



Local & Regional
Europe

EU Impact Assessment: Better legislation and policy through early involvement of local and regional government

CEMR response to the public consultation on the revision of the
Commission's Impact Assessment guidelines

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General comment:

CEMR is the European umbrella organisation of national associations representing local and regional government. With 57 associations from 40 countries, it is the broadest territorial organisation and represents some 100 000 local authorities in the European Union.

CEMR is particularly committed to the principles of local democracy, local democratic governance and self-government, faithful to the principles and the spirit of our *European Charter of Municipal Liberties* of 1953, which resulted in the adoption of the *European Charter of Local Self-Government* in 1988.

Local and regional governments should be considered equal actors in European governance. They contribute to the implementation of European Union policies in their territories, especially in fields as important as cohesion, social inclusion, environment or climate. The *Treaty of Lisbon* has extended the principle of subsidiarity to local and regional governments but their recognition as key actors of European development needs to be better understood by the institutions of the European Union.

Europe should not be seen solely as a distant, additional institutional level, embodied in the meetings of Heads of State and Government and in technocratic institutions. Above all, it should be an area of respect and freedom for the territories in all their diversity.

Therefore, we believe that the European Union needs to better involve the local and regional government level in the different phases of policy and legislation making. We are convinced that the future of the European Union can only be developed and implemented through our territories and through mobilisation of all actors and that local and regional authorities play a major role.

CEMR believes that the subsidiarity and proportionality principles of the Lisbon Treaty are not sufficiently taken into consideration, and calls the European Commission to develop a systematic, transparent and formal pre-policy and legislative consultation that includes local and regional government on issues that affect them directly and that have administrative and financial impacts on them. This in turn will lead to more support, better implementation and enforcement on the ground. We need to act as one government, where the regional and local level represents the EU legislation closest to its citizens and businesses.

On the consultation:

The consultation focuses on the questions and the content of the Impact Assessment, but does not address the procedure and the context, in which they are performed. However, it is important to look into the broader picture and to link it with the 'smart regulation' question.

Comments on the context of impact assessments

We believe that the preparation process of new legislation and non-legislative initiatives should be more transparent and provide more interaction with the target groups concerned, in particular local and regional government. Such an approach should include an early exchange on existing policies and legislation on (sub-) national level. This would provide a better overview and allow a debate on the necessity of the European initiative and the different options for a common EU policy.

At the moment, decisions on different options are taken by the Commission on the basis of the impact assessments, and cannot be the object of a technical and practical debate with the Member States, the European Parliament and relevant actors or stakeholders.

The outcome is a proposal which is often disproportional and unfeasible. Member States, including their local and regional levels of government, are faced with unclear definitions, unnecessary details

and high friction costs. As politicians, members of the European Parliament do not necessarily have the technical expertise to enter into such detailed technical questions. Negotiations in an EU of 28 Member States are not suitable to correct these flaws, instead they focus on weakening and deleting parts of the legislative proposal. This in turn bears the risk to deviate the focus of the initiative, it prevents the EU institutions to concentrate on a political discussion on its desired role (eg. subsidiarity); the desirable policy options and diminishes support for implementation and enforcement of EU laws. Policy is often much more than legislation, but also depends on fitting EU legislation in the broader national, regional and local policy. We strongly invite the European Commission to reconsider this approach.

CEMR welcomes the publication of the roadmaps with information about planned impact assessments. However, the gap of information between the roadmap fiche and the final impact assessment is too big. We would appreciate if more details could be provided, for example the quarter of the year when the assessment is planned, what will be the objective of the assessment, how it will be organised (e.g. launch of studies, evaluations, etc.), a link to open calls for studies, and policy options that will be examined. This could also be seen as an opportunity to provide better input to the impact assessment process.

Executive Summary

For local and regional government, anticipating the **impact of new EU legislation** or policy with regards to **potential costs, the administrative and regulatory dimension is crucial**: new EU legislation often has a direct impact on them or they have to implement it. Therefore, all major or even significant EU legislative and also non-legislative proposals concerning regional and local government should be open for impact assessment and consultation.

The Impact Assessment should **assess the situation in the Member States** and find out what legislation exists in order to achieve the targeted objective(s). Existing legislation should be taken into consideration and differences between the Member States should not automatically lead to harmonisation.

Impact Assessments on new EU proposals should **not use sampling** with the result that regional and local governments of several countries are excluded from participating in the assessments. There is a particular issue when the Impact Assessments are carried out per Member States and when the Commission assumes that regional and local government jurisdiction is homogeneous and uniform within any Member State.

We believe that the **Impact Assessment Board (IAB)** needs to be made separate from the Commission main services or at least contain part of its members made up of independent experts. This should lead to robust and independent assessments, as well as transparent and unbiased preparation of legislative or non-legislative proposals.

When contracting out major parts of the assessment work to external consultants, these contracts often have **narrow terms of reference**, both in what and who they ask. This places severe constraints on the collected feedback and is not always fit to provide the views of regional and local government bodies. In-house consultations with narrowly formatted e-questionnaires do not allow a proper representation of views particularly if they significantly depart from the Commission's originally assumptions.

Subsidiarity assessments so far **have not been serving the requirements** of the Lisbon Treaty. Article 5 of the Treaty Protocol 2 clearly states that the Commission needs to assess "any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens". Five years after entering into force of the Treaty the Commission has still not established a structured and formalised mechanism for such an assessment. The Commission cannot argue that because some provision in the Treaties give it powers to legislate in an area that it can automatically use this to override the subsidiarity principle. It needs to consistently prove that EU action is going to be more effective than national, regional or local action.

