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Commission follow-up to the "TOP TEN" Consultation of SMEs on EU Regulation

COMMISSION FOLLOW-UP TO THE 'TOP TEN' CONSULTATION OF SMES ON EU REGULATION

1. Introduction

Small and medium-sized enterprises are essential to economic growth and job creation.¹ The Commission has taken a range of actions over the years to support them and continues to strengthen its actions.

This includes the decision of November 2011 to make a concerted effort to lighten the regulatory load on SMEs². As part of this effort, the Commission asked SMEs throughout 2012 through conferences and consultations to identify the EU laws and areas of legislation that they consider most burdensome. They contributed actively.³ Based on these responses, the Commission produced a list of EU legislative acts considered by SMEs and stakeholder organisations to be the most burdensome.⁴

The results of this initiative, called the 'Top Ten', together with a number of other actions being taken by the Commission, were announced in the March Communication on "Smart Regulation – Responding to small and medium-sized enterprises"⁵ Member States were also informed of the results via the SME Envoy network. The Commission committed to a direct and immediate follow up to SME concerns. The European Council welcomed this initiative and invited the Commission to report back by June.⁶ This report indicates the follow-up actions on the main results of the consultation, in response to that request.

The success of the 'Top Ten' initiative requires that the co-legislators and Member States join the effort. Many Commission actions are contained in legislative proposals that the co-legislators are now examining. The Council and the European Parliament need to ensure that the SME friendly provisions in these proposals are maintained and that unnecessary burdens are not inadvertently added in the decision making process.

This is not a one-off effort. It forms part of the larger REFIT exercise announced in the Commission Communication on EU Regulatory Fitness of 12 December 2012.⁷ Through Refit the Commission will continue to act to lighten regulatory burden and simplify legislation across the board, taking a broad range of stakeholder input into consideration.

¹ 20,7 million SMEs account for over 65 % of private sector employment. SMEs are amongst the most innovative businesses, leading the creation of jobs and growth. Apart from access to financing and markets, regulatory burden represents one of the heaviest barriers to the start-up and development of small businesses. Com(2008)394

² Com(2011)803

³ This consultation attracted 1000 responses, out of which 779 came from enterprises and 154 from their representative organisations Com(2013)122, SWD(2013)60

⁴ The list was drawn up by combining the lists of the 20 legislative measures most quoted respectively by enterprises and their representatives organisations. The measures most often quoted from both lists were put into a list of 14 legislative measures. - Com(2013)122, SWD(2013)60

⁵ Com(2013)122

⁶ European Council Conclusions – 14 March 2013 EUCO 23/13

⁷ Com(2012)746

2. TOP-10 results and follow-up

For each of the main 'Top Ten' legislative measures, the Commission has already taken action. Where possible, the Commission has itself acted directly to deal with the issue. In other areas, where legislative change is needed, the Commission has made proposals to the co-legislator. Just over half of the actions outlined below are items on which the European Parliament and the Council need to take action. The Commission has also either already started to review the legislation in question or plans a review to identify the right course of action.

The concerns of SMEs that did not make it into the main 'Top Ten' list will be examined in the broader programme of regulatory burden reduction, the REFIT programme. A report on progress will be forthcoming in the autumn.

2.1 Action already completed by the Commission under its own authority

Chemicals

Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)

SMEs tell us that:

They have concerns about the complexity and cost of information obligations, inconsistent application by Member States and a lack of coherence with specific chemicals legislation such as Restrictions of Hazardous Substances (RoHS), biocides, endocrine disruptors and Toy Safety.

