Von: Jacobi, Axel
Gesendet: Dienstag, 12. Juli 2016 17:16
An: Druckerei
Betreff: WG: European Patent Reform / Unified Patent Court / SME / Affordable European litigation fee insurance schemes
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I. Druckerei mdB Ausdruck der nachfolgenden email mit Anlagen

II. WV

Axel Jacobi
- für IIIB4 -

-----Ursprüngliche Nachricht-----
Von: Jacobi, Axel
Gesendet: Dienstag, 12. Juli 2016 17:17
An: Jean.Bergevin@ .eu; 'Michael.KOENIG@ .eu'
Cc: Karcher, Johannes; Pakuscher, Irene
Betreff: European Patent Reform / Unified Patent Court / SME / Affordable European litigation fee insurance schemes

Dear Jean, dear Michael,

since the question has been raised during Parliamentary proceedings in re the Agreement on a Unified Patent Court (https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Uebereinkommen_Einheitliches_Patentgericht.html), whether the new system is sufficiently attractive for SME, I am wondering whether you could provide us with a short update on IP legal expense insurance schemes.

Affordable European litigation fee insurance schemes would indeed be nice. According to the Single Market Strategy (section 3.3.1, p. 75/76) the Commission is in the process of reviewing national IP legal expense insurance schemes in certain Member States.

Are there any results already? What are the next steps?

Kind regards, in particular from Johannes,

9516 — 31 492/2016

Axel

Jacobi

Staff Counsel / Judge at the Federal Patent Court

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Orig.: en

Munich, 14.10.2015

SUBJECT: Presentation given at the 16th meeting of the Select Committee of the Administrative Council - Possible Components of an SME IPR package (European Commission)

SUBMITTED BY: Chairman of the Select Committee

ADDRESSEES: Select Committee of the Administrative Council (for information)

This document has been issued in English and electronic form only.

European Commission

Possible Components of an SME IPR package

Presentation to the Select Committee of the Administrative Council of the EPO. Munich 13 and 14 October 2015.

Jean Bergevin, Head of unit F5, DG GROW, European Commission

Context

- **Response to the call of Member States to ensure that the unitary patent can be attractive to SMEs within the EU.**
- **Must address the needs of identified innovative SMEs (with real patenting potential) across the EU.**
- **Must ensure for these SMEs who are real innovators that the expected net returns of patenting outweigh the costs.**

European Commission

Working on four key elements.

Direct European Structural and Investment Funds towards patenting activity for identified innovative SMEs.

Affordable European litigation fee insurance schemes.

Link IPOs and expert IPR service providers into European business networks to provide SMEs with IP portfolio info.

Develop the specialised mediation and arbitration service so that it meets SMEs needs.

European Structural and Investment Funds (ESIF)

There are budgets for SMEs and innovation but left to Member States and regions who may not be putting it into IPR (some already use them for the support to national patents).

Commission will establish "guidelines" for use of these funds for IPR purposes in support of innovative SMEs suggesting implementation/monitoring by IPOs.

Would try to link/integrate these guidelines to research funds (SME instrument under Horizon 2020).

European Commission

SME instrument under Horizon 2020

Research Funds – "SME Instrument". Can get a voucher of €50,000 part of which can be used to plan IPR (Phase 1).

Once they have an actual innovation project (Phase 2) can claim up to €2.5 million that can be used also for patenting.

Very successful scheme – only 10% get funded but 50% of projects considered worthy of funding. The remaining 40% will have a facilitated access to ESIF funding (through so called Seal of Excellence).

Information services

Optimise use of European Enterprise Network funded under COSME programme (info, business advice, matchmaking, internationalisation of SMEs).

Could use COSME/national funds to also provide guidance to specialised IPR services (i.e. via IPOs).

Subsidisation of preliminary patent search for the individual applicant? Also trademark/design advice.

European Commission

Insurance for litigation fees

Insurers believe the Unitary patent and Unified Patent Court provide the conditions and scale of market to offer viable, affordable insurance products for SMEs applying for patents.

Prior "labelled" projects should reduce risk further and therefore allow for even more attractive insurance rates.

Scheme should also offer policies to cover litigation fees for trademarks and designs.

Mediation and arbitration service

Should be up and running from day 1.

Aimed at assisting SMEs.

Important also for Standard Essential Patents.

Commission's services willing to work closely with the centre to develop and promote its services.

European Commission

Positive signal needed

We hope to announce the SME IPR package at the end of October in the Internal Market Strategy.

A unanimous opinion at this meeting on the distribution key gives the political impetus to get this SME IPR programme into political focus and running by end 2016.

Necessary for EPO/IPOs/OHIM to work with Commission over next twelve months to ensure that it is successful and contributes to the success of the unitary patent.

Council of the European Union

Brussels, 28 October 2015
(OR. en)

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ADD 1

COMPET 472
MI 664
CONSOM 180
PI 81
IND 158
ECOFIN 816

COVER NOTE

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	28 October 2015
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	SWD(2015) 202 final
Subject:	COMMISSION STAFF WORKING DOCUMENT A Single Market Strategy for Europe - Analysis and Evidence Accompanying the document Upgrading the Single Market: more opportunities for people and business

Delegations will find attached document SWD(2015) 202 final.

Encl.: SWD(2015) 202 final

EUROPEAN
COMMISSION

Brussels, 28.10.2015
SWD(2015) 202 final

COMMISSION STAFF WORKING DOCUMENT

A Single Market Strategy for Europe - Analysis and Evidence

Accompanying the document

Upgrading the Single Market: more opportunities for people and business

{COM(2015) 550 final}
{SWD(2015) 203 final}

Contents

1. UPGRADING THE SINGLE MARKET

A deeper and fairer Single Market is one of the European Commission's 10 political priorities. Removing remaining regulatory and non-regulatory barriers in the Single Market for goods and services was identified as a priority in the 2015 Annual Growth Survey[1].

The Single Market is arguably among European Union's greatest achievements. For over 20 years, it has helped companies to benefit from economies of scale, triggered efficiency gains that support EU competitiveness and offered consumers an increased choice of products and services at lower prices.

For all the progress made, too many significant economic barriers remain, notably in the area of services. The Commission estimates that more ambitious implementation of the Services Directive would add 1.8 % of EU GDP[2].

The recent report on Single Market integration and competitiveness in the EU and its Member States[3] underlines that labour productivity growth could be increased in the EU if regulatory barriers to competitiveness and integration were removed, thus allowing for improvements in the allocation of resources across firms and sectors in the Single Market. The reallocation of resources will have to proceed along three axes:

i. movements of capital and human resources from low to high productivity firms within sectors in the Member States;

ii. new technological developments, changes in input prices and the emergence of new business models suggest that cross-sectoral reallocation of human and capital resources may take increasing importance in the future as a source of productivity growth; and

iii. as a third source of productivity growth, the geographical reallocation of resources within the Single Market and a better insertion of EU firms in international value chains.

As Single Market opportunities have not yet been fully exploited in this respect, the Commission is bringing forward a Single Market Strategy[4] comprised of a set of feasible measures that are critical to meeting these objectives and thus reaping the benefits of the Single Market. The measures are coherent with and build on other Commission initiatives. The strategy supports a broader European strategy to boost growth and jobs. It also addresses the objective of a deeper and fairer Single Market with a strengthened industrial base. Furthermore, it focuses on making the Single Market a springboard for EU companies, notably SMEs and start-ups in particular, to scale up and expand their operations.

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[1] COM(2014) 902.
[2] http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf
[3] Integration and Competitiveness in the EU and its Member States, Commission Staff Working Document, (2015) 203.
[4] COM(2015) 550.

The measures fall into three categories:

1. **Creating opportunities** for consumers, professionals and businesses by enabling the balanced development of the collaborative economy, giving start-ups the opportunity to scale up and grow cross-border, unlocking investment (in particular for SMEs), creating a 'services passport' for companies, modernising the regulation of professions, addressing restrictions in retail establishment and preventing unjustified discrimination against consumers and entrepreneurs;

2. Encouraging and **enabling the modernisation and innovation** that Europe needs, through more transparent, efficient, sustainable and accountable public procurement, promoting innovation procurement, modernising the EU's intellectual property framework, and raising quality and promoting interoperability through a modernised standardisation system and European standards; and

3. **Ensuring practical delivery** that benefits consumers and businesses in their daily lives, by taking a smart and collaborative new approach to enforcement and implementation, improving the delivery of the Services Directive by reforming the notification procedure and strengthening the Single Market in goods.

This document is structured around these three categories and provides evidence to underpin each measure. Each measure is complemented by an analysis of the policy context and a description of the problem encountered and the expected impacts. The legislative measures will be subject to further impact assessment work, which will ultimately form the basis for the Commission's decisions.

2. CREATING OPPORTUNITIES FOR CONSUMERS AND BUSINESSES

2.1. Enabling the balanced development of the collaborative economy

Policy context

The collaborative economy[5] is developing rapidly. The take up of collaborative business models has been particularly widespread in certain sectors, such as transport, accommodation and professional services, but is growing across the whole economy[6].

The collaborative economy creates new opportunities for services providers, innovative entrepreneurs and existing companies. It leads to greater choice for consumers, and often lower prices in the market. It can also contribute to increasing economic, social and environmental value of idle assets and resources, and increasing employment through more flexible job schedules. In some cases, the emergence of new business models impacts existing markets, creating tensions with existing goods and services providers. In part this stems from uncertainty relating to applicable regulation, e.g. on licensing, consumer protection, taxation, social security and employment models.

[5] Sometimes also known as, *inter alia*, collaborative consumption, the sharing economy, peer (P2P) economy, the access economy, etc.

[6] Stokes K., Clarence E., Anderson L., Rinne A, 'Making sense of the UK collaborative economy', *Nesta Collaborative Lab*, 2014.

Some Member States and local authorities have begun to react to the regulatory challenges posed by the collaborative economy in a varied and often *ad hoc* way, thus risking the creation of an uneven playing field for companies across different Member States or across regions within the same Member State. The Commission has already received a number of complaints in relation to regulatory measures taken in some Member States.

A clear and adequate regulatory environment is essential to ensure that the benefits of the collaborative economy fully materialise. Divergent approaches and hasty regulatory responses may lead to the fragmentation of the Single Market and to the under-exploitation of the opportunities that the collaborative economy offers to entrepreneurs and consumers in the EU.

The importance of the collaborative economy has also been recognised in the context of action on platforms in the Digital Single Market Strategy[7], which announced that the Commission would address the regulatory challenges posed by the collaborative economy in the Single Market Strategy and in the e-commerce framework, as appropriate.

On 24 September 2015, the Commission launched a public consultation allowing all interested parties (platform providers, traditional service providers, new service providers, users of such services and public authorities) to present their views on the opportunities and issues raised by the emergence of the collaborative economy and the most appropriate EU policy response[8]. The results of this consultation will complement the analysis in this Staff Working Document.

Problem and impact

Collaborative business models create new opportunities that add value to underutilised assets in an innovative way: private homes are being opened up to tourists, private cars are being used for car-sharing/offering lifts, previously owned goods are being rented, sold or swapped, laboratories and research findings are being opened up to non-academics, the quality of plumbing and accountancy services is being reviewed online, depreciating or unexploited skills are being bartered for community services or odd jobs. The online platforms that enable the rise of the collaborative economy range from small local initiatives to large international companies.

Some of the issues that are faced by stakeholders and have an impact on the sustainable growth of the collaborative economy and existing business models are specific to the sector in which the initiatives take place. Others reflect important cross-cutting concerns that can have an impact on the collaborative economy as a whole.

Regulatory burden and uncertainty

Collaborative economy business models present new options to consumers in sectors that have been dominated by traditional business-to-consumer models. Well-established rules in these sectors often do not fit the nature and features of collaborative business models. This may become a disproportionate burden that slows the development of innovative services down. Moreover, it is often unclear whether and how current rules apply to individuals or

[7] European Commission, *A Digital Single Market Strategy for Europe*, COM(2015) 192 and SEC(2015)100.
[8] European Commission, open consultation on 'Regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy': https://ec.europa.eu/eusurvey/runner/Platforms/

companies adopting collaborative economy models. In that respect, regulators face a number of questions.

Firstly, there may be sectors where business authorisations and registration obligations exist. In these cases, it is not clear to what extent such types of obligations apply to individuals and services providers in the collaborative economy. For professional providers, the question as to whether existing obligations are justified by overriding public interest reasons may be asked not only in relation to providers embracing collaborative business models, but also in relation to traditional providers. In addition, it would have to be assessed whether restrictions are proportionate and justified under existing fundamental freedoms and EU legislation such as the Services Directive[9].

Secondly, consumer protection legislation aims to protect the safety and interests of consumers and to target problems stemming from information asymmetry or a weaker bargaining position when dealing with service providers. When collaborative models are used, the transaction is often peer-to-peer, thus raising questions as to whether the same level of asymmetry may occur. It is not clear to what extent some of those issues may be fully addressed by the reputational systems and control mechanisms usually set up by the collaborative economy platforms and used by providers and users. Lack of consumer trust may discourage transactions and reduce the benefits of the collaborative economy.

Thirdly, the emergence of the collaborative economy also brings new questions as regards liability. Platforms may take no responsibility other than to facilitate a transaction between a provider and a user. This creates uncertainty about whether providers are sufficiently covered to address their liability, especially given the fact that appropriate insurance schemes for collaborative economy services are still in the early stages of development.

All parties are negatively affected by regulatory uncertainty. Providers face the uncertainty of the applicable regulatory framework, which leads to legal and financial risks, including the risk of disproportionate regulatory reactions. Incumbents often claim the existence of unfair competitive advantages for providers under the collaborative economy, who may be subject to different rules, while offering a service that is considered a close substitute/replacement of their services. Regulatory uncertainty and fragmentation across and within Member States complicates (or even impedes) market access and limits investment opportunities for platforms. Users are concerned by issues linked to insurance, safety, trust, data privacy, etc. Finally, public authorities face important policy and regulatory challenges given the wide variety of collaborative economy initiatives across many sectors; the delicate balance that needs to be found between consumer choice, stimulating innovation, protecting consumers and ensuring fair competition; and the different layers of government responsibility (local, national and EU level) related to collaborative economy issues. This leads to the question of ensuring a level playing field.

The existing level of regulations as they apply to traditional service providers cannot automatically and in each and every case be considered a benchmark for the collaborative economy. This means that the objective of creating a level playing field between collaborative

[9] European Union, 'Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market', 2006.

and traditional economy actors could also imply reducing regulatory requirements for the provision of services through traditional channels.

Unexploited potential

Possibilities offered by the collaborative economy have not yet been explored fully and many business models are still being tested. EU policies should support consumer choice and entrepreneurship in this field, empower people to capitalise on their assets, property, knowledge, and skills, and stimulate small and micro-entrepreneurship amongst the general public. This clearly includes providers of traditional services that may also want to offer their services through collaborative economy platforms.

Collaborative economy models may also be applied in the field of collaborative production, where the combination of open-design, crowd-sourcing and decentralised manufacturing is still new. The possibility to find efficiencies, to save money, but also to use each other's networks and customers are features of the collaborative economy offering opportunities for businesses also in the field of collaborative production, marketing and branding activities or logistics[10].

Wider questions

The collaborative economy raises a number of additional wider questions. These include the evolution towards a more on-demand economy and the impact this has on workers. On the one hand, the collaborative economy allows workers/entrepreneurs to organise their work (and time) on a more independent basis and creates new opportunities for the unemployed to enter the workforce. On the other hand, this could mean a shift of certain risks from firms to workers (e.g. income instability, absence of minimum wages, etc.), thus changing the nature and balance of labour relationships.

In addition, there could be mixed effects on public budgets: on the one hand, the introduction of more informal and on-demand activities under the collaborative economy could have a negative impact due to less revenue being generated from taxes and social security contributions. On the other hand, collaborative economy platforms offer new opportunities to increase tax revenues, as well as to fight tax evasion through the traceability of every operation.