Crucially the Commission fails to understand that **local or regional authorities are not "stakeholders"**. They are public institutions and administrations and have to be considered in the same way as national ministries or governmental agencies. Lumping them together with private business and civil society is not only inappropriate, particularly when the draft legislation concerns their legal powers;

Key recommendations

On the impact assessment process

1. Establish an Independent Impact Assessment Board;
2. Provide a Structured Dialogue with regional and local government as an integral part of Impact Assessments:
3. Recognise Local and Regional Government representatives as partners in EU policy development, not lobbyists;
4. Studies, preliminary impact assessments concerning regional and local government contracted out should be carried out in partnership with regional and local government representative bodies.

On the impact assessment content

1. Separate Guideline section on impact on national, regional and local government;
2. Terms of Reference for Impact Assessments and Consultations should be open for comments from national, regional, local government;
3. Assessment of cost and benefits across policy options to describe specific cost of European option as well as cost of non-European option: cost, compliance, regulatory, competence loss impact upon regional / local government need to be properly reflected in policy choices;
4. Mainstreaming of Multi-Level Governance principle;
5. Assessment of all legal bases across the Treaty (horizontal competence assessment) and across national, regional and local government (vertical competence assessment);
6. Assessment of the situation in the Member States; existing legislation should be taken into consideration, and differences between the Member States should not automatically lead to harmonisation;
7. Subsidiarity Assessment Toolkit and Territorial Impact Assessment mainstreamed into Guidelines.

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

Q.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?

CEMR welcomes the fact that the European Commission has detailed Impact Assessment Guidelines and we welcome the opportunity to contribute to the review of these Guidelines and the related one on standards for Consultation.

- **Local and regional government should be involved**

We advocate that the European Union should fully incorporate into its policy development and implementation process a **Multi-Level Governance ethos**, whereby local, regional, national and EU institutions work together on cross cutting issues.

We very much support the key principles that should define the way the Commission carries out impact assessments as described in the provided questions.

For local and regional government, anticipating the impact of new EU legislation or policy with regards to potential costs, the administrative and regulatory dimension is crucial: new EU legislation often has a direct impact on them or they have to implement it, as we will describe later in our response. Therefore they should be more involved at an earlier stage in the impact assessment process, being able to comment on different policy options.

We believe that the options do not sufficiently take into consideration the costs and benefits. Very often the Commission Impact Assessment only focuses on the benefits of an EU regulation but pays very limited regard to the costs of an EU regulation (transactional, compliance, reorganisation, etc.).

It does not contribute to good policy-making when it falls upon national, regional or local authorities to provide the Commission the counterfactual information particular in costs of the Commission's own proposal. The different options need to be presented in a clear template with the costs and benefits of each option and not just measured EU wide but per Member State and ideally at sub-national level.

With reference to the subsidiarity principle (Article 5 TFEU) and the requirement to maintain an open, transparent and regular dialogue with representative associations and civil society (Article 11 TFEU), we ask the Commission to **establish a structured dialogue with local and regional government representatives**, where the annual planning and preparation of new legislation and non-legislative initiatives would be presented and discussed, in particular to identify its relevance for the sub-national level. As an inherent part of this dialogue, the Commission should present the long-term planning, including forecasts from individual Directorates General.

Example: Data Protection Regulation

The costs for the public sector to comply with the new legislation fell on individual Member States. Countries that did a very general cost assessment detected several hundred million per year in compliance costs only by measuring the impact at national level; let alone sub-national costs that are by definition more difficult to measure as they are far more dispersed.

Example: Public Sector Information Directive (PSI)

With the publication of the PSI Directive in July 2014, the Commission said that following “an independent report carried out by the consultants McKinsey in 2013, open data re-use could boost the global economy hugely; and a 2013 Spanish study found that commercial re-users in Spain could employ around 10,000 people and reach a business volume of €900 million.”

However, no consideration was given to the costs for local and regional authorities that are facing serious challenges with the implementation of the directive.

Example: Energy Efficiency: obligations for the public sector

The original proposal from the European Commission on the Energy Efficiency directive contained specific obligations for additional building refurbishment targets for the public sector (noting that in practice regional and local authorities as the largest owners of buildings). At a 3% annual rate of refurbishment this would have clearly gone beyond the financial and administrative capacity of most municipal and regional authorities in Europe. CEMR members such as COSLA made cost simulations that proved that this was a rate that would simply not be feasible in financial and capacity terms for the average Council. For example, an estimation by the Association of Finnish Local and Regional Authorities estimated the costs of this requirement to be around 700 million € per year for the Finnish municipalities. By contrast the Commission own impact assessment did not scope the actual impact of this target in those bodies such as public authorities that were specifically required to implement it.

This was a particularly irksome piece of legislation given the similar Energy Performance in Buildings Directive had only been agreed two years earlier and it contained specific targets that were just being implemented in the Member States at the time.

On that basis CEMR successfully campaigned during the legislative negotiations for the 3% target for the public sector to be abolished. However this would have been not necessary if better impact assessment of the Commission proposals were carried out in the first place.

Furthermore, the political dimension should also be taken into consideration (e.g. the question how a Member State and its sub-national authorities want to organise their public services) and potential trade-offs that new legislation would entail to the other tiers of governance in the EU, the national, regional and local level.

EU legislation does not only ignore local and regional governments, but it can sideline their powers and competences that are guaranteed in their national constitution.

If regional and local concerns are not seriously taken into consideration, we are afraid that the assessments are excessively optimistic, limited or scattered in relation to the regional and local impacts.

- **Existing legislation should be assessed and taken into consideration**

The Impact Assessment should assess the situation in the Member States and find out what legislation exists in order to achieve the targeted objective(s). Existing legislation should be taken into consideration, and differences between the Member States should not automatically lead to harmonisation.

