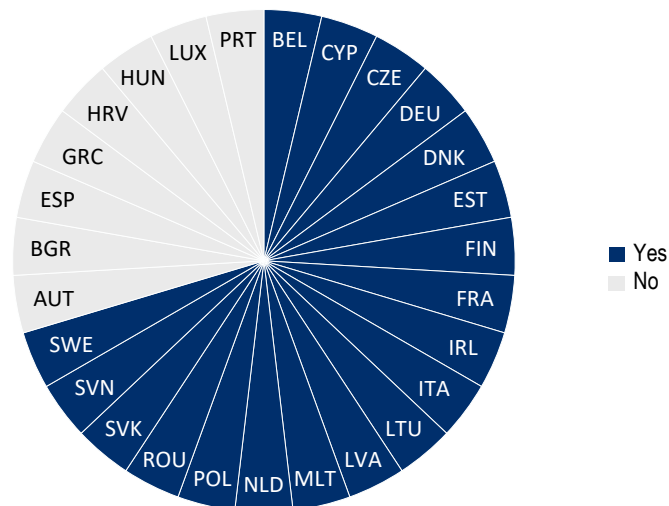
- The majority of EU Member States report facilitating and informing domestic stakeholders about the European Commission's consultations. The facilitation role enables Member States and their citizens, businesses, and other affected parties to take part in determining the outcomes of the European Commission's legislative proposals. In addition, the engagement of domestic stakeholders in ongoing European Commission consultations can improve resultant EU policies at both the negotiation and transposition stages.

Facilitating domestic stakeholder participation in European Commission's consultations helps to ensure that all views are included and taken into account by the European decision makers. Member States'

stakeholder input can help to identify feasible alternatives to those proposed by the European Commission; identify and assess potential benefits and costs of various policy options; and raise potential implementation issues. Member States thus have an important role in ensuring that European legislative proposals consider all stakeholder views and are evidence-based.

Nineteen EU Member States facilitate the engagement of domestic stakeholders in the European Commission's consultation processes (Figure 1). Most EU Member States inform stakeholders of the European Commission's consultations through their individual ministries' websites, where stakeholders are redirected to the relevant Commission consultation page. Some EU Member States (**Denmark, Finland, the Netherlands and Slovenia**) list the European Commission's consultations on their respective central consultation portal that their own stakeholders are already familiar with. Ministries in **France** communicate the European Commission's public consultations to stakeholders through publication on their websites or through direct exchanges relevant parties. **Germany** uses a multi-step process to assist stakeholders prioritise potentially relevant consultations.

Figure 1. A majority of EU Member States report informing domestic stakeholder about European Commission consultations



Note: Data is based on 27 EU Member States.

Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

In addition, half of the EU Member States facilitate the co-ordination of domestic government input in the European Commission's consultations. Qualitative evidence suggests that the national ministry in charge of the regulatory agenda co-ordinates with other ministries or officials to submit an official response.

The use of stakeholder engagement by EU Member States to inform the negotiation of EU directives and regulations

Summary points

- A minority of EU Member States systematically consult with domestic stakeholders at the negotiation stage, but when they do, the consultations are generally open to the public. EU Member States would benefit from a greater use of stakeholder engagement at the negotiation stage to better understand the domestic impacts of proposed EU legislation.

- About a third of EU Member States report to systematically utilise the results of the European Commission's consultation to inform the national negotiating position, especially those that do not have formal requirements to consult domestic stakeholders in place.

Engaging with stakeholders at the early stages of policy development helps to identify specific issues and provides the opportunity to citizens to help shape regulatory proposals (OECD, 2021^[4]). Two relevant dimensions to consider in the EU context are the extent of substitutable and complementary stakeholder engagement:

- The substitutionary dimension relates to EU Member States utilising the input received to the European Commissions' proposals by their domestic stakeholders (irrespective of whether the Member State helped to facilitate that input).
- The complementary dimension is when individual EU Member States call for domestic input directly from stakeholders in forming their negotiating position. This may unearth new stakeholders who were either unwilling, unable – or, if not facilitated by the EU Member State – uninformed about the European Commission's own stakeholder engagement on a proposal.

Despite the potential for Member States to utilise different engagement strategies the reality is more mixed. Only six Member States' governments have systematic requirements to conduct stakeholder engagement to define a negotiating position for the development of EU regulations or directives. Of these, **Italy** and the **Slovak Republic** systematically open stakeholder engagement to the general public (Table 1). An additional six Member States require stakeholder engagement to inform their negotiation position for some EU regulations and directives.

EU Member States would benefit from more systematically engaging with affected stakeholders in the formulation of their negotiation position to better understand domestic impacts of proposed regulations or directives. This is especially the case for proposed EU regulations, for which the negotiation stage represents the final opportunity to shape such proposals.

Table 1. EU Member States use the European Commission's consultations more than requiring stakeholder engagement to form a negotiation position

	Stakeholder engagement is required to define negotiating positions	Stakeholder engagement to define negotiating positions must be open to the public	Results of European Commission's consultations are used to inform negotiating positions
Austria			
Belgium			
Bulgaria			
Croatia			
Cyprus			
Czech Republic			
Denmark			
Estonia			
Finland			
France			
Germany			
Greece			
Hungary			
Ireland			
Italy			

Latvia	Systematic approach	Never	Systematic approach
Lithuania	Never	Never	Systematic approach
Luxembourg	Never	Never	Never
Malta	Never	Never	For some regulations/ Sometimes
Netherlands	Never	Never	Systematic approach
Poland	For some regulations/ Sometimes	Never	Systematic approach
Portugal	Never	Never	Systematic approach
Romania	Never	Never	Systematic approach
Slovak Republic	Systematic approach	Systematic approach	For some regulations/ Sometimes
Slovenia	For some regulations/ Sometimes	For some regulations/ Sometimes	Systematic approach
Spain	Never	Never	Never
Sweden	For some regulations/ Sometimes	For some regulations/ Sometimes	For some regulations/ Sometimes

- Systematic approach
- For some regulations/ Sometimes
- Never

Note: Data is based on 27 EU Member States.

Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

Approximately a third of Member States report to systematically use the results of the European Commission's consultation processes as input to inform the national negotiating position for the development of EU regulations or directives, profiting from synergy effects through the stakeholder consultation framework of the European Commission (Table 1). Data indicates that Member States that do not carry out domestic stakeholder engagement to inform their negotiating position tend to more systematically use the results of the European Commission's consultation. An additional ten Member States sometimes use the Commission's consultation results to inform their respective negotiating position.

Box 1. Selected Member States' negotiation procedures on European Commission's proposals

In **Slovenia** the relevant ministry prepares the draft position and identifies the most important issues and the relevant stakeholder groups to be included in the consultation process, depending on the content of the proposed regulation. Before presenting the draft position to the stakeholders, intergovernmental consultation takes place to discuss open issues. Beside regular consultation via a ministerial advisory body, consultation is most often carried out in writing. Slovenia's positions for the most important dossiers, for instance regarding the Common Agricultural Policy and Common Fisheries Policy, undergo public consultation and conferences.

While **Poland** has no requirement for open public consultation on European Commission's proposals, government officials in different ministries are usually consulted. The mechanism of consultation and conducting work on EU draft legislative acts is included in the Polish guidelines. The mechanism is generally applicable from the official presentation of the draft EU legislative act by the European Commission to the EU Council and European Parliament. Ongoing consultations and dialogue with stakeholders occurs throughout the whole process. All concerned stakeholder organisations are proactively provided with information obtained from the work of the European Commission committee/working group. In this working group the Commission consults the Member States on the proposal, and leading experts encourage participation in the consultation, in particular to report any reservations, doubts, proposals for more favourable solutions, simplifications, etc.

Source: Indicators of Regulatory Policy and Governance Survey 2021; Radaelli et al. (unpublished^[5]), Extending the OECD indicators of Regulatory Policy and Governance (iREG) to all EU Member States of the European Union.

The overall results suggest that the majority of EU Member States both facilitate and rely on the consultations of the European Commission. One-third of EU Member States do facilitate the European Commission's consultations – and use the ensuing results – combined with a requirement to conduct their own stakeholder engagement to inform their respective negotiation positions. **Cyprus, Germany, Ireland, Lithuania, Malta, the Netherlands, and Romania** have no requirement to conduct stakeholder engagement on proposals of the European Commission and instead both facilitate domestic stakeholders' input into the Commission's consultation processes, and then utilise the ensuing results to inform their negotiating positions.

However, despite the availability of the European Commission's consultation results, some Member States do not have a requirement for the government to conduct stakeholder engagement to define their negotiating position, nor use the results of the Commission's consultation processes. To some extent this could be because the Member State facilitates the European Commission's consultations and considers that this is sufficient – i.e., the substitutionary dimension. This may be the case in **Belgium** and the **Czech Republic**, however in **Austria, Greece, Luxembourg, and Spain** it appears that little is done to inform domestic stakeholders about consultations of the European Commission, and there are no requirements in place to either conduct stakeholder engagement or utilise the Commission's consultation results.

The lack of both substitutionary and complementary stakeholder engagement is particularly worrying in the development and negotiation of EU regulations. Since these are directly applicable and binding in their entirety without being transposed into EU Member States' national law, there are fewer opportunities to involve stakeholders and to use their feedback in shaping the legislative proposal.

The use of stakeholder engagement by EU Member States to inform the transposition of EU directives

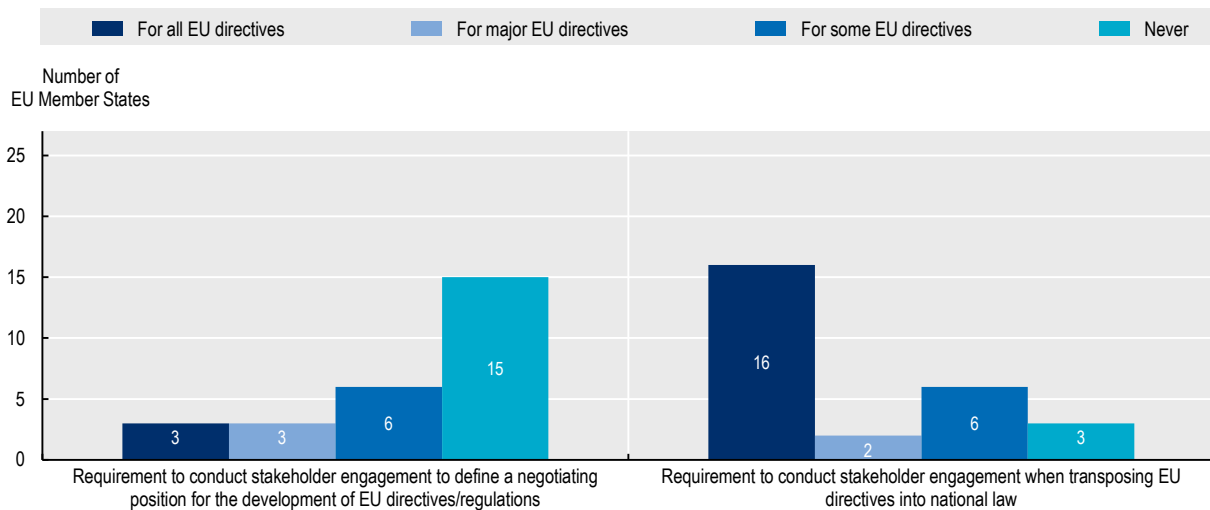
Summary points

- Most EU Member States systematically consult affected parties at the transposition stage of EU directives.
- On the other hand, EU Member States report to use the results of the European Commission's consultation less frequently at the transposition than at the negotiation stage. EU Member States may benefit from further using the information resulting from the European Commission's consultations to inform the transposition of EU directives, particularly where implementation issues were considered, and to potentially identify affected domestic stakeholders.
- Data shows that EU Member States that joined the European Union since 2004 tend to use the results of the European Commission's consultation outcomes more systematically than other EU Member States. The majority of Northern EU Member States use the European Commission's consultation results to inform the transposition of EU directives at least sometimes, however, in other EU regions, the share of EU Member States using the European Commission's consultation is lower.

