1. **WHEN IS AN EXPLANATORY MEMORANDUM NECESSARY?**

All Commission proposals and delegated acts should include an explanatory memorandum (although a simpler form is used for delegated acts which covers (i) context of the delegated act; (ii) consultations prior to the adoption of the act; (iii) legal elements of the delegated act).

2. **WHAT IS THE PURPOSE OF THE EXPLANATORY MEMORANDUM?**

The purpose of the explanatory memorandum is to explain the reasons for, and the context of, the Commission's proposal drawing on the different stages of the preparatory process. It presents the results of the better regulation processes and tools used to prepare the initiative including opportunities for legislative simplification and reducing unnecessary regulatory costs. It also serves as a basis for the examination of the proposal by national Parliaments under the subsidiarity control mechanism (Protocol No. 2 to the Treaties).

The explanatory memorandum should be available in the same languages as the proposal it introduces and in principle should not exceed 15 pages (although in particularly complex cases a longer text may be justified). It is transmitted to the other Institutions together with the accompanying act and is available to the public through EURLex. The explanatory memorandum is however not published in the Official Journal and has no legal effect.

The explanatory memorandum should not be confused with the recitals, which are part of the act itself and are thus published in the Official Journal.

3. **THE CONTENT OF THE EXPLANATORY MEMORANDUM**

The Commission should summarise the context of the proposal, how it complies with the principles of conferral (i.e. reasons for the choice of legal basis), subsidiarity and proportionality and with smart regulation principles, as well as with fundamental rights. It should also explain the choice of a legal instrument. The explanatory memorandum ensures the transparent exercise by the Commission of its right of initiative. Therefore it should be reader-friendly, clearly worded, concise and written with the non-specialist in mind.

The specific content of the explanatory memorandum should respond to various obligations, including Protocol No 2 on the application of the principles of subsidiarity and proportionality, and the Commission's better regulation agenda, including the inter-institutional agreement on better law-making.

The most significant proposals will have been subject to fitness checks or evaluations of the existing policy framework, to impact assessment and informed by stakeholder consultation. The results of this preparatory work should be reflected in the explanatory memorandum.
The explanatory memorandum should include the following elements:433

(1) CONTEXT OF THE PROPOSAL

- Reasons for and objectives of the proposal:
  - Describe the reasons behind the proposal or the existing problem(s) that the proposal is meant to tackle (e.g. obstacle to free movement, dangerous products, environmental pollution, etc.).
  - State if this is a REFIT initiative.
  - State the relevant institutional background of the proposal (e.g. mandate from the European Council, undertaking by the Commission to revise an act, Commission work programme, reply/ reaction to a legislative initiative resolution of the EP, reply/ reaction to a European Citizens' Initiative, etc.).

- Consistency with existing measures in the area:
  - Mention any important Union measures and initiatives already undertaken in the relevant area (existing legislation, linked policy proposals, white or green papers) or comparable initiatives in the Member States.
  - Provide a clear description of the similarities and differences between the proposal and any existing acts (e.g. different field of application, complementarity etc.).
  - Explain the timing of the proposal (why the proposal is presented now) and the sequencing of proposals related to the same policy sector.

- Consistency with other Union policies
  - Mention links with other Union policies, in particular in cases of "mainstreaming" (economic, competition, employment, environment, equal opportunities, etc.). Keep this part short and avoid overlaps with the "impact assessment" section.

(2) LEGAL BASIS, SUBSIDIARITY AND PROPORIONALITY

- Legal basis

In accordance with the interinstitutional agreement on better law-making, the Commission should, in a clear and complete way, justify the legal basis of the proposal, especially where it would seem that several options exist.

433 The template presented in this tool is not entirely appropriate for proposals adopted under Article 218 TFEU. Specific templates should be used which will be available on GoPro/Myintracomm following the revision of the current Vademecum on the external action of the European Union: https://webgate.ec.europa.eu/fpfis/wikis/display/REGISTRY/External%20representation%20of%the%20EU
– Explain what the legal basis of the proposal is. When several feasible options seem to exist, justify the choice on the basis of objective criteria.

– Clarify whether the concerned policy area falls under an exclusive or shared competence or under other categories of competence (support and coordination competences).