Example: VAT legislation on public bodies and tax exemptions in the public interest

The European Commission launched a consultation to prepare the impact assessment on the ‘review of existing VAT legislation on public bodies and tax exemptions in the public interest’ earlier this year. Based on two economic studies and discussions within the ‘group on the future of VAT

and with VAT experts within the VAT expert group and a stakeholder conference, the Commission thinks that the complexity and the lack of harmonisation require a common approach.

VAT recovery is a relevant source of income for local and regional authorities; changes in the current recovery schemes would have a knock on effect on the domestic taxation arrangements in the Member States and would require changes in existing territorial equalisation systems. These are sensitive issues considering the political and fiscal upheaval it would create, clearly outweighing any theoretical gain that is based purely on economic criteria.

For example, the refund system – one of the suggested options- can create problems in some states (e.g. Germany) because of the financial distribution among different public levels: the national, regional and local level.

When different levels of achievement of certain policy objectives exist, Member States that are lagging behind should be helped to achieve a higher level).

For instance, some consultations are organised over the summer or we are contacted on a short-notice by consultants, what does not allow us to gather enough contribution and expertise from our members over Europe. In addition, questions identified in such consultations are already oriented and de facto do not allow discussing all possible options.

Example: Review of EU waste targets - COM(2014)397

Article 11.4 of the Waste directive 2008/98/EC gives mandate to the European Commission to examine the targets set in the directive “with a view to, **if necessary**, reinforcing the targets [...]”. The whole preparatory work of the European Commission conducting to the legislative proposal to review EU waste targets published in July 2014 focused on **how** to revise the targets. There was no real debate on **whether** the targets should be revised or not. The [public consultation](#) organised in September 2012 was a good illustration, as there was no real opportunity to share reflections on the need to reinforce targets.

- ***Critical issues on the provision of evidence and expertise by consultants***

CEMR is concerned about the rigour of the consultation exercises carried out as evidence gathering ahead of the Impact Assessment, in particularly when this is externalised to consultancies and/or uses a sample of a small number of cases/Member States.

As European umbrella organisation, CEMR is sometimes contacted by consultants doing surveys and studies for the Commission. Through our membership, they try to gather information about the application of a specific piece of legislation (e.g. public procurement directives, remedies directives, etc.). However, not being involved in the preparation of the questionnaires or the implementation of the survey leads to a limited willingness of the experts concerned to contribute to a study, in particular since the consultants get paid for the expertise that is provided by the local and experts for free.

Commission services also gather information and expertise by organising stakeholder meetings, which according to our experience tend to disproportionately represent private or civil society stakeholders rather than competent local and regional authorities.

Example: VAT

There is an **unbalanced over-representation of industry and the private sector** in the various working structures of stakeholder dialogue regarding VAT questions. Out of 26 appointed members of the VAT expert group to the European Commission, none of these organisations represent local and regional government. At the Tax Forum in November 2013, and at the where the review of the EU VAT system was discussed, only one local government representative (representing all municipalities of Europe) was invited and the rest of the speakers were either representing private interests or academics (e.g. tax consultants, professors, business people, lawyers, etc.).

We believe that this not fair, considering that the Commission's initiative directly and exclusively concerns the way regional and local governments organise public services and their ability to recover VAT.

Example: Waste Framework Directive

For the review of the Waste Framework Directive, there was an accumulation of studies which were essentially dealing with the same subject but from different perspectives. This weakens representativeness (with several studies contracted out to different consultancies) and clearly diminished the ability of regional and local government to contribute..

- ***Sampling and weighting***

We are equally concerned with the sampling. While we understand that practical and cost reasons force the Commission (or more commonly their consultants) to choose a small set of Member States when it comes to regulatory impact, this is often not fit for purpose as there are 28 separate jurisdictions that can simply not be extrapolated.

Example: Working Time Directive

The Commission has issued a study concerning the Working Time Directive in the field of public health to prepare the impact assessment. Eight countries have been selected for interviews with the consultants: Denmark, Germany, France, Italy, Greece, Czech Republic, Hungary and the UK. While the selection is well explained (*Denmark* representing the Nordic countries, Germany and France representing the conservative/corporatist cluster, Italy and Greece representing the Southern European countries, Czech Republic and Hungary representing the Central and Eastern European countries and the UK which does not fit well into any of the other groups. This seems very simplistic and does not allow having a differentiated view on the situation in the EU Member States.

Equally the Commission does not weight differently the input to impact assessments, and treats a response on behalf of a large constituency (e.g. CEMR on behalf of the 100.000 local authorities of the EU) the same as that of individual contributions (e.g. individual cities). We are convinced that a common response from the European umbrella organisation is far more effective than individual members sending identical responses. Therefore paradoxically the absence of such weighting in Commission Impact Assessments /Consultations runs against the ethos argued by the Commission that common European-wide solutions are preferable to individual responses and solutions.

Furthermore neither the Commission nor the consultants disclose in the impact assessment why and on which basis they choose one country and not another (they may do so in their internal documents). There are abundant examples, to cite recent examples from our sector the Local Development under ERDF study, which was used to develop the new Local Development strands of EU funds 2014-2020. Certain territories were apparently randomly chosen even when they seemed

not to have the sufficient level of relevance. Furthermore, when the consultants are identified they often refuse the evidence of territories that are not part of the sample they were given even when they are often more relevant.

Even when the Commission issues an open call for interested contributors/members of sample (which is welcome) there are issues that cannot simply be left to sampling as each national situation is entirely different. A good example of that is the recent [Multi-Level Governance](#) study commissioned by DG REGIO.