Finally, the collaborative economy involves not only sharing goods and services but, in many cases, personal data as well. Protecting the privacy of providers and consumers is important to secure and maintain the trust of the different actors involved.

Impact

The collaborative economy can enable a more efficient use of resources, knowledge, skills, and assets, thereby increasing productivity and allowing for alternatives to traditional services and goods. It can offer consumers more choice and convenience, potentially at a lower cost, and presents a viable alternative to ownership. Moreover, it supports entrepreneurship and

[10] Business Innovation Observatory, 'Collaborative economy, Collaborative production and the maker economy', Case Study 51, September 2015.

reduces barriers for individuals to becoming economically active, thus helping the (re)integration of citizens into the labour market.

Several studies show that participation levels in the collaborative economy are already high in some sectors and have the potential to increase even further across many different sectors of the economy[11]. Current estimates indicate that 68 % of adults globally are willing to share or rent goods for money[12].

The collaborative economy provides important opportunities to raise growth and create jobs. The online platforms at its heart are expanding the market for the temporary usage of services and assets on the side of both supply and demand, whilst the majority of revenues and employment generated are going to the individual providers. According to a recent study,[13] the five main collaborative economy sectors (peer-to-peer finance, online staffing, peer-to-peer accommodation, car sharing and music video streaming) have the potential to increase global revenues from around EUR 13 billion now to EUR 300 billion by 2025. A third of European consumers say that they will increasingly participate in the collaborative economy[14].

At the same time, the collaborative economy is having an impact on sector incumbents that are coming under pressure to respond to consumer expectations. Some of the expected growth may be at the expense of these providers, but an overall increase in economic activity can be expected on the back of easier access to some of the shared services and lower prices[15]. This will benefit consumers, in particular those with a low income.

The Commission intends to help enable the balanced development of the collaborative economy by ensuring that the regulatory environment is clear and adequate. The Commission will engage in an active dialogue with market operators, consumers and public authorities to identify needs and regulatory gaps. Where appropriate, the Commission will provide guidance as regards the application of existing EU law to the activities and sectors in which the new collaborative economy business models are used. This guidance will aim to avoid new business models being hindered by over-restrictive regulation, while at the same time ensuring the protection of consumers and the public interest.

[11] ING International Survey, 'What's mine is yours – for a price. Rapid growth tipped for the sharing economy', 2015.
[12] Nielsen, 'Is sharing the new buying?', 2014.
[13] Consumer Intelligence Series: The Sharing Economy. PwC 2015, https://www.pwc.com/us/en/technology/publications/assets/pwc-consumer-intelligence-series-the-sharing-economy.pdf
[14] ING International Survey: What's mine is yours - for a price. Rapid growth tipped for the sharing economy. http://www.ezonomics.com/ing_international_survey/sharing_economy_2015
[15] For example Zervas G., Prosperio D., Byers J. 'The Rise of the Sharing Economy: Estimating the Impact of Airbnb on the Hotel Industry', *Boston University*, 2015.

2.2. Helping SMEs and start-ups to grow

Policy context

Support for SMEs, especially those that are young, innovative and designed to grow fast (start-ups)[16] is rather well established at EU, national and regional level of economic activity[17]. These incentives usually take the form of a financial support or other types of benefits in kind (e.g. training)[18]. It can also involve exempting start-ups from certain administrative requirements that lead to additional costs for them (e.g. accounting requirements)[19].

The EU *acquis* has recognised that specific solutions are sometimes justified for start-ups in the Union's regulatory environment. For instance, EU state aid rules allow for limited in time (first five years) aid for newly created small enterprises, with higher aid intensities for the innovative ones[20].

There is a growing consensus in empirical economic literature that scale-ups, rather than small firms as a whole, are net job creators[21]. Small start-ups are more likely to be genuinely new firms as compared to larger entrants, who are more likely to be a product of a merger or acquisition. It is also found that the large majority of surviving start-ups do not grow. The probability of exit is highest when a firm is two years old and on average the survival rate beyond three years is 60 %[22]. In a similar vein, start-ups and young scale-ups disproportionately contribute to job creation in the USA[23].

High-growth young firms play a critical role in the reallocation dynamics and contribute substantially to intra-industry labour productivity growth. At least half of intra-industry labour productivity growth in the USA is attributable to employment being reallocated from less productive to more productive firms within the industry and young firms contribute disproportionately to this contribution from reallocation[24]. According to recent OECD research, globally most productive firms are younger than the total population of companies,

[16] OECD recognises start-ups as firms that are less than three years old, see Criscuolo, C., P. N. Gal and C. Menon, 'The Dynamics of Employment Growth: New Evidence from 18 Countries', *OECD Science, Technology and Industry Policy Papers, No. 14, OECD Publishing*, 2014 http://dx.doi.org/10.1787/5jz417hj6hg6-en

[17] Initiatives to support start-ups at: http://startupdelta.org/ in the Netherlands, or www.startuppoland.org in Poland.

[18] Digital Agenda for Europe, Start-up Europe: https://ec.europa.eu/digital-agenda/en/about-startup-europe

[19] See the SME test in the Better Regulation guidelines toolbox http://ec.europa.eu/smart-regulation/guidelines/docs/br_toolbox_en.pdf

[20] Article 22 of the Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty states: 'Start-up aid schemes shall be compatible with the internal market within the meaning of Article 107(3) of the Treaty and shall be exempted from the notification requirement of Article 108(3) of the Treaty, provided the conditions laid down in this Article and in Chapter I are fulfilled' and adds 'For small and innovative enterprises, the maximum amounts set out in paragraph 3 may be doubled'.

[21] Criscuolo, C., P. N. Gal and C. Menon, 'The Dynamics of Employment Growth: New Evidence from 18 Countries', *OECD Science, Technology and Industry Policy Papers, No. 14, OECD Publishing*, 2014.

[22] Calvino, F., Criscuolo, C., Menon, C., 'Cross-Country evidence on start-up dynamics', *OECD Science, Technology and Industry Working Papers, 2015/06, OECD Publishing*, Paris, 2015.

[23] In a typical year, start-ups account for about 10 percent of firms and more than 20 percent of firm level gross job creation in the USA, see: Haltiwanger, J., R. S Jarmin, R. Kulick, J. Miranda, 'High Growth Young Firms: Contribution to Job Growth, Revenue Growth and Productivity', (preliminary draft) in: *Measuring Entrepreneurial Businesses: Current Knowledge and Challenges, NBER*, 2014.

[24] *Ibid.*

which supports the idea that young firms possess a comparative advantage in commercialising radical innovations[25].

Problem and impact

Europe is not short of innovative ideas, often created by SMEs and start-ups, but too often innovative solutions developed in Europe are not produced and commercialised in Europe. A very small number of new companies account for a disproportionately large amount of wealth and job creation. Compared to the USA, fewer such innovative start-ups are created in the EU and those that see the light of day are reluctant to expand cross-border. This is a major missed opportunity.

Fragmentation

There are large fixed costs associated to cross-border expansion, also in terms of information costs[26]. SMEs are at a disadvantage compared to large firms, and even more so in the case of start-ups. Their major problem is the lack of knowledge, which leads them to fear entering other EU countries because they do not know which rules apply. The development of a 'Single Digital Gateway', as announced under the Digital Single Market Strategy for Europe[27], will help address this information gap by further development of an online one–stop shop access point to all Single Market-related information, assistance, advice, problem-solving services and to national and EU-wide procedures for activities covered by Single Market law. This gateway will build on already existing national and EU web portals like Your Europe. Regulatory fragmentation in the Single Market also ultimately cripples EU start-ups' access to finance.

There are large differences across the EU when it comes to start-up average size upon entry, survival share and post-entry growth which suggests that innovation environments do greatly vary across the Union. Recent findings suggest that although a small proportion of EU large firms accounts for a disproportionate share of aggregate exports outside the EU, a large number of EU exporting firms are small and medium enterprises (SMEs) and they have a non-negligible part in EU exports[28].

Europe has a relatively large share of 'static' firms that neither grow nor shrink and have lower productivity growth. Furthermore, only a few of Europe's largest companies are young[29]. The 2015 Survey of Internationalisation of European SMEs revealed that in 2012-2014 only 23 % of new and young SMEs (up to seven years old) exported within the EU and 15 % of them exported outside the EU and that only 2 % of new and young SMEs expanded cross-border

[25] Andrews, D., Criscuolo C., Gal P.N., 'Frontier firms technology diffusion and public policy: micro evidence from OECD countries', *The Future of Productivity: Main Background Papers OECD*, 2015.
[26] OECD (2009), *Top Barriers and Drivers to SME Internationalisation*, Report by the OECD Working Party on SMEs ad Entrepreneurship.
[27] COM(2015) 192.
[28] Cernat, L, A Norman-Lopez and A D T-Figueras, 'SMEs are more important than you think! Challenges and Opportunities for EU exporting SMEs', *Chief Economist Note no. 3, DG TRADE*, Brussels, 2014.
[29] Bravo-Biosca, A., 'Where is Europe's Starbucks? Or why Europe needs a new Single Market for entrepreneurs to save the Euro, close the north-south divide and drive long term economic growth', quoting *Growth Dynamics, a report by Nesta and FORA* that maps the distribution of business growth in Europe and the USA, *and Bruegel's Working Paper 2008/03*, which shows that only 2 per cent of the European companies in the world's largest 500 firms by market capitalization were founded after 1975, compared to 14 per cent in the USA.

through foreign direct investment[30]. Morevoer, the study showed that young SMEs are more likely to enter into technological cooperation with foreign firms, compared to older SMEs. In the 2014 European Parliament of Enterprises, 84 % of SMEs stated that the Single Market was not sufficiently integrated and was not allowing their company to operate and compete freely[31].

Barriers to cross-border expansion

Start-ups and SMEs find it difficult to identify and meet the regulatory requirements when trading across borders. Amongst others, SMEs and start-ups complain about a heavy burden that a set of VAT registration and reporting obligations puts on them[32]. Compliance with the VAT rules inevitably becomes more complicated and burdensome when a business engages in online cross-border transactions with customers located in other Member States or third countries[33]. Since VAT is levied in the country of the customer and in accordance with that country's laws, different national VAT rules will apply and different tax authorities will be involved. Overall, 16 % of SMEs that are trading across the borders and 18 % of those that do not trade internationally perceive complicated foreign taxation regimes as a major obstacle to cross-border expansion[34].

As regards company law, there persist differences between Member States' company laws and when founders set up subsidiaries or new companies in other Member States they face different legal or administrative requirements than in the Member State of their primary establishment. These differences result in costs for companies. Although all companies wishing to expand cross-border are affected, these administrative and legal burdens are proportionally much heavier for SMEs, who often have smaller financial means and organisational resources than larger companies[35]. Costs related to compliance with legislation and legal advice related to set-up were mentioned by almost 62 % of companies and business federations in the 2013 on-line consultation as one of the biggest 'company law obstacles' preventing companies from expanding their activities abroad[36]. In addition, existing rules in company law do not sufficiently integrate the benefits of digital technology[37].

There is also insufficient legal clarity as regards carrying out cross-border operations, such as cross-border divisions, where there is no EU legal framework in place, but also cross-border

[30] European Commission, 'Internationalisation of SMEs', *Flash Eurobarometer 421*, 2015.
[31] http://www.parliament-of-enterprises.eu/upload/45_EPEresults_16Oct14_5446157c3e2b1.pdf
[32] Around 75-80 % of respondents mentioned the change in VAT regulations which came into effect in January 2015 as being a significant (or indeed the most significant) inhibitor to cross-border activities. 'Startups and the Digital Single Market, Final Report', *NESTA, tech.eu and The Lisbon Council*, 2015.
[33] European Commission, Commission Staff Working Document 'A Digital Single Market Strategy – Analysis and evidence' SWD(2015) 100, pp. 31-33.
[34] European Commission, 'Internationalisation of SMEs', *Flash Eurobarometer 421*, European Commission, 2015.
[35] European Commission, Commission Staff Working Document 'Impact Assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on single-member private limited liability companies', SWD(2014) 124.
[36] Results of the 2013 on-line consultation - http://ec.europa.eu/internal_market/consultations/2013/single-member-privatecompanies/
[37] European Commission, Commission Staff Working Document 'A Digital Single Market Strategy – Analysis and evidence' SWD(2015) 100, pp. 75-78.

mergers, where stakeholders called for improvements in the current EU framework as regards a number of procedural as well as substantive rules[38].

It appears that the ex-ante perception of barriers to cross-border expansion is often much greater than the actual assessment of those barriers once a firm has attempted to scale up. In a recent Digital Single Market survey, the percent of firms fearing barriers to operate in another Member State (e.g. VAT rules, consumer protection laws or delivery services) was almost twice as high compared to the firms that actually had tried operating in another Member State[39]. These results were confirmed in the recent survey on the barriers for internationalisation for SMEs[40]. This shows that small firms without international experience lack confidence and sufficient information to enter foreign markets and to deal with foreign regulations.

Access to finance

EU start-ups face particular challenges in obtaining capital for their launch and initial phases, limiting their investment opportunities, expansion potential and innovation. Similarly, start-ups who succeed in growing leverage on average in Europe much less funding in later stages of growth than their American counterparts. In addition, regulatory constraints in some Member States limit the overall supply of venture capital financing for innovative companies, limiting their growth prospects.

Venture capital investment (as a percentage of GDP) remains low despite the policy efforts (e.g. tax incentives, supportive legal regimes, etc.) from EU Member States and the EU. This may stem, *inter alia*, from idiosyncratic regulatory regimes in the EU as regards exit routes for venture capital, i.e. initial public offerings (IPOs) and merger and acquisitions (M&As) and thus smaller size of individual financial markets. Furthermore, third-country venture capitalists (such as those from the United States) seem to perceive European regulations as difficult to navigate and manage on the one hand, and markets and policies fragmented on the other, limiting their willingness to fund European projects. Moreover, individual private

[38] European Commission, 2013 evaluation study on the cross-border mergers directive (http://ec.europa.eu/internal_market/company/docs/mergers/131007_study-cross-border-merger-directive_en.pdf) and 2015 public consultation on cross-border mergers and divisions (http://ec.europa.eu/internal_market/consultations/2014/cross-border-mergers-divisions/index_en.htm)

[39] At least one third of companies that sell, used to sell, or tried to sell online to other EU countries say that "not knowing the rules that need to be followed in another country" is a problem (37 %), and for 15 % of these companies this is a major one. Companies that are not currently selling online stress that "not knowing the rules to be followed" would be a problem (54 %), with 29 % of them having the opinion this would be a major problem. Further, companies engaged in online selling perceive delivery costs (27 %), expansive cross-border dispute resolution (21 %) and complicated foreign taxation regimes (15 %) as major barrier to cross-border expansion. These barriers are even perceived to be more important by SMEs that do not trade cross-border. They mentioned that delivery costs (28 %) and costly cross-border dispute resolution (32 %) are major obstacles to enter foreign markets. Companies engaged in online activities, Flash Eurobarometer 413, European Commission, http://ec.europa.eu/public_opinion/flash/fl_413_en.pdf

[40] 24 % of SMEs that currently/previously export/exported say that "too complicated administrative procedures" are a major problem, compared to 34 % of SMEs that do not export. Further, companies engaged in exporting perceive delivery costs (21 %), expansive cross-border dispute resolution (20 %) and complicated foreign taxation regimes (16 %) as major barrier to cross-border expansion. These barriers are even perceived to be more important by SMEs that do not trade cross-border. They mentioned that and costly cross-border dispute resolution (27 %), higher delivery costs (22 %) and complicated foreign taxation regimes (18 %) are major obstacles to enter foreign markets. Internationalisation of SMEs (2015), Flash Eurobarometer 421, European Commission.

venture capital funds in the EU refrain from investing in very young small seed-stage companies, in contrast to the situation in the USA.

