



Position Paper

September 2014

Response to the consultation on the 2014 revision of the Commission's Impact Assessment Guidelines

EUROCHAMBRES acknowledges the steps taken by the Commission towards embedding the impact assessment process within its functions and the efforts made over the recent years to improve its quality. Nevertheless, the current impact assessment system has a number of deficiencies, which the revision of the Impact Assessment Guidelines addresses only partly. EUROCHAMBRES counts on the new Commission Vice-President for Better Regulation, Mr Frans Timmermans, to continue the reform agenda and go further in achieving an evidence-based approach to policy-making, which will ensure simple, understandable and proportionate regulatory decisions for European businesses. EU legislation and policies must create opportunities for companies instead of obstacles through the addition of unnecessary new burdens to the stockpile.

General comments

EUROCHAMBRES welcomes the Commission's consultation on its new draft Impact Assessment (IA) Guidelines. Properly assessing the impact of future legislation and policies is essential to businesses, particularly SMEs, which have to comply with the law and the rules on a day-to-day basis. The Commission's integrated approach is an important policy tool as it evaluates the different kinds of impacts (economic, social and environmental), while focusing on both the costs and benefits.

EUROCHAMBRES is pleased with the improvements contained in the new draft guidelines, notably the clarity of the document and the distinction between the research work and the communication of the results of the process in the IA report. This should lead to a more digestible report of maximum 30-40 pages. The preparation of an executive summary of maximum 2 pages is also positive. We believe that it should respect rigorous template guidelines focusing notably on showing evidence of what type of EU measure is required and why, besides clearly presenting quantitative figures for the costs, benefits and administrative burdens of the different policy options.

However, we are concerned that the "Think Small First" principle is hardly mentioned in the revised guidelines and strongly disapprove of the dilution of the reference to the SME test, which should be a key component of the IA. Policies should be designed that take into account the majority of businesses— i.e. SMEs.

We also question the objective pursued with the revision of the IA guidelines. It seems that the focus has been put more on simplification of the general requirements rather than reaching higher levels of quality. The new guidelines contain little guidance about the means to identify and measure impacts using existing

analytical tools and methods. Furthermore, little emphasis is placed on quantification, the absence of which is the greatest barrier to good quality and evidence-based evaluation.

These shortcomings represent an important pitfall, which will make it difficult to achieve the needed quality leap in policy-making. EUROCHAMBRES encourages the Commission to revisit its draft and address these deficiencies.

Scope

EUROCHAMBRES believes that the scope of coverage of proposals requiring an impact assessment leaves worrying scope for interpretation. The fact that all types of initiatives can be subject to an IA is to be welcomed (i.e. legislative and non-legislative initiatives, delegated acts and implementing measures). However, the conditions to fulfil are too generic (i.e. "*choices among noticeable different policy alternatives*" and "*significant direct economic, environmental or social impacts expected*") and open the door to discussions on whether an IA is needed. In the end, it remains at the DG's discretion to define which initiatives need to be accompanied by an IA, especially that there is no longer the requirement to conduct an IA for the initiatives of the Commission's Legislative Work Programme.

Also, EUROCHAMBRES questions the addition of the new condition: "*choices among noticeably different policy alternatives*". This provision allows the Commission to free itself from the IA requirement if it believes that there is no alternative policy option. The identification of policy alternatives should remain a key analytical step of the IA when assessing the various ways to achieve the stated policy objective.

EUROCHAMBRES therefore calls for **clear cut criteria** and the establishment of a **transparent process** to determine the initiatives requiring an IA. The roadmap should be the basis on which a decision as regards the need and depth of an IA is made. Today, the roadmaps are used as a communication tool rather than a tool for making a decision and there is no real control over the quality of the roadmaps. The link between the roadmap and the impact assessment needs to be strengthened by introducing a quality check of the roadmaps, which would notably verify the justification given for conducting or not an IA. This control could be performed by the Secretariat General of the Commission or the Impact Assessment Board (IAB).

For all initiatives – legislative and otherwise - the **principle of proportionate analysis** should apply. This would allow focusing the resources and efforts on the most relevant initiatives.

Delegated acts and implementing measures should always be subject to an IA when substantial economic, social or environmental impacts are expected according to the results of the roadmap. Few impact assessments are currently carried out for these measures, although they might have major impacts on businesses, in particular SMEs, as they regulate technical issues and often issues beyond that. EUROCHAMBRES regrets that **no detailed guidance** is given for such initiatives in the new guidelines. The key questions noticeably differ from ones contained in the general IA guidelines given the technical nature of these measures. For the delegated acts with significant impacts, the Commission should check whether the planned measure is an important amendment to or a change of the legislative act. In this case, the delegated act would be the wrong instrument and the legislative act should be changed.

Generally, those affected by the provisions in the delegated acts and implementing measures learn about them only when they are published in the Official Journal. Consulting European and national business associations on the draft delegated acts and implementing measures having impacts on businesses, in particular SMEs, would help raise awareness of these measures and increase their legitimacy, as well as quality.

