

Special Report

Has the Commission ensured effective implementation of the Services Directive?



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Special Report**Has the Commission
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(pursuant to Article 287(4), second subparagraph, TFEU)

The ECA's special reports set out the results of its performance and compliance audits of specific budgetary areas or management topics. The ECA selects and designs these audit tasks to be of maximum impact by considering the risks to performance or compliance, the level of income or spending involved, forthcoming developments and political and public interest.

This performance audit was produced by Audit Chamber IV — headed by ECA Member Milan Martin Cvikl — which specialises in auditing revenue, research and internal policies, financial and economic governance and European Union's institutions and bodies. The audit was led by ECA Member Neven Mates, supported by the Head of his private office, Georgios Karakatsanis and Marko Mrkalj, Attaché; Paul Stafford, Principal Manager; Wayne Codd, Head of Task; Sandra Dreimane, Jurgan Manjé and Wolfgang Stolz, auditors.



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Reply of the Commission

Glossary and abbreviations

CHAP: Commission complaint recording system

CPC: consumer protection cooperation

CSRs: country-specific recommendations

ECC-net: European consumer centres network

ESA: European System of Accounts

EU: European Union

EU pilot: EU pilot entails cooperation between Member States and the Commission on issues concerning the conformity of national law with EU law or the correct application of EU law. It is used as a first step with the aim of avoiding formal infringement proceedings if possible.

GDP: gross domestic product

IMI: internal market information system

MS: Member State

NACE Rev 2: statistical classification of economic activities in the European Community

PSC: point of single contact

Solvit: an alternative dispute resolution mechanism that has been set up to help EU citizens and businesses who have been denied the possibility to exercise their EU internal market rights because a public administration in another Member State has misapplied internal market legislation.

Sweeps: EU-wide screening of websites in particular online sectors

TFEU: Treaty on the Functioning of the European Union

I
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.

II
The Court's audit focused on the actions that the European Commission had taken to support the MSs in addition to an examination of the enforcement measures which should resolve the issues of non-compliance that restrict the proper functioning of the single market for services.

III
Most MSs did not transpose the Directive into national legislation on time. Nevertheless, throughout the process, the Commission monitored progress and provided support to help implement the Directive during and after transposition by organising the mutual evaluation process, as well as providing guidance during regular thematic expert group meetings.

IV
The mutual evaluations and performance checks in targeted sectors were useful for MSs but also demonstrated that a significant number of obstacles persisted. The Commission did not sufficiently follow up on these, in particular showing reluctance to challenge the justification of 'proportionality' used by some MSs to maintain non-compliant requirements.

V
The Commission has been only partially effective in ensuring the implementation of the Directive. Some years after the 2009 deadline for implementation, barriers to the internal market for services covered by the Directive remain, with the Commission reluctant to pursue legal proceedings, in part due to the length of the judicial procedure but also due to a lack of strength in the legislation. Measures such as Solvit and EU pilot have been employed to resolve problems, though without the speedy results required by both businesses and service recipients. Consumers do not yet enjoy the level of access to the internal market for services intended by the Directive.

VI
The potential economic benefit of full implementation of the Directive is still not known, though estimated output gains are frequently quoted to demonstrate the impact of reducing barriers. Due to the lack of appropriately detailed data on sectors affected by the Directive, there is still no reliable quantification of its impact.

VII

Amongst its recommendations, the Court in particular asks the Commission to be bolder in enforcing the Directive by:

- following up results from exercises such as the mutual evaluation and performance checks to resolve non-compliance and, along with MSs, addressing the most economically significant issues;
- starting EU pilot cases as soon as possible when an issue is identified — information on resolutions should be shared;
- reducing the length of infringement procedures as much as possible;
- referring important issues of non-implementation and incorrect application to the Court of Justice.

VIII

In addition:

- the Commission should draft guidance for transposition and issue it as soon as possible after adoption;
- the Commission should endeavour to ensure that the issue of data needed for assessing the impact of new legislation is addressed early in the legislative procedure;
- MSs should respect the points of single contact (PSCs) charter by, for example, making information available in multiple languages and enabling completion of all administrative steps necessary for provision of services across borders;
- 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;
- revision of the consumer protection cooperation (CPC) regulation should extend the scope to include Article 20 of the Services Directive.

01

The Services Directive (hereafter referred to as the Directive) was adopted in 2006 with the aim of reducing legal and administrative barriers to both providers and recipients of services. This should be achieved by MSs through legal transposition of the Directive, increased transparency and simplified procedures which would make it easier for businesses and consumers to provide or use services in the single market. It covers services which contribute 46 %¹ of EU GDP. All MSs had to implement it by the end of 2009.

02

The origins of the Directive go back to 1997 with the Commission's presentation of the action plan for a single market², calling for the removal of sectoral obstacles to market integration. Later papers focused specifically on services, arguing that a range of barriers in the internal market for services 'amounts to a considerable drag on the EU economy and its potential for growth, competitiveness and job creation'³ and eventually leading to a proposal in 2004 for a Services Directive (commonly referred to as the Bolkestein directive) which based free movement of services on the country-of-origin principle. This would imply that service providers should comply only with the regulations of the MS of establishment, regardless of where the service activity was performed. The country-of-origin principle was, however, abandoned at the request of the European Parliament⁴. The Services Directive⁵, adopted in 2006, introduced instead an obligation for MSs to 'ensure free access to and free exercise of a service activity within its territory' and 'not make access to or exercise of a services activity in their territory subject to compliance with any requirements ... that do not respect the principles of non-discrimination, necessity and proportionality'⁶.

03

The directive exempted a number of economic activities: non-economic services of general interest, financial services, electronic communications, temporary work agencies, healthcare, audio-visual services, gambling, activities connected with the exercise of official authority, social services, private security services, notaries and bailiffs and taxation. The Directive also does not affect MSs' social security legislation.

- 1 SWD(2014) 131 final of 31 March 2014, 'Work plan for reporting on national reforms in services markets'.
- 2 CSE(97) 1 final of 4 June 1997 Communication of the Commission to the European Council 'Action plan for the single market'.
- 3 COM(2002) 441 final of 30 July 2002, 'Report from the Commission to the Council and the European Parliament on the state of the internal market for services'.
- 4 COM(2013) 547 final of 24 July 2013, 'Proposal for a directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC'.
- 5 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36).
- 6 Article 16(1) of the Services Directive. Proportionality: the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

Introduction

04

Whereas the single market for goods is well developed in terms of intra-EU trade, it is widely recognised that the services market has not achieved its full potential, with a need for growth underlined by the European Parliament in the Corazza Bildt report⁷ on the internal market for services, and more recently in the Coffera-ti report⁸. The impact of successful implementation of the Directive is potentially very high, given the importance of services in the EU economy.

05

The deadline for transposition was set for 2009, but the Commission's Communication of 22 October 2013 stated that 'Europe is still falling short of its ambitions for the single market, in particular in key areas like the digital economy, energy and services'. In January 2014, the Council highlighted the need for coordination between the Commission and MSs to improve the way single market rules are implemented, applied and enforced⁹.

Objectives of the Services Directive

06

Full implementation of the Directive should remove red tape and significantly facilitate the establishment of service providers both at home and abroad. It should facilitate the cross-border provision of services. To help achieve this objective, MSs are required to set up PSCs, which should assist businesses by providing comprehensive information on the procedures necessary to offer and provide services and by allowing them to complete required formalities online. The directive also strengthens the rights of service recipients, particularly consumers, by prohibiting discrimination on the basis of nationality or residency.

07

The obstacles which the Directive is intended to eliminate include¹⁰:

- (a) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of their registered offices;
- (b) prohibition for a provider to have establishment in more than one MS or on being entered in the registers or enrolled with professional bodies or associations in more than one MS;

- 7 Corazza Bildt report on the internal market for services: state of play and next steps (2012/2144(INI)) (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0273+0+DOC+XML+V0//EN>).
- 8 Coffera-ti report on single market governance within the European semester 2014 (2013/2194(INI)) (<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0066+0+DOC+XML+V0//EN>).
- 9 Note on the Commission's 2014 work plan for reporting on national reforms in services markets, 5431/14, Compet 29, MI 51, Council of the European Union, Brussels, 22 January 2014.
- 10 As described in Article 14 of the Directive.

- (c) an obligation on the provider to have its principal establishment in the recipient territory;
- (d) conditions of reciprocity with the MS in which the provider already has an establishment;
- (e) conditions of passing an economic-needs or market-demand test for obtaining authorisation, or mandatory assessment of potential or current economic effects of the activity, or assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority;
- (f) involvement of competing operators, including within consultative bodies, in the process of granting authorisations or in the adoption of other relevant decisions of competent authorities;
- (g) financial guarantees, including any obligation to obtain insurance policies from a provider or body established in the recipient territory;
- (h) obligation to have been pre-registered for a given period in the registers in the MS or to have previously exercised the activity for a given period in their territory.

Roles and responsibilities

08

The directive sets out the roles and responsibilities of the Commission and the MSs.

09

MSs are responsible for transposing the Directive into their legislation and a number of tasks regarding the following-up of the transposition through mutual evaluation (see paragraphs 21 to 29) and for facilitating assistance to businesses by setting up PSCs. This is the first time that MSs have been legally obliged to put in place such e-government services and make them available for cross-border users.

10

Solvit is a dispute resolution mechanism that has been set up to help EU citizens and businesses who have been denied the possibility to exercise internal market rights because a public administration in another MS has misapplied internal market legislation. The system operates through a network of Solvit centres based in the national administration of each MS. Solvit is a practical alternative to formal problem-solving mechanisms such as national court procedures or complaints to the European Commission.

11

DG Internal Market, Industry, Entrepreneurship and SMEs (previously DG Internal Market and Services) coordinates the Commission's policy on the EU single market and seeks the removal of unjustified obstacles to trade, in particular in the field of services and financial markets. It should monitor how EU law is being implemented in practice, assist MSs and initiate infringement procedures when necessary.

12

The Court's main audit question was to assess whether the Commission ensured effective implementation of the Directive. This was broken down into two sub-questions, as follows.

- (a) Has the Commission adequately monitored and evaluated the implementation of the Directive?
- (b) Has the Commission sufficiently facilitated and enforced the implementation of the Directive?

13

Interviews and examination of files were carried out at the Commission. Moreover, the audit included fact-finding visits to a range of responsible ministries, business organisations, chambers of commerce and consumer bodies in seven MSs to collect information on remaining obstacles to trade and the effectiveness of existing mechanisms for their elimination. The Court selected MSs with significant cross-border trade: Germany, the United Kingdom, Austria, Slovakia, France, the Netherlands and Portugal. In addition, a number of European organisations were also consulted.

14

Following the end of the transposition process in 2009, the Commission tried to identify areas in which the Directive had not been implemented while also setting up several mechanisms to reduce the remaining barriers. However, barriers persist, some of which are due to vague drafting in the Directive. The Commission has been reluctant to take infringement measures partly due to a lack of solidity in the legal base and partly due to the length of time necessary for such a legal procedure to enforce compliance (several years even if exchanges are made on time).

15

It is not yet possible to evaluate the extent to which the expected economic benefits of the Directive have been realised. While the Commission has published estimates on potential GDP gains from the Directive, this was estimated on the basis of approximated data. The Commission did not initiate any systematic effort to compile data on cross-border trade in services covered by the Directive before 2014. Moreover, in 2015 these data remain unavailable, which makes it impossible to assess growth in cross-border services or increases in GDP arising from implementation of the Directive.

Transposition and monitoring of implementation

The Commission assisted and monitored the transposition

16

The Directive entered into force on 28 December 2006 and set the deadline for transposition at 28 December 2009. The transposition was an onerous exercise for MSs, covering legislation on a large number of economic activities and therefore the Directive allowed 3 years instead of the usual 2.

17

The Commission published the *Handbook on the implementation of the Services Directive*, which aimed to provide MSs with technical assistance by describing appropriate approaches to implementation. However, it only became available in all languages almost a year after the approval of the Directive¹¹. Representatives of MSs visited reported that the handbook was a useful aid, though they considered that its impact would have been greater had it been available soon after the Directive had entered into force. In addition to the handbook, the Commission provided advice to MSs through monitoring visits and responding to their queries.

