1. INTRODUCTION

The “Think Small First” principle\(^1\) requires that SMEs’ interests are taken into account at the very early stages of policy making in order to make legislation more SME friendly. The Commission Impact Assessment Guidelines (see Annex 1) support its application, indicating that services should assess the impact of forthcoming legislation and administrative initiatives on SMEs (the ‘SME-test’), and take the results of this analysis into account when designing proposals, including through alternative mechanisms and using flexible approaches. All analytical steps of an IA are expected to follow this line on which Annex 8 of the Guidelines contains specific guidance.

As announced in its November 2011 report on "Minimizing regulatory burden for SMEs, 'Adapting EU regulation to the needs of micro-enterprises' [COM(2011) 803 final], the Commission has now strengthened its commitment to ensure proportionality in the EU approach to regulation, in particular with regard to micro-enterprises, i.e. SMEs with less than 10 employees and a turnover or balance sheet total equal to or less than €2 million.

As of 2012, therefore:

- The Commission's preparation of all future legislative proposals is based on the premise that in particular micro-enterprises should a priori be excluded from the scope of the proposed legislation unless the necessity and proportionality of their being covered can be demonstrated.

- Where micro-enterprises must be covered by legislative proposals for public policy reasons recourse to adapted solutions and lighter regimes will be sought concerning all forms of regulatory burden including, in particular regarding administrative requirements.

- The demonstration of the proportionality of covering micro-enterprises and the assessment of possible adapted solutions should be included in the Impact Assessment, thus adding a specific micro-enterprises dimension to the 'SME test'.

This note provides complementary guidance to that already provided in the Impact Assessment Guidelines with regard to these specific issues. It does not replace the more comprehensive guidance contained in the guidelines with regard to impact assessment in general and SMEs in particular.

2. THE "REVERSED BURDEN OF PROOF"

The principle of proportionality states that any Community action should not go beyond what is necessary to achieve satisfactorily the objectives which have been set. Whenever micro-

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enterprises should be covered, the Commission must demonstrate this in the impact assessment accompanying such an initiative.

This assessment and the determination of possible adapted solutions will require a specific effort to consult relevant stakeholders, analyse the problem drivers, design options and identify and, to the extent possible, quantify specific impacts on micro-enterprises in terms of both costs and possible benefits. As always, careful planning will be necessary to ensure a proportionate analysis of all relevant issues for decisions concerning micro-enterprises.

There are certain categories of proposals in which the approach to be adopted is clear, for instance in cases when:

1) Micro-enterprises are not directly affected by the proposal, when it is sufficient simply to confirm that this is the case.

2) It is in the interest of micro-enterprises themselves to be subject to the rules in a given piece of EU legislation (e.g. Late payments directive), when data and reasoning should be presented supporting this conclusion.

3. THE "REVERSED BURDEN OF PROOF" IN THE IMPACT ASSESSMENT PROCESS

The commitments above have the following specific implications for the different stages of the impact assessment process and should be systematically discussed in IA steering group:

Roadmap

Recalling the overall Commission commitment to minimize regulatory burdens for SMEs and in particular micro-enterprises, roadmaps should either:

1. explain that micro-enterprises are to be excluded from the scope of the initiative,

or

2. state that they are expected to fall under the scope of the initiative: in this case, the roadmap should explain why this is the case, state that the possibility of applying adapted solutions will be considered during the impact assessment process and, if the preparations are sufficiently advanced, give an idea of possible proportionate ways in which the regulation might concern them;

or

3. state that the proportionality of including them in the scope of the initiative will be assessed in the Impact Assessment: in this case, roadmaps should clarify how the necessary data and stakeholders' opinions would be collected.

If the further preparation of the proposal leads to a change in the direction of the approach being followed, for example due to a modification in the objectives or as a result of data collection and stakeholder consultations, the appropriateness of publishing a revised roadmap should be discussed with SG-C2.

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2 For those exceptional cases where they may be no need for an impact assessment, such a demonstration should be developed in the initiative's explanatory memorandum.
Consultations

Public and stakeholder consultation should be carried out according to the Commission standards and any sector specific procedure. Annex 8.4(1) of the Impact Assessment Guidelines contains specific suggestions on how to consult SME representatives. Depending upon the relevance of the initiative for SMEs and in particular micro-enterprises, the services should use appropriate consultation means to ensure input on the needs and interests of SMEs, in particular micro-enterprises alongside large enterprises.

Consultations should cover all aspects of impact assessment analysis. For the specific issue of the coverage of micro-enterprises, public and stakeholder consultations provide a most useful tool to:

- collect their views concerning their preferred options in terms of their being exempted, subject to special provisions or subject to the full regime. There have been cases where the consultation showed that micro-enterprises preferred to be included rather than excluded, even if this is not entirely necessary for the attainment of the public policy objective;
- collect any available statistics on micro-enterprises that would be affected;
- estimate the potential positive and negative impacts on micro-enterprises.

Impact assessment drafting

On the basis of existing material, evaluation results, stakeholders inputs and expertise from all relevant Commission services (and notably those of ENTR-E.4 on the assessment of SME impacts), the lead service should use the impact assessment process and the discussions in the IA steering group to come to a definitive view on whether in particular micro-enterprises need to be included in the scope of the legislation in order for its objectives to be achieved:

1. If there is clear evidence that excluding them would mean that the initiative would not be able to achieve its goals or would undermine other Treaty-based goals or fundamental rights, they should be covered but the possibility to apply adapted solutions should be assessed.

