COSLA Response

EU Impact Assessment Guidelines

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?

The **Convention of Scottish Local Authorities** (COSLA) is the representative voice of the Scottish municipalities both nationally and internationally. It is a keen advocate of the Position that European Union legislation should fully respect the local competences and autonomy of Councils in organising and providing local services.

COSLA also believes that EU involvement should take place only when it has clear EU Treaty competence (the principle of conferral), and where its' actions can provide real EU added value;

COSLA strongly defends the **subsidiarity principle** whereby *"the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level"* as well as the principle of proportionality.

COSLA also calls on the European Commission to establish robust mechanisms of **pre-legislative consultation** to local stakeholders in matters that affect them directly.

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

These are traditional principles that COSLA has long been advocating and which have most recently been confirmed by the full COSLA convention on 27 June ahead of the launch of this Consultation and which inform the detailed response provided below.

Detail:

On the basis of the above principles we certainly welcome the fact that the Commission has a detailed Impact Assessment Guidelines and we therefore welcome the opportunity to contribute to the review of these guidelines and the related one on standards for Consultation.

We very much support the key principles that should define the way the Commission carries out impact assessments as described in the above question. We are however concerned that the Guidelines as currently defined do not reflect the fact that when the Commission proposes to legislate in a new area it does not sufficiently and specifically address the trade-offs that this would entail to the other two tiers or governance that make the EU , the national and local/regional. This is particularly an issue for local government which as will be described elsewhere in this response it often finds itself that new EU legislation that have a direct impact in Councils or simply will rely on them to be actually implemented have been formulated with excessively optimistic, limited or scattered assessment of it local impacts.

Summary of key Recommendations

- Independent Impact Assessment Board
- Separate Guideline section on Impact in national and local government
- Terms of Reference for IA and Consultations open for comments from national/local government
- Assessment of Cost and Benefits across policy options to describe specific cost of Europe as well as Cost of non-Europe: cost, compliance, regulatory , competence loss impact upon local government need to be properly reflected in policy choices
- Mainstreaming of Multi-Level Governance principle
- Subsidiarity Assessment Toolkit and Territorial Impact Assessment mainstreamed into Guidelines
- Structured Dialogue with local government as an integral part of impact assessment
- Recognition that Local Government representatives such as COSLA are partners in EU policy development, not lobbyists
- Contracted out studies, preliminary impact assessments concerning local government carried out in partnership with local government representative bodies.

Consultation to Local Government:

We are 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 (small) consultancies and/or uses a sample of a small number of cases/Member States.

For instance previous examples of such impact studies are the assessment we made of the impact in local government HR of the draft 2010 Working Time Directive review (the first time such assessment was undertaken at municipal level anywhere in the EU, hence it was used by other countries as a template to carry their own assessment) or the assessment of the impact upon the local government building stock of the public sector specific targets of the draft Energy Efficiency Directive. Very often we have to chase the consultants or second guess the Commission own preparatory work – even when we are in the most favourable position to provide relevant and representative information to the Commission.

Stakeholder meetings tend to disproportionately incorporate private or civil society stakeholders rather than competent local and regional authorities. A recent example was the stakeholder meetings concerning the review of EU VAT recovery arrangement's where there was only one local government representative (representing all municipalities of Europe) invited and several dozen private and civil society representatives. This does not make sense considering that this proposal directly and exclusively concerned Local Government ability to recover VAT and thus highlighting that trying to put on the same platform /group civil society and local government as public authorities can be on occasion not appropriate.

An assessment we are carrying out at the moment is the potential impact of the elimination of the VAT recovery scheme as it is mooted in the VAT Green Paper currently in consultation. Such assessment finds that scrapping the current scheme would amount to 10% of the Scottish local government budget, however such as assessment of costs hardly fits

A crucial reason for that is the way that such impacts are contracted out to small consultancies, often split into several sub impact assessments and in turn the Commission often gives these consultancies so narrow terms of references that they then have limited room of manoeuvre, even when COSLA or our sister organisations elsewhere end up chasing them to persuade them to use the evidence we have as it is often more relevant that the evidence scope given by the Commission to carry these Impact Assessment. A notable example of this is the review of the Working Time Directive in 2010, an again in 2014 were we had to chase via very indirect means the consultants carrying out the early impact assessment.