While few member states require stakeholder engagement to define their negotiation position, the vast majority of Member States have a requirement to undertake stakeholder engagement when transposing

EU directives into national law (Figure 2). There has been no change in the number of Member States undertaking stakeholder engagement at the transposition stage since 2017.

Figure 2. Stakeholder engagement is more systematically required at the transposition stage than at the negotiation stage of EU directives



Note: Data is based on 27 EU Member States.

Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

Transposing EU directives involves amending existing or adopting new domestic regulation. As a result, the vast majority of Member States have the same requirements for stakeholder engagement during the transposition of EU directives as they have for regulations originating domestically. From a practical perspective it should be noted that consultation at the transposition stage is centrally concerned with assessing various implementation options, since the decision to regulate has already been made.

EU Member States report that they use the European Commission's consultation results less systematically at the transposition stage than at the negotiation stage (Figure 3). One reason might be that the results of consultations conducted by the European Commissions are out of date due to changes to draft directives in the Council or the European Parliament, or because national adjustments in the transposition including gold plating require additional information. For examples on the use of the results of the European Commission's consultation during the transposition stage, see Box 2

Box 2. Selected Member States' use of the European Commission's consultation results during the transposition stage

Slovenia uses the results of the European Commission's consultation (including the assessment of the EU directive and reasons for adoption) for preparing the legislative proposal with which the European directives are transposed into national legislation.

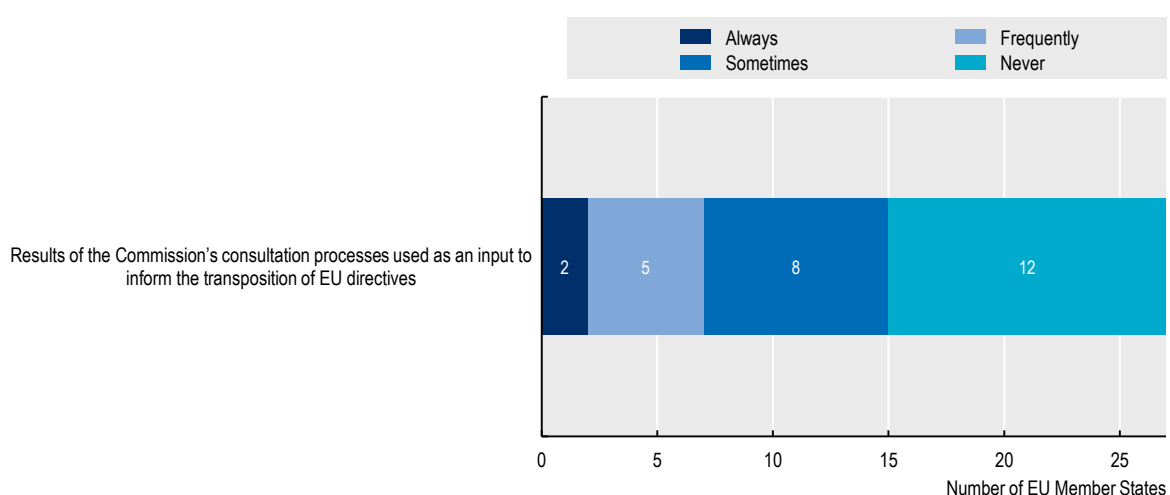
In **Austria**, the results of the Commission's consultation processes can be integrated into the materials used to draft laws, e.g. by giving reasons and explanations for a draft piece of legislation.

In addition to use in transposition, **Croatia** uses the results of the European Commission's consultation including impact assessments and opinions/recommendations of the Regulatory Scrutiny Board during the preparation of national opinions regarding EU regulations.

Source: Indicators of Regulatory Policy and Governance Survey 2021.

Data shows that the EU Member States that joined the European Union since year 2004 tend to more systematically use the results of the European Commission's consultation results to inform the transposition of EU directives than other EU Member States. Considering the geographical regions of the European Union, the majority of Northern EU Member States use these results at least sometimes. However, in other geographical parts of the European Union, the share of EU Member States using the European Commission's consultation results is even lower.

Figure 3. The European Commission's consultation results are not systematically used at the transposition stage



Note: Data is based on 27 EU Member States.

Source: Indicators of Regulatory Policy and Governance (IREG) Survey 2021.

Malta and **Romania** are the only Member States that report to always use the results of the European Commission's consultations. In **Romania**, the results of the European Commission's consultations are processed by the departments for EU affairs and used in the legislative drafting process when transposing the EU directive.

Box 2. Selected Member States' use of the European Commission's consultation results during the transposition stage

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Source: Indicators of Regulatory Policy and Governance Survey 2021.

Requirements and practices regarding RIA for the negotiation of EU directives and regulations and for the transposition of EU directives

The use of RIAs by EU Member States to inform the negotiation of proposed EU directives and regulations