Recent research suggests that higher public equity investments in start-ups are associated with a lower incidence of write-offs and a longer duration for the investments[41]. There are, however, some limits to public investors' engagement. Evidence suggests that venture capital backed firms have a higher probability of successful exit though IPOs and acquisitions if the public sector is involved, but its involvement is limited and subject to control of private funds managers[42]. This strengthens the view that the public intervention must be large enough to make a difference, but not too large in order not to twist the objectives of the VC-backed firms towards unprofitable ones.

In addition, insolvency regimes are important throughout the life cycle of a company[43]. Certain aspects of national insolvency frameworks hinder a smooth closure of old and setting up of a new company. In particular, in several Member States it takes many years for honest entrepreneurs who undergo bankruptcy before they can be discharged of their old debts and be able to return to business activities. The same applies to single businesspersons who are kept out of the economy for long periods of time as well as to honest directors who did not succeed in one venture and who are being disqualified from exercise of their functions.

The long discharge periods may stigmatise failure, discourage entrepreneurship, with negative effects for employment rates, growth and innovation, while shorter discharge periods could have a positive impact on the level of entrepreneurship, including the self-employment rates[44]. Therefore, it is important to have proportionate 'second chance' provisions in the EU legislation to reduce the currently excessive time periods laid down in national legislations preventing honest but failed entrepreneurs to restart the economic activity.

Regulatory barriers to innovation

Regulatory barriers specifically related to innovation constitute another hindrance to the growth of innovative start-ups and SMEs. Empirical studies on the impacts of regulations on innovation present a rather heterogeneous, and often ambivalent, picture regarding the area of regulation, types of companies, sectors, and types of innovation and the time horizon of the impacts incurred[45]. There may exist[46]: (i) barriers such as outdated or blocking legislation where regulations are the obstacle for R&I actions, or too frequent changes in standards which may also limit the incentive for investment if a technology is relatively recent; (ii) non-supportive frameworks when the regulatory environment is not open to or not supportive

[41] Buzzacchi, L., Scellato G., Ughetto E., 'The investment strategies of publicly sponsored venture capital funds', *Journal of Banking & Finance 37*, pp. 707–716, 2013.

[42] Brander, J.A., Du Q., Hellmann T.F., 'The effects of government-sponsored venture capital international evidence', *NBER 16521*, 2010.

[43] Today in Europe around 40 % of enterprises do not survive the first three years of their existence; an average of 200,000 firms are going bankrupt across the EU each year, resulting in direct job losses of 1.7 million every year. Around a quarter of these bankruptcies have a cross-border element. See: European Commission, Staff Working Document accompanying the Commission Recommendation on a New Approach to Business Failure and Insolvency, SWD(2014) 62.

[44] 'A Second Chance for Entrepreneurs, Prevention of Bankruptcy, Simplification of Bankruptcy Procedures and Support for a Fresh Start', *Final Report of the Expert Group* for Directorate General Enterprise and Industry, 2011, p. 10 (with reference to Armour, J. and Cumming D., 'Bankruptcy Law and Entrepreneurship', *University of Cambridge Centre for Business Research Working Paper No. 300*, 2005).

[45] Blind K., 'The impact of regulation on innovation', *NESTA working paper*, 2012.

[46] Pelkmans, J. and Renda, A., 'Does EU regulation hinder or stimulate innovation?', *CEPS Special Report No. 96*, November 2014.

enough for R&I actions; (iii) problems with the implementation of EU legislation across Member States and (iv) gaps when no EU legislation exists in a given field. Innovation, particularly breakthrough innovation, is a long process requiring considerable investment. Companies will not invest if the situation is perceived as being too risky either because existing regulations prevent innovation, or because the legislative framework is not sufficiently clear, predictable or stable.

Bringing innovation to the market and large-scale implementation of new solutions can be hindered not only by lack of funding, but also because of confusion about required authorisations, ambiguous regulation, and a lack of opportunities for testing and demonstrating innovative products, processes and/or services in real world conditions[47]. The existing evidence is strongly in favour of lead markets and of the creation of a favourable environment for fast-growing firms in innovative markets[48].

2.3. Making the market without borders for services a practical reality

2.3.1. A 'services passport' for companies

Policy context

Business services constitute one of the largest services sectors in the EU contributing 11.7 % to EU GDP and 12.6 % to overall employment[49]. However, a number of key business services sectors suffer from limited cross-border trade and investment in the Single Market. In addition, despite its increased economic significance in terms of size the productivity of the sector is low, in particular compared to the USA[50]. The sector is not only important in its own right but has important links to other sectors of the economy. As the manufacturing industry is an important consumer of business services, increased competition and productivity gains in business services would entail important benefits for the manufacturing industry as well[51].

The EU construction sector represents 5.9 % of EU GDP and 6.6 % of EU total employment[52]. Construction is one of the most regulated services sectors in Europe and its recovery is proving to be slow and difficult. Labour productivity in construction has evolved negatively over the last decade. In addition, the EU construction market is characterised by a low level of integration, both in terms of temporary cross-border service provision and in terms of establishment in other Member States.

In both business and construction services, SMEs are often obliged to work through local partners when offering their services in another Member State to be able to comply with

[47] To remove such barriers the Government of the Netherlands launched the Green Deal programme in 2011 as part of their Sustainability Agenda. The Green Deals are agreements between various parties (including businesses, social organisations, and lower-tier government bodies) that focus primarily on removing non-financial obstacles, such as legislation and licensing. The aim is to boost solutions that are both economically viable and environmentally sustainable and hence to stimulate jobs and growth.

[48] 'Report of the High-level Panel on the Measurement of Innovation chaired by Prof. Andreu Mas-Colell', 2010.

[49] Eurostat, National Accounts detailed breakdown, 2011.

[50] ECORYS, 'Study on business-related services', 2012.

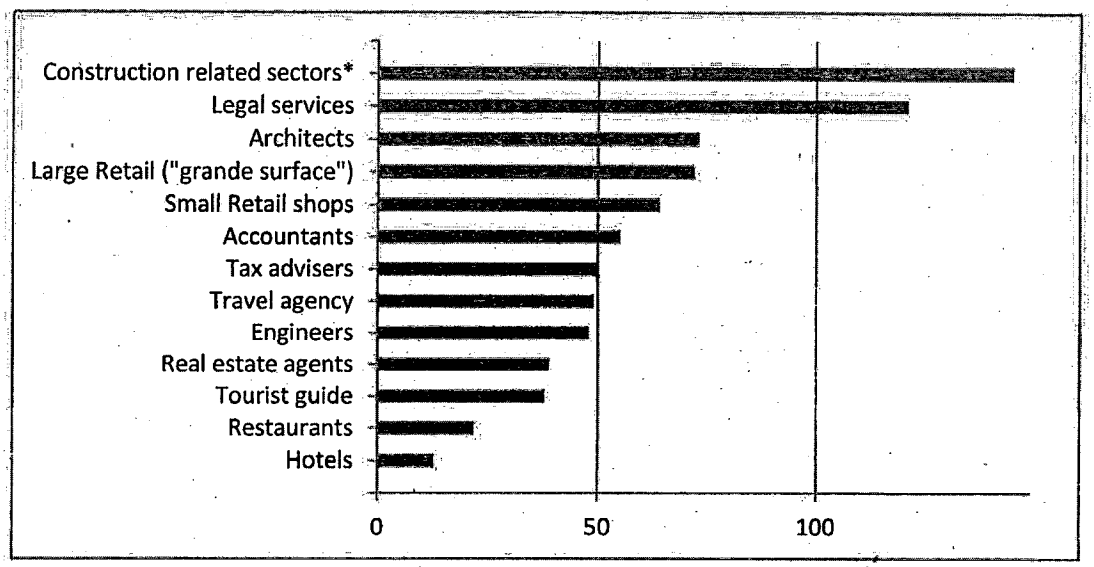
[51] For example Fernández Corugedo E. and Pérez Ruiz E. 'The EU Services Directive: Gains from Further Liberalization', *IMF Working Paper WP/14/113*, 2014; Arentz et al., 'Services Liberalisation in Germany - Overview and the Potential of Deregulation', 2015.

[52] Eurostat, National Accounts detailed breakdown, 2012.

certain rules of the country where the service is provided. As a result, competition remains limited.

The 2015 update[53] of the 2012 study[54] on the economic impact of the Services Directive shows that construction and some key business services are still among the sectors with the largest number of barriers in the EU.

Figure 1 - The number of maintained restrictions in the sectors covered by the Services Directive in all the EU Member States in 2014



* Includes: construction/building companies; certification services in the area of construction; crafts businesses in construction sector.

Source: Commission assessment, 2015

Given the negative impact of existing barriers in the provision of services on the economy, the European Council recommended to eight Member States, within the context of the 2015 European Semester, to improve the functioning of their service markets.

Problem and impact

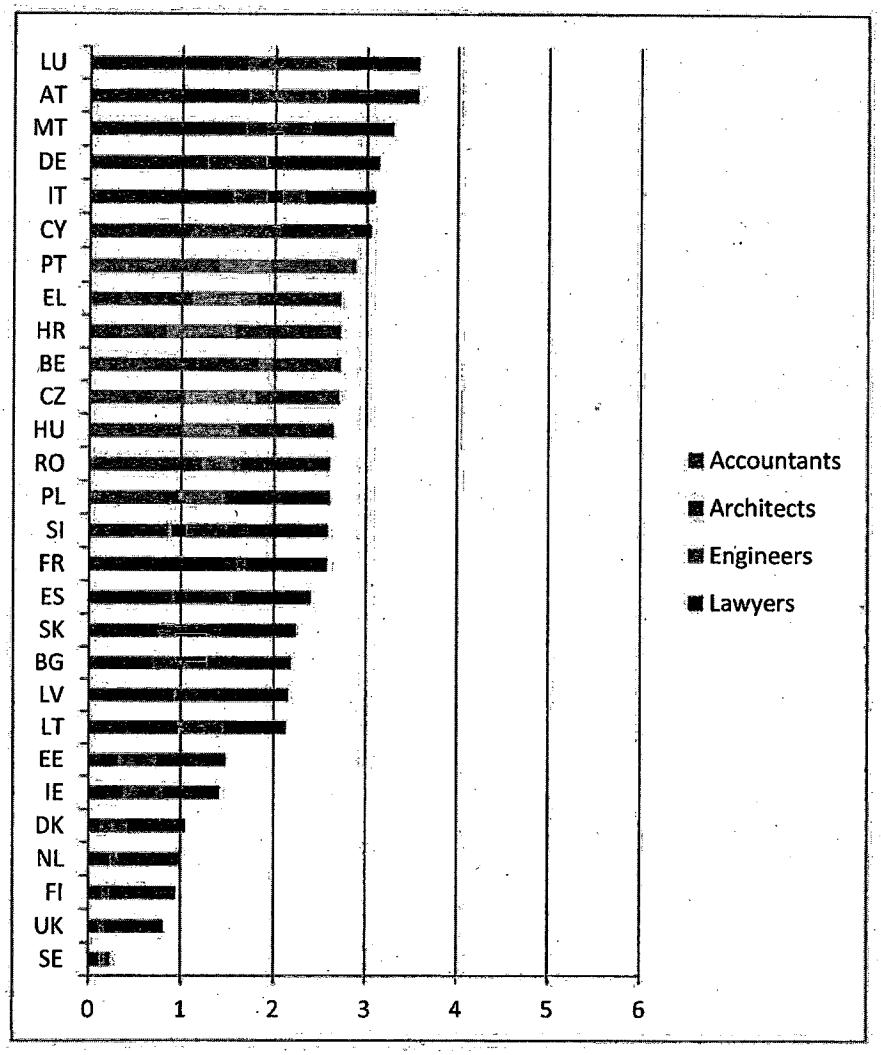
A 2015 Commission assessment of restrictions in the business services sector stemming from a set of regulatory and administrative barriers in four key professions shows a diverse picture across Member States and professions[55]. Whereas some Member States show relatively high levels of restrictiveness in each of these sectors, others impose much fewer restrictions.

[53] For further details on this update see: http://ec.europa.eu/DocsRoom/documents/13327/attachments/1/translations/en/renditions/native

[54] Monteagudo J., Rutkowski A. and Lorenzani D. 'The economic impact of the Services Directive: A first assessment following implementation', *European Commission economic paper 456*, 2012.

[55] Further information on this economic analysis is available on http://ec.europa.eu/DocsRoom/documents/13328/attachments/1/translations/en/renditions/native. It covers the following regulatory barriers: reserved activities, tariffs, restrictions on advertising, compulsory chamber membership, restrictions on corporate form, insurance obligations and authorisation requirements. In addition, it

Figure 2 - Overall restrictiveness scores per Member State (Business services)



Source: Commission assessment, 2015

As regards *construction services*, companies in this sector have a high potential for mobility due to the nature of the services they provide: the construction itself generally takes place at its final destination, and many other specialised services that contribute to it are also dispatched on site more or less regularly. Many construction companies consider international mobility an important factor for the success of their organisation, especially in terms of short-term mobility[56].

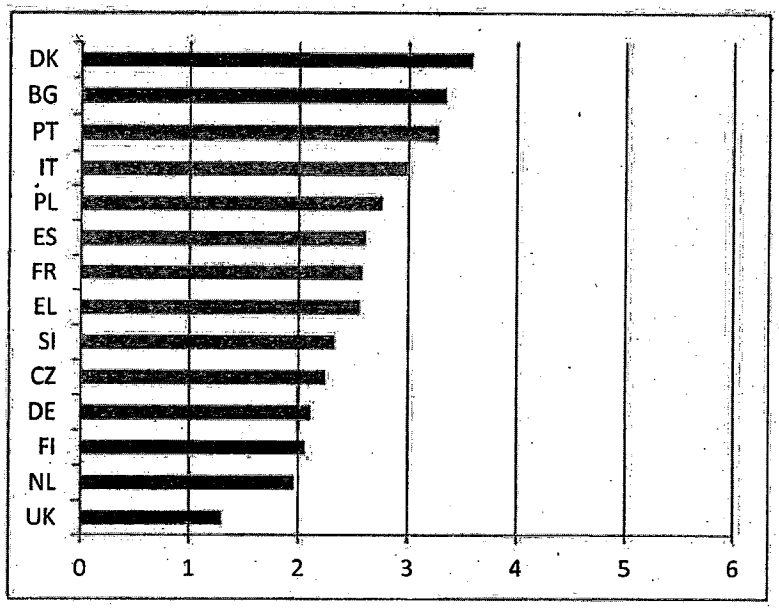
However, barriers in several Member States deter companies from providing their services in other Member States. A forthcoming study commissioned by the Commission services concludes that the conditions imposed on construction service providers for accessing the

also captures the performance of the Points of Single Contact in the different Member States. Higher scores indicate higher restrictiveness.

[56] Montgomery, E., 'International Mobility in the Engineering & Construction Industry, Analysis and insight on trends and best practices', *PricewaterhouseCoopers*, 2008.

market (both for temporary cross-border provision and for secondary establishment) vary significantly in terms of restrictiveness among the Member States covered[57].

Figure 3 - Overall restrictiveness scores per Member State (Construction)



Source: Ecorys, forthcoming

This section will look in more detail at some of the barriers for business services and construction, of which the assessment is summarised in the above figures.

Authorisations, registrations and notifications

Authorisation schemes are procedures that require the service provider to obtain a formal or implied decision by a competent authority to access or exercise a service activity. In the context of an authorisation scheme, a service provider has to provide information and certificates to the competent authority and cannot start the service provision until a decision on its application has been taken (formally or tacitly). Authorisations are not prohibited per se, but they can be maintained only if they are non-discriminatory, justified by an overriding reason of general interest and proportionate (Article 9 of the Services Directive). Furthermore, a number of rules and principles also apply to the scope, validity, procedure and conditions required for the granting of the authorisation (Articles 10 to 13 of the Services Directive). Authorisation schemes can only be applied by the host Member State to cross-border providers of temporary or occasional services when the scheme is justified and proportionate to protect public policy, public security, public health or the environment (Article 16 of the Services Directive).

