

Position Paper

UEAPME¹ position² on the Report from the Commission to the Council and the European Parliament “Minimizing regulatory burden for SMEs – Adapting EU regulation to the needs of micro-enterprises” (COM (2011) 803 final of 23.11.2011)

1. Introduction

UEAPME and its member organisations fully support the Commission and Member States efforts for better regulation and cutting red tape. Indeed, for UEAPME and all its member organisations, the reduction of red tape and better regulation has been high on their agenda for decades.³

Recently, also public authorities and especially the European Commission are recognising that the **compliance cost of regulation is higher the smaller an enterprise is**.⁴ The report mentions in the introduction that “the Commission is aware (that the smallest firms face the greatest cost in complying with legislation”. We cannot agree more with this. Indeed, the “Commission Recommendation of 22 April 1997 on improving and simplifying the business environment for business start-ups”⁵ already mentioned that the average cost of administrative burdens is between 6 and 30 times higher for SMEs than for larger businesses.

However, the report presented on 23 November is a mixture of statements which at first sight can sound as very promising for SMEs, but its conclusions and proposals actually point in the complete opposite direction regarding the issue of exemptions. The report is also mixing up most of the time micro enterprises, small enterprises and SMEs, starting from the title.⁶

After reading the report carefully, it is not clear at all what the aim or objective is at the end. The report contains many statements which UEAPME fully agrees with, but they stand on their own as no logic is provided behind. The reason is clearly to cover the real aim of the report: the idea to exempt micro enterprises from the scope of European legislation.

¹ UEAPME subscribes to the European Commission’s Register of Interest Representatives and to the related code of conduct as requested by the European Transparency Initiative. Our ID number is [55820581197-35](#).

² With the exception of MKB-Nederland

³ We refer here to our multiple position papers and proposals on this topic: <http://www.ueapme.com/spip.php?rubrique54>

⁴ However, the Commission Recommendation of 22 April 1997 on improving and simplifying the business environment for business start-ups, C (97) 1161 final, 22 April 1997, already mentioned that the average cost of administrative burdens is between 6 and 30 times higher for SMEs than for larger businesses.

⁵ C (97) 1161 final, 22 April 1997

⁶ To mention only a few: “*Much legislation will remain applicable to SMEs and micros...*”

“*Exemptions or lighter provisions for smaller businesses...*”

“*Whilst the general objective is to exempt small businesses...*”

“*In order to strengthen the focus on exemptions and tailor-made legislation for microenterprises and SMEs...*”

“*All exemptions and lighter regimes for SMEs and micro companies proposed by the Commission as well as other proposals where...*”

This idea was launched in a letter sent by Prime Minister Cameron and 8 other leaders to President Van Rompuy and President Barroso, dated 18 March 2011. This letter stated that: *“We should seek to ensure that new burdens on business are offset by savings elsewhere. We should give small businesses exemptions from regulatory burdens when they face disproportionate costs of compliance. We must demand that all impact assessments are clear on the implications for growth and competitiveness.”*

UEAPME can fully agree with most of the content as it takes over our demand to have a net reduction of administrative burden and real impact assessments. It should also be mentioned that “small enterprises” in this letter should not be interpreted according to the European definition, but that it means simply “SMEs”. While disproportionate costs for SMEs are of course unacceptable, we question whether exempting them is the best solution. Indeed, if there are disproportionate costs for 99.8 % of the enterprises, one can question if the idea of legislation as such in this field is necessary and acceptable and if one should not look for alternatives.

While UEAPME fully agrees with the statement in the report that *“It is ... essential to free up micro enterprises to allow them pursue their business goals without unnecessary regulation”*, it must be highlighted that unnecessary regulation is unacceptable for all enterprises regardless of their size and even more unacceptable in general in all kind of policies and fields. We wonder what the aim is of referring to such a trivial statement.

