

The Netherlands' response to the public consultation on the revision of the European Commission's Impact Assessment guidelines

Introduction

Robust impact assessment is a vital element of both the Dutch and European policy-making process. It provides political decision-makers with the information needed to make effective, evidence-based, and value for money policies. We believe there is a need for considerably more openness, rigour and quantification in Commission Impact Assessments (IAs) and call on the Commission to continue to devote serious effort to raising their quality.

Effective impact assessment allows the Commission for instance to fulfil its Regulatory Fitness ('REFIT') and 'Think Small First' commitments, amongst others by facilitating the identification of unnecessary costs to business and disproportionately burdensome obligations for SMEs. Minimising regulatory burdens is a key EU growth priority for the Netherlands, and has been consistently requested by the European Council.

We value the efforts the Commission has already made in the past years to improve the system and quality of Impact Assessments. Overall, we welcome the draft Impact Assessment Guidelines as a means of increasing the quality of Commission IAs even more. Improved guidance on subsidiarity analysis, proportionality, costs and non-regulatory alternatives is particularly welcomed, and we call on the Commission to further develop these areas. We also call on the Commission to improve the guidance, most importantly through:

- An improved commitment to quantification in impact assessments, including the costs of proposals for the EU budget, businesses and member states' governments.
- Clearer 'SME test' instructions and greater discussion of lighter regimes for SMEs.
- Clear instructions to ensure rigorous, quantified analysis of the likely impacts on businesses and innovation and tests on risks to EU competitiveness when relevant (in other words, more effort to enable debate and real 'competitiveness testing')
- A restatement of the existing commitment to 'evaluate first' and instructions about the discussion of existing evaluations in IAs.

The Netherlands supports a systematic, evidence-informed approach to the design and review of EU legislation. We particularly support: competitiveness test; measure impacts; proportionate rules; exemptions and lighter regimes; target for burden reduction; evaluate and enforce. On the subject of 'Competitiveness tests', we believe that all new EU proposals should be tested with regard to their impact on European competitiveness.

In order to better 'measure impacts', we believe:

- The European Commission should publish an annual statement of the total net cost to business of the proposals which it brings forward.
- The European Commission, the European Parliament and the Council should work together during the legislative cycle by using and updating the information of the Impact Assessments, taking into account the changes made by the European Parliament and the Council of Ministers in the final proposals.
- The European Commission should publish provisional Impact Assessments when it goes out to consultation – setting out the impacts of the options proposed.
- The Commission should, in addition to its own research, engage in a dialogue with member states on the policy options before the publication of the final impact assessment. This will provide a better overview of existing (sub) national policy and aspects of proportionality (eg. costs, feasibility and enforcement) of the EU policy options.
- Independent scrutiny of Impact Assessments is important. An Independent Impact Assessment Advisory Group should scrutinise Impact Assessments for all legislative

proposals, as well as for amendments to proposals, from all the EU institutions. Impact Assessments which do not receive a positive opinion from this Group, due to lack of quality, should not proceed.

- The focus of EU action should be on those areas where only joint action at European level can deliver the desired results. When the EU acts, the most efficient and least burdensome approach should be taken. Impact assessments need to develop to such an extent that the evidence to achieve this ambition is there.

General questions on the draft Impact Assessment Guidelines (annex I)

1) In line with international best practice, the Commission's Impact Assessment system is an integrated one, covering costs and benefits; using qualitative and quantitative analysis; and examining impacts across the economic, environmental and social areas. Do you agree that this is the right approach?

We support the Commission taking an integrated approach to impact assessments. It is important to robustly assess all relevant impacts, costs and benefits, to ensure that the expected overall cross sectorial effects of a policy are transparent to policy-makers and European citizens. We also agree that analysis should be proportionate to the extra insights it can generate and to the scale of impact and interest in the proposal.

However, the guidelines should be clearer and more ambitious about the importance of quantitative analysis. Quantification and monetisation are essential in order to compare options rigorously and transparently. Where proposals will have significant costs to member states' governments and business, we would expect to see at least the direct costs quantified and monetised. This is particularly the case with administrative costs and enforcement costs, which are relatively straightforward to monetise. It would be good to distinguish also between costs which are occurring only once and recurring costs. It is also important to consider the enforcement costs of non-binding regulations.

When using sampling and weighting in impact assessments careful consideration should be given to the results. When only a small set of Member States is used to measure regulatory impact this is often not fit for purpose as there are 28 separate jurisdictions that can simply not be extrapolated. On top of using consultancy firms to carry out impact assessments it would be wise to engage in a dialogue with member states on the policy options before the publication of the final impact assessment. This will provide a better overview of existing (sub) national policy and aspects of proportionality (eg costs, feasibility and enforcement) of the EU policy options.