¹¹ All language versions were published on the internet in November 2007, with only the English language version being available as of 30 July 2007.

Observations

18

Through bilateral work and support given to MSs, the Commission took the necessary steps to monitor progress in transposition and reported on it to the Competitiveness Council. In June 2012 it issued a more comprehensive report in the form of the services package¹².

Twenty Member States were late with transposition

19

The deadline for transposition was only met by eight MSs¹³. Letters of formal notice were sent to the MSs that had not notified transposition, signalling the start of infringement procedures. On 27 October 2011, the three cases¹⁴ which had not in the meantime been resolved were referred to the Court of Justice. These cases were, however, resolved before being considered by the Court. The last MS to complete the transposition was Greece on 31 May 2012.

20

The Commission envisaged that the PSCs (see paragraphs 44 to 55) would play a significant role in the implementation of the Directive. The Commission therefore gave them prominence in its reporting on MSs' progress on implementation, relying on its own analysis as well as on studies made by business organisations. By the 2009 deadline, 21 out of 27 MSs had established 'first-generation' PSCs¹⁵, though the degree to which administrative procedures could be completed online, and used cross-border, varied.

Mutual evaluations were an innovative practice, managed well by the Commission and subsequently also used for other directives

21

The mutual evaluation exercise foreseen in the Directive required each MS to assess the justifications for national requirements on service providers and then to share their findings with other MSs. Its purpose was to increase understanding of the reasons underlying the requirements in place and to encourage MSs to compare their regulatory approaches and share best practices, removing requirements which are agreed to be unjustified.

12 COM (2012) 261 final of 8 June 2012, 'A partnership for new growth in services 2012-2015' and supporting documents.

13 Czech Republic, Estonia, Croatia, Lithuania, Hungary, Malta, Netherlands, Sweden.

14 Germany (closed 26.1.2012), Austria (closed 26.4.2012), Greece (closed 31.5.2012).

15 First generation PSCs comply with the limited requirements set out in the Directive. Second generation PSCs 'should not only meet the obligations of the Services Directive but go beyond them, both in scope and functionality', according to the PSC charter.

22

The directive set out the process and requirements for the mutual evaluations of the regulatory framework applicable to services activities in the MSs. By 28 December 2009 the MSs had to present a report to the Commission containing information on: (i) authorisation schemes, (ii) specific national requirements the MSs intend to maintain and (iii) multidisciplinary activities. The MSs had to provide explanations showing the compatibility of the remaining authorisation schemes or requirements with the substance of the Directive, justify why those requirements complied with the conditions of non-discrimination, necessity and proportionality, as well as indicate which providers remained subject to such requirements.

23

The Commission shared the explanations on requirements with the other MSs, giving them 6 months to respond. The Commission then completed a report on the mutual evaluation process on 28 December 2010, having coordinated MSs' responses, accompanied where appropriate by proposals for additional initiatives. The Commission was required to follow this up on an annual basis. This was first done in the form of the services package, published in June 2012 and then through initiatives such as peer review on legal form, shareholding and tariff requirements, evaluation of national regulations on access to professions and access to insurance stakeholders workshops.

24

The success of the mutual evaluation exercise in screening multiple MSs' legislation was such that this practice has later been emulated in other fields such as the revised professional qualifications directive.

25

The mutual evaluation methodology consisted of the following steps¹⁶: individual MSs' self-assessments, discussions in clusters of five MSs and plenary meetings with all MSs. The Commission noted the improvements achieved, such as the replacement of cross-cutting authorisation schemes with less burdensome methods such as declarations and the abolition of sector-specific schemes, minimum capital requirements, bans on having more than one establishment, compulsory tariffs and quantitative and territorial restrictions¹⁷.

16 COM(2011) 20 final of 27 January 2011, 'Towards a better functioning single market for services building on the results of the mutual evaluations process of the Services Directive', p. 6.

17 SEC(2011) 102 final of 27 January 2011, 'Commission staff working paper on the process of the mutual evaluation of the Services Directive — Accompanying document to COM(2011) 20 final', p. 10.

Observations

26

Significant steps were made towards the removal of barriers. Officials in the MSs visited considered the mutual evaluation process to be one of the highlights of the implementation of the Directive due to the fact that the MSs had to cooperate intensively in screening very large amounts of national and regional legislation, to assess its compatibility with the Directive and the existing case-law of the Court of Justice.

27

It was acknowledged by the visited MSs that the Commission has done much on a practical level to help implement the Directive, by organising cluster discussions for the mutual evaluation as well as providing guidance during regular thematic expert group meetings.

Still a long way from successful implementation

28

The mutual evaluation process reports indicated that barriers were only partly lifted. According to Commission estimates, of all the barriers that the Directive seeks to remove for the selected professional groups studied, 10 % had been fully removed, 60 % partly removed, and 30 % remained¹⁸. This indicated that there was still a long way to go to complete implementation.

29

Whilst the mutual evaluations involved cooperation to screen large amounts of national and regional legislation, officials in a number of MSs visited criticised the eventual effectiveness of this exercise. They considered that the Commission had done little to eliminate the potentially unjustified barriers that were identified during the mutual evaluation process. In addition, a group of six MSs were of the opinion that the Commission did not sufficiently challenge the 'proportionality' justification. They advocated publishing specific guidance with examples of what is and is not proportionate. This would provide a common understanding of proportionality and allow the Commission to have a yardstick when assessing existing and new requirements.

18 J. Monteagudo, A. Rutkowski, D. Lorenzani, 'The economic impact of the Services Directive: a first assessment following implementation', *Economic Papers* No 456, June 2012, European Commission, Brussels, 2012, p. 30.

Performance checks were made on how EU legislation works in practical business scenarios

30

In 2011 and 2012 the Commission undertook 'performance checks' to assess 'how different pieces of EU legislation are applied and how they work on the ground'¹⁹ from the perspective of different users of the single market. This involved taking account of EU instruments besides the Directive. The Commission decided to carry out the checks based on case studies in selected business sectors and for selected activities.

31

MSs were invited to provide information on how their national legislation would be applied in practice to potential service providers, who wanted to either set up a business or provide cross-border services on their territory.

32

A staff working document²⁰ of the Commission summarised the results of the performance checks for three sectors considered important for cross-border trade in the EU: construction (contributing 6.3 % to GDP); business services (11.7 %); and tourism (4.4 %).

The outcomes led to further legislative proposals by the Commission

33

The checks showed that there is a very close link between the Directive and the professional qualifications directive. Recognition of qualifications is often needed before an individual is allowed to provide services or set up a cross-border business. The results of the performance checks prompted the Commission to submit amendments to the professional qualifications directive and on cooperation via the internal market information system (IMI)²¹.

19 COM(2011) 20 final, p. 9.

20 SWD(2012) 147 final of 8 June 2012, 'Commission staff working document on the results of the performance checks of the internal market for services (construction, business services and tourism)'.

21 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') (OJ L 354, 28.12.2013, p. 132).

34

Performance checks identified barriers in national legislation imposing requirements for special shareholding structures and insurance. Businesses often needed to adapt their legal form or shareholder structure to be able to operate in another MS via secondary establishment, which might lead to supplementary costs. Another common difficulty identified was insurance coverage. In a significant number of MSs, the insurance coverage in the MS of establishment is not recognised by the MS in which the company intends to provide the service, again resulting in additional costs to the provider. Staff working documents on these two questions were published in October 2013²² and March 2014²³.

Commission could have used results better to systematically enforce the Services Directive

35

The performance checks revealed that significant barriers and obstacles still exist in the MSs, some of them common to all three sectors (cross-cutting barriers) and some industry specific.

36

Even though this was not the main purpose of the exercise, the conclusions of the performance checks reiterated those of the mutual evaluation, i.e. that a significant number of obstacles remained. The results could have supported further systematic enforcement of the Directive by the Commission addressing the economically most significant issues.

Lack of economic impact assessment

37

The Commission made only a predictive assessment of the economic benefits of the Directive, carried out at the time of its introduction, and did not have sufficiently detailed economic data to cover only those activities concerned by the Directive.

22 SWD(2013) 402 final of 2 October 2013, 'Commission staff working document on the outcome of the peer review on legal form, shareholding and tariff requirements under the Services Directive'.

23 SWD(2014) 130 final of 31 March 2014, 'Commission staff working document — Access to insurance for services provided in another Member State'.

38

In 2012 the Commission estimated that GDP could be increased by an extra 1.6 %, on top of the 0.8 % claimed to be already achieved, through better implementation of the Directive²⁴. This study used an econometric model and data on barriers existing prior to the 2009 deadline for implementation, collected during the mutual evaluation process, in combination with economic data on the sectors concerned to predict the effects of removing the barriers. It was not, therefore, an *ex post* exercise in quantifying the effects of the Directive's implementation.

39

The Commission was obliged to make assumptions about the size of economic sectors affected by the Directive since detailed breakdowns are not available from existing national accounts or balance-of-payments sources.

40

The Commission made commitments to the European Council as late as 2014²⁵ that it would 'reinforce its monitoring tools through more in-depth quantitative and qualitative reporting on sectoral and national reforms concerning services'. In particular, it agreed to collect services-related data for 2012, 2013 and 2014 which distinguishes between those relevant for sectors covered by the Directive and those relevant for sectors outside its scope. As the data will not encompass the period before the implementation of the Directive, they will not enable an assessment of its overall effect.

41

The Commission presented a paper in May 2014 to the National Accounts Working Group which described the economic analysis undertaken with regard to the Directive and presented the data needs arising from the future analytical commitments it had made. In particular, it emphasised the need for data which distinguishes between economic activity which is covered by the Directive and that which is not. The Commission noted that 'data availability currently seriously restrains the scope of in-depth analysis and progress reporting' and sought a solution for the problems of outdated or missing data²⁶, sometimes for a period of up to 10 years.

42

The National Accounts Working Group members agreed to respond to requests from the Commission in order to attempt to resolve specific issues where it would be possible to provide data that might not be publicly available. Nevertheless, no commitment was given to provide the data necessary for proper evaluation of the Directive.

- 24 J. Monteagudo, A. Rutkowski, D. Lorenzani, 'The economic impact of the Services Directive: a first assessment following implementation', *Economic Papers* No 456, June 2012, European Commission, Brussels, 2012.
- 25 Services: tapping the potential for growth and jobs, Commission contribution to the European Council of 20-21 March 2014.
- 26 With regard to the 64-branch NACE rev. 2 breakdown in national accounts. According to the recently finalised ESA 2010 transmission programme, this breakdown will now be submitted by MSs. See Regulation (EU) No 549/2013 of the European Parliament and of the Council of 21 May 2013 on the European system of national and regional accounts in the European Union (OJ L 174, 26.6.2013, p. 1).

Implementation

Tools and support provided by the Commission for the implementation of the Services Directive have been underused and are thus only partially effective

43

A number of tools, information services and cooperation mechanisms have either been provided for in the directive or have been otherwise set up by the Commission to facilitate full implementation of the Directive. The PSCs have been the most prominent of those which derive directly from the Directive. Others, including the IMI and the European consumer centres network (ECC-net) have also been developed with the intention of improving trade in services within the EU. However, the level of effectiveness of these instruments for the directive has not been as high as intended.

44

The directive obliges MSs to ensure that PSCs enable service providers to complete all the procedures and formalities required for authorisation by the competent authorities electronically at a single point. They should also provide information to potential suppliers and users. The MSs should make the information and services 'accessible at a distance and by electronic means'²⁷ and are encouraged to provide it in other official EU languages.

45

Setting up PSCs has proven to be a challenging task, and MSs have considerable freedom in choosing an approach, resulting in different ways of PSC being embedded in MSs' administrative structures.

Delays in setting up points of single contact and varying quality across Member States

46

By the time the transposition deadline passed (28 December 2009), many MSs still did not have a fully functioning PSC. In order to assist MSs, the Commission established two expert groups in addition to the general expert group in charge of the implementation of the Services Directive. The EUGO expert group deals with the PSCs in general and bears the name of the network of PSCs that is also used to create a common brand across the EU (see **Figure 1**). The e-procedures expert group focuses on more technical matters involved in enabling service providers to complete administrative procedures online.