- ***Lack of transparency***

A further issue of concern is that of the lack of transparency of commissioned Impact Assessment or Consultations. Very often these are used as key evidence to justify the Commission legislating in a new area. However, very often the existence of these exercises is not openly disclosed by the Commission or it is made explicitly by the consultants that the input to this impact assessment/consultation would directly inform the Commission policy choices.

Example: urban mobility

A clear example was the recent [“Access Restriction”](#) consultation whose existence was very little publicised and only known to a small group of stakeholders. Furthermore the main avenue for contribution was a website that at the time of the consultation gave away very little hints that the evidence would be used by the Commission to build a case for tabling mandatory EU legislation on urban mobility (in the end it decided against it, but as a representation being made with the consultation exercise).

Example: Directive on the reduction of national emissions – COM(2013)920

The rationale beyond the selection of one option over the others is in some cases very unclear, especially when the “preferred option” is not chosen. For instance, the impact assessment accompanying the proposal for a revision of the National emissions ceilings directive concludes that “Setting air pollution reduction objectives for 2025 rather than only for 2030 would not cause economic inefficiency or incoherence with climate and energy policy, and would deliver additional cost-effective emission reductions in the period 2025-2030 [...] (p.70 SDW(2013)531). However, in the proposed directive, the air pollution reduction objectives are set for 2030, with non-mandatory objectives for 2025 (art. 4 and Annex II).

Example: Legislative proposal to review EU waste targets – COM(2014)397

This draft proposal is a good illustration of the lack of transparency of choices made by the European Commission. In its proposal for a directive on waste targets, the European Commission is proposing stricter recycling targets (including for municipal waste) but is imposing at the same time a single method to calculate the recycling targets. However, the new targets are not set on the basis of the new calculation method but on the basis of the different measurement methods currently used by municipalities. There is no assessment of the impact of the change of measurement method on the achievement of the targets.

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

As described in this response, we advocate that **all major or even significant EU legislative** but, crucially, also non-legislative proposals concerning regional and local government are **open for impact assessment and consultation**.

CEMR would be in favour of open consultation to regional and local authorities on issues of relevance to them. In addition to that, a **structured dialogue** should be established with associations of regional and local government either on national or at European level with the European umbrella organisations such as the Council of European Municipalities and Regions. The absolute bottom-line is that **CEMR must be invited to participate in any impact assessment or consultation** on EU legislative and non-legislative proposals concerning regional and local government.

As a general rule, regional and local government should be specifically invited to participate in Impact Assessment of new EU legislative or non-legislative proposals that:

- Propose to legislate in an EU policy area that previously was **not addressed** by the EU (e.g. urban mobility);
- On areas of shared competence, any proposal that aims to **expand the scope/detail of competence** of the European Commission over the powers currently exercised by Regional and Local Government;
- Proposals that would have **significant cost and administrative implications** for regional and local authorities, such as meeting new EU targets (e.g. energy, waste), compliance, regulatory (e.g. building standards) or capacity costs (e.g. Working Time);
- Proposals that contain specific provisions **directly aimed at regional and local authorities** (e.g. municipal waste, EU standards on municipal registries, EU accounting standards for budgets, etc.).

There can be other cases where proposals should be assessed on their impact on local and regional level; it is not always obvious and may need a more in-depth examination to get the full picture.

On new EU proposals meeting any of the above questions Impact Assessments should not use sampling with the result that regional and local governments of several countries are excluded from participating in these assessments. There is a particular issue when the Impact Assessments are carried out per Member States and when the Commission assumes that regional and local government jurisdiction is homogeneous and uniform within any Member State. There are countries with different jurisdictions when it comes to local government (e.g. Austria, Belgium, Germany, and UK)

We are aware that the Commission does not have the means to assess the impact in specific jurisdiction; therefore it is worth pointing out that national governments can, and regional and local government associations would be happy to help the Commission to have a better understanding on how a specific proposal would specifically concern the local government jurisdiction.

Furthermore, it might be necessary to shift resources to the preparatory phase and allow more in-depth examination of existing legislation in the Member States, the impact on the sub-national level and different options in order to get a better legislative proposal.

CEMR is not calling for additional burden or organisational costs, but wishes to optimise what currently exists and to enable a more joined up discussion. In particular, we are more **than keen that Structured Dialogue arrangements with European organisations** (and national, according to the criteria described above) **are mainstreamed as part of general EU policy making and Impact Assessment in particular**. This is something that currently exists at broad strategic level (one annual meeting with the European Commission President and the President of CEMR and

other European associations) or on an ad hoc basis on certain policy areas and upon the criteria of the individual EU officials and units concerned (Transport, Waste, Energy, for instance).

Regional and local government organisations are able to provide the Commission with robust evidence that anticipate impacts on regional and local government of forthcoming EU legislation but there is often no structured way to input that into the Commission's own considerations. We are afraid that very often the consultation stage is too late and the Commission has already decided at the Impact Assessment stage its policy choice, hence the value of having a Structured Dialogue with regional and local government at the Impact Assessment stage.

Increasingly, Commission officials believe that this role can be provided by the Committee of the Regions (CoR). However, we wish to highlight that the CoR is a political consultative body that provides its opinions on the Commission's proposed legislation. Furthermore CoR members do not have an imperative mandate but a representative one. This means that CoR opinions do not automatically reflect the views of regional and local government across the EU as they are subject to trade-offs and intra-institutional balances, particularly as recent changes of its internal rules had increased the role of European political groups. While the CoR is a valuable proxy to test the (general) views of regional and local government, it is certainly not suited to provide evidence or to ask directly regional and local government representatives and experts what the impact of EU proposals will be in their area, certainly so at Impact Assessment stage, where experts in their fields are needed to provide the requested expertise.

