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IMPACT ASSESSMENT

Accompanying the document

Proposal for a

Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System

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1. Context and background

The objective of the **Services Directive**¹ is to **develop the single market for services** to allow businesses and consumers to take full advantage of the opportunities stemming from an integrated and competitive services single market. On the basis of the Directive, service providers and recipients should benefit from a **freedom of establishment** and a **freedom to provide services across borders**. Generally, the Services Directive covers both purely domestic and cross-border situations.

The Services Directive established that national rules restricting the right of establishment and the freedom to provide services falling under the Directive must be non-discriminatory, proportionate and justified by public interest objectives. To ensure that all new legal requirements introduced by Member States fulfil these conditions, the Services Directive provides for a procedure whereby Member States shall **notify new or changed legal requirements** affecting services. This allows for a verification of whether such requirements are justified, non-discriminatory and proportionate, thus preventing the introduction of new barriers contrary to the Services Directive and contributing to a more integrated and competitive single market for services.

Commission assessments undertaken in 2012 and in 2015² have shown that despite a multitude of national reforms following the entry into force of the Services Directive in 2006, many national barriers remain in place - with **negative impacts** for businesses and citizens. Some of these barriers are due to measures newly introduced by Member States and which the existing notification procedure has not prevented.

A Commission evaluation of the existing notification procedure contained in the Services Directive was undertaken in 2015/2016 and revealed a number of important **shortcomings** (see Annex 5). These include limited possibilities to prevent disproportionate regulation, the limited scope of requirements covered by the current notification obligation, and the absence of consequences of non-notification. Taken together, these shortcomings limit the effectiveness of the existing procedure in preventing the introduction of disproportionate regulatory barriers. A stakeholder consultation undertaken in 2016 highlighted similar shortcomings (see Annex 2).

Following its evaluation and in line with calls for policy action by the European Parliament³, the EU Council⁴ and the European Court of Auditors⁵, the Commission in its **Single Market**

¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, OJ L376 of 27.12.2006, p.36

² Josefa Monteagudo, Aleksander Rutkowski, Dimitri Lorenzani: "The economic impact of the Services Directive: A first assessment following implementation"; European Commission Economic Paper 456; June 2012; http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf
European Commission: "Assessment of the Economic Impact of the Services Directive – Update of the 2012 Study"; http://ec.europa.eu/growth/single-market/services/economic-analysis/index_en.htm

³Draft report on the Single Market Strategy (2015/2354(INI)), Committee on the Internal Market and Consumer Protection,

Strategy adopted on 28 October 2015⁶ announced a legislative proposal to improve the delivery of the Services Directive by reforming its notification procedure.

1.1.Scope

The objective of this initiative is to improve the enforcement of the existing EU Services Directive through a more effective and efficient notification procedure. The scope of the initiative is therefore limited to the sectors falling under the Services Directive⁷.

Services not covered by the Services Directive are in many cases subject to sector-specific EU legislation with their own mechanisms, meaning it is not necessary and would be disproportionate to apply the notification procedure under the Services Directive to these sectors.

This policy initiative will not touch upon national measures specifically regulating information society services covered by the notification obligation under Directive (EU) 2015/1535⁸ (Single Market Transparency Directive, SMTD). As the SMTD is considered to be working satisfactorily, there is no need to transfer information society services to the procedure under the Services Directive. This being said, this impact assessment in places refers to the SMTD-system for comparison purposes.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-573.011+01+DOC+PDF+V0//EN&language=EN>

Draft report on Non-Tariff Barriers in the Single Market (2015/2346(INI), Committee on the Internal Market and Consumer Protection

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=->

[%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-573.111%2b01%2bDOC%2bPDF%2bV0%2f%2fEN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-573.111%2b01%2bDOC%2bPDF%2bV0%2f%2fEN)

⁴ The **Competitiveness Council** called upon the Commission "to increase the effectiveness of the notification procedure under Directive 2006/123/EC, including by providing clear guidance as to the notification obligations and making notifications public and transparent as is the case for goods". Paragraph 15 of the Council document 6197/15 adopted on 2 March 2015.

⁵ The need for an improved notification mechanism was also highlighted by the European Court of Auditors in its report on the implementation of the Services Directive. Special report No 5/2016; published on 14 March 2016.

⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Upgrading the Single Market: more opportunities for people and business', COM(2015) 550 final, 28.10.2015,

<http://ec.europa.eu/DocsRoom/documents?locale=en&tags=single-market-strategy-2015-communication>

⁷ Excluded from the scope of Services Directive are financial services, electronic communications services with respect to matters covered by other EU instruments, transport services falling within the scope of Title VI of the Treaty on the Functioning of the European Union (TFEU), healthcare services provided by health professionals to assess, maintain or restore the state of patients' health where those activities are reserved to a regulated health profession, temporary work agencies' services, private security services, audio-visual services, gambling, certain social services provided by the State, by providers mandated by the State or by charities recognised by the State and services provided by notaries and bailiffs appointed by an official act of government.

⁸ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance) OJ L 241, 17.9.2015, p. 1

1.2. Legal context

1.2.1. Services Directive

According to the Services Directive, Member States have an **obligation to notify** legislative changes affecting the freedom of establishment (Article 15) and the free movement of services (i.e. temporary cross-border service provision - Articles 16 and 39(5)) to the Commission and to the other Member States.

The obligation regarding establishment is limited to a closed list of national requirements⁹, whereas the obligation regarding free movement of services covers any national requirements unless specifically exempted in Article 17 of the Services Directive¹⁰. As regards freedom of establishment, the scope of the existing notification obligation is thus not fully aligned to the scope of the Services Directive.

Member States must according to Articles 15 and 16 assess whether the requirement in question is **non-discriminatory** (i.e. not directly or indirectly discriminatory with regard to nationality or place of establishment), **justified** by an overriding reason relating to the public interest and **proportionate** (i.e. suitable to achieve the objective pursued, not going beyond what is necessary to attain the objective and not replaceable by less restrictive means to attain the same objective).¹¹

The Commission examines the compatibility of notified requirements with EU law, and may according to Article 15(7) of the Services Directive, where appropriate, adopt a **Decision** requesting the notifying Member State to refrain from adopting the requirements or to abolish already adopted national measures. The possibility for the Commission to issue Decisions, however, is limited to requirements affecting the freedom of establishment and does not cover requirements concerning temporary cross-border service provision.

⁹ According to Article 15(2) Member States shall notify the following requirements: a) quantitative or territorial restrictions, b) an obligation on a provider to take a specific legal form, c) requirements which relate to the shareholding of a company, d) requirements other than those concerning Directive 2005/36/EC or provided for in other community acts, which reserve access to the service activity in question, e) ban on having more than one establishment in the territory of the same Member State, f) requirements fixing a minimum number of employees, g) fixed minimum and/or maximum tariffs and h) an obligation on the provider to supply other specific services jointly.

¹⁰ Article 16 shall, according to Article 17, not apply to (1) services of general economic interest which are provided in another Member State, inter alia: a) postal services covered by Directive 97/67/EC, b) electricity services covered by Directive 2003/54/EC, c) gas services covered by Directive 2003/55/EC, d) water distribution and supply services and waste water services and e) treatment of waste, (2) matters covered by Directive 96/71/EC (posting of workers), (3) matters covered by Directive 95/46/EC (data protection). (4) matters covered by Directive 77/249/EEC (lawyers), (5) the activity of judicial recovery of debts, (6) matters covered by Directive 2005/36/EC (professional qualifications), (7) matters covered by Regulation (EEC) no 1408/71 (social security schemes), (8) matters covered by Directive 2004/38/EC (administrative formalities of competent authorities in Member States with which beneficiaries must comply), (9) possibilities to require VISA or residence permit for third country nationals, (10) matters covered by Regulation (EEC) no 259/93 (shipment of waste) and (11) copyright, neighbouring rights and matters covered by Directive 87/54/EEC and Directive 96/9/EC, (12) involvement of notaries, (13) matters covered by Directive 2006/43/EC (statutory audit of annual accounts and consolidated accounts), (14) registration of vehicles leased in another Member State and (15) rules linked to private international law.

¹¹ Article 15 (establishment) allows Member States to justify the introduction of new requirements with any of the overriding reasons related to public interest which have recognised by the Court of Justice, e.g. consumer protection and combatting fraud. However, according to Article 16 (free movement of services) Member States may only justify new requirements with public policy, public security, public health or the protection of the environment.

Such a Decision is legally binding upon the Member State concerned. Where a Member State does not comply with the Decision, the Commission may issue a letter of formal notice for non-compliance with EU law in the context of an infringement procedure, without previously launching an EU Pilot procedure. Where a Member State disagrees with a Decision taken, it has to take legal action against the Commission in front of the Court of Justice of the European Union (hereinafter 'CJEU').

	Freedom of establishment	Free provision of cross-border services
Covered by 'notification obligation' in original proposal 'COM(2004) 2 for a Directive on services in the internal market' ¹²	Yes	No
All measures affecting the specific freedom covered by the notification obligation of the adopted Services Directive?	No	Yes
What needs to be notified according to the Services Directive?	Any new laws, regulations or administrative provision	Any changes in requirements, including new requirements
Specific period for reaction from Commission foreseen in the Services Directive?	Yes, 3 months from date of receipt of the notification	No
Possibility to adopt a Commission Decision foreseen in the Services Directive?	Yes	No
Reference to notification obligation under the Single Market Transparency Directive?	Yes	No

Table presenting the differences between the notification obligation of freedom of establishment and the free provision of cross-border services covered by the Services Directive

In 2007, the Commission issued a **Handbook** on the implementation of the Services Directive. It aims to clarify inter alia the scope of application of the Services Directive and the various obligations provided for in that Directive. It also contains information on the application of the notification provisions. Further guidance was provided by the Commission at various meetings of the Expert Group on the implementation of the Services Directive¹³.

¹² Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(2004) 2 final, 5.3.2004, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004PC0002&from=EN>

¹³ Handbook on the implementation of the Services Directive (2007), http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf, Expert group on the implementation of the Services Directive meetings of 23 April 2013, 25 March 2014 and 25 January 2016.

EXISTING NOTIFICATION PROCEDURE UNDER THE SERVICES DIRECTIVE

The notifying Member State directly uploads a notification into the Internal Market Information system (IMI) containing the following information:

- Level of requirement imposed (national, regional, local).
- Status of the act with date (or expected date) of entry into force
- Specific provision/article in the act that contains the notified requirement
- Services activity/ies to which the notified requirement applies
- Type of requirement and brief description
- Indication of the justification and detailed statement of ground
- Proportionality analysis

All other Member States and the Commission are informed via an automatic e-mail of the notification and of any subsequent document uploaded into the system. Other Member States and the Commission can upload comments and/or questions on the respective notification in IMI. The notifying Member State is invited to consider these comments and to respond to them again via IMI.

The IMI system closes the notification after 3 months from the date of the receipt of the translation of the original notification.

1.2.2. The Single Market Transparency Directive & other instruments

The notification obligation established under the Services Directive complements a previously existing notification obligation established by Directive (EU) 98/34 – now replaced by the **Single Market Transparency Directive (SMTD)** (EU) 2015/1535 – which establishes a notification obligation for new or changed requirements in the areas of goods and information society services.¹⁴

The notification procedure established under the SMTD consists of the communication by Member States of draft technical regulations to the Commission and the non-adoption of notified drafts thereof during a "standstill period". The Commission and Member States can issue comments and "detailed opinions", which should be taken into account by the notifying Member State. The "detailed opinions" prolong the initial "standstill period". Under the case law of the CJEU, in case the notification procedure is not completed by a Member State, the technical regulations in question are inapplicable by national authorities such as administration and judges. The notification system established by the SMTD ensures the transparency of notifications to stakeholders, which can gain access to notifications through an on-line tool.

¹⁴ A regulatory measure notified under the Transparency Directive does not need to be renotified under the Services Directive (Article 15(7), second paragraph of the Services Directive)

The revised **Professional Qualifications Directive** 2005/36/EC includes an obligation for Member States to report changes made to their list of regulated professions. Member States also have to provide every two years a report to the Commission about the requirements which have been removed or made less stringent. Moreover, Member States shall provide the Commission with information on requirements they introduced and the reasons for considering that those requirements are compatible with the Professional Qualifications Directive, within six months of the adoption of the measure introducing such requirements.

1.3.Economic context

The EU economy is predominantly a **services-based economy** with services accounting for 71% of EU GDP and 68% of EU employment (excluding government and public services). Services sectors falling within the scope of the Services Directive (which among others excludes sectors such as financial services, transport services, telecommunication services and health services) amount to 46% of EU GDP.¹⁵

The Services Directive and national reforms adopted following its entry into force until 2014 are estimated to yield 0.9% EU GDP growth over ten years.¹⁶ A **more ambitious implementation** of the Services Directive could yield up to **1.7% EU GDP** growth in addition to what has been achieved so far.¹⁷

Reform progress has slowed in recent years and reforms to abolish or reduce barriers in services have been undertaken by a limited number of Member States only.¹⁸ Some Member States have introduced important **new restrictions**, while other Member States backtrack on previous reform measures or introduce new barriers to limit the effects of previous reforms. Realising the 1.7% GDP growth potential will depend on both, Member States removing existing obstacles and refraining from introducing disproportionate restrictions that undo the positive impact of reforms.

Economic assessments^{19,20} show that reducing regulatory barriers in, for example, business services would generate more intensive competition as a result of more firms entering the market. It would also lead to benefits for consumers in terms of, for example, lower prices (inter alia as a result of reduced profit rates), wider choice or better quality. Lower market access barriers would additionally lead to more performant sectors characterised by a

¹⁵ Eurostat, National Accounts Statistics, 2013

¹⁶ Josefa Monteagudo, Aleksander Rutkowski, Dimitri Lorenzani: "The economic impact of the Services Directive: A first assessment following implementation"; European Commission Economic Paper 456; June 2012; http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf

¹⁷ European Commission: "Assessment of the Economic Impact of the Services Directive – Update of the 2012 Study"; http://ec.europa.eu/growth/single-market/services/economic-analysis/index_en.htm

¹⁸ *ibid*

¹⁹ European Commission: "Business services – Assessment of Barriers and their Economic Impact"; http://ec.europa.eu/growth/single-market/services/economic-analysis/index_en.htm

²⁰ Eric Canton, Daria Ciriaci, Irune Solera: The Economic Impact of Professional Services Liberalisation; European Commission Economic Paper 533; September 2014; http://ec.europa.eu/economy_finance/publications/economic_paper/2014/pdf/ecp533_en.pdf

stronger allocative efficiency. Organisations like the OECD, the World Bank and the IMF have carried out studies coming to similar results.²¹

2. Problem definition

2.1. Ineffective notification procedure fails to prevent the introduction of unjustified and disproportionate regulatory barriers in services

The objective of the notification procedure introduced in the 2006 Services Directive was to contribute to its effective implementation by preventing new unjustified and disproportionate regulatory barriers from being adopted by Member States, causing new obstacles in the services single market.

The procedure was designed as an enforcement tool whereby the compliance of new regulatory measures with EU law would be verified. This would avoid costly and lengthy legal proceedings between the Commission and Member States for newly adopted national laws failing to comply with EU law (infringement proceedings) and regulatory uncertainty and unpredictability stemming from frequently changing regulation (e.g. where a recently introduced measure would have to be amended again as a result of an infringement procedure).

The need for an effective notification procedure is confirmed by the fact that Member States continuously review and adjust their services regulation as they take account of new market developments (e.g. emergence of collaborative economy) and policy objectives (e.g. energy certification requirements contributing to climate change objectives). As a result, Member States notified a total of 1639 newly introduced regulatory measures between the deadline for the implementation of the Services Directive at the end of 2009 and the end of 2015.

However, an evaluation of the existing notification procedure shows that its initial objective has not been met. This is confirmed by the results of the public consultation undertaken (see Annex 2).

One main problem is that not all Member States fulfil the notification obligation: five Member States did not notify any regulatory measure between the end of 2009 and the end of 2015. An additional 10 Member States notified ten or less regulatory measures over this period. At the same time, the top seven notifying Member States account for 86% of all notifications (see Annex 5).

As to the reasons why Member States are not notifying, discussions with representatives from Member States held both bilaterally and multilaterally in the expert group on the implementation of the Services Directive pointed to a lack of awareness of the obligation

²¹ OECD: Services Trade and Domestic Regulation, 2007;
OECD: Service Regulation and Growth: Evidence from OECD countries, 2010
World Bank: EU Regular Economic Report 3: Growth, Jobs and Integration: Services to the Rescue; 2016
IMF: The EU Services Directive: Gains from Further Liberalization; IMF Working Paper WP/14/113; 2014

and absence of standard practices, especially among regional public authorities. A lack of any clear consequences in case of non-notification moreover fails to provide incentives for Member States to comply with the obligation. The absence of any consequence of non-notification implies a perverse incentive. Notifying Member States will have their notified measures subject to review by the Commission and other Member States, whereas non-notifying Member States do not.

The Commission has undertaken a number of initiatives to ensure Member States' compliance with the notification obligation in the Services Directive. Thus, it has issued a Handbook to explain to Member States how to comply with the Services Directive. Within the context of the Expert Group on the implementation of the Services Directive the Commission also regularly presented data on notifications received, naming, shaming and faming Member States. It moreover organised discussions among Member States to share experience and best practice, and approached non-notifying Member States bilaterally to encourage notifications.

Beyond this, however, the possibilities for the Commission to enforce the notification obligation are limited. It is general Commission policy not to open legal action against Member States for non-compliance with procedural obligations, unless there are substantive grounds, i.e. an infringement on substance with EU law. Only in such cases will the Commission in its infringement action addressing the substance of the non-notified requirement also add a point on the non-compliance with procedural obligations. One reason for this is that, in the absence to notify national laws at draft stage, Member State may always rapidly notify a requirement to prevent the Commission from adopting legal action solely for non-notification.

Beyond non-notification, the main underlying reasons why the existing procedure has not met its objective are set out in the sub-sections below (problem drivers).

As a result of the identified shortcomings, existing notifications and complaints received by the Commission show that Member States have introduced new regulatory requirements that have not met the non-discrimination, justification and proportionality criteria established by the Services Directive. This is illustrated by the fact that from 2009 to 2015 the Commission had to initiate 30 EU Pilot cases²² against Member States for newly introduced regulatory measures which the Commission considered not to be compatible with EU law. This represents 27% of all EU Pilot cases related to the Services Directive initiated by the Commission over this period, with this share continuously rising: in 2015 the EU Pilot cases against newly introduced regulatory measures represented 40% of all EU Pilot cases initiated under the Services Directive (based on complaints, own-initiative cases and notifications). This is evidence of regulatory requirements being introduced by Member

²² EU Pilot is a Commission initiative aimed at asking Member States to answer questions and to find solutions to problems concerning the application of Union law. It is supported by an online database and communication tool. Through the dialogue in EU Pilot, the Commission and Member States solve problems more quickly and compliance with Union law obligations is achieved to the benefit of the public and businesses.

States into their national legislation that raise important concerns over their compliance with the Services Directive.

Mechanisms such as the mutual evaluation process (2010-11), performance checks (2011-12) and peer review (2012-2013)²³ have not reduced the need to ensure an effective notification procedure as they focussed on the reduction of existing regulatory barriers rather than the prevention of new unjustified and disproportionate regulatory measures.

In comparison, the notification obligation under the Single Market Transparency Directive (SMTD) applying to information society services and goods is an example of a mechanism more effectively preventing new barriers from being introduced. This is confirmed by a calculation undertaken by CEPS²⁴, which developed an effective prevention indicator (EPI)²⁵ that measured the ability of the SMTD-system to prevent barriers to intra-EU goods trade. Amounting to 9.7% in 2010 and 11.7% in 2011 for the SMTD, the indicator shows that the SMTD prevented a number of national measures from being adopted, which would have been harmful to the proper functioning of the Single Market for goods and information society services. CEPS did not extend the indicator to also cover the services notification procedure, the potential impact of which, however, is likely to be larger than in the area of goods which are subject to harmonised EU rules and the application of the mutual recognition principle in a way that is not the case in services.²⁶

Several studies show the negative economic effects of restrictive regulatory barriers in services markets. Thus, the Commission^{27 28} using econometric modelling has established a causal link between restrictive regulatory barriers and reduced competitiveness as a result of lower market dynamics (less firms entering and exiting the market) and reduced

²³ Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive, 27.1.2011, COM(2011) 20 final. Commission Staff Working document on the result of the performance checks of the internal market for services (construction, business services and tourism), Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the implementation of the Services Directive, A partnership for new growth in services 2012-2015, 8.6.2012, SWD(2012) 147 final. Commission Staff Working document on the outcome of the peer review on legal form, shareholding and tariff requirements under the Services Directive, accompanying the document Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Evaluating national regulations on access to professions, 2.10.2013, SWD(2013) 402 final.

²⁴ CEPS Policy Brief, "Pre-empting Technical Barriers in the Single Market", Anabela Correia de Brito and Jacques Pelkmans, No. 277, 11 July 2012.

²⁵ The basis for the calculation is the gross prevention indicator i.e. the ratio of the sum of the comments and detailed opinions of one year, divided by the total number of notifications which is then filtered to eliminate double counting due to the fact more than one Member State can have a detailed opinion on the same notified draft law and/or that a Member State and the Commission may file a detailed opinion on the same draft law.

²⁶ This is the only available data on preventive enforcement. Data on enforcement (focussed on EU Pilot cases and infringement proceedings) only provide information on the length of procedures. No indications are given in respect of the cost related to such proceedings or the possible impact they could have on businesses.

²⁷ European Commission: The economic impact of services liberalisation; September 2014, http://ec.europa.eu/economy_finance/publications/economic_paper/2014/pdf/ecp533_en.pdf

²⁸ 'Business services – Assessment of Barriers and their Economic Impact', http://ec.europa.eu/growth/single-market/services/economic-analysis/index_en.htm

allocative efficiency rates, and increases in consumer prices. These studies are of direct relevance to this initiative given that the shortcomings in the existing notification procedure mean it is unable to prevent the introduction by Member States of the restrictive regulatory requirements that these studies have proven to be economically harmful.

2.2.The drivers of the problem

2.2.1. Driver 1 Limited possibilities to prevent disproportionate national regulation

The effectiveness of the current notification procedure suffers from limited possibilities to prevent the introduction of disproportionate national regulation. This is principally for two reasons.

Firstly, there is no obligation for Member States to notify draft regulations rather than those that have already been adopted. In the period between the deadline for the implementation of the Services Directive at the end of 2009 and the end of 2015 only 13% of notified regulatory measures were at draft stage and not yet adopted. Only in these cases could comments from the Commission and other Member States on the notified act still be taken into account in the legislative process. The 13% of draft notifications originated primarily from four Member States.

In 87% of all notified measures the only option for the Commission to address unjustified or disproportionate regulatory measures was thus to revert to administratively heavy and resource- and time-consuming enforcement actions (EU pilot cases and infringement procedures) (see Annex 5 for detail).

By comparison, the notification system under the Single Market Transparency Directive (SMTD) obliges Member States always to notify draft measures. This allowed the Commission in 2014 to issue 62 detailed opinions on draft measures notified while limiting the number of infringement proceedings that needed to be opened to one.

Secondly, the existing notification procedure does not give external stakeholders access to notifications. This limits the opportunities to hear views of stakeholders, which could provide valuable input for an assessment of the justification and proportionality of regulatory measures.

A comparison to the SMTD is again illustrative. The latter allows for all interested parties, including non-institutional stakeholders, to be informed of notifications and to comment on them. Each year, stakeholders provide between 300 and 400 comments on the 600 to 700 measures notified under the TRIS system that is used for the SMTD. This confirms a considerable interest from stakeholders. The public consultation on the services notification procedure confirmed a similar stakeholder interest with nearly three quarters of respondents supporting increased transparency (see Annex 2). Also the response from the public authorities was positive with 60% in favour.

2.2.2. Driver 2 Ineffective Decision powers

Regulatory requirements which concern the freedom of establishment are notified on the basis of Article 15(7) of the Services Directive. Where the Commission believes that the notified measure is not in line with the requirements of the Services Directive, it may on the basis of Article 15(7) adopt a Commission Decision requesting the Member State in question to refrain from adopting the notified measure or (where it is already adopted) to abolish it.

Until today, the Commission has not made use of the possibility to adopt a Commission Decision. This is because the existing design of the notification procedure makes it impossible in practice for the Commission to adopt a Decision. Under the Services Directive, the adoption of a Decision must take place within three months after the date of the notification of a regulatory requirement. A Decision must be preceded by a dialogue between the Commission and the notifying Member State. In practice, it is not possible within this time-span for the Commission to analyse the incoming notification, to hold a dialogue with the notifying Member State on this notification and to complete applicable procedures leading up to the adoption of a Decision. Experience with the existing procedure shows that in particular the organisation of a meaningful dialogue between the notifying Member State, the Commission and other Member States on the substance, merits and justification of a notified measure requires an adequate timeframe.