Summary points

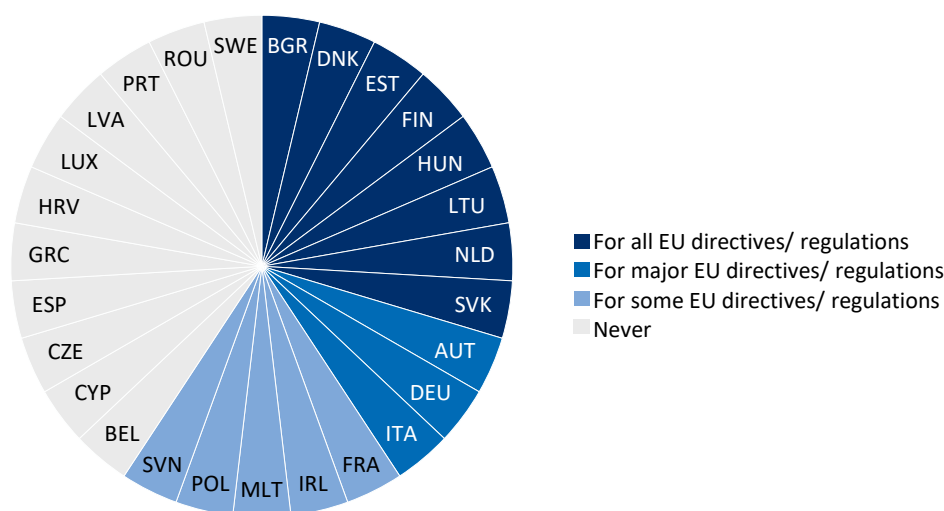
- Just above half of EU Member States have formal requirements in place to conduct impact assessment to inform their negotiating position. This suggests that some countries do not have relevant information on the impacts of proposed EU legislation on their domestic economy and society. However, despite not having formal requirements to carry out domestic impact assessments, some countries report doing so in practice.
- The short timing between the publication of the European Commission's impact assessment and the beginning of the negotiation may represent a barrier to EU Member States undertaking suitable analysis to inform their domestic negotiation position.
- The vast majority of EU Member States reported to use the results of the European Commission's impact assessment at the negotiation stage, but only a minority reported doing so systematically.

EU Member States should be informed about the domestic impacts of a proposed EU regulation or directive, as this may help them to ground their amendments of proposed EU directives and regulations during the negotiation phase on evidence and on an understanding of the anticipated impacts in individual countries. EU Member States can directly amend proposed EU directives or regulations during the negotiations undertaken by the European Parliament and the Council of the European Union. Given that negotiation can result in substantial changes to a proposal before it becomes an EU legislative act, EU Member States ought to prepare evidence on the impacts of the proposed legislation on their individual countries and use it in the debate. This is particularly important for EU regulations as these are directly applicable and binding in their entirety without being transposed into Member States' national law. The negotiation stage is thus crucial as, once regulations are adopted, EU Member States do not have another opportunity to amend them.

Despite the gains from analysing the domestic impacts of a proposed EU regulation or directive ahead of the negotiation, many EU Member States – and in particular, Southern European Member States – are under no obligation to conduct RIA to define a negotiating position and evaluate the potential policy impacts at the early stages of a European Commission proposal. This suggests that EU Member States' negotiation positions are not systematically informed by analysis and may fail to consider how the European Commission's proposals may affect their citizens and businesses. In fact, just over half of the EU Member States have a requirement to carry out RIA to define the negotiating position for the development of at least some EU directives and regulations (Figure 4). Carrying out domestic impact analysis is particularly

relevant when the original impact assessment of the European Commission does not necessarily include an assessment of the impacts on individual countries.

Figure 4. A significant number of EU Member States do not have a requirement to conduct RIA to define the negotiating position for the development of EU directives and regulations



Note: Data is based on 27 EU Member States.

Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

Some EU Member States however consider it important to use evidence to inform their negotiating position, even though they are not formally required to do so. This is, for example, the case of **Croatia, Latvia** and **Sweden**, which all have procedures in place to include some assessment of domestic impacts in the negotiation stage. Member States undertaking a RIA without being formally required to do so demonstrates the value of assessing the impacts of EU legislative proposals ahead of the negotiation.

The identification of laws that will be subject to RIA is predominantly based on proportionality, and particularly on the significance of their impacts in general, their impacts on national and EU budgets, or their non-budgetary domestic impacts. Such approach provides Member States with some evidence on the types and potential scope of the regulatory impacts on the domestic economy, businesses, and citizens, during the negotiations.

All EU Member States reported carrying out RIAs to inform the development of domestic regulations but in contrast, only around two-thirds reported carrying out RIAs in practice during the development or adoption of EU directives and regulations. This suggests that countries have relevant tools required for carrying out an impact assessment in practice but that such instruments may not be utilised as systematically for laws originating from the EU. However, the timing between the publication of the European Commission's impact assessment and the beginning of the negotiation can make it difficult for EU Member States to undertake an analysis of domestic impacts of the proposed rules (see Box 3

Box 2. Selected Member States' use of the European Commission's consultation results during the transposition stage

Slovenia uses the results of the European Commission's consultation (including the assessment of the EU directive and reasons for adoption) for preparing the legislative proposal with which the European directives are transposed into national legislation.

In **Austria**, the results of the Commission's consultation processes can be integrated into the materials used to draft laws, e.g. by giving reasons and explanations for a draft piece of legislation.

In addition to use in transposition, **Croatia** uses the results of the European Commission's consultation including impact assessments and opinions/recommendations of the Regulatory Scrutiny Board during the preparation of national opinions regarding EU regulations.

Source: Indicators of Regulatory Policy and Governance Survey 2021.

). Furthermore, EU Member States can use the impact assessment produced and published by the European Commission and which provides complementary evidence on the legislative proposal to inform their negotiating position.

Box 3. The timing difficulty during the negotiation stage

The main difficulties countries report on the interface between the EU and the national processes is the length of time it would take for EU Member States to analyse and quantify the domestic impacts of the EU regulation.

Even though the assessment of expected impacts of proposed regulations is crucial in order to carry out evidence-based and well-informed decisions, conducting a more in-depth analysis may not be always possible at the negotiation stage. Time is a variable that is affected by administrative challenges, i.e. how EU affairs are processed with their own deadlines. The deadlines may or may not allow for time invested in in-depth RIA and stakeholder engagement.

Evidence provided by some EU Member States suggests that the issue of timing creates friction in the system – there are instances where analytical time to produce quantification of costs or subject RIA content to stakeholder scrutiny is inconsistent with political timing. In addition, it may often be the case that the nature of an EU proposal is uncertain, which makes it difficult to undertake analysis. The inability to carry out RIA can, for example, lead to difficulties optimising future burdens, and the timing pressures may also generate analytical capacity gaps.