Q. 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?

As explained in our answer to the second question, we urge the Commission to **establish a separate section** of the Guidelines **dealing specifically with subsidiarity and proportionality, regulatory and administrative, compliance and cost impact at regional and local level** and potential asymmetric territorial impacts rather than these being spread out across the Guidelines and often lumped upon specific impacts of civil society, business or the environment.

We believe that the EU is first and foremost a political and legal construction, based on several levels of government. Whether one agrees that the relationship between these levels of government (local/regional, national and EU) should be underpinned by the principles of Multi-Level Governance, subsidiarity and proportionality (as we do) or not, it is a fact that the implications of new EU policy and legislation upon the regional and local level of government cannot be dispersed or diluted among questions affecting sections of society, economy or the environment, and they should be examined separately and on their own right.

Quite often EU legislating in an area means that national, regional or local government would no longer be free to legislate in that field. While according to the principles of subsidiarity and conferral an European Union solution might be advisable, the policy, legislative and economic trade-off for the other two tiers of government need to be clearly and separately assessed before concluding whether legislating at EU level is appropriate or not.

Q. 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?

Internal Commission:

We believe that the **Impact Assessment Board (IAB) needs to be made separate from the Commission main services** or at least contain part of its members made up of independent experts. This is something that is increasingly commonplace in national administrations to increase the quality and independence of such bodies and we see no reason why the European Commission should not operate a similar way.

A good example is the [Office of Budget Responsibility](#) that provides independent assessment of the UK Government budgetary trends and its impact in the economy that sits out with government and party politics. Another similar example is Actal, the Dutch Advisory Board on Regulatory Burden, an independent and external advisory body that advises Government and Parliament on how to minimize regulatory burdens. It will broaden its mandate to include sub-national regulatory burdens as well. Also the [National Regulatory Control Council](#) in Germany ensures transparency regarding the consequential costs of laws for decision makers in government and parliament. It examines laws, ordinances and regulations that are already in effect, as well as existing administrative processes to identify possibilities for simplifications and cost reductions. In Finland, there is a negotiation system called "Basic services procedure". In this procedure the government has to find a common view with the local authorities (the Finnish Association of Local and Regional Authorities) for example of the estimated costs of new duties. Another example is the Scottish Government [Strategic Board](#) that is made up by Director-Generals plus three Non Executive Directors that are recruited from open call.

Clearly in the event of a totally autonomous IAB there are significant issues of inter DG coordination that need to be addressed. Certainly CEMR has been vocal in the past of the many overlapping and often competing initiatives concerning regional and local government carried out separately by individual DGs. However, there is no reason why the coordination functions currently being carried by the IAB cannot be simply transferred to an enlarged Impact Assessment Steering Group (IASG). This way the Commission can benefit from robust, independent assessments and still maintain a link between impact assessment and interdepartmental strategic decision making.

Commission-Member States:

While respecting the fact that EU Treaties confer on the European Commission the monopoly of tabling EU legislation, we believe that this power is not independent of, but merely autonomous from the Member States that make up the EU as a supra-national organisation.

In the context of Impact Assessments we see no reason why the European Commission when designing an Impact Assessment or, more specifically, when designing the Terms of Reference for a consultation, particularly one to be carried out by contracted consultants, does not **seek the contribution at least of government departments**. Very often - as expressed elsewhere in this response - **the Commission questionnaires are not fit for purpose** on how the problem is defined at national and particularly at regional and local level. Giving the opportunity of at least Member State Governments (ideally regional and local governments on matters directly affecting them) to comment on the Terms of Reference does not impede the Commission monopoly of initiative while ensuring that the questions being asked are really relevant.

Representativeness of Local Government:

We would like to address the issue of the Transparency Register in this context, as local authorities may be excluded from meeting with Commission officials or participating in consultations and impact assessment exercises if they are not registered.

CEMR and its member associations from EU countries are very worried about the impact of the recent and unexpected changes to the Inter-Institutional Agreement (IIA) on the Transparency Register that has resulted in Local Government being asked to join the same registry as private and commercial lobbyists to contribute to EU policy discussions.

Indeed we are in the nonsensical position of local authorities now having to comply with the register (sections 16 and 17 of the IIA) if they want to continue to engage in EU policy development, whereas regions remain exempt from this requirement, as they rightly are recognised as public authorities and not as private or voluntary sector lobbyists.

It is furthermore worrying that the Guidelines on the IIA as they are currently drafted foresee that those local government organisations not willing or able to register would face penalties in terms of meeting EU officials to discuss forthcoming EU legislation or participate in consultation or impact assessment exercises.

Ignoring the local democratic mandate and treating local government elected members and their officials as private lobbyists, would rightly be seen as a significant and unacceptable change of tone between the different spheres of government. The European Union institutions will be perceived as acting in a centralising manner, treating local people and their communities in a remote and high handed way. Were we to choose not to co-operate with the European institutions, the EU policy processes will be deprived of much needed information, accountability and acceptance.

This is why, while we are calling that these unfair provisions are removed from the IIA, we are urging the Commission to ensure that the IIA Guidelines as well as the Impact Assessment Guidelines and the Standard for Consultation Guidelines contain provisions that effectively enable local authorities or their representative organisations to continue to be able to participate in consultation and impact assessments without being to register as lobbyist and without any penalty provided they meet the following criteria:

- It is a **public authority** as defined in domestic law of failing that it is recognised by the government as exercising political representation functions akin to a local authority. This would apply also to its employees;
- Does **not carry out for profit** activities nor its engagement with the EU institutions is destined to any direct material gain to its member local authorities or to itself;
- It is explicitly **recognised** by national government as a key partner in EU policy development;
- It has a **national or regional representativeness** and political mandate;
- It is recognised as the **nominating body**, directly or indirectly or with the Committee of the Regions, and its officers support CoR members work as described in the respective Internal Rules of their CoR national delegation;
- It is **registered at the Committee of the Regions own register** for the carrying out of its institutional functions CoR own register of organisations supporting its members that any member of the public can access to, thus making the need to also feature in the Transparency register redundant. If only the Commission just could put a link in the Transparency Register website to the one of the CoR register.