27 Article 7 of the Directive.

Figure 1

The EU-wide logo intended for identification of PSC websites



47

PSCs are included in the Commission's single market scoreboard and have been the subject of a number of studies by the Commission and several external organisations²⁸. These analyses have shown that the level of ambition varies widely in terms of what MSs' administrations have tried to achieve, and consequently the quality of PSCs is varied. Weaknesses exist in terms of languages available for completing the administrative requirements, user-friendliness, acceptance of e-signatures and the extent to which they actually function as e-government portals. The promotion and 'findability' of PSCs varies, with not all PSCs identifying themselves with the EUGO logo created by the Commission.

48

Following an announcement in the services package of 2012²⁹, and to make the PSCs more responsive to the needs of business, the Commission developed a *Charter for the electronic points of single contact under the Services Directive* (PSC charter) to serve as a guideline for those countries that intend their PSCs to go beyond that which is legally required. The PSC charter aims to underpin the development of the second-generation PSCs.

28 — *Services directive implementation survey — The Chambers' perspective on the points of single contact*, Eurochambres, Policy survey, 7th edition, January 2011.
 — *Are the points of single contact truly making things easier for European companies? — Services Directive implementation report*, BusinessEurope, November 2011.
 — *The functioning and usability of the points of single contact under the Services Directive — State of play and way forward, Final report*, Deloitte and tech4i2 for European Commission, Directorate General for Internal Market and Services, DG MARKT/2010/22/E (SMART 2007/035, LOT 4), 21-01-2012.
 — J. Montesgudo, A. Rutkowski, D Lorenzani, 'Part 2: Assessing the economic impact of setting up points of single contact: an approximation based on the doing business', in 'The economic impact of the Services Directive: a first assessment following implementation', *Economic Papers* No 456, June 2012.

29 COM(2012) 261 final, p. 12

Observations

49

The PSC charter gives guidance to the MSs that are willing and ambitious to develop their PSCs and enables them to develop in a similar direction. The charter can serve as a framework for discussion on how best to implement it and exchange best practices.

50

The Commission's development of the charter is a positive action to overcome the limited set of legal obligations which exist for the PSCs for businesses and private individuals that expect considerably more.

51

Using the PSC charter for testing the PSCs makes it clear to the MSs against which criteria their PSCs are to be measured. On one hand the inclusion of the voluntary criteria helps ambitious MSs to get an independent assessment of where they are. On the other, MSs which are less ambitious with their PSCs may be encouraged to develop PSCs in accordance with the charter.

52

A study contracted by the Commission³⁰, which was published in 2015, found that PSC performance was 'mediocre with considerable scope for improvement' and provided a detailed list of specific recommendations.

Points of single contact difficult to find, low business awareness

53

For PSCs to contribute to increasing cross-border trade and provision of services, businesses should be aware of the information and services they offer. Good online access would allow businesses looking for information or support to be directed towards the PSCs.

30 *The performance of the points of single contact — An assessment against the PSC charter*, a study prepared for the European Commission DG Internal Market, Industry, Entrepreneurship and SMEs, 2015.

54

However, many organisations consulted by the ECA reported that awareness of PSCs among businesses remained low. Both MSs' authorities and business groups stated that the Commission should do more to promote PSCs.

55

The Commission states that the reason for its limited promotion of PSCs is a lack of resources³¹. The Commission says that online, targeted promotion activities would have the greatest effect, but that a more active role played by business organisations in the promotion of PSCs among their members would enhance the level of awareness.

Little administrative cooperation in matters relating to the Services Directive

56

The freedom to make cross-border supplies means that authorities face an additional challenge in performing necessary checks on suppliers from another MS. The Directive provides for the means to do this through administrative cooperation, which is performed electronically through the IMI system (see **Box 1**). This takes the form of mutual assistance whereby one MS can ask another to supply information, for example on permits and compliance with trading standards, or carry out checks, inspections and investigations.

31 For example in SWD(2012) 148 final of 8 June 2012, 'Commission staff working document: Detailed information on the implementation of Directive 2006/123/EC on services in the internal market', p. 20.

Box 1

The IMI system

The Directive required the Commission to establish an electronic system for the exchange of information on administrative cooperation between MSs, taking into account existing information systems. Commission Decision 2009/739/EC³² states that the IMI shall be used for this purpose. The IMI had already been launched in February 2008 to support Directive 2005/36/EC on the recognition of professional qualifications³³. Since December 2009, the IMI has become an instrument for information exchange in the services field. The number of areas in which the IMI is used has since expanded to eight: professional qualifications; services; posted workers; cross-border road transport of euro cash; Solvit; patients' rights in cross-border healthcare; e-commerce (pilot project); train driving licences (pilot project).

32 OJ L 263, 7.10.2009, p. 32.

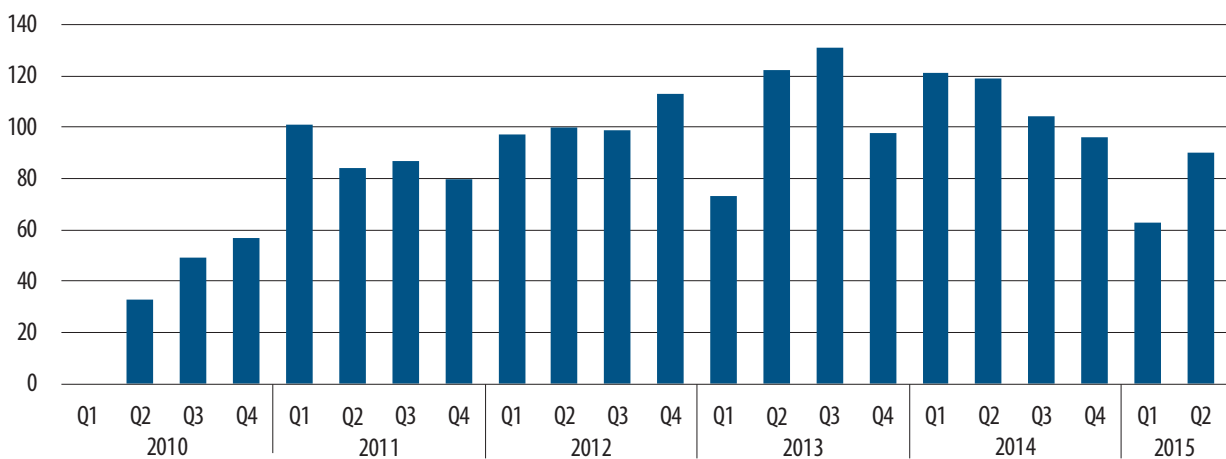
33 Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005, p. 22).

57

The number of Directive-related requests (see **Figure 2**) depends on factors such as the number of service providers going across borders, the relevant legislation in the host country, competent authorities being aware and being connected to the IMI and the need to contact the competent authorities in another MS. Interpretation of the number of requests made via the IMI is therefore difficult, but the Commission recognises that it is little used in relation to the Directive compared to the professional qualifications directive. In order to boost the use of the IMI for directive issues, the Commission has organised conferences and training courses.

Figure 2

Total Services Directive-related IMI requests per quarter



Sources: http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/internal_market_information_system/index_en.htm
http://ec.europa.eu/internal_market/imi-net/statistics/index_en.htm

58

The IMI is also used as the communication tool for the Directive alert mechanism, where authorities in other MSs should be warned against a specific service provider regarding health, safety or environmental concerns. However, the authorities in the MSs visited rarely use the alert mechanism, stating that the corresponding function in the IMI is superfluous. Only three alerts have been sent in total, one of which was erroneous and withdrawn.

59

Through the IMI system, the Services Directive provides for notifications of new national requirements regarding the cross-border provision of services and the freedom of establishment. In September 2013 a notifications module was launched in the IMI to replace notifications via email. Notifications sent through the IMI are received by the Commission and by the national IMI coordinators in the MSs, with the intention that they should be subject to peer review by the other MSs.

60

The notification process was not considered useful by administrations in the MSs visited. The criticisms include the associated workload on the part of MSs' authorities, and the lack of clarity in notifications received.

61

A total of 310 notifications³⁴ have been sent through the IMI since the system has been in use for this purpose. Although issuing the notifications is a legal obligation, of the 31 EU and EEA MSs connected to the IMI, seven have never sent any notification. For the remaining 24 MSs, the number of notifications over a period of 20 months ranged from 1 to 73.

62

Notification of new requirements is an obligation that the Directive has in common with Directive 98/34/EC³⁵, which obliges MSs to notify the Commission, at the draft stage, of their technical regulations related to products and information society services. However, the Directive does not include the 3-month standstill period³⁶ that applies to Directive 98/34/EC notifications before they are adopted or the public consultation of notifications. The publication of directive notifications on an open website is under consideration according to Commission staff. Several interlocutors in the MSs indicated that they would welcome a similar standstill procedure.

63

Overall, the usage of the IMI for the Directive is moderate to low: information requests occur, as do notifications, but alerts and case-by-case derogations³⁷ are rare.

34 Figures up to 1 June 2015 provided by the Commission.

35 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 (OJ L 204, 21.7.1998, p. 37).

36 Adoption of national legislation is postponed until the end of the standstill period.

37 Article 18 of the Directive: Derogations from Article 16 — in exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures relating to the safety of services.

Observations

64

Given the fact that the Directive obliges the MSs to notify any new requirements, using the IMI for this purpose is logical. The IMI as a communication platform offers the functionality needed. Extension of the IMI system to include a stand-still period and publicly accessible website containing notified requirements would allow interested parties better access to the notifications and scrutiny of new requirements.

Consumers continue to encounter problems in accessing the single market for services

65

Article 20 of the Directive states that MSs should ensure that service recipients (including consumers) must not be subject to discriminatory requirements based on their nationality or place of residence and that access to a service should be similarly unrestricted. Typical examples of such restrictions may, for example, concern a multinational online retailer which does not allow a customer to shop directly from one website but automatically redirects that customer to an online store in his/her own country, where prices and conditions may be different. In other cases of non-compliance, a trader might refuse to supply a product to a customer in another country without justification. The directive allows 'differences in the conditions of access where those differences are directly justified by objective criteria'.

66

The Commission and MSs have set up ECC-net to provide information and give assistance to services recipients who have problems with traders in other countries. Centres in this network, which is made up of the EU MSs, Norway and Iceland, are jointly funded by the EU budget and national funds. Each MS hosts a centre which should respond to consumers' queries, providing advice about redress procedures and using contacts with ECC-net centres in other countries where necessary.

67

The network published a report analysing consumer complaints made between January 2010 and December 2012. In this period, the network received 222 complaints related to Article 20. In its visits to ECCs and other bodies in seven MSs, the ECA understood that this number understates the scale of the problem, since the ECC/MSs consider consumers to be ill-informed about their rights, and in particular about those deriving from the Directive. Furthermore, even where consumers are aware that there may be a breach, the effort necessary to make a complaint is often not considered worthwhile either relative to the value of the service concerned or because of the need to obtain a prompt solution.

Observations

68

Two reports have been published regarding application of discriminatory requirements: *Study on business practices applying different conditions of access based on the nationality or the place of residence of service recipients*³⁸ and *Online cross-border mystery shopping — State of the e-Union*, produced by ECC-net³⁹.

69

The first report sought to identify whether there are differences in the treatment of customers based on nationality or residence. The study covered four sectors — car rental, digital downloads, online sale of electronic goods and tourism. It concluded that there was prima facie evidence of systematic differentiation based on the residence of the customer for the four sectors covered but not on nationality. Differentiation was identified in particular with regards to services provided online, with automatic address-based redirection or the existence of parallel country-based websites.

70

The study suggests that there could be both legal and regulatory as well as business drivers to such differences arising. Examples of legal and regulatory drivers of differentiation could be financial costs, compliance costs or differences in the MSs' legislation, while business drivers could be transport and delivery costs, marketing costs or corporate structure, including franchising.

71

The second report aimed to identify obstacles to cross-border online shopping. With the help of 17 EU members of the ECC network, a shopping exercise of 305 online cross-border purchases was made for ten relevant product categories⁴⁰. Overall, ECCs reported that 173 cases out of the 305 (56 %) had some issues arising⁴¹ regarding the contractual terms and customer rights, showing that consumers still face obstacles in cross-border receipt of services.