Commission response:

The Commission has carried out a comprehensive review of REACH which included an analysis of links and possible overlaps with other EU legislation affecting chemicals, as well as particular difficulties for SMEs. In March 2013 the Commission adopted a Commission implementing regulation⁸ providing reduced fees for SMEs - 35% reduction for medium companies, 65% for small companies and 95% for micro-companies for registration. In addition, further implementation guidance is being prepared and the European Chemicals Agency (ECHA) has appointed an SME Ambassador at the request of the Commission to integrate the specific needs of SMEs across its activities and to provide an interlocutor for stakeholders. In order to improve the consistency between REACH and other chemicals legislation for those cases where potential overlaps have been identified, the Commission will strive to minimise or avoid them by inviting ECHA to issue guidance, if appropriate, and

⁸ Commission Implementing Regulation (EU) No 254/2013 of 20 March 2013 amending Regulation (EC) No 340/2008 on the fees and charges payable to the European Chemicals Agency pursuant to Regulation (EC) No 1907/2006 of the European Parliament and of the Council on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)

preparing implementing legislation, in particular when considering future restrictions and substances subject to authorisation. As implementation of REACH has not yet been fully completed, in the interests of legal stability and in agreement with many business organisations, the Commission does not consider further legal amendments to REACH useful at the moment.

2.2 Commission proposals on which the EU legislator needs to act

Data protection

Directive 95/46/EC on the protection of personal data (revision⁹ in legislative procedure awaiting EP first reading)

SMEs tell us that:

The new proposal for a general data protection regulation is excessively detailed in obligations it imposes on those processing personal data. The proposed reform includes exceptions in the obligations for SMEs which should be maintained in the co-decision process. The main economic benefits of this reform will accrue only to companies trading across borders, as they will benefit more from harmonisation, whilst companies trading only domestically will have to bear the burden of the additional obligations.

Commission response:

The Commission is working closely with the European Parliament and the Council in order to maintain the exceptions for SMEs in those cases where their processing of personal data does not present specific risks to the fundamental rights and freedoms of citizens. The Commission will also work with the EU legislator to further develop the existing elements of a risk-based approach. This work will focus on calibrating the obligations of data controllers in order further to simplify the regulatory environment and minimise undue administrative burden, whilst maintaining a high level of protection for personal data and the clarity of the legal obligations for data controllers.

Employment

Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (Additional measure¹⁰ in legislative procedure awaiting EP first reading)

SMEs tell us that:

⁹ COM(2012)11 - Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and of the free movement of such data

¹⁰ COM(2012)13 - Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

They support clarification of enforcement, with the objective of fighting fraud and unfair competition. For this purpose, they suggest the introduction of a system of prior notification of detachments to Member States and reconsideration of joint and several liability for SMEs. They argue that liability will impact SMEs disproportionately as they have far less capacity to monitor all their subcontractors' compliance with relevant legislation. They also argue that joint and several liability may constitute a barrier to SMEs entering new markets.

Commission response:

The proposal for an enforcement directive being discussed in the legislative procedure already contains positive elements for SMEs and micro-enterprises such as risk-based inspections, increased obligations of host Member States to make legal information readily available and enhanced legal certainty through a limited set of control measures and administrative requirements that can be applied by the Member States. Joint and several liability is an important measure, already applied in several Member States, to provide protection against abuse and exploitation of vulnerable workers. The Commission is supporting the efforts to reach an agreement in the legislative process, in particular on the two main contentious issues (list of control measures and joint and several liability).

Product safety

Directive 2001/95/EC on general product safety (revision¹¹ in legislative procedure awaiting EP first reading)

SMEs tell us that:

Member States apply product safety rules and controls in different ways. Producer responsibility is considered a heavy burden for smaller companies and the provisions on product withdrawal from the market allow for wide interpretation. The system is expensive for SMEs and does not offer proper information and protection to consumers.

Commission response:

In February 2013, the Commission proposed to replace the General Product Safety Directive by a directly applicable Regulation on Consumer Product Safety to ensure more uniform application. This proposal addresses many of the TOP Ten comments, reducing divergences between Member States including a simpler set of more common requirements and an exemption from notification obligations for products which present risks only in isolated cases under the responsibility of the economic operator. The proposed Market Surveillance Regulation establishes a uniform framework, avoiding double checks of products and improving cooperation between authorities and economic operators. Better market surveillance will also help protect responsible SMEs from unfair competition from non-compliant products. The proposals take account of the needs of small businesses envisaging

¹¹ COM(2013)78 - Proposal for a Regulation of the European Parliament and of the Council on consumer product safety and repealing Council Directive 87/357/EEC and Directive 2001/95/EC

guidance and assistance for SMEs. The Commission will establish a framework for regular consultation with business on implementation, including through the Market Surveillance Forum. The Commission will also press for maximum clarity on product withdrawal in the legislative procedure and issue guidelines to assist business before the regulations are applied.