Thus we believe that bodies meeting the above criteria should continue to have unhindered access to Impact Assessment and Consultations and thus the individual Commission guidelines should fully reflect the above criteria.

Specific questions (annex II)

Q. 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?

Stakeholder Engagement

The Commission normally contracts out major parts of the assessment work to **external consultants**. This is often split into several sub-impact assessments. The contracts have narrow terms of reference, both in what and who they ask. This places a severe constraint on when the Commission is prepared to hear our views and what they are prepared to hear regional and local government bodies say. Similarly when the consultation is carried out in-house, we see a growing and worrying trend to use narrowly formatted e-questionnaires that do not allow a proper representation of views particularly if they significantly depart from the Commission's originally assumptions.

CEMR wants the Commission to engage with local, regional and central government representatives ahead of launching any impact assessment so as to ensure that the results of the surveys and broader consultations are properly representative and able to capture the real evidence from the ground.

Furthermore we would be keen that **stakeholder mapping principles are clearly spelt out** in the Guidelines and that EU officials are provided with a [stakeholder analysis toolkit](#) to carry out such assessments. The results of the stakeholder matrix, including the positioning of individual actors (for/against, leader/follower, etc.) should be made public as part of the impact assessment. Finally, it is worth highlighting that when the Commission is thinking about new legislation it often fails to take into account the asymmetric territorial (regional / local) impact of that draft legislation. This is why CEMR urges the Commission to join in the development of a new [ESPON CoR Territorial Impact Assessment tool](#) as this tool could help make the Commission more aware of the impact of its proposals further down the line.

Q. 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?

We believe that **the EU should allow more diversity in Europe, taking into consideration the historical, political and cultural differences**. The EU should more agree on common objectives and a framework, take into consideration existing national legislation and, when proposing new legislation, leave the Member States more flexibility in defining the way how the objectives are achieved. European legislation has become too detailed and prescriptive, which creates frustration on the local and regional level where it is applied.

The EU Commission is required to consider subsidiarity and proportionality when preparing new legislation (Art. 5 TEU). The subsidiarity principle requires the EU to consider which level of government is appropriate when proposing legislation; where decisions towards a specific end should be taken and that these should take place at the level closest to the citizens. Often this would mean regional or local government.

The proportionality principle requires that a Union action should not exceed what is necessary to achieve the objectives of the Treaty.

Protocol No 2 of the Lisbon Treaty on the Application of the Principles of Subsidiarity and Proportionality, requires the Commission to "consult widely" before tabling legislative proposals, also

taking into account the local dimension of the proposal. **Article 5 of the protocol clearly states that the Commission needs to assess “any burden, whether financial or administrative, falling upon the Union, national governments, regional or local authorities, economic operators and citizens”.**

The Lisbon Treaty entered into force on 1 January 2009, but the Commission has still not established a structured and formalised mechanism to put the requirement of the protocol into practice, and it is not transparent in how it responds internally to the need of such assessments and the result of such consultations.

Following a recent European Parliament resolution and the Multi-Level Governance White Paper **CEMR wants to see the Commission develop a more robust approach to subsidiarity that includes regional and local levels of self-government as well as the relationships between the EU and its Member States.**

We believe that the way the Commission has been carrying out subsidiarity assessments so far does not satisfy the requirements of the Treaty. Our view is based on the following elements:

- Opportunistic use of legal basis
- Disregard of Multi-level governance and shared competence implications
- Absence of a rigorous Subsidiarity Scoreboards mainstreamed within the IA guidelines
- Absence of a regulatory impact assessment and a competence screening at sub-national level
- Absence of rigorous regulatory and compliance costs

Below this will be explained in detail:

According to the principle of subsidiarity, the Treaties require the EU institutions to respect and safeguard the existing powers of regional and local government. However, this has not always been the case as recent examples have shown (see Box 1).

Example: Subsidiarity concerns in EU action on urban mobility

The European Commission’s initial plan to propose legislation on urban mobility is a recent example where the EU has tried to overstep its competences conferred on it by the EU Treaties, and in particular the principles of subsidiarity.

As the Commission does not have powers whatsoever in local planning it is arguing for the creation of uniform rules on urban mobility using their vast powers with respect to the Internal Market. The latest attempt was to set up binding EU legislation on urban mobility through the draft EU Urban Mobility Action Plan. Essentially it used the alleged that there was an argument economic gain and the reductions to barriers to intra-EU trade. If this was agreed it would open the door to the European Commission having new powers on a policy area that is not conferred to it in the Treaties.

It was only due to the concerted action of CEMR, its member associations and national governments that the Commission agreed, for now, halt on its legislative proposals this time round.

Compliance with the principle of conferral:

When considering tabling a piece of legislation the Commission is required to argue that it is backed by several articles in the EU Treaties.

However while article 5 TFEU urges the Commission to respect the subsidiarity principle, the Commission is able to “pick and choose” other articles that in its eyes justify new EU legislation.

Using the above example on urban mobility the Commission can argue that Articles 114 (internal market) or Article 192 (environmental protection) empower the Commission to legislate. Very often it argues that a problem is not merely local there is a “transnational element” thus prompting and permitting the Commission to act. Clearly using the most favourable provision of the Treaty while disregarding other Treaty provisions let alone the powers of national and subnational level on issues of shared competence is plainly wrong.