Despite a considerable reduction in the number of authorisation and registration requirements following the entry into force of the Services Directive, numerous requirements remain in place across many Member States. They are particularly burdensome where service providers attempt to offer their services in another Member State to the one where they are primarily

[57] Bulgaria, the Czech Republic, Denmark, Germany (North Rhine-Westphalia), Greece, Finland, France, Italy (Milan), Netherlands, Poland, Portugal, Slovenia, Spain (Madrid) and the UK (England).

established. In cases of secondary establishment, cross-border providers are sometimes asked to show that they comply with requirements very similar to those applied to them in their Member State of primary establishment. Temporary cross-border service providers are sometimes asked to comply with authorisations in the country of destination that are not clearly justified under Article 16 of the Services Directive, or they are asked to show compliance with conditions that are the same or very similar to the ones applicable to the authorisation obtained in their country of establishment.

Authorisation schemes are in some cases further complicated by the fact that the authorisation is not valid for the entire territory of a Member State or has a limited validity period. In addition, procedures are in many cases overly burdensome due to requirements to provide numerous documents – often translated and at times even certified or authenticated – and the absence of tacit approval systems meaning service providers must await explicit permissions before being allowed to offer a service.

According to the 2015 Commission assessment of selected *business services*, authorisation requirements apply in seven Member States for legal persons who provide civil engineering services, in six Member States for accounting services and in eight Member States for architectural services. In addition, registration at the professional chamber is also sometimes required for the provision of the service by certain types of legal persons. Such requirements exist for architectural services in nine Member States, engineering in seven Member States and accounting in eight Member States.

On the other hand, the study commissioned by the Commission services on the *construction* sector found horizontal authorisation schemes required to allow service providers to access the construction market – in six[58] out of the fourteen Member States covered by the study. These authorisation schemes are for example related to technical and professional capacity or quality management certifications and apply both to temporary cross-border provision as well as establishment.

For both *business services and construction*, a substantial number of documents are required in certified or authenticated form, translated and sometimes only accepted if issued in the host Member States, imposing significant administrative burden. Documents of equivalent purpose are often not accepted. Full electronic application handling is often not available.

Procedures that only require service providers to file a notification or declaration with the competent authority are not considered as authorisation schemes. They are usually less burdensome than authorisation schemes and allow for the immediate start of the service provision. However, even notification requirements can render the provision of a service more difficult, especially if they imply the submission of an important amount of documentation.

Feedback obtained from stakeholders during workshops held throughout the EU and through an online questionnaire[59] has confirmed the problems for service providers stemming from multiple authorisations, registration or prior notification requirements. Responses to the on-

[58] Bulgaria, Denmark, Greece, Italy, Portugal and Spain.

[59] In cooperation with the Member States, the Commission in 2014 organised 9 workshops across Europe to hear from stakeholders the barriers they faced in the services Single Market. Over 300 business and business organisations participated in the events. In addition, the Commission conducted two questionnaires on barriers to the Single Market in services. Together 293 answers were submitted by stakeholders, mostly SMEs (81 %).

line questionnaire showed that 79 % companies have encountered problems with registration, authorisations and licenses when providing cross-border services (temporarily or through secondary establishment). As such, requirements can be complicated, lengthy and costly to comply with, deterring service providers from going cross-border and forming an obstacle to greater cross-border trade and investment, particularly by SMEs.

Finally, the temporary posting of workers by companies from one Member State to perform a service in another Member State has become an important feature of the Single Market for services. In 2013, 1.74 million posted workers were registered across the Single Market (an increase of 13 % compared to 2012 and 27 % compared to 2010), out of which 8 % were self-employed. Despite this rapid growth, the overall share of posted workers in the total workforce remains low at about 0.6 %[60]. Even in construction, which features over 40 % of all posted workers in the EU, these make up no more than 2-4 % of the overall workforce.

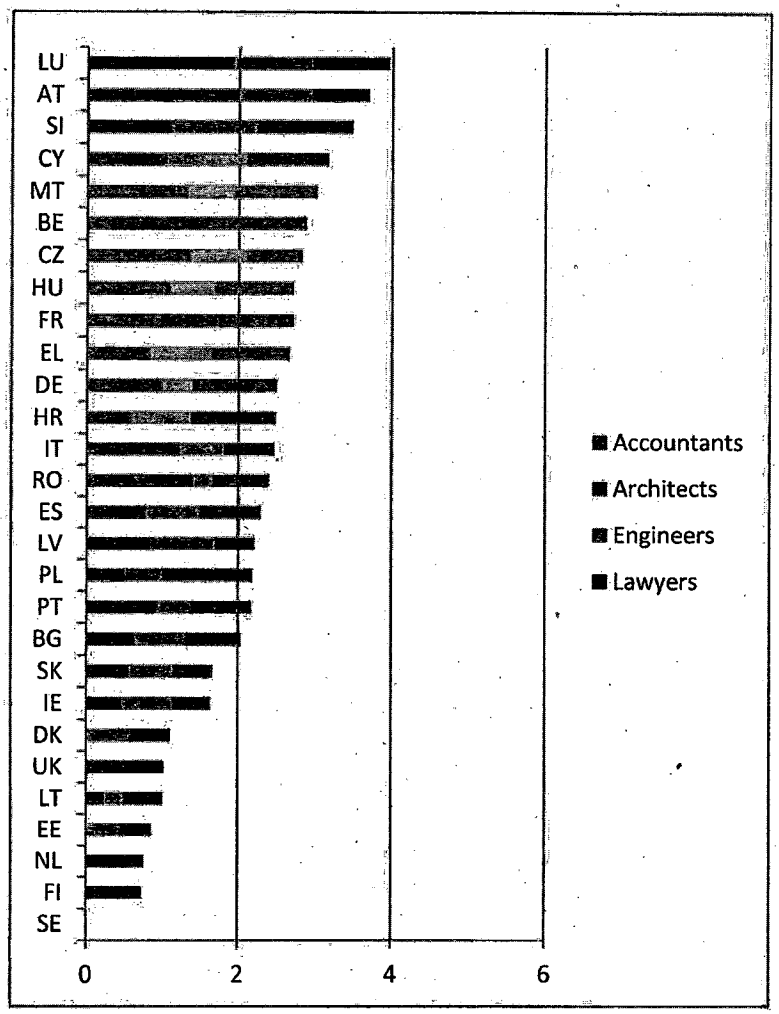
Feedback from service providers shows that companies need to comply with burdensome formalities when posting workers. More than 30 % of companies providing services cross-border which responded to the Commission questionnaire reported that existing rules on the posting of workers constituted a barrier. The problems related to posting of workers were raised principally by companies active in the construction sector, but also frequently by business services companies. Stakeholders reported burdensome administrative requirements for the posted workers related to the necessary paperwork, registration obligations and fees charged in the context of these procedures. In many cases it was not clear for companies whether their workers would be covered by the Posted Workers Directive[61] and in particular its minimum wage rules.

The following figures summarise the restrictiveness of authorisation and notification requirements in business services and construction across Member States both when providing services cross-border on a temporary basis and in the case of secondary establishment.

[60] Pacolet, J. and De Wispelaere, F., 'Posting of Workers. Report on A1 portable documents issued in 2012 and 2013', European Commission, 2014.

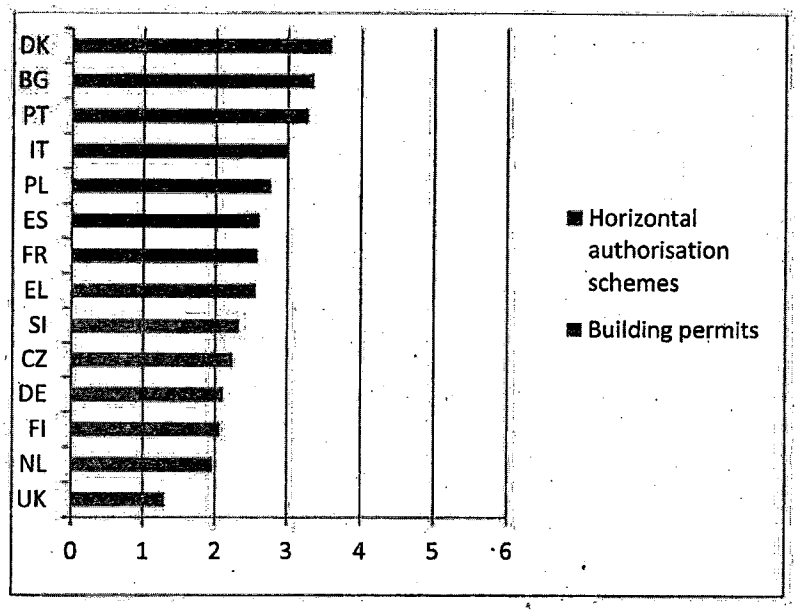
[61] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

Figure 4 - Restrictiveness scores authorisation and notification requirements (Business services)



Source: Commission assessment, 2015

Figure 5 - Restrictiveness scores authorisation and notification requirements (Construction)



Source: Ecorys, forthcoming

Legal form, shareholding, management and multidisciplinary restrictions

Important restrictions are found for companies providing professional services in Member States as regards the legal form of service providers, their shareholding structure, the allocation of voting rights and management positions, and as regards multi-disciplinary restrictions[62].

Legal form restrictions allow for the provision of certain services by partnerships and sometimes by limited liability companies only. Other company types, including public limited liability companies, are sometimes not allowed. Sometimes company forms incorporated in another Member State are not recognized for this purpose.

Requirements for shareholding and voting rights to be held by qualified professionals often bar legal persons from holding shares and sometimes go beyond imposing a simple majority. But even if requirements impose a simple majority to be in the hands of professionals or companies controlled by professionals, national laws still do not allow companies coming from other Member States which do not comply with such requirements to enter these markets in whatever way. In some cases professionals holding shares or voting rights even need to be established in the host Member State.

Requirements imposing management positions to be held by professionals are also common, preventing companies coming from Member States without such requirements from opening a secondary establishment in that market or providing temporary cross-border services there.

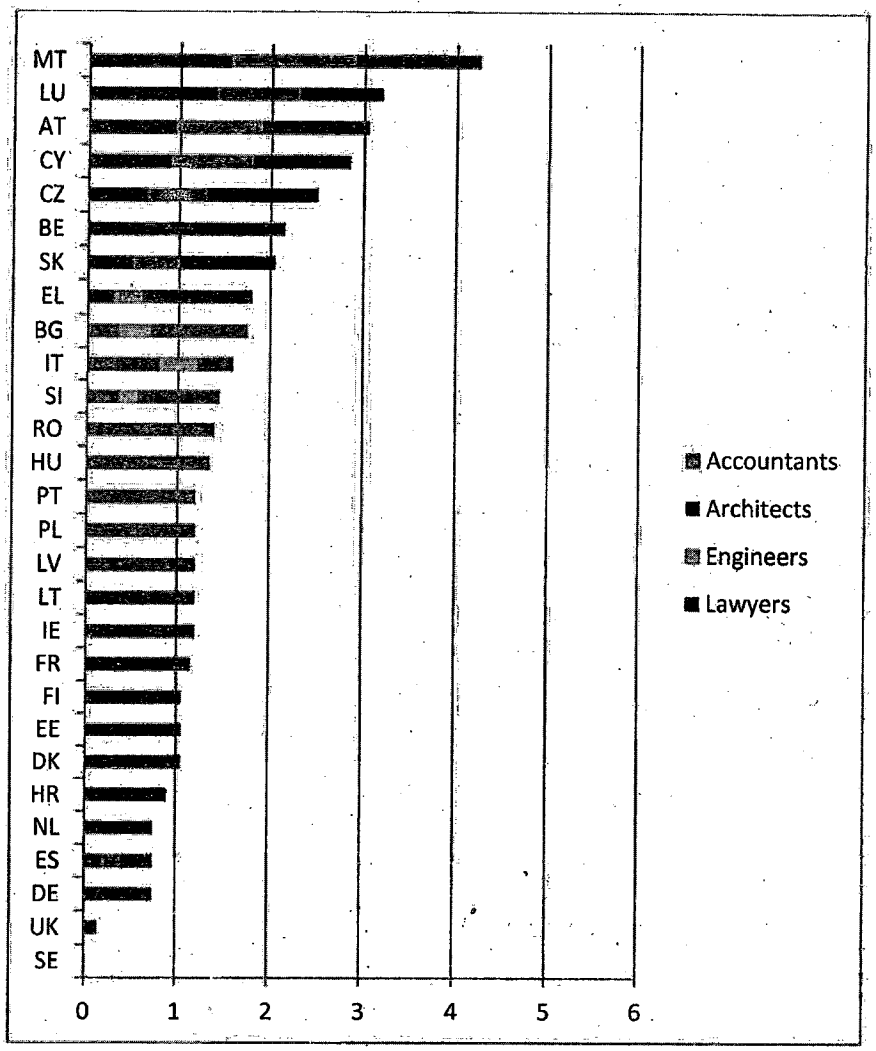
Finally, multidisciplinary restrictions forbidding joint exercise of certain professional activities in combination may also prevent companies from other Member States from opening a secondary establishment or providing temporary cross-border services.

[62] See also European Commission Staff Working Document on the outcome of the peer review on legal form, shareholding and tariff requirements under the Services Directive accompanying the document Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Evaluating national regulations on access to profession, SWD(2013) 402, 2 October 2013.

All these requirements can be maintained within the boundaries of Articles 14, 15, 16 and 25 of the Services Directive. Although some of these rules are meant to protect the independence of the professionals, they may also significantly reduce the scope for competition, hamper business development and innovation, including the possibility for domestic companies to grow, as joint practice of certain professional activities may not be possible and access to capital by outside investors is substantially complicated. As a result, small service providers find it difficult to grow into larger, more competitive and more productive companies.

These requirements are serious obstacles for the establishment of service providers from other Member States and their cross-border services provision, because such restrictions might oblige them to change their legal form, structure or business model. They may require companies established in another Member State to reincorporate and/or restructure their corporation, as set-up in the Member State of primary establishment. Requirements form a barrier for providers from all Member States regardless of restrictions in the home Member State, because Member States impose differing requirements.

Figure 6 - Restrictiveness scores legal form, shareholding, management & multidisciplinary restrictions (Business services)



Source: Commission assessment, 2015

The 2015 Commission assessment of legal form and shareholding requirements and multidisciplinary and voting rights restrictions showed that legal form, shareholding, management and multi-disciplinary restrictions exist in about half the Member States as regards architects, civil engineers or accountants. The most excessive requirements are currently the object of infringement proceedings by the Commission.

Legal form requirements exist in four Member States for architects and civil engineers and in one Member State for accountants.

Shareholding and voting rights requirements are widespread. Requirements on shareholding and voting rights for architects exist in twelve Member States. These might affect 100 % of the shareholders (and voting rights), the majority of the shareholders (and voting rights) or two thirds of the voting rights. For civil engineers, such requirements exist in nine Member States and, similarly to architects, they affect 100 %, the majority or two thirds of the shareholders and/or voting rights. Finally, six Member States have in place shareholding and voting rights requirements for accountants. They affect the majority of the shareholders (and voting rights), two thirds of the voting rights or the majority of voting rights.

Restrictions on the joint exercise of the profession are found in nine Member States for architects, eight Member States for civil engineers and four for accountants. The restrictions in question might be either a complete ban on the joint exercise with any other profession, a prohibition of the joint exercise among these professions (joint exercise of architectural and engineering services, for example) or joint exercise of these three professions with other service activities.