Public procurement

Directive 2004/18/EC on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (revision¹² in legislative procedure awaiting European Parliament first reading)

SMEs tell us that:

EU Directives on public procurements include onerous requirements regarding the economic standing of SMEs, inappropriate use of quality criteria by contracting authorities to establish the most economically advantageous tender and difficulty stemming from the application of different procedures or practices in different Member States despite harmonisation. Red-tape and administrative burden linked to the preparation of offers act as a barrier for small businesses to participate in public tenders.

Commission response:

The Commission proposed a revision of the public procurement regime in December 2011. Some of the proposed modifications will have a direct impact on the access of SMEs to public procurement, including concessions.

The revision includes provisions to require the acceptance of self-declarations for selection purposes (only the winning bidder will have to submit complete evidence) and a provision that the list of selection criteria will be made exhaustive. A limitation is introduced in the maximum turnover cap required to participate in procurement procedure, which cannot exceed three times the estimated value of the contract

Furthermore contracting authorities will be encouraged to split contracts into lots allowing for the participation of more bidders, particularly SMEs, and will have to explain to bidders when not doing so (application of the "comply or explain" principle).

The Commission proposal foresees a gradual transition to e-procurement. Companies would be able to consult tender opportunities online and submit their offers electronically, which will simplify the process and increase transparency.

Finally, the Commission draws attention to the SME concerns at the continuing complexity of public procurement procedures and practices among Member States contributing to administrative burdens.

¹² COM(2011)896 - Proposal for a Directive of the European Parliament and of the Council on public procurement

Recognition of professional qualifications

Directive 2005/36/EC on the recognition of professional qualifications (revision¹³ in legislative procedure awaiting European Parliament first reading)

SMEs tell us that:

The provisions of this directive overlap with those of the Services Directive, and it is not easy for an SME to differentiate between obligations stemming from both regulations. Whilst certain SMEs expressed satisfaction with some of the provisions proposed in the amendment being currently discussed in legislative procedure, especially the introduction of the European Professional Card and the generalisation of the Internal Market Information (IMI) System¹⁴, some other new proposals are questioned, like the partial access open to professions with a larger scope of activities in the host Member State, or the tacit recognition of qualifications for professions linked to health and safety.

Commission response:

The revision ensures consistency with the Services Directive, notably by ensuring that all information and procedures related to the recognition of qualifications are available with the Points of Single Contact for all professions. The rules on temporary mobility will be modernised so that provision of services becomes easier.

The proposal includes the introduction of the European Professional Card (EPC), based on enhanced on-line cooperation between Member State authorities in the verification of qualifications and on the introduction of the concept of 'tacit recognition' once the deadline for a recognition decision has passed. Tacit recognition will apply to all professions using the EPC, but the host Member State will have the possibility to extend the deadline where necessary, in particular for reasons related to public health and safety. This will ensure a quicker processing of the requests for recognition and allow the professionals to start their activities without delay.

Partial access will be used on a case-by-case basis to avoid that differences in the scope of activities reserved to certain professions in the host Member State prevent professionals from home Member States from establishing in the host Member State. Host Member State competent authorities will have the possibility to reject partial access for reasons of general interest.

¹³ COM(2011)883 - Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System

¹⁴ http://ec.europa.eu/internal_market/imi-net/index_en.html

Road transport

Regulation (EEC) No 3821/85 on recording equipment in road transport (revision¹⁵ close to adoption in legislative procedure)

SMEs tell us that:

The obligation to install a tachograph generates costs, and compliance with the current regulation is heavy in terms of administrative burden. Vehicles that do not travel far from their base should be exempted from the requirement of this regulation.