2) Do you agree with the scope of coverage of proposals requiring an impact assessment? If not, why not?

We agree that an IA should be required when the Commission has to decide whether the EU should act, and any or all of the different policy alternatives are expected to have significant direct economic, financial, environmental or social impacts. We believe the current definition of scope should be clarified to clearly specify that an IA should still be carried out when there is only one feasible policy option in addition to the baseline option of no policy change. We would emphasise that 'significant' should be interpreted as 'non-negligible'. If more detailed advice is developed on significance, it should also clarify when impacts are to be considered direct and when they are to be considered indirect, and an IA should be required when significant indirect impacts are expected.

We therefore urge the Commission to introduce more rigorous controls to ensure that IAs are produced for all initiatives which fulfil the criteria set out above.

3) Are the appropriate questions being asked in the Impact Assessment guidelines? Are there other issues that the impact assessment should examine? How would this help to improve the quality of Commission policy proposals?

We believe the key questions in the Impact Assessment guidelines on p. 9 are broadly appropriate, but suggest one particular clarification. The second question should be 'Why should the EU act?', rather than 'Why should the EU act and not Member States alone?'. We strongly welcome the focus given to the analysis of subsidiarity. However, there should not be an assumption that every problem should be solved at either EU or Member State level. Some problems are better solved by regional or local government; others do not require government intervention at all. In this respect, variations between regulatory practice between Member States should be well understood and taken into account.

We also underline the importance we attach to consult national parliaments at an early stage in order to meet possible objections earlier. When based on evidence, the Commission decides not to initiate a proposal, we would suggest to make this publicly known.

4) Do you have any other suggestion on how to improve the guidance provided to Commission services carrying out an impact assessment and drafting an impact assessment report?

Quantification: As discussed above, we believe the guidelines should show a more ambitious commitment to quantification and monetisation, especially of cost to business but also of cost to the public sector and of welfare impacts. The tone of the draft guidelines does not reflect the importance of quantification and monetisation in increasing transparency and allowing policy options to be properly compared.

The guidelines should include more detailed standardised instructions to guide officials in quantifying and monetising their proposals in a consistent way. This should include guidance on data collection and usage, the appropriate time horizon for appraising policy, the appropriate discount rate, and how risk and uncertainty should be incorporated into analysis. This consistency would facilitate comparisons between different policies.

The guidelines state that it is often difficult to quantify the costs of implementation and enforcement in Member States, and that 'known unknowns' such as these should be discussed and analysed qualitatively. We believe that the Commission should be more ambitious about assessing these costs quantitatively, as they can often account for a substantial proportion of the total costs of a policy option. To help with quantification, Services should be guided to proactively request data from Member States (including local and regional level) if necessary (or regional /local authorities in the event that it is proposed to make them implementing authorities). Furthermore, given the "evaluate first" principle, evaluations should be used to gain more data as well.

Evaluate first and cumulative burdens: We strongly support the Commission's commitment to 'evaluate first'. We think that the guidelines should restate this principle to 'evaluate first' before introducing new legislative proposals. Evidence from the evaluation of existing legislation is essential to support and strengthen the impact assessment. It can, for example, support evidence and experience-informed work on baseline definitions, the assessment of macro-economic impacts, difficulties and regulatory burdens with the implementation, predictions of how business models will react to new interventions, competitiveness analysis and the refinement of policy objectives. Therefore, the Commission should be careful with launching new proposals unless existing legislation in the policy area has been evaluated in a proportionate way, in line with existing commitments. We suggest that a summary of evaluation evidence should feature in Impact Assessments which accompanies proposals to amend existing rules. Services should particularly explain whether existing EU legislation generated the expected benefits, and if not, why not.

Additionally, it is important to consider cumulative burdens on business and government resulting from different pieces of legislation in a given sector, and we have noted the Commission's recent cumulative cost assessments with interest. The inclusion of evidence from these and similar existing evaluations should be encouraged to assist with the assessment of the cumulative impact of regulation in IAs, which in turn permits better analysis of overall effect on the competitiveness of the sector.

SME test and lighter regimes: We welcome the inclusion in the guidelines of the need to examine whether a policy would place disproportionate burdens on SMEs, and we support the emphasis placed on excluding micro-enterprises unless their inclusion can be justified. However, we believe the guidelines should go further. They should include an explicit requirement to undertake a robust SME test, including discussion of the effect on micro-enterprises and small businesses, and to clearly set out or signpost the findings as a subsection in the report (as is the case in the existing guidelines). The SME test should be strengthened to ensure that the impacts on micro-enterprises and small businesses are explicitly and fully taken into account, as the SME category is broad, and the impacts on medium-sized businesses can be very different to the impacts on smaller businesses.