Experience of the European Parliament indicates that time constraints also pose a challenge to its use of regulatory management tools, as the Parliament's impact assessment work must not delay the legislative process. This is particularly true for assessing the impact of major amendments put forward by the European Parliament.

Source: Indicators of Regulatory Policy and Governance Survey 2021; Radaelli et al. (unpublished^[5]); OECD (2022^[6]).

Over 80 percent of EU Member States have reported using the European Commission's impact assessment as input to inform their national negotiating position for the development of EU directives and regulations, although few report doing so systematically (Figure 5). Using the information provided in the European Commission's impact assessments is an especially relevant "low-hanging fruit" for the EU Member States that do not undertake their own analysis, as this may be the only source of evidence that they can use when developing their negotiating position. Using the results of domestically carried out RIA as well as those carried out by the European Commission can help countries form a comprehensive

negotiating position to inform better decisions by taking into account robust and available information on the impacts of a proposed regulation.

Data indicates that Member States that joined the European Union since 2004 tend to more systematically use the results of the European Commission's impact assessment to inform their negotiating position. All Northern and Western European countries at least sometimes use the results of the European Commission's impact assessment.

Figure 5. A majority of EU Member States use the European Commission's impact assessments during negotiation but few do so systematically



Note: Data is based on 27 EU Member States.

Source: Indicators of Regulatory Policy and Governance (IREG) Survey 2021.

The use of RIA to inform the transposition of EU directives

Summary points

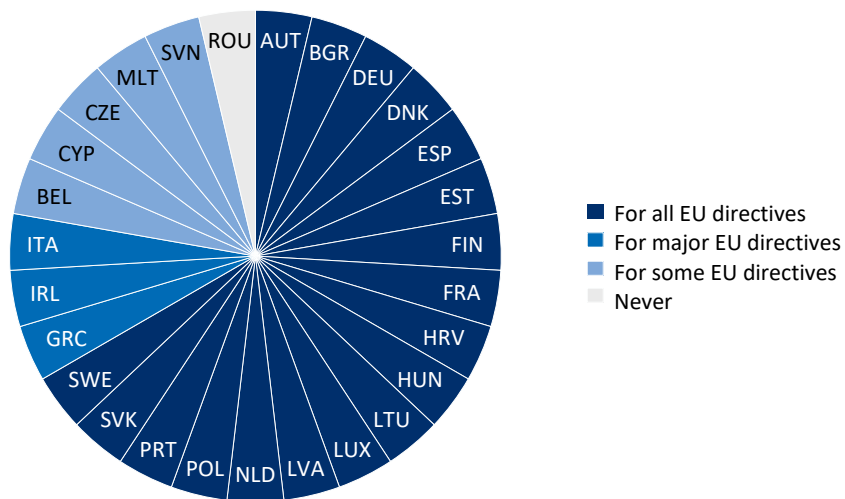
- Regulatory impact assessment is more systematically required to be undertaken during the transposition of EU directives into Member States' national law than during the negotiation stage. Almost all EU Member States are required to assess the impacts of EU directives when transposing them.
- Approximately half of EU Member States report using the results of the European Commission's impacts assessment to inform the transposition of EU directives. Similarly to the use of the European Commission's consultation results, EU Member States use less often the European Commission's impact assessment at the transposition than at the negotiation stage.
- Data suggests that EU Member States that joined the European Union since 2004 tend to use the results of the European Commission's impact assessments at the transposition stage more often than older and founding Member States. Data also indicates that from a geographical perspective, most Western European Member States are least likely to utilise the European Commission's impact assessments.

Transposition is the very last step of the EU legislative process for directives and takes place after the adopted policy is published in the Official Journal of the EU. EU Member States are bound by the terms of the directive as to the result to be achieved and the deadline by which transposition should take place

(European Commission, 2018^[7]). They can however use the transposition process to add national provisions that go beyond the actual requirements set-out in the directive.

Requirements to assess the domestic impacts of directives when they are transposed into domestic law are well established across EU Member States. Almost all countries have formal requirements to conduct RIA when transposing at least some EU directives into domestic laws and this has not changed since 2017. In fact, more than three-quarters of EU Member States systematically require RIAs to be carried out during the transposition stage of EU directives (Figure 6). Only **Romania** does not require RIA to be carried out during the transposition of EU directives, as EU directives are explicitly exempted from RIAs at the transposition stage (Article 6 of Government Decision No. 561/2009). Examples of RIA practices for the transposition of EU directives in a sample of EU Member States is provided in Box 4.

Figure 6. Most EU Member States systematically require RIAs to be carried out when transposing EU directives into national law



Note: Data is based on 27 EU Member States.
 Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

Box 4. Examples of RIA practices at transposition stage

The RIA process in **Estonia** kicks off when the deliberations of the Council of the European Union are close to adopting a legal text. The responsibility lies with the Department of Justice and the Government Office. The process follows a series of steps that are carried out by default, meaning that there are no thresholds or exceptions.

In **Denmark**, the Danish Business Regulation Forum advises the government on the implementation of new business-oriented EU legislative acts by commenting on the relevant ministry’s Implementation Plan. The responsible ministry must prepare Implementation Plans for all EU legislation (directives, regulations, implementing legislation and delegated acts) that have consequences for business and that must be implemented in Danish law. The Implementation Plan must be drawn-up immediately after the adoption of the legislative act and its publication in the Official Journal of the European Union. In their implementation scheme, the ministries have to explain how they have taken the recommendations from the DBRF into account or why it has chosen not to do so.