UEAPME welcomes the announcement that *“The Commission will also continue to work with Member States to help them minimise regulatory burden and eliminate gold plating when implementing EU legislation.”* This is however nothing new. The Review of the Small Business Act mentioned already that *“Member States should avoid ‘gold plating’, i.e. exceeding the requirements of EU legislation when transposing Directives into national law. The Commission confirms its readiness to assist the Member States in this task”* and further *“The Commission will: in line with the Smart Regulation Communication, explore the possibility for reducing “gold plating” by Member States”*⁷. As the majority of administrative burden stems from the national and regional level, the reduction of gold plating would have deserved much more attention in a report dealing with “minimizing regulatory burden for SMEs”. We are also interested in how the Commission is actually helping Member States *“minimise regulatory burden and eliminate gold plating”*, as mentioned in the report.

With its intention to generally exempt micro enterprises in the future from EU legislation, the European Commission is going one step too far, changing fundamentally the valid and necessary intention of relieving micro enterprises from red tape. While everybody is now convinced that the major problems can only be solved at European if not at international level, in a world that is becoming more and more global, the Commission seems to be going in the opposite direction in this report.

The statement in the report that *“Compliance with legislation stemming from the regional, national or European level will always be more burdensome for the smaller enterprises”*, gives us the impression that the Commission has given up to apply the real “Think Small First” principle and to try to reduce the burdens for enterprises.

2. Why exempting micro enterprises from EU legislation is not an option

UEAPME has always stressed that simplification and better regulation is a complex issue that cannot be achieved through simplistic proposals. Simplification and better regulation need in the first place a cultural shift, a change of mindset among civil servants, public authorities and the legislator in general.

It has never been the aim of the European founding fathers to create a two-level or two layers legal framework in Europe, meaning one for the happy few that are active in the entire internal market and one for the “lesser” subjects being only active at local level. The objectives are clear: **to create a Union which offers high**

⁷ Review of the “Small Business Act” for Europe COM(2011) 78 final p.7, 23.2.2011.

standards of social, environmental and consumer protection. So, if legislation is necessary in this field it should apply to everybody.

Standards and regulations which are related to the quality aspects of enterprises, their products and their services must also be respected by smaller enterprises, if they want to be successful and **remain competitive on the market, even locally.** This is a point that we have always stressed. The Commission states in its report that *“It is acknowledged by SMEs and their representatives that SMEs cannot expect to be above the law.”* As a matter of fact, not only UEAPME has never asked for SMEs to be above the law, but we firmly believe that nobody should be above the law and that everybody should comply with necessary regulations.

The report mentions further that *“Exemptions or lighter provisions for smaller businesses will not undermine overall public policy objectives pursued through the relevant regulations, for example in public and workplace health and safety, food safety or environmental protection.”* This statement is completely true for lighter provisions but not at all for exemptions, which is confirmed by the analysis which we can fully subscribe, but that only applies to lighter provisions:

“Their aim should be to reduce the disproportionate burden of delivering these objectives. There are instances when lightening the burden for smaller operators, while in itself attractive, could produce broader negative repercussions which could outweigh any benefits. In such cases the priority attached to the impact on smaller operators should play a key role in the design of the whole instrument. The key issue is to apply the “Think Small First” principle to avoid unnecessary burdens on SMEs.”

The actual standards in the fields of environment, health and safety etc. create indeed too often high administrative burdens and compliance costs. Such burdens and costs should not be reduced or abolished by exempting small enterprises from these rules and standards themselves, but by simplifying the procedures.

Therefore, UEAPME fully supports simplification as regards procedures of record keeping, documentation, publications, statistics and similar requirements for proving the compliance with these rules and standards adapted to the reality of smaller enterprises.

As a consequence, the **“Think Small First”** approach should apply also here. Make legislation from the point of view of micro and small enterprises and make exemptions for the larger enterprises providing tailored regulatory schemes.

If regulations were created only if really necessary, with smaller entities in mind and through the application of the real “Think Small First” approach, exemptions would not be necessary for them.

Moreover, we are under the impression that those who want to exempt smaller enterprises often do not want to take the decision not to legislate at all, perhaps under pressure of some lobby groups.

2.1. Comprehensive application of the "Think small first" principle

More than 98% of all EU enterprises are micro and small enterprises. Good governance and good lawmaking, in particular in the areas of trade, social, economic, environmental and company legislation, implies that legislation should be based on the needs and characteristics of enterprises of this size. European micro and small enterprises, as SMEs in general will only be able to prosper if the legal framework of the internal market fulfils these requirements.