Notifications which concern the freedom to provide services cross-border on a temporary basis are notified on the basis of Article 39 of the Services Directive. This Article does not contain the possibility for the Commission to adopt a Decision requesting the Member State in question to refrain from adopting the notified measure or (where it is already adopted) to abolish it. The only possible option available to the Commission is opening enforcement action (EU Pilot and infringement proceedings) where it believes that a notified requirement is not in conformity with EU law.

Pursuing EU Pilots and infringement proceedings, however, requires considerable time and resources for both, national authorities and the Commission. Infringement proceedings take on average 29 months, while the time necessary for a Decision procedure is fixed at 3 months to prepare the Decision.

While the possibility to adopt a Decision is thus limited to notifications that concern the freedom of establishment and does not extend to the freedom to provide services cross-border on a temporary basis, 86% of regulatory measures notified between the end of 2009 and the end of 2015 concern the temporary provision of services cross-border. Of the total notifications received in 2010-2015, 226 concern establishment requirements, whereas 1413 concern requirements affecting temporary cross-border services or both temporary cross-border services and establishment cases. This shows that under the present notification procedure in only a minority of cases is the Commission actually in a position to adopt a Decision to prevent the introduction of a national regulatory requirement that contradicts the existing Services Directive.

The ineffectiveness of the existing Decisions instrument was also highlighted by respondents to the public consultation: 80% of respondents agreed that the current system is not adequate to prevent the adoption of disproportionate restrictions by Member States and called to extend the possibility for Decisions to also cover notified measures concerning temporary cross-border services provision.

2.2.3. Driver 3 Lack of thorough proportionality assessments

As per Articles 15 and 16 of the Services Directive, Member States may maintain certain regulatory requirements even where they constitute obstacles to the freedom of establishment and the freedom to provide services, provided they assess and show these are non-discriminatory, justified by an overriding public interest and proportionate. The corresponding assessment is thus key to establishing whether a regulatory measure is permissible or not.

Indeed, Member State's assessments confirming the proportionality of a requirement are central to the policy approach to the services single market, given limited regulatory harmonisation and the limited application of the mutual recognition principle (especially as compared to the goods sector). It is particularly important for certain sectors, such as regulated professions, retail and construction, as highlighted in the Single Market Strategy.

Despite the importance of the assessment of the justification and proportionality of regulatory measures, the current notification procedure does not contain a clear obligation for Member States to provide a substantive assessment of the justification and proportionality of a regulatory measure as part of their notification. Member States must indicate whether the notified measure is proportionate, but they do not need to furnish any assessment showing how this is the case.

In practice, the information provided in the notification procedure is often not sufficient for a proper assessment of the justification and proportionality of measures notified by Member States (see Annex 5). This shortcoming was also highlighted by many stakeholders during the public consultation: nearly half (45%) asserted that the assessment by Member States whether national legislation is justified and proportionate to meet public policy objectives is insufficient.

An evaluation of the notifications received in 2014 and 2015 shows that approximately 50% of all received notifications did not include substantive information on the justification and proportionality of the notified requirement, with many assessments not going beyond a standard phrase stating that the notified requirement is proportionate to achieving the desired public interest objective and does not impose excessive restrictions. For other notifications received, Member States provide information allowing at least for a partial understanding how and in what way the notified measure is justified and proportionate to reach identified public interest objectives.

2.2.4. Driver 4 Limited scope of requirements covered by the current notification obligation

The current notification obligation for requirements affecting temporary provision of cross-border services is much wider and more substantial than the obligation for requirements affecting the freedom of establishment. According to the Services Directive,²⁹ all requirements affecting temporary cross-border service provision (such as reporting obligations, authorisation schemes, minimum number of employees, requirements on insurance, etc.) should be notified, unless they concern services which are not covered by the exemptions in the Directive (e.g. services of general economic interest, matters related to posting of workers and professional qualifications)³⁰.

On the other hand, the notification obligation for establishment requirements is limited to a closed list of requirements in the Directive.³¹ This approach stems from the original Commission legislative proposal for the Services Directive and changes introduced by the legislator prior to its adoption. The original Commission legislative proposal limited the notification obligation to a number of establishment requirements defined in Article 15 of the Directive. It did not extend to all establishment requirements and did not cover the temporary provision of cross-border services at all. The latter had not been foreseen in the Commission legislative proposal because the country of origin principle was to apply to such services; but when this was rejected by the legislator and instead it was agreed that Member States could keep in place requirements also for the cross-border provision of services, the scope of the notification requirement was extended to cover such requirements. Establishment requirements beyond Article 15 were not covered by the notification obligation in the original Commission proposal because their relative importance and national regulatory activity on such requirements was originally underestimated. During the negotiations of the draft Directive it was decided not to cover

²⁹ Article 16 and 39(5) of the Services Directive

³⁰ Article 16 shall, according to Article 17, not apply to (1) services of general economic interest which are provided in another Member State, inter alia: a) postal services covered by Directive 97/67/EC, b) electricity services covered by Directive 2003/54/EC, c) gas services covered by Directive 2003/55/EC, d) water distribution and supply services and waste water services and e) treatment of waste, (2) matters covered by Directive 96/71/EC (posting of workers), (3) matters covered by Directive 95/46/EC (data protection), (4) matters covered by Directive 77/249/EEC (lawyers), (5) the activity of judicial recovery of debts, (6) matters covered by Directive 2005/36/EC (professional qualifications), (7) matters covered by Regulation (EEC) no 1408/71 (social security schemes), (8) matters covered by Directive 2004/38/EC (administrative formalities of competent authorities in Member States with which beneficiaries must comply), (9) possibilities to require VISA or residence permit for third country nationals, (10) matters covered by Regulation (EEC) no 259/93 (shipment of waste) and (11) copyright, neighbouring rights and matters covered by Directive 87/54/EEC and Directive 96/9/EC, (12) involvement of notaries, (13) matters covered by Directive 2006/43/EC (statutory audit of annual accounts and consolidated accounts), (14) registration of vehicles leased in another Member State and (15) rules linked to private international law.

³¹ According to Article 15(2) Member States shall notify the following requirements: a) quantitative or territorial restrictions, b) an obligation on a provider to take a specific legal form, c) requirements which relate to the shareholding of a company, d) requirements other than those concerning Directive 2005/36/EC or provided for in other community acts, which reserve access to the service activity in question, e) ban on having more than one establishment in the territory of the same Member State, f) requirements fixing a minimum number of employees, g) fixed minimum and/or maximum tariffs and h) an obligation on the provider to supply other specific services jointly.

additional establishment requirements as the scope of the notification obligation was already being extended to cover requirements effecting temporary cross-border services provision. As a result, authorisation schemes, insurance requirements and multi-disciplinary restrictions, which are dealt with in separate Articles of the Directive, were not covered by the notification obligation.

This is a major driver for the ineffectiveness of the existing notification scheme. A mutual evaluation exercise undertaken in 2010 and 2011 concluded that there were around 4400 authorisation schemes and 225 multi-disciplinary requirements in place across the EU, confirming high regulatory activity on these issues.³² The mutual evaluation process established that different types of horizontal authorisation schemes, i.e. schemes that apply to all or a large variety of services, exist in Member States. It further established that several layers of procedures can still apply, even though some Member States reduced the scope of authorisation schemes and/or replaced them with prior declaration obligations for some services.

A recent Commission assessment³³ confirmed that a considerable number of insurance requirements remain in place for the services provided by accountants, architects, engineers and lawyers. Although only a limited group of Member States had such requirements in place for all four business services assessed, only two Member States had no insurance requirements in place. The same Commission assessment also showed strict requirements in several Member States in relation to multidisciplinary activities.

Over the past years, the Commission had to launch several enforcement actions to address authorisation requirements, multidisciplinary restrictions and professional indemnity insurance requirements constituting significant barriers preventing the establishment of services providers. If these requirements were covered by the notification obligation, the notification procedure could help ensure that any new or changed regulatory requirement introduced by Member States would comply with the principles on non-discrimination, necessity (i.e. justified by an overriding reason of public interest) and proportionality and thereby be compliant with the Services Directive. These requirements currently falling outside the scope of the notification obligation means its mechanism is not available for an important area of Member States' regulatory activity.

In the public consultation many respondents highlighted the incoherence in notification obligations and stressed the need to enlarge the scope of the current notification obligation, in particular as concerns authorisation requirements (73 out of 126 respondents), requirements affecting multidisciplinary activities (71 out of 126 respondents) and

³² Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive, 27.1.2011, COM(2011) 20 final.

³³ Business services – Assessment of Barriers and their Economic Impact, http://ec.europa.eu/growth/single-market/services/economic-analysis/index_en.htm

professional indemnity insurance requirements (63 out of 126 respondents), which was also supported by a majority of the responding public authorities.

2.2.5. Driver 5 Unclear legal consequences when the notification obligation is not respected by Member States

Under the existing rules, there is a lack of clarity and potential absence of legal consequences of a failure to notify. The Services Directive remains silent as to what the possible legal consequence could be.

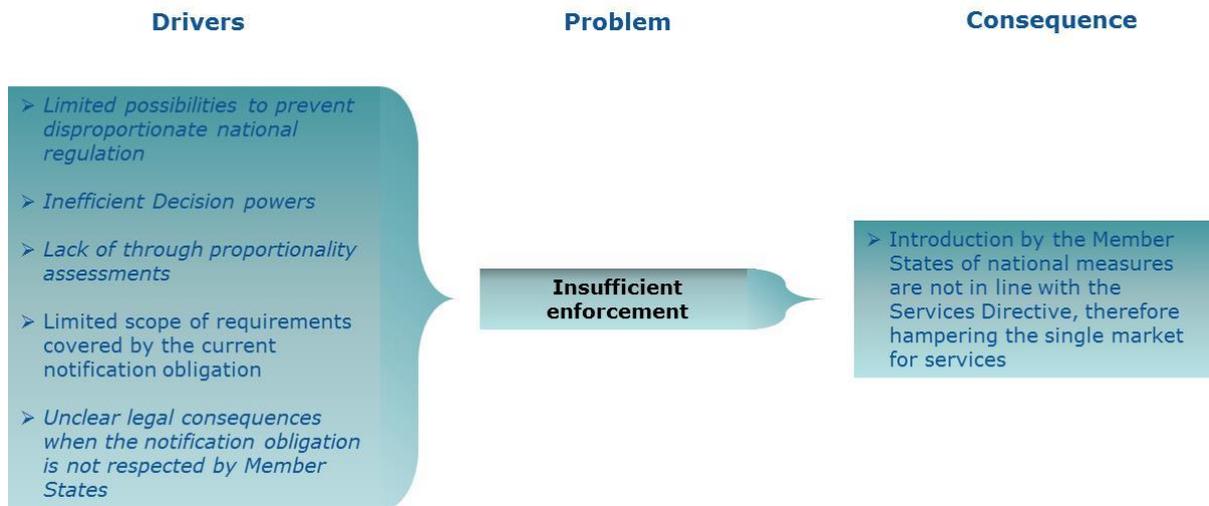
In the context of the public consultation and substantive debates with public institutions, most stakeholders requested the Commission to provide clear guidelines on the legal consequences when the notification obligation is not respected. 80% of the public authorities responding to the public consultation supported the need to clarify the legal consequences of not respecting the notification obligation. The lack of clarity and potential absence of legal consequences of the failure to notify a new requirement means not all Member States comply with the notification obligations.

Although it is impossible for the Commission to present precise figures as to how many more notifications it should have received, the following provides an estimate: taking the average amount of notifications by the top 11 notifying Member States, Member States not notifying and the Member States providing very few notifications should have per year an average of 13 notifications (for more detail in respect of the calculations see Annex 4).

On several occasions the Commission received notifications by some Member States related to the transposition of EU legislation into national law. Given the transposition obligation for all Member States, corresponding notifications should have been received by all Member States. This again confirms the uneven compliance of Member States with the notification obligation.

While the SMTD on the notifications in the area of goods and information society services equally does not contain a special provision in terms of possible legal consequences of a measure not being notified, the Court of Justice in its ruling in case C-194/94 concluded that a national provision which had to be notified under Directive 98/34/EC (the predecessor of the SMTD) but was not shall be declared inapplicable to individuals by national Courts. This could also be the case when a Member State adopts a regulation in breach of the obligation to respect the standstill period (C443/98) foreseen in the SMTD.

2.2.6. Problem tree



2.3. Who is affected, in what ways and to what extent?

2.3.1. Services providers

Service providers established in the EU are highly affected by a notification procedure that does not meet its objective. In the absence of an effective notification mechanism Member States may introduce requirements which are not compatible with the Services Directive and which can only be repealed following an infringement procedure. If, for example, a Member State introduces disproportionate establishment requirements banning a service provider from an activity in that country or makes certain tariffs mandatory, those obstacles apply as from the day of their adoption at national level. If those requirements were notified at draft stage, the negative effect on the companies operating on the single market could be avoided through preventive ex-ante enforcement. In the absence of an efficient notification mechanism, obstacles once created remain in place until an infringement procedure is successfully completed (taking 29 months on average).

An assessment³⁴ by the Commission shows, for example, that in the business services sector Member States with more restrictive barrier levels see a lower number of new service providers entering their markets. As a result, competition is lower in these Member States and market dynamics are constrained. Indeed, Member States with more restrictive regulatory barriers see a lower combined share of companies entering and exiting the market ('churn rate').

³⁴ Business services – Assessment of Barriers and their Economic Impact, http://ec.europa.eu/growth/single-market/services/economic-analysis/index_en.htm

A recent assessment of the construction services sector in the EU, published by the Commission in February 2016³⁵ also showed that there is considerable room for simplification of procedures imposed on cross-border service providers of construction services, in terms of establishment and those offering temporary cross border services.

As a result service providers face obstacles while doing business in other Member States, either by trying to establish in that Member State or by providing cross-border services. This applies to both, foreign and domestic services providers, with a serious impact in particular for SMEs. Complying with all requirements in place in the various Member States leads to a considerable cost which weighs more heavily (proportionally) on the turnover of SMEs.

More specifically, due to the lack of transparency in the current system, service providers can often not be easily made aware of regulatory measures that other Member States intend to introduce, and which might impact them and their activities. Certainly, foreign services providers could participate in a domestic consultation process. However, such processes usually take place in the national languages of the Member State concerned and have a focus on domestic concerns with the cross-border dimension usually neglected.

The current scope of the notification obligation is limited to certain regulatory requirements. If all requirements affecting the freedom of establishment and the freedom to provide cross-border services covered by the Services Directive were subject to the notification obligation, this would generate an important positive impact for SMEs.

2.3.2. Services recipients

Services recipients are directly being given rights by the Services Directive (in respect of the prohibited restrictions under Article 19 and the non-discrimination principle in Article 20). Moreover, service recipients are also affected by the Services Directive because for example the prohibition of restrictions of the freedom to provide services cross-border under Article 16 Services Directive also target restrictions related to service recipients. This leads to the fact that in particular in Member States with more restrictive environments service recipients may not benefit (or do so to a limited extent) from the EU single market for services and thus end up paying higher prices for these services than consumers in Member States with lower barriers or have lower quality or choice³⁶. The requirements in place could very well hinder service providers willing to do business across-borders, therefore influencing what is on offer and potentially affecting the competition between service providers, which in turn will also have an impact on consumer's choice.

³⁵ Simplification and mutual recognition in the construction sector under the Services Directive, [http://bookshop.europa.eu/en/simplification-and-mutual-recognition-in-the-construction-sector-under-the-services-directive-](http://bookshop.europa.eu/en/simplification-and-mutual-recognition-in-the-construction-sector-under-the-services-directive-pbET0116073/;pgid=Iq1Ekni0.1ISR00OK4MycO9B0000kq6TNbTU;sid=1dqtLZ6BxIStJMmWiXczivykdxnRfZIS0wk=?CatalogCategoryID=9cQKABstREYAAAEjKJEY4e5L)

[pbET0116073/;pgid=Iq1Ekni0.1ISR00OK4MycO9B0000kq6TNbTU;sid=1dqtLZ6BxIStJMmWiXczivykdxnRfZIS0wk=?CatalogCategoryID=9cQKABstREYAAAEjKJEY4e5L](http://bookshop.europa.eu/en/simplification-and-mutual-recognition-in-the-construction-sector-under-the-services-directive-pbET0116073/;pgid=Iq1Ekni0.1ISR00OK4MycO9B0000kq6TNbTU;sid=1dqtLZ6BxIStJMmWiXczivykdxnRfZIS0wk=?CatalogCategoryID=9cQKABstREYAAAEjKJEY4e5L)

³⁶ Cf. Business services – Assessment of Barriers and their Economic Impact

2.3.3. National authorities

Based on information received from some Member States and follow-up reflections in the Expert Group on the Services Directive with all of them, the average time spent to comply with the current notification procedure is 12 working hours per notification. Taking the EU average of hourly earnings of civil servants with university education of €32.10, this results in an average administrative cost of €385.20 per notification. This cost varies significantly between Member States from €45.60 in Bulgaria to €426 per notification in the Netherlands, due to differences in hourly earnings between Member States³⁷ (for detailed evidence overview, see Annex 4).

Lack of notifications, notifications of already adopted requirements or insufficient information on notified measures are shortcomings also impacting national authorities as their information on and opportunity to input to regulatory requirements being introduced by other Member States is limited. Furthermore, a more effective notification procedure could prevent lengthy infringement proceedings between the Commission and Member States, which had in 2014 an average duration of 29.1 months. Even if the average duration would be 0 months, authorities would have more costs to follow an infringement procedure because they would have to re-launch entire national procedures for changing laws.

At present the costs for running notifications are uneven between Member States given that some Member States notify while others do not.

2.4. What is the EU dimension of the problem?

The ineffectiveness of the existing preventive enforcement mechanism established by the present notification procedure means the introduction of new unjustified and disproportionate regulatory barriers to the services single market by Member States is at present not avoided in an effective manner. This results in new regulatory barriers hampering the integration and competitiveness of the EU single market for services.

2.5. How would the problem evolve, all things being equal?

All things being equal the problem and underlying drivers described and explained above would remain. As a result, there would be a continued risk of Member States introducing new unjustified and disproportionate barriers that are not in compliance with the Services Directive. The Commission would continue the dialogue with the Member States with the aim to improve the fulfilment of the notification obligation. It would do this by requesting clarifications and issue comments on the notifications.

Furthermore, the Commission would continue the discussions in the Expert Group on the individual notifications with a particular focus on the proportionality assessment but also show statistics on the notifications per Member State per year and the amount of

³⁷ See Annex 4 with evidence overview for details.

comments issued by both the Commission and the Member States and statistics in respect of the response performance per Member State in respect of such comments.

It is unlikely that these discussions would lead to much change in Member States complying with the notification obligation. Some Member States would continue to protect the domestic markets and lack of awareness in particular at lower levels of government would remain. Member States would likely continue introducing requirements that create barriers and hamper the further development of the single market for services, resulting in economic potential not being reached. There would be no incentive for Member States to notify, when notification leads to an immediate assessment of the notified requirement, while where this is not notified such an assessment would only take place under a potential EU Pilot or infringement procedure.

Even if enforcement action in the form of infringement procedures became in future much quicker compared to the current situation (an average of 29 months), this would still result in a period of regulatory insecurity for stakeholders due to the situation remaining unclear until the proceedings coming to an end and the entry into force of possible adaptations to the national measures at stake.

Parallel EU policy initiatives, such as the proportionality test would not alter the situation described above.

The initiative for a proportionality test³⁸ aims to improve the quality of the assessment of the proportionality of regulatory requirements that Member States must undertake under the Professional Qualifications Directive³⁹. To this end, the initiative defines minimum criteria to be followed during the assessment by Member States of the proportionality of requirements falling under the Professional Qualifications Directive. Where such requirements also fall under the notification obligation under the Services Directive, the minimum criteria for proportionality assessments to be established by the initiative for a proportionality test would also apply to the content of the proportionality assessments that Member States must undertake under the notification procedure established by the Services Directive. Therefore, although the initiative for a proportionality test will not deal with the notification obligation under the Services Directive per se, there will be measures to be notified under the Services Directive, to which the initiative for a proportionality test will apply, contributing to more thorough proportionality assessments.

³⁸ Page 9 of the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Upgrading the Single Market: more opportunities for people and business', COM(2015) 550 final, 28.10.2015, <http://ec.europa.eu/DocsRoom/documents?locale=en&tags=single-market-strategy-2015-communication>

³⁹ Article 59(3) of Directive 2005/36/EC

3. EU right to act

3.1. Does the EU have the right to act?

The provisions of the Treaty (Articles 53(1), 62 and 114 TFEU) give the EU the competence to act with regard to the single market for services.

EU rules adopted under Articles 53(1) and 62 TFEU should have as the objective the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons, with regard to the right of establishment and the freedom to provide services. Article 114 TFEU gives the EU the competence to adopt EU legislation for the establishment and the functioning of the single market in general.

The objective of the present initiative is to ensure a smoother and speedier enforcement of the Services Directive through an improved notification procedure. The notification of national draft regulatory measures under this procedure provides for an opportunity to prevent the adoption of unjustified or disproportionate national measures. The notification mechanism thereby contributes to the overall coherence between national rules preventing the emergence of future obstacles resulting from their heterogeneous development.

The notification procedure provides for a consultation mechanism that allows for the communication of information by the notifying Member States (draft regulations, information on proportionality etc.) and the possibility for the Commission, other Member States and stakeholders to enter into a dialogue with the notifying Member State.

The appropriate legal basis for the initiative are therefore Articles 53(1) 62 and 114 TFEU.

3.2. What would be the added value of action at EU level?

According to the principle of subsidiarity set in Article 5 TFEU, action at EU level may only be taken if the envisaged aims cannot be achieved sufficiently by Member States alone and can be better achieved at EU-level.

The Services Directive has as objective to facilitate the freedom of establishment for services providers and the free movement of services in the single market. The notification procedure contributes to this objective, which by its very nature requires action at EU level as in the context of services single market, regulatory measures adopted by one Member State impact the single market as a whole. They create obstacles to services providers established in other Member States seeking to offer services cross-border or to establish in the Member State in question as well as to the services providers who want to establish in their country.

Given the transnational character of the single market, the need for better performing services markets, and the objective of the notification procedure, namely to ensure its proper functioning, an action is necessary at EU level.

3.3. Consistency with other EU policies and with the Charter for fundamental rights

The initiative to reform the notification procedure stems from the Single Market Strategy⁴⁰, adopted on 28 October 2015, which announced several actions to further develop the single market for services. These actions also feature in the Commission Work Programme 2016.

One objective of any legislative proposal to improve the notification procedure for services would be to improve the consistency with the existing notification procedure for goods and information society services established by the **Single Market Transparency Directive** (SMTD).

The SMTD covers both goods and information society services. According to the SMTD, Member States must inform the Commission of any draft technical regulation prior to its adoption. Starting from the date of notification of the draft, a three-month standstill period – during which the notifying Member State cannot adopt the technical regulation in question – enables the Commission and the other Member States to examine the notified text and to respond appropriately.

Where it emerges that the notified drafts may create barriers to the free movement of goods or to the free provision of information society services, the Commission and Member States may submit a detailed opinion to the Member State that has notified the draft. The detailed opinion has the effect of extending the standstill period by additional three months for products and by additional one month for services. In the event of a detailed opinion being issued, the Member State concerned has to explain the action that it intends to take in response to the detailed opinion.

Member States are bound to inform the Commission of final texts as soon as those texts have been adopted and to indicate cases in which the notified draft has been abandoned, in order to allow the procedure under the SMTD to be closed. If the draft technical regulation undergoes substantial changes Member States are obliged to re-notify the draft measure with the application of a new standstill period.

The Court of Justice in its judgement in case C-194/94 'CIA-Security'⁴¹ ruled that a national provision which was not notified under the '98/34 procedure' while it should have been, can

⁴⁰ Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive, 27.1.2011, COM(2011) 20 final.

⁴¹ Judgment of the Court of 30 April 1996, Case C-194/94 'CIA Security International SA v Signalson SA and Securitel SPRL'.

be declared inapplicable to individuals by national courts. In case C-443/98 'Unilever'⁴² it was decided that a technical regulation, adopted in breach of the obligation to postpone the adoption of a notified national legislation, i.e. to respect the standstill period, can also be declared inapplicable to individuals by national courts. The current notification procedure in the Services Directive explains that the notification of a draft national law in accordance with the SMTD shall fulfil the obligation of the notification provided for in the Services Directive.