In **Finland**, the decision-making process during the transposition stage of EU legislation follows the same procedural steps as legislative initiatives originating domestically. While the RIA follows the standard procedure and format, it takes the European Commission's impact assessment as a starting point. Therefore, the RIA is to a certain extent less elaborated and comprehensive than a RIA on a domestically originated laws, since for example, the problem definition is already defined by the requirement to transpose an EU directive, or directly implement a regulation. On the other hand, the RIA is more elaborated than the impact assessment accompanying the EU Letter

The **Italian** government prepares an annual bill (the "*European delegation law*") that contains the provisions of legislative delegations necessary for the transposition of the directives and other acts of the European Union into Italian law with further legislative decree. This bill contains an appendix with all the legislative decree. Each legislative decree contains the national impact assessment. There is no difference between RIAs of EU legislation and other RIAs. The RIAs of EU legislation are carried out by individual departments and Ministries. They are scrutinized by the central RIA unit which could provide a negative opinion. In that case the opinion is integrated in the documents supporting the final decision of Council of Ministries.

The process in **Poland** is equal to the legislative process of domestic originated drafts acts. The leading ministry submits the application for the introduction of the draft act to the Government Work Plan. The RIA should be attached to that application.

The responsibility for transposition in **Slovak Republic** is allocated by the Government Office. Key stakeholders are consulted during the commenting procedure on the preliminary position which is available at the Slov-lex portal. Relevant European Commission regulations (mainly of higher importance) are subject to impact assessment during the preliminary commenting procedure governed by the Ministry of Economy of the Slovak Republic. The impact on public finances, budget, and businesses, social and environmental impact must be indicated in the "preliminary position" paper.

Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021 and Radaelli et al. (unpublished^[5]).

When EU Member States assess the domestic impacts of directives, they usually follow the same processes as when analysing the impacts of their respective domestic proposals. As transposing EU directives involves amending existing or developing new domestic regulations, the transposition in EU Member States almost always goes through the same legislative process as laws originating domestically. As such, it is understandable and logical that the RIA requirements for laws originating at the EU level are identical to those originating domestically. The depth of the analysis in some sections may differ as policy makers have less flexibility to improve the policy when transposing EU directives (OECD, 2020^[8]). For example, the assessment of the baseline 'do nothing' options or of alternative non-regulatory options may be less in-depth for RIAs accompanying EU legislative proposals because the decision to regulate has already been made. When fewer policy options or instruments are available, even if the impacts may be quite significant, policy makers have less flexibility to improve a policy at this stage. Despite this, governments should be mindful that EU directives or other supranational instruments might still have a degree of flexibility in their implementation (OECD, 2020^[8]).

EU Member States generally assess the impacts of EU legislation on national economies and societies once the legislation is adopted instead of during the negotiation when it can still be amended. Comparing the number of EU Member States with requirements to carry out RIA to inform the negotiation (Figure 4) versus those with a requirement to carry out RIA during transposition (Figure 6) suggests that countries use RIAs at a later stage in the legislative process. This issue was highlighted in the previous edition of the Better Regulation across the European Union report (OECD, 2019^[3]) and has not evolved since. The flexibility offered by directives is limited, as the requirements and provisions from the EU directive are already set and Member States are under strict obligations to implement them. The fact that domestic

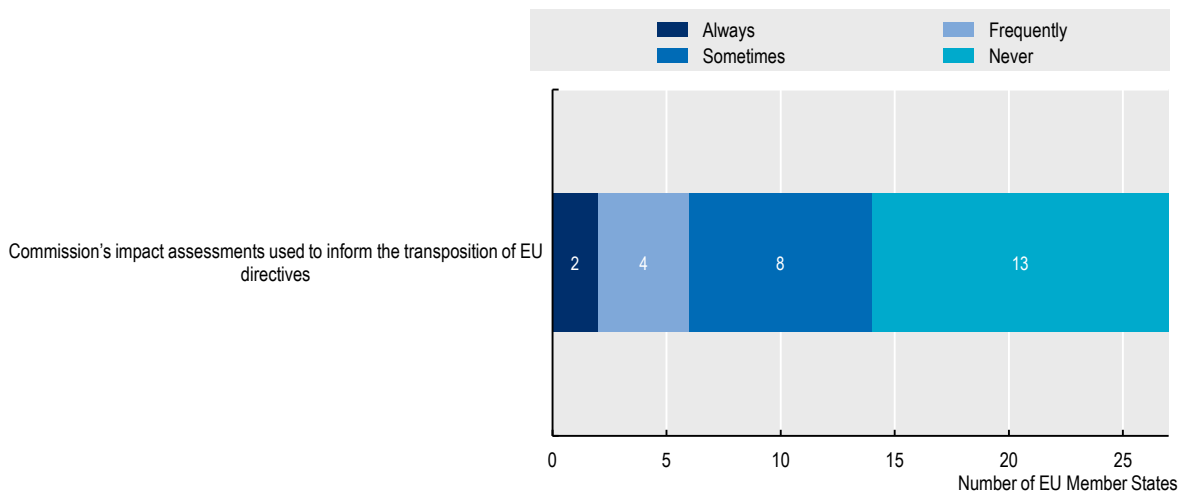
impact assessments are more systematically undertaken once the EU legislative text is adopted raises concerns on the capacity of EU Member States to ground the negotiation and ensuing amendments of EU directives on solid evidence regarding the regulatory impact on domestic citizens and businesses.

EU Member States could use the European Commission’s impact assessments when assessing the domestic impacts of the adopted directive, as they continue to provide helpful information and evidence to the domestic policy maker in charge of transposing the EU directive. There is value in using the European Commission’s impact assessment as a source of information when EU Member States are assessing the impact that a directive has on the domestic economy and society. Whilst the European Commission’s impact assessments provide evidence aggregated at the EU level, they still contain crucial information on the types of costs and benefits that EU Member States collectively can expect to face – this information can be aid EU Member States to develop their own assessment of the domestic impacts.

Approximately half of EU Member States report using the results of the European Commission’s impacts assessment to inform the transposition of EU directives (Figure 7). Generally, Member States occasionally use the results of Commission’s impact assessment, rather than on a systematic basis (Figure 7).