Instead **CEMR believes that the principle of subsidiarity is a horizontal clause** (as defined in the Treaty Protocol 2), **one that cuts across and overrides all other articles that confer EU powers to the EU.**

The Lisbon Treaty **Protocol 26 on Services of General Interest** requires the Commission to fully respect the “*essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users*”. In any forthcoming proposal or initiative regional and local public service provision needs to be protected.

In other words **the Commission cannot and must not be allowed to argue that because some provision in the Treaties give it powers to legislate in an area that it can automatically use this to override the subsidiarity principle and thus regional and local powers.** It needs to consistently prove that EU action is going to be more effective than regional or local action.

Exclusive competences of the Union or not

Given that the way EU Treaties are constructed most EU powers are shared with national and sub-national authority, contrary to what part II.C of the Impact Assessment Guidelines (p.33) assumes. Having a legal basis is not in itself enough to justify any EU action or satisfy itself that the Commission proposal satisfied subsidiary.

By contrast the Commission Guidelines must assess all legal basis across the Treaty (horizontal competence assessment) and across national, regional and local government (vertical competence assessment) before it can satisfy itself that the Commission has sufficient competence to legislate.

Clearly the Commission might have concerns about its ability to map out how a given competence is exercised at sub-national level across the 28 Member States. In that respect, in addition to asking the Member States ahead of carrying out the subsidiarity assessment, there are a number of reference material compiled, inter alia, by the Committee of the Regions that list in a pretty exhaustive way how competences are distributed at national, regional and local levels across the 28 Member States.

Proportionality

The principle of **proportionality** requires the EU to show that the measures it proposes are required to achieve its specific objectives, and not to interfere excessively with domestic legislation and competences.

It is in the interest of regional and local government that the proportionality principle is applied correctly as it is them who are often responsible for implementing EU legislation. **CEMR wants to ensure that EU legislation is neither excessive nor obstructive to the implementation of existing national policies with similar objectives** (see the various boxes below). Proportionality may also mean that there needs to be a certain degree of flexibility to ensure that it can be implemented in the national, regional and local context.

Example: Energy efficiency obligations

The Energy Performance in Buildings Directive, the Renewables Directive, and the Energy Efficiency Directive all include specific targets for regional and local authorities (either explicitly or by virtue of them being the bodies that have the specific competence that the EU directive relies on, for example planning powers or enforcement of building standards). The original Commission drafts for this legislation proposed far more detailed obligations on the sub-national authorities than were eventually included in the final legislation. Despite this, even where the Commission proposals are softened during the legislative negotiations it often re-introduces them again in the next review of the EU legislation.

As we prepare for the new Energy 2030 proposal we expect this scenario to be repeated again.

Example: Proportionality in Data Protection:

The EU Data Protection rules are a sensitive policy area with ramifications well outside the EU. The legislation currently being discussed, though originally conceived for the private sector has finally extended into the management of data inside the public sector. This ignores the fact that public authorities have a statutory obligation to collect and keep data to provide public services and thus do not use data for commercial purposes.

Previous data protection policy for the public sector was dealt with through separate EU legislation. We have been working with our member associations as it became evident that a disproportionate set of requirements was to be imposed upon Councils, often setting up requirements over how Councils should organise themselves internally. While at best there would be limited additional benefit to citizens in those countries who already have data protection legislation it was at significantly greater cost to Councils, and of course therefore to the public. The UK Government's [own impact assessment](#) estimated the cost of complying being at least £250m per year. Interestingly when the Commission tabled its proposal no similar projection on the financial impact on the public sector was undertaken. The Finnish Association of Local and Regional Authorities has estimated the costs for the Finnish municipalities alone would be €200m in the first year of the implementation (including one-time costs) and around €100m per year in the coming years. The estimate is based on a moderate interpretation of the Commission's proposal.

Civil Registry Documents

The European Commission has also proposed the standardisation of civil registry documents (birth, marriage and death certificates). While there may be some marginal benefit for those moving across the EU, there is already a worldwide international treaty that deals with this (the 1961 Hague Apostille Convention). This is also an issue of subsidiarity and the ability of Councils to define their own registry arrangements. In spite of that clear subsidiarity and proportionality as well as a clear invasion of local competences, the Commission decided to move to legislate without even carrying out a simple subsidiarity assessment and thus just relying in its internal market powers.

Example: Proportionality in the EU environment policy: the waste and air review

Regional and local authorities play a key role in many EU environmental policy areas. A good example is the EU's waste targets as well as national targets set out in the Waste legislation. As the EU's waste framework is currently under review, it is important that EU legislation is proportionate to achieving the EU's waste objectives (e.g. phasing out of land filling). The European Commission, before tabling a new legislative proposal, therefore needs to consider existing national measures, regional and local circumstances to be able to effectively support efforts rather than imposing new obligations regardless of the national policy frameworks.

For regional and local governments, proportionality and policy coherence is essential. Some domestic legislation is more ambitious than the EU waste targets, and does not depart from the outcomes sought from the EU rules.

However, the danger is that new EU legislation could introduce detailed implementation provisions, and alter the framework under which regional and local authorities operate in waste management. This could lead to both domestic legislation needing to be amended in order to meet new EU requirements and a disruptive effect on the ground where policy implementation has already started and can come at a significant additional cost, without any additional improvement in outcomes.

The same could be said for the **Air Quality** legislation where EU targets and requirements for very local air quality standards run against the notion that such impacts have any transnational effect at all. Furthermore EU legislation in this area not sufficiently acknowledges that municipalities are often not responsible for background conditions affecting local air quality standards. This can result in the pointless referral to the European Court of Justice for infringement of EU Law.