38 Published on 7 December 2009.

39 Published in September 2011.

40 Items included clothing, sporting goods, household goods, books, music DVDs, video or computer games, software, electronic equipment and personal care products.

41 For example, difficulties in finding enough web traders who were willing to sell across borders, rates of correct delivery, free delivery offers being withdrawn and differences in the amount to be charged to credit cards, which were then attributed to 'VAT rates, customs clearance and currency issues'. Many traders did not provide sufficient information about the customer rights to return goods.

Service providers still unfairly discriminate

72

Whilst Article 20(2) of the Directive requires that any discrimination be 'directly justified by objective criteria', recital 95 opens a loophole by referring to 'objective reasons that can vary from country to country, such as additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, such as higher or lower demand influenced by seasonality, different vacation periods in the MSs and pricing by different competitors, or extra risks linked to rules differing from those of the MS of establishment'.

73

This has led to unjustifiable discrimination as illustrated in the examples shown in **Box 2**.

Box 2

Discriminatory practices towards consumers

'While booking a vacation package online with a theme park based in France, a Bulgarian consumer selected by mistake the UK as her country of residence. She soon spotted her mistake and selected Bulgaria instead. The consumer learned that there was nearly 40 % price difference and she was asked to pay EUR 500 more than her British counterparts.'

'While on holidays in an Austrian ski resort a German consumer discovered that the purchase price of tickets for lifts was much more expensive for tourists than for Austrian residents.'

Source: Enhanced consumer protection — the Services Directive 2006/123/EC: analysis of Article 20.2 and Article 21 related consumer complaints reported to ECC-net between 2010 and 2012, pp. 20-21.

74

ECC-net report lists a number of similar examples of such discriminatory treatment, which are more often based on residence than nationality and often indirectly applied based on country of credit card issuance or place of delivery.

75

Article 20(2) has also proved to be a cause of unease and uncertainty for businesses who do not understand what obligations may fall on them when selling long-distance to customers in other countries. According to retail representatives in the MSs, the guidance provided so far⁴² has failed to give reassurances or certainty about when businesses must supply across borders.

Resolving the problems

76

The Commission has adopted a thematic approach to resolving the most significant types of problems relating to service providers. It uses the CPC network to conduct 'sweeps', which consist of EU-wide screening of websites in particular online sectors. Simultaneous, coordinated checks are made to identify breaches of consumer law and to subsequently ensure its enforcement. Following such investigations, the relevant national authorities should take proper enforcement action, contacting companies about suspected irregularities and ask them to take corrective action or face legal proceedings. Sweeps have been made in the following fields: airlines, mobile phone content, electronic goods, online ticket sales, consumer credit, digital contents and online travel booking.

77

According to an external evaluation⁴³ carried out in 2012, the resulting enforcement rate was high for all sectors, although the impact of sweeps could be increased through more publicity and follow-up actions to ensure continued compliance. Unfortunately, the Directive's requirements have not specifically been integrated into the evaluations carried out in these exercises since, according to the Commission, the CPC legislation was enacted prior to the Directive entering into force. The external evaluation made recommendations for extending the scope for the sweeps, but rejected the inclusion of the Directive in this, despite recognising that '[the Directive] guarantees certain rights to recipients of services such as non-discrimination, information rights, and professional liability insurance and commercial communication. The cross-border relevance and consistency criteria are significant in this respect.' The evaluation considered, however, that 'the Services Directive has a strong focus on MSs' obligations rather than on the activities of individual service providers, and secondly, the Directive also covers business-to-business aspects (i.e. the concept of "recipients of services" is not limited to consumers) inconsistent with the consumer focus of the CPC objectives.' This view is in contradiction with the evidence presented in the ECC-net report which underlines the important effect on consumers of non-compliance with the Directive.

42 SWD(2012) 146 final of 8 June 2012, 'Commission staff working document — With a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market ('the Services Directive').

43 *(External) evaluation of the consumer protection cooperation regulation — Final report submitted by the Consumer Policy Evaluation Consortium (CPEC)*, 17 December 2012.

Enforcement

The Commission employs a number of enforcement tools

78

Compliance with the Directive is important from both the legal and the economic point of view. When EU rights are breached, quick and efficient solutions are needed for both the service providers and the service recipients.

79

The Commission may initiate an infringement procedure against an MS that has failed to fulfil a treaty obligation. The Commission has also set up the general pre-infringement mechanism EU pilot and the alternative conflict resolution mechanism Solvit, which is specifically designed for internal market issues. In addition, the Commission can address high-level issues at the political level by making country-specific recommendations (CSRs) under the European semester.

Solvit is rarely used for the Services Directive

80

Solvit is a free, mainly online service between MSs, provided by the national administrations. It was set up in 2001⁴⁴ and updated in 2013⁴⁵. Solvit provides solutions to a range of practical situations such as: getting professional qualifications recognised, visa and residence rights, trade and services (businesses), vehicles and driving licences, family benefits, pension rights, working abroad, unemployment benefits, health insurance, access to education, cross-border movement of capital or payments and VAT refunds. In 2013 the Commission issued a brochure with examples of practical solutions to individual problems achieved by using Solvit centres.

81

In general, the majority of cases are resolved successfully, within an average of 9 weeks⁴⁶ (against a target of 10 weeks⁴⁷). Typically, the system has received approximately 1 400 cases per year, increasing to 2 368 in 2014.

44 Commission recommendation of 7 December 2001 on principles for using 'Solvit'—the internal market problem solving network (OJ L 331, 15.12.2001), p. 79.

45 Commission recommendation of 17 September 2013 on the principles governing Solvit (C(2013) 5869 final).

46 Commission recommendation on the principles governing Solvit (17 September 2013), p. 2.

47 http://ec.europa.eu/solvit/index_en.htm

Box 3

Solvit solutions**Solvit lets tourists charter German yachts in Italy**

A German enterprise chartered four yachts under a German flag to tourists in Italy. The business owner was fined for not having registered its commercial yachts with local port authorities in accordance with recent Italian regulations. Five months later, after repeated efforts to obtain registration, the business owner was told that registration would only be possible if the business was established in Italy. Solvit stepped in to make it clear that this condition was not in line with EU law and that the authorities should accept the registration in the German Chamber of Commerce. All four yachts were registered and charter licences were issued.

Solved within 9 weeks

Solvit ensures fair treatment for rafting companies in Slovenia

Rafting companies from Hungary and Slovakia complained that cheaper, year-long access to a particular river in Slovenia was reserved for Slovenian companies. Foreign companies not only had to pay more but had the daily inconvenience of buying tickets. Thanks to Solvit, the discriminatory rules were changed and foreign companies can now ply their trade on Slovenia's rivers on the same basis as local companies. Because it implied a change of the rules, solving the case took longer than the Solvit average.

Solved within 10 months

Source: European Commission, Solvit — Success stories, 2013.

82

However, Solvit plays a minor role regarding the Directive. In 2014 only 17 cases out of 2 368 related thereto (six in 2013, 16 in both 2012 and 2011).

83

Solvit has limited personnel and technical capacity to handle complex business cases⁴⁸. In large MSs such as Germany, France and the United Kingdom, Solvit centres are understaffed⁴⁹ and the number of staff with legal qualifications is insufficient⁵⁰. The Commission, however, organises regular training courses for Solvit centre staff on legal issues.

48 Nordic innovation report, *Delivering a stronger single market*, June 2012, p. 50.

49 Ibid.

50 M. Kaeding, F. Voskamp, *Better implementation of EU legislation is not just a question of taking Member States to Court*, working paper (2011/w/01 EIPA), p. 10.

Observations

84

Most cases have been introduced by private individuals, and only approximately 20 cases have been introduced by companies, as they generally have other means to resolve problems arising when conducting business abroad. A study made by the Commission in 2011 stated that businesses would prefer to go to formal instances to find solutions.

85

The solutions provided by Solvit are not legislative solutions, and information on cases and how they have been resolved is not available to the public, therefore not helping other possibly interested parties. Moreover, different solutions may be provided to identical problems, for example by different MSs and regional authorities.

EU pilot — a pre-infringement system appreciated by Member States

86

EU pilot is a confidential mechanism for the exchange of information between the Commission and the MSs. It was set up by the Commission in 2008 with 15 volunteer MSs⁵¹ and by July 2013 included all 28 MSs. EU pilot is used as an attempt to clarify or resolve problems so that, if possible, formal infringement proceedings under Article 258 TFEU can be avoided.

87

The Commission opened 1 502 EU pilot cases in all areas in 2013 and 1 208 cases in 2014. By early 2015 there had been 84 cases relating to the Directive.

On average it takes just over 16 months to resolve a Services Directive-related EU pilot case

88

The Commission submits individual cases to the MS concerned using the EU pilot application. MSs' authorities have a 10-week deadline to provide a reply and propose a solution.

51 The Czech Republic, Denmark, Germany, Ireland, Spain, Italy, Lithuania, Hungary, the Netherlands, Austria, Portugal, Slovenia, Finland, Sweden and the United Kingdom.

Observations

89

The Commission publishes the average response rate of the MSs to all EU pilot letters, having set a deadline of 70 days. According to the single market scoreboard (July 2014)⁵² the majority of MSs were marked as 'green' for respecting the deadline. The Czech Republic, Ireland, Spain, Italy, Latvia, Poland, Portugal, Romania, Sweden and the United Kingdom are ranked as 'yellow', or close to respecting the deadline (with 71 to 77 days average response time). The average response time of France, however, is 93 days. The time taken by the Commission is not indicated in the scoreboard but according to the second evaluation report on EU pilot⁵³, where it also set itself a deadline of 70 days to assess replies and decide on follow-up, the average time taken was 102 days.

90

For most EU pilot cases concerning the Directive, several exchanges of correspondence were necessary adding to the time required. The average duration of directive cases is 16.6 months.

In some cases the Commission has waited too long to take action

91

The Court examined six EU pilot cases concerning the Directive. In this sample, the process took between 5 and 8 months where the case was resolved using EU pilot. However, the more complex cases which were later transferred to the infringement stage took between 9 and 30 months.

92

MSs were on time with their replies. However, **Box 4** gives examples of delays in EU pilot procedure.

52 http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/eu_pilot/index_en.htm#maincontentSec

53 SEC(2011) 1629/2 of 21 December 2011, 'Second evaluation report on EU pilot'.

Box 4

Examples of delays in EU pilot procedure

In case of one MS, it took the Commission 16 months after identifying issue to send the administrative letter and another 6 months to launch the EU pilot case.

In the case of another MS, it took the Commission almost 20 months from receiving a complaint to starting the EU pilot.

One EU pilot case was started in 2012 and has not yet been closed, as the verification of the correct implementation of the legislative changes introduced is still necessary.

93

Information on EU pilot cases is not made public either during the time they are active or after they have been completed. As a result, even if such procedures provide a remedy in an individual country, they do not benefit other interested parties nor do they contribute to creating an established EU legal practice in this area.

The Commission has hardly used infringement procedures

94

If, after preliminary consultations in EU pilot, the Commission considers that EU rules are not being properly applied, it may open infringement proceedings against the MS in question. The Commission has the power to try to bring the infringement to an end, including, where necessary, referral of the case to the Court of Justice of the European Union. This can be done either based on a complaint received by the Commission⁵⁴ or based on the Commission's own initiative.

95

The case may be resolved if the MS provides the necessary additional information which satisfies the Commission that there is in fact no infringement or if it accepts the Commission's opinion and brings the violation to an end.

96

The 'zero-tolerance policy' was announced by the Commission as part of its services package in 2012. However, the Commission took the position that only a limited subset of requirements to be within the scope of its 'zero tolerance' (see **Box 5**).

54 All complaints, on all subjects, including those which lead to EU pilot and/or infringement, are registered in the Commission complaint recording system (CHAP). CHAP includes field flagging where complaints pertain to Article 56 (freedom to provide services) or 49 (freedom of establishment) of the TFEU.

Box 5

'Zero tolerance' of non-compliance

The Commission has decided to only enforce its 'zero-tolerance' policy regarding non-compliance in respect of the following obligations set out in the Services Directive:

The Directive prohibits a number of discriminatory and particularly burdensome requirements, which are listed in Article 14.