One further objective of any legislative proposal to improve the notification procedure for services would be to improve the consistency with the reporting obligation for Member States under the **Professional Qualifications Directive** (PQD; Directive 2005/36). This is the case notably as regards the assessment of the proportionality of national measures, mandatory both under the Services Directive and the PQD.

The PQD establishes rules according to which a Member State makes access to or pursuit of a regulated profession dependent on the possession of specific professional qualifications.

Under the PQD, Member States have to provide every two years a report to the Commission about the requirements which have been removed or made less stringent. Member States shall also provide the Commission with information on requirements they introduced and the reasons for considering that those requirements are compatible with the PQD, within six months of the adoption of the measure introducing such requirements.

In the Single Market Strategy⁴³, an initiative was announced to improve the quality of proportionality assessments of regulations governing professional qualifications. Such an initiative would set criteria for Member States when preparing proportionality assessments of draft national laws falling under the PQD. Some measures falling under the PQD may also fall under the Services Directive and its notification obligation. In such cases, the information on the proportionality assessment to be provided following the notification procedure under the Services Directive would have to meet the requirements of the proportionality test set out in the PQD.

Any services notifications initiative would promote rights enshrined in the **Charter of Fundamental Rights** and in particular in Article 11 on freedom of information, since a high degree of transparency would be allowed to the public by giving it access to the notification information and in Article 16 on freedom to conduct a business, since this initiative would contribute to preventing that unjustified or disproportionate barriers to the provision of services would be tabled by Member States.

⁴² Judgment of the Court of 26 September 2000, Case C-443/98 'Unilever Italia SpA v Central Food SpA'.

⁴³ Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive, 27.1.2011, COM(2011) 20 final.

4. Objectives

4.1. General policy objectives

The general policy objective of this initiative is to contribute to more competitive and integrated services markets. This is to be achieved through an improved enforcement of the EU Services Directive, which prevents at an early stage the introduction of unjustified barriers at Member States' level that could hamper the freedom of establishment of services providers and the freedom to provide services cross-border.

4.2. Specific policy objectives

There are 4 specific policy objectives to this initiative:

1. Increase the effectiveness of the notification procedure as a whole
2. Improve the quality and content of notifications submitted
3. Align the notification obligation closer to the scope of the Services Directive
4. Enhance compliance with the notification obligation

5. Policy options



5.1. Discarded Options

5.1.1. Including services in the Single Market Transparency Directive

Experience and feedback from Member States and stakeholders show that the existing Single Market Transparency Directive (SMTD) procedure described in section 3.3 works satisfactorily. Although it also applies to information society services, its main field of

application is that of goods (approximately 94% of notifications received as per the SMTD in 2015 concerned goods).

Including services within the scope of the SMTD would at first seem an attractive policy option to ensure coherence of procedures and realise synergies both on the side of the Commission and with Member States.

The Commission nevertheless decided to discard this policy option. The regulation of goods and services in EU law differs fundamentally. While 80% of EU goods are subject to harmonised EU rules, the remaining 20% are subject to the mutual recognition principle between Member States. In the services sector, harmonisation of applicable regulations at EU level is very limited. So is the application of the mutual recognition principle. Instead, the Services Directive establishes a legal framework with key principles for Member States to apply and implement in their national legal systems and contexts.

As a consequence, the scope for and approach of national regulatory measures differs widely between goods and services. This has consequences for the demands placed on the respective notification procedures. Thus, in the absence of much regulatory harmonisation and mutual recognition, the notification procedure applicable to services aims to ensure that regulatory requirements that Member States introduce comply with the principles of non-discrimination, necessity and proportionality defined in the Services Directive. The proportionality assessment to be undertaken by Member States is particularly important to judge if the regulatory requirement is in line with the Services Directive. A summary of such an assessment must hence be supplied under the services notification procedure. It is, however, not required under the SMTD given a proportionality assessment of regulatory requirements is less relevant in the area of goods in the light of regulatory harmonisation and mutual recognition.

Moreover, the existing notifications procedure under the Services Directive includes the possibility for the Commission to adopt formal Decisions in line with Article 288 TFEU, where the Commission believes that a notified regulatory requirement is not in line with the Services Directive. This provision was included in the Services Directive to provide for an effective mechanism to avoid the introduction of unjustified regulatory requirements contradicting the Services Directive by Member States not bound by the harmonisation of rules at EU level and subject only to limited mutual recognition. The possibility for the Commission to adopt formal Decisions is, however, not foreseen under the SMTD.

Lastly, political considerations also played a role, namely regulatory risks stemming from a re-negotiation of the existing SMTD also with regards to its application to regulatory requirements governing the free movement of goods in the single market (e.g. the existing standstill clause).

5.1.2. Merging the obligation under the PQD with the notification obligation of Services Directive

A further policy option at first considered, but then discarded was a potential merger of the reporting obligation under the Professional Qualifications Directive (PQD) with the notification obligation of the Services Directive. Several reasons led to this decision.

Firstly, the services covered by the two Directives differ in scope. Several services sectors are covered by the PQD, but not by the Services Directive, including health services and transport services.

Secondly, while related, the two Directives differ in their subject matter: one deals in principle with the regulation of professional qualifications of individual persons and their mobility, the other with the regulation of services markets more widely.

Thirdly, the two procedures in the PQD on the one hand and the Services Directive on the other hand differ significantly. The obligation under the PQD is a reporting obligation which does not contain any consultation with the Commission and the other Member States; this is in contrast with the notification procedure under the Services Directive, which does provide for such a dialogue. Furthermore, the reporting obligation in the PQD is a result of the amending Directive 2013/55 and only entered into force in January 2016. Experience with the application of this reporting obligation should be gathered before it is amended. The identified shortcomings of the notification procedure under the Services Directive, however, require more immediate action.

5.1.3. Services sectors outside the scope of the Services Directive

A third policy option discarded was an extension of the scope of the notification obligation under the Services Directive to services sectors not covered by that Directive. With the objective of this initiative being an improved enforcement of the Services Directive, the scope of services sectors covered by this initiative should be in line with the scope of services sectors covered by the Services Directive.

EU legislation which covers services outside the scope of the Services Directive (e.g. financial services; transport) moreover feature their own mechanisms to ensure that the rules in the EU legislation are properly enforced, for example via specifically assigned supervisory authorities. There is no evidence available which would justify extending the scope of the notification obligation to sectors outside the scope of the Services Directive. At the same time, such a step would risk considerable regulatory complications and overlaps.

5.2. Policy Option 1: Baseline scenario: No EU policy change

The baseline scenario implies no changes to the notification procedure under the Services Directive. Member States would continue to notify their measures under the obligation currently foreseen Member States and the Commission would continue to provide comments on notified measures, where appropriate, requesting the notifying Member State

to take these into account. Where this would not be done and in case of an infringement with EU law, the Commission would continue to launch enforcement action, starting with EU Pilots.

The assessment of the proportionality of notified measures, the results of which must be stated as part of the notification of a measure, would be improved subject to the potential parallel Commission initiative on a proportionality test, which would aim to provide guidance to Member States on their proportionality assessments.

In the context of the Single Market Strategy adopted on 28 October 2015, the Commission would also seek to develop other policy initiatives intended to foster the integration of the services markets in the EU, including the European services card.

Under the baseline scenario, the Commission would also continue working in cooperation with Member States on national reforms, notably in the context of the European Semester, to improve the functioning of the services markets.

5.3. Policy Option 2: Non-legislative initiative (guidelines)

Under this option, the Commission would issue guidelines to Member States to improve the application of the existing notification obligations stemming from the Services Directive. This would be done via a non-legislative measure and fully reflect existing legal provisions. The guidelines would build on the Commission's experience in handling notifications and on existing guidance given notably through the Handbook on the implementation of the Services Directive published in 2007.⁴⁴ The guidelines would not be binding.

The guidelines would offer clarifications on the exact notification obligations under Articles 15(7) and Articles 16 and 39 of the Services Directive.

Member States would also be encouraged to notify new requirements as early as possible and preferably before their final adoption into national law, for the Commission and/or other Member States to submit comments where appropriate.

In addition, the guidance would encourage Member States to provide substantive information on the proportionality assessment when they notify a new requirement.

Finally, these guidelines would clarify the respective procedures that apply to notifications made and the differences between them as per Article 15 of the Services Directive on the one hand, and Articles 16 and 39 on the other hand.

5.4. Policy Option 3: Measures to increase the effectiveness and quality of the notification procedure

Option 3 would contain measures to increase the effectiveness of the existing notification procedure, which responds to the request from the Competitiveness Council of 2 March

⁴⁴ http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf

2015 calling upon the Commission "to increase the effectiveness of the notification procedure under Directive 2006/123/EC".⁴⁵

An obligation to notify **draft** measures would be introduced (rather than measures already adopted or entered into force). Measures would have to be notified during the stage of preparation, when amendments on substance can still be made. The European Parliament in its May 2015 Report on the Single Market Strategy⁴⁶ supported the notification of national acts introducing or changing requirements covered by the notification obligation at draft stage.

Measures would have to be notified at least three months prior to their adoption. This would allow for a **three months consultation period** consisting of two phases. During a first phase lasting two months, Member States and the Commission would be able to comment on a notified measure. During a second phase of one month, the notifying Member State would react to comments it received. The choice of three months for the length of the consultation period is based on other notification systems and in particular the SMTD, as well as the current timeframe foreseen in the Services Directive. Experience with the application of the existing services notification procedure and the SMTD shows that a three months period allows for a dialogue between Member States, the Commission and stakeholders.

Notifications would be made **transparent** and accessible to interested stakeholders, who would thus obtain information on the planned introduction of measures and obtain an opportunity to provide comments on them. Via IMI, a public interface would be created, which would allow stakeholders to get access to the notifications. Stakeholders would, during the three months consultation period referred to above, be able to issue comments to the Commission and the notifying Member State. The European Parliament in its above-mentioned Report on the Single Market Strategy supported making notifications transparent to stakeholders. The EU Council in its above-mentioned EU Council Conclusions also called for the transparency of notifications, which was also confirmed by a majority of public authorities supporting the transparency of notifications in their responses to the public consultation.

Member States would, moreover, be required to provide detailed information on the **proportionality assessments** they have undertaken. The information regarding the proportionality of requirements would have to clearly outline the public interest objective pursued by the Member State and explain how the notified requirement is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain that objective. It would also have to contain information on different policy options which were considered in order to attain the public interest objective. The importance of

⁴⁵ Council document 6197/15 adopted on 2 March 2015

⁴⁶ A8-0171/2016

proportionality assessments was also underlined by the above-mentioned Council Conclusions.

In addition, the existing possibility to adopt **Decisions** on regulatory measures concerning requirements affecting the freedom of establishment would be aligned with the scope of the notification obligation. The procedure leading up to the adoption of a Decision would moreover be clarified to make this possibility more operational and establish a procedure that provides clarity to all concerned parties. This would address shortcomings of the existing mechanism identified in its evaluation (cf. Annex 5).

5.5. Policy Option 4: Measure to expand the scope and improve coherence of the current notification system

This option builds on option 3 and additionally expands the **scope of requirements** covered by the notification obligation to align it closer to the scope of the Services Directive. Thus, the notification obligation would be expanded to establishment requirements related to prior authorisations (as referred to in Article 9 of the Services Directive); requirements affecting multidisciplinary activities (as referred to in Article 25); and requirements to hold professional indemnity insurance (as referred to in Article 23).

Of course, there are many other establishment requirements beyond those in Article 15 and authorisation schemes, multi-disciplinary restrictions and professional indemnity insurance requirements, begging the question why not other additional establishment requirements – or indeed all establishment requirements in general – should be covered by the notification obligation. The reason is that in line with the proportionality principle, this option would extend the scope of the notification obligation only to requirements where the Commission has evidence that this would be required to achieve the objective of the initiative to prevent the introduction of unjustified regulatory requirements and barriers at national level that could hamper the services single market. Judging by its experience with the application of the Services Directive over the past years, the Commission at the present stage has no indication that other establishment requirements constitute systemic and potentially unjustified regulatory barriers to the establishment of services providers and would therefore need to be covered by this initiative. As already explained under Driver 4, both the mutual evaluation process and the more recent assessment of barriers by the Commission confirmed the presence of different types of horizontal authorisation schemes, strict insurance requirements and strict requirements in relation to multidisciplinary activities in the Member States. The negative economic impact of such identified barriers is significant regarding intensity of competition, sector profitability and efficiency of resource allocation and therefore justifies the extension of the scope of the notification obligation to these requirements.

5.6. Policy Option 5: Additional instruments to guarantee compliance by Member States

5.6.1. Policy Option 5a: Instrument to clarify legal consequences of non-notification

Option 5a would build on options 3 and 4 and include in addition the following element:

The legal instrument would contain an explicit provision stating that breach of the obligations to notify at least three months prior to their adoption draft measures falling under the scope of the revised notification procedure and/or adoption of a notified measures within three months following the issuing of an alert by the Commission shall constitute **a substantial procedural defect of a serious nature as regards its effects vis-à-vis individuals.** .

5.6.2. Policy Option 5b: Instrument to render inapplicable adopted measures which are incompatible with the Services Directive

Option 5b would build on options 3, 4 and 5a, and include in addition the following element.

Under this option a provision could be included whereby a Commission Decision finding an individual notified measure to be non-compliant with the Services Directive would make such a notified and already adopted measure **automatically and with direct effect inapplicable** (without this necessitating a national legal measure to withdraw or amend it).

5.7. Choice of legal instrument

The realisation of policy options 1 and 2 does not require a new legislative instrument.

Elements from policy options 3, 4 and 5 can be put into practice through the adoption of an EU legislative instrument based on Articles 53(1), 62 and 114 of the Treaty, which give the competence to the EU to act for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons and for the adoption of EU rules for the establishment and the functioning of the single market in general.

The realisation of objectives referred to in Articles 53(1), 62 of the Treaty requires the adoption of a Directive which is also one of the legislative instruments which may be adopted for the purpose of the Article 114 of the Treaty.

The Commission may consider in that context amending the Services Directive or the Single Market Transparency Directive (SMTD).

The introduction of new elements to the Services Directive would impact several provisions of that Directive, going beyond its mere technical adaptation. Re-opening of the Services Directive appears to be disproportionate and the necessary improvements can be better achieved through an enforcement instrument targeting precisely the identified issues.

Amending the SMTD will not allow for the improvement of the notification procedure for services since there is no possibility for the Commission, under that Directive, to adopt legally binding Decisions requesting the Member States to refrain from adopting the notified requirements. Furthermore, the proportionality principle plays a more important role in the single market for services, which differs from the single market for goods. Much of the single market for goods is covered by harmonised rules and, for the non-harmonised area the mutual recognition principle is widely applied, which is not the case for services. Therefore information on proportionality provided by the notifying Member State should be more developed in the case of services. An amended SMTD would also cover several heterogeneous requirements in the field of goods and services which may undermine the overall clarity of the final legal text.

Therefore, the realisation of the objectives will be better achieved through the adoption of a new Directive.

6. Analysis of impacts

The analysis below will not assess social and environmental impacts because none of the specific policy objectives, nor the assessed policy options feature social or environmental dimensions.

Option 1: Baseline scenario

Impact on the specific policy objectives

Option 1 is unlikely to improve the effectiveness of the notification procedure. The notification procedure will continue to be non-transparent not allowing stakeholders to provide comments on notified measures. The absence of an obligation to notify measures at draft stage would continue to limit the influence of the consultation period meaning enforcement would continue to rely on ex-post enforcement action.

The quality and content of the notifications might see an improvement if the initiative on a proportionality test announced in the Single Market Strategy⁴⁷ will be adopted. For those measures which fall under the PQD and the Services Directive, Member States will have to provide information in respect of their proportionality assessment of the notified measures following the requirements set out in the proportionality test. This will have a positive effect on the quality and content of the notified measure.

Other initiatives in the Single Market Strategy, like the European services card, will not have an effect on the specific policy objectives of this initiative.

Under this option, the scope of the notification obligation would continue to be limited

⁴⁷ Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive, 27.1.2011, COM(2011) 20 final.

and important regulatory requirements concerning the establishment of services providers would continue not to fall under the notification obligation.

Economic Impacts

Operating costs and conduct of business

This option does not entail any obligation for businesses and would not entail any costs for them. The impact on their activities is equally expected to be limited due to the limited expected effect of this option on the policy objectives.

Impact on the Single Market

The impact of this policy option in terms of reducing unjustified and disproportionate barriers is expected to be limited. The current situation is likely to continue.

Competitiveness of business

The impact on the competitiveness of businesses is expected to be limited as this option would not lead to an effective enforcement tool preventing the introduction of unjustified and disproportionate regulatory barriers.

Impacts on SMEs and microenterprises

In the absence of any tangible impact for the competitiveness of business and on the single market for services, the impact on SMEs and microenterprises is at most limited.

Impact on Member States Public Authorities

Given that this option is based on the current situation, no impact is expected for public authorities.

Impact on the Commission

The impact on the Commission will remain the same as this option does not foresee any changes in respect of the current situation.

Stakeholders views

A minority of the respondents considered the current procedure under the Services Directive working well. In terms of public authorities 23% of respondents expressed this opinion and for the business community 15% agreed with this statement (Annex 2).

Option 2: Non-legislative initiative (guidelines)

Impact on the specific policy objectives

This option would have no measurable impact on the main policy objective as it would not

be possible to address key shortcomings of the existing notification procedure without legally amending it.

The effectiveness of the existing notification procedure will not be improved following the adoption of guidelines. The guidelines could clarify procedural steps and include recommendations to Member States (e.g. to notify draft measures and to provide information on proportionality assessments), however the guidelines will not be able to change the design of the existing procedure, such as to extend the scope of the notification obligation to additionally cover important establishment requirements or to align the possibility to adopt Decisions to the scope of the notification obligation. Furthermore, although guidelines could suggest making the current system transparent, a separate decision from Member States would be required to realise transparency for third party stakeholders.

Previous efforts to influence behaviour of Member States in terms of compliance, via the publication of the Commission handbook on the implementation of the Services Directive, have not delivered noticeable results. Also, specific discussions of the notification procedure with the responsible national experts in the Expert Group on the implementation of the Services Directive has had limited effect. Naming and shaming in order to improve compliance has not led to any impact. In the absence of any consequences of non-notification, Member States will have no reasons to notify on a more systematic basis.

The impact of this policy option in terms of Member States notifying draft measures and providing more information on proportionality assessments would depend very much on the willingness of Member States to comply with the notification procedure. But above all, even if notifications would take place at draft stage, Member States would still be able to adopt notified measures, which would mean that ex-post enforcement action would be the only remaining possibility for the Commission to intervene.

Economic Impacts

Operating costs and conduct of business

This option does not entail any obligation for businesses and would not entail any costs for them. The impact on their activities is equally expected to be limited due to the limited expected effect of this option on the policy objectives.

Impact on the Single Market

As this option is not considered to address the specific policy objectives, its impact on the single market in terms of reducing unjustified and disproportionate barriers is expected to be limited.

Competitiveness of business

The impact on the competitiveness of businesses is expected to be limited as this option would not lead to an effective enforcement tool preventing the introduction of unjustified and disproportionate regulatory barriers.

Impacts on SMEs and microenterprises

In the absence of tangible impacts on the competitiveness of business and on the Single Market for services, there is no noticeable impact on SMEs and microenterprises.

Impact on Member States Public Authorities

This option does not change the existing notification obligation and thus does not impose cost increases on Member States' public authorities.

Impact on the Commission

This option would not impact the Commission in a measurable way. Improved information on proportionality assessments as a result of the guidance could make it easier for the Commission to analyse incoming notifications.

Stakeholders views

A large majority of the respondents (both public authorities and the business community) supported elements to be included in an EU level policy action which can only be achieved through a legislative instrument. 80% of public authorities and the business community saw the need to introduce legal consequences where Member States do not fulfil the notification obligation. The obligation to notify drafts received support from almost 60 % of the public authorities and 72% of the business community (Annex 2).

Option 3: Measures to improve the effectiveness and quality of the notification procedure

Impact on the specific policy objectives

This option will somewhat address the specific policy objective to improve the effectiveness of the notification procedure by i) introducing the obligation to notify *draft* measures, ii) granting access to interested non-institutional stakeholders, iii) defining a consultation period, iv) requiring Member States to provide more detailed information on proportionality assessments, and v) allowing the Commission to adopt Decisions on regulatory measures concerning both, requirements affecting the establishment of services providers and the cross-border provision of services.

Introducing an obligation to notify draft measures and clearly defining the procedure for a consultation period would constitute important improvements of the existing notification procedure, allowing for comments to be made when these can still be taken into account by the notifying Member State before it adopts the notified measure.

Granting access to interested stakeholders would make the procedure more effective by allowing stakeholders to share their views on a draft notified measure, which contributes to better law making.

Providing for the possibility of Commission Decisions also on regulatory measures

affecting the cross-border provision of services would increase the effectiveness of the notification procedure by providing for a clear and transparent mechanism for cases where a notified measure is not compatible with EU law. It will also make the notification procedure more coherent.

Providing information on proportionality assessments will improve the effectiveness of the notification procedure by allowing other Member States, the Commission and stakeholders to better understand notified measures.

The positive impact of this policy option would be limited, however, by the fact that the scope of the notification obligation would continue to exclude important establishment requirements, limiting the coherence of the notification procedure. It would be further limited by the absence of any impact on the compliance by Member States with the notification obligation.

Economic Impacts

Operating costs and conduct of business

This option does not entail any obligation for businesses and would not entail any costs for them. Where businesses decided to comment on notified measures this would entail an administrative costs in terms of resources required to do so, but providing such comments is voluntary (opportunity, no obligation).

On the other hand, a more effective notification procedure would improve the application of the Services Directive and lead to fewer and less restrictive regulatory barriers being introduced, and consequently make it easier for businesses to offer their services in the single market.

The transparency of notifications would provide business with more upfront information about national measures which Member States plan to introduce. A large part of the business community (almost 80%) indicated in their responses to the public consultation that increased transparency is very important for them.

Impact on the Single Market

This option would positively impact on the Single Market because it would make the notification procedure more effective in preventing the introduction of unjustified barriers to the services single market.

The Single Market Transparency Directive (SMTD) includes several of the elements which this option would introduce and its performance in preventing barriers to the single market can therefore serve as a proxy. As mentioned previously, it achieved an effective prevention indicator of 9.7% in 2010 and 11.7% in 2011. This indicator measures the ability of the SMTD-system to prevent barriers to intra-EU goods trade. The analysis shows that a number of measures were indeed prevented from being adopted, which would have been harmful to the proper functioning of the Single Market for goods and Information Society Services.

Competitiveness of business

54 (out of 79) of the respondents of the business community to the public consultation are of the opinion that a reform of the notification procedure would lead to better functioning of the services markets overall. In contrast to option 2, the various elements of this option would prevent the introduction of unjustified measures thereby improving competitiveness of business over the coming years. Raising awareness of the regulatory activities within the respective services sectors of Member States would also contribute to improve competitiveness.

Impacts on SMEs and microenterprises

Preventing the introduction of barriers and increasing transparency would also positively impact on SMEs and microenterprises and reduce their compliance costs.

Due to transparency, more information is available in terms of the requirements applicable in the notifying Member States and SMEs and microenterprises would also benefit from the improved competitiveness as referred to above. The option does not place any obligation on SMEs or microenterprises.

Impact on Member States Public Authorities

This option does not introduce any new obligations for Member States' authorities. It is nevertheless expected to lead to a limited increase in administrative costs for Member States.

This option introduces an obligation to notify measures at draft stage. This would result in additional administrative costs where draft measures have to be re-notified in case substantial changes have been made to the notified draft act. However, the administrative costs associated to this are expected to be limited. The notification obligation under SMTD also places upon Member State authorities the obligation to notify again in case of substantial changes. But in only approximately 10 of 700 measures notified per year was a new notification necessary. Based on information received from Member States, the average time spent to comply with the notification procedure is 12 hours per notification. This leads to administrative costs of €385.20 per notification assuming the EU average of hourly earnings for civil servants holding a university degree of €32.10. The administrative costs of re-notifications would therefore be limited.

The public consultation did not show a clear view by public authorities directly concerned on whether the obligation to notify draft measures and subjecting them to a consultation period would result in an increase of their administrative burden / cost. Almost 40% of responding public authorities thought it would lead to a cost increase, while almost 50% thought this would not be the case.

