

FIT FOR FUTURE Platform Opinion

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	<p>The SME test analyses the possible effects of EU legislative proposals on SMEs. By assessing the costs and benefits of policy options, it helps implement the 'think small principle' and improve the business environment. BusinessEurope, Eurochambres, and SMEunited have joined forces to analyse the application of the SME test by the Commission. They have analysed 26 impact assessments against the better regulation requirements to assess how the SME test has been carried out. The Platform could add additional value, bringing in evidence and experience from diverse stakeholders, regions and local communities.</p>
Have your say: Simplify!	<i>No relevant suggestions on this topic have been received from the public.</i>
Commission follow up	REFIT Scoreboard: <i>pending</i> Annual Burden Survey: The EU's efforts to simplify legislation (2023)

SUGGESTIONS SUMMARY

- Suggestion 1:** Introduction of a specific part dedicated to the SME test
- Suggestion 2:** Reinforce the analysis of the indirect effect of legislation
- Suggestion 3:** Analysis of the cumulative impact of legislation
- Suggestion 4:** Cost calculation using an example company
- Suggestion 5:** Strengthen the data collection on impacts on SMEs for their timely availability
- Suggestion 6:** Ensure that periods for public consultation allow sufficient time for reply when they overlap with vacation periods
- Suggestion 7:** Reinforcement of the role and mandate of the RSB
- Suggestion 8:** Promote ‘ex-post’ evaluations of EU law regarding impacts on SMEs
- Suggestion 9:** Assess significant impacts of implementing acts and delegated acts.

SHORT DESCRIPTION OF THE LEGISLATION ANALYSED

This opinion focuses on the application of the SME test and puts forward suggestions that can improve the adaptation, execution and application of the SME test. Even though some suggestions might hold true for or be of value to other policy areas like workers, consumers, and the environment, the scope of this opinion does not exceed that of SMEs.

Avoiding unnecessary legislative burdens – without diminishing the goals set out in legislation – on SMEs is particularly relevant as the costs of regulation often affect them disproportionately hard. This comes from the difficulty for SMEs to benefit from economies of scale, compared to large companies, but also because of the limited capacity to amortise expenses such as compliance with regulations. At the same time, regulation also plays an important role in ensuring a level playing-field among companies, since SMEs are particularly vulnerable to unfair competition from mala fide companies.

Bearing in mind that impact assessments are the basis of quality law-making with an assessment of the direct and indirect impact of legislation on all relevant stakeholders, this comprehensive exercise must be carried out diligently and with the same level of detail and accuracy with regard to every aspect, so as to ensure a balanced and proportionate legislation that delivers in the general interest. The SME test, as part of this overall analysis and equally considered in relation to the other aspects of the impact assessment, must consider the potential impact of EU legislative proposals on SMEs. As a starting point, legislation should follow the ‘think small first’ principle in order to apply to all businesses. By assessing the costs and benefits of policy options, it helps to implement the ‘think small principle’ and improve the business environment as set out in the [small business act](#), the regulatory fitness and performance programme (REFIT) and the Commission’s better regulation requirements. As part of the SME test, SMEs and SME representative organisations (business associations) are consulted to assess and possibly quantify the impact on SMEs (cost-benefit analysis) and establish mitigating measures, if needed. The SME test is an integral part of the Commission’s impact assessment process, carried out ex-ante for newly prepared legislation, and strengthened further through the 2021

revision of the Better Regulation Guidelines and Toolbox. This last revision clarified rules regarding the proportionality of SME test and also introduced the SME filter, which is a consultation process based on the input from the SME Envoys Network that helps to identify at an early stage initiatives that are likely to affect SMEs and that thus need to be analysed specifically from this angle.

Sources:

[Better Regulation Guidelines and Toolbox](#)

[Commission Communication Better regulation: Joining forces to make better EU laws](#)

[An SME Strategy for a sustainable and digital Europe](#)

[Commission Communication “Think Small First” - A “Small Business Act” for Europe, COM\(2008\) 394 final. 25.06.2008](#)

PROBLEM DESCRIPTION

Existing evidence suggest the following issues:

BusinessEurope, Eurochambres and SMEunited have presented a report on the application of the SME test across the Commission services. The authors analysed 26 impact assessments carried out between 2018 and 2022 against the 2017 better regulation requirements to assess how the SME test has been carried out.

Following the report’s findings, the regulatory time of 12 weeks for public consultations is respected in most cases but prolonged in case of overlapping holiday periods in roughly half the cases only. 69% of the proposals’ inception impact assessments/calls for evidence do take into consideration whether SMEs are affected. However, the SMEs views are not systematically reported in the impact assessments. Furthermore, the impact assessments do not pay sufficient attention to indirect impact on SMEs when considering mitigating measures. Finally, the SME test does not sufficiently differentiate the impact between sub-categories of SMEs. The heterogeneity and diversity of European SMEs should be acknowledged in European policies, as they will impact differently on microenterprises, family and "traditional" businesses, social economy enterprises, liberal professions, self-employed people and any other specific sub-groups that may have a quite different legal form and model of operation.