EUROCHAMBRES also notes that the Commission Guidelines on Implementing Acts (SEC(2012)617) do not mention that an impact assessment is required in the case of expected significant economic,

environmental or social impacts. This reference should be added as it is the case in the Commission Guidelines on Delegated Acts (SEC(2011)855).

Subsidiarity

EUROCHAMBRES welcomes the strong focus attached to respecting the principle of subsidiarity. Businesses want rules that make sense and deliver benefits without imposing unnecessary burden. For a better acceptance of the EU and any new EU legislation, it is essential to concentrate on the areas and problems which can only be solved at EU level.

EUROCHAMBRES considers that annex II.C is well structured and describes precisely the procedure for checking compliance with the principle of subsidiarity. EUROCHAMBRES particularly welcomes the importance given to the consultation of stakeholders in this field, while stressing the necessity to include **robust and detailed subsidiarity justifications in the IAs**, particularly as regards the following items:

- **Legal basis.** It is essential to thoroughly assess the EU's right to act and identify the correct legal basis in the Treaties, particularly when there is scope for interpretation. The choice of a legal basis is important as it determines the procedure for adopting a proposal. The Internal Market legal basis (Article 114 TFEU) is used for numerous initiatives, even in cases where there is no obvious link. For the Commission, this article is attractive as it doesn't require unanimity in the Council and the consent of the European Parliament. In Justice and Home Affairs in particular, the Commission's approach to law-making appears to be very inclined to enlarge its areas of responsibility.
- **Necessity test and added value test.** The Commission must examine in more detail whether the policy objective(s) can(not) be sufficiently achieved by the Member States. The description and assessment of existing national measures are sometimes incomplete and outdated. Furthermore, the analysis as regards EU added value is often superficial. Distortions of competition and obstacles to free movement have to be demonstrated with sufficient evidence. Legal diversity is inherent in the EU and there is no reason for harmonization when legal differences do not cause any specific disadvantage to the single market. Moreover, the problem is sometimes caused by a lack of enforcement of national law. In this case, there is no need for harmonisation. Standard formulations and circular reasoning must be avoided.
- **Delegated acts.** Compliance with the principle of subsidiarity should be verified instead of referring to the relevant legislative act. It would enable to check at an early stage whether the planned measures correspond to the frame defined in the legislative act.

SME test

EUROCHAMBRES strongly disapproves of the dilution of the reference to the SME test in the revised guidelines. This represents a backward step from the current situation and is certainly not in line with the repeated commitments made by the Commission to reinforce the application of the test¹ and respond to the needs of SMEs². The SME test is a crucial element of the IA that the Commission services cannot neglect considering the dominant role of SMEs in the economy and disproportionate effect of regulatory costs and administrative burdens on them. A well conducted SME test is a pre-condition for evidence-based policy-making and a decisive component to smaller businesses' capacity to operate without unnecessary regulation.

EUROCHAMBRES asks the Commission to provide a **stronger focus on SMEs in the new guidelines and to reincorporate the notion of SME test**. It should be compulsory to analyse whether SMEs are

¹ Communication from the Commission "Review of the Small Business Act for Europe" (COM(2011)78; Report from the Commission "Minimizing regulatory burdens for SMEs" (COM(2011)803)

² Communication "Smart regulation – Responding to the needs of small and medium-sized enterprises" (COMM(2013)122)

disproportionately affected or disadvantaged compared to large companies and if so, options should cover alternative mechanisms and flexibilities that might help SMEs to comply. Furthermore, it must be demonstrated that the IA has been prepared in accordance with the “Think Small First” principle, with the **results of the SME test annexed to the IA report**.

EUROCHAMBRES would also welcome the elaboration of a **methodology to carry out an SME test**, which would go beyond the questions listed in the current annex 8 to the IA guidelines, involving input from both business representatives and academics.

Option identification

The IA is not a tool to collect proof to support preliminary policy preferences. All options, including not regulating, must be considered and thoroughly analyzed. As “less can be more” when it comes to legislation, EUROCHAMBRES believes that it is appropriate to **analyse first** whether the “do nothing” option and non-regulatory means such as self-regulation and voluntary agreements, can reach a set objective. In this respect, more guidance should be provided in the guidelines on alternative policy instruments, notably self- and co-regulation, in order to raise awareness and understanding of these instruments.

Furthermore, EUROCHAMBRES takes the view that **the application of the principle of mutual recognition for goods and services** should be listed among the options to be considered in the analysis. Not everything should be regulated in detail in the internal market. The principle of mutual recognition is viable and sometimes preferable option that should be given equal consideration. It facilitates the free movement of goods and services even where the national provisions of the individual Member States are not harmonised. EUROCHAMBRES believes that it is a pragmatic and effective tool for economic integration and helps companies to penetrate markets in other Member States. The principle of mutual recognition and enhanced market supervision should therefore be given adequate consideration as one of the policy alternatives available.