The European Commission certainly deserves praise for its actions so far. In fact, it understood before anyone else the clear link between “better regulation” and the Lisbon agenda. It is thanks to the Commission that “better regulation” became commonplace in Brussels, and it is after all the Commission that convinced reluctant

Member States to adopt the symbolic goal to slash red tape by 25% in five years at the 2007 Spring Council.

With the adoption of the “Small Business Act” and in particular the introduction of the “Think Small first” Principle, the European Commission has taken in theory a decisive step in the right direction, promoting better legislation for SMEs. The European Commission should however apply and interpret this principle in the correct way. The real “Think Small First” approach means that measures and legislation should be conceived from the point of view of small enterprises, taken as the rule, not as the exception. Furthermore, all measures to simplify existing legislation and administrative procedures should also use this “Think Small First” approach. This means also that all EU legislative acts should be drafted in such a way that they do not create any increased red tape for SMEs compared with large enterprises.

The interpretation now given by the Commission to exempt micro/small or even SME from future legislation is completely in contradiction with the “Think Small First” approach and makes it completely meaningless. It reconfirms the tendency to draft “top-down” legislation, under which legislative acts tailored to the needs of large enterprises and corporations are applied to SMEs.

Any categorical exemption completely disregards the fact that the needs and expectations of micro enterprises on the one hand and small ones on the other hand depend on the file or legislation. This is even admitted by the Commission in the report, when it mentions that *“First results of the screening process show that clear-cut criteria for identifying legislation from which micro companies can be exempted are difficult to identify on a general basis”* (point 3, p.3).

When micro enterprises are removed from the scope of EU legislation, there would no longer be any incentive - or indeed any need – for the European legislator to direct its focus towards the needs of such enterprises. With this proposal the European Commission is running away from its responsibility and shows a surprising inability to take into account the needs and characteristics of SMEs. It confirms the idea that Europe “can only think big”.

This is also an way to achieve the 25% target for the reduction of red tape. By excluding micro enterprises or even SMEs in general from the scope of EU legislation, the Commission claims that it has done its job, while in fact it is passing the “hot potato” to the Member States.

2.2. An additional burden for micro enterprises and an obstacle preventing them from gaining a foothold in the internal market

An exemption of micro enterprises from the scope of EU legislation does not mean that micro enterprises are not subject to / do not need any regulation. Generally speaking, Member States' existing national regulations would continue to apply, with the consequence that micro enterprises, in contrast to all other enterprises, would be subject not to EU legislation but to a specific national legislative framework. With regard to cross-border activities, which would hereby become more difficult or even impossible for micro enterprises to carry out, such enterprises would suffer major disadvantages due to their general lack of financial and human resources. The various initiatives of the European Commission designed to motivate SMEs in particular to engage in cross-border activities within the internal market would be counteracted by the planned exemption of micro enterprises, leading to a de facto denial of access to the internal market.

On the issue of exemptions, any fundamental differentiation between micro enterprises on the one hand and all other ones on the other hand would also inevitably lead to a structural split of the legal order, entailing an undesirable fragmentation of Member States' legislation and a threat for internal market.

In addition, the market (e.g. in case of subcontracting, supply chain...) will in practice oblige micro enterprises anyway to adapt to the regulations from which they are exempted. This will increase even more the costs and administrative burdens as rules will not be drafted in a way that takes into account their specificities. From a better regulation and legislation point of view, it is also clear that exemptions make the legislation more difficult and complex. Indeed, **exemptions have to be interpreted in a strict, limited way; consequently, they have to be very precise.** For SMEs it is easier to know the general rule than to know all the exemptions.

2.3. Exempting micro enterprises is an additional obstacle to (even small) growth (“threshold effect”)

Micro enterprises that upgrade to small enterprise as the result of for example an (even limited) increase of the turnover or of the number of employees, will suddenly come under the scope of many pieces of European legislations in all kinds of fields, from accounting to social, environmental and contractual rules.

What normally should be a smooth process without any consequences will now suddenly lead to a wide ranging change in the company’s internal and external processes, which can even affect the whole enterprise structure. In some cases, there is even a threat that numerous entrepreneurs will shy away from this risk, stopping the company’s expansion or at least becoming more cautious in their investment decisions, or keeping business operations restricted to local or national boundaries⁸.