Some other occasions such as the Commission review of the Waste Targets Directive the accumulation of impact assessments three separate studies that were essentially dealing with the same subject. This weakens representativeness (with several studies contracted out to different consultancies) clearly diminished the ability of local government to contribute (and this in the case when such as COSLA or others we have a dedicated function to engage in his process, let alone others with less available capacity) . For the commission it is also counterproductive as it weakens the evidence based gathered. By contrast, the advisory group that was created to scope this issue was a helpful exercise, even if there was only one local government rep on behalf of all LG of Europe. Notable examples in addition of the above are the review of EU procurement and concessions Directive.

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 MS when it come to regulatory impact this is often not fit to purpose as there are 27 separate jurisdictions that can simply not be extrapolated.

Equally the Commission makes no provision to weight differently the input over impact assessment between one respondent doing so on behalf of a large constituency (e.g. our European umbrella CEMR on behalf of the 100.000 local authorities of Europe) that that of individual contributions (e.g. individual cities). This often results in being far more effective that individual members send identical responses as to increase numbers than going through the painful negotiation of getting all local government of a country or the EU as a whole come with a common position. Therefore paradoxically the absence of such weighting in Commission IA/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 consultants disclose why and on which basis they choose one country and not another. 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 by the terms of reference 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.

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. A clear example was the recent "Access Restriction" consultation whose existence which 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 representations being made out with the consultation exercise)

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

As described elsewhere in this response we support that all major or even significant EU legislative but, crucially, also policy proposals concerning local government are open for Impact Assessment and consultation.

According to the principle of proportionality depending on the scope of the proposal concerned we may accept that instead of full consultation open to any local authority (which is the preferred option) a structured dialogue can be organised by associations of local government be that on a national basis or at very least on an European basis such as via our European umbrella organisation the Council of European Municipalities and Regions (CEMR). The absolute bottom-line is that CEMR must be invited to participate in any impact assessment of consultation on EU policy and legislative proposals concerning local government.

However this is a minimum to be met in every case and we expect that as a general rule COSLA on behalf of the municipalities of Scotland would be specifically invited to participate in Impact Assessment of new EU policy or legislative proposals that:

- Propose to legislate in an EU area that previously was **not addressed** by the EU (e.g. urban mobility)
- On areas of shared competence, any proposal that aimed to **expand the scope/detail of competence** of the European Commission over the powers currently exercised by Scottish Local Government
- Proposals that would have a **significant cost implication** for Scottish local authorities in terms of cost : meeting new EU targets (e.g. Energy), compliance, regulatory (building standards) or capacity costs (e.g. Working Time)
- Proposals that contain specific provisions **directly aimed at local authorities** (e.g. Municipal Waste, EU standards on municipal registries,

On new EU proposals meeting any of the above tests we cannot accept that Impact Assessments can be subject to sampling with the result that Scottish local government is unilaterally excluded from the start from participating in these assessments. This is particularly the case even when the IA are carried per Member States, very frequently the Commission simply assumes that local government jurisdiction is homogeneous and uniform within any Member State. Given that the within the UK there are four entirely independent jurisdictions when it comes to local government this assumptions and Impact Assessments carried on that basis is entirely unfit to purpose. Indeed to a certain extent this also applies to other Member States with a federal or regionalised structure such as Belgium or Germany and would only fit those Member States that follow a classic centralistic organisation such as France or Slovenia.

Anticipating the argument from the Commission that they do not have the means to assess the impact in specific jurisdiction it is worth pointing out that national government and certainly COSLA are happy to proactively help the Commission have a better understanding on how a specific proposal would specifically concern the Scottish Local Government jurisdiction.

To be clear we are not calling for additional burden or organisational costs but to optimise what currently exists and enable a more joined up discussion. In particular we are more **than keen that Structured Dialogue arrangements with European** (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 leadership 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 for instance).

This means that very often COSLA and other organisations are able to provide , at no extra cost for the Commission with robust evidence that anticipate impacts in local government of forthcoming EU legislation but there is often no structured way to input that into the Commission own considerations. Very often the consultation stage is too late as the Commission has already decided at the Impact Assessment stage its policy choice, hence the value of having Structured Dialogue with local government at the Impact Assessment stage.