Conditions for access to construction services

The forthcoming study commissioned by the Commission services on construction has found stringent requirements in several Member States for accessing the construction services market (both for established service providers operating permanently in the market and sometimes also for temporary cross-border provision). The way in which compliance with them can be demonstrated presents a barrier for companies from other Member States. Requirements that can prove burdensome for service providers are:

- Technical and professional capacity conditions often require reorganisation and adaptation of business models, including through hiring local professionals or teaming up with local partners. These sometimes oblige service providers to hold a certain degree of experience, hire a certain number of qualified personnel or even have certain equipment available irrespective of concrete works to be undertaken.
- Organisational requirements to fulfil health and safety standards[63] (such as imposing provision of either internal or external health and safety services under divergent conditions across Member States) may require reorganisation at branch level for companies primarily established in another Member State or, more frequently, the hiring of a local (external) service provider to comply with the requirement. These requirements do not relate to health and safety standards that a company should respect on the ground, but how a construction company is structured to ensure compliance.
- Organisational (mandatory) certification schemes impose complex requirements on how a business is structured (e.g. as regards quality management systems) under strict and detailed national standards which differ significantly across Member States. The result of this divergence is that sometimes mutual recognition becomes difficult in practice, requiring businesses to set up local structures they would not otherwise need and which then must undergo multiple and expensive certification procedures.
- Economic or financial capacity requirements oblige businesses to obtain specific financial guarantees and may sometimes unjustifiably not take account of requirements complied with in the Member State of primary establishment (such as previously obtained guarantees or even equity capital of the parent company that could also cover the activity in the new Member State).

These conditions are often the object of horizontal authorisation schemes. However, in countries which do not impose such controls on construction service providers, they are sometimes conditions for issuing building permits.

[63] These requirements stem from provisions implementing the Framework Directive for Health and Safety, Directive 89/391/EEC.

Table 1 - Conditions for access to construction services

Type of restriction	BG	CZ	DK	DE	EL	FI	FR	IT	NL	PL	PT	SL	ES	UK
Technical and professional capacity	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Certification			X					X						
Economic/ financial capacity	X										X		X	
Good repute	X		X								X			

Source: Ecorys, Commission assessment, forthcoming

Mandatory professional indemnity insurance

Insurance obligations are usually imposed by national legislation in order to ensure the possibility of redress for claims against service providers. Member States take a very heterogeneous approach as regards insurance obligations and access to insurance for provision of services. An insurance obligation can be imposed by way of legislation or for professional services by the internal rules of professional associations.

Different approaches are taken by different Member States for the same profession or by the same Member State for different professions. In some cases professional associations organise collective insurance cover, while in others the service provider has to contract individual cover. These divergences are leading to legal uncertainty from the perspective of the service providers and represent an important barrier to cross-border activities. Insurance requirements for construction service providers[64] also vary greatly across Member States, rendering mutual recognition inapplicable.

Many SMEs and professionals find it hard to obtain insurance cover for cross-border activities since the market focuses on domestic needs and solutions are only available where there are economies of scale (e.g. for major companies that need global insurance cover). Even when service providers are required by law to be insured, there is usually no corresponding obligation for the insurance industry to offer insurance coverage.

The Services Directive foresees an equivalence rule for insurance policies issued in other Member States (as per Article 23 of the Services Directive). Nevertheless, while this rule as such was transposed in national law, in most cases Member States did not offer practical tools for ensuring that such equivalence could work in daily cross-border context. Thus, no

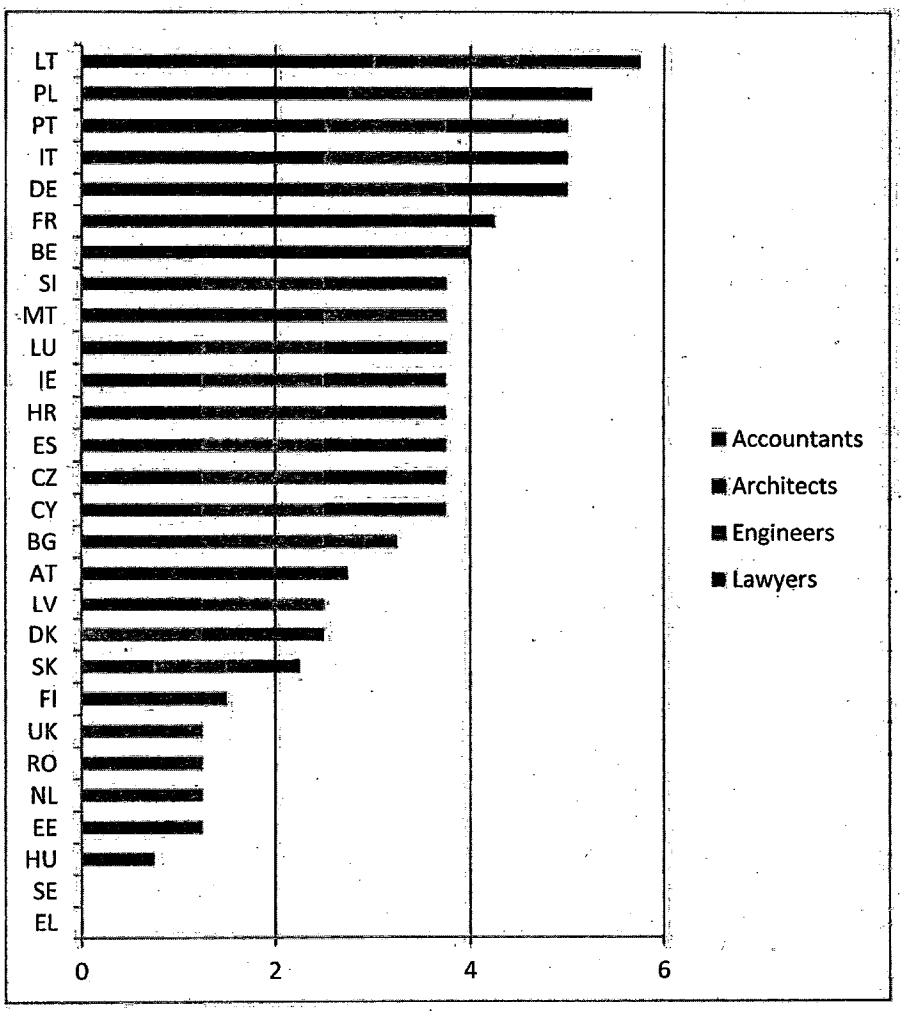
[64] In all Member States except Greece (it is *de facto* mandatory in the UK).

approach exists on the comparability and equivalence assessment of insurance cover from other Member States.

In addition, the lack of transparency regarding insurance policies for the service providers concerned and regarding information about the recipients of services also creates difficulties in the Single Market for services. For example, in the absence of clear details regarding the territorial scope or temporal cover of insurance policies, competent authorities are not in a position to decide about the possible equivalence of such policies. Nor can service providers judge if their insurance covers them going abroad.

Finally, lack of clarity on the geographical limitations and on the period covered by existing insurance policies create significant risks for the client, as well as for the service provider who is under an obligation to inform the client about his insurance coverage and who may (wrongly) believe that the existing insurance policy cover extends beyond national borders and is valid during a certain period. It also creates the risk of contracting double insurance.

Figure 7 - Restrictiveness scores mandatory professional indemnity insurance (Business services)



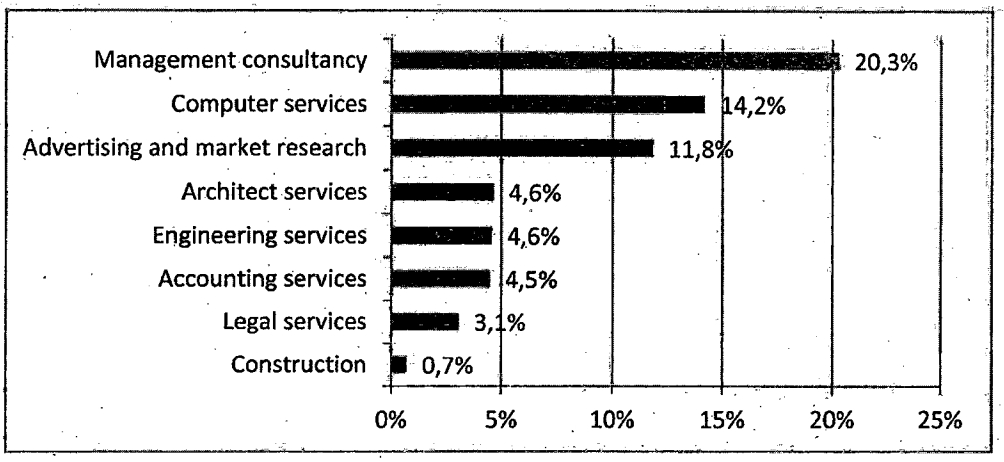
Source: Commission assessment, 2015

The above summarises the restrictiveness of professional indemnity insurance requirements in business services across Member States.

Impact

The EU *construction sector* is characterised by very low integration across Member States, both in terms of temporary cross-border service provision and secondary establishment. Regarding temporary cross-border service provision, the level of intra-EU imports and exports in construction is low. The figure below gives an indication of temporary cross-border trade intensity. It shows for different services sectors the average of intra-EU imports and exports compared to the total size of the sector in terms of turnover. This indicates that the construction sector has significantly lower levels of intra-EU imports and exports compared to other services sectors.

Figure 8 - Indicator of cross-border trade intensity



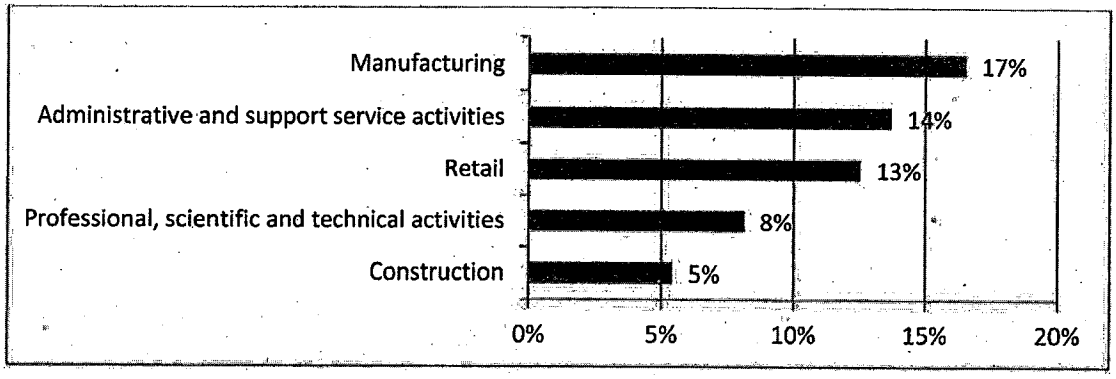
Source: Eurostat (2012), Commission assessment

This picture is also confirmed when asking SMEs active in the construction sector about their export participation. For example, an EU survey on internationalisation of SMEs[65] showed that only 7 % of EU SMEs active in the construction sector export their services compared to 19 % in business services, 25 % in retail and 56 % in manufacturing. Another example is the UK 2014 Small Business survey[66] which shows that only 4 % of UK construction SMEs sell services outside of the UK compared to 25 % in business services and 45 % in manufacturing.

The levels of secondary establishment in the construction sector are also low. The figure below gives an indication of the intensity of secondary establishment in different services sectors and the manufacturing sector. It shows the proportion of total EU value added which is generated by intra-EU foreign affiliates. Here again construction is shown as lagging significantly behind other sectors.

Figure 9 - Indicator of secondary establishment intensity

[65] European Commission, 'Internationalisation of European SMEs', 2010.
[66] BIS, 'Small Business Survey 2014: SME employers', 2015.



Source: Eurostat (2012), Commission assessment

A 2015 European Commission assessment of the economic impact of selected barriers in four *business services* sectors confirmed significant economic impact regarding intensity of competition, sector profitability and efficiency of resource allocation[67].

Concerning the impact of regulatory barriers in business services on competition, the figure below shows the share of companies newly establishing in a market (relative to all firms in a market, 'birth rate') for Member States with more restrictive versus those with less restrictive barrier levels[68]. It illustrates that Member States with more restrictive barrier levels have on average a lower number of new service providers entering their markets in each of the four sectors analysed.

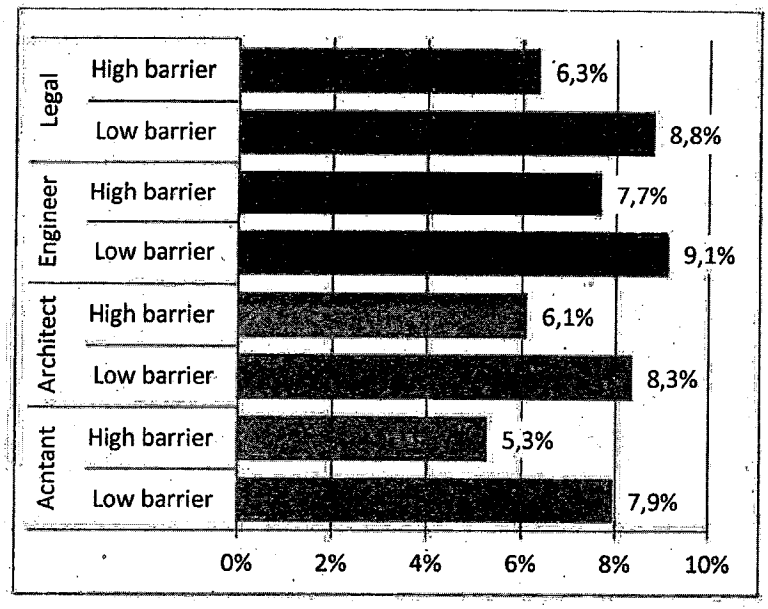
As a result, competition is lower in these Member States and market dynamics are constrained. Indeed, Member States with more restrictive barrier levels have on average also a lower combined share of companies entering and exiting the market ('churn rate') in each of the four sectors analysed[69].

Figure 10 - Average birth rates for high vs. low restrictive Member States

[67] The assessment used econometric analysis to estimate the impact of the following barriers in the sectors of architects, civil engineers, accountants: reserved activities, tariffs, restrictions on advertising, compulsory chamber membership, restrictions on corporate form, insurance obligations, authorisation requirements and performance of the Points of Single Contact.

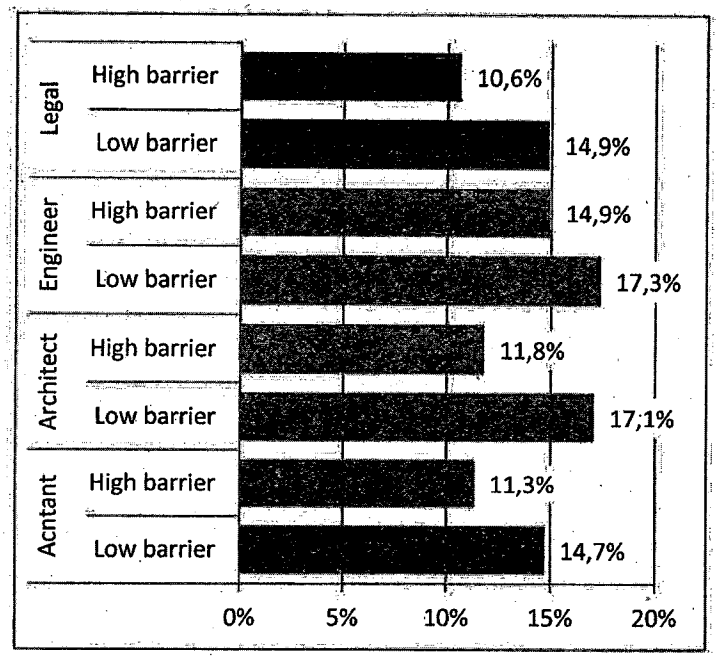
[68] The graph compares the (simple) average of birth rates (average 2010-2012) for the 10 most versus the 10 least restrictive Member States in each sector. Greece and Croatia are excluded from the analysis given no or low data availability.

[69] The graph compares the (simple) average of churn rates (average 2009-2011) for the 10 most versus the 10 least restrictive Member States in each sector. Greece and Croatia are excluded from the analysis given no or low data availability. One outlier has been removed from the analysis (Romania – legal).



Source: Eurostat, Commission assessment

Figure 11 - Average churn rates for high vs. low restrictive Member States



Source: Eurostat, Commission assessment

High market birth and churn rates are associated with high levels of overall competition (with both domestic and foreign entrants) as more productive companies replace less productive ones, increasing the overall competitiveness of a sector.