Transparency of the notification system could lead to stakeholders detecting cases of non-notification, upping the pressure on Member States to notify. This could lead to an increase in notifications and a corresponding increase in administrative burden for Member States currently not meeting their notification obligation. The average number of notifications by the top 10 notifying Member States is 13 notifications per year, with an average administrative cost associated to the sum of these 13 notifications of €5007.60 per Member State. Member States currently notifying fewer than 13 measures per year would thus see an increase in administrative cost to this average (see Annex 4 for the

calculations).

Furthermore, transparency will most likely result in comments from stakeholders, which Member States may need to respond to, somewhat further increasing their administrative cost. As a proxy, Member States have indicated that they spend on average 10 hours to reply to comments from the Commission (for more details in respect of overview of Member States' feedback is in Annex 4).

Although the obligation to carry out a proportionality assessment of new requirements in the field of services already exists under the current provisions of the Services Directive, the new notification procedure will require the Member State to communicate such an assessment in a more systematic and structured way. This might result in a slight increase of time spent per notification by Member States.

A positive effect in terms of administrative costs could stem from the fact that Member States are likely to be faced with less EU-Pilot requests or infringement proceedings as a result of an improved notification procedure contributing to the compliance of new national measures with the Services Directive.

Impact on the Commission

On average, the assessment of a notification by a Commission staff member will take 2-3 hours. In case comments or questions addressed to the Member State concerned are to be prepared, it is estimated that this will lead to an additional 5 hours of work.

This option will impact the Commission in that it will lead to additional work stemming from the comments received from stakeholders who will be granted access to the notifications to be considered. Another element could be the possible increase of notifications from those Member States currently not completely fulfilling the obligation under the Services Directive. Further to this increase in workload, there is likely to be an impact on the translation costs. Currently a notification from a Member State is translated into English. The current translation cost is on average €26 per page. Notifications are on average between 2 and 3 pages long. This leads to an average translation cost per notification of €65.

Enhancing transparency of and more detailed information about the proportionality of notified regulations would make the assessment of notified measures easier and more concrete to assess a notification. It will be also easier for the Commission to compare the proportionality assessments from different Member States and to elaborate a common approach in similar situations.

On the other hand, the ability for the Commission to adopt Decisions also in respect of measures affecting temporary cross-border provision of services could have a positive impact as it could lead to a reduction in resource-intensive enforcement action.

Stakeholders views

The results of the public consultation shows a wide support (69% of public authorities and 60% of the business community) for improvements of the current system through EU action and more specifically for the introduction of an obligation to notify draft legislation (more than half of the public authorities handling notifications), for increased

transparency (supported by 80% of the business community and more than 60% of the public authorities) and for the introduction of a clear timeframe to ensure that all stakeholders can react to a notified measure (support from 65% of public authorities). Furthermore, in its Conclusions on Single Market Policy, the Council of the European Union called upon the Commission and Member States to make notifications public and transparent for all the stakeholders as is the case for goods.

Option 4: Measure to expand the scope and improve coherence of the current notification system

Impact on the specific policy objectives

This option, building upon option 3, would in addition address the specific policy objective of aligning the notification obligation closer to the scope of the Services Directive. It would improve the efficiency and coherence of the notification procedure beyond the improvements under option 3, by covering key regulatory requirements falling under the Services Directive but not under the present notification procedure (notably to cover establishment requirements related to prior authorisations, requirements affecting multidisciplinary activities, and requirements to hold professional indemnity insurance). On the other hand, this option would not improve the compliance of Member States with the notification obligation.

Economic Impacts

Operating costs and conduct of business

This option does not entail any obligation for businesses and would not entail any costs for them.

The extension of the scope of the notification procedure would lead to a reduction in the number of unjustified regulatory barriers being introduced by Member States in violation of the Services Directive, thereby further reducing regulatory barriers for businesses.

With a larger range of measures to be notified by the Member States, costs borne by businesses to find out the applicable rules in a particular Member State will further be reduced.

Impact on the Single Market

This option would positively impact the Single Market by extending the scope of the notification obligation and applying its procedure to additional types of important regulatory requirements affecting services providers in the single market.

Competitiveness of business

A better functioning Single Market due to barriers prevented from being introduced has a positive effect on the competitiveness of business. This effect will be stronger than under option 3 as this option will cover a wider range of requirements potentially impeding the proper functioning of the internal market.

Impacts on SMEs and microenterprises

Expanding the scope of the notification procedure to more requirements of the Services Directive, will lead to the prevention of more potential barriers. This will positively impact SMEs and microenterprises. Compliance costs for SME's will be further reduced.

Impact on Member States Public Authorities

The extended scope of the notification obligation will result in a higher number of notifications thereby increasing the administrative costs for public authorities. According to the public consultation, extending the scope of the notification obligation to align it with the scope of the Services Directive will have a cost impact according to 54% of public authorities' respondents while 15% of the responding public authorities do not expect an impact.

Based on the mutual evaluation exercise over the years 2010-2011, around 4400 authorisation schemes and 225 multi-disciplinary requirements were detected in Member States. Although the obligation to notify only applies when changes are made or new requirements are introduced, which depends very much on developments within the respective Member State, it is likely that the number of notifications to be made will increase. As previously stated, the average cost of an individual notification for a national administration in the EU amounts to €385.20, with important variations between Member States.

The increase in notifications would, however, also lead to Member States being subject to less legal enforcement action from the Commission, reducing resources required for this.

Impact on the Commission

In addition to the effects of option 3, this option will lead to additional administrative costs for the Commission. This will be the consequence of an increased number of notifications of national regulatory measures. In addition, the translation costs will increase.

However, the increase in the administrative cost for the Commission would be partly compensated by an expected decrease in enforcement action against unjustified national measures already adopted at national level but in violation of the Services Directive.

Stakeholders views

Concerning the scope of the notification obligation, most respondents stressed the need to expand it to other types of services and requirements in order to improve consistency and effectiveness of EU action. 42% of public authorities supported extending the scope also covering authorisations, 50% said the same in terms of multidisciplinary activities and 53% are in favour of also covering professional liability insurance requirements with the notification obligation.

Option 5: Additional instruments to guarantee compliance by Member States

Impact on the specific policy objectives

In addition to the impacts realised under option 3 and 4, option 5 (5a and 5b) would in particular pursue the specific policy objective to enhance compliance of Member States with their notification obligation. This option would, in the view of the Commission, result in legal consequences of non-notification and non-compliance with the notification procedure, thereby further increasing the effectiveness of the notification procedure.

Respondents to the public consultation considered the improvement and clarification of the legal consequences of non-notification by a Member State as one of the most important factors that an EU action should ensure: almost 80% of respondents supported this. Interestingly, this support is shared amongst all respondents, including 80% of the public authorities and 78% of the business community.

Option 5a would insert a provision which will state that failure to fulfil certain obligations of the notification procedure constitutes a substantial procedural defect of a serious nature as regards its effects vis-à-vis individuals.

Option 5b would have an even larger impact because under this option a Commission Decision declaring a national measure non-compliant with the Services Directive would make such a notified measure automatically and with direct effect inapplicable. This would apply, for example, where a Member State would disregard a Commission Decision. This option would thus offer watertight solutions to ensure utmost compliance by a Member State and limit its room for manoeuvre.

Economic Impacts

Operating costs and conduct of business

Option 5 (5a and 5b) does again not entail any obligation for business. Therefore it will not have an impact on their operating costs.

Both sub-options would benefit business by reducing the barriers they face as a result of a more effective notification procedure preventing the introduction of unjustified and disproportionate barriers.

Impact on the Single Market

Under option 5, preventive controls of new national restrictions will be more effective with a more immediate effect on the functioning of the Single Market.

The elimination of regulatory barriers would be more rigorous through the use of the Decision powers declaring the national non-compliant regulations inapplicable (Option 5b); Member States would have no possibility of ignoring Decisions adopted by the Commission.

Competitiveness of business

A better functioning Single Market due to the prevention of unjustified barriers is

expected to positively affect the competitiveness of businesses. Under option 5 (5a and 5b), even more unjustified barriers can potentially be prevented: potential legal consequences of failure to meet certain notification obligations would increase incentives to notify and reduce the number measures that should have been notified but were not.

Impacts on SMEs and microenterprises

An improved compliance with the notification obligation will reduce the number of unjustified regulatory barriers, which will positively impact SMEs and microenterprises. It will in particular increase trust of SMEs in the functioning of Single market rules and increase confidence that notification obligations matter in daily reality.

Impact on Member States Public Authorities

This option will have a similar impact on the public authorities in the Member States as option 4. Additional costs would occur where Member States currently do not comply with the notification obligation established under the Services Directive, but would do so in future to avoid the inapplicability of non-notified measures.

The average number of annual notifications by the top 10 notifying Member States standing at 13 (with an average administrative cost of €5007.60), Member States currently notifying fewer than 13 measures per year would see an increase in administrative cost to this average.

There might also again be a decrease of the costs on public administrations linked to a possible reduction in legal enforcement cases resulting from a better functioning notification procedure.

With Option 5b, national public authorities are however exposed to scenarios that they would actually not comply with Commission decisions (or challenge them before the Court of Justice). It risks being too intrusive for national legislative processes.

Impact on the Commission

The impact on the Commission of option 5 (5a and 5b) would be similar to the impact of option 4. There may be some additional administrative costs for the Commission as a result of a higher number of notifications received. With an average of 13 notifications per Member State per year this means around 420 notifications per year (compared to a current average of 250). In addition, translation cost will rise to €11000 on a yearly basis (increase of 170 notifications times 2.5 pages times €26).

A positive effect will stem from less workload due to less enforcement action being necessary.

Stakeholder views

According to the public consultation, the improvement and clarification of the legal consequences of non-notification by a Member State (Option 5a) was considered one of the most important features that an EU level policy action could include, with the support of almost 80% of the respondents, including 80% of the public authorities and 78% of the

business community.

In addition, respondents supported widely the idea to provide, in a forthcoming EU wide initiative, clarifications on when and how stronger measures can be taken by the Commission against disproportionate requirements, going in the sense of Option 5b. Three quarters of them answered favourably, whereas only 10% showed disagreement.

7. Comparison of options

7.1. Comparison in terms of effectiveness, efficiency and coherence

Option 1 The evaluation of the current notification procedure shows that the procedure is not effective and efficient at present. Under option 1, key factors which contribute to the present ineffectiveness would remain in place. Nor would option 1 improve the coherence of the procedure. The 'baseline scenario' will only see a minimal change in the current situation if the proportionality test introduced through a parallel initiative is applied as this should improve some of the proportionality assessments that Member States need to inform on as part of this notification procedure.

Option 2 As has been assessed above, there would be no measurable impact of a non-legislative initiative (guidelines) on the specific policy objectives of this initiative. Option 2 would not noticeably improve the compliance by Member States with the notification obligation, nor would it improve the effectiveness or coherence of the notification procedure. Although guidelines could improve the quality and content of notifications somewhat (depending on the degree to which Member States would follow them), no noticeable impact is expected of this option in terms of its overall efficiency.

Option 3 would have some positive impact on the efficiency of the notification procedure. The quality and content of the notifications would improve substantially, because it would include an obligation to notify acts at draft stage, make the system transparent for stakeholders, lead to improved information Member States would have to submit on the proportionality of new regulatory measures, and improve the clarity of the applicable procedure. The coherence of the procedure would also improve, but would remain limited. Efficiency improvements would be limited, however, by no measurable improvement of compliance with the notification obligation and the fact that important regulatory establishment requirements would remain outside the scope of the notification obligation. This option would lead to a small increase of administrative burden for national administrations and the Commission (not for businesses) due to possible re-notifications of previously notified draft acts and the submission of more detailed information on the notified measure.

Option 4 would in addition to the effects established by option 3 (which it encompasses) significantly improve the efficiency and coherence of the notification procedure by including some important and widespread regulatory requirements covered by the Services Directive but currently not covered by the scope of the notification obligation. This option would, on the other hand, increase the administrative costs for Member States and the Commission due to an envisaged increase in the number of measures to be notified. This cost increase should, however, be partially compensated by a resulting expected reduction in the need for ex-post enforcement action (EU pilots; infringement cases). Given the considerable increase

in the effectiveness and coherence stemming from the inclusion within the scope of the notification procedure of three important and widespread types of establishment requirements, this option would improve the efficiency of the notification procedure beyond the improvements under option 3.

Option 5 would further improve the effectiveness of this policy initiative, beyond the improvements of options 3 and 4, which it encompasses. The clarification of what would be the consequences of not respecting certain obligations under the revised notification procedure would positively impact compliance by Member States with the notification obligation, thus subjecting more national measures to the notification procedure, thereby contributing to its policy objectives.

Table: Comparison of Options

"0" no impact, + limited positive impact, ++ some positive impact, +++ substantial positive impact, - limited negative impact, -- some negative impact, --- substantial negative impact

	Impact on public authorities	Effectiveness	Efficiency (costs/ benefits)
Option 1 No action (baseline)	0	0	0
Option 2 Non-legislative guidelines	(0) No changes in terms of notification obligation for public authorities and thus no cost increase for them	(+) Clarification could improve quality and content depending on degree to which Member States apply guidelines to a limited extent. (0) No coherence as notification obligation does not cover important requirements within the scope of the Services Directive and Decision remains limited. (0) Compliance not improved	(0) No measurable impact in terms of efficiency
Option 3 Measures to improve the effectiveness and quality of the notification procedure	(-) Obligation to notify acts at draft stage will in some cases necessitate re-notifications. Transparency may necessitate engagement with stakeholders.	(+++) Quality and content substantially improved via proportionality elements, transparency for stakeholders and obligation to notify measures at draft stage. (+) Coherence improved by Decision possible for all notified requirements. However, notification obligation for establishment requirements remains limited. (0) No measurable impact on compliance.	(+) Efficiency improved due to substantial increase in quality and content of notifications and limited improvement in coherence of the notification procedure, with only a limited increase of costs for public authorities.
Option 4 Expand the scope to	(--) Some increase of administrative costs due to larger scope of	(+++) Quality and content substantially improved via proportionality elements,	(++) Efficiency improved due to substantial increase in quality and

improve coherence	regulatory measures to be notified, obligation to notify acts at draft stage and transparency for stakeholders.	transparency for stakeholders and obligation to notify measures at draft stage. (+++) Coherence of the notification obligation substantially improved by additionally covering key regulatory establishment requirements and Decision possible for all requirements. (0) No measurable impact on compliance.	content of notifications and substantial increase in coherence, with only some increase of administrative costs for public authorities.
Option 5 Ensure compliance with the notification obligation	(a) (--) Some increase of administrative costs due to larger scope of regulatory measures to be notified, obligation to notify acts at draft stage and transparency for stakeholders.	(+++) Quality and content substantially improved via proportionality elements, transparency for stakeholders and obligation to notify measures at draft stage. (+++) Coherence of the notification obligation substantially improved by additionally covering key regulatory establishment requirements and Decision possible for all requirements. (+++) Substantial improvement of compliance from legal consequences of non-notification.	(+++) Efficiency improved substantially due to substantial increase in quality and content of notifications, substantial increase in coherence and substantial improvement in compliance, with only some increase of administrative costs for public authorities.
	(b) (--) Some increase of administrative costs due to larger scope of regulatory measures to be notified, obligation to notify acts at draft stage and transparency for stakeholders.	(+++) Quality and content substantially improved via proportionality elements, transparency for stakeholders and obligation to notify measures at draft stage. (+++) Coherence of the notification obligation substantially improved by additionally covering key regulatory establishment requirements and Decision possible for all requirements. (+++) Substantial improvement of compliance from legal consequences of non-notification.	(+++) Efficiency improved substantially due to substantial increase in quality and content of notifications, substantial increase in coherence and substantial improvement in compliance, with only some increase of administrative costs for public authorities.

7.2. Preferred option / Justification for no preferred option

The option which contributes most to the achievement of the policy objectives and has the most positive overall impact is option 5a.

Option 5 would address the shortcomings of the existing procedure identified in the ex-post evaluation and by stakeholders: the lack of compliance with the notification obligation due

to the absence of any legal consequences, the fact that most notified measures are already adopted, the scope of the current notification obligation not covering key requirements covered by the Services Directive, the incoherent application of Commission Decisions, external stakeholders not being able to access and provide comments on notified measures due to a non-transparent system, and the absence of substantive information on the proportionality of notified measures.

Option 5 addresses the identified problems effectively; by obliging Member States to notify draft measures, making the notifications accessible to external stakeholders the option creates the possibility for Member States, the Commission and stakeholders to intervene in a proactive manner prior to a national requirement being adopted; improving the information that would be submitted together with a notification, notably on the proportionality of the notified measure will allow other Member States, the Commission and stakeholders to better assess whether a requirement is compatible with the Services Directive. It furthermore introduces a three month consultation period which provides the Commission, Member States and stakeholders with an appropriate timeframe to consult and exchange views and comments on notified measures. It also improves the efficiency and coherence of the notification obligation by extending its scope to important requirements falling under the Services Directive but not currently covered by the notification obligation, aligning therefore the scope of the notification obligation more closely with that of the Services Directive. Efficiency and coherence are further improved by clarifying in which cases and under which conditions the Commission can use its existing Decision powers. Specifying the consequences of not respecting certain obligations under the notification procedure would further increase the effectiveness of the notification obligation.

While the impact in terms of costs, effectiveness and efficiency of options 5a and 5b are similar, the difference between options 5a and 5b lies in the consequence of a possible Decision adopted by the Commission. Option 5b in addition to the element of option 5a, entails the element of 'a Decision which would 'declare' a national measure to be null and void' if adopted. This is in general to be considered not fully respecting the proportionality and subsidiarity principles given its intrusiveness in national legislative responsibilities. Option 5a, on the other hand, is considered proportionate to reaching the policy objective of this initiative, because the Commissions' Decision is an element of ex-ante control, preventing the adoption of draft regulatory measures and it only entails the element given 'effect' to non-compliance with the notification obligation and procedure vis-à-vis individuals.

7.3. Subsidiarity and proportionality of the preferred option

The subsidiarity principle set in Article 5 TEU requires the assessment of the necessity and the added value of the EU action. On the base of the present impact assessment, it appears that EU intervention would be the only way to establish a common notification mechanism for the whole EU single market for services.

The purpose of the notification mechanism is a better enforcement of provisions of the Services Directive, which aims specifically to eliminate or reduce the obstacles to the freedom of establishment and the provision of services in cross border context. The overall objective is to ensure a smooth functioning of the EU single market for services which is not limited to the territory of one Member State but covers the whole territory of the EU. Therefore, given the specificity and the transnational nature of the EU single market, an efficient and coherent preventive control of national regulatory measures in the field of services, including the management of an appropriate IT tool for that purpose, can only be achieved at the level of the EU. The transparency of notifications and notified draft and adopted acts to stakeholders will be ensured through their publication at one place by the Commission.

The obligation for Member States to notify draft measures at least three months prior to their adoption will make it possible to address unjustified measures through a consultation procedure when changes to the legislative act are still possible – which is considerably more efficient than having to change already adopted measures that are not compliant with the Services Directive. This will contribute to the application of the subsidiarity principle in the sense that the notifying Member States will be able to make improvements to the national regulations they have notified before their adoption, by appropriate means chosen at the Member States level.

The preferred option does not go beyond what is necessary to solve the identified problems and is proportionate to achieve its objectives: it entails only a limited increase in terms of administrative burden for public authorities of the Member States and the Commission, due to an increase in scope of the notification obligation, the potential need to re-notify previously notified draft measures and better compliance with notification obligation due to an increased transparency.

The preferred option would be the adoption of a legally binding legal instrument, rather than non-binding guidelines (option 2). Taking into account the current shortcomings of the notification mechanism and several attempts by the Commission to improve the functioning of the system by no-binding tools, it appears necessary to adopt a legally binding instrument in order to ensure an appropriate implementation of the notification mechanism.

8. Monitoring and evaluation

The Commission will ensure that the action selected in the course of this IA contribute to the achievement of the policy objectives defined in Section 4. The monitoring process could consist of two phases:

- 1) The first phase would concentrate on the short-term, starting right after the date of transposition. It would focus on how Member States meet the revised notification obligation. The Commission would assess the incoming notifications in IMI in the first year to determine whether Member States fulfil their notification obligation. The Commission

would in this respect first assess how those Member States with no or a very low number of notifications perform in comparison with the baseline scenario of 13 notifications per year. It would further examine the developments in terms of amount of notifications per Member States. The Commission will use the IMI database in this respect to gather the information.

2) The second phase would be mid-to-long-term and would focus on direct effects of the rules contained in the legislative proposal. The table below presents the main indicators that would be used to monitor progress towards meeting the objectives pursued by this initiative, as well as the possible sources of information. The information-gathering should start 2 years after the start of application of the legislative proposal.

The monitoring process in terms of the fulfilment of the specific policy objectives is presented in the below table.

Specific objectives	Operational objectives	Indicator	Source of data	Baseline
Improve the effectiveness of the notification procedure	Prevent the adoption of national regulatory measures that are not in line with the Services Directive	Reduction in EU pilots on newly introduced regulatory measures Effective prevention indicator (EDI) adapted to the specificities of EU services regulation and the services notification procedure ⁴⁸	IMI Comments from Commission, Member States and stakeholders	n/a
Improve the content of the notifications submitted by Member States	Improve information on the proportionality of notified measures	% of notifications accompanied by reasonable information on proportionality assessments submitted by the	Box on proportionality assessment in IMI. Discussions in the Expert Group	50%

⁴⁸ The ratio of the sum of the comments and Decisions of one year, divided by the total number of notifications which is then filtered to eliminate double counting due to the fact more than one Member State can have a comments on the same notified draft law and/or that a Member State and the Commission may file comments/Decision on the same draft law.

		Member States	on the implementation of the Services Directive.	
Improve the internal coherence of the notification procedure	Expand the scope of the notification obligation to establishment requirements Improve consistency of Decision powers	Number of notifications concerning establishment requirements. Amount of Decisions adopted by the Commission in respect of notified measures.	IMI EUR-lex	n/a n/a
Increase the compliance with the notification obligations	Ensure that all relevant legislation is notified to the Commission	Increase in amount of notifications	IMI	5 Member States have never notified any measure and 7 Member States have a very low level of notifications

An application report could be issued 3 years after the start of application of the revised notification procedure and an evaluation could take place after 5 years.

9. Annexes

9.1. Annex 1: Procedural information

9.1.1. Identification

Lead DG: DG Internal Market, Industry, Entrepreneurship and SMEs (DG GROW)

Agenda planning/Work programme references: The Agenda Planning Reference is 2016/GROW/029. The initiative to improve the notification procedure for services is a part of the Single Market Strategy, adopted in October 2015.

9.1.2. Organisation and timing

An Inter-Service Steering Group was set up in 2016. In total, four meetings were organised: on 14 January 2016, on 23 February 2016, on 25 April 2016 and on 18 May 2016. The following Directorate-Generals and services were consulted: CNECT, COMP, GROW, MOVE, SJ, SG, JUST, EMPL, EAC, ECFIN, FISMA, SANTE, TRADE and ENER. The feedback received from these Directorate-Generals and services has been taken into account.

The ISSG approved the Inception Impact Assessment and the public consultation during its meeting of 14 January 2016.

The ISSG of 18 May 2016 agreed to the submission of the Impact Assessment Report to the Regulatory Scrutiny Board.

9.1.3. Consultation of the Regulatory Scrutiny Board

The Impact Assessment Report was examined by the Regulatory Scrutiny Board on 22 June 2016. The Board gave a positive opinion on 24 June 2016, asking for a number of improvements:

- better explanation why the current notification procedure is not working in a satisfactory manner;
- better justification of the scope of the initiative;
- a more logical link between the problem definition and the options, including the option to align the notifications procedure with that of the Professional Qualifications Directive or to extend the Single Market Transparency Directive to services;
- better explanation of the content of options and better assessment to what extent the preferred option would solve the problem, i.e. the ineffectiveness of the notification procedure.

9.1.4. Studies to support the IA

No external study was undertaken in support of the impact assessment. An ex-post evaluation of the existing notifications procedure was undertaken by the Commission.

9.2. Annex 2: Stakeholder consultation

1. Introduction

The Commission consulted stakeholders to contribute to the evaluation of the current notification procedure and to obtain feedback on potential improvements to the existing system. The consultation of stakeholders consisted of two pillars: (1) a public consultation of interested stakeholders through an EU Survey online and (2) through in-depth discussions with institutional stakeholders (Member States and other EU institutions) directly concerned by the notification procedure and its planned reform.

This document mainly summarizes the results gathered through the online public consultation questionnaire, which was running from 26 January until 19 April, for a period of 12 weeks.