The Directive introduces specific obligations to simplify authorisation procedures:

- (1) tacit approval, i.e. silence from the administration means approval, provided for in Article 13(4); and
- (2) nationwide validity of authorisations is provided for in Article 10(4).

The Directive bans the total prohibition of commercial communications for regulated professions in Article 24.

Establishment requirements render impossible the provision of cross-border services. They are one of the most restrictive requirements addressed by Article 16 of the Services Directive (the freedom to provide services clause) in its paragraph 2, and MSs may not impose it on service providers.

Source: COM(2012) 261 final, 'A partnership for new growth in services 2012-2015', p. 4.

97

This policy addresses only the most restrictive requirements covered by the Directive. The policy is not applied to other obstacles and barriers identified where the justification of proportionality provided by the MS needs to be assessed and possibly challenged. The Commission's position is that it cannot pronounce on these specific cases as they can only be decided by the Court of Justice of the European Union. However, the Commission is reluctant to refer cases when it is not absolutely certain that the ruling would confirm the breach of legislation.

98

For some cases, the Commission has provided guidance in presentations to expert group meetings of new requirements based on IMI notifications of legislative measures. Nevertheless, the 'zero-tolerance policy' is not applied for what the Commission considers to be unjustified requirements imposed by MSs.

99

There have only been nine infringement cases for non-conformity of national legislation with the Directive since its introduction. This is low compared to the number of issues reported during the mutual evaluations, performance checks and implementation report (services package) and is not consistent with the Commission's announced policy of 'zero tolerance'.

Infringement cases take too long

100

According to data provided by the Commission, the average duration of the 18 cases pending on 1 October 2014 which related to the Directive was 19.6 months. This already exceeded the 18-month target set by the Commission to resolve such infringements. By the end of 2015 — some 15 months later — 11 of these cases were still pending. The Commission does not systematically compile or publish information on the length of closed infringement procedures relating to the Services Directive.

101

In addition to the 20 cases relating to late transposition (see paragraph 19) and nine cases for non-conformity (see paragraph 99), there have been 55 cases⁵⁵ regarding incorrect application or transposition of the Services Directive and 20 similar infringements which concern TFEU Articles 49 (freedom of establishment) or 56 (freedom to provide services). These are cases where the directive was transposed correctly in the national legislation but the provisions of the legislation were incorrectly transposed or applied.

Individual services-related complaints followed up on regular basis; however, there are long periods of inactivity during the infringement procedures

102

Ten infringement cases were examined by the Court which arose from either barriers highlighted during the visits to the Commission and MSs or where the procedure took a particularly long time.

55 As of 1 April 2015.

Observations

103

Cases in CHAP were followed up on a regular basis. Those relating to the Directive were transferred to DG Internal Market and Services, which then either prepared a response or opened an EU pilot case to start the pre-infringement procedure. In all cases there were multiple communications between the Commission and the MSs. However, once the infringement procedures started long delays occurred, and there were periods of inactivity for individual cases as well as delays in the MSs' responses. For example, in one case there was a period of inactivity between February 2012 and March 2014, and in another case there was a gap between November 2012 and May 2015 in the correspondence of the Commission, although subsequently the decision was made quickly.

104

Even though it takes longer than expected and planned, all infringement cases closed resulted in the MS concerned amending its legislation, thereby remedying the problems identified. It can be concluded that when infringement procedures are initiated they lead to legislative changes in the MSs. However, their number remains extremely low. Moreover, while the Commission announces the opening of an infringement procedure, detailed documentation is not made available to the public when the case is closed, which reduces the transparency of the procedure and adversely affects the development of common legal practice.

Only one case referred to the Court of Justice

105

When the Commission takes an MS to the Court of Justice, it is for the Commission to provide evidence of the infringement of EU law. If the evidence provided is not sufficiently conclusive, the Court is entitled to rule against the Commission by declaring the case inadmissible or as unfounded. The Commission has referred only one infringement case on the basis of the Directive⁵⁶ to the Court of Justice⁵⁷ (see **Box 6**).

56 Articles 14, 15 and 16.

57 Case C-179/14, *Commission v Hungary*, 2012/4083.

Infringement case brought to the Court of Justice

The European Commission decided to bring Hungary to the Court of Justice of the European Union to contest its legislation on issuing luncheon, leisure and holiday vouchers. The Commission considers that the restrictions introduced by the Hungarian legislation in force on 1 January 2012 are contrary to the fundamental principles of the freedom of establishment and the freedom to provide services, enshrined in the Treaty on the Functioning of the European Union (Articles 49 and 56) and contrary to the Services Directive (Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market).

In 2011, Hungary amended its legislation on the issue of vouchers for meals (hot and cold), leisure and holidays, granted by employers to their employees, and considered as benefits in kind and therefore subject to more favourable tax and social security rules. This legislation entered into force on 1 January 2012 with no significant transitional period or measures. Previously, there were no specific conditions on employers issuing hot- and cold-meal vouchers to their employees, or for the form of such vouchers.

This new legislation has created a monopoly for a public foundation responsible for issuing cold-meal vouchers (paper or electronic) and hot-meal vouchers (paper), granted by employers to their employees. Furthermore, it establishes very strict conditions for the issue of vouchers for hot meals, leisure and holidays, considered as benefits in kind, which may no longer be in electronic form.

This new legislation means that operators present on the hot- and cold-meal vouchers market for several years are now excluded from the market for vouchers considered as benefits in kind.

Since Hungary has not brought its legislation into line with the reasoned opinion sent to it in November 2012 the Commission decided to bring this case before the Court of Justice. As of October 2015, the case was still pending.

106

In the reports of the Commission, European Parliament and other bodies, and particularly in the services package (June 2012), enforcement tools have been reviewed and recommendations made for future action. The Court found consensus in the MSs visited that all issues of non-compliance should be rigorously addressed and that infringement procedures should be applied.

107

The Commission has not created a systematic strategy to strengthen the single market in services, in particular the areas covered by the Directive. The current enforcement activities do not always focus on the economically most significant industries selected on a risk-based approach.

Country-specific recommendations have had limited success

108

In addition to infringement procedures, the Commission is trying to influence MSs by including Services Directive-related recommendations in CSRs issued in the context of the European semester. Such recommendations are approved by the Council. The Commission considers CSRs to have greater political impact than infringement procedures since they are agreed and adopted by MSs' governments.

109

In June 2014, issues related to 'competition in the service sector' were included in 14 CSRs⁵⁸. For example, the Commission recommended that the government of France 'remove unjustified restrictions on the access to and exercise of regulated professions and reduce entry costs and promote competition in services'. In 2015, it was noted that some progress had been made in this area⁵⁹. However, in some MSs there has been either no progress, limited progress or the CSR has not been addressed. (See **Box 7**).

110

Although the CSRs are considered by the Commission to have greater political impact than infringement procedures, not all MSs act upon the recommendations appropriately. There is no evidence that CSRs are more effective in removing barriers than infringement procedures.

58 http://ec.europa.eu/europe2020/pdf/csr2014/overview_recommendations_2014_by_member_state_en.pdf

59 For example, regulated professions, particularly pharmacies and opticians, promoting competition in services, reducing the regulatory burden affecting the retail sector with the 'Loi relative à l'artisanat, au commerce et aux très petites entreprises' (ACTPE), aimed at simplifying the procedure for the establishment of retail outlets and the draft law on economic activity giving more powers to the Competition Authority.

2014 CSR followed up in 2015, with limited or no progress noted

CSR 5 for Hungary recommended that it 'stabilise the regulatory framework and foster market competition, inter alia by removing barriers in the services sector.'

However, in 2015 it was noted that Hungary has made limited progress in addressing CSR 5 and the Council recommendation. In fact no progress was achieved in stabilising the regulatory framework and fostering market competition, especially in the services sector.

CSR 4 for Austria recommended that it 'remove excessive barriers for services providers, including as regards legal form and shareholding requirements and with respect to setting up interdisciplinary services companies'.

Austria has not made reform progress over the reporting period, including as regards legal form and shareholding requirements and interdisciplinary service activities. There has still been no broad review of the existing restrictions.

CSR 6 for Spain recommends that it 'adopt an ambitious reform of professional services and of professional associations by the end of 2014, defining the professions requiring registration in a professional organisation, and the transparency and accountability of professional bodies, opening up unjustifiably reserved activities and safeguarding market unity in the access to and exercise of professional services in Spain. Further reduce the time, cost and number of procedures required for setting up an operating business. Address unjustified restrictions to the establishment of large-scale retail premises, in particular through a revision of existing regional planning regulations.'

No progress has been made as regards the adoption of the reform of professional services and professional associations.

Some progress has been made in further reducing the time, cost and number of procedures required for setting up an operating business.

111

The Commission has a duty to coordinate policy on the EU single market and seek the removal of unjustified obstacles to trade in the field of services. Some years after the deadline for implementation of the Services Directive, barriers to the internal market for services covered by the Directive still exist. The Commission has set up a number of mechanisms to identify barriers, created support structures to assist MSs in reducing them and set up alternative conflict resolution measures. However, the Commission has been reluctant to pursue legal proceedings, partly due to the length of the procedure and partly due to its lack of confidence in the strength of the legislation. Overall, the Commission has been only partially effective in ensuring the implementation of the Directive.

Transposition and monitoring of implementation

112

Most MSs did not transpose the Directive into national legislation on time. The Commission monitored MSs' progress and reported thereon to the Competitiveness Council. It was acknowledged by the MSs that the Commission has done much on a practical level to help them implement the Directive during and after transposition, by organising group discussions for the mutual evaluation process as well as providing guidance during regular thematic expert group meetings. Guidance for transposition was issued in the form of the *Handbook on the implementation of the services directive*, which, though considered useful, was not released in time for the start of the 3-year period and thus contributed to delays in full transposition (see paragraphs 16 to 20).

Recommendation 1

The Commission should draft guidance for transposition and issue it as soon as possible after adoption.

113

The mutual evaluation process and subsequent performance checks demonstrated that a significant number of obstacles persisted. The MSs consider that the Commission could have done more to eliminate the potentially unjustified barriers that were identified during this process. In addition, the Commission did not sufficiently challenge the proportionality justification provided by some MSs. The results were not used to support systematic enforcement of the Directive by the Commission by aiming to address the economically most significant issues (see paragraphs 21 to 36).

Conclusions and recommendations

Recommendation 2

Results from exercises such as mutual evaluations and performance checks should be followed up to resolve non-compliance; the Commission and the MSs should address the economically most significant issues.

114

The potential economic benefit of full implementation of the Directive is not known, though estimated output gains are frequently quoted to demonstrate the impact of reducing barriers. Due to the lack of appropriately detailed data on sectors affected by the Directive, there is still no reliable quantification of its impact. The Commission has only recently asked MSs to provide necessary detailed national accounts breakdowns (see paragraphs 37 to 42).

Recommendation 3

The Commission should endeavour to ensure that the issue of data necessary for assessing impacts of new legislation is addressed early in the legislative procedure.

Implementation

115

PSCs are a prominent feature of the Directive. There were delays in their establishment and their quality varies greatly across MSs, with some demonstrating a lack of ambition to make the PSCs more responsive to the needs of businesses. The Commission drew up a charter which asks MSs to make the important effort needed to achieve this, but this has yet to yield satisfactory results (see paragraphs 46 to 52).

116

Awareness of PSCs amongst businesses is not high and not all PSCs are sufficiently visible (see paragraphs 53 to 55).

Recommendation 4

MSs should respect the PSC charter by, for example, making information available in multiple languages and enabling completion of all administrative steps necessary for the provision of services across borders.

Conclusions and recommendations

117

Administrative cooperation through the IMI can be usefully applied with regard to the Directive but is much less used than, for example, under the professional qualifications directive. The IMI is also a useful communication vehicle for the obligatory notifications, but is underused due to MSs' dissatisfaction with the Commission's treatment of notifications sent and with the lack of comprehensibility in notifications received from other MSs (see paragraphs 56 to 64).

Recommendation 5

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.

118

There is evidence that many consumers continue to encounter problems in accessing the single market for services, even if they do not make formal complaints. However the Commission could propose to extend the scope of the CPC regulation so that it covers Article 20 of the Services Directive (see paragraphs 65 to 77).

Recommendation 6

The Commission should amend the annex of the CPC regulation so that it includes Article 20 of the Services Directive.