• Subsidiarity (for competences other than exclusive)

Demonstrating the compliance of the proposal with the principles of subsidiarity and proportionality is a fundamental part of the explanatory memorandum. Avoid standard phrases that merely state that the proposal respects these principles.

– Explain what the Union dimension of the problem is. While respecting Union law, are well-established national arrangements and special circumstances applying in individual Member States respected?

– Necessity test: Why can the objectives of the proposal not be adequately achieved by Member States? Is the scope of action limited to those aspects that Member States cannot achieve satisfactorily on their own, and where the Union can do better?;

– Effectiveness test: What is the most effective solution – that achieved by Union action or that achieved by possible national means? What specific added value is expected by the envisaged Union measure and what would be the cost of taking no action at all?

• Proportionality

Explain the scope of chosen policy option:

– Does the option go beyond what is necessary to achieve the objective satisfactorily?

– Will the Union action leave as much scope for national decision as possible while achieving satisfactorily the objectives set?

• Explain the choice of instrument:

– Has the simplest form of Union action (instrument) been chosen; and is this choice consistent with the pursued objective and effective enforcement?

– Is there a solid justification for the choice of instrument - Regulation, (framework) Directive, or alternative regulatory methods?

(3) RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

In support of evidence-based policymaking, the purpose of this section is for the Commission to explain the preparatory analytical work undertaken, including ex-post evaluations of existing provisions, stakeholder consultation, the collection and use of expertise and impact assessments.
If no evaluation, consultation activity or impact assessment has been undertaken, this section should explain why.

The section should provide a short overview of the main findings and how they have been taken account in the final proposal – for further details references should be made to relevant Evaluation, consultation and Impact Assessment reports.

- Evaluation/fitness Check and related opinions of the Regulatory Scrutiny Board
  - Summarise the results of any ex-post evaluations/fitness checks of existing measures related to the policy objectives, clarifying the link to the identified problems the proposal aims to tackle. Provide links to available SWDs, studies or reports;
  - In case the RSB issued an opinion on the evaluation/fitness check (or made comments on the evaluation/fitness check included in the related IA report), summarise the Board's findings and explain how they were taken into account;
  - Describe approved exceptions from the procedural requirements of the better regulation Guidelines together with an appropriate justification.

- Stakeholder consultation
  - Describe the consultation(s) made and the tool(s) used (written public consultation, consultation targeted at pre-selected organisations, hearings, etc.).
  - State briefly the main sectors and/or institutional bodies that responded, giving an objective and balanced summary of their answers. Avoid vague wording such as "the associations consulted broadly welcomed this initiative". Provide link to published consultation results/reports (e.g. on "the Europa 'Consultation Portal"
  - Summarise how the results of the consultation were taken into account in the proposal and, where appropriate, explain where the Commission's views diverge and why;
  - Describe approved exceptions from the procedural requirements of the better regulation Guidelines together with an appropriate justification.

- Use of expertise

If the Commission has relied on expertise, describe the methodology used, the range of expertise consulted, the advice received, how it was taken into account and, where appropriate, indicate how to access any publicly available information (e.g. website).

- Impact assessment and opinion of the Regulatory Scrutiny Board

434 https://ec.europa.eu/info/consultations_en

435 See Tool #4 on Evidence-based better regulation.
A summary presentation of the main elements of the impact assessment (IA) process serves to strengthen the motivation underlying the proposed policy choice, and to show that the careful assessment of alternative policy options and foreseen impacts have been fully taken into account by the Commission. Given that some elements of the impact assessment process are reported on under other sections in the explanatory memorandum, this section should focus on the assessment of alternative policy options and their impacts, as set out below.

The sections below should be completed on the basis of other available analysis or information.

- Where relevant, explain why the proposal is not supported by an impact assessment. Reference should be made to the initial political validation, the Roadmap where the question about the need for an impact assessment is addressed and also to the better regulation Guidelines and the Tool #9 on when an IA is necessary;

- Describe approved exceptions from the procedural requirements of the better regulation Guidelines together with an appropriate justification;

- Provide the links to the IA summary sheet and the positive opinion of the Regulatory Scrutiny Board. Where no positive opinion was issued, a clear justification should be given for proceeding with the initiative;

- Explain which policy alternatives were examined, how they compare and why the final proposal was considered to be the preferred policy choice;

- Describe the main economic, social and environmental impacts of the preferred option, who would be affected and how. Quantified estimates of the impacts should be provided wherever possible and reasons given where this is not possible;

- Summarise the main content of the Regulatory Scrutiny Board's opinion(s) and explain how they were taken into account.