Finally anticipating the argument that this role can be provided by the Committee of the Regions it should be noted that the role of CoR in Impact Assessment ,where we support several CoR members and are active members of its subsidiarity network, is both enhanced and framed by its consultative duties as expressed in the Treaty (notably heir members holding a representative but not an imperative and directly accountable mandate to their nominating bodies) and therefore clearly it does not substitute from direct consultation and engagement with local government or their national and regional representative bodies.

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 mentioned in the second part of the questionnaire we are keen that there is a separate section that section of the Guidelines dealing specifically with the subsidiarity, regulatory, compliance and cost impact at regional and local level and the 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 that brings together several levels of government. Whether one agrees that the relationship between these levels of government (local/regional, national. EU) should be underpinned by the principles of Multi-Level Governance, subsidiarity and proportionality (as we do) or not, the true remains that the implications of new EU legislation upon the other two levels of government cannot be dispersed or diluted among questions affecting sections of society, economy or the environment but they should be examined separately and on their own right.

More often than not the EU legislating in an area means that national 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 on occasion 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.

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 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 could not operate a similar approach

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 outwith government and party politics.

An example of the second option 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 COSLA has been vocal in the past of the many overlapping and often competing initiatives concerning 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 assessment 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 an international organisation.

Translated to 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 out consultants, do not seek the contribution, at least of the Member State Governments . Very often as expressed elsewhere in this response the Commission questionnaires are simply not fit to purpose on how the problem is defined at national and particularly at local level. Giving the opportunity of at least member state governments (ideally local government 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:

COSLA and indeed our sister organisations from other Member States are very much concerned about the impact of the recent and unexpected changes to the Inter Institutional Agreement on the Transparency Register that has resulted in Local Government being to join the same registry as private lobbyists to carry out EU policy discussions.

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

The more so as it appears that the Guidelines on the IIA currently being drafted foresee that those organisations not willing or able to register would have 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 the EU policy processes will be deprived of much needed information and accountability.

This is why, while we are calling that this 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 continue to be able to participate in consultation and impact assessment without being to register as lobbyist and without any penalty provided that 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 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** of the Committee of the Regions and its officers support Scottish 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)

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 EU Commission is required to consider subsidiarity and proportionality when proposing legislation. In the Protocol (No 2) on the Application of the Principles of Subsidiarity and Proportionality, it is clearly required to "consult widely", before tabling legislative proposals, also taking into account the local dimension of the proposal. However, the Commission has not established a mechanism to do this and it is not transparent in how it responds internally to the result of such consultations.

Following a recent European Parliament resolution and the Multi-Level Governance White Paper **COSLA 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.**

The Commission normally contracts out **external consultants** for the assessment work. 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 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.

COSLA wants the Commission to engage with local 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 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 (local) impact of that draft Legislation. This is why COSLA 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.

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 clearly disagree with the way the Commission has carrying out Subsidiarity assessment so far. These concerns are around the following issues:

- 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:

Subsidiarity

The subsidiarity principle, (European Union (Art.5 (3) TEU)), requires the EU to consider which level of government is appropriate 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 local government.

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

Box 1: 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 COSLA and others working with national governments that the Commission agreed, for now, halt on its legislative proposals this time round.

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 Treaty article 5 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 allow the powers of national and subnational level on issues of shared competence is plainly wrong.

Instead **COSLA 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 Treaty **Protocol 26 on Services on General Interest of the Lisbon Treaty** 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 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 on an area it can automatically use this to override the subsidiarity principle and thus local powers. It needs to consistently prove that EU action is going to be more effective than local action.

Thus, 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) assume having a legal basis is not IN ITSELF enough to justify 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 and Local Government (vertical competence assessment) before it can satisfy itself that the Commission has sufficient competence

Clearly the Commission might have concerns about its ability to map out how a given competence is exercised at subnational 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 Scottish Local Government that the proportionality principle is applied correctly as it is we who are often responsible for implementing EU legislation. **COSLA wants to ensure that EU legislation is neither excessive nor obstructive to us implementing 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 and local context.