The Platform acknowledges the work done in the [Communication on the SME Relief package](#), which gathers several proposals made in this opinion.

Sources:

[The SME Test benchmark 2022](#)

The Fit for Future Platform has acknowledged the issues raised by the legislation concerned as follows:

Regarding: modernisation and future proofing of existing laws, including via digitalisation, the efficient labelling, authorisation and reporting obligations, the simplification of EU legislation:

The Platform has recognised the progress made in the application of the SME test. Despite these efforts, the Better Regulation Guidelines are not applied consistently by all Commission

services. The Platform concluded on a set of suggestions to improve the SME test and ensure that each Directorate General carries it out consistently and for every legislative proposal that should be accompanied by an impact assessment, although the impact of every legislation should be analysed. In this document the Platform suggests concrete measures that could be swiftly implemented. The objective is therefore to build on what already exists and improve the efficacy of the SME test.

If relevant, specific issues on the local and regional level:

The Platform remarks that applying the SME test is first and foremost a primary responsibility of each DG of the European Commission with engagement of all relevant stakeholders. Moreover, the European Commission along with the European Parliament and the Council should also ensure the proper implementation of the Interinstitutional Agreement on Better Law making. The Agreement sets out the institutions' commitments to deliver high-quality EU legislation that is efficient, effective, simple and clear, and that avoids overregulation and unnecessary burdens for businesses, especially SMEs. Likewise, the Better Regulation Guidelines¹ state that "better regulation" is a shared commitment of all EU institutions.

SUGGESTIONS

Suggestion 1: Introduction of a dedicated part in impact assessments dedicated to the SME test

Description: The Better Regulation Guidelines state that the impact assessment report must include the assessment of impacts on SMEs "*with a reference to the result of the 'SME test'*". In their report, BusinessEurope, Eurochambres and SMEunited conclude that out of 26 impact assessments, only 38% of the reports included one or more sections presenting the SMEs' views. Proper parts dedicated to thoroughly assessing the impact on SMEs were largely absent. Information was often found scattered throughout the different documents and annexes making it difficult to consolidate information in a clear and transparent manner. Since SMEs make up the large majority of all companies in the EU, assessing the SME dimension is of particular importance to ensure that envisaged regulation can be effectively implemented and applied, thereby achieving the desired results in terms of companies' compliance, regardless of size.

A specific part dedicated to the SME test based on a template drafted by the Commission services (in ex-ante impact assessments) should be always included and cover every policy option. Such dedicated and specific part would allow the legislator to have an easier and structured access to all the relevant information for the assessment of the situation. It would also be beneficial for SMEs and their representatives to better understand the expected impact of the legislation as proposed by the Commission on their businesses.

In addition, foreseeing a dedicated part would incentivise every Directorate General to carry out an SME test with the ultimate objective to have it systematically as part of the impact assessment.

¹ [SWD\(2021\) 305 final](#)

Expected benefits: Clarity of information for a thorough analysis of the impact of legislation on SMEs.

Suggestion 2: Reinforce the analysis of the indirect effect of legislations

Description: The BusinessEurope, Eurochambres and SMEunited report shows that impact assessments do not pay sufficient attention to indirect impact on SMEs, notably when considering mitigating measures. This can lead to legislation with a disproportionate impact on SMEs and no specific measures foreseen to lessen the impact.

The Better Regulation Guidelines require the Commission services to consider mitigating measures when policy options impose a disproportionate burden on SMEs, compared to large enterprises. Any such analysis should also consider the significance of SMEs in the sectors concerned. If the indirect impact is not taken into account, SMEs can indirectly be forced to deal with legislation or the consequences of legislation not fit for them and where no mitigating measures or guidelines have been foreseen.

It can also create hurdles in the practical application of legislation by European citizens, financial authorities, investors and companies. Addressing the indirect impacts through assessment of policy coherence and trickle-down effect of legislation¹, will make European law more fit for purpose and deliver a regulatory framework tailored for entrepreneurship and growth, with the potential of also contributing to broader policy objectives as those set out by the Green Deal and the Social Pillar. The Regulatory Scrutiny Board already required the Commission services to explore more thoroughly the risks of significant unintended consequences on SMEs as well.²

However, the Platform acknowledges the difficulties linked to the quantification of the trickle-down effect and advises the Commission to duly involve SME representative and social partners in this process and to focus on qualitative indirect effects whenever needed.