The questionnaire notably invited stakeholders to share their views on issues such as the effective enforcement of the Single Market Rules and preventive examination; the efficiency of existing notification obligation under the Services Directive; possible measures to improve the current notification procedure; the impact of a notification procedure.

The last section provides a summary of the discussions with institutional stakeholders which took place in the Expert Group on the Implementation of the Services Directive including bilateral exchanges (meetings, position papers), as well as the views expressed by other EU institutions.

2. Summary of Responses to the European Commission's 2016 Public Consultation

Executive summary

A total of 126 stakeholders from 21 countries responded to the public consultation. Two kinds of respondents were representatives of the business community (representatives of companies, of chambers of commerce or chambers of professionals, etc.) and more than 20% were public authorities.

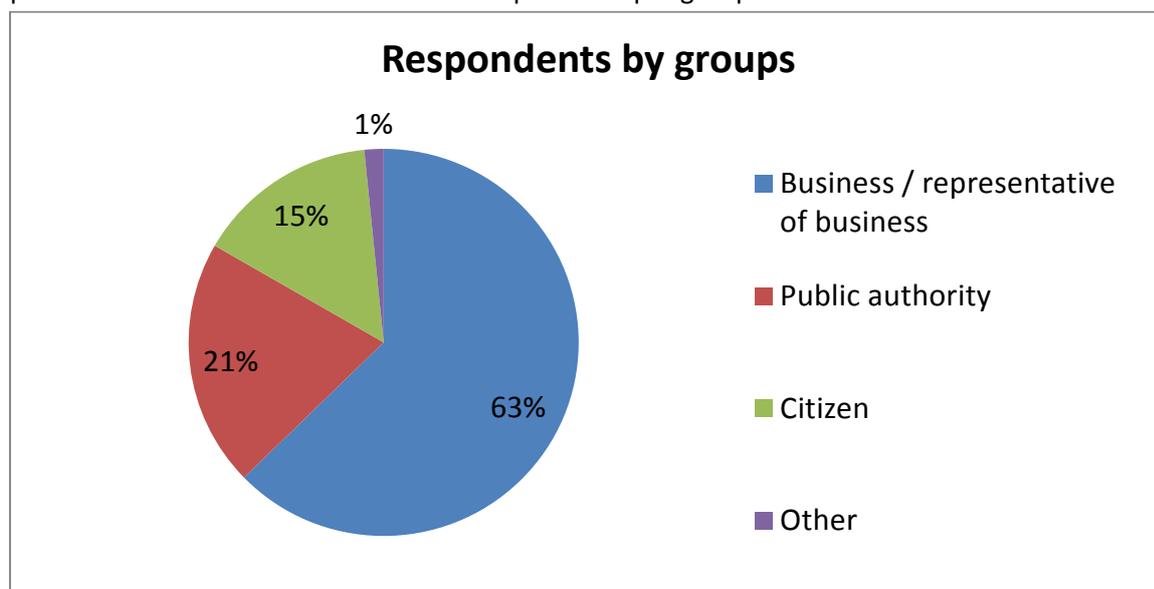
Main outcome of the public consultation is as follows:

- A large majority of stakeholders (80%) considered the current services notifications system not satisfactory, in particular public authorities who handle the notification procedure, as well as the business community.
- The consultation shows a large support for a series of options which could be included in a forthcoming initiative, in particular: an obligation to notify draft legislation (77%); increased transparency of the notification procedure vis-à-vis non-institutional stakeholders (70%); improvements to the proportionality test undertaken by Member States (74%); clearer legal consequences of non-notification (79%).
- Respondents also expressed an opinion in favour of extending the scope of the current notification obligation to a series of measures covered by the Services Directive: requirements related to prior authorisations (73%), requirements affecting multidisciplinary activities (80%); requirements to hold a professional indemnity insurance (73%); services standards (71%).
- Although some stakeholders identified a “standstill” period as a sensitive issue, most supported the need to give a clear timeframe for the notifying Member State, the Commission, other Member States and stakeholders to interact on a notified draft, before its adoption (65%).
- Trends in responses differ between main stakeholders groups. Businesses support in particular enhancing transparency of the current notification procedure; clarifications and extension of the scope of the notification obligation; and measures to improve the Commission decision powers and to prevent the adoption of disproportionate requirements by Member States. Public authorities were particularly supportive of clarifying the scope of the notification obligation and improving the current procedure. However, although overall supportive, some of them were more critical as regards measures which would prevent disproportionate restrictions from being adopted.

- Views on impacts of possible actions: the impact of further EU action was considered positive by a large a majority of respondents, for the procedure itself (71%), the better functioning of the services markets (69%), enhanced compliance by Member States on proportionality (67%) and more systematic notification (60%).
- These results will feed into the impact assessment that DG GROW is currently preparing, and in particular to support the different policy options envisaged.

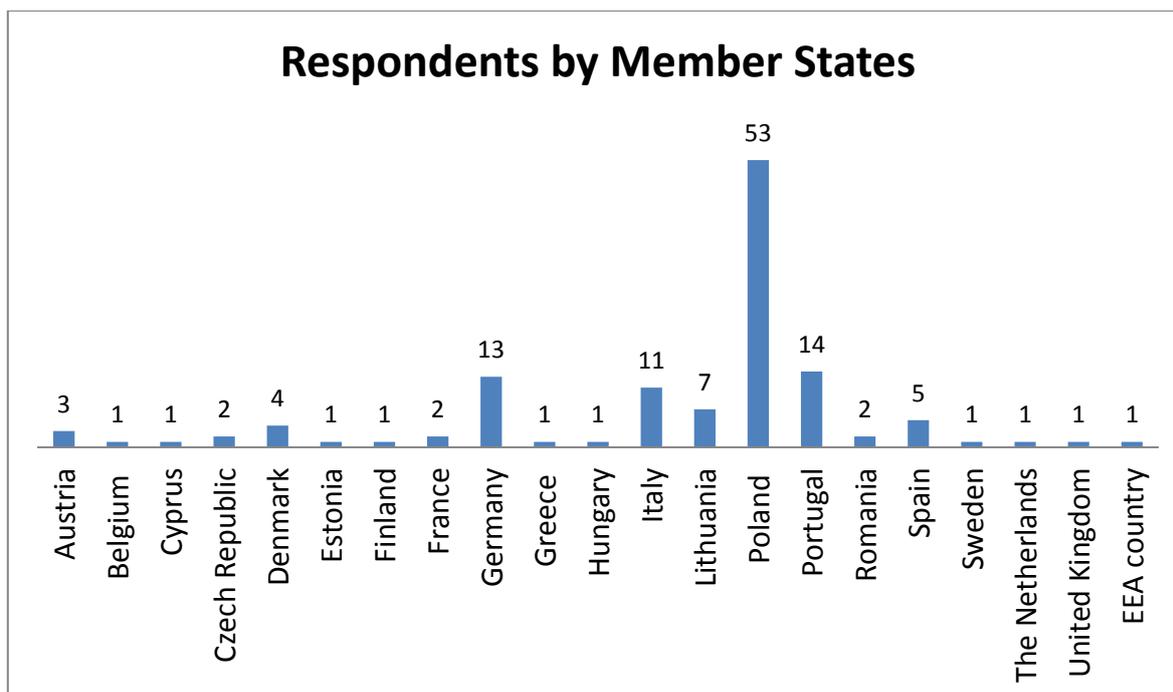
3. Overview of the respondents to the public consultation

The Commission received 126 replies from individuals and organisations in response of its online public consultation. The breakdown of respondents per group is as follows:



The large majority of responses (63%) came from businesses and their associations, almost a quarter from public authorities (21%) and further replies from citizens (15%) and other organisations (i.e. think tank) (1%).

With respect to the geographical distribution, the respondents came from 21 countries (20 Member States and 1 country from the European Economic Area, EEA), in particular from Poland, Portugal and Germany. No responses were submitted from the following states: Bulgaria, Croatia, Ireland, Latvia, Luxemburg, Malta, Slovakia and Slovenia. The breakdown of replies per country is as follows:



Poland comes out clearly as the largest provider of responses, with a total of 53. Nevertheless, responses received have come from diverse types of respondents and in that sense did not unbalance the overall trends observed amongst the other responses to the consultation: one public authority at State level handling notifications (Ministry of the Interior and Administration); one university (classified under “other”); and multiple types of representatives of the business community: 49 service providers among which 5 large companies, 12 SMEs and 32 micro companies; one chamber of commerce; one business federation.

4. Consultations topics

4.1. Effective enforcement of the Single Market rules and preventive examination

4.1.1. Importance of uniform application and effective enforcement of existing rules

A large majority of the respondents (83%) considered a uniform application and effective enforcement of EU rules to be important. Most respondents (63%) believed that efforts should be stepped up to ensure rules are applied correctly. 20% of respondents find current policies sufficient.

4.1.2. Preventive examination to ensure proportionality of national requirements

A majority of the respondents (54%) considered that an improved procedure for notifications of new national rules could help reinforce the uniform application of rules across the single market. Almost one third of the respondents (29%) considered either the existing preventive tools such as sharing knowledge and experience or the enforcement tools which allow for a check after adoption at national level to be sufficient to provide for a more uniform application of single market rules for services.

Four out of five public authorities considered preventive examination necessary to ensure a more uniform application of single market rules for services whereas for business this is nearly 2 out of 3.

4.2. Existing rules and procedures under the Service Directive as regards notification obligations

4.2.1. Effectiveness of the current notification procedure

Most respondents who replied to this question (80%) were of the opinion that the current procedure for notifications under the Services Directive is either not working or considers the procedure to be in need of improvements. Close to three quarters of public authorities expressed this opinion and among business almost two third.

4.2.2. Shortcomings of the current notification procedure

Around 8 out of 10 respondents indicated at least one shortcoming in the current notification procedure in the Services Directive.

The questions asked under this section concern the current notification procedure, of which external stakeholders (business community and citizens) are currently not part and on which it therefore is difficult for this group to have an opinion as precise as public authorities might have in respect of the shortcomings of the existing procedure. This being said, external stakeholders did have clear views on how existing procedure should be improved in subsequent sections of the online questionnaire.

In terms of the shortcomings of the current notification procedure in the Services Directive the group of respondents who replied to this question marked the following elements:

- A large majority of respondents (60%) considers the fact that for Member States and stakeholders the notification obligations are not clear in terms of what national regulation should be notified as a shortcoming.
- Half of the respondents (50%) regards the fact that the notification procedure is not transparent for stakeholders as a shortcoming.
- Close to half (45%) of the respondents saw the following as shortcomings in the existing procedure:
 - (I) the different rules exist on the notification obligation for establishment and temporary provision of cross-border services;
 - (II) the lack of clarity in terms of whether the notifying Member State must respond to comments issued by the Commission or other Member States;
 - (III) the assessment by Member States;
 - (IV) whether national legislation/regulation is justified and proportionate to meet public policy objectives.
- Over a third of respondents (37% and 34%) thinks (I) the fact that notified measures have already been adopted by Member States; and (II) the limited time to react to notified legislation/regulation and prevent the adoption at national level are shortcomings of the current procedure.
- More than a quarter of respondents (27%) believe that Member States not respecting their notification obligations and the absence of a mechanism in place to stop such behaviour are a shortcoming of the current rules, with business representing almost three quarters of this group.
- A small amount of respondents (20%) see the limited possibilities for Member States, the Commission and stakeholders to intervene as a shortcoming.

4.3. Measures to improve the current notification procedure for services

4.3.1. Elements to be included at EU policy level

A large majority of respondents, including 69% of public authorities and 60% of the representatives of the business community, support EU action to improve the current notification obligation under the Services Directive. Only 15% of all respondents did not see the need for an EU action.

An obligation to notify draft legislation, rather than notifying legislation already adopted at national level, was identified as an element which an EU level policy action should include, by nearly three quarters of the respondents. More than half of the public authorities, including those handling notifications, recognized it as an element which could improve the current notification system under the Services Directive. 72% of the business community supported an obligation to notify draft legislation, which would represent an improvement compared to the current system (see footnote)⁴⁹.

Nearly three quarters of respondents also considered that notifications should be made available to the public, supporting an increased transparency of the current notification procedure. This argument is in particular supported by 80% of the business community, which is today not associated to the notification procedure taking place between the notifying Member States, the Commission and other Member States. More than 60% of the public authorities also showed support to include such provision in a EU level policy action.

A very large number of respondents (83%) also agreed to the introduction of clarifications about the scope of the notification obligation in an EU level policy action, i.e. about the type of measure which should be notified. Among them, all public authorities but two supported such improvement, indicating that it might contribute to improving their understanding of the current system.

On the issue of scope, nearly 8 out of 10 respondents who shared their opinion on the matter also favoured aligning the procedure applicable to regulations governing the temporary cross-border provision of services with that applying to the freedom of establishment.

The clarification of the procedure to notify (including the different steps by which a public authority has to go through, the way to handle comments from the Commission and other Member States, etc.) was also identified as an improvement that an EU level action could bring, by 81% of all the respondents, among which 22 public authorities and 77% of the business community. Respondents who offered a more detailed response in their comments underlined that the system currently in place under the existing notification system for goods provides a clear procedure for goods and information society services, and could be used as an inspiration for services.

⁴⁹Examples were shared in reference to the existing notification system for goods under which such an obligation is already operative and contributes to the compliance of Member States and overall efficiency of the notification procedure. Some respondents showed support for such obligation to be complemented by a provision specifying at what point in the legislative process Member States could be required to notify a legislative initiative.

The introduction of a clear timeframe in the existing notification procedure is supported as a feature of a future EU level policy action by 65% of the respondents. This was the case of 65% of the public authorities and 73% of the representatives of the business community at large. Only a limited share of the respondents (23%) considers that such a provision is not necessary, some underlining that the current system already provides sufficient flexibility and clarity in this respect.

The introduction of an obligation for Member States to provide a thorough proportionality assessment was supported by three quarters of the respondents (74%) who expressed an opinion. Among those supporters, emphasis was put on the importance of the proportionality check prior to a national regulation on services, to evaluate consequences on the competition in the services market in particular, and the functioning of the single market in general. Several respondents also alerted that additional obligations for Member States to improve their proportionality test should not generate undue costs for administrations.

The improvement and clarification of the legal consequences of non-notification by a Member State was considered one of the most important features that an EU level policy action could include, with the support of almost 80% of the respondents, including 80% of the public authorities and 78% of the business community. Respondents recognized that the absence of the legal consequences is an important shortcoming of the current notification system.

More than half of the respondents supported the need to introduce instruments to prevent disproportionate requirements from being adopted at national level. Among them, nearly 60% of public authorities, which are handling notifications at local, regional or national level. In addition, almost 70% of the representatives of the business community who took position on this question, indicated their support.

4.3.2. National regulatory requirements to be covered by notification obligations

Most respondents expressed their support to expanding the current notification obligation for services to include other measures and requirements.

Almost half of the respondents who took a position did not consider the current scope of the notification obligation under the Services Directive satisfactory.

Requirements related to prior authorisations and their procedures for access and exercise of the service activity should additionally be covered, according to 73% of respondents who shared an opinion on the matter.

Many respondents from both public authorities and the business community expressed support for the introduction of requirements affecting multidisciplinary activities (50% and 54%).

At the same time, requirements to hold a professional indemnity insurance should additionally be covered by a notification obligation, according to nearly three quarters of the respondents which expressed an opinion on the matter.

More than three quarters of respondents support the notification obligation to also cover services standards.

Finally, more than 70% of respondents which expressed an opinion on whether they agree or not to extend the notification obligation to requirements affecting commercial communication supported the idea.

4.3.3. Procedural clarifications to be provided

Most respondents indicated the need to provide procedural clarifications to the existing notification procedure on several matters.

More than 8 out of 10 respondents (85%) supported the need to specify what type of information should be submitted by the notifying authority together with the notified legislation. This degree of support was echoed by public authorities (85%).

In addition, more than three quarters of the respondents (78%) indicated that clarification on the timing by which the Commission, Member States and stakeholders would be able to react to notifications is necessary. This was supported by 70% of public authorities and stakeholders (more than 80% of business representatives and 84% of citizens).

The introduction of a fixed timeframe for notifying Member States to respond to comments and reactions from the Commission, other Member States and stakeholders, was supported by nearly 8 out of 10 respondents (79%). This included three quarters of the public authorities and of representatives of the business community.

Respondents supported widely the idea to provide, in a forthcoming EU wide initiative, clarifications on when and how stronger measures can be taken by the Commission against disproportionate requirements. Three quarters of them answered favourably, whereas only 10% showed disagreement.

4.3.4. Actions to prevent disproportionate restrictions

Most respondents favoured actions to prevent the adoption of disproportionate restrictions by Member States.

Only one third of respondents (35%) expressing an opinion judged that the existing system which allows the Commission and Member States to discuss notifications is sufficient to prevent Member States from adopting disproportionate restrictions. On the other hand, two third of those respondents found the existing system to be insufficient including in particular 68% of the representatives from the business community which expressed their opinion on the matter.

Respondents expressed disagreement on the fact that the existing system allowing the Commission to adopt a legal Decision is sufficient to prevent Member States from adopting disproportionate

restrictions. Nearly three quarters of the respondents which expressed an opinion on the matter indicated so.

A majority of respondents among those who took position, agreed that the Commission should always be entitled to adopt a legal Decision on a notification, irrespective of whether this concerns temporary cross-border provision of services or the freedom of establishment.

In addition, among those who expressed an opinion, a majority of respondents agreed that a "standstill" period could be useful whereby the national legislative procedure is paused for a certain period (e.g. prior to the adoption of a law by the national parliament), in order to allow the Commission, other Member States and stakeholders to comment and react to the draft legislation.

According to more than two third of respondents who expressed their opinion (64%), the Commission should always be entitled to adopt a detailed opinion following the model applied to the notification procedure for the goods sector. Among these respondents, this position was supported by two third of the public authorities, and three quarters of the representatives from the business community.

The issue of inapplicability of new measures introduced by Member States, in case of failure to notify based on the existing jurisprudence in the goods sector, was met with divergent views from respondents. Three quarters of the respondents took a position on the matter, with 51% disagreed and 49% agreed for such clarification to be introduced in an EU level action.

With only less than three quarters of respondents taking position on the matter, around 60% disagreed with the idea that Member States should only be allowed to adopt legislation/regulation if they have obtained prior approval from the Commission.

4.3.5. Measures to address proportionality assessment

A very large share of respondents supported measures to strengthen the proportionality assessment undertaken by Member States when notifying.

Nearly three quarters (71%) of respondent which replied to the question disagreed that the current situation is satisfactory and that there is no need for further action.

Similarly, three quarters of the respondents replying to the question agreed that a legal obligation for Member States to submit proportionality assessments should be introduced.

More than 8 out of 10 respondents who expressed their opinion on the matter considered that the Commission should support proportionality assessment by Member States for particular areas (e.g. an analytical framework to guide assessment).

4.4. Impact of a revised notification procedure under the Service Directive

The notification procedure at the level of the Member State is under the responsibility of public authorities. Companies, professional organisations or citizens do not intervene directly in the notification process. Therefore, the relevant information on the modification of the process of notification or on the administrative costs is essentially provided by the respondents from public authorities.

Replies submitted by the public authorities represent less than one fifth of all replies (18%). Almost all the authorities who replied to the public consultation (88%) are public authorities in charge of the notification process.

4.4.1. Changes to national processes linked to the notification obligation

Among the replies provided by public authorities (26 replies), only a limited number of national authorities considered that the new procedure would require significant changes on their part compared to the current notification obligation (19%).

For 38% of public authorities, the new notification procedure would not imply any changes or only limited changes in that regard.

More than one third of the public authorities (35%) do not know what will be the impact of the revised notification procedure.

It results from the 100 replies provided by the respondents other than the public authorities (companies, professional organisations, citizens) that a large part of them do not know what will be the impact on the fulfilment of the current notification obligation on Member States (40%).

As regard the remaining respondents (60%), most of them (36%) consider that the new procedure will have a significant impact, whereas for 21% there will be no changes or only limited changes.

4.4.2. Costs for public authorities

As regards costs for public administrations, it follows from the replies provided by public authorities that they expect some features of the new notification procedure to have an impact on costs, but not all.

Most public authorities consider the introduction of the following elements not to lead to a notable increase in costs: an obligation to notify draft legislation (50% approve, 35% disagree), strengthening the obligation to provide a proportionality assessment (38% approve, 35% disagree) and the introduction of a consultation period (46% approve, 38% disagree).

On the contrary, extending the scope of the notification obligation to align it with the scope of the Services Directive will have an impact on costs according to 54% of public authorities' respondents and no impact for 15%.

As regards making notifications transparent for stakeholders, most public authorities do not know the impact on the costs (35%). The remaining respondents are equally split between increase of the costs and no notable impact on costs.

4.4.3. Overall impact

An overwhelming majority of respondents agree that the Commission proposal will have a positive impact. It will improve the notification procedure (71% approve, 6% disagree), will contribute to a

better functioning of services markets overall (69% approve, 12% disagree), Member States will take the principle of proportionality more seriously (67% approve, 13% disagree) and Member States will notify more measures, more systematically and provide more information (60% approve, 14% disagree).

An overwhelming majority of respondents (72%) who gave their opinion consider that the modified notification procedure will have an impact in practice. The proportion of public authorities, which expressed their views on that point and consider that the new procedure will have a practical impact, reaches 84%.

It also stems from the consultation that the modified notification procedure would result in changes at national level. For 38% of respondents, the new procedure will possibly impact on national procedures for adopting national legislation/regulation, whereas 26% disagree with that conclusion. The proportion of public authorities considering that the modified notification procedure would result in changes at national level is also 38%. Around 30% of businesses share the same view.

5. Additional feedback from institutional stakeholders

Discussions on the evaluation of the current notification procedure with institutional stakeholders started before the launch of the public consultation. Member States contributed to this evaluation in the Expert Group on the Implementation of the Services Directive. Since March 2015, several substantive debates took place within the Expert Group to address specific questions on the notification obligation and possible shortcomings. During these meetings, Member States explained to the Expert Group what arrangements were taken within their government structures to fulfil the obligation to notify. A majority of Member States have appointed a central (contact) point within their government structure.

National experts expressed divergent views in respect of the scope of the current obligation in Article 15 and Article 39 with a majority considering the scope of the obligation clear enough. As to coherence in terms of other types of requirements for which no notification obligation exists the Expert Group was divided with a group in favour of also covering authorisation requirements and a group which considers the current scope sufficient for a proper functioning of the Services Directive. Overall Member States' representatives considered the current procedure sufficient to assess and comment on one and others notifications. Some improvements in the used system (Internal Market Information System, IMI) would be welcomed. It became also clear that one Member State has the obligation to notify draft measures present in its law and another Member State has a provision in place which explains the legal consequence of not notifying.

In addition discussions also tackled issues of a "standstill" period, the national consultation process and transparency, with a clear majority in favour of transparency, but views in respect of a standstill period were divided. Some Member States question the overall necessity of such a period to have a proper functioning notification procedure.

Questions in relation to the consequence of not notifying turned out difficult for the Member States, with hardly any taking a stance on this.

Experts also discussed administrative costs of the notification obligation. Estimated figures on the notification procedure were presented and discussed. National experts provided detailed

information on the average man-hour to prepare and process a notification. In addition to the discussions in the Expert Group meetings, institutional stakeholders provided relevant inputs through position papers and bilateral meetings with the Commission. Most of the countries that shared their views on the notification obligation under the Services Directive stressed the need to ensure that the process applies to draft laws and to make notifications publicly available (i.e. online) so that businesses have the opportunity to react.

Several Member States also called for a proper timeframe allowing all the stakeholders to react to notifications. According to some, proportionality assessment as well as clarifications on the notification obligation and the procedure should also be granted.

Furthermore, during bilateral meetings, two Member States expressed a clear opposition to a "standstill" clause. However, according to one of these two, a consultation mechanism should be found to ensure other Member States, the Commission and stakeholders could react to notified measures and allowing for an interaction with the notifying Member State prior to its adoption of the notified measure.