The SME test is a vital element of the Commission's existing commitments on smart regulation, for example the 2011 Communication on minimising the burden of EU regulation for SMEs. We therefore believe that excluding the SME test from these guidelines would not only reduce the quality of impact assessments but would also weaken the Commission's smart regulation commitments.

In addition, we believe the commitment to introduce adaptations and lighter regimes for SMEs in situations where micro-exemptions are not feasible should be made more prominent (it is currently included in a footnote on p.14, while micro-exemptions are discussed on p.14 and p.24).

EU analysis¹ suggests that regulation can cost up to ten times as much per employee for SMEs compared to larger companies; therefore lighter regimes are essential to ensure regulation for small companies is proportionate and supports growth.

Alternatives to EU regulation: We strongly welcome the emphasis in the guidelines on considering alternatives to EU regulation, including regulation on a (sub) national level, self- and co-regulation, as part of a range of policy options. By considering a range of policy instruments to achieve its objectives, the Commission can ensure the most appropriate approach is taken so that it is effective, efficient and avoids placing disproportionate regulatory burdens on business and governments. It is, however, important that the impact of non-regulatory alternatives is also scrutinised .

Furthermore, the guidelines should include mention of a wider range of alternatives to regulation, such as policies to provide information and guidance. There should also be greater consideration of policies to increase compliance and enforcement of existing legislation, rather than introducing a new regulatory proposal. On many policy areas member states do have policy or legislation in place on national, regional and local level. EU legislation/policy should have a clear added value to lower level of policy/legislation (subsidiarity) or use well working national, regional and local policy/legislation as a base for EU policy/legislation (proportionality).

We also think it would be helpful if the guidance could more clearly distinguish between the types of policy options that should be considered (p.13-14), such as:

- Working within existing legislative structures to reach objectives (e.g. improving implementation and enforcement)
- Working with stakeholders to develop non-regulatory interventions, such as policies to provide information and guidance, self-regulation by industry or improved product design, or compliance with recognised standards, with the option of support by an accredited conformity assessment.
- Considering a wider range of interventions, such as soft-law², co-regulation and market-based solutions.

Furthermore, the inclusion of international standards as an alternative policy instrument (p.14 and p.38) should be clarified. The term 'international standards' can be interpreted as both voluntary standards (such as those developed by the European Committee for Standardization or the International Organization for Standardization), and international agreements made in other

¹ http://ec.europa.eu/enterprise/policies/sme/files/support_measures/regmod/regmod_en.pdf

² E.g. policy Communications combined with Council Conclusions and Council Recommendations.

jurisdictions (p.14 and p.38). We agree that it is useful to avoid 'unnecessary regulatory differences', but conforming to international agreements will not necessarily represent a non-regulatory policy approach, and so it would be clearer to distinguish this from the discussion of non-legislative approaches, such as voluntary standards.

Consideration of options: We are concerned that, as currently drafted, paragraphs 2 and 3 will encourage officials to excessively rapidly discount policy options without sufficient discussion and analysis. These paragraphs should be more positively drafted. For example, paragraph two could emphasise that the screening should ensure options are technically feasible and legally viable, rather than encouraging officials to discount options. If barriers are identified, officials might want to consider with experts whether these could be overcome as part of the policy development.

Transparency and IA Reports: We believe that executive summaries add considerable value to Commission IA reports by making the options and evidence contained in the report more accessible to citizens and other stakeholders. We therefore welcome the advice provided in the guidelines that executive summaries should continue to accompany IA reports. Where the Commission's final proposal differs from the preferred option in the IA (which can occasionally happen due to political reasons), we believe that the executive summary of IA reports should also include a statement on the degree of variation.

It would also be valuable to boost the transparency and demonstrate the robustness of IA reports by clearly referencing source data, or publishing original data and the calculation methods used to permit others to recreate and test the estimates. Also the timing and announcement of the publication of the IA is of importance. IA reports are often published simultaneously with the new proposal of the Commission. Further discussions are because of this more focused on the proposal and could underexpose the IA report.

Any external reports that have been produced on request of the Commission during the preparatory phase of the IA should also be made public.

Finally, we welcome the emphasis the guidelines place on writing IA reports with the non-expert reader in mind. Many are too technical and hard to follow – it is essential that this is addressed to ensure that the analysis contained in the report is transparent, open to scrutiny and able to play a full role in informing debates and the European legislative procedure in general.

Format guidelines: In order to make clear what exact steps should be taken in the IA process, it should be useful to place each paragraph of Annex II (B to F), which elaborates on the steps mentioned in the Questions of chapter III, right after each question (in order to have all steps and information together) instead of in a separate Annex.