Enforcement

119

Whilst EU pilot is a useful tool for cooperation between MSs and the Commission, it often takes too long to launch cases and information about their resolution is not made public. As a result, even if the EU pilot provides a remedy in an individual case, it does not benefit other interested parties or contribute to creating an established EU legal practice in this area (see paragraphs 86 to 93).

Conclusions and recommendations

Recommendation 7

The Commission should not delay the starting of an EU pilot case where an issue has been identified. Information on the issues resolved via EU pilot should be shared (anonymously, if necessary), contributing to disseminating best practice.

120

Despite the 'zero-tolerance' policy there have only been nine infringement cases for non-conformity of national legislation with the Directive. These have taken too long to resolve (2 years on average) and only one Services Directive infringement case has actually reached the Court of Justice. The Commission has no systematic strategy to strengthen the single market in services, in particular the areas covered by the Directive. The current enforcement activities do not always apply a risk-based approach to focus on the most economically significant industries (see paragraphs 94 to 107).

Recommendation 8

The Commission should reduce the length of the infringement procedures as much as possible. It should apply an approach to initiating infringements based on risks and economic importance of the issue concerned. Finally, given that the Commission itself considers that important issues of implementation can only be decided by the Court of Justice, it should refer them where necessary.

This Report was adopted by Chamber IV, headed by Mr Milan Martin CVIKL, Member of the Court of Auditors, in Luxembourg at its meeting on 3 February 2016.

For the Court of Auditors



Vítor Manuel da SILVA CALDEIRA
President

Executive summary

IV

The Commission set out its priorities in the 2012 communication on the implementation of the services directive¹. In its communication, the Commission explains that it is focusing on enforcement, but that it is not its only area of action. The Commission has also identified priority sectors and set actions for the years to come, including a retail action plan, reform of the professional qualifications directive and a peer review on legal form and shareholding. This set of actions was welcomed by the European Council in its conclusions of 23 October 2013. The Member States (MSs), as underlined by the European Council, have their central role to play in the implementation of the services directive.

The Commission opened several infringement files in the first half of 2015 where the proportionality of a national measure needs to be assessed. For example, the Commission opened eight infringement cases on legal form and shareholding, or tariffs (which are conditional obligations provided by Article 15 of the Services Directive). A number of cases have also been launched on the basis of quantitative or territorial restrictions (Article 15 of the Services Directive) and on the basis of Article 20(2) (non-discrimination in the access to services). Ten EU pilots were opened in the second half of 2015 on non-compliance with Article 8 of the Services Directive on points of single contact (PSCs), which, again, need a proportionality assessment.

V

The Commission does pursue legal proceedings where necessary. The Commission has identified its priority sectors and taken action in them.

Part of the directive is based on a proportionality assessment to be conducted by the MSs on a case-by-case basis, and the Commission must take that into consideration (e.g. Article 15 and Article 39 requiring MSs to evaluate certain requirements). Action is therefore decided not by levels of confidence, but by legal basis. The length of judicial procedures has never been a deterrent to the opening of infringement files. For unconditional obligations contained in the directive, the Commission has acted promptly with a very consistent number of own-initiative investigations. Of the average 80 EU pilots per year, the Commission opens more than 30 files on its own initiative.

¹ http://ec.europa.eu/growth/single-market/services/services-directive/implementation/evaluation/index_en.htm

VI

Regarding the economic impact of the Services Directive, the 2012 study (http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf) was based on an assessment of barriers in services sectors at two points in time: before the introduction of the directive and after the introduction (at the end of 2011). The Commission has also carried out an update of this study to capture national reforms which were carried out between 2012 and 2014 (available here: <http://ec.europa.eu/DocsRoom/documents/13327/attachments/1/translations/en/renditions/native>). In addition, more detailed assessments have recently been carried out on remaining barriers and the economic potential of removing them in the priority sectors of business services and retail. These were published in the staff working document on the single market strategy (see Sections 2.3 and 2.4: <http://ec.europa.eu/DocsRoom/documents/13405/attachments/1/translations/en/renditions/native>).

VII First indent

The Commission opened more than 30 files (zero-tolerance cases) following the 2013 mutual evaluation exercise. It opened 15 EU pilot files following the peer review on legal form, shareholding and tariffs in 2014. Of those 15 files, in five cases a letter of formal notice has been sent to the MS concerned, which makes around 80 EU pilots per year overall. This is one of the highest number of files opened in the Commission for a single piece of secondary legislation. It constitutes a huge effort from MSs and the Commission since it required 1 584 national pieces of legislation to transpose it, the highest number of transposition measures ever required for a single piece of EU secondary legislation

VII Second indent

EU pilot is a system via which the Commission and the MSs discuss, at an early stage, possible violations of EU law. These discussions are governed by confidentiality. The Commission does not disclose whether an EU pilot on a particular subject matter is/was pending against a particular MS. The Commission exchanges good practices with MSs on the application of Union law, including the functioning of EU pilot, in dedicated fora. The Commission publishes information on EU pilot in an aggregated manner in the annual report on monitoring the application of EU law (COM(2015) 329). If the Commission were to publish specific information on an EU pilot case, it would have to respect the confidentiality obligations it has vis-à-vis the MSs, to be considered on a case-by-case basis. The Commission's practice of handling ongoing EU pilot investigations confidentially has already been confirmed by the Court of Justice of the European Union (*Petrie* judgment (Case T-191/99), *Spirlea* judgment (Case T-306/12), *ClientEarth v Commission* (Cases T-424/14 and T-425/14)). These judgments were rendered in relation to access to documents requests by external third parties. In light of the foregoing, the Commission considers that its current dissemination policy strikes an appropriate balance between the need to promote best practices on application of EU law and respect for confidentiality vis-à-vis the MSs. The Commission is committed to disseminating aggregate information on EU pilot.

VII Third indent

The Commission considers the aim of the infringement proceeding to be to terminate a violation of EU law and ensure compliance at the earliest stage possible. It is committed to limiting as far as possible the time needed to reach this goal. The most effective way to reach this goal, though, is not always linked to the rapidity of an infringement proceeding, since sometimes going ahead with an infringement procedure without taking into consideration contingent situations can have counter-effective results.

Reply of the Commission

VII Fourth indent

The fact that cases have not been referred to the Court of Justice does not necessarily mean that the Commission was not active in pursuing infringements, but means that compliance has been ensured before the referral. The purpose of the infringement procedure is to ensure compliance at the earliest stage possible. In this respect the EU pilot tool is an effective instrument for solving issues before starting a formal infringement procedure and, eventually, referring the case to the Court of Justice, if needed. After the introduction of EU pilot, the number of infringement procedures, and thus of referrals to the Court of Justice, has drastically decreased in general. As indicated in the reply, this statement is valid for the infringement procedure in general.

VIII First indent

The Commission is assisting MSs in the implementation of Union legislation using a comprehensive array of compliance-promoting tools (implementation plans for major legislative initiatives, networks and expert committee meetings and guidelines). The better regulation package adopted in May 2015 confirmed the Commission's support for MSs in their implementation efforts (*Better regulation guidelines*, pages 33-35). In this respect, all proposals for major directives are accompanied by implementation plans which describe implementation challenges and relevant support actions to be taken by the Commission.

The handbook on the implementation of the Services Directive was available 7 months after the adoption of the Services Directive, and 29 months before the deadline for transposition. Extensive consultations and discussions with the MSs took place before the publication of the handbook, and the content was therefore well known to MSs beforehand. Publishing the handbook without proper consultation would have been a greater problem than the delay in its publication.

VIII Second indent

According to the new better regulation agenda, the Commission is strengthening its approach to impact assessment and evaluation in order to improve the evidence base which underpins all legislative proposals, without prejudice to political decisions. The Commission opened up its policymaking process to further public scrutiny and input with a web portal where initiatives and new public consultations can be tracked when the Commission is evaluating existing policies or assessing possible new proposals.

VIII Fourth indent

The single market strategy for goods and services, published by the Commission on 28 October 2015, announced several actions in order to improve the delivery of the Services Directive, including reform of the notification procedure. The Commission is considering several legislative options, including elements such as a standstill period and allowing the stakeholders access to notifications to ensure better transparency. The single market strategy points to the fact that provision of information on a publicly available website is not available yet. A corresponding proposal is planned for 2016.

VIII Fifth indent

The single market strategy announces such revision of the consumer protection legislation, but also legislation offering a more specific framework beyond Article 20 of the Services Directive.

Introduction

11

The Commission notes that DG Internal Market, Industry, Entrepreneurship and SMEs was formed through the merging of the previous DG Internal Market and Services and DG Enterprise and Industry.

Observations

14

The Commission identified areas in which the directive had not been implemented and took appropriate actions, e.g. the zero-tolerance policy and the legal form, shareholding and tariffs cases. MSs have the responsibility to identify restrictions and barriers in their territory.

The Commission has found it useful to systematically apply EU pilot as an effective way of avoiding lengthy legal procedures and of ensuring compliance by MSs in a swift way.

Some important provisions in the Directive require a proportionality assessment to be conducted by the Member State on a case-by-case basis, and the Commission has to take that element into consideration and take care not to go beyond the scope of the Services Directive.

15

Regarding the economic impact of the Services Directive, the 2012 study (http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf) was based on an assessment of barriers in services sectors at two points in time: before the introduction of the directive and after the introduction (at the end of 2011).

The Commission has done an update of this study to capture national reforms which were carried out between 2012 and 2014 (available here: <http://ec.europa.eu/DocsRoom/documents/13327/attachments/1/translations/en/renditions/native>). In addition, more detailed assessments were recently done as well on remaining barriers and the economic potential of removing them in priority sectors business services and retail. These were published in the staff working document on the single market strategy (see Sections 2.3 and 2.4: <http://ec.europa.eu/DocsRoom/documents/13405/attachments/1/translations/en/renditions/native>).

17

The handbook was available 7 months after the adoption of the Services Directive, and 29 months before the deadline for transposition. Extensive consultations and discussions with the MSs took place before the publication of the handbook, and the content was therefore well known to MSs beforehand. Publishing the handbook without proper consultation would have been a greater problem than the minor delay in its publication.

Reply of the Commission

28

The Commission is of the view that more should be done to improve the ambitious implementation of the Services Directive. In 2015, the Commission services conducted a follow-up exercise to the 2012 assessment, examining the progress made during 2012-2014. The exercise found that measures undertaken this period will only add an additional 0.1 % of EU GDP (out of the potential 1.8 % of GDP as identified in the 2012 study).

The Commission is of the view that additional measures should be undertaken to further reduce legal form restrictions, as evident in e.g. country specific recommendations under the European semester, and through recent Commission actions targeting such restrictions in several MSs.

29

The Commission set out its priorities in the 2012 communication on the implementation of the Services Directive². In its communication, the Commission explains that it is focusing on enforcement, but that it is not its only area of action. The Commission has also identified priority sectors and set actions for the years to come, including a retail action plan, reform of the professional qualifications directive and a peer review on legal form and shareholding. This set of actions was welcomed by the European Council in its conclusions of 23 October 2013. The MSs, as underlined by the European Council, have a central role to play in the implementation of the Services Directive.

In summer 2012, the Commission contacted MSs to enquire how they intended to remove obvious infringements (zero-tolerance cases).

36

Performance checks did not aim to identify barriers incompatible with the Services Directive. Following the performance checks, the professional qualifications directive was amended in 2013 (see the initial proposal (COM(2011) 883 final, Section 4.11) and the 2011 Commission communication (COM(2011) 20, Section 4.2)) and the amended package travel directive is being agreed in 2015 (see the initial Commission proposal (COM(2013) 512, Section 1.4)).

37

A detailed assessment of the reforms implemented by MSs since the introduction of the Services Directive until the end of 2011 and their potential economic impact was published in 2012.

The study (http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf) provides a detailed explanation of the economic data used to carry out the assessment, as well as their sources (see pages 19-20 and 67-68). Some of the data may have been missing or unavailable for one or more MSs. This is, however, a very common problem for any type of economic study or econometric analysis.

38

Please see Commission reply to paragraph 15.

² http://ec.europa.eu/growth/single-market/services/services-directive/implementation/evaluation/index_en.htm

39

See also Commission replies to paragraphs 37 and 38.