The European Parliament and the Council of the European Union have also contributed to the reflexion on the notification procedure. The Committee for Internal Market and Consumer Protection (IMCO) of the European Parliament issued the following draft reports including comments on the notification procedure of the Services Directive:

1. The draft report on the Single Market Strategy (2015/2354(INI)).⁵⁰ Paragraph 26 indicates the following: the IMCO Committee "*Emphasises, in respect of the single market in services, that there is a clear need to improve the cross-border provision of services; urges the Member States to ensure proper and more effective application of the Services Directive, while avoiding the practice of gold-plating; welcomes the Commission proposal to improve notification under the Services Directive; agrees to extend the notification procedure provided for in Directive 2015/1535 to all the sectors not covered by that directive*"
2. The draft report on Non-Tariff Barriers in the Single Market (2015/2346(INI))⁵¹. Paragraphs 21 and 23 indicate the following: the IMCO Committee "*21. Draws attention to the problems for service providers, especially in business services and construction, stemming from multiple authorisations, registration or prior notification requirements; [...] 23. Emphasises that the notification obligation contained in the Services Directive could have been effective in reducing or eliminating NTBs, but has been neglected by Member States and the Commission; welcomes, therefore, the renewed focus on the notification procedure in the Single Market Strategy, as through early engagement as regards proposed regulatory measures, disproportionate national measures can be revised to resolve issues before they occur*"

⁵⁰ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-573.011+01+DOC+PDF+V0//EN&language=EN>

⁵¹ The draft report is available online <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-573.111%2b01%2bDOC%2bPDF%2bV0%2f%2fEN>

In its Conclusion on 19 February 2015,⁵² the Council of the European Union stressed "*the benefits of requiring Member States to notify new requirements on services and service providers, inter alia, such as for legal form and shareholding and authorisation schemes so as to highlight any restrictions that may be disproportionate or unjustified, and with a view to the phasing out of all such restrictions as soon as possible*" and called "*upon the Commission, working with Member States, to increase the effectiveness of the notification procedure under Directive 2006/123/EC, including by providing clear guidance as to the notification obligations and making notifications public and transparent as is the case for goods*".

The need for an improved notification mechanism was also highlighted by the European Court of Auditors in its report on the implementation of the Services Directive (Special report No 5/2016; published on 14 March 2016⁵³): "*whereas the single market for goods is well developed in terms of intra-EU trade, the services market is widely recognised to have not achieved its full potential. The Services Directive addresses services activities covering approximately 46 % of EU gross domestic product (GDP), with the aim of reducing legal and administrative barriers to both providers and recipients of services. This should be achieved by Member States (MSs) through legal transposition of the Directive, increased transparency and simplified procedures which make it easier for businesses and consumers to provide or receive services in the single market*". Among its specific recommendations, the Court of Auditors suggests that "*the legislator should introduce a standstill period for the notification of draft requirements and ensure that they are published on a publicly available website to allow better access and timely scrutiny*".

9.3. Annex 3: Practical implications of the initiative for the affected parties: who is affected and how

Stakeholders who would be affected by the initiative as contained in the preferred policy option 5a:

- **National authorities** will be affected by the obligation to notify **drafts**. In order to fulfil the obligations stemming from the notification procedure, they will have to make sure that measures covered by the notification obligation will be notified in IMI at least three months prior to the adoption of the measure. This will require an adaptation of the internal system to fulfil the obligation. National authorities will have to decide within the legislative process, when the appropriate time for the notification will be in order to have a sufficiently developed measure to be notified but at the same time also provides for enough time (3 months) to have a proper dialogue with the Commission and the other Member States and to take account of comments received. Option 5a does leave that room for assessment.

The other impact will stem from the fact that the system will be made **transparent**. It is likely that the notifying Member State will receive comments from stakeholders who previously would not have been aware of the intention to introduce new requirements. Although this option will not oblige Member States to take the comments on board, they could play a role in the final discussions on the requirements. Transparency will also

⁵²Council Conclusions on Single Market Policy, Ref. 6197/15, 19 February 2015 <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%206197%202015%20INIT>

⁵³ http://www.eca.europa.eu/Lists/ECADocuments/SR16_05/SR_SERVICES_EN.pdf

improve, together with the introduction of a specific provision dealing with the consequences of **non-compliance**, to an increase of notifications for those Member States currently not complying with the notification obligation. Member States will have to make sure that the obligation is correctly met by public authorities at all layers of government. The Services Directive also applies to regional and municipal levels of government.

The extension of the **scope** of the notification obligation to also cover authorisation schemes, multidisciplinary activities and professional indemnity insurance will lead to an increase in compliance costs for all Member States. Given the regulatory activity noted on previous occasions, this will lead to more requirements being covered by the notification obligation which will therefore result in more notifications. Member States will have to make sure that prior to the introduction of relevant changes to the requirements concerned the notification will take place.

The information to be provided by Member States will in general also be more extensive, as per notification more details have to be provided in terms of the **proportionality** assessment undertaken by the notifying Member State. The assessment as such will have to be made on the basis of the current conditions of the Services Directive, but the reporting on these issues has not been consistent over the years, and will be part of the notification obligation and might slightly increase the time spent on each notification.

On the other hand, a more effective notification procedure will improve the compliance of adopted national measures with the Services Directive and thereby reduce the need for legal enforcement action and associated administrative costs for Member States.

- **The Commission** will see an increase in notifications as a result mainly of the widening of the scope of the notifications obligations. This increase will first impact the workload of the Commission and further see an increase in terms of costs related to translations. Transparency will also result in the Commission receiving comments from external stakeholders which will have to be assessed in the framework of the notification obligations which will result in an increased workload.

The obligation to provide more information in respect of the proportionality assessment undertaken by the Member State will also see an increase in translations costs (more reporting), but at the same time facilitate the work of the Commission in terms of assessing the compatibility of the national measure with EU law which will lead to a reduction of the workload.

- **Service providers** wanting to benefit from the opportunities the Single Market for services offers will see their opportunities widen. Firstly, a more effective notification procedure will contribute to fewer unjustified regulatory barriers, facilitating the freedom of establishment and the freedom to provide cross-border services. For SMEs in particular fewer unjustified barriers will mean lower adaptation costs to the various requirements the different Member States have in place and therefore additional opportunities to benefit from the freedom to provide cross-border services will increase. Secondly, this initiative will also introduce a transparent system for external stakeholders in respect of the notification procedure. As a result, businesses will have easier access to

information on changing requirements and the opportunity to provide comments on the planned introduction of regulatory measures.

9.4. Annex 4: Estimation of costs for public authorities

1. Estimation in terms of increase of notifications when all Member States fulfil the current notification obligation stemming from the Services Directive

Table 1 (as presented in the Annex 5: Evaluation report – Notification procedure of the Services Directive) shows the overview of the number of notifications received per Member State per year from 2010 (start of the notification obligation) until end of 2015.

Member State	2010	2011	2012	2013	2014	2015	Total
Austria	1	14	11	6	7	1	40
Belgium	0	0	2	0	19	5	26
Bulgaria	1	0	1	3	2	0	7
Croatia	NR	NR	NR	0	61	0	61
Cyprus	1	2	4	0	6	2	15
Czech Republic	0	0	0	12	0	143 ⁵⁴	155
Denmark	1	1	2	0	6	2	12
Estonia	1	2	0	0	1	0	4
Finland	0	0	0	0	0	0	0
France	0	1	10	15	13	13	52
Germany	52	674 ⁵⁵	0	0	5	12	743
Greece	0	0	0	0	0	0	0
Hungary	4	1	7	11	22	14	59
Ireland	0	0	0	0	0	0	0
Italy	6	5	6	4	1	4	26
Latvia	1	0	0	3	12	2	18
Lithuania	0	5	23	0	1	0	29
Luxembourg	0	0	3	0	1	0	4
Malta	0	0	0	0	0	0	0
Netherlands	64	57	16	21	5	51	214 ⁵⁶
Poland	0	0	0	0	0	1	1
Portugal	0	0	1	0	0	6	7
Romania	0	0	1	0	1	0	2
Slovakia	0	0	0	0	0	0	0
Slovenia	0	7	1	0	3	0	11
Spain	0	1	1	0	8	0	10
Sweden	6	19	15	19	48	29	136
United Kingdom	1	0	1	0	3	2	7
Total	139	789	105	94	225	287	1639

Table 1 Number of notifications per Member State in the period 2010-2015.

⁵⁴ 127 notifications on the same issue: a prohibition of door-to-door sales of goods and services, notified by different municipalities.

⁵⁵ 620 notifications on either funeral services or cleaning services, notified by different municipalities.

⁵⁶ Some notifications concern the 'General Municipal Ordinance' or 'Building Ordinance' notified by different municipalities.

In order to estimate the average amount of notifications per Member State per year if all Member States would fulfil the current notification obligation of the Services Directive, the Commission used the following calculations.

Based on the overall, the average amount of notifications per Member State per year is:

Member State	Average
Austria	6.7
Belgium	4.3
Bulgaria	1.2
Croatia	20.3 ⁵⁷
Cyprus	2.5
Czech Republic	4.7 ⁵⁸
Denmark	2
Estonia	0.7
Finland	0
France	8.7
Germany	20.5 ⁵⁹
Greece	0
Hungary	9.8
Ireland	0
Italy	4.3
Latvia	3
Lithuania	4.8
Luxembourg	0.7
Malta	0
Netherlands	35.7
Poland	0.2
Portugal	1.2
Romania	0.3
Slovakia	0
Slovenia	1.8
Spain	1.7
Sweden	22.7
United Kingdom	1.2
EU average	13

Table 2 Average amount of notifications per individual Member State per year

The top 11 notifying Member States notified on average 13 notifications per year. Applying this average to all Member States would result in 364 notifications per year, on average 91 notifications in addition to the current average over the period 2010-2015 (273 notifications on average per year).

2. Estimation of the baseline administrative costs related to the notification obligation

The Commission has requested during a meeting of the Expert Group on the Services Directive⁶⁰ information from the Member States in terms of time spend per notification and the cost attached to this (FTE). Unfortunately, Member States were unable to provide such

⁵⁷ Croatia was not yet a Member of the EU in the years 2010-2012 the amount of notifications of this country was divided by 3.

⁵⁸ For statistical purposes the excess 127 (see footnote 1) was deleted from the calculations.

⁵⁹ For statistical purposes the excess 620 (see footnote 2) was deleted from the calculations.

⁶⁰ Expert group on Services Directive meeting of 16 July 2015.

information due to the fact that the task to notify is part of officials' total work package and therefore difficult to separate in terms of time spent.

A more recent call for information in respect of the administrative costs to a smaller group of Member States resulted in information in terms of the hours spent per notification and the level of the civil servant occupied with the notifications⁶¹. Based upon this information the European Commission presented members of the Expert Group prior to the meeting taking place on 25 April 2016 with estimates and the request to inform the Commission during the meeting on 25 April whether the average values were reasonable.

These average figures presented:

- Preparation of a notification (including coordination with line Ministry): 10 man hours per notification
Authorities will have to determine whether a measure needs to be notified. Furthermore the notification has to be written (complexity of a measure has an influence on the time necessary). Finally consultations need to take place with relevant authorities.
- Processing of notification in IMI: 2 man hours per notification
The information needs to be uploaded in the Internal Market Information system.
- Processing comments received from the Commission or other MS, including providing a response: 5 man hours per notification⁶²
Comments need to be analysed in terms of content and the competent authority responsible for the reply needs to be determined. Answers to the comments need to be prepared, coordinated with relevant other authorities and afterwards uploaded in IMI
- Providing a comment on a notification made by another MS: 4 man hours per notification⁶³
The notification needs to be assessed by responsible authority. Coordination needed to determine whether comments should be made. Comments need to be formulated and coordinated with relevant authorities. Afterwards the comments need to be uploaded in IMI.

In general, notifications are handled by academically trained lawyers.

During the discussion at the 25 April 2016 Expert Group meeting, FR, HR, IT, PT and BE considered the above values presented in terms of the preparation and processing of a notification to be too low. On the other hand, DK, NO, AT, EE and FI argued that the above figures are overestimated. From the group of Member States on which the average values was based, both NL and SE calculate more man hours in order to fulfil the notification obligation (preparation and processing) whereas the others, UK, HU, PL and DE indicated less man hours. Other Member States have not reacted.

Member States were unanimous in that the estimated average of 5 man hours annually necessary to reply to questions and comments from the Commission and other Member States is too low.

⁶¹ Request was sent to Sweden, United Kingdom, Netherlands, Hungary, Poland, France, Portugal and Germany. The Commission did not receive an answer from France and Portugal.

⁶² Based on the frequency with which the Commission and other Member States submit comments (period 2014-2015). The average is commenting on 1 notification per Member State per year.

⁶³ Based on the frequency with which other Member States submit comments (period 2014-2015) the average is commenting on 1 notification per Member State per year.

Based on this feedback, the Commission decided to apply the following averages for the calculation of the administrative costs stemming from this policy initiative (relevant for the Impact Assessment):

- Preparation of a notification (including coordination with line Ministry): 10 man hours per notification;
- Processing of notification in IMI: 2 man hours per notification;
- Processing comments received from the Commission or other MS, including providing a response: 8 man hours per notification;
- Providing a comment on a notification made by another MS: 4 man hours per notification.

Description of the required action	Tariff (hour)	Time (hour)	Price per notification in euro	Frequency (per year)	Total administrative burden in euro annually
Preparation of a notification	32.1	10	€321	13	€4173
Processing of notification in IMI	32.1	2	€64	13	€832
Processing comments received following notification	32.1	8	€257	1	€257
Commenting notification other MS	32.1	4	€128	1	€128

Table 3 Overview of the average baseline administrative burden per year based on the average EU amount of notifications (see table 2).

Table 3 provides an overview of the average baseline administrative burden per notification based on the average frequency for the EU. The tariff per hour is based on the "2006 Mean Hourly Earnings By Main Economic Activity And Occupation* + adjustment to 2010 Prices + Nonwage Labour Costs + 25% Overhead ESTAT: Structure of Earnings Survey - NACE rev 1.1: C to O not L."

Table 4 provides an overview per Member State of the administrative cost based on the EU frequency average and based on the individual Member State frequency average on the years 2010-2015. Also here the tariff per hour is based on the "2006 Mean Hourly Earnings By Main Economic Activity And Occupation* + adjustment to 2010 Prices + Non wage Labour Costs + 25% Overhead ESTAT: Structure of Earnings Survey - NACE rev 1.1: C to O not L."

To calculate the administrative cost, the Standard Cost model (SCM) is used. Administrative burden is calculated on the basis of the average cost of the required administrative activity (Price) multiplied by the total number of activities performed per year (Quantity). The cost is generally estimated by multiplying a tariff (based on average labour cost per hour including overheads) and the time required per action. Other types of costs (outsourcing, equipment or supplies' costs, etc.) are not taken into account.

The quantity is calculated as the frequency of required actions multiplied by the number of entities concerned. The core equation of the SCM is $P \times Q$, where

- P: costs of an administrative action are determined according to Tariff * Time
- Tariff: gross wage, wage costs and material and overhead costs.
- Time: the variable time should be taken to mean the time (in minutes or hours) that it takes a business to perform a certain activity.
- Q: number of times that the message is delivered per year (number of businesses * frequency). This should be used for the amount of notifications received for the various years in order to estimate the administrative burden.

Member State	Tariff in euro	MS yearly average based on their notification between 2010-2015	Price per notification in euro ⁶⁴	Total administrative burden based on EU frequency (full compliance by all- 13 notifications annually) in euro	Total administrative burden based on MS average in euro
Austria	38,4	6.7	460,8	5990,4	↓ 3087,36
Belgium	49,3	4.3	591,60	7690,80	↓ 2543,88
Bulgaria	3,80	1.2	45,60	592,80	↓ 54,72
Cyprus	31,30	2.5	375,60	4882,80	↓ 939,00
Czech Republic	11,70	25.8	140,40	1825,20	↑ 3622,32
Denmark	45,70	2	548,40	7129,20	↓ 1096,80
Estonia	8,80	0.7	105,60	1372,80	↓ 73,92
Finland	36,10	0	433,20	5631,60	↓ 0,00
France	39,20	8.7	470,40	6115,20	↓ 4092,48
Germany	42,50	123.8	510,00	6630,00	↑ 63138,00
Greece	26,30	0	315,60	4102,80	↓ 0,00
Hungary	8,50	9.8	102,00	1326,00	↓ 999,60
Ireland	41,60	0	499,20	6489,60	↓ 0,00
Italy	38,90	4.3	466,80	6068,40	↓ 2007,24
Latvia	6,30	3	75,60	982,80	↓ 226,80
Lithuania	6,30	4.8	75,60	982,80	↓ 362,88
Luxembourg	50,80	0.7	609,60	7924,80	↓ 426,72
Malta	16,60	0	199,20	2589,60	↓ 0,00
Netherlands	35,50	35.7	426,00	5538,00	↑ 15208,20
Poland	13,00	0.2	156,00	2028,00	↓ 31,20
Portugal	22,20	1.2	266,40	3463,20	↓ 319,68
Romania	6,50	0.3	78,00	1014,00	↓ 23,40
Slovakia	9,80	0	117,60	1528,80	↓ 0,00
Slovenia	19,70	1.8	236,40	3073,20	↓ 425,52
Spain	27,60	1.7	331,20	4305,60	↓ 563,04
Sweden	36,80	22.7	441,60	5740,80	↑ 10024,32
United Kingdom	38,20	1.2	458,40	5959,20	↓ 550,08
EU average	32,10	13	385,20	5007,60	5007,60

⁶⁴ Assuming 12 hours for processing and preparing notification. The estimate does not take into account time concerning processing comments as not all notifications result in any comments.

Table 4 Total baseline administrative burden per individual Member State per year based on EU average and individual Member State average.

Table 4 shows the baseline administrative burden assuming full compliance with the notification obligation i.e. under the assumption that each Member States submits on average 13 notifications per year compared to the administrative burden calculated on the achieved average per Member States in period 2010-2015. The arrows in the last column show whether the current costs borne by Member States are lower or higher than the estimated EU average of full compliance with the current notification obligation. For example, it means that the Netherlands spend on average €15208.20 annually to meet the notification obligations compared to €5538 assuming the EU average level of compliance of 13 notifications per year. On the other side, Slovakia, Ireland, Malta and Finland don't spend anything compared to the average annual cost assuming the EU average level of compliance of 13 notifications per year of €1528,80 (SL) €6489.60 (IR) , €2589,60(MT) and €5631,60 (FI) respectively.

3. Estimation of the administrative costs per option

Policy Option 3: Measures to improve the effectiveness and quality of the notification procedure

This option contains the following elements to be introduced into the notification obligation:

The obligation to notify draft measures, coupled with a period of three months in which the Member State may not adopt the notified measure, the notification system will be made transparent, Member State need to provide proper proportionality assessments and the possibility to adopt decisions will be aligned in that decisions can also be adopted in case of measures affecting the freedom to provide services.

The increase in administrative costs will be limited under this option.

The obligation to notify drafts might lead to the possibility that could result in the necessity to notify again in case substantial changes have been made to the 'original' notification. However, experience in this respect with the notification obligation under Directive 2015/1535 (SMTD Directive) show that only in 10 out of 700 notifications a new notification necessary.

Making the system transparent is likely to result in comments from external stakeholders, but without an obligation to take such comments on board, in principle Member States will not be faced with additional work. On the other hand, transparency might influence compliance (non-notification might be detected), however the administrative costs stemming from this falls within the costs calculated under the baseline scenario.

A slight increase might flow from the obligation to better formalize the proportionality assessment and communicate the information via IMI. Although the obligation to carry out a proportionality assessment of new requirements in the field of services stems from the existing provisions of the Services Directive, the reporting as such requires work which will lead to a small increase in administrative cost. In terms of the baseline scenario, on average Member States indicated to need 2 hours for uploading the information into IMI. The proportionality assessment might require maximum 30 minutes more. The increase of cost is therefore negligible.

A positive effect, meaning a decrease in administrative costs, could result from the fact that Member States are likely to be faced with less infringement proceedings. The benefit of notifying in the draft stage means that amendments could still be made. In addition, aligning the possibility for the Commission to issue decisions also in respect of measures affecting

temporary cross-border provision of services means that the need for infringement proceedings could reduce for these measures as well.

Option 4: Measure to expand the scope and improve coherence of the current notification system

This option also contains the elements of option 3.

Extending the scope of the notification obligation will result in a higher number of notifications therefore the administrative burden for Member States will increase somewhat. It could be assumed that the same level of baseline administrative cost per notification (i.e. € 385 per notification) would apply also to notifications concerning establishment.

It is very difficult to present an estimate on how many new notifications will have to be done. Based on the mutual evaluation exercise over the years 2010-2011⁶⁵, around 4400 authorisation schemes and 225 multi-disciplinary requirements were detected in the Member States. However the obligation to notify only applies when changes are made or new requirements are introduced and this depends very much on developments within the respective Member State.

The increase in notifications will however also lead to a reduction in terms of Member States being less affected by enforcement action from the Commission.

Option 5: Additional instruments to guarantee compliance by Member States

This option will also contain the elements of option 4 that means that the increase in administrative costs as a result of expansion of the scope of the notification obligation will also be seen under this option.

Under option 5a a provision stating the consequences of not complying with certain obligations from the notification procedure will be introduced. For those Member States not complying with these obligations it will have an impact on their public authorities, which will need to better comply with the notification obligation in order to avoid the consequences on non-notification. The number of notifications will increase and therefore the administrative cost for the public authorities will increase. However, the total administrative costs will be the baseline scenario as presented in table 4. Given that the average baseline cost per notification is €385, this might result in a burden of around €5008⁶⁶ per Member State, taking the average of 13 notifications per Member State per year. It should however be underlined, that these administrative costs should already be borne by the Member States, given that this option is not about extending the notification obligation but ensuring compliance with the existing notification in the Services Directive.

Also under this option, the administrative costs related to the notification obligation need to be considered together with an expected decrease of the costs on public administrations linked to processing of infringement cases which would have been taken by the Commission under the current notification procedure against unlawful measures being introduced by a Member State.

⁶⁵ Communication from the Commission to European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a better functioning Single Market for services – building on the results of the mutual evaluation process of the Services Directive, 27.1.2011, COM(2011) 20 final.

⁶⁶ The negligible increase of costs (maximum 30 minutes more per notification) due to proportionality requirements is not taken into account in this calculation. As mentioned under option 4, it is impossible to estimate the additional costs due to extending the scope of notification obligation.

Under option 5b, the possibility for the Commission to declare in its decisions a national regulation inapplicable, in case it was assessed non-compliant with the Services Directive during the notification process, can expose the public authorities to the changes of the national legal framework which are much faster than following a classic infringement procedure. The time for the authorities to adapt to the new legal context will be much shorter.

Overall, the increase of administrative burden will be at the similar level as the increase established under option 4.

9.5. Annex 5: Evaluation report – notification procedure of the Services Directive

1. Introduction

The purpose of this evaluation is to assess the functioning of the current notification procedure of Directive 2006/123/EC on services in the internal market ("Services Directive"), in terms of effectiveness, efficiency, coherence, relevance and EU added value. Member States have an obligation to notify new laws, regulations and administrative provisions affecting the freedom of establishment for providers to the Commission according to Article 15(7). Similarly, Member States have an obligation to notify legislative changes affecting the freedom to provide services (i.e. temporary provision of cross-border services) according to Article 16 and 39(5) of the Services Directive. This evaluation assesses the processes put in place by the Services Directive regarding notification and does not aim at assessing comprehensively their contribution to or wider impacts on the Single Market.

2. Background

2.1 Services Directive and its notification procedure

The objective of the Services Directive is to release the full potential of services markets in Europe by removing legal and administrative barriers to trade. The original proposal of the Commission in 2004 contained a specific notification obligation only for requirements in relation to the freedom of establishment (now Article 15). A notification obligation for the freedom to provide services (now covered by Article 16) was not to be necessary, due to the proposed 'country of origin' principle. However, during the negotiations on the proposal, this principle appeared too controversial and as a compromise current Article 16 was introduced which does allow Member States, with certain limitations, to impose also requirements in case of temporary cross-border provision. The obligation of Article 39(5) to notify was introduced at the last minute as a safeguard, to introduce some form of control on Member States legislative action.

The original proposal, based on an inventory of the services market in Europe, limited the notification obligation to the freedom of establishment and did not cover a possible notification obligation for authorisations or multi-disciplinary activities. It was considered that the requirements covered by Article 15 were more suitable for a notification obligation.

The Directive was adopted in 2006 after very long, intensive and difficult discussion both in Council and the European Parliament. The Services Directive had to be implemented by all EU countries end of 2009. Prior to the entry into force of the Services Directive, the only obligation to notifying service requirements concerned the obligation to notify requirements in relation to information society services based on Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, the Single Market Transparency Directive (now Directive 2015/1535).

The Services Directive established that national rules restricting the right of establishment and the freedom to provide services falling under the Directive must be non-discriminatory, proportionate and justified by public interest objectives. To ensure that all new legal requirements imposed by Member States fulfil these conditions and to prevent new barriers, the Services Directive introduced a procedure whereby Member States shall notify to the Commission new or changed legal requirements affecting services. This should allow the Commission and other Member States to assess whether such requirements are justified and proportionate, thus preventing the introduction of new barriers and contributing to a more ambitious implementation of the Services Directive, which is the more specific objective of the notification procedure. Such a procedure did not exist prior to the adoption of the Services Directive.