A quantification of the relationship between barrier levels and birth rates can be assessed through a regression analysis[70]. To this end, an econometric model is created with birth rate as a dependent variable and barrier level as an explanatory variable. Average firm size in a sector is used as a control variable to approximate the possible impact on birth rates caused by the presence of additional possible entry barriers created by large incumbents. Two sets of dummies (fixed effects for sectors and for countries) also enter the equation.

Table 2 - Results of regression analysis barrier levels – birth rates

Barrier level	-0.658*** (0.003)
Average firm size	-0.103 (0.395)
R^2	0.976
Adjusted R^2	0.966
F	91.1 (0.000)

Source: Eurostat, Commission assessment

[70] The regression analysis covers the four business services sectors analysed and 28 Member States. Average of 2010-2012 birth rates per Member State and sector were used.

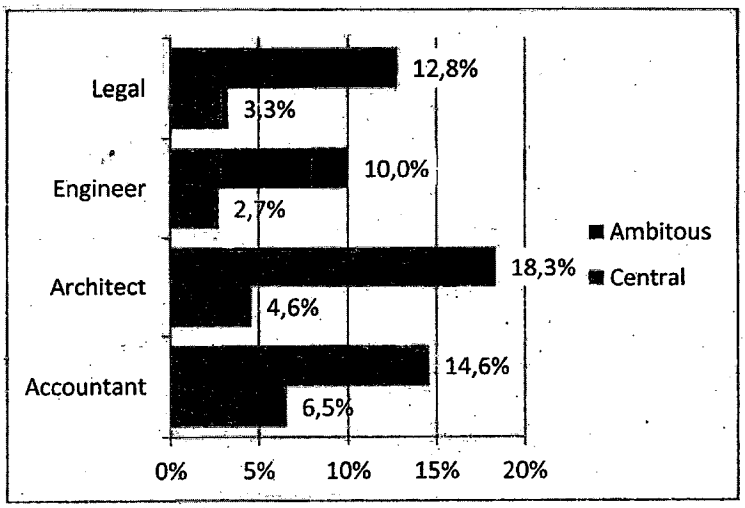
The results of this regression analysis confirm a negative and statistically significant[71] relation between barrier levels and birth rates. In other words, Member States can increase the number of new service providers entering into their markets by reducing barrier levels.

On this basis, the potential impact of reducing barrier levels on birth rates can be estimated. Two alternative 'reform' scenarios are considered:

- A 'central scenario' in which barrier levels are assumed to be reduced to the *average* level across all EU Member States in a given sector;
- An 'ambitious scenario' in which barrier levels are assumed to be reduced to the average of the 'top 5' EU Member States, where the top 5 represents the five countries with the lowest barriers in a given sector.

The results of these two scenarios for each of the four business services sectors analysed are shown in the figure below. Under the central scenario relative births intensity could increase by 2.7 % to 6.5 %[72] (EU weighted average), depending on the sector concerned. Under the ambitious scenario birth rates could increase by 10 % to 18.3 %[73] (EU weighted average).

Figure 12 - Estimated relative impact of reduced barriers on births intensity



Source: Eurostat, Commission assessment

Concerning the impact of regulatory barriers in business services on profitability, the figure below shows average profit rates[74] for Member States with more restrictive versus less

[71] Weighted OLS regression (with the size of a sector in each country, in terms of employment, as a weight) with two-dimensional fixed effects (country dummies and sector dummies, included but not reported in the table). based on 102 observations. The *p*-values are in the parentheses. The barrier level is statistically significant (at *p*-value well below 1 %) and the model has a large explanatory power (high *R*-squared and *F*-statistic).

[72] This corresponds to the increase of the birth rate by between 0.24 of a percentage point and 0.43 of a percentage point. The impact in per cent is calculated as a relative increase in the birth rate.

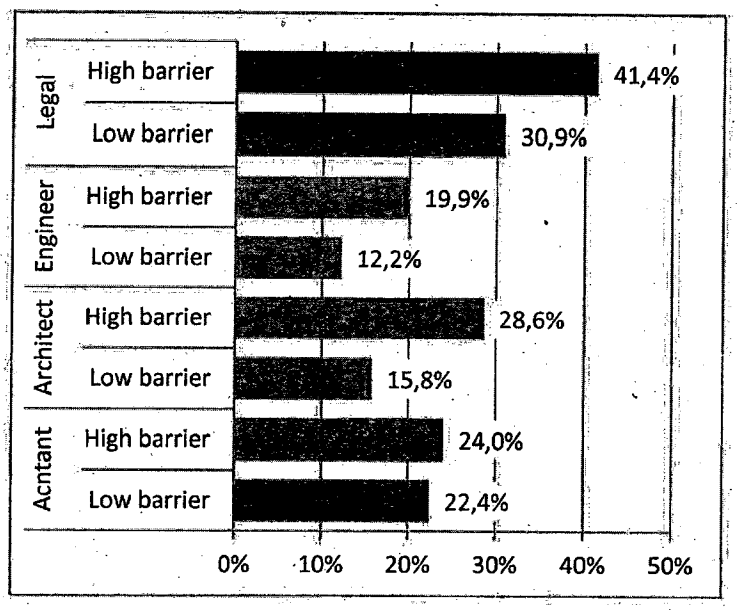
[73] The corresponding increase of the birth rate: between 0.88 percentage point and 1.41 percentage points.

[74] Approximated by gross operating surplus/turnover.

restrictive barrier levels[75]. It shows that Member States with more restrictive barriers have on average higher profit rates in each of the four business services sectors analysed. This is also indicative of the fact that consumers in those Member States are paying higher prices for these services than consumers in Member States with lower barriers.

[75] The graph compares the (simple) average profit rates (average 2010-2012) for the 10 most versus the 10 least restrictive Member States in each sector. Some data is missing for the Czech Republic.

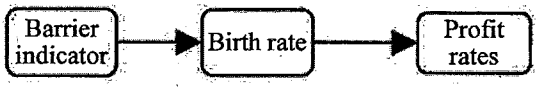
Figure 13 - Average profit rates for high vs. low restrictive Member States



Source: Eurostat, Commission assessment

Combining the results of the above econometric analysis on the link between barrier levels and birth rates with a recent Commission study quantifying the impact of birth rates on profit rates in the four sectors analysed[76], the relationship between barrier levels and profit rates can be estimated. The underlying reasoning for this is that changes in barrier levels affect business dynamics and, through it, the profit rates of the sector.

Figure 14 - Link barrier levels and profit rates



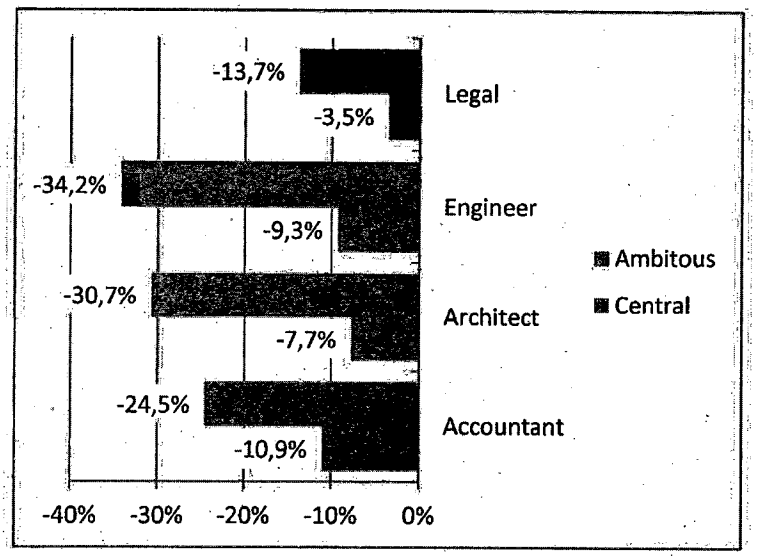
This two-step approach (illustrated in the graph above) allows us to estimate the potential impact of reducing barrier levels on profit rates. For this, two alternative reform scenarios are again considered, the central scenario and the ambitious scenario illustrated above. In the central scenario, profitability in the sectors analysed could be reduced by 3.5 % to 10.9 %[77] (EU weighted average) depending on the sector concerned. In a more ambitious scenario, they could decrease by 13.7 % to 34.2 %[78] (EU weighted average).

[76] Canton E., Ciriaci D., and Solera I., 'The Economic Impact of Professional Services Liberalisation', *European Economy, Economic Papers 533*, 2014.

[77] This corresponds to the decrease of the profit rate by between 1.6 percentage point and 3.0 percentage points. The impact in per cent is calculated as a relative decrease in the profit rate.

[78] The corresponding decrease of the profit rate: between 6.1 percentage points and 6.2 percentage points.

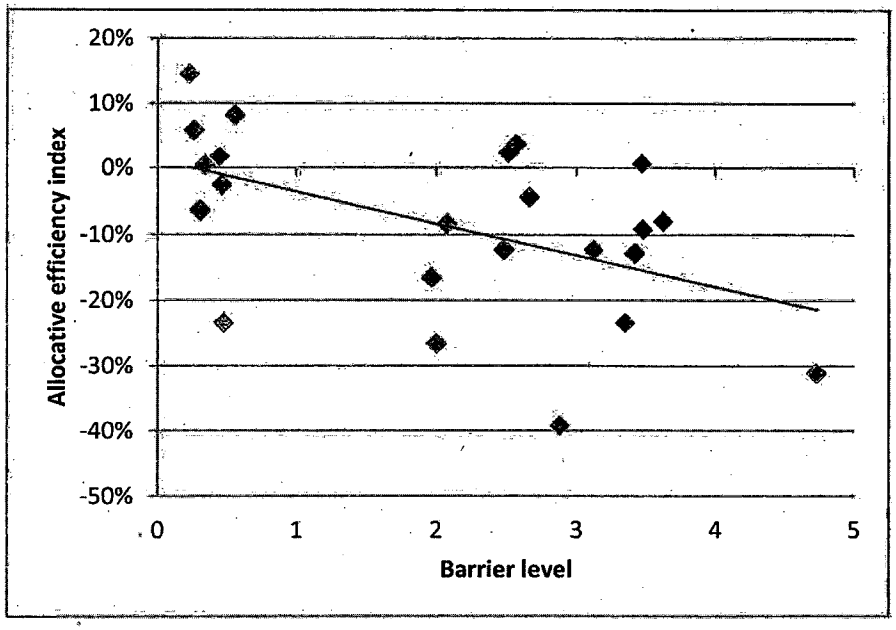
Figure 15 - Estimated relative impact of reduced barriers on profitability



Source: Eurostat, Commission assessment

As regards the impact of regulatory barriers to business services on productivity, allocative efficiency reflects the extent to which productive factors are allocated towards their most efficient use (based on the market shares of more versus less productive firms) and thereby constitutes a key measurement of the productivity and competitiveness of a given economic sector. The four sectors assessed are characterised by low and even negative levels of allocative efficiency in most Member States.

Figure 16 - Relation allocative efficiency index and barrier levels

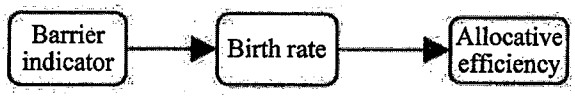


Source: Eurostat, Commission assessment

The figure above shows the relationship between the allocative efficiency index[79] and barrier levels[80]. This indicates that Member States with higher barrier levels have a less efficient flow of resources to their most productive use, which has a negative impact on overall productivity in these sectors.

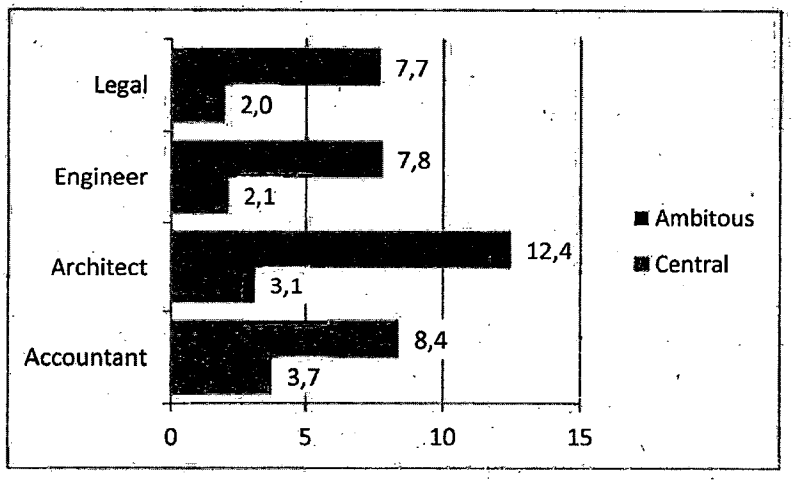
Combining the results of the econometric analysis on the link between barrier levels and birth rates with the above-mentioned recent Commission study also quantifying the impact of birth rates on allocative efficiency in the four business services sectors analysed, we are able to estimate the relationship between barrier levels and allocative efficiency. The underlying reasoning for this is that changes in barrier levels affect business dynamics and, through it, the allocative efficiency of the sector (see graph below).

Figure 17 - Link barrier levels and allocative efficiency



This two-step approach allows estimation of the potential impact of reducing barrier levels on allocative efficiency, again using the same two alternative 'reform' scenarios as above. In the 'central scenario' the allocative efficiency index in the sectors analysed could be increased by 2.0 to 3.7 percentage points (EU weighted average) depending on the sector concerned. In a more ambitious scenario, they could increase by 7.7 to 12.4 percentage points.

Figure 18 - Estimated impact of reduced barriers on allocative efficiency (percentage points)



Source: Eurostat, Commission assessment

[79] This index is calculated on the basis of labour productivity and market shares statistics, capturing the extent to which more productive firms have higher market shares. The potential increases are expressed in percentage points given that in several cases this index has a negative value. For additional details on the Allocative Efficiency index see European Commission, 'Product Market Review 2013: financing the real economy', 2013.

[80] The graph shows average allocative efficiency (AE) indices for the accounting and legal sector and for those Member States where this data is available. There is no disaggregated data available on AE for the architect and engineer sectors.

Conclusion

Conditions imposed on service providers to access the market in a number of key business services sectors and the construction sector vary significantly across Member States in terms of restrictiveness. This makes it difficult and in some cases even impossible for companies, in particular SMEs, to provide services in other Member States.

Evidence shows that the EU construction sector is indeed characterised by very low levels of integration across Member States both in terms of temporary cross-border service provision and secondary establishment. Removing barriers would increase cross-border activities and contribute to more competition in the construction market.

In addition, the analysis undertaken confirms that reducing barrier levels in the business services sectors assessed would generate more intensive competition as a result of more firms entering the market. It would also lead to benefits for consumers in terms of lower prices as a result of reduced profit rates. Finally, the analysis confirmed that lower barriers would lead to more performant sectors characterised by a stronger allocative efficiency.

2.3.2. Modernising regulation of professions

Policy context

Regulated professions are professions, access to which or pursuit of which, is conditional upon the possession of specific professional qualifications or for which the use of a specific title is protected. As a consequence, a large number of professional activities are reserved for professionals meeting these requirements so as to reduce the information asymmetry between service providers and consumers and to protect the public from unqualified practitioners. The exercise of economic activities can also be linked to other requirements[81], such as mandatory membership in professional organisations, insurance requirements, legal form and shareholding requirements etc.

Differences in regulatory approaches within one and the same profession or differences in organising professions can be significant across Member States. They reflect the fact that Member States are entitled to establish safeguards to protect certain overriding reasons of public interest, in line with the case-law of the Court of Justice of the European Union, and diverging views as to whether such protection is necessary and how it is to be achieved.