40

See Commission replies to paragraphs 37 to 39.

Common reply to paragraphs 41 and 42

The Commission has launched an initiative trying to obtain more complete and timely submission of the national accounts data published by Eurostat. However, there are several other types of statistical data on services sectors (including for example Eurostat's structural business statistics) which allow for in-depth analysis of the services markets.

43

Concerning information services or cooperation mechanisms, the Services Directive only provided for PSCs. As regard the use of the IMI, more than 6 000 competent authorities are registered in the system for the area of service. The number of information exchanges between the authorities is still relatively low because MSs underestimate the potential of the system (and due to the lack of awareness about the legal obligations based on the Services Directive especially at local level).

The European consumer centres network (ECC-net) was not created for the purposes of the Services Directive. It is in charge of a broad range of activities. One of its key roles is to promote the rights of consumers in a cross-border context. The European consumer centres (ECCs) also participate, as much as their resources permit, in the promotion of consumer rights under the Services Directive.

46

Setting up the PSCs and ensuring their proper functioning is the responsibility of the MSs. The Commission has provided support throughout this process. This was done through the following two expert groups.

- EUGO. This provided a platform for exchanging best practices and organising a benchmarking exercise to give MSs feedback about their performance and necessary improvements (organised on a yearly basis via benchmarking studies or user testing).
- The e-procedures expert group. This was set up to discuss issues related to the interoperability of electronic procedures and specific tools provided by the Commission to facilitate compliance with the obligations under Article 8 of the Services Directive. This technical subgroup no longer exists. Issues relevant to e-procedures are now addressed under Regulation (EU) No 910/2014 on electronic identification and trust services for electronic transactions in the internal market (eIDAS regulation).

47

The single market scoreboard provides an opportunity to report on the performance of the PSCs on a yearly basis. This has been done based on the external studies referenced by the Court, but also based on the user testing that the Commission has been carrying out jointly with the MSs. User testing was carried out with the MSs in 2011, 2013 and 2015. In 2013, the Commission also involved businesses (through the Enterprise Europe network, Eurochambers and BusinessEurope) in the testing exercise. This was not continued in 2015 as business testing was carried out by the external contractor as part of the study.

Reply of the Commission

51

The Commission will continue to support MSs by giving guidance and issuing recommendations based on best practice.

52

Following the recent PSC study, the Commission has decided to open 10 EU pilot investigations against 10 MSs. The investigations are currently under way (December 2015).

54

The EUGO network was created to coordinate the actions of the authorities governing PSCs, contributing to raising awareness among entrepreneurs and enterprises on how they can get detailed information about doing business abroad and how to complete administrative formalities concerning the establishment of a business or the cross-border provision of services.

55

The Commission has been working to increase access to the PSCs, e.g. through better signposting from the our Europe Business website. Under the COSME programme, it has proposed funding PSC cross-border awareness-raising projects, particularly focusing on online activities.

60

The clarity and the quality of notifications sent via the IMI, and in particular of the proportionality assessment of national regulations required under the Services Directive, depend on the notifying Member State. In order to facilitate the assessment of notifications, the Commission provides a translation into English for all MSs, and makes this available in the IMI system.

It should be noted that, since there is no obligation under the Services Directive to notify about draft measures, in the majority of cases the notified measures are already adopted. In that context, the only effective tool for the Commission to tackle those measures is an infringement procedure, whereas the action of the Commission would be more efficient at the draft stage. Under the single market strategy the Commission announced a legislative initiative to address these issues.

61

The Commission is aware of several requirements which should have been notified by MSs but have not been. Unlike the system set under the transparency directive, (ex 98/34/EC, now 2015/1535/EU) completed by the Court of Justice case-law (Case C-194/94 *CIA Security*), where in the absence of notification the national measures are inapplicable. Sanctions of this kind do not exist under the Services Directive. The Commission is considering introducing, within the framework of its legislative action under the single market strategy, a provision according to which non-notification renders the requirement void, which should encourage the MSs to notify.

62

Although the Services Directive and the transparency directive both set out an obligation to notify new requirements, the Services Directive does not contain any obligation to notify draft measures and does not include any standstill period, seriously limiting the possibility for the Commission to intervene. The figures show that the great majority of measures notified have already been adopted by the MSs. In addition, notifications under the Services Directive are not transparent to stakeholders and the business community at large, and thus they do not have the possibility to react on the draft measure. In order to improve the notification procedure for services, the Commission is considering several legislative options, including elements such as a standstill period and allowing stakeholders access to notifications to ensure better transparency. Provision of information on a publicly available website can be considered a tool to achieve this transparency.

66

Certain ECCs host a Services Directive contact point, but the activities of these contact points are separate from the activities of ECCs, which are structures co-financed by the European Commission and the MSs to assist consumers with their cross-border purchases issues.

67

Brochures have been published at the EU level to ensure consumers are better informed, not least *Buying services everywhere in the EU*³, giving clear indications to consumers about their rights. The main awareness-raising efforts must, however, take place nationally so as to take into account the specific communication needs of citizens in the various MSs.

The 222 complaints relating to Article 20 reported by ECCs represent only a subset of all complaints by consumers, as not all of these complaints are reported to ECCs but can be reported to national authorities, consumer associations or the Commission (e.g. around 1 000 complaints have been made to Your Europe Advice, Direct).

75

The Commission's 2012 guidance has not been effective in providing legal certainty for traders and consumers and clarifying the provisions of Article 20(2). Further action is therefore necessary to give effect to these principles and develop concrete rules against discrimination based on the nationality or place of residence of market participants. In the single market strategy, the Commission announced that it will take legislative measures to fight unjustified different treatment of customers on the basis of residence or nationality in terms of access, prices or other sales conditions. This includes identifying and banning specific forms of residence-based discrimination not grounded in objective and verifiable factors.

76

Sweeps are carried out under Article 9 of the consumer protection cooperation (CPC) regulation (Regulation (EU) No 2006/2004), which contains an annex listing the substantive laws concerned. The Services Directive is currently not included in this annex, and therefore sweeps cannot be carried out to check business compliance with the consumer-relevant provisions of this directive (i.e. Article 20). Within the context of the single market strategy, the aim is to add Article 20 to the annex of the CPC regulation. This would mean that it will be subject to all the provisions of the regulation — not only sweeps provisions (Article 9) but also general provisions such as mutual assistance requests (Articles 6-8).

3 <http://bookshop.europa.eu/en/buying-services-everywhere-in-the-eu-pbKM0414646/?CatalogCategoryID=X0gKABstUGQAAAEjwZAY4e5L>

77

The external evaluation indeed recommends extending sweeps, as these are powerful enforcement tools. This is taken into account in the review of the CPC regulation, as one of the measures that will be proposed is to increase the efficiency of coordinated actions (under Article 9 of the regulation) such as sweeps. The external evaluation made a clear difference between the current CPC framework and what needs to be achieved to strengthen its cooperation mechanisms per se and the scope of its annex. As no provisions of the Services Directive are currently included in the CPC annex, there is no specific recommendation regarding sweeps in relation to the Services Directive.

On the scope of the annex, the external evaluation does not recommend taking into account the whole of the Services Directive for the reasons referenced by the Court and copied from the external evaluation report. While preparing the review of the CPC regulation, however, the assessment of the external evaluation regarding the important cross-border dimension of this directive has been taken into account, and the Commission intends to propose the inclusion of Article 20 only (as explained in the Commission reply to paragraph 76).

82

Implementation issues related to the Services Directive are very often structural problems linked to regulation, and not to administrative misconduct. Having said that, the single market strategy provides for Solvit to be reinforced so as to be able to deal with more structural problems and problems not necessarily having a cross-border dimension.

83

The Commission assists and supports the functioning of Solvit by:

- (a) organising regular training sessions and network events in cooperation with national Solvit centres;
- (b) drafting and updating the Solvit case-handling manual in cooperation with national Solvit centres;
- (c) providing case-handling assistance at the request of Solvit centres (in complex cases this may include providing informal legal advice);
- (d) managing and maintaining the Solvit database and a public interface, and providing specific training and materials to facilitate its use by the Solvit centres;
- (e) monitoring the quality and performance of Solvit centres and the cases they handle;
- (f) ensuring good articulation of complaint handling and Solvit;
- (g) informing Solvit centres, at their request, about the follow-up given by the Commission to unresolved cases, where a complaint has been lodged with the Commission.

89

The EU pilot is primarily a tool to obtain compliance by the MSs and avoiding launching an infringement procedure. This requires a thorough analysis and continuous dialogue.

90

16.6 months is the timespan from the registration of the first complaint. Therefore the time for a case in EU pilot is, on average, 11 months.

Box 4 — Examples of delays in the EU pilot procedure

The Commission opened an EU pilot in November 2012 and sent a letter of formal notice (the first step in the infringement proceeding) in October 2013. As such, the EU pilot stage lasted only 11 months.

The third case was opened in March 2012 and was closed in May 2013 for further treatment within the framework of infringement proceedings. The Commission's request for supplementary information in February 2013 is the reason for the slight delay in closing the EU pilot.

93

EU pilot is a system via which the Commission and the MSs discuss, at an early stage, possible violations of EU law. EU pilot is an informal but structured dialogue phase between the Commission and the individual Member State concerned, the aim of which is to rapidly find solutions and to avoid recourse to formal infringement procedures. If this bilateral dialogue leads to a satisfactory outcome, the EU pilot case will be closed. If, on the contrary, a possible violation of EU law has been identified but a solution could not be found at this early stage, the Commission may launch an infringement procedure (by sending the Member State a letter of formal notice). This dialogue is governed by confidentiality. The Commission does not disclose whether an EU pilot on a particular subject matter is/was pending against a particular Member State. The Commission exchanges good practices with MSs on the application of Union law, including the functioning of EU pilot, in dedicated fora. The Commission publishes information on infringement cases, i.e. where a formal procedure for violation of EU law has been opened by the Commission by sending a letter of formal notice. Once an infringement procedure has been opened and a letter of formal notice has been sent, the Commission publishes the title and number of the case (http://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/?lang_code=en). The same applies to the stage of a reasoned opinion, where a short press release is published as well. At the state of referral to the Court of Justice, the Commission publishes a more detailed press release. The Commission publishes information on EU pilot in an aggregated manner in the annual report on monitoring the application of EU law (COM(2015) 329). If the Commission were to publish specific information on an EU pilot case, it would be contrary to the confidentiality obligations it has vis-à-vis the MSs in the context of pre-infringement action (which might undermine the trust of the national authorities in these and other cases). The Commission's practice of handling ongoing EU pilot investigations confidentially has been confirmed by the Court of Justice (*Petrie* judgment (Case T-191/99), *Spirlea* judgment (Case T-306/12), *ClientEarth v Commission* (Cases T-424/14 and T-425/14)).

In light of the foregoing, the Commission considers that its current dissemination policy strikes an appropriate balance between the need to promote best practices on application of EU law and the Commission's confidentiality relationships with the MSs. The Commission is committed to reflecting on the best ways to disseminate aggregate information on EU pilot.

Reply of the Commission

97

The Commission opened several infringement files in the first half of 2015 in cases where the proportionality of a national measure needed to be assessed. For example, the Commission opened eight infringement cases on legal form and shareholding, or tariffs (which are conditional obligations provided by Article 15 of the Services Directive). A number of cases have also been launched on the basis of quantitative or territorial restrictions (Article 15 of the Services Directive) and on the basis of Article 20(2) (non-discrimination in the access to services). Ten EU pilots were opened in the second half of 2015 on non-compliance with Article 8 of the Services Directive on PSCs, which, again, need a proportionality assessment. When the Commission takes a Member State to the Court of Justice, it is up to the Commission to provide necessary evidence for an infringement of EU law and for the fact that it gave MSs the opportunity to present their arguments prior to any Court action. If the Commission does not provide such evidence, the Court of Justice is entitled to rule against the Commission by either declaring it as not admissible or as unfounded.

98

The zero-tolerance policy was conceived immediately after the mutual evaluation exercise as a policy for tackling unconditional obligations, i.e. obligations which were not dependent on a proportionality analysis. At the beginning of the implementation of the Services Directive, those obligations were deemed a priority for the Commission. However, as indicated in the Commission reply to paragraph 97, the Commission has subsequently launched infringement cases for unjustified requirements.