Commission response:

A revision of the tachograph legislation was tabled following inter alia a recommendation of the High Level Group on Administrative Burdens. The Commission's proposal foresaw that current optional exemptions provided by Regulation 561/2006 for certain categories of vehicles would apply within a uniform radius of 100 km, calculated from the base of the transport undertaking (up from 50 km). The final stages of the legislative procedure have been reached and the issue of the exemptions has been subject to intensive discussion as one of the final points for agreement between Parliament and Council.

The final outcome, yet to be adopted, is likely to be in line with the Commission's proposal, with the exception of the so-called "craftsmen" exemption (Article 13 (1) letter d), which will no longer be optional, in contrast with the other exemptions. This should improve legal certainty across the Union and avoid administrative burden and complexity for stakeholders and Member States.

2.3 Commission evaluations already under way or programmed

Employment

Council Directive 89/391/EEC on the introduction of measures to encourage improvements in the safety and health of workers at work

SMEs tell us that:

The general obligation for documenting risk assessments is too burdensome. For low risk activities, risk analysis could be performed without being documented. Exemptions and lighter requirements should be applied in case of temporary employment and for micro companies. In cases where several legislative measures overlap, risk assessments and (double) documentation of risk assessments should be abolished.

¹⁵ COM(2011)451 - Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EEC) No 3821/85 on recording equipment in road transport and amending Regulation (EC) No 561/2006 of the European Parliament and the Council

Commission response:

The Occupational Health and Safety Directives largely take into account the specificities of SMEs. For example, Framework Directive 89/391/EEC allows Member States to adapt the risk assessment documentation obligations in the light of the nature of activities and the size of undertakings. The entire acquis on Occupational Health and Safety (Directive 89/391/EEC and its 23 related directives) is currently undergoing a full evaluation (a REFIT Fitness Check) and will include specific consultation of SMEs. The conclusions of this ex-post evaluation will be available before the end of 2015. Member States will feed into this evaluation with implementation reports by December 2013. They should take the concerns of SMEs into account in their submissions and report on measures to facilitate implementation by SMEs.

Directive 2008/104/EC on temporary agency work

SMEs tell us that:

This directive has not made it easier for companies to work across borders. Administrative burden is high in particular due to Member State requirements. For example, companies that wish to be active in several Member States may still have to register in all these Member States separately. SMEs suggest ensuring more proportionate requirements that facilitate cross-border services and for temporary agency work to be brought under the Services Directive.

Commission response:

A report to be drawn up in consultation with Member States and social partners, representing the interests of European workers and European employers, is scheduled for December 2013. This report will take SME concerns and regulatory burden aspects into account and will specifically examine how Member States have complied with the requirement to identify and justify current obstacles to the activity of temporary work agencies.. The Commission will consider including recommendations to Member States in the country-specific measures for 2014 if the assessment by the Commission of national systems identifies specific regulatory burden aspects as obstacles to growth and competitiveness.

Directive 2003/88 concerning certain aspects of the organisation of working time

SMEs tell us that:

The Directive is complex and inflexible, in particular in the case of seasonal work or where businesses face a sudden changing level of demand. Changes to the counting of on-call time and extension of the reference period for the calculation of average weekly working hours to 12 months would allow small businesses more flexibility. The burden of working-time record-keeping should be shared between employer and employee. The complexity of this

directive makes it a quasi-obligation for SMEs to seek specialised legal assistance which is costly.

Commission response:

A detailed Impact Assessment is being prepared and will take special account of the concerns of SMEs.

Value added tax

Directive 2006/112/EC on the common system of value added tax

SMEs tell us that:

The system is very complex, with different national procedural rules and the lack of a simple, uniform VAT declaration. This discourages SMEs from trading across borders. VAT identification numbers should be generalised. The obligation of companies trading across borders to register in all Member States where they want to export creates additional burden. The absence of an upper limit to VAT rates adds to the complexity of the system. There is inadequate information and guidance.