2.4. Notion of exemption

“The screening exercise shows an important range of legislation with existing exemptions. A distinction should be made between different cases. In some cases, SMEs are completely excluded from the scope of the legislation. In other instances, legislation applies to SMEs but exemptions are granted based on the size of the enterprise. Finally, legislation is applicable to SMEs but with lighter requirements.”

UEAPME does not agree with this analysis and the distinction made. Indeed 11 of the 21 mentioned legislations have nothing to do with exemptions based on the size of the enterprise. This is the case for numbers 1, 2, 3, 11, 12, 13, 18, 19, 20 and 21. In these legislations the size of the enterprise is not even the criterion but the e.g. the way of producing (small quantities).

Extended transition periods: Extended transition periods have nothing to do with minimising administrative burdens for SMEs. Reasonable transition periods are part of good governance and should be based on the needs and possibilities of the smallest enterprises and decided on in agreement with the representative organisations.

These two last points are the direct consequence of the existing confusion on the notion of “exemption” as used by the Commission in this Report. Only when certain enterprises by decision of the legislator do not fall totally (or partially) under the scope of a piece of legislation, one can call this an exemption and this should be avoided as a generic rule.

On the other hand, dedicated measures for some enterprises (for example for the production at small scale), specific measures supporting compliance (agreed transition periods, lighter regimes...) and /or implementation (as procedures) are not exemptions. They are part of the solution to implement the “Think Small First” principle and the “Smart regulation” objective, if they are conceived for these enterprises and in partnership with the representative organisations.

⁸ “Threshold effect” – “effet de seuil”: Radical change of state within a system whether a physical system like the human body or an abstract (conceptual) systems such as an economy that often manifests suddenly when a critical limit is crossed.

3. Further comments on the report

The proposal of the Commission to establish a **scoreboard** can be supported but should be established for all European legislative proposals. In addition, it should be updated on a daily basis and not on a yearly basis. In a year time a proposal can have been adopted by European parliament and Council.

UEAPME also fully supports the integration of a micro-and small enterprise dimension into the SME Test for all the legislative proposals able to have an impact on them and not only “*in cases where micro-enterprises must be covered by its legislative proposals for wider public policy reasons*”.

UEAPME demands that Member States adopt this proposal and requests the European Commission to evaluate the implementation of the SME Test in each of them.

4. Strengthening the application of the SME test, particularly for micro enterprises

Although the report clearly states that “From January 2012 the Commission’s preparation of all future legislative proposals will be based on the premise that in particular micro enterprises should be exempted...” Commission officials have already publicly declared that this sentence has to be seen in relation to what is mentioned on page 4 of the report under point 3 and that the exemptions will not apply in case overall public policy objectives or the internal market are undermined, and for example, health and safety at the workplace, food safety or environmental protection.

The question is then in what kind of policies exemptions will be applied, as the mentioned examples cover in fact nearly the totality of the European policies towards enterprises. In addition, if it is only in a extremely limited number of (still undefined) files that the rule will apply, one can question if it is really necessary to announce this report as a fundamental change in the Commission’s policy.

In our opinion the text is not ambiguous: the Report mentions clearly that the Commission will strengthen the focus on exemptions for **all** future legislative proposals, which is for UEAPME not an option.

As 90% of all enterprises are micro enterprises, an exemption of this group would suggest that in practice that there is no need to legislate. Therefore UEAPME proposes the following alternative to the Commission’s proposal:

“If the proportionality of micro enterprises being covered cannot be demonstrated by the Commission services, then the proposal as such should not be tabled.”

This proposal has the following advantages:

- it ensures that every future legislation will be proportional (for micros, small, medium and big enterprises);
- it really applies the think small first principle as the analysis and the proposal starts from the characteristics, needs, possibilities of the micro enterprises;
- it ensures that new legislation will only be introduced if it is really necessary.

In order to improve the Impact Assessments UEAPME proposes that stakeholders should be consulted on the first draft of the impact assessment, before the final study is used as a basis for consultation.