For example, when SMEs are exempted from certain obligations but indirect impact is exercised through a trickle-down effect in the supply or value chain, better considering, for instance, entire supply/value chains rather than using a single company perspective in the SME test will highlight the consequences of proposed legislation on specific companies within that supply chain, and thus bring to light what will fall down on SMEs which were not part of the initial scope. Indeed, although certain legislations leave SMEs out of scope, they let the possibility to bigger companies within scope to pass regulatory burdens on to SMEs in their supply chain. More attention should be paid especially to indirect regulatory burden for SMEs, e.g. via Business-to-Business contracts.

Expected benefits: Less legislation impacting indirectly SMEs disproportionately without foreseeing mitigating measures.

Suggestion 3: Analysis of the cumulative impact of legislations

Description: As other stakeholders, SMEs, regardless of their legal form or model of operation, are not confronted with just one set of (proposed) legislation, but with different more, or less,

² This example comes from the IA carried out for the Directive on adequate minimum wages in the European Union;

cohesive sets of legislation. The information of the cumulative impact of these different cohesive sets could very well provide the Commission with a specific and detailed insight of cumulative impact of an entire body of legislation on SMEs. This may also reveal risks of incoherence across policy areas, in case different initiatives and policies pursue opposing rather than mutually supporting objectives.

We invite therefore the Commission to make use of branch and sector specific cumulative impact analyses. Cumulative impact analysis would provide stakeholders with relevant information and raise awareness among entrepreneurs and legislators. Cumulative impact analysis could also be useful for the application of the “One-in-one-out” principle and ambitions in the [SME Relief Package](#), as it would help the Commission services to identify the diverse forms of SMEs as well as areas and sectors where SMEs are faced with many burdens and where looking for potential burden reduction, seems most appropriate.

It would also provide the Commission with a comprehensive and up to date list of all the requirements in place and their specificities and allow to get a better insight into the cumulative impact of different sets of legislation.

Expected benefits: Reduction of the regulatory burdens and support to the application of the “One-in-one-out” principle.

Suggestion 4: Cost calculation using an example company

Description: The report of BusinessEurope, Eurochambres and SMEunited points out that calculating the anticipated costs of proposed legislation is not always possible for all companies in a specific branch in Europe. The Commission should always disclose as many background variables for their quantification on costs for businesses, SMEs among them, as possible. When the Commission can demonstrate its inquiry for broader data was not successful and motivate why it has not been possible to estimate costs more thoroughly, calculating the costs could take the form of a concrete example of what one company must do to be fully compliant. The Commission should work with a calculation of the costs for a single company or a limited set of companies when calculation of the costs for all companies within a branch in Europe is not possible, in order to still have an idea of the anticipated costs. While labour costs, employment and tax systems differ among Member States, examples could be included in the SME test for different types of company, such as a self-employed person, a small company, a medium-sized company and a liberal professional. Creating focus groups according to the different company sizes and estimate/calculate costs in cooperation with the companies involved therein could be an effective way to undertake calculations.

Expected benefits: Giving insights on anticipated costs to policymakers and SMEs in specific branches.

Suggestion 5: Strengthen the data collection on impacts on SMEs for their timely availability

Description: The Commission deplores the absence of data when carrying out an SME test. Early in the policy process, the Commission often lacks detailed and concrete information from

the private sector on the potential impact of legislation on SMEs. SME representatives are also struggling with institutional deadlines to gather relevant data.

In the context of its annual Work Programme, the Commission should provide the planning of surveys, studies and data needed to ensure SME representatives can plan ahead of time. This would allow organisations to better coordinate the collection of data to be shared with the Commission for its legislative work. An earlier involvement of SME representatives would improve the Commission's compliance with the Better Regulation Guidelines and, for instance, suggest tailored mitigating measures. In line with the "think small first" principle, the Commission services would be able to reflect on SME needs early in the impact assessment process.

Commission services would have to strengthen their collaboration with Member States in ensuring a timely consultation of stakeholders during the negotiations phase.

Moreover, the cooperation between the Enterprise Europe Network (EEN) and representative SME organisations needs to be further strengthened. The EEN is already tasked to collect feedback at local level on problems with the implementation of existing legislation and to carry out surveys on the impact of potential ones. In order to ensure reaching out to SMEs, such tasks need to be carried out in close cooperation with the representative SME organisations.

Strengthening the data collection could also be achieved if the Commission provides better explanation on how it has taken into account stakeholders' views or not, and why.

A more consistent application of the different DGs of methods of consultation, including targeted ones, would provide greater transparency with regard to targeted consultations especially in the process for delegated acts.

Expected benefits: Data-based proposals with less room for shortcomings.