Commission response:

A proposal for a standard VAT declaration facilitating compliance for businesses with activities in several Member States is planned for end-2013. In addition, work has started with Member States on the implementation of a "mini-one-stop-shop" for e-services, broadcasting and telecom services. The introduction of the mini-one-stop-shop in 2015 is timed to coincide with the introduction of the new rules on the place of supply. The Commission will work with Member States to ensure that it provides good support to business from the start. The Commission supports broadening the concept as already put forward in its 2004 proposal. Recent Council conclusions on the future of VAT are, however, that this can only be done after an assessment of the mini-one-stop-shop. Work on the development of the EU VAT web portal, providing accurate, reliable and timely information on the implementation of the EU VAT regime in the different Member States will be intensified. This will be done in active consultation with Member States and SMEs, to better suit the needs of SMEs for practical solutions, including proportionate arrangements for accessible language versions, building on the detailed information in the existing website.

Directive 2008/9/EC laying down detailed rules for the refund of value added tax

SMEs tell us that:

They are concerned by the lack of Member State responses to requests for VAT refunds and delays in receipt of refunds.

Commission response:

The Commission held a conference in 2012 on the improved arrangements for refunds of VAT. According to the information currently available to the Commission, the initial problems with the VAT refund system have now been resolved. The Commission is ready to ensure quick and effective follow-up should any further problems come to light.

Waste

Directive 2008/98 on waste and Decision 2000/532/EC establishing lists of waste and hazardous waste

SMEs tell us that:

They are concerned about some aspects of the Directive, for instance they are uncertain as to when waste ceases to be waste. Some argue that the definition of by-products discourages innovation. There are further problems of Member States adding unnecessary requirements ('gold-plating') and lack of appropriate advice and guidance. Exemptions or lighter regimes should be introduced, notably concerning reporting and the requirement for waste transfer notes.

Commission response:

The Commission is carrying out a review of EU waste policy and legislation under REFIT to be concluded in 2014 with a view to determining whether change to waste legislation is necessary. The Commission will work with Member States and stakeholders on hands-on guidance and advisory actions and further explore specific issues, for instance in relation to the reduction of administrative burden from the registration requirements for waste transporters stemming from Article 26 of Directive 2008/98/EC. The Commission will also take action to increase the participation of SMEs in the European Resource Efficiency Platform¹⁶. In the beginning of 2014 the Commission will hold a workshop to discuss the concerns that SMEs have expressed with respect to EU waste legislation.

Regulation 1013/2006 on shipments of waste

SMEs tell us that:

Due to differences in implementation and interpretation across Member States, the Regulation has not led to the creation of a common market for waste utilisation and recycling. More should be done to ensure uniform implementation of the regulation with more focus on hazardous waste and less on unproblematic waste. There should be further simplification of

¹⁶ http://ec.europa.eu/environment/resource_efficiency/re_platform/

procedures to move waste between Member States, leaving the inspection and evaluation of waste treatment facilities to the authorities of the receiving Member State.

Commission response:

To further promote a common market for waste utilisation and recycling the Commission has taken a number of initiatives such as the development of end-of-waste criteria removing specific waste streams (e.g. metals, glass, copper) from the scope of EU waste legislation (including the Waste Shipment Regulation). In response to a specific recommendation by the High level Group on Administrative Burdens, the Commission has actively encouraged the use of electronic systems for exchange of waste shipment data between Member States and has recently launched a feasibility study on a possible EU-wide electronic data exchange system.

To help ensure more uniform implementation of the Regulation with a focus on problematic waste streams, a Commission proposal to strengthen waste shipments inspections is planned for mid-2013. Wide support was expressed by stakeholders for this proposal during the public consultation carried out on the proposal in 2011. The Commission has taken the concerns of SMEs into account in preparing the proposal and is ready to explain how this has been done once the proposal is adopted.

3. Conclusions

The Commission is responding directly to the concerns of SMEs. The goal is to lighten the regulatory load where possible while continuing to respect policy goals and maintain legal stability. The Commission calls on the EU legislator in adopting, and Member States in implementing, EU regulation to ensure that legislation is adapted to the needs of SMEs, with particular reference to the proposals already tabled by the Commission in areas of regulation identified as particularly burdensome through the TOP10 consultation. The Commission will maintain the momentum in burden reduction and simplification in its Refit programme on which it will report in the autumn. It will monitor progress through its annual scoreboard.