2. If there is clear evidence that it is in their interest to be included in the scope of the proposal, they should be covered but the possibility of applying adapted solutions should be assessed.

3. If there is clear evidence that excluding micro-enterprises would not go against their interest or materially affect the capacity of the initiative to achieve its goals or undermine other Treaty-based goals and fundamental rights, their exclusion can be confirmed.

4. If evidence remains inconclusive, the coverage decision should be based on a proportionate assessment of factors such as the:

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3 Such as those provided under Treaty Art.154 in the field of social policy and in Annex 5.2 of the Impact Assessment Guidelines.
a. **Risks** arising from their exclusion, taking into account for example the share of micro-enterprises in a particular sector, their specific needs (e.g. regarding legal certainty or recruitment and skills) and the possible obstacles to growth that "regulatory thresholds"5 may introduce.

b. **Negative impacts** that coverage would have on them (*direct cost increases, loss of competitiveness etc.*): the higher the negative impact (especially relative to costs), the weaker the argument for coverage. For specific guidance on impacts see the Impact Assessment Guidelines and Annex 8.4(3) in particular.

Whenever coverage is considered, the impact assessment process should identify possible alternatives in terms of lighter regimes / adapted solutions, seek stakeholders' views and compare their impact and on the initiative's capacity to achieve its overall objectives. For specific guidance on alternative options and mitigating measures impacts see the Impact Assessment Guidelines and Annex 8.4(4) in particular. Needless to say, the impact assessment would also still need to prove, in more general terms, that the initiative provides a proportionate response to the identified problems not just in terms of its treatment of micro-enterprises but also for other sizes of enterprises and other stakeholders (consumers, workers, public administrations etc.).

**Impact assessment report**

The impact assessment report should present the evidence supporting whatever decision is reached with regard to micro-enterprises. While a brief explanation of the reasons may be sufficient whenever such a decision is basically self-evident (normally within the problem definition), in all other cases, references should be included in:

- The problem definition: to show that they are (or are not) affected by the identified problem and/or do (or do not) influence the problems' drivers.
- The objectives: to show that they are (or are not) relevant for them.
- The policy options: to clarify whether they are excluded (or included) from their scope or, when necessary, to identify potential adapted solutions.
- The analysis of impacts and the comparison of options which should look at the options in a proportionate manner.
- Stakeholder input: the views expressed by them in the course of the stakeholder consultations should be included in the overall summary annex on consultations held and integrated in the main text whenever appropriate.

**Impact assessment report executive summary and explanatory memorandum**

The results of the micro-enterprises dimension of the SME test should be also clearly indicated in the IA executive summary and the IA section of the explanatory memorandum.

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5 Threshold effects are where the introduction of set values below which certain benefits apply (such as exclusion from certain legislative requirements) creates an incentive to remain below the threshold. For example, if a firm is exempt from legislation provided it does not employ more than 250 people, there would be an incentive to ensure that the threshold is not crossed, thus restricting employment growth. (DG ENTR – "Think Small First" toolkit – Final Report)
Annex 1

Relevant extracts from the Commission Impact Assessment Guidelines

(…)

**Impacts on SMEs:** Due to their size and scarce resources, SMEs can be affected by the costs of regulations more than their bigger competitors. At the same time, the benefits of regulations tend to be more evenly distributed over companies of different sizes. SMEs may have limited scope for benefiting from economies of scale. SMEs in general find it more difficult to access capital and as a result the cost of capital for them is often higher than for larger businesses.

The Commission in the **Small Business Act** has made a commitment to implementing the ‘**Think Small First**’ principle in its policy-making, to assess the impact of forthcoming legislation and administrative initiatives on SMEs (the ‘SME-test’), and to take the results of this analysis into account when designing proposals. Your IA should reflect this in each of the analytical steps.

The IA should analyse whether SMEs are disproportionately affected or disadvantaged compared to large companies and if so, options should cover alternative mechanisms and flexibilities in approach that might help SMEs to comply. Annex 8.4 provides further guidance on assessing impacts on SMEs and on possible mitigation measures. Unit E4 of DG Enterprise and Industry will provide advice and support on all issues related to impacts on SMEs.

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Annex 2

Relevant extracts from the Commission Report on "Minimizing regulatory burden for SMEs. Adapting EU regulation to the needs of micro-enterprises" - COM(2011) 803 final

 (...)

4. STRENGTHENING THE APPLICATION OF THE SME TEST PARTICULARLY FOR MICRO-ENTERPRISES

In order to strengthen the focus on exemptions and tailor-made legislation for microenterprises and SMEs, the Commission has started to work to reverse the burden of proof.

From January 2012 the Commission's preparation of all future legislative proposals will be based on the premise that in particular micro-entities should be excluded from the scope of the proposed legislation unless the proportionality of their being covered can be demonstrated. This demonstration is a new element to be included in the SME test. Thus modified, the test will de facto reverse the burden of proof and focus the preparation of EU law on the specific situation of SMEs and micro companies.

From the same date the Commission will also ensure that, in cases where micro enterprises must be covered by its legislative proposals for wider public policy reasons, its proposals will be substantiated via the introduction of a micro-entities dimension in the "SME test" which forms part of the regular Impact Assessment. In these cases, recourse to adapted solutions and lighter regimes will be sought. As the arguments and reasons for lighter regimes become more visible, it should also be easier to trace the position of SMEs and micro companies throughout the decision making process.

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