The Directive makes reference to the existing obligation to notify under the Single Market Transparency Directive in order to avoid Member States having to notify twice in case of measures which cover both.

The notification obligation regarding requirements affecting the freedom of establishment is different than the obligation on requirements affecting the free movement of services, as shown in section 2.1.1 and 2.1.2.

2.1.1 The freedom of establishment

Article 15 of the Services Directive regulates the notification obligation for requirements affecting the freedom of establishment. According to Article 15(7), Member States are obliged to notify the Commission any new laws, regulations or administrative provisions which set requirements listed in Article 15(2), together with the reasons for those requirements. Within a period of 3 months from the date of the notification, the Commission examines the requirements and where appropriate could adopt a Decision requesting the Member State to refrain from adopting the requirements or to abolish them.

The following requirements are included in the exhaustive list of Article 15(2): a) quantitative or territorial restrictions, b) obligation on the provider to take a specific legal form, c) requirements which relate to the shareholding of a company, d) requirements, other than those covered by Directive 2005/36/EC or other Community acts, which reserve access to the service activity in question, e) ban on having more than one establishment in the territory of the same State, f) requirements fixing a minimum number of employees, g) fixed

minimum and/or maximum tariffs with which the provider must comply and h) an obligation on the provider to supply other specific services jointly with his service.

These requirements constitute severe obstacles to the freedom of establishment and can often be replaced by less restrictive means. The European Court of Justice has in many cases ruled such requirements to be incompatible with the freedom of establishment. However, under certain circumstances and in specific sectors such requirements might nevertheless be justified. As a result, Article 15 does not provide for their outright prohibition but requires Member States to assess these requirements on the basis of the criteria in Article 15(3), namely, non-discrimination, necessity (i.e. justified by an overriding reason of public interest) and proportionality, and notify the Commission about them.⁶⁷

2.1.2 The free movement of services

The obligation to notify requirements affecting the free movement of services is covered by Article 16 and 39(5) of the Services Directive. The obligation is not limited to a list of requirements which is the case for requirements affecting the freedom of establishment; it covers all requirements affecting the freedom to provide services unless it concerns any of the services specifically mentioned in Article 17 of the Services Directive.⁶⁸ According to Article 39(5) of the Services Directive, Member States shall transmit to the Commission any changes in their requirements, including new requirements, as mentioned in Article 16(1) and the first sentence of Article 16(3), together with the reasons for them. The Commission also examines these measures within a period of 3 months, but in case the Commission considers such measures to be in conflict with EU law, it does not have the possibility to adopt a Decision, but will have to open an EU Pilot and where necessary follow-up with infringement proceedings.

Article 16 (1) requires Member States to respect the right of providers to provide services in a Member State other than that in which they are established and shall ensure free access to and free exercise of a service activity within its territory. However, Member States may introduce requirements if they are non-discriminatory, justified by public policy, public security, public health or the protection of the environment and proportionate. Furthermore, Article 16(2) introduces a non-exhaustive list of requirements which in principle cannot be imposed by a

⁶⁷ Handbook on the implementation of the Services Directive (2007), p. 32

⁶⁸ Article 16 shall, according to Article 17, not apply to (1) services of general economic interest which are provided in another Member State, inter alia: a) postal services covered by Directive 97/67/EC, b) electricity services covered by Directive 2003/54/EC, c) gas services covered by Directive 2003/55/EC, d) water distribution and supply services and waste water services and e) treatment of waste, (2) matters covered by Directive 96/71/EC (posting of workers), (3) matters covered by Directive 95/46/EC (data protection), (4) matters covered by Directive 77/249/EEC (lawyers), (5) the activity of judicial recovery of debts, (6) matters covered by Directive 2005/36/EC (professional qualifications), (7) matters covered by Regulation (EEC) no 1408/71 (social security schemes), (8) matters covered by Directive 2004/38/EC (administrative formalities of competent authorities in Member States with which beneficiaries must comply), (9) possibilities to require VISA or residence permit for third country nationals, (10) matters covered by Regulation (EEC) no 259/93 (shipment of waste) and (11) copyright, neighbouring rights and matters covered by Directive 87/54/EEC and Directive 96/9/EC, (12) involvement of notaries, (13) matters covered by Directive 2006/43/EC (statutory audit of annual accounts and consolidated accounts), (14) registration of vehicles leased in another Member State and (15) rules linked to private international law.

Member State in case of temporary provision of cross-border services. The examples of requirements have, to a large extent, already been subject of case-law of the European Court of Justice and have been found to be incompatible with Article 56 of the Treaty. On this basis, there is a strong presumption that such requirements cannot be justified by one of the four public interest objectives (i.e. public policy, public security, public health and the protection of the environment) referred to in Article 16(3) since they will in general be disproportionate.⁶⁹

The following requirements are included in the list of Article 16(2):

- (a) an obligation on the provider to have an establishment in their territory;
- (b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;
- (c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider needs in order to supply the services in question;
- (d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
- (e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
- (f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;
- (g) restrictions on the freedom to provide the services referred to in Article 19 of the Services Directive.

If a Member State introduces requirements according to Article 16(1) and/or 16(2) they should be notified in accordance with Article 39(5) of the Services Directive.

3. Methodology

This evaluation is based on various sources of information such as the statistics from the notifications in the Internal Market Information System (hereinafter IMI) and the Commission assessment of the notifications coming in prior to the use of IMI as of 2014 (see for an explanation of the system under 2.2).

Furthermore, several discussions have taken place with Member States in the Expert Group on the Services Directive⁷⁰, providing information on for example the way in which national administrations are organised to fulfil the notification obligation, what type of instruments are in place to help such a process, how the process works in practice, why some of the Member States have never or only made a few notifications, whether Member States experience difficulties with the notification obligation and how they see the consequence of non-notification.

⁶⁹ Handbook on the implementation of the Services Directive (2007), p.39

⁷⁰ Expert Group on the Services Directive meetings of 13 March and 16 July 2015.

Also the Court of Auditors have examined the notification obligation as part of its assessment of the effective implementation of the Services Directive⁷¹.

The public consultation on the proposal to reform the notification procedure for services ran from 19 February until 19 April 2016 also provided input to this analysis. It was addressed to both stakeholders and administrations of the Member States at local, regional and national level (see Annex 2 for more details).

This evaluation investigates the functioning of the notification procedure set up by the Services Directive by analysing the Commission's five standard evaluation criteria (effectiveness, efficiency, relevance, coherence, and EU added value) through a set of questions answered below in section 5.

4. Implementation – state of play

The developments in respect of the notification process

Period 2009-2013

From the implementation date of the Directive end 2009 until the end of 2013, the obligation to notify materialised via a form to be filled in by Member States and to be sent together with a copy of the law, regulation or administrative provision by e-mail to a functional mailbox⁷² of the Commission.

The format of these forms have been discussed in the Expert Group on the Services Directive with the Member States.⁷³

Form A was used by the Member State for the notification of new requirements applicable to established providers and falling within Article 15(2) of the Services Directive.

Form B was used for the notification of new requirements covered by Article 16 of the Services Directive which Member States intend to apply to cross-border providers established in other Member States. This form allows compliance with notification obligations under Article 39(5).

Member States were requested to reply to the questions in terms of:

- Level at which the notified requirement is imposed (national, regional, local)?
- Date (or expected date) of entry into force
- Specific provision/article in the act that contains the notified requirement
- Service activity/ies to which the notified requirement applies
- Type of requirement (list of requirements stemming from Articles 15 and 16 was provided).
- Description of the notified requirement
- Indication of the justification(s)
- Detailed statement of ground

⁷¹ European Court of Auditors, Special report No 5/2016, "Has the Commission ensured effective implementation of the Services Directive?", adopted by Chamber IV on 3 February 2016.

⁷² GROW-SERVICES-NOTIFICATIONS@ec.europa.eu

⁷³ Expert Group on the Services Directive of 9 September 2009.

The form also provided the possibility to indicate whether in addition to being applicable to cross-border providers, the notified requirements also applied to established service providers and fell under one of the eight categories listed in Article 15(2) of the Directive. In that case Member States could specify under point 11 of form B. This would allow compliance, in these specific circumstances, with notification obligations under both Articles 39(5) and 15(7) of the Services Directive, thus a separate form A will not have to be completed.

Once received, the Commission took care of distributing the original notification via e-mail to all other the Member States, followed by an English translation. The system was only for the Commission and the Member States. External stakeholders were not involved in any of the states of the process.

An overview of the number of notifications received per Member State is provided in table 1.

Period 2014 and onwards

Since the beginning of 2014, the notifications are no longer received via e-mail, but Member States and the Commission use Internal Market Information system (IMI). The change came due to the entry into force of the IMI regulation⁷⁴, which introduced IMI for administrative cooperation between competent authorities of the Member States and between competent authorities of the Member States and the Commission necessary for the implementation of Union acts in the field of the internal market. The Annex to the regulation lists the notification obligation of the Services Directive as a provision on administrative cooperation in a union act that is to be implemented by means of IMI.

In comparison to the form used prior to IMI, the following additional information is requested from the Member States:

- Status of the act
- Reference to the legislation on the internet
- Whether the imposing authority is the sender of the notification
- Indicate whether it concerns a requirement effecting establishment only or establishment and/or freedom to provide services.
- Proportionality analysis

The notifying Member State directly uploads the notification into IMI. All other Member States and the Commission are informed via an automatic e-mail about this notification.

Member States and the Commission are also informed via e-mail of any subsequent document uploaded into the system (including translations).

Also for the notifications uploaded in IMI the Commission is providing an English translation and, if relevant, a translation of the comments made by the Commission and/or other Member

⁷⁴ Regulation (EU) No 1024/2012 of the European Parliament and of the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ('the IMI Regulation').

States and the reply from the notifying Member State to comments from the Commission and other Member States.

The IMI system closes the notification after 3 months from the date of the receipt of the translation. After closure of the notification it is not possible for Member States and the Commission to upload any other documentation related to the notification in the system.

External stakeholders have no access the notification procedure running via IMI.

An overview of the number of notifications received per MS is provided in table 1.

Member State	2010	2011	2012	2013	2014	2015	Total
Austria	1	14	11	6	7	1	40
Belgium	0	0	2	0	19	5	26
Bulgaria	1	0	1	3	2	0	7
Croatia	NR	NR	NR	0	61	0	61
Cyprus	1	2	4	0	6	2	15
Czech Republic	0	0	0	12	0	143 ⁷⁵	155
Denmark	1	1	2	0	6	2	12
Estonia	1	2	0	0	1	0	4
Finland	0	0	0	0	0	0	0
France	0	1	10	15	13	13	52
Germany	52	674 ⁷⁶	0	0	5	12	743
Greece	0	0	0	0	0	0	0
Hungary	4	1	7	11	22	14	59
Ireland	0	0	0	0	0	0	0
Italy	6	5	6	4	1	4	26
Latvia	1	0	0	3	12	2	18
Lithuania	0	5	23	0	1	0	29
Luxembourg	0	0	3	0	1	0	4
Malta	0	0	0	0	0	0	0
Netherlands	64	57	16	21	5	51	214 ⁷⁷
Poland	0	0	0	0	0	1	1
Portugal	0	0	1	0	0	6	7
Romania	0	0	1	0	1	0	2
Slovakia	0	0	0	0	0	0	0
Slovenia	0	7	1	0	3	0	11
Spain	0	1	1	0	8	0	10
Sweden	6	19	15	19	48	29	136
United Kingdom	1	0	1	0	3	2	7
Total	139	789	105	94	225	287	1639

Table 1 Number of notifications per Member State in the period 2010-2015.

⁷⁵ 127 notifications on the same issue: a prohibition of door-to-door sales of goods and services, notified by different municipalities.

⁷⁶ 620 notifications on either funeral services or cleaning services, notified by different municipalities.

⁷⁷ Some notifications concern the 'General Municipal Ordinance' or 'Building Ordinance' notified by different municipalities.

Results of the changes in use of system

As to the general amount of notifications received, no difference can be noted in respect of the change in the system used, going from forms being sent by e-mail to the use of IMI.

The statistics due show that IMI facilitates commenting, because after analysing all the notifications the Commission notes a substantial increase in the comments made both by the Member States and the Commission. Prior to IMI, the Commission only made one written comment and other Member States made only two (period 2010-2013) whereas since the introduction of the notification into IMI, the Commission has issued forty written comments and other Member States twenty-seven (years 2014-2015).

2.3 Practical arrangements of the notification obligation in the Member States

The notification obligation laid down in Article 15(7) and 39(5) as such does not have to be transposed in the respective Member States, due to the fact that the obligation is directed at them and does not create any additional right to others. That being said, Member States have made different arrangements within their government structures to fulfil the obligation to notify. Several Member States have appointed a central (contact) point within their government structure being responsible for the notifications or to function as a sort of check within the process (for example DK, HR, FR, IT, CY, LT, PT, SI, SK and SE). Only three of these Member States (DK, SE and SI) have decided to use the already existing contact point under the Single Market Transparency Directive 1998/34 (now Directive 2015/1535), the contact points of which are responsible for the obligation to notify regulations in the area of goods and information society services.

Other Member States have appointed several bodies/authorities being responsible for the notifications under the Services Directive (for example NL, MT, PL, RO, UK).

In the group of Member States with over 10 notifications in consecutive years most Member States have organised the notification obligation via a central contact point.

2.4 Treatment of the notification by the Commission

All notifications received are assessed by the Commission on their compatibility with EU law. In this respect no distinction is made between notification covered by the freedom of establishment or whether it concerns a notification related to the freedom to provide services. In case the Commission has concerns in respect of the compatibility with EU law or has questions on the notification as such, it will upload comments and/or questions in IMI. Such comments are also visible for the other Member States. The Commission works with the aim to assess the notification within one month after the date of the notification. In case of comments they should ideally be uploaded within two months of the date of the notification in order to give the notifying Member State enough time to respond.

According to the second paragraph of Article 15(7) for the freedom of establishment, the Commission, after the obligatory examination of the compatibility of any new requirements with Community law, where appropriate, is entitled to adopt a Decision requesting the

Member State in question to refrain from adopting them or to abolish them if already adopted.

Such an instrument is not available in respect of the measures regarding the freedom to provide services in Article 16. The notification obligation for these requirements in Article 39(5) remains silent on such an instrument. For these requirements the only possible action would be enforcement action.

5. Answers to the evaluation questions

5.1. Effectiveness

- *To what extent have the objectives been achieved?*
- *What have been the (quantitative and qualitative) effects of the intervention?*
- *What factors influenced the achievements?*

a) Achieved objectives and effects of the intervention

The objective of the notification procedure in Article 15(7) and 39(5) of the Services Directive is to improve the functioning of the Single Market for services by making sure that all new legal requirements imposed by Member States are non-discriminatory, proportionate and justified by public interest objectives and to prevent new barriers on the Single Market for services to be introduced. The notification obligation should allow both the Commission and Member States to assess whether the notified requirements fulfil the conditions of the Services Directive.

The Commission received a total of 1639 notifications since the implementation date of the Services Directive end 2009 until the end of 2015. Five Member States (FI, IE, EL, MT and SL) have never notified any requirements affecting the freedom to provide services and the freedom of establishment introduced after 28 December 2009. A considerable group of Member States (PL (1), RO (2), EE (4), LU (4), BG (7), PT (7) and UK (7)) have very few notifications.

During several meetings of the Expert Group of the Services Directive the Commission made detailed overview of the compliance of the Member States. Statistics per Member States were presented showing the amount of notifications⁷⁸. The Commission also asked specifically those Member states with no or a limited amount of notifications to explain in a meeting of the Expert group to address the reasons behind the low number of notifications⁷⁹.

The report of the Court of Auditors refers to the lack of compliance by some of the Member States⁸⁰.

This is in contrast to those Member States with over ten notifications in consecutive years (HU, NL and SE). Until now, no convincing argument has been given by those Member

⁷⁸ Expert group on the Services Directive meetings of 23 April 2013, 25 March 2014 and 25 January 2016.

⁷⁹ Expert group on the Services Directive meeting of 13 March 2015.

⁸⁰ Paragraph 61 of the European Court of Auditors, Special report No 5/2016, "Has the Commission ensured effective implementation of the Services Directive?", adopted by Chamber IV on 3 February 2016.

States with a low amount of notifications or no notification at all. It is clear that different degrees of regulatory intensity cannot be the reason behind this lack given that some of the top-notifying Member States (SE, NL) are countries with highly liberalised services markets. The question has been addressed to Member States during a meeting of the Expert Group on the Services Directive⁸¹, but none of these Member States have been able to explain the differences between them and the other Member States. What could be behind the absence of notifications is the lack of awareness of the existence of the notification obligation especially at local and regional level in the administration and the lack of consequences. As will be further explained under part b2 (Factors impeding the effectiveness of the notification procedure), the absence of a clear legal consequence when the requirement has not been notified does not help the fulfilment of the notification obligation.

In several ongoing enforcement cases the Commission became aware of the fact that the requirements at stake in the particular case being in conflict with the obligations of the Services Directive had also not been notified despite the obligation in the Services Directive. In such cases, the Commission has added the failure to notify as a separate ground for action.

From 2009 to 2015 the Commission had to initiate 30 EU Pilot cases⁸² (based on complaints, own-initiative from the Commission or notifications) against Member States concerning regulatory measures covered by the Services Directive they newly introduced and which the Commission suspected not to be compatible with EU law. This represents 27% of all EU Pilot cases initiated by the Commission over this period related to the Services Directive. The amount of cases based on newly introduced regulatory measures is rising, representing in 2015 40% of all EU Pilot cases related to the Services Directive.

The Commission has undertaken several studies on the effect of the Services Directive on the Single Market and its potential in terms of economic growth. Given the indirect effect on the Single Market the notification procedure has in this respect (it effects the requirement being subject of the notification) it is difficult to establish the exact part of the growth potential which could be attributed to the notification procedure.

b) Factors influencing the functioning of the notification procedure

Several factors influence the effectiveness of the notification procedure.

b1) Factors improving the effectiveness of the notification procedure

Organisation and actions at Member States' level

⁸¹ Expert group on the Services Directive on 13 March 2015.

⁸² EU Pilot is a Commission initiative aimed at asking Member States to answer questions and to find solutions to problems concerning the application of Union law. It is supported by an online database and communication tool. Through the dialogue in EU Pilot, the Commission and Member States solve problems more quickly and compliance with Union law obligations is achieved to the benefit of the public and businesses.

The transposition of Article 15(7) and 39(5) of the Services Directive required Member States to organise at national level the responsibility to notify in order to fulfil the obligations of the Services Directive. Following questions asked in the Expert Group on the Services Directive, it is clear that Member States have chosen different ways in how to take care of the notification obligation. Member States have appointed a central (contact) point within their government structure being responsible for the notifications or to function as some sort of check within the process by using existing structures or designate a particular ministry to be responsible for the job.

Other Member States have appointed several bodies/authorities being responsible for the actual notification. Commission analysis shows a positive correlation between the establishment of one central contact point and the number of notifications transmitted. That said, the Netherlands has decided to have the responsibility to notify placed upon all Ministries, provinces and municipalities and is among the top notifying Member States.

Depending on the way in which it is organised, one or more staff members will take care of the actual notification, but it will be the authority in the Member State responsible for the proposed measure to indicate the notification obligation.

Examples of good practices:

Hungary: The Ministry of Justice is responsible for the Services Directive and, more specifically, the notification obligation. The Ministry has set up a "Services Notification Center" which is also the national IMI-coordinator. In addition, there is one Services Directive "Contact Point" in every Ministry which is registered in IMI. One of the main tasks of the Center is to assess and approve notifications/draft legislation prepared by other Ministries. The Ministry responsible for the draft legislation will then upload the notification in IMI and the IMI coordinator (Ministry of Justice) approve and forward the notification to the Commission. The Services Notification Center receives all notifications from other Member States and distributes them to the relevant Ministries. The Ministries are encouraged to follow the notifications and learn from other Member States.

Sweden: The Ministry for Foreign Affairs has the overall responsibility for notifications on services based on laws and regulations issued by the Government, and notifications according to the Transparency Directive. It has a coordinating role and an obligation to inform and advice the other Ministries about the notification obligation under the Services Directive and the Transparency Directive. All other Ministries have an obligation to consult the Ministry for Foreign Affairs if legal proposals may have an impact on the Single Market to ensure that new or changed provisions are in compliance with EU law and that Sweden fulfils the notification obligations. Once the notifications have been finalised; the Ministry for Foreign Affairs send the notifications to one of its authorities – the National Board of Trade – which is responsible for uploading the notifications in IMI and TRIS. The National Board of Trade is responsible to inform and advice other authorities and municipalities about the notifications obligation under the Services Directive. In addition, the authority is responsible to submit notifications according to the Services Directive and the Transparency Directive in IMI and TRIS.

Further to the structure chosen, Member States have introduced different means to guide the fulfilment of the notification obligation. Such additional instruments range from flow charts, counselling, annual meetings, circulars, trainings, workshops, step-by-step guidance, website and a toolkit. Given the various instruments on offer to guide the notification obligation and with all Member States having introduced such additional means, no specific conclusion can be drawn as to whether a particular instrument works better than another one. The Commission does have the impression that if Member States have opted for a range of instruments overall a higher number of notifications can be detected. Member States which have only limited instruments in place are among the Member States with no or with a small amount of notifications (for example MT, PL, UK, RO, PT).

The use of IMI

The use of IMI for the notification obligation under the Services Directive is working very well and considered a useful communication vehicle for the obligatory notifications. Both Member States and the Commission appreciate the quick adaptations of IMI to the particular needs of the users and to the technical developments. Overall it is considered to be a user-friendly tool.

Although no increase in the amount of notifications has been detected since the use of IMI, what could be established is that more comments have been made by Member States and the Commission. Overall the administrative procedure has been improved due to the use of IMI.

b2) Factors impeding the effectiveness of the notification procedure

On the basis of Commission assessments of the statistics of the existing notification procedure, feedback from Member States notifying national regulations under this procedure and the public consultation, the following additional issues have been identified as impeding the effectiveness of the notification procedure:

Possibilities for Member States, the Commission and stakeholders to intervene in a proactive manner prior to a national regulation being adopted are limited

There is no obligation for Member States to notify regulations in draft form⁸³. In practice, from the 1639 notifications received via the Internal Market Information system and via the functional mail box during the entry into force of the Services Directive and the end of 2015, 1426 referred to final regulation (which could mean they had already been adopted) and 213 to draft regulation (which means either not yet adopted or not yet into force). Furthermore, the notification obligation in the Services Directive does not prevent Member States from adopting notified legal requirements. On the contrary, Article 15(7) even states that the '*[...] notification shall not prevent Member States from adopting the provision in question.*'

As a result, in most cases the possibilities for the Commission and other Member States to intervene are limited to enforcement action (EU Pilot, infringement proceedings). Notifying

⁸³ The only Member State with the obligation in national legislation is Hungary. That being said, also Member States without the specific obligation in the law notify draft measures.

Member States are not obliged to take comments which the Commission or other Member States issue in response to a notification into account. In case the notified measures is not in conformity with EU law, the Commission will have to initiate legal proceedings or, where the notified legal requirements concerns establishment, it could adopt a formal Decision requesting the Member State in question to refrain from adopting the requirement or abolish it.

The results of the public consultation show wide support (69%) for improvements of the current system with EU action, more specifically through obligation to notify draft legislation and the introduction of a clear timeframe to ensure that all stakeholders can react to the draft law.

The notification procedure for goods and information society services under Directive 2015/1535/EC (former Directive 98/34.) contains the obligation to notify draft legislation. This system is also transparent, in that external stakeholders, such as business and NGO's can access the notifications.

The result of these features is that for instance in 2014, the Commission issued 62 detailed opinions on draft measures notified whereas in the end it opened only one infringement proceeding against a Member State because of national technical regulations adopted in breach of the provisions of Directive 98/34/EC (now Directive 2015/1535/EC). This seems to suggest that if Member States still have time to modify their legislation following comments from the Commission and the Member States expressed in detailed opinions, afterwards only limited enforcement action is needed to address the infringement of EU law.

Notifications are not transparent to stakeholders and the business community at large. The current system used for the notifications, IMI, does not grant third parties access to the contents of the notifications (contents of national rules, any explanation by a Member State). The outcome of the public consultation showed that 70% of the respondent considered this a shortcoming. Furthermore, in its Conclusions on Single Market Policy, the Council of the European Union called upon the Commission and Member States to make notifications public and transparent for all the stakeholders as is the case for goods.