Example: VAT reform

The Commission has been consulting on whether the existing EU Directive that enables local authorities to recover VAT should be scrapped. It sees article 13 as a barrier to intra EU trade. This runs against the evidence that most local government activities are eminently local and therefore do not obviously distort intra EU trade.

Considering that VAT recovery scheme amounts to a significant percentage to many regional and local government budgets, changes to EU VAT rules would require compensation arrangements to be put in place. Knock on effects to the domestic fiscal and taxation arrangements not being covered by EU legislation mean that additional administrative burdens would be created.

What appears to be only an EU matter could indirectly shape internal Member State taxation and internal fiscal transfer arrangements which according to the current Treaties would be against the principles of conferral, subsidiarity (as the EU has no powers on domestic taxation) and indeed proportionality (for the theoretical gains of doing away with the VAT recovery schemes are outweighed by the significant distortion of internal fiscal arrangements that they would entail).

Our view is that **the subsidiarity compliance tends to be overly optimistic when it comes to cost at regional and local level**. We note that despite the Treaty provisions and the Commission's own internal guidelines it tends to satisfy itself as being compliant with the requirements but doesn't explain how it arrives at such conclusions.

CEMR wants to see the Commission adopt a set of guidelines to assess subsidiarity. The starting point could be the ['Subsidiarity and proportionality analysis kit'](#), developed by the Committee of the Regions and which at the moment the Commission is not obliged to use. Such a toolkit must be mainstreamed as part of the Impact Assessment Guidelines described in Annex II.

Crucially the Commission fails to understand (p. 35) that **local or regional authorities are not "stakeholders"**. They are public institutions and administrations and have to be considered in the same way as national ministries or governmental agencies. Lumping them together with private business and civil society is not only inappropriate, particularly when the draft legislation concerns their legal powers; it also contravenes the principle of Multi-Level Governance. In this regard it is worth recalling that Article 5 of the Common Provisions Regulation¹ of the Structural Funds clearly

¹ Regulation (EU) No 1303/2013 of the European Parliament and of the Council of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down

enshrines for the first time in an EU legislative text the principle of Multi-Level Governance as a key principle and modus operandi in defining policies that cut across E, national and sub-national levels. Furthermore this article 5 CPR clearly makes a distinction between local and regional authorities as partners in policy and implementation with civil society or private bodies that are interesting parties i.e. stakeholders.

We believe that this distinction between partners and stakeholders is crucial when carrying out impact assessments. Failure to do so, as it is increasingly the case, results in:

- Commission's inability to define policies that really make an impact on the ground (EU2020 targets are a prime example) as often it is local and regional authorities that have the powers to implement the EU policies and legislation.
- Alienation and loss of legitimacy of EU decisions on the basis that Impact Assessments ignore that regional and local authorities have a democratically accountable remit enshrined by law or constitutions that simply cannot be put at the same level to that of private stakeholders.

While we recognise that CPR refers only to 1/3 of EU policies (Cohesion, Agriculture, Maritime Affairs) these are precisely the main instruments and incentives that the European Commission can use to deliver wider EU goals, namely Europe2020. This is why there is no reason why the Commission by way of this **Impact Assessment Guidelines should not choose to extend the same principles expressed in article 5 CPR (multi-level governance, distinction between partners and stakeholders) to other EU policy and legislative proposals.**

Q. 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?

Q. 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?

There is an issue of presentation. Very often the Commission presents results on potential EU-wide benefits of a given option without properly contextualising them.

Example: Public Procurement

The [2010 evaluation on Public Procurement](#) found that only 3.5% of the total value of procurement transaction is done on a cross-border basis. However, this figure was not discussed as a possible argument against the need for new regulation at EU level of public procurement activities when tabling the new Directives in 2011.

Q. 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?

We understand that Annex II.F structures the key impact questions along the three dimensions of sustainability: economic impact, social impact and environmental impact. However, we wish to highlight that it is now common sense to add governance as a fourth dimension. In the tables with the questions, 'governance, participation, good administration, access to justice, media and ethics' is addressed in the context of social impacts.

We welcome the questions in relation to the economic impact on

- public authorities, budgetary consequences, additional administrative burden and creation or new restructuring (compliance costs)
- specific regions or sectors: this is consistent with the notion of (asymmetric) Territorial Impact Assessment

However, **we disagree that impact on regional and local government to be dealt with only in terms of economic and social impacts.** As mentioned above, the EU has in most areas only shared competence with national, regional or local government. Furthermore the governance sub-section on economic impacts lumps impact for local government with a wide range of civil society or social stakeholders this failing to meet the test criteria of distinguishing between competent local and regional authorities (with whom the EU commonly shares a competence to act on a given issue) and civil society, private stakeholders.

This is why we urge that **a specific governance section on non-regulatory impacts on national, regional and local authorities is set up.** Such section would group the questions regarding legislative impact: which regional and local powers would be curbed by legislating at EU level? What are the compliance costs for regional and local authorities to meet EU standards? What are the asymmetric territorial impacts?

However, in other cases it is simply that the Commission is spatially blind and it deliberately excludes local /regulatory impact assessments at sub-national level. In order to try to counter that argument, the Commission should join in the elaboration of a new ESPON CoR Territorial Impact Assessment tool that could at least provide a more elaborate evidence base to EU decision making.

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About CEMR

The Council of European Municipalities and Regions (CEMR) is the broadest organisation of local and regional authorities in Europe. Its members are over 50 national associations of municipalities and regions from 41 European countries. Together these associations represent some 150 000 local and regional authorities.

CEMR's objectives are twofold: to influence European legislation on behalf of local and regional authorities and to provide a platform for exchange between its member associations and their elected officials and experts.

Moreover, CEMR is the European section of United Cities and Local Governments (UCLG), the worldwide organisation of local government.

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