Box 2: Energy efficiency obligations

The Energy Performance in Buildings Directive, the Renewables Directive, and the Energy Efficiency Directive all include specific targets for 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 draft proposals for this legislation proposed far more detailed obligations on the subnational 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.

For instance in the Energy Efficiency Directive the Commission's proposal for additional building refurbishment targets for the public sector (noting that in practice Local Authorities as the largest owners of buildings) would have clearly gone beyond the financial and administrative capacity of Scottish councils, and quite possibly most other municipal and regional authorities in Europe. 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 Scotland at the time.
As we prepare for the new Energy 2030 proposal we expect this scenario to be repeated again.

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Box 3: 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 counterparts 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.

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.

Box 4: Proportionality in the EU waste framework review

Scottish Local Authorities play a key role in many EU environmental areas. A good example is the EU's waste targets as well as national targets set out in the Waste (Scotland) 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 landfilling). The European Commission, before tabling a new legislative proposal, therefore needs to consider existing national measures and local circumstances to be able to effectively support efforts rather than imposing new obligations regardless of the national policy framework.

For Scottish local government, proportionality and policy coherence is essential. Scottish 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 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 fails to acknowledge that Councils often are not responsible for background conditions affecting local air quality standards. This can result in the pointless referral of UK local authorities (and half of the other Member States) to the European Court of Justice for infringement of EU Law.

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Box 5: 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 one tenth of the Scottish local government budget, changes to EU VAT rules would require compensation arrangements to be put in place. Knock on effects to the internal UK fiscal and domestic taxation arrangements not being covered by EU legislation, mean 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 not 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).

COSLA recommendations:

Our view is these tend to be overly optimistic when it comes to cost at a 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.

COSLA 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 the same way of a national ministry or a governmental agency. Lumping them together with private and politically and democratically accountable in any consultation process it is not only inappropriate, particularly when the draft legislation concerns their legal powers; it also contravenes the principle of Multi-Level Governance. On that regard it is worth recalling that Article 5 of the Common Provisions Regulation[1] clearly 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 EU-national and subnational 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 inability to define policies that really make an impact on the ground (EU2020 targets 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 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 5CPR (multi-level governance, distinction between partners and stakeholders) to other EU policy and legislative proposals.**

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?

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 would be keen that the options are expressed in terms of cost and benefits. Very often the Commission IA only focuses on the benefits of EU regulation but pays very limited regard to the cost of EU regulation (transactional, compliance, reorganisation). A good example is the recent Data Protection Regulation were the costs for the public sector to comply with the new legislation fell on individual member states (notably the UK) to made in house their own cost impact assessment and which found that just a very general impact assessment detected several hundred million per year in compliance costs and that 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. It does not contribute to good policymaking when it falls upon national 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

[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 general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006

the costs and benefits of teach option and not just measured EU wide but per Member State and ideally at sub-national level.

Secondly 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. For instance the 2010 evaluation on Public Procurement found that only 3.5% of the total value of procurement transaction is done in a cross-border basis. However this figure was never used when tabling the new Directives 2011 at least as a possible argument against the need for more regulation at EU level of procurement activities.

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 welcome that Annex II.F when covering the different impacts it specifically contain a sub-sections on Economic Impact in

- Public Authorities – budgetary consequences, additional administrative burden and creation or new restructuring (compliance costs)
- Specfic Regions or sectors. This is consistent with the notion of (asymmetric) Territorial Impact Assessment

We equally welcome that there is a specie subsection in Social Impacts that Covers Governance, participation, good administration etc.

We disagree however that impact in local government can be dealt with only in terms of Economic and Social Impacts. Once again the EU has in most areas only shared competence with national 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 competence 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 section non Regulatory Impacts on National, Regional and Local Authorities is set up. Such section would group the questions regarding legislative impact: which local power would be curbed by legislating at EU level, what are the compliance costs for 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 assessment at sub-national level. In order to try to counter that I am involved 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. The risk is however that this is going to be developed out with the Commission own revision of the IA Guidelines (and relates moves from the European Parliament recently much enlarged IA and Evaluation teams)

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