Suggestion 6: Ensure that periods for public consultation allow sufficient time for reply when they overlap with vacation periods

Description: BusinessEurope, Eurochambres and SMEUnited report shows that entrepreneurs in SMEs struggle to give input to proposed legislation if public consultation is done during the periods in which they usually have their vacations. Every interest group or organisation struggles to provide useful inputs due to short deadlines. The regular time period of 12 weeks should be rigorously respected as a minimum to allow for a meaningful stakeholder consultation.

The suggestion is to make use of the possibility of extension of the period of public consultation for proposed legislation ([Tool #51 of Better Regulation Toolbox](#)) when these periods coincide with periods in which SME entrepreneurs usually have their vacations or where due to holidays they have an increased level of activity.

Expected benefits: Higher yield on participation of SMEs in public consultations.

Suggestion 7: Reinforcement of the role and mandate of the Regulatory Scrutiny Board (RSB)

Description: The RSB is currently the body monitoring the correct application of the SME test. The SME-test is part of an impact assessment made by the Commission. When an impact assessment is not performed, this means automatically that no SME-test is done. The decision by the Commission not to make an impact assessment is therefore a very important one.

In too many cases impact assessments are missing in situations when performing an impact assessment and SME test seem very appropriate.

Unfortunately, the mandate of the RSB is limited to monitoring the quality of impact assessments that are actually done. It is important to extend the mandate of the RSB so that the RSB can express itself on the choice and motivations by the Commission not to perform an impact assessment and SME-test, and can raise suggestions where the impact assessment for SMEs is missing or inadequate.

Furthermore, introducing a specific chapter in the RSB's annual report, addressing the quality of SME-tests performed by the Commission, could also be included. This would stimulate a systematic scrutiny by the RSB of the quality of SME tests and would also increase the relevance of the RSB annual report for SMEs and their representatives. In the short term, introducing a quarterly report by the RSB on the application of SME-tests, should also be considered.

Expected benefits: Ensuring the proper and complete execution of SME tests and transparent communication on their execution and outcome.

Suggestion 8: Promote 'ex-post' evaluations of EU law regarding impact on SMEs

Description: Promote emphasis on SME perspective in "ex-post" evaluations and fitness checks of EU law in order to assess whether obligations for SME (for instance report obligations) are still necessary or adequate, considering for example technological evolution or other changes or new approaches that may enable simplification or reduction of said obligations or procedures, while maintaining existing protection standards and their effective enforcement and, therefore, reduce unnecessary burdens. In its rolling evaluation plans, the Commission could also explicitly annotate which of the evaluations are of particular importance for the SMEs.

When a legislative act reaches the date of its revision clause, the revision could include the ex-post evaluation of the impact on SMEs. Ex-post evaluations should include an analysis of the current enforcement of legislation. The result of this exercise should be used as a basis to adapt the legislation and ensure effective enforcement.

Expected benefits: Ensuring that legislative acts are adequate over time.

Suggestion 9: Assess significant impacts of implementing acts and delegated acts

Description: Implementing and delegated acts are an integrated part of the EU's legislative framework, and their scope follows from the TFEU art. 290 and 291. Delegated acts allow for

flexibility, and supplement or amend' basic EU regulations on more technical standards, while implementing acts are set out to ensure uniform conditions for implementing them. Prior to adopting an implementing act, the Commission will have to submit a draft for approval by Member State representatives in a 'comitology' committee; Parliament do not have any mandate in the process. By contrast, the Commission can adopt delegated acts after consulting national experts and stakeholders, and then submit these acts for ex post control of 2 months by the Council and the Parliament, each of which have the right of veto.

The Commission has in their current mandate introduced for example a vast number of multiple ambitious and comprehensive legislative proposals, in the political aim to reach the ambitions of the digital and green transition. This comprehensive legislative catalogue has also given mandate for the Commission to introduce multiple implementing and delegated acts.

Unfortunately, only in a few cases the tertiary legislations considers impacts on SMEs, despite the built-in approval steps by the Council and European Parliament.

Consequently, the initial scope and impact assessment (if they exist) of the basic legislation are diluted/reduced as the proportion of the implementing or delegated acts is expanded indirectly. It concerns especially SMEs which become, or risk becoming, subject to compliance requirements, that in some cases distort their competitiveness on the single market and globally.

Therefore, we suggest stricter application of the requirements of Tool #42 of the Better Regulation Toolbox³ to carry out impact assessment including an SME-test for implementing or delegated acts that may entail significant burdens for SMEs.

Expected benefits: Ensuring that significant burdens introduced through implementing and delegated act are thoroughly assessed.

¹ The trickle-down effect refers to obligations imposed to larger companies which, in practice, fall on SMEs as part of the value chain due to external pressure to provide the same level of information.

³ Impact assessments should be prepared for delegated and implementing acts when the expected economic, environmental, or social impacts of EU action are likely to be significant and the Commission has a margin of discretion regarding the content of the act;