EU Member States that joined the European Union since 2004 tend to use the results of the European Commission’s impact assessments at the transposition stage more often than older and founding Member States. From a geographical perspective, there is no clear distinction in the share of Member States using the European Commission’s impact assessments to inform the transposition of EU directives; although, data indicates that most Western European Member States are less likely to utilise the European Commission’s impact assessments.

Figure 7. Only six EU Member States report systematically using the European Commission’s impact assessments to inform the transposition of EU directives



Note: Data is based on 27 EU Member States.
 Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

Only **Malta** and **Poland** report to always use the results of Commission’s RIA to inform their transposition of EU laws. For example, in **Malta**, the results of Commission’s analysis and findings are used in comparing with Malta’s national situation and to provide options for strategic direction and assist regulators with the implementation of EU laws. In **Poland**, the draft legislative act and staff working documents are used to assess the impact on the national economy.

Use of *ex post* evaluation in the EU legislative process

Summary points

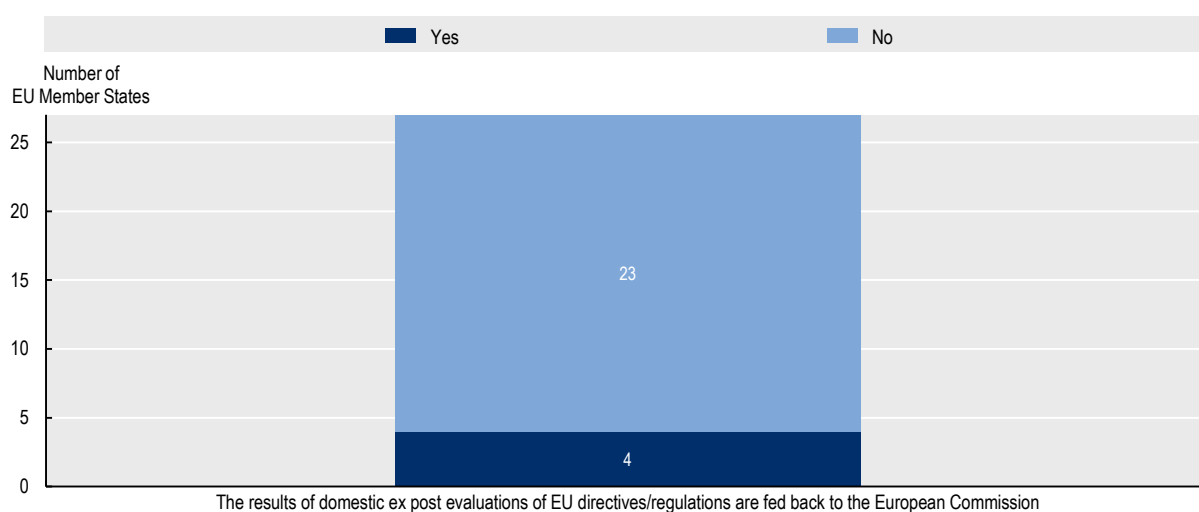
- Despite the fact that around 85 per cent of EU Member States undertook at least one *ex post* evaluation in the past five years, less than 15 per cent shared their results with the European Commission. As a transparency measure, reviews should generally be published and shared with relevant parties.

Ex post evaluations help to assess whether laws are working as originally intended and, if not, to propose improvements. Left unchecked, the stock of laws will continue to grow unabated creating unnecessary red tape for citizens and businesses. Moreover, evaluations operate as an important check to ensure that laws remain justified and in the public interest. In turn, this helps to build community support for laws and boost trust in government action as it increases the level of transparency and accountability (OECD, 2021^[9]).

Ex post evaluations of existing EU directives or regulations undertaken by the European Commission as well as EU Member States can contribute to better policy making across the European Union. Given that the vast majority of EU Member States have undertaken some evaluations, coupled with the evaluations of the European Commission, there is an available evidence base that can help to improve the rules of both Member States and the European Union more generally.

The opportunity to learn from evaluations is not limited to the policy ministry conducting the review. Results can be widely applicable. Part of the learning process is to integrate results into future policy making and more precisely in any subsequent RIAs. Yet, currently sharing results beyond an individual jurisdiction is rare (Figure 8). Despite the fact that around 85 per cent of EU Member States undertook at least one *ex post* evaluation in the past five years, less than 15 per cent shared their results with the European Commission where the evaluation involved areas of EU legislative competencies. As a transparency measure reviews should generally be published and shared with relevant parties. However, EU Member States that do not feed the results of their *ex post* evaluations of EU directives/regulations with the European Commission, mostly do not do so because they do not have EU directive review mechanisms, or because they rarely carry out evaluations.

Figure 8. It is rare that EU Member States share the results of their *ex post* evaluations of EU directives/regulations with the European Commission



Note: Data is based on 27 EU Member States.
 Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

Use of the results of the European Commission’s ex post evaluation by the Member States