- If the final policy proposal deviates from the options assessed in the impact assessment, clarify in which way it deviates from these options and what the likely impacts would be of this change.

- Regulatory fitness and simplification

This section aims at providing targeted information on the regulatory fitness of the final proposal and the extent to which regulatory burdens are minimized and proportionate to the objective to be achieved. All revisions of existing legislation are expected to assess the potential to simplify the legislation and to identify, quantify (wherever possible) and reduce any unnecessary regulatory costs. This REFIT-related work should be reported in impact assessments, evaluations and fitness checks which support the initiative.

In particular, this section of the explanatory memorandum should outline:

- If the proposal includes a revision of existing legislation and if the possibility to simplify the legislation and/or reduce unnecessary costs has been identified, then
the explanatory memorandum should explain how these possibilities will be exploited by the proposal without undermining the objectives of the legislation.

In addition, and wherever possible, a **burden reduction objective** for tackling unnecessary regulatory costs should be presented for the specific legislation (see COM(2017) 651). This objective should be based on the REFIT-related findings of the impact assessment and any earlier evaluation or fitness check (described above in relation to the simplification of legislation and identifying any unnecessary regulatory costs). This objective should be quantified wherever possible. The European Parliament and the Council are encouraged to take account of the burden reduction objective in their legislative work and by the Member States in respect of their transposition and implementation of the legislation at national level.

- If there is no scope to simplify or reduce regulatory costs a short justification should be provided;
- Who will be affected and how? What will the affected parties have to do in order to comply and what will public authorities have to do to ensure compliance?
- Why microenterprises are not exempted from the scope of the initiative, and whether there is a "lighter" regulatory regime for SMEs generally;
- How the expected compliance costs for SMEs and any other relevant stakeholders have been minimized (providing quantitative estimates as far as possible);
- How any negative effects on sectoral EU competitiveness or on international trade have been minimized;
- How the proposal is "internet ready" and consistent with the operation of the internet, social media and other digital developments. Will the proposal operate effectively in both the digital and physical worlds?;
- **Fundamental rights**: Where the proposal has consequences for fundamental rights, explain how the fundamental rights obligations have been met.

**4)** **BUDGETARY IMPLICATIONS**

Briefly outline the budgetary implications of the initiative (if any) and, where appropriate, refer to the "financial statement" showing the budgetary implications and the human and administrative resources required.

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436 See Tool #22 on The SME test for examples of mitigating measures for SMEs.

437 See Tool #27 on The digital economy and society & ICTs or systems.

438 See Tool # 28 on Fundamental rights and human rights.
(5) OTHER ELEMENTS

- **Implementation plans, monitoring, evaluation and reporting arrangements:** Reference should be made to the implementation planning associated with the measure, including reference to the monitoring, evaluation and reporting framework to be applied to assist with its implementation and application and to report on its performance.

- **Explanatory Documents:** The need for providing Explanatory Documents on the transposition of directives should be explained, including why they are necessary for the Commission to carry out its task of overseeing the transposition of directives.

- **Variable geometry:** In case of proposals under Title V of part three TFEU (justice and home affairs), particular arrangements apply to the UK and Ireland (protocol 21), Denmark (Protocol 22) and to different EU Member States and associated countries depending on their participation in Schengen (protocol 19). The implications of the proposal on these countries should be explained where relevant.

- **More detailed explanation of the specific provisions of a proposal:** In addition to the general explanation of the reasons for the Commission proposal, it is advisable to provide more information on the provisions, adding a commentary for each chapter or article. Such a commentary may focus just on selected key articles including those provisions intended to simplify the legislation or tackle unnecessary regulatory costs. This additional text should have added value for the future interpretation of the act to be adopted. A more detailed commentary may be useful for explaining any new ideas in the proposal (in particular if such an explanation goes beyond the general framework of the explanatory memorandum). An article-by-article commentary may be very useful after adoption of the directive in the event of difficulties in the interpretation of a particular provision. A more detailed explanation may also be useful when codifying or rewriting a text, so that provisions in the old text taken over (and codified) in the new one can be indicated.