99

The Commission has opened much more cases than nine for non-conformity of national legislation and has open nine infringement cases based on the zero-tolerance policy, meaning that for a selection of measures included in the Services Directive — which the Commission can identify as unconditional obligations — MSs should have no infringement cases for non-conformity with national legislation. ‘Zero tolerance’ is therefore met when there are no infringement proceedings against MSs. Although nine infringement cases have been opened, the Commission launched around 40 investigations. The nine infringement cases can therefore be considered a good result, since the others have been solved in the previous stages of the investigation. We must take into consideration that the Commission based zero-tolerance cases on the report on national obstacles, which is the basis of the 2012 implementation package. Following the screening of this report, the Commission identified the unconditional obligations which were not met by the MSs. The 40 investigations open are the result of such exercise.

100

The Commission confirms that 18 months has been the target for an infringement case and that the average duration for cases concerning the Services Directive was 19.6 months. Those cases include politically very sensitive ones. The duration of cases concerning the Services Directive is below the average duration of cases concerning other internal market directives.

101

As explained in the Commission reply to paragraph 99, the so-called cases for non-conformity are zero-tolerance cases launched by the Commission on its own initiative.

104

The duration of infringement cases related to the Services Directive is below the average. Furthermore the Commission considers that legislative changes in the MSs are not only the consequences of the opening of infringement proceedings. Since the introduction of EU pilot many cases have been solved before the opening of infringement procedures. The success of EU pilot explains the more limited number of infringement procedures and subsequent referrals to the Court of Justice. On the documentation available, decisions taken by the Commission on infringement cases are publicly available on the Commission website. In addition, the Commission's annual report on monitoring the application of Union law provides a complete overview of the infringement procedures handled by the Commission in the previous year. As recognised by the Court of Justice, the climate of mutual trust between the Commission and the Member State concerned should be preserved while these procedures are ongoing. This policy is also pursued in the context of requests for access to documents (see Article 4(2) of the access to documents regulation (Regulation (EC) No 1049/2001). However, in line with that case-law, as soon as the investigation is closed, and to the extent that it is not linked to other ongoing investigations, the Commission no longer applies such a general presumption and examines each request with a view to granting widest possible access pursuant to Regulation (EC) No 1049/2001.

Box 6 — Infringement case brought to the Court of Justice

As stated in the annual report on monitoring the application of EU law (2014)⁴, the overall decrease of the number of infringement procedures can be put in relation to the important increase of preliminary rulings under Article 267 TFEU since 2010. The Court of Justice has addressed conformity issues of national laws in regard to EU legislation in about half of its judgments under Article 267 TFEU since 2010 and has identified non-conformities in numerous cases. Whilst preliminary rulings are distinct from infringement judgments, this gives the Commission an additional opportunity to ensure in a more systematic manner that violations of Union law deriving from national legislation or its application are remedied.

The Advocate General delivered his opinion in September 2015.

107

The enforcement strategy in the area covered by the Services Directive is based on different instruments: infringements, corporate social responsibility (CSR) and dialogue with MSs. Action by the Commission has to consider all the different instruments. Since 2007, the Commission has set out its priorities via enforcement action, and the Commission set out its priorities in the 2012 communication. These priorities have been pursued, of course taking into consideration the obligation of the Commission as guardian of the treaties. A more thorough priority-based policy will be further developed under the single market strategy.

108

CSRs under the semester process relate to issues and problems that have been analysed and discussed between MSs and the Commission, as well as at Council level. There is thus stronger political ownership. Infringement procedures can have political impacts as well.

110

Please see the Commission reply to paragraph 108.

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Conclusions and recommendations

111

The Commission does pursue legal proceedings where necessary. The Commission has identified its priority sectors and pursued them.

Much of the directive is based on a proportionality assessment to be conducted by the MSs on a case-by-case basis, and the Commission must take that into consideration (e.g. Article 15 and Article 39 requiring MSs to evaluate certain requirements). Action is therefore decided not by levels of confidence, but by legal basis. The length of judicial procedures has never been a deterrent to the opening of infringement files. For unconditional obligations contained in the directive, the Commission has acted promptly with a very consistent number of own-initiative investigations. Of the average of 80 EU pilots per year, the Commission opens more than 30 files on its own initiative.

112

The handbook was available 7 months after the adoption of the Services Directive, and 29 months before the deadline for transposition. Extensive consultations and discussions with the MSs took place before the publication of the handbook, and the content was therefore well known to MSs beforehand. Publishing the handbook without proper consultation would have been a greater problem than the minor delay in its publication.

Recommendation 1

The Commission accepts the recommendation. The better regulation package adopted on 19 May 2015 set a general framework for simplifying and making EU laws more effective. The Commission is assisting MSs in the implementation of Union legislation using a comprehensive array of compliance-promoting tools (implementation plans for major legislative initiatives, networks and expert committee meetings and guidelines). The Commission considers that the preparation of guidance should not interfere with the political process leading to an agreement between the European Parliament and the Council on new legislation.

113

The Commission set out its priorities in the 2012 communication on the implementation of the Services Directive⁵. In its communication, the Commission explains that it is focusing on enforcement, but that it is not its only area of action. The Commission has also identified priority sectors and set actions for the years to come, including a retail action plan, reform of the professional qualifications directive and a peer review on legal form and shareholding. This set of actions was welcomed by the European Council in its conclusions of 23 October 2013. The MSs, as underlined by the European Council, also have their role to play in the implementation of the Services Directive.

Performance checks did not aim to identify barriers incompatible with the Services Directive. Instead they focused on possible inconsistencies between different pieces of EU legislation, so as to avoid any inconsistencies among them. Following the performance checks, the professional qualifications directive was amended in 2013 (see the initial proposal (COM(2011) 883 final, Section 4.11) and the 2011 Commission communication (COM(2011) 20, Section 4.2)) and the amended package travel directive is being agreed in 2015 (see the initial Commission proposal (COM(2013) 512, Section 1.4)).

⁵ http://ec.europa.eu/growth/single-market/services/services-directive/implementation/evaluation/index_en.htm

Recommendation 2

The Commission accepts the recommendation. The Commission identified its priorities in the 2012 communication and followed up on this. In its communication from June 2012, it called on the MSs to introduce more ambitious national reforms in services. It supported this call by issuing CSRs in the context of the European semester.

114

The 2012 study (http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf) was based on an assessment of barriers in services sectors at two points in time: before the introduction of the directive and after the introduction (at the end of 2011). The calculated impacts were therefore not based on theoretical *ex ante* estimations but on actual national reforms that were carried out. Calculated elasticities to estimate the economic impact of removing barriers were based on cross-country comparisons of economic data available at the time. This does not, however, mean that these elasticities are inaccurate or unreliable.

The Commission has done an update of this study to capture national reforms which were carried out between 2012 and 2014 (available here: <http://ec.europa.eu/DocsRoom/documents/13327/attachments/1/translations/en/renditions/native>). In addition, more detailed assessments were recently done as well on remaining barriers and the economic potential of removing them in priority sectors business services and retail. These were published in the staff working document on the single market strategy (see Sections 2.3 and 2.4: <http://ec.europa.eu/DocsRoom/documents/13405/attachments/1/translations/en/renditions/native>).

Recommendation 3

The Commission accepts the recommendation. It adopted the better regulation package on 19 May 2015 to ensure the effectiveness of the Commission's action. The better regulation package also contains guidelines on how to conduct impact assessments so as to examine the potential economic, social and environmental consequences of proposed options for action. The Commission follows such guidelines.

115

The Commission will continue to support MSs by giving guidance and issuing recommendations based on best practice.

116

The Commission has been working to increase access to the PSCs, e.g. with Your Europe Business. Under the COSME programme, it has proposed funding PSC cross-border awareness-raising projects, particularly focusing on online activities.

Recommendation 4

The Commission accepts the recommendation. Although the recommendation is addressed to MSs, the Commission will continue to support them by giving guidance and issuing recommendations based on best practices.

Reply of the Commission

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The clarity and the quality of notifications sent via the IMI, and in particular of the proportionality assessment of national regulations required under the Services Directive, depend on the notifying Member State. In order to facilitate the assessment of notifications, the Commission provides a translation into English for all MSs, and makes this available in the IMI system.

The Commission's services assess all notifications submitted by the MSs in the IMI system. When the assessment of national requirements raises questions as regards compatibility with the Services Directive, the Commission's services send comments to the relevant Member State via the IMI.

It should be noted that, since there is no obligation under the Services Directive to notify about draft measures, in the majority of cases the notified measures are already adopted. In that context, the only effective tool for the Commission to tackle those measures is an infringement procedure, whereas the action of the Commission would be more efficient at the draft stage.

Recommendation 5

The Commission accepts the recommendation.

118

Currently, the Commission has no means to make better use of the CPC regulation. This regulation needs to be formally amended so that it can be used to enforce Article 20 of the Services Directive.

Recommendation 6

The Commission accepts the recommendation.

119

EU pilot is a system via which the Commission and the MSs discuss possible violations of EU law concerning incorrect transposition or bad application of the EU *acquis*. An EU pilot case will be closed — if the discussions with the Member State bring a satisfactory outcome — or could give rise to an infringement procedure (by sending to the Member State a letter of formal notice) — if the Commission concludes that a violation of EU law by the Member State is in place. EU pilot is not a tool that offers remedies in individual cases but addresses general issues of application of Union law.

Recommendation 7

The Commission accepts the first part of the recommendation. The Commission is committed to limiting as far as possible the time needed to investigate, within EU pilot, alleged violations of EU law. As regards the second part of the recommendation, the Commission does not disclose whether an EU pilot on a particular subject matter is pending against a particular Member State. The Commission exchanges good practices with MSs on the application of Union law, including the functioning of EU pilot, in dedicated fora. The Commission publishes information on EU pilot in an aggregated manner in the annual report on monitoring the application of EU law (COM(2015) 329). If the Commission were to publish specific information on an EU pilot case, it would be contrary to the confidentiality obligations it has vis-à-vis the MSs in the context of pre-infringement action (which might undermine the trust of the national authorities in these and other cases). The Commission's practice of handling ongoing EU pilot investigations confidentially has been confirmed by the Court of Justice (*Petrie* judgment (Case T-191/99), *Spirlea* judgment (Case T-306/12), *ClientEarth v Commission* (Cases T-424/14 and T-425/14)). These judgments were rendered in relation to access to documents requests.

In light of the foregoing, the Commission considers that its current dissemination policy strikes an appropriate balance between the need to promote best practices on application of EU law and the Commission's confidentiality relationship with the MSs. The Commission is committed to reflecting on the best ways to disseminate aggregate information on EU pilot.

120

Enforcement strategy in the area covered by the directive is based on different instruments: infringements, CSRs and dialogue with MSs. Action by the Commission has to consider all the different instruments. Since 2007, the Commission has set out its priorities via enforcement action, and the Commission set out its priorities in the 2012 Communication. These priorities have been pursued, of course taking into consideration the obligation of the Commission as guardian of the treaties.

Recommendation 8

The Commission accepts the recommendation. It considers the aim of the infringement proceeding to be to terminate a violation of EU law and ensure compliance at the earliest stage possible, and it is committed to limiting as far as possible the time needed to reach this goal. The most effective way to reach this goal, though, is not always linked to the rapidity of an infringement proceeding, since sometimes going ahead with an infringement procedure without taking into consideration contingent situations can have counter-effective results.

Since the introduction of EU pilot the number of infringement procedures, and thus of referrals to the Court of Justice, has drastically diminished, due to the fact that solutions are often found within the framework of EU pilot. The primary goal of the Commission's policy is to convince MSs to take action so as to address issues of compliance.

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The services market is widely recognised not to have achieved its full potential in terms of intra-EU trade. The Services Directive aims to reduce legal and administrative barriers to providers and recipients of services, but some years after the 2009 deadline for its implementation, unjustified barriers still persist. The audit found that, though the Commission has successfully identified problems in the Member States, it has not sufficiently challenged certain types of obstacles and the measures taken have not achieved results quickly enough. Service providers and consumers continue to be frustrated by not having the level of access to the internal market intended by the Directive.



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