While professional licensing may indeed remedy the inefficiencies derived from asymmetric information and provide incentives to invest in skills, it may also limit employment, increase prices, and weaken competition. The tension between these two conflicting views has shaped the debate on the desirability and proportionality of regulation of professions. In times of high unemployment, fiscal austerity, and economic recession, the impact of labour market regulation on the creation of new jobs, wages, labour mobility, and economic performance is of central importance for the policy debate in Europe. Indeed, given the first results of the peer review of regulation of professions in the EU ('mutual evaluation')[82], the effects of reforms carried out by a number of Member States and the new market developments

[81] See point 3.2.1 of European Commission 'Communication on Evaluating national regulations on access to professions', 2013.

[82] http://ec.europa.eu/growth/single-market/services/free-movement-professionals/transparency-mutual-recognition/index_en.htm

reducing the information asymmetry between professionals and consumers (which is the fundamental justification for regulation of professions), there is scope for reviewing and adapting regulation to the evolving market situation.

Over 5 000 professions are regulated across the EU, with on average 186 regulated professions per Member State. There are, however, important disparities between countries (from 72 regulated professions in Lithuania to 409 in Hungary), as reported in the EU Regulated Professions Database[83]. The health and social services sector accounts for 42 % of all regulated professions followed by business services (15 %), public services and education (9 %), transport (8.5 %) and construction (6 %). The mutual evaluation exercise conducted on the basis of the new Article 59 of the Professional Qualifications Directive[84] in all Member States between 2014 and 2015 highlighted that many professions which should be considered as regulated were not notified as such.

The number of regulated professions is not in itself an indicator of regulatory intensity. The type of regulation determines how restrictive conditions are to access the professions, and it can range from no regulation or title protection to reserving certain activities exclusively to (a group of) professionals holding specific qualifications. Regulation by way of title protection limits the use of the professional title to those holding the required qualifications but does not prevent other professionals from exercising the activities without holding the title. This form of regulation applies to 12 % of all regulated professions according to the EU Regulated Professions Database. Regulation limiting access to certain activities to those holding specific professional qualifications, referred to as reserved activities, is the most common form of regulation across the EU (55 %). The stricter form of regulation which combines both reserves of activities and title protection applies to 5 % of all regulated professions[85].

According to a very recent survey representative of the active population in the EU[86] contracted in 2014 by the Commission and carried out in April 2105 by TNS Opinion in the 28 Member States, at least 21 % of the labour force in the EU (50 million people) can be considered as working in a regulated profession[87]. This is the first ever survey measuring the prevalence of occupational regulation at European level using the same questionnaire and methodology across all EU countries. The results show that at national level, the proportion of people working in regulated professions ranges from 15 % in Sweden and Denmark to 33 % in Germany.

The European Council has repeatedly stressed the importance of making progress on enhancing the mutual recognition of professional qualifications, reducing the number of

[83] The statistics are based on the information available in the database in September 2015. It must be noted that the definitions of most regulated professions are not harmonised at EU level and that the Member States define the way they notify professions into the Database. The numbers of professions are hence not directly comparable across the countries.

[84] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications as recently amended by Directive 2013/55/EU.

[85] Information extracted from the database of regulated professions: http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm?action=homepage . No information was submitted by Member States for 26 % of all regulated professions and another form of regulation was in place in 2 % of the professions present in the database of regulated professions.

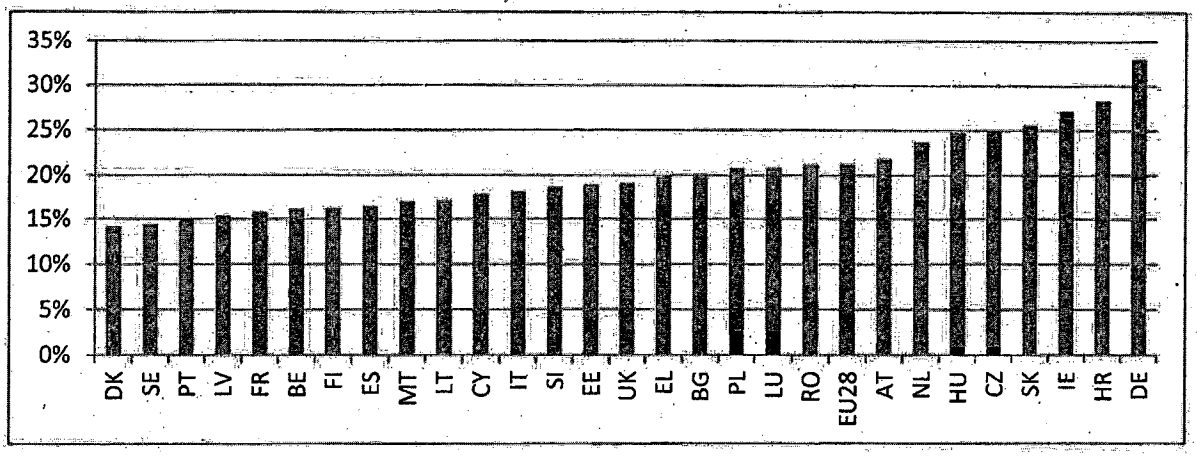
[86] TNS Opinion, 'Measuring the prevalence of occupational regulation: ad-hoc survey for the European Commission', 2015 forthcoming.

[87] Respondents were asked whether they needed to have a professional certification, a licence or to have taken an exam in order to practice legally the profession. Those surveyed were either in employment or actively searching for an employment.

regulated professions and removing unjustified regulatory barriers. It has also called for on Member States to 'identify the remaining barriers to access to professions, assess the cumulative effect of all restrictions imposed on the same profession' and recently urged Member States to present concrete follow-up measures for structural reform[88].

[88] Council Conclusions of March 2012, October 2013, March 2015.

Figure 19 – Share of regulated professions in total labour force, 2015



Source: TNS Opinion for the European Commission, 'Measuring the prevalence of occupational regulation', 2015, forthcoming

Problem and impact

Studies consistently show that if regulation is not appropriately designed and implemented, it may create market restrictions, limit consumer choice, raise prices and reduce the number of people being able to enter the market[89]. Regulating professions can also have a negative impact on the mobility of professionals between jobs as it prevents them from reacting quickly to labour market opportunities[90].

The first tangible results of the mutual evaluation exercise confirmed the regulatory diversity between the Member States and that regulatory approaches regarding the same or similar professions often differ fundamentally (no regulation vs. very stringent regulation, e.g. engineers, hairdressers[91]).

For example in several Member States certain activities such as drawing plans or designing projects are reserved to professionals holding a civil engineering professional qualification[92]. In others only the title is protected[93] and in a third group of countries which do not regulate the professions, exercise of the activity is possible without having to prove professional qualifications but safeguards of general interest are laid down in rules concerning the execution of the works or in consumer protection laws[94]. In the case of reserved activities,

[89] Canton E., Ciriaci D., and Solera I., 'The Economic Impact of Professional Services Liberalisation', *European Economy, Economic Papers 533*, 2014 and Kleiner, 'Licensing Occupations: Ensuring Quality or Restricting Competition?', *Upjohn Institute Press,* 2006.

[90] Prantl and Spitz-Oener, 'How does entry regulation influence entry to self-employment and occupational mobility?', *Economics of Transition* , 2009.

[91] For details on certain professions discussed in depth during the mutual evaluation process in 2014 and 2015 please see sectoral reports: http://ec.europa.eu/growth/single-market/services/free-movement-professionals/transparency-mutual-recognition/index_en.htm

[92] E.g. Austria, Poland, Portugal.

[93] E.g. Belgium, France, Germany, Ireland and the United Kingdom: this means access to the profession is not restricted, but providers need to hold the necessary qualification if they want to use the title.

[94] E.g. the Netherlands, Sweden.

these often vary in scope from one country to another which makes it complicated for professionals to exercise their activity cross-border or establish in another Member State. When relocating to another Member State to provide services temporarily or to establish permanently, professionals might be required to have their professional qualifications recognised in the host Member State. The Professional Qualifications Directive provides a comprehensive legal framework for such recognition of qualifications.

The evaluation[95] of the Professional Qualifications Directive carried out in 2011 provided information on the difficulties of its daily application by professionals and competent authorities. The findings of the evaluation were also echoed in the impact assessment on the revision of the Directive[96].

In the two questionnaires conducted by the Commission in 2014 on barriers to the Single Market in services, where 293 answers were submitted by mostly SMEs, problems with the recognition of professional qualifications were reported by 41 % of companies[97]. Many found the recognition procedures to be lengthy and costly[98]. Other difficulties reported stemmed from the lack of an EU-wide harmonised definition of regulated professions and of educational training requirements. Companies also reported problems concerning the recognition of qualifications in specific sectors (e.g. construction together with engineering, IT, consultancy and legal services) and particular difficulties encountered in decentralised Member States where professional qualifications requirements can differ between regions.

The mutual evaluation process also brought to light that the justification and proportionality of the national regulations are not always properly assessed. Justification and proportionality considerations differ for the same activity, with some Member States relying on the functioning of the market and general legislation (such as consumer protection), while others argue for stringent professional regulation. The observed differences in the ways countries regulate the same or similar professions show that there is room for considering alternatives beyond the cross-border context; evidence consistently shows that performance of national markets is adversely affected by too stringent access requirements which shift resources to less effective use[99], limit consumer choice, raise prices and reduce the number of people being able to enter the market[100].

[95] European Commission, 'Evaluation of the Professional Qualifications Directive', 2011.

[96] European Commission, 'Impact assessment accompanying document to the proposal for a directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System', SEC(2011) 1558.

[97] The Commission invited stakeholders to respond to an open online questionnaire on barriers to the Single Market in services between July 2014 and January 2015. In total 293 responses were submitted, 81 % of responses coming from SMEs.

[98] The quarterly Your Europe Advice feedback reports demonstrate that there are some significant remaining barriers, notably the high fees for the recognition procedures, regarding the national procedures on the recognition of professional qualifications which were not directly addressed by the latest revision of the Professional Qualifications Directive in 2013.

[99] Canton E., Ciriaci D., and Solera I., 'The Economic Impact of Professional Services Liberalisation', *European Economy, Economic Papers 533*, 2014.

[100] European Commission, 2014, http://ec.europa.eu/growth/single-market/services/free-movement-professionals/index_en.htm

The effects of recent reforms of regulation of professions

Improving access to professions, in particular through a more proportionate and transparent regulatory environment in Member States, would facilitate the mobility of qualified professionals in the Single Market and the cross-border provision of professional services. As confirmed by empirical studies, modernising the regulation of professions tends to have a positive impact on employment, entrepreneurship, consumer choice and the affordability of services.

Building on empirical evidence and on the information provided by the EU Member States during the process of mutual evaluation, the Commission will propose measures to improve access to professions at EU and national level.

In 2014, the Commission launched a series of targeted studies to measure the economic impact of reforms on regulated professions. These studies analysed reforms in Germany, the UK, Greece and Italy.

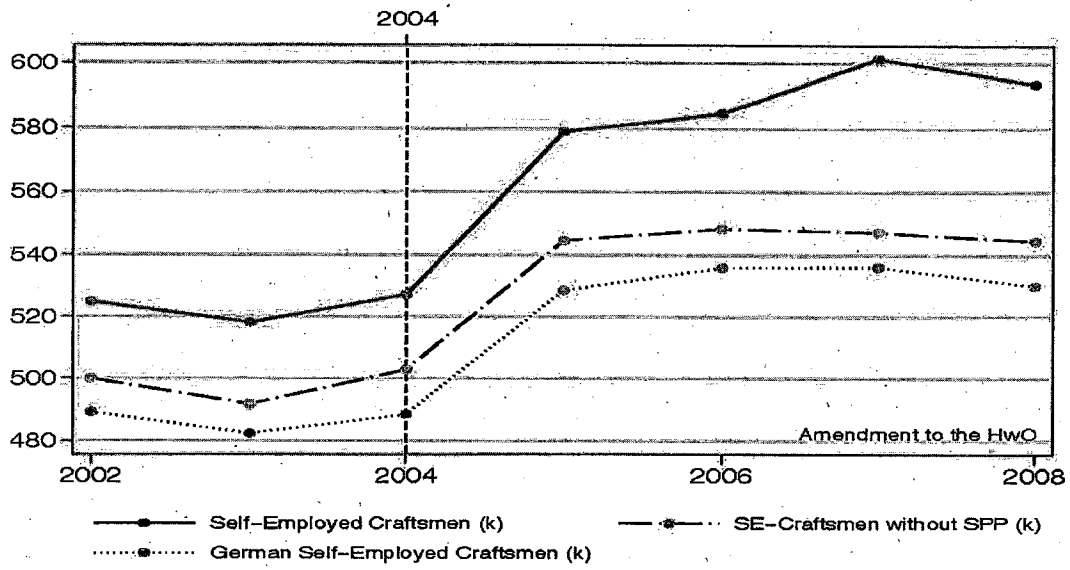
Reforms of the craft sector in Germany

Germany is one of the Member States in which a specific qualification (*Meister*) was required in order to engage in self-employment for some craft professions. This requirement was removed for 53 of 94 occupations in craftsmanship in an amendment to the German Trade and Crafts Code in 2004. For the other 41 occupations the requirement was partly reduced.

Results tend to demonstrate that the reforms undertaken have led to a further opening of the market[101]. Following the reform of 2004, for those craft professions which were deregulated there was a doubling in the number of new entrants in these professions and a net increase in the number of self-employed in the sector, while no evidence was found that exit rates were affected significantly (they did increase, but less than entry rates). Importantly, more than five years after the reform more self-employment than before the reform is observable (see figure below). These results are robust with respect to variations of the definition of the period before and after the reform. The influence of other policies, such as subsidies for unemployed people trying to set up a business, or the 2004 and 2007 EU enlargements, are accounted for.

[101] Rostam-Afschar D., 'Regulatory Effects of the Amendment to the HwO in 2004 in German Craftsmanship', *Free University Berlin and German Institute for Economic Research (DIW Berlin)*, a study commissioned by the European Commission, 2015, http://ec.europa.eu/growth/single-market/services/free-movement-professionals/index_en.htm

Figure 20 - Craftsmanship and entrepreneurship policies: total, unsubsidized (without SPP), and German self-employed craftsmanship in thousands[102]



Source: Rostam-Afschar D., 'Regulatory Effects of the Amendment to the HwO in 2004 in German Craftsmanship', 2015, German micro census and author's calculations

Overall employment did not react much to the reform because most of the new businesses are one-person-businesses founded partly by former employees. These one-person-businesses may be expected to grow in the future. Another direct consequence of the larger number of one-person-businesses is that the share of businesses providing training receded. However the study demonstrates that training activity was only reduced slightly due to the reform and explains that the reasons for the decline in the number of apprentices in craftsmanship may in particular be linked to an increasing number of people choosing to study at universities.