EUROCHAMBRES reiterates its reservations as regards the Commission's approach to a priori exempt micro-enterprises from the scope of any proposed legislation unless a strong case is made to include them, as mentioned in the revised guidelines on page 14. This approach contradicts the basic principle that policies should apply to and be designed for all companies, including micros. The potential benefits of exemptions for micro-enterprises should be considered on a case-by-case basis as a consequence of the findings of the IA and not as a starting point. EUROCHAMBRES believes that the priority should be given to the implementation of the Think Small First principle in the new guidelines, notably through the effective application of the SME test. This will ensure that the benefits of forthcoming legislation outweigh the costs for the large majority of businesses, i.e. SMEs, thus avoiding the need to actively push for exemptions.

Additionally, it is important to check the suitability of all possible policy options for digitalisation. No EU legislation should be launched without checking how it can be administered electronically.

Impacts

EUROCHAMBRES considers that the revised guidelines and annex II F ask the right questions to assess the impacts of different policy options. However, the list of questions in the annex is very broad and would need to be streamlined or should distinguish between the more and less important questions to ensure an appropriate IA process.

EUROCHAMBRES is however concerned that the revised guidelines provide **hardly any guidance about the measurement and assessment of specific impacts** although well-established analytical instruments and methods exist. For instance, references are made to the issues of cumulative costs, compliance costs

and enforcement costs but no guidance is provided about how to assess these burdens. Also, the use of the EU Standard Cost Model to quantify the administrative burden placed on businesses is no longer a requirement.

Moreover, there is no reference to the existing thematic guidance documents developed by various DGs. The link between them and the new IA guidelines is unclear. Are these documents binding? Will they be dropped or revised? This creates confusion, while illustrating a lack of coherence which weakens the usefulness of these supporting documents. EUROCHAMBRES believes that the Competitiveness Proofing Toolkit and the SME test should be an integral part of the IA.

Considerable emphasis is placed on the transparency with which results are presented, estimations explained and limits acknowledged, but not on strengthening the process for gathering quantitative data – especially on SMEs. The revised guidelines seem to focus more on the obstacles rather than the opportunities saying that “*assessing impacts can be particularly challenging at the EU level*” and insisting on the necessity to “*be frank about the limitations*”. This is particularly worrying considering that the lack of quantitative data does not allow for sophisticated assessment of the impact and is the most significant barrier to good quality and evidence-based evaluation. It is essential to put a stronger focus on quantification in the revised guidelines, underlining that **quantification and monetization must be the norm rather than the exception**. In addition, **specific guidance should be provided on how to quantify and monetize costs and benefits**.

Specifically, **more emphasis should be given to the cost-benefit analysis for SMEs**. As shown in the 2013 EUROCHAMBRES SME Test Benchmark³, analysis of the impact on SMEs remains often largely superficial during Commission IAs and relies to a great extent on qualitative information, while quantification is key if the magnitude of the impact on SMEs is to be factored in.

Greater attention should be given to the evaluation of compliance and enforcement costs for businesses, citizens and administrations. To date, the focus has been on the reduction of administrative burdens, yet this represents only 1% of the total regulatory burden of an SME. Analysis of alternative measures to reduce compliance costs, notably by using Information and Communication Technologies, should be considered.

Moreover, EUROCHAMBRES believes that the member states should be systematically called upon to provide reliable data, notably the EU countries that have an IA system in place.

Impartiality

Impartiality is among the fundamental principles of IA. It is the role of the Impact Assessment Board (IAB) to check the compliance with the IA guidelines and ensure that the IA is unbiased. Considering the importance of the monitoring to ensure quality IAs, EUROCHAMBRES regrets that there is no longer a reference to the IAB in the new guidelines.

To ensure that the IA is not biased, EUROCHAMBRES believes that the IAB should **publish and consult stakeholders on the draft IA reports** with the objective of identifying factual errors, missing or misleading data. This check performed by stakeholders would be purely based on facts and figures to ensure that the necessary evidence to inform political choices has been gathered and is present in the IA report.

Furthermore, EUROCHAMBRES considers that **IAB decisions should be binding**. The fact that the IAB cannot put any policy proposal on hold is a real flaw in the Commission's IA system. No proposal should be allowed to proceed to inter-service consultation unless the impact assessment is approved by the IAB.

³ EUROCHAMBRES SME Test Benchmark 2013, http://www.eurochambres.eu/objects/3/Files/SME_Test_Benchmark_2013-2013-00787-01.pdf

Additional time should then be granted to the Commission services to implement the recommendations of the IAB.

Nevertheless, even though the establishment of the IAB has reinforced the IA process within the Commission, EUROCHAMBRES underlines inherent limitations in the IAB's capacity to provide neutral opinions on draft IAs given its set up – i.e. it is a Commission body and its members are high level officials appointed by the Commission President. Ultimately, an **independent impact assessment body** should be established, supported by and available to the three EU institutions to guarantee external scrutiny of IAs from across the institutions and staffed with independent experts. This would have the added advantage of supporting the IA process throughout inter-institutional negotiations.

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