During the discussions on the use of an online tool in 2011 the transparency issue has been subject to a consultation among the experts of the Member States attending the expert group on the Services Directive⁸⁴. Based on the results, 12 Member States were in favour of making the notifications public and 11 against (remaining Member States did not reply to the consultation), the decision was taken not to make notifications available to the public.

⁸⁴ E-mail sent to the members of the Expert Group on the Services Directive on 8/7/2011 containing a document on the transparency issue with the following questions:

1. Do you agree that comments made by another Member State or the Commission in respect of notifications sent by your Member State be made available to all the other Member States and the Commission?
2. Do you agree that the Commission informs the other Member States about the start of formal infringement proceedings (such as opening of an EU Pilot case) against your Member State pursuant a notification?
3. Do you agree that comments made by another Member State or by the Commission in respect of notifications sent by your Member State be made public?
4. Do you agree to make the notifications sent by your Member State available to the public?

Therefore, service providers do not have the possibility to be informed via notifications from other Member States of draft requirements and to comment on them. They risk being confronted with new regulation "on the ground".

In contrast, the system under the Transparency Directive is transparent, in that external stakeholders, such as business and NGO's can access the notifications. In 2014, 217.242 searches in the Technical Regulations Information System database (TRIS)⁸⁵ used to implement the Single Market Transparency Directive were noted and the subscribers to the mailing list nearly reached 5000. On a yearly basis between 300 and 400 comments from stakeholders on the notifications are received. This shows a considerable interest from those outside the procedure as such in the notifications.

The limited possibilities for the Commission, Member States and stakeholders to intervene on the introduction of requirements which might not be in conformity with the Services Directive affects the effectiveness of the notification obligation. It is currently not fulfilling its roles as initially intended by the legislators in that is an effective control mechanism which prevents the adoption of disproportionate requirements. This becomes more apparent in comparison with Directive 2015/1535, where certain features, such as the obligation to notify draft regulation, result in a more upfront control of regulations.

Incoherent and inadequate Decision powers

The Commission shall in respect of requirements concerning the freedom of establishment, within a period of 3 months from the date of receipt of the notification examine the compatibility of any new requirements with Community law. In case the Commission comes to the decision that the notified requirement affects the freedom of establishment and is not in line with the requirements of the Services Directive, it may on the basis of Article 15(7) adopt a Decision requesting the Member State in question to refrain from adopting the notified requirements or to abolish them. The Decision is to be interpreted as a Decision referred to in Article 288 TFEU: "*A decision shall be binding in its entirety. A decision which specifies to whom it is addressed shall be binding only on them.*"

The Commission has until today not made use of this possibility, because the period of 3 months counting from the receipt of the notification to the adoption of a Decision is too short for the Commission to hold a meaningful dialogue with the respective Member States, something that is essential before proceeding to prepare the adoption of a Commission Decision. The Commission needs in general approximately one month to assess the requirement notified on its compatibility with EU law and the Member State needs to be given at least one month to be able to examine the Commission's assessment and react to it, with further discussions to follow prior to the Commission being in a position to adopt a legally binding Decision.

⁸⁵ The Technical Regulation Information System contains all the notified technical regulations. Interested parties (stakeholders) can search in this database for the notifications under Directive 2015/1535.

In respect of the requirements affecting the freedom to provide services, Articles 16 and 39(5) do not contain a similar possibility for the Commission to adopt a Decision in which it requests the Member State from refraining to adopt or abolish the requirement it notified. As has been explained under 2.1, no notification obligation was foreseen for the requirements of Article 16, which resulted in a last moment action to insert a notification obligation for cross-border service provision in Article 39(5). At that moment no in-depth reflection took place as to align it with obligation already present in Article 15(7).

The only possible way for the Commission to intervene in case of incompatibilities with Community law is to start an enforcement action (EU PILOT and/or infringement proceedings).

The statistics of the total notifications done by the Member States show that 226 of the notifications concern establishment whereas 1413 concern temporary cross-border services or both temporary cross-border services and establishment cases. At least 86% of the total amount of notifications received concern requirements which affect temporary cross-border provision of services, where the possibility to issue a Decision is not available. An EU PILOT or infringement proceedings is the only way to address the possible infringement of the Services Directive.

The applicable timeline for the Commission to adopt a Decision and the fact that the Commission can only issue a Decision in respect of requirements affecting the right of establishment constitutes a third set of factors limiting the effectiveness of the existing notification procedure.

Lack of thorough proportionality assessments

The Services Directive requires that rules affecting services are non-discriminatory, necessary and proportionate. In order to determine whether a requirement is proportionate it is necessary to take into account less restrictive alternatives. In addition, the assessment of proportionality requires that due consideration is taken of the global environment in which the service activity takes place. If other mechanisms and safeguards are in place which seek to meet the same public interest objectives, these should be taken into account when determining the need for requirements and if so the restrictiveness of those requirements.

Article 15 of the Services Directive requires the fulfilment of the proportionality test for those measures affecting the freedom of establishment and Article 16 and 39(5) does the same for requirements affecting the freedom to provide services.

It should be stressed that the current notification procedure does not contain a clear obligation to provide a detailed proportionality assessment; neither does it provide specific criteria to conduct such an analysis. The obligation to assess the proportionality of the measure stems from Articles 15 and 16 as such. Member States have to, as part of the notification procedure, indicate whether the measure is proportionate. For this, IMI contains a specific field (called 'proportionality assessment') and it is necessary to complete all the fields in order to finalise a notification.

The obligation to complete the 'proportionality assessment' field in IMI does not necessarily lead to good quality proportionality assessments, given that a single phrase suffices to fulfil the obligation in IMI. Therefore the quality among the Member States and per notification differs considerably. In approximately 50% of the notifications the proportionality assessment is lacking due to the fact that the information provided does often not go beyond the standard phrase that the measure is proportionate since the requirements are suitable for achieving the desired objective and do not impose excessive restrictions.

On the basis of newly introduced requirements by the Member States, where the Commission questions the proportionality, the Commission doubts whether the application of the principle is done correctly by the Member States (examples: territorial restrictions on driving schools, requirements on number of employees and the place where the activity takes place for internet travel agencies and requirements to be registered in the trade register by means of establishment or a legal representative). Some of these requirements have been notified in which case the Commission has expressed its doubts about the proportionality element of the notification via comments it has sent in IMI. In case the requirement has not been notified, the matter is subject of enforcement proceedings. Furthermore the Council has called specifically for Commission guidance on proportionality⁸⁶.

In addition to a considerable amount of Court jurisprudence on proportionality, the Commission has used meetings of the Expert Group of the Services Directive⁸⁷ to discuss individual notifications with a focus on proportionality, in order to help the Member States to make such an assessment in individual cases. Notifications to be discussed were selected on the basis of examples of good or bad proportionality assessments. The continuous call from the Council for guidance on proportionality shows that Member States consider these discussions not enough. However, given that the proportionality assessment needs to be done on a case by case basis providing general guidance is very difficult⁸⁸.

The effectiveness of the notification procedure suffers from the difficulties Member States seem to have to make a proper proportionality assessment and the absence of the obligation for Member States to provide detailed information on the proportionality assessment as such, due to the fact that based on what is provided now, it is very difficult to examine the different elements taken into account by the respective Member States.

Legal effect of non-compliance with the notification obligation is not clear

⁸⁶ See for example, Competitiveness Council conclusions adopted 2-3 December 2013 and conclusions adopted 2 March 2015.

⁸⁷ Expert group on the Services Directive meetings of 25 March 2014, 21 November 2014, 13 March 2015, 16 July 2015 and 25 January 2016.

⁸⁸ Specific guidance is foreseen in the announced Communication on the collaborative economy and an analytical framework on proportionality is under development for professional qualifications.

The statistics reported on at the beginning of this section show that some Member States have never notified and some have only a few notifications. Although it is impossible for the Commission to estimate how many more notifications it should have received, it is clear that if several Member States notify the implementation of an EU directive in a given field with consequences under Articles 15 and/or 16 of the Services Directive, it raises the legitimate question why other Member States do not consider this implementation to have an effect on the requirements of Articles 15 and/or 16 of the Services Directive, because they do not notify the measures they have implemented.

Under the existing rules, the legal consequences of a failure to notify are unclear. The Services Directive remains silent as to what the possible consequence could be. Directive 2015/1535 does not contain a special provision in terms of possible legal consequences of a measure not being notified either. However, the Court of Justice in its ruling in case C-194/94 concluded that a national provision which is not notified under the Directive while it should have been can be declared inapplicable to individuals by national courts. This could also be the case when a Member State adopts a regulation in breach of the obligation to respect the standstill period (C443/98). The Court's ruling took into account the particular features of Directive 1998/34 (predecessor of Directive 2015/1535), namely the obligation to notify draft legislation and the presence of a standstill clause which does not allow a Member State to adopt the measure during the notification process.

The Commission can, as part of an EU PILOT or infringement proceedings, add the fact that the notification obligation has not been fulfilled as a separate ground in the proceedings, but there exist until now no case law of the Court of Justice explaining what the legal consequence could be. As a result of the absence of clear legal consequences of not-notifying, Member States compliance with the notification obligation raises questions.

Conclusion

The objective of the notification obligation of the Services Directive has not been reached because it currently does not fulfil its role as initially intended by the legislators of a mechanism that effectively prevents the adoption of unjustified and disproportionate requirements that are not in compliance with the Services Directive. The effectiveness of the notification procedure is limited by a number of elements described in this section, hampering the objective of the Services Directive to establish more competitive and integrated services markets. Not all Member States comply with the notification obligation, in particular due to the absence of clear consequences of non-compliance.

Other factors impeding the optimum functioning of the notification procedure are the lack of transparency, which results in limited influence of external stakeholders. Especially compared to the Single Market Transparency Directive where on average 300-400 comments from external stakeholders are received on a yearly basis, transparency is completely lacking in the notification obligation of the Services Directive.

Most notifications concern already adopted measures, limiting severely the effectiveness of the notification procedure. Enforcement action is very often the only follow-up available for the Commission to intervene.

Trying to achieve compliance via detailed presentations on Member States performance in respect of compliance with the notification obligation or detailed discussions in respect of proportionality in the Expert Group of the Services Directive has not led to the desired results.

5.2. Efficiency

- To what extent are the costs involved justified, given the changes/effects which have been achieved?

- To what extent has the intervention been cost effective?

- If there are significant differences in costs (or benefits) between Member States, what is causing them?

The Commission has requested during a meeting of the Expert Group on the Services Directive information from the Member States in terms of time spent per notification and the cost attached to this (FTE)⁸⁹. Unfortunately, Member States were unable to provide such information due to the fact that the task to notify is part of officials' total work package and therefore difficult to separate in terms of time spent.

A more recent call for information in respect of the administrative costs to several Member States⁹⁰ provided information in terms of the hours spend per notification and the level of official occupied with the notifications. On average 12 working hours are needed in order to comply with the notification obligation as such (procession the notification and uploading the information into IMI, details on these calculations are presented in Annex 4 Evidence overvie attached to the Impact Assessment). This entails the necessary coordination in relation to the data content and the content of the documents to be uploaded, meeting the experts in charge of the legislation in the course of fulfilling the notification obligation, uploading the documents with a prior check of uploaded data before approval and informing the competent authority on the fulfilment of notification and updating registry on notifications.

In case comments are received from other Member States or the Commission an additional 8 working hours are necessary in terms of analysing its content in order to determine the competent national authority, forwarding it to competent authority, coordination of the content of the answer to the comments, uploading the documentation, informing the competent authority and updating registry on notifications.

⁸⁹ Expert group on Services directive meeting of 16 July 2015.

⁹⁰ Sweden, United Kingdom, Portugal, Netherlands, Hungary, Poland and Germany.

Notifications are in general dealt with by university-trained administrators, which leads with an average labour cost of € 32,1 per hour⁹¹, to an administrative burden of € 385,20 per notification.

The benefits for Member States of the notification procedure are two-fold. Indirectly it intends to prevent the introduction of measures which are incompatible with the Services Directive. This should lead to the creation of a Single Market for services. Such a Single Market would be beneficial for all Member States in that it offers their service providers the opportunity to go cross-border and it benefits consumers with more choice in terms of service providers.

More directly, a notification procedure could prevent lengthy infringement proceedings between the Commission and the Member States. In the latest version of the Single Market Scoreboard 10/2015, the average duration of infringement proceedings was 29.1 months.

The introduction of the use of the Internal Market Information system (IMI) led to a better overview of the notifications for both the Member States and the Commission, which resulted in an increase of comments made. Although the Commission still needs to translate the incoming notifications, its workload has been reduced because it is no longer necessary to send the notifications via e-mail. Member States are now informed automatically about new notifications and when documentation is uploaded.

Overall the perception of Member States and the Commission is that IMI facilitates the communication of the notification process. Member States are overall satisfied with the use of IMI. The use of the system is a subject of ongoing discussions with the Member States to improve the system.

It has been established in section 3 that the notification procedure is not effective; the objectives have not been fully reached and despite efforts undertaken during expert group meetings to particularly address the notification obligation (statistics and individual notifications). Therefore, no matter how Member States have chosen to organise their fulfilment of the notification obligation, assessing the efficiency is difficult. Member States perception tends towards the fact that administrative burden is agreeable and thus, in its present form, the costs, taking the benefits of the notification procedure as such into consideration, are acceptable. The administrative burden does not seem to be the factor which prevents Member States from notifying.

5.3. Relevance

<p><i>-To what extent is the notification procedure in Articles 15(7) and 39(5) still relevant?</i> <i>-How well do the original objectives still correspond to the needs within the EU?</i></p>
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The objective of the introduction of the notification obligation in the Services Directive was to prevent Member States from imposing new legal requirements which are non-

⁹¹ 2006 Mean Hourly Earnings By Main Economic Activity And Occupation* + adjustment to 2010 Prices + Non wage Labour Costs + 25% Overhead ESTAT: Structure of Earnings Survey - NACE rev 1.1: C to O not L.

discriminatory, proportionate and justified by public interest objectives. Such requirements could hamper the functioning of the services single market. A well-functioning Single Market could lead to economic growth and job creation in the services sector, which will benefit Member States' economies. This objective still remains valid.

It is important for external stakeholders, being business organisations and individual services providers across the Single Market to be aware of the requirements Member States intend to introduce, regardless of whether they are compatible with the Services Directive. Services providers need to be aware of obligations they face when seeking to do business across borders. In that respect it is important to know the full extent of the requirements to be fulfilled in order to be able to make the proper assessment whether to do business in another Member State and what form is best to be chosen. Business organisations need such information to be able to properly inform their members and provide the correct guidance.

70% of the respondents to the public consultation and 80% of the business community consider increased transparency of the notification procedure vis-à-vis of non-institutional stakeholders very important.

In addition new business models are emerging, which until now have seen a very different legal reaction from the Member States. The collaborative economy initiatives in the areas of transport and tourism are forbidden or limited in some Member States, whereas in other Member States they are accepted and considered to be covered by the existing legal framework (with varying degrees). Developments in the area of energy-supplies, in particular in relation to authorisation schemes in place in various Member States are relevant in respect of the Services Directive. These examples show that the Single Market for services is constantly developing and developments are not the same in all Member States. This will have a negative effect on the overall functioning of the Single Market for services which shows the need for monitoring from the Commission, Member States and stakeholders.

The need to have a notification obligation for the services sectors remains highly relevant, given that the necessity to ensure the application of the Services Directive is still relevant today. Service providers across Europe still need to be aware of the obligations which are imposed on them when they want to do business in other Member States. Providing information on the requirements present in the Member States remains necessary.

-How well adapted is the intervention to subsequent technological or scientific advances?

The intervention due to being a notification procedure, is by nature technologically neutral.

5.4. Coherence

-To what extent is the intervention coherent internally?

The scope of requirements covered by the current notification obligation is limited

The current notification obligation covers requirements under Articles 15 (establishment) and 16 (temporary provision of cross-border services) of the Services Directive. The Services Directive also covers other type of requirements:

- authorisation schemes;
- requirements relating to the obligation to exercise a given specific service activity exclusively or which restrict the exercise jointly or in partnership of different activities;
- requirements to have professional liability insurance.

These requirements are currently not covered by the notification obligation and are therefore not notified by the Member States. Member States however also need to assess whether such requirements are justified and proportionate. Furthermore, authorisation schemes applicable to service providers wishing to establish in a Member States have to fulfil detailed criteria according to Articles 9-14 of the Services Directive, e.g. ensuring recognition of equivalent controls which the service provider already has been subject to criteria on duration of the authorisation and on the selection among several candidates. However, since authorisation schemes on establishment are not covered by the notification obligation in Article 15 the Commission and Member States may not intervene and possibly prevent the introduction of a scheme which does not fulfil these criteria.

As a result, the Commission and other Member States are unaware of the presence of certain requirements which could also result in services markets being restricted and difficult to access by local and foreign services providers.

Examples of enforcement action from the Commission on such requirements are:

- the ban for an accountant to also function as a real estate agent, insurance broker or to perform financial activities;
- an authorisation system which obliges customers to use the services of the authorised chimney sweeper in their district and this chimney sweeper has an exclusivity right to perform his services in a designated area.

Costly and complex enforcement action on these requirements could potentially have been avoided had they been subject to a dialogue between the notifying Member State and the Commission and other Member States prior to their adoption.

There is also incoherency in respect of the follow-up given in respect of a notification, i.e. whether the Commission can adopt a Decision, depending on whether the measures effects the freedom of establishment or the freedom to provide services, which has been analysed under effectiveness.

The current the scope of the notification obligation is limited. Only the requirements covered by Articles 15 and 16 need to be notified. This despite the fact that the Services Directive also deals with other requirements which have an impact on service providers wanting to go cross-border. In addition examples exist of enforcement action necessary to address the possible incompatibility of these requirements which the Services Directive. This makes the intervention internally not coherent.

- *To what extent in the intervention coherent with other interventions with similar objectives (notification obligation)?*

Notification obligation for goods and information society services: Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 lays down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (former Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services).

The 2015/1535 notification procedure allows the Commission and the Member States of the EU to examine the technical regulations Member States intend to introduce for products (industrial, agricultural and fishery) and for Information Society services before their adoption. The aim is to ensure that these texts are compatible with EU law and the Internal Market principles. Directive (EU) 2015/1535 applies to all draft technical regulations, which include technical specifications, other requirements, rules on services and regulations prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider. As regards services, the Directive applies only to Information Society services defined as any service provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.

The system used for this notification obligation is transparent in that external stakeholders can access the notifications made by the Member States.

The Services Directive in the last paragraph of Article 15(7) explains that the notification of a draft national law in accordance with Directive 98/34/EC (replaced by Directive 2015/1535) shall fulfil the obligation of notification provided for in the Services Directive.

Reporting obligation professional qualification: Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') provides for an obligation for Member States to report any change to the list of existing regulated professions, specifying the activities covered by each profession, and a list of regulated education and training, and training with a special structure, referred to in point (c)(ii) of Article 11, in their territory which it provided by 18 January 2016 (Article 59(1)). In paragraph 5 of Article 59 subsequently places upon Member States the obligation to provide information on the requirements they introduced after 18 January 2016 in respect of the requirements they maintained, within six months of the adoption of the measure.

In the Single Market Strategy it has been announced that the Commission will set out an analytical framework for Member States to use when reviewing existing professional regulations or proposing new ones to provide a methodology for comprehensive proportionality assessments of professions regulations, which should help them to demonstrate that public interest objectives cannot be achieved through other.

The notification obligation of the Services Directive runs parallel to the notification obligations presented in the area of goods and information society services and to the reporting obligation placed upon Member States in the area of professional qualifications. In case of a possible overlap with notifications taking place under Directive 2015/1535, the Services Directive provides for a mechanism to avoid double notifications.

- To what extent is the intervention coherent with wider EU policy?

The Single Market Strategy (SMS)⁹² highlighted the fact that the Single Market needs to be revived and modernised in a way that improves the functioning of the markets for products and services and guarantees appropriate protection for people. This Strategy aims to achieve that. It is made up of targeted actions in three key areas: (1) creating opportunities for consumers, professionals and businesses; (2) encouraging and enabling the modernisation and innovation that Europe needs; (3) ensuring practical delivery that benefits consumers and businesses in their daily lives.

Effective compliance is essential to deliver the opportunities and benefits of the Single Market. End-2015 12 infringement proceedings concerning the Services Directive were pending. On average, national administrations, with the help of the Commission, need almost 30 months to resolve an infringement proceeding.

Improving the delivery of the Services Directive by reforming the notification procedure is one of the initiatives falling within the need to provide a practical delivery.

The SMS has identified reforming the notification procedure of the Services Directive as a need to improve the delivery of the Services Directive and therefore the improvement of the services markets. The strategy announced action to fulfil this need. The objective of notification procedure of the Services Directive is coherent with the objectives of the recently launched initiative.

5.5. EU added value

- What is the additional value resulting from the EU intervention, compared to what could be achieved by Member States at national level?

-To what extent do the issues addressed by the intervention require action at EU level?

The Services Directive gives Member States the possibility to introduce requirements which affect the freedom of establishment and the freedom to provide services. However, in order to

⁹² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Upgrading the Single Market: more opportunities for people and business', COM(2015) 550 final, 28.10.2015, <http://ec.europa.eu/DocsRoom/documents?locale=en&tags=single-market-strategy-2015-communication>

avoid these requirements creating barriers for service providers, the Services Directive obliges Member States to ensure such requirements to be proportionate and non-discriminatory, justified by an overriding reason relating to the public interest.

The notification obligation in the Services Directive enables the Commission and Member States to examine whether the requirements notified are compatible with the Services Directive. Considering the impact such measures have on service providers, both national and in cross-border situations, it is of the utmost important that such measures are verified. In particular given that the services market in Europe lags behind in terms of intra-community trade.

If no notification obligation would be present in the Services Directive, the assessment in respect of the compatibility of the requirements a Member States wishes to introduce with the Services Directive would be left to the respective Member State. The current amount of Member States' and Commission's comments on notifications plus the ongoing infringement proceedings based on notifications and those concerning non-notified measures show the EU added value in ensuring national measures comply with the Services Directive.

Considering that services are part of the Single Market, there is an EU added value due to the necessity to prevent the adoption of unjustified barriers preventing service providers from benefiting from the freedom of establishment and freedom to provide cross-border services.

6. CONCLUSIONS

The evaluation has shown that the existing notification procedure of the Services Directive is not an effective and efficient tool to achieve the pursued objectives. Several factors contribute to this: an unclear and non-transparent procedure under which most notified measures are de facto already adopted, Decision powers are incoherent, a lack of information on proportionality assessments, important regulatory requirements are not covered by the notification obligation, and unclear legal effects of non-compliance with the notification obligation. Above all, Member States do not consistently comply with the notification obligation. However, the need for a notification obligation remains highly relevant, and coherent with other EU policy actions. With the existing notification procedure failing to reach its objectives, EU action is considered necessary to address identified shortcomings to turn the notification procedure into an effective and efficient instrument for a better application of the existing Services Directive.

9.6. Annex 6 : Glossary

For the purposes of the Impact Assessment on notifications by Member States of new regulatory requirements on services the following definitions shall apply:

- **'Service'** means any self-employed economic activity, normally provided for remuneration, as referred to in Article 57 of the Treaty. It covers for example retail of goods and services, leisure services, services provided by architects and engineers, construction services such as installations and maintenance of equipment, food services such as hotels and restaurants, and leasing services.
- **'Notification'** means process by which the Member States communicate to the Commission information regarding new requirements, including the communication of draft acts and information on proportionality assessment of those requirements, with the view of their preventive assessment by the Commission and other Member States.
- **'Draft act'** means a text laying down an authorisation scheme or a requirement, formulated with the view of having it enacted as a law, regulation or administrative provision of a general nature, the text being at the stage of preparation at which substantial amendments can still be made by the notifying Member State
- **'Requirement'** means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements.
- **'Overriding reasons relating to the public interest'** means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives.
- **'Proportionality assessment'** means information provided by a Member State outlining the public interest objective pursued by the Member State when adopting a requirement and explaining how the given requirement is suitable for securing the attainment of that objective and does not go beyond what is necessary in order to attain it, considering other possible policy options.
- **'Member State authority'** means a body or authority which has a supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, including courts acting as such, professional bodies, and those professional associations or other professional organisations which,

in the exercise of their legal autonomy, regulate in a collective manner access to service activities or the exercise thereof.

- **'Commissions' Decision'** means a Decision referred to under the Article 288 TFEU

- **'Internal Market Information System (IMI)** means the electronic tool provided by the Commission to facilitate administrative cooperation between competent authorities of the Member States and between competent authorities of the Member States and the Commission, including notification procedure for services.