"Think small first in the EU"? A Reality Check

EUROCHAMBRES Report on the European Commission's Application of the SME Test

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Despite recent efforts by the European Commission to improve the application of the SME test by its services, EUROCHAMBRES 2013 SME Test Benchmark reveals that the Commission is still, in the majority of the dossiers analysed, failing to 'think small first' and take into account the costs and benefits to smaller businesses in the preparation of legislative proposals.

I. Introduction

There is a strong case for addressing the shortcomings and accelerating progress in the implementation of the SME test at EU level. The SME test is a crucial element of the impact assessment that European Commission services cannot neglect considering the dominant role of Small and Medium-sized Enterprises (SMEs) in the economy and the disproportionate effect of regulatory costs and administrative burdens on them (i.e. the smaller the company, the heavier the burden). The Commission's impact assessment (IA) guidelines of 2009 make it mandatory for the Commission services to analyse the effects of legislative proposals on SMEs and consider a more flexible approach if small businesses face a higher burden than large companies. The SME test is therefore a central instrument of the EU Smart Regulation agenda, aimed at minimizing the regulatory burden of legislation that is deemed necessary at EU level, while delivering policy objectives (i.e. environmental, health & safety, etc...).

In 2011, a study from the European Parliament and EUROCHAMBRES' first SME Test Benchmark[1] highlighted the uneven application of the SME test due to significant gaps in a number of areas (e.g. collecting relevant data), which limit the effectiveness, impact and consistency of its implementation. The Commission acknowledged this weakness in its impact assessment system and committed to strengthen the application of the test,[2] notably with the introduction of the "reversal of the burden of proof",[3] whereby micro-businesses are exempted from all future EU legislation unless a strong case is made to include them.

The objective of the second EUROCHAMBRES SME Test Benchmark conducted in late 2013 was to provide updated evidence on how recent Commission IAs have integrated the specific consideration of SMEs in legislative proposals and provide concrete recommendations to address the shortcomings and accelerate progress in the application of the SME test.

II. Methodology

EUROCHAMBRES 2013 SME Test Benchmark provides a snap-shot of the quality and application of the SME test by the Commission. It is based on an analysis of the impact assessments in relation to 14 different legislative dossiers from the October 2011 – June 2013 period. These have been identified by EUROCHAMBRES in collaboration with its national Chamber members as being of particular importance to the SME community and which therefore should have been subject to a thorough cost-benefit analysis for SMEs. The screening was purely procedural, based on the Commission's own SME test guidelines[4].

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1 EUROCHAMBRES, EUROCHAMBRES SME Test Benchmark 2011 (Brussels, 2011), available on the Internet <http://www.eurochambres.eu/content/default.asp?PageID=1&DocID=3831>. European Parliament, Directorate-General for Internal Policies, Policy Department Economic and Scientific Policy, Barriers and Best Practices in SME Test Implementation, IP/A/ITRE/ST/2010-08, PE464.437, (Brussels, 2011)

2 Communication from the Commission to the European Parliament, the Council, Economic and Social Committee and the Committee of the Regions on the Review of the "Small Business Act" for Europe, COM(2011)78; Report from the Commission to the Council and the European Parliament on minimizing regulatory burdens for SMEs – Adapting EU regulation to the needs of micro-enterprises, COM(20011)803; Communication from the

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Legislative dossiers selected for the benchmark

European Commission Directorate General	Legislative proposal title and reference	Year of impact assessment
Communications Networks, Content and Technology (DG CONNECT)	Proposal for a Regulation on electronic identification and trust services for electronic transactions in the internal market	2012
Justice, Fundamental Rights and Citizenship (DG JUST)	Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data	2012
Health and Consumer Policy (DG SANCO)	Proposal for a Directive on alternative dispute resolution for consumer disputes	2011
Internal Market and Services (DG MARKT)	Proposal for a Directive on public procurement	2011
Internal Market and Services (DG MARKT)	Proposal for a Regulation on European Venture Capital Funds	2011
Communications Networks, Content and Technology (DG CONNECT)	Proposal for a Directive on re-use of public sector information	2011
Internal Market and Services (DG MARKT)	Proposal for a Directive on the recognition of professional qualifications	2011
Internal Market and Services (DG MARKT)	Proposal for a Regulation on European Social Entrepreneurship Funds	2011
Internal Market and Services/Trade (DG MARKT/TRADE)	Proposal for a Regulation on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries	2012
Justice, Fundamental Rights and Citizenship (DG JUST)	Proposal for a Regulation on insolvency proceedings	2012
Justice, Fundamental Rights and Citizenship (DG JUST)	Proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures	2012
Health and Consumer Policy (DG SANCO)	Proposal for a Regulation on Consumer product safety	2013
	Proposal for a Regulation on market surveillance of products	2013
Internal Market and Services (DG MARKT)	Proposal for a Directive on e-invoicing in public procurement	2013
Internal Market and Services (DG MARKT)	Proposal for a Directive on disclosure of non-financial and diversity information by certain large companies and groups	2013

III. Results and recommendations

The EUROCHAMBRES 2013 SME Test Benchmark reveals that the SME test is not yet an integral part of IAs despite the provision of additional guidance material on enterprise competitiveness (i.e. Competitiveness Proofing) and on micro-enterprises and the repeated commitments made by the Commission to reinforce its application over the last two years. Progress in the use of the SME test is limited, with 43% of the IA reports still failing to consider smaller businesses – compared to 56% in 2011. The quality of the SME test remains very low, with an average score of 28%. Furthermore, half of IA reports

Commission to the European Parliament, the Council, Economic and Social Committee and the Committee of the Regions on Smart regulation – Responding to the needs of small and medium-sized enterprises, COM(2013)122.