Specific questions (annex II)

5) Problem analysis: do you think the draft text in annex II.B provides a clear description of the issues to be taken into account when analysing a problem? If not, how should it be improved?

The text appears appropriate. We would add that it is important to analyse the scope of the problem: whether it applies equally across the EU, or is asymmetric and exists only in certain Member States or regions. The Commission has drafted a staff working document³ on assessing the territorial impacts, which could be integrated into the guidelines.

6) Subsidiarity: do you think the draft text in annex II.C provides a clear description of the issues to be taken into account when verifying compliance with the subsidiarity principle? If not, how should it be improved?

³ SWD (2013) 3 final Commission staff working document: Assessing territorial impacts: operational guidance on how to assess regional and local impacts within the Commission Impact Assessment System

Overall, we welcome the guidance on subsidiarity as it provides for more rigorous and thorough analysis of the issues involved than the previous Guidelines.

However, we believe that impact assessments for proposals that revise existing legislation should not rely on past subsidiarity analysis without first verifying that this analysis was rigorous (see p.34) and still appropriate. We agree that analysis should be proportionate and IAs should restate previous analysis where appropriate, but the IA should not begin from the assumptions that all existing legislation conforms to the subsidiarity principle and that existing analysis is sufficient.

7) Objectives: do you think the draft text in annex II.D provides a clear description of the issues to be taken into account when setting out objectives? If not, how should it be improved?

Overall, the draft text does provide a clear description. We support the emphasis on distinguishing within categories of business stakeholders, particularly for SMEs, as the needs of small businesses can differ substantially from those of medium-sized businesses. It is therefore important to examine the effects of regulation on micro-enterprises and small enterprises in particular.

8) Option identification: do you think the draft text in annex II.E provides a clear description of the steps to be followed when identifying alternative policy options? If not, how should it be improved?

We agree that it is important to identify the baseline, 'no policy change' policy option accurately. We also welcome the emphasis on selecting a number of strong policy options for analysis, including alternatives to regulation, but we suggest some improvements to this as described above.

In addition, the term 'regulatory bias' is unclear. It would be helpful if it could be explained. The guidelines suggest that stakeholders' proposals and opinions should be asked and considered to look for considerable support. This process should be more transparent, whereby stakeholders can know if and when they are consulted. Therefore, the notion 'Do not forget to ask for stakeholders' proposals and opinions' should be stronger formulated to emphasize the importance of involving stakeholders.

9) Identification of impacts: Is the list of questions included in the 2009 guidelines (see annex II.F) considered complete and up-to-date? Are there any impacts that should be added or taken out?

It should deserve consideration to add ICT impact in the impact assessment. In the past, legislation was proposed without a valuation of the ICT (interoperability) issues, required for an effective implementation. (e.g. under the services directive the issue of a missing European system of e-authentication of businesses was overlooked). In future it should be compulsory to consider the availability of needed functionalities, not only at European but also at national level, also the financial impact should be known. Under the ISA programme interesting preparatory work has been done.

We recognise that the list is thorough, but are not convinced that the current format is the most useful way of presenting the information. There is a risk that these questions could narrow down thinking and be seen as exhaustive/prescriptive. They appear to constitute a checklist, and could encourage a tick-box exercise rather than a proper, carefully thought through, tailored assessment of impacts. It could be more appropriate to present a shorter list of the types of impacts to be considered, followed by a list of non-exhaustive example questions.

In line with our desire for improved quantification and rigour, we would suggest internal work is conducted to improve the frequency and robustness of assessment of impacts on total economic output.

In addition, we think that the impact on developing countries should be mentioned more prominently in the guidelines, as Commission services should be aware of the horizontal aims with regard to BCO (e.g. on p. 17 after the listed affected parties in Question 5).

Finally

As mentioned above, we are in favour of setting up an Independent Impact Assessment Advisory Group which scrutinises Impact Assessments from all the EU institutions. Until then, we are keen to see the IAB's opinions being more consistently respected and acted on. As things currently stand, some proposals still proceed despite negative IAB opinions, and we have noted several cases where weaknesses highlighted by the IAB do not seem to have been properly remedied in final IAs. We believe it is vitally important that the Commission acts on the IAB's advice, revising analysis and proposals in order to secure a positive opinion from the IAB or dropping ideas that cannot reasonably be expected to deliver a net benefit.

It would be useful for the IAB to keep a record of its opinions on matters that the Guidelines either do not discuss or cover in broad terms, and to distribute this to Services in regular reports (e.g. situations when detailed assessment of SME or competitiveness impact has and has not been requested). Building up a log of 'case histories' would boost the consistency of Impact Assessments and would assist with future updates of the Guidelines.