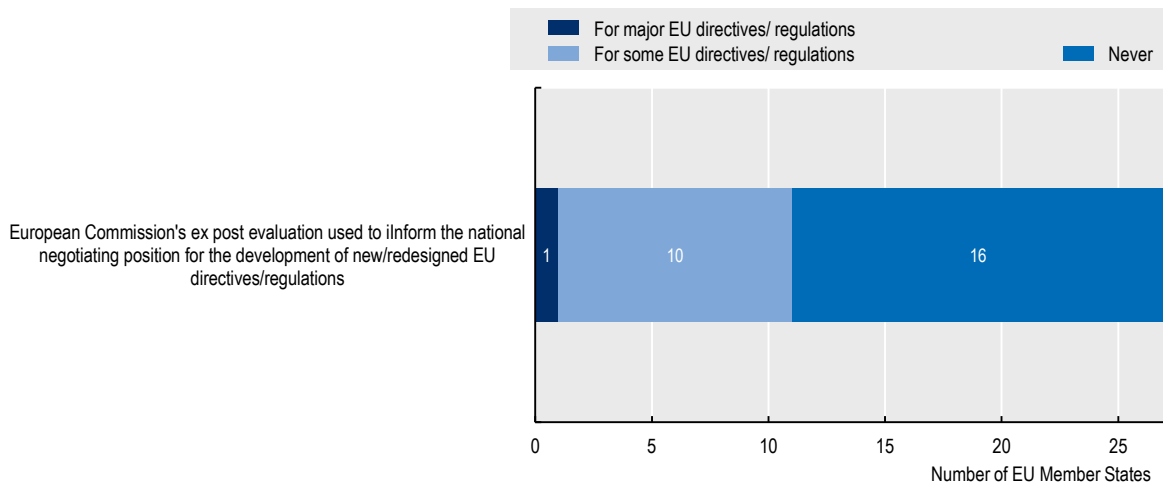
Summary points

- When the European Commission undertakes *ex post* evaluations, the majority of EU Member States do not use the results to inform either their negotiation position or for the transposition of newly made EU directives.
- During the negotiation stage, the old and founding EU Member States more commonly use the results of the European Commission’s *ex post* evaluations than Member States that joined the European Union since 2004. On the other hand, EU Member States that joined the European Union since 2004 are more likely to use European Commission’s evaluations to inform the transposition of new or redesigned regulations.

The European Commission has an institutionalised approach to conducting *ex post* evaluations. Under the “evaluate first principle”, the European Commission utilises evaluations to improve the existing regulatory environment and inform impact assessments. The European Commission also in some cases utilises evaluations ‘back-to-back’ with its impact assessment as part of the same process when it proposes legislative changes. Such an approach provides information and evidence about the existing regulatory environment, the extent to which what has occurred was originally expected, and if not (or if the originally envisaged are not currently being attained), allows the Commission to put forward new regulatory directions in the form of a new impact assessment.

There are 11 Member States that report using the results of European Commission’s *ex post* evaluations to inform their national negotiating position for the development of new or redesigned EU directives/regulations (Figure 9). **Slovenia** is the only country that engages in this practice systematically. Data shows that the old and founding EU Member States more commonly use the results of the European Commission’s *ex post* evaluations at the negotiation stage than Member States that joined the European Union since 2004.

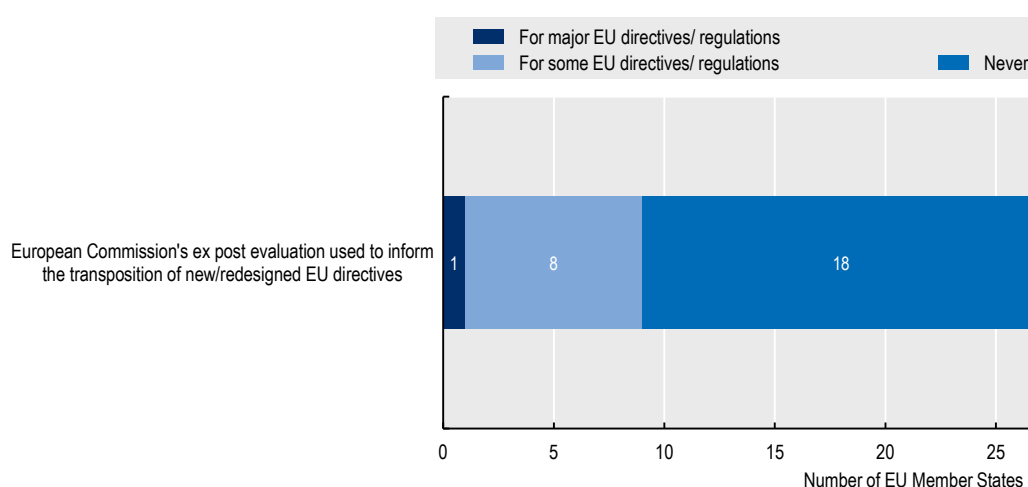
Figure 9. EU Member States do not systematically use ex post evaluation of the European Commission to inform their national negotiation position



Note: Data is based on 27 EU Member States.
Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

Nine EU Member States reported using the results of the European Commission's evaluations to inform the transposition of new or redesigned EU directives (Figure 10). The results of the European Commission's evaluations at the transposition stage are most commonly used by EU Member States that joined since 2004. The relatively low uptake may be partially explained in situations where the European Commission undertook a 'back-to-back' review and any resultant new European Commission's proposals and supporting material were made directly available to EU Member States through such avenues.

Figure 10. EU Member States do not systematically use *ex post* evaluation of the European Commission to inform the transposition of new/redesigned EU directives



Note: Data is based on 27 EU Member States.
Source: Indicators of Regulatory Policy and Governance (iREG) Survey 2021.

It stands to reason that EU Member States utilise the European Commission's evaluations more at the negotiation stage than at the transposition stage. During negotiation, with the Commission having identified problems or difficulties with the operation of the law, have then suggested modifications in the form of either an amendment or a new proposed rule. EU Member States may then rely on the European Commission's identified issues and stated future direction to inform their own negotiating position. Since the focus of the transposition stage is more centred on implementation, the original rationale as identified in the evaluation may be of less direct relevance to individual EU Member States. Moreover, Member States are likely to focus on any national additional provisions included as part of the transposition process. The focus on such provisions (to the extent that they are included) helps to ensure that all relevant impacts are included in any ensuing analysis by Member States.

Discussion questions

- What kind of impact analysis and stakeholder engagement could EU Member States conduct to prepare their negotiation of EC proposal? Could they alternatively rely on the Commission's work in this regard?

- Why do most EU Member States not systematically use the consultation and impact assessment prepared by the European Commission as input to inform the transposition of EU legislation?
- How can EU Member States help facilitate and promote the more systematic use of regulatory management tools by the Council of the European Union and the European Parliament? How can the European Commission facilitate and promote this?
- How can EU Member States better utilise evaluations undertaken by the European Commission? To what extent could these evaluations be used to better inform Member States' negotiation and transposition work? Alternatively, how can the EU Member States evaluations feed better into the Commission's work?

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