3 Report from the Commission to the Council and the European Parliament on minimizing regulatory burdens for SMEs – Adapting EU regulation to the needs of micro-enterprises, COM(20011)803.

4 European Commission, Impact Assessment Guidelines (Brussels, 2009), annex 8.4.

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Use and quality of the SME test in the selected impact assessment reports

Rank	Proposal	Directorate General	SME Test conducted	Quality level
1	Regulation on Consumer product safety/market surveillance	DG SANCO	Yes	67%
2	Directive on public procurement	DG MARKT	Yes	50%
2	Regulation on electronic identification and trust services for electronic transactions in the internal market	DG CONNECT	Yes	50%
3	Directive on e-invoicing in public procurement	DG MARKT	Yes	42%
3	General Data Protection Regulation	DG JUST	Yes	42%
4	Regulation on insolvency proceedings	DG JUST	Yes	33%
4	Directive on non-financial and diversity information by certain large companies and groups	DG MARKT	Yes	33%
5	Directive on alternative dispute resolution for consumer disputes	DG SANCO	Yes	25%
6	Directive on re-use of public sector information	DG CONNECT	No	17%
6	Regulation on the access of third-country goods and services to the Union's internal market in public procurement	DG MARKT/TRADE	No	8%
7	Directive on improving the gender balance among non-executive directors of listed companies	DG JUST	No	8%
7	Regulation on European Venture Capital Funds	DG MARKT	No	8%
7	Regulation on European Social Entrepreneurship Funds	DG MARKT	No	8%
8	Directive on the recognition of professional qualifications	DG MARKT	No	0%

from 2012 and 2013 included in the SME Test Benchmark fail to specify whether or not micro-enterprises should be excluded from the scope of the proposed legislation.

1. The main findings

- The presentation of the SME test in the IA reports is poor. Relevant information is scattered and consequently hard to locate. This raises concerns about transparency and accountability.
- Weakness in the collection and reflection of the views of SMEs, which are far from being systematic and sufficient, suggesting a "tick a box" approach in the SME test rather than a genuine intention to gather input. The involvement of SMEs in the process is low or even non-existent for 71% of the IAs analysed. SME consultations are mainly based on general consultation methods that fail to take the particular concerns of SMEs into account.
- Persistent failure to properly evaluate the impact on SMEs, with almost three-quarters of the IA reports analysed not having conducted a thorough cost-benefit analysis for SMEs. The analysis is rather superficial often based on a general assessment for all businesses and impacts are almost never quantified or monetized.
- Mitigating measures for SMEs are rarely recommended in the cases analysed and exemptions of micro-enterprises are recommended in only two cases.

From this, one can conclude that the SME test remains merely a perfunctory process rather than a valuable tool for evidence-based policy-making. Concerns arise that the decisions taken by the Commission are often based on a partial and incomplete view of the potential impact on 99% of Europe's businesses. The whole Commission strategy to reduce regulatory burdens on SMEs is significantly undermined by the fact that the SME test is not yet common practice, which often results in new rules that bring disproportion-

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ate and unnecessary burdens on those very businesses that are seeking to grow and constitute a source of jobs creation. This on-going failure to properly assess the impact of new legislation on 99% of businesses implies a continued over-reliance on the ex-post evaluation of current EU laws and screening of the *acquis communautaire* to identify burdens, gaps and inefficiencies as part of the Regulatory Fitness and Performance Programme (REFIT). Time and money is invested on repairing/fixing EU laws which have not been well designed in the first place.

There is a need for a quality leap and stronger supervision to ensure a consistent, transparent and efficient application of the SME test with the opinion of the SMEs and their representatives fully taken into account and based on a robust assessment of the impacts of proposals on SMEs.

2. The main recommendations

- Maintain the "Think Small First" principle as the leitmotif of the SME policy and the SME test, its flagship measure for its implementation.
- Merge its Competitiveness Proofing and the operational guidance on micro-enterprises into the SME test to improve understanding and enforcement of the guidelines and provide a list of compulsory minimum standards to be met.
- Make it compulsory to present conclusive evidence that the SME test was conducted.
- Consult earlier and properly SMEs and their representatives with the objective of gathering quality input and not simply to comply with an SME test requirement.
- Introduce procedures to improve the availability and quality of data relating to SMEs in cooperation with the member states.
- Invest more time and resources within the Commission services to conducting each step of the SME test thoroughly and to implementing the recommendations made by the Impact Assessment Board thereafter.
- Strengthen the role of the IA support units in the DGs, notably with regard to the screening of the draft IAs before they are submitted to the Impact Assessment Board.
- Ensure that no proposal proceeds to inter-service consultation unless the impact assessment is approved by the Impact Assessment Board and contains a robust SME test and evidence of its completion.

It is critical to the process of EU economic recovery and growth that policies are prepared on the basis of strong evidence and thorough consultation with the business community, with particular efforts made to reach SMEs. In this respect, the Commission's guidelines on impact assessments, which will be reviewed in 2014, should contain stricter mechanisms to guarantee an efficient and robust application of the SME test across the directorates-general.

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