5. An Action Plan to involve SMEs better in law-making and in evaluating the progress made

A substantial part of the report is dedicated to the issue of better involving SMEs in lawmaking and in evaluating the progress made. While we can only welcome the intention of the Commission to strengthen the involvement and consultation of small business in better law making, the proposed changes are not at all convincing.

- In the field of social policy the report states that “... the Commission **will** use the consultation process with the European social partners provided under Article 154⁹ of the Treaty, before issuing a proposal.” It is quite strange that the Commission announces this, as this is actually already the case since many years and it is even an obligation according to the Treaty.
- The consultation of the European Social Partners should, in any case, not replace impact assessments carried out by the European Commission. The results of these impact assessments should then be presented in the framework of a Social Partner consultation.
- Once again the Commission will rely on the Enterprise Europe Network, which in many countries does NOT reach the average SME. The Enterprise Europe Network is primarily a service-orientated network which should help and assist SMEs in exploiting the potential of the Single Market. The EEN’s role in gathering feedback on legislative proposals is limited, as most SMEs are reluctant to fill in complex questionnaires which also require legal knowledge of the EU matters in question. The experience with “SME panels” on various topics is that only a tiny fraction of SMEs concerned actually answer the questionnaires. This approach may be useful in some very sector-specific issues, but not in fields of a more general interest for SMEs. Thus, the business representative organisations should remain the main voices of SMEs.
- We do not see the added value of creating a “dedicated webpage, to identify the top 10 EU legislative acts considered to place burdens on micro enterprises and SMEs.” By proposing this the Commission admits that its commitment in the Small Business Act” to do “a complete screening of the acquis and include the results in the updated simplification rolling programme” has failed. If the Commission is so committed to simplification and better regulation why does it limit it to only 10 pieces of legislation? What will be the criteria to decide if a legislative act is part of the top 10?

The fundamental problem is not that the opinion of SMEs is not known, but **that the Commission does not take sufficiently into account the opinion of the SMEs as expressed by their legitimate representative organisations.** The best proof of this is this report itself, which does not at all reflect the opinion of the business community, although the SME Envoy had liaised with the SME stakeholders and although UEAPME since many years is advocating against the principle of exempting micro enterprises/SME from European

⁹ Article 154 (ex Article 138 TEC):

1. The Commission shall have the task of promoting the consultation of management and labour at Union level and shall take any relevant measure to facilitate their dialogue by ensuring balanced support for the parties.

2. To this end, before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Union action.

3. If, after such consultation, the Commission considers Union action advisable, it shall consult management and labour on the content of the envisaged proposal. Management and labour shall forward to the Commission an opinion or, where appropriate, a recommendation.

4. On the occasion of the consultation referred to in paragraphs 2 and 3, management and labour may inform the Commission of their wish to initiate the process provided for in Article 155. The duration of this process shall not exceed nine months, unless the management and labour concerned and the Commission decide jointly to extend it.

legislation. Therefore, the representative SME organisations must be finally recognised by the Commission as the legitimate representatives of the enterprises and as the main source of stakeholder consultation.

6. Annexes

The report attaches two annexes with proposals on exemptions or lighter regimes in existing legislation and future legislations. The only reference made in the report mentions that they are "*examples of preliminary results of the ongoing screening exercise*". Nowhere in the document however the Commission mentions what the objectives of these lists are and what the Commission intends to do with them. UEAPME will come back with specific comments on the proposals once this has been explained by the Commission.

7. Conclusion

Micro enterprises are just as much part of the European economy as all other enterprises and must therefore remain covered by EU legislation - as already provided for under the "Think Small First" principle. Any general exemption of micro enterprises is to be rejected, not just from a legal and SME policy perspective but also and in particular for micro-economic reasons.

Instead of across-the-board exemptions, the "Think Small First" principle needs to gain prominence as a legislative guideline, with future legislation ensuring effective regulations for SMEs entailing a minimum of red tape and based on high-quality and independent impact assessments. A focus must be put in all legislative initiatives of the European Commission on the consistent application of the "SME Test" included in the guidelines for impact assessments. The European Commission must not adopt a policy of sweeping the "problem" of micro enterprises under the carpet by generally exempting them from EU legislation. Instead, the existing provisions of the SME Test must be applied.

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