Reforms in Greece

In Greece, a major reform started in 2010 and lifted restrictions on entry and conduct regulations in a large number of professions across several economic sectors[103]. Results show that the reform has led to lower prices for consumers of services provided by real estate agents, legal professions, in accounting and tax consulting services and physiotherapist/physiotherapy centre services[104]. Figure 21 shows that the prices of services

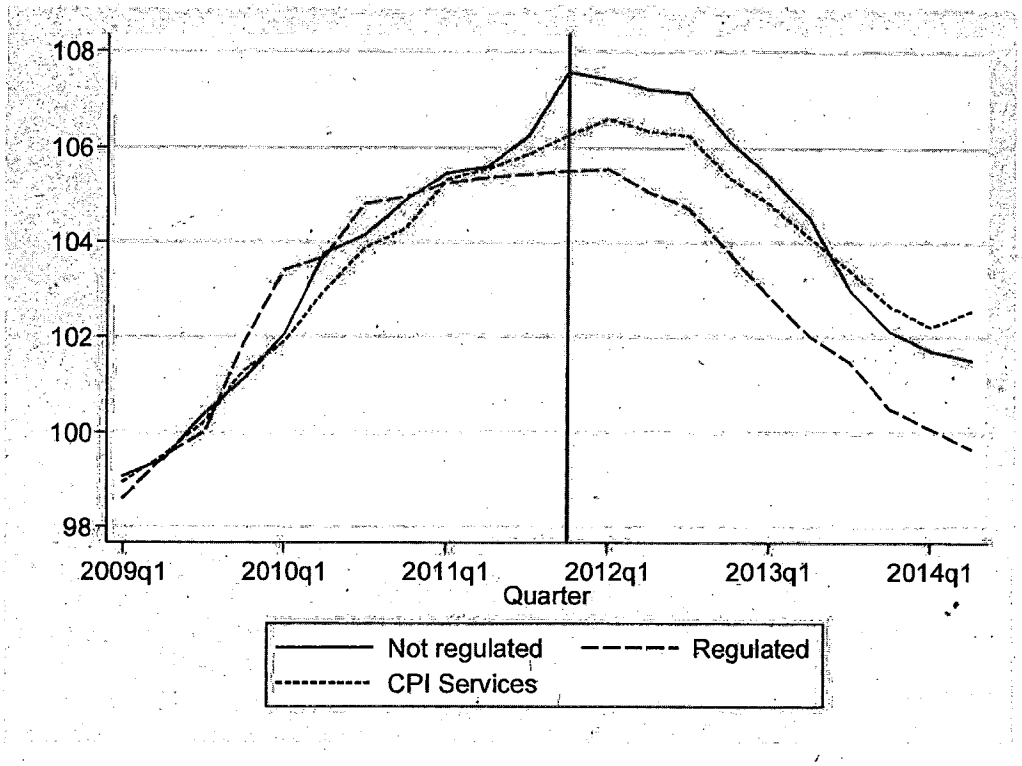
[102] Self-Employed Craftsmen: total number of self-employed craft businesses. German Self-Employed Craftsmen: total number of self-employed craft businesses having indicated German citizenship. SE-Craftsmen without SPP: self-employed who indicate not having received public payments (SSP).

[103] The professions analysed in the study were chosen according to the data availability and the date where the law entered into force, i.e.: lawyers-law firms, notaries-notary firms, auditors-chartered accountants, accountants-tax consultants, dentists-dental practices, physiotherapists-physiotherapy centres, taxi drivers-taxis, shipping agents, tourist guides, chartered valuers and real estate agents.

[104] Athanassiou E., Kanellopoulos N., Karagiannis R.,Kotsi A., 'The effects of liberalisation of professional requirements in Greece', *Centre for Planning and Economic Research (KEPE),* Athens, a study commissioned

did adjust to the recession, but there was a variation on the speed and level of adjustment according to the regulation regime, with prices in the regulated professions appearing to have been more flexible. The study concludes that this could have been because in these professions there were greater margins for price reductions as initial prices were usually higher.

Figure 21 – Evolution of consumer price index for the services and the regulated and not regulated professions, 2009Q1-2014Q2



Source: Athanassiou E., Kanellopoulos N., Karagiannis R.,Kotsi A., 'The effects of liberalisation of professional requirements in Greece', 2015, ELSTAT, authors' calculations

Empirical data indicate significant positive employment effects for the professions of notaries, auditors, tourist guides and chartered valuers. With respect to service quality, there are some indications of possible positive effects of the reforms in the legal and accounting services, taxi services, charter valuer services and real estate services. In the case of tourist guides, no evidence of a change in service quality as a result of the reforms could be empirically demonstrated.

Reforms of nursery school profession in the United Kingdom

The UK case study[105] looked at the economic impact of the introduction of licensing in the case of nursery school workers (The Childcare Act 2006) and security occupations (Private

by the European Commission, 2015, http://ec.europa.eu/growth/single-market/services/free-movement-professionals/index_en.htm

[105] Koumenta M., Amy Humphris A.,'The Effects of Occupational Licensing on Employment, Skills and Quality: A Case Study of Two Occupations in the UK', *Queen Mary University of London*, a study commissioned by the European Commission, 2015, http://ec.europa.eu/growth/single-market/services/free-movement-professionals/index_en.htm

Security Act 2001). In the case of nursery school workers the study found that, in line with the economic theory, introducing licensing (restricting access to this profession) resulted in a significant negative impact on employment but also brought a significant positive impact on skill levels and an overall significant positive impact on quality. In the case of regulation of security workers, results show a significant positive effect on wages and quality but no significant impact on employment or skills. Given that for security guards increased quality was achieved through requiring a clean criminal record the authors suggest that depending on the profession, a high level of quality can be ensured by regulation of other aspects than qualifications.

Reforms of pharmacist profession in Italy

The case study on Italy[106] finds some impact of the 2006 reform on the market for pharmacists with new entrants in OTC (over-the-counter) market, increasing demand for pharmacists leading to higher earnings of young pharmacists and higher overall employment.

Evidence on effects of reforms discussed with stakeholders

Some of these results were presented and discussed at two seminars organised by the Commission in 2014 in the framework of the Single Market Forum[107]. The objective of the events was also to consult stakeholders on the mutual evaluation of regulated professions and to exchange experience between Member States on the liberalisation reforms ongoing and completed. Discussions touched amongst others on economic aspects of the 2003/04 reform in Germany where evidence shows that the reform encouraged new entries in those professions where entry requirements were relaxed whilst exit rates remained about constant. Views from other EU countries were also presented, amongst others from tax advisors in the Netherlands, a profession which is not regulated and has not seen a decline in quality of the services provided, from the UK government which deregulated legal services, from the Polish government which is currently implementing the last phase of an ambitious reform of regulated professions, the broader effects of which remain to be assessed but effects on employment can already be seen[108] (legal services: access to bar relaxed, the number of lawyers and solicitors doubled between 2010 and 2014) and from the French government which has recently initiated reforms of a number of professions. The importance of the mutual evaluation as one of the priorities in the area of the Single Market to contribute to increase employment, especially of young people, was emphasised and Poland was used as one of the examples for other Member States to show that reforms can effectively be pursued and that they already show positive effects on employment.

2.4. Addressing restrictions in the retail sector

Policy context

Retail and wholesale services, also known as distributive trades, represent 9.6 % of the EU's value added and accounted for 13.1 % of the EU's total employment in 2012. The sector is

[106] Pagliero M., 'The effects of recent reforms liberalising regulated professions in Italy', *University of Turin and Carlo Alberto College*, a study contracted by the European Commission, 2015, http://ec.europa.eu/growth/single-market/services/free-movement-professionals/index_en.htm

[107] http://ec.europa.eu/internal_market/forum/2014/events/professional-qualifications/index_en.htm

[108] Kleiner M., 'Reforming Occupational Licensing Policies', *Humphrey School of Public Affairs, University of Minnesota, Discussion Paper 2015* – 1, Hamilton Project, 2015 January.

particularly important for youth employment with 13.7 % of employees in the 15-24 age range. More than 6 million companies, i.e. 29 % of all EU undertakings are active in this sector. In 2011, the retail sector alone[109]:

- Employed 18.6 million people (8.3 % of the EU workforce) – more than the construction sector and three times as many as financial services or information and communication activities;

- Generated EUR 2.592 billion of turnover (10.9 % of the total for the non-financial business economy);

- Generated EUR 453 billion of value added (4.3 % of total EU value added);

- Accounted for 3.6 million businesses.

European retailers are also leading international players: five of the top ten global retailers are from the EU. In addition, the retail sector is strongly integrated into the EU economy and has strong links with other economic sectors.

Retail therefore has an essential role to play in stimulating growth and job creation in the European economy. The efficiency in this sector has implications for competitiveness, innovation and price trends. The European Council pointed out the existence of barriers to the functioning of the retail sector by recommending that some Member States improve the functioning of the retail sector during the 2015 European Semester exercise.

Problem and impact

The continued low integration of the retail sector in the Single Market creates important economic costs and leaves untapped economic potential. Several economic indicators show that there is significant scope for improving the functioning of the European retail sector:

- High prices for retail services cause unnecessarily high costs for consumers and businesses. An analysis of prices in retail outlets across product categories in thirteen Member States has shown that the concentration of retail at the regional level is linked to higher levels of prices for the consumers, after taking into account the impact of other structural and economic factors that affect prices[110]. Mark-ups have increased in six Member States between 1996 and 2013[111], which may indicate lower competitive pressure allowing firms to sell at higher prices;

- Innovation in products offered to the final consumer has decreased and this evolution is only partly explained by the economic environment prevailing in many Member

[109] University of Oxford,'Retail &Wholesale: Key sectors for the European economy', 2014.
[110] See European Central Bank Economic Bulletin Issue1/2015 (page37 et ssq), 'Grocery prices in the Euro Area' available at: https://www.ecb.europa.eu/pub/pdf/ecbu/eb201501.en.pdf See also European Central Bank Working paper series, N°1744/December 2014, 'Retail market structures and consumer prices in the Euro area' https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1744.en.pdf
[111] Thum-Thysen A. and Canton E., 'Estimation of service sector mark-ups determined by structural reform indicators', *European Economy Economic Papers 547*, 2015. Mark-ups in retail have increased between 1996 and 2013 in the Czech Republic, Estonia, Hungary, Ireland, Luxembourg and Slovakia.

States since 2008. Structural elements (such as types and sizes of shops, and competition in wholesale and retail) appear to contribute significantly to the evolution of innovation and product choice. In particular the opening of new shops is a significant driver - and one of the few positive drivers together with the size of shops - of the introduction of innovative products. The situation is similar for product choice. The opening of new shops has a positive influence on the range of products offered, whether they are innovative or not. It is also linked to a greater variety in the size of products offered to consumers[112];

- Low levels of labour productivity, coupled with negative productivity growth, harm competitiveness, growth and employment in the sector. From 2010 to 2012, productivity growth in the sector was flat in the EU, compared to a growth of 3.9 % in the US[113]. A number of studies[114] show that the difference in retail productivity growth between Europe and the US can be explained by less restrictive entry regulations, bigger investments in ICT and innovation and the creation of new retail formats in the US. These force incumbents to become more productive and trigger a dynamic where less productive firms are replaced with more productive ones. The productivity gap is also evident when comparing the EU retail sector with other sectors of the European economy. For example, at 119 %, the retail sector's wage-adjusted labour productivity is significantly lower than the one of manufacturing (144 %)[115]. Furthermore, wage-adjusted labour productivity in retail has decreased from 126 % to 119 % between 2010 and 2012.

Stepping up reforms to reduce regulatory barriers in the retail sector would have a number of positive effects. Increased competitive pressures following a reduction in barriers would lead to the entry and survival of more efficient and innovative firms. Consumers could enjoy lower prices, more variety, innovation and higher quality. This would also have positive spill-over effects in other sectors of the European economy.

Recent analyses confirm that restrictive regulation is hampering competition in the sector.[116] Retailers face persisting barriers to market entry created by certain retail establishment conditions such as burdensome and complex authorisation processes or specific restrictive requirements linked to the size and location of shops, as well as by operational restrictions.

The improvement of conditions for establishment could help to strengthen competition in the retail sector and could have a positive impact on consumer choice and innovation[117].

[112] See 'The economic impact of modern retail on choice and innovation in the EU food sector' published by the Commission in October 2014, http://ec.europa.eu/competition/publications/KD0214955ENN.pdf

[113] Bureau of Labor Statistics, US Department of Labor, 'Productivity and costs by industry: mining, wholesale trade, retail trade and food services and drinking places industries', 2013; EUROSTAT data, 2012.

[114] Maican F. and Orth M. 'A Dynamic Analysis of Entry Regulations and Productivity in Retail Trade', 2012; van Ark B., O'Mahony M. and Timmer M. P. 'The Productivity Gap between Europe and the US. Trends and causes', 2008.

[115] Eurostat, 'Structural Business Statistics', 2012.

[116] Holland van Giizen Advocaten, 'Legal study on retail establishment through the 28 Member States: Restrictions and freedom of establishment', forthcoming.

[117] 'The economic impact of modern retail on choice and innovation in the EU food sector', *EY, Cambridge Econometrics Ltd., Arcadia International*, 2014.

Retail establishment

Selecting the right location for retail development and the timely start of operations are decisive for business success. As indicated in the European Retail Action Plan (ERAP)[118], the execution depends not only on the availability of suitable real estate but also on the existence of commercial and spatial planning rules and procedures that do not inappropriately hamper competition.

The peer review on retail establishment launched in 2014, the information received from stakeholders as well as a supporting legal study allowed the Commission to identify barriers that retailers face when intending to open retail stores.

The rules governing retail establishment vary considerably across the EU, not only at national level but also at regional and even local level. Regulatory schemes can focus on a specific retail authorisation or can be found in 'planning authorisations' and in the drafting of planning documents. These systems can also coexist. While Member States have the power to decide on the system which suits their needs better and on the appropriate level of decision, their regulatory framework should respect EU law.

Public policy objectives such as environment protection, consumer protection and town and country planning are often put forward by Member States as reasons to justify the high level of restrictions imposed on retail establishment. When restrictions to the freedom of establishment are justified on the ground of such public policy objectives, they must nevertheless be appropriate and proportionate to these objectives. However, the public policy objectives pursued are not always clearly expressed and the appropriateness and the proportionality of the relevant regulatory framework are often not assessed.

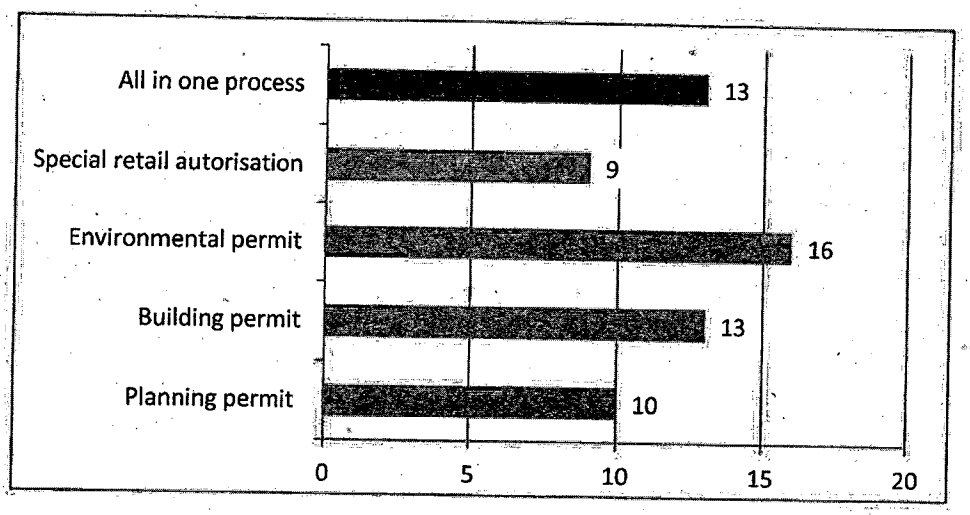
Member States impose requirements relating to the size of retail outlets or to their location which may result in market entry barriers for certain store formats or business models. For example, some Member States impose a ban or special conditions on the establishment of certain stores depending on their size or intended location.

Furthermore, retail establishment procedures are often excessively burdensome. Retailers applying for retail establishment often need to provide impact assessments (relating to traffic or employment, or specific retail impact assessments), to apply for a large number of permits/authorisations (planning permit, building permit, environmental permit and in some cases, a specific retail authorisation) or to contact several public entities. Economic data is often required from retailers as part of this process. The appropriateness of the data compared to the objectives pursued and the use of such data in practice are not always clear. Authorisation procedures may take years to go through, which can mean that the planned establishment is no longer economically viable. The Commission attempted to measure the level of restrictiveness of retail establishment regulations[119] by analysing the number of permits required, the number of entities to be contacted and the number of market studies and impact assessments requested. During this analysis the Commission also checked for the existence of regulations specific to the location, for requirements to provide economic data

[118] European Commission, 'Communication on setting up a European Retail Action Plan', COM(2013) 36 of 31 January 2013.
[119] Methodology of the retail restrictiveness assessment:
http://ec.europa.eu/DocsRoom/documents/13326/attachments/1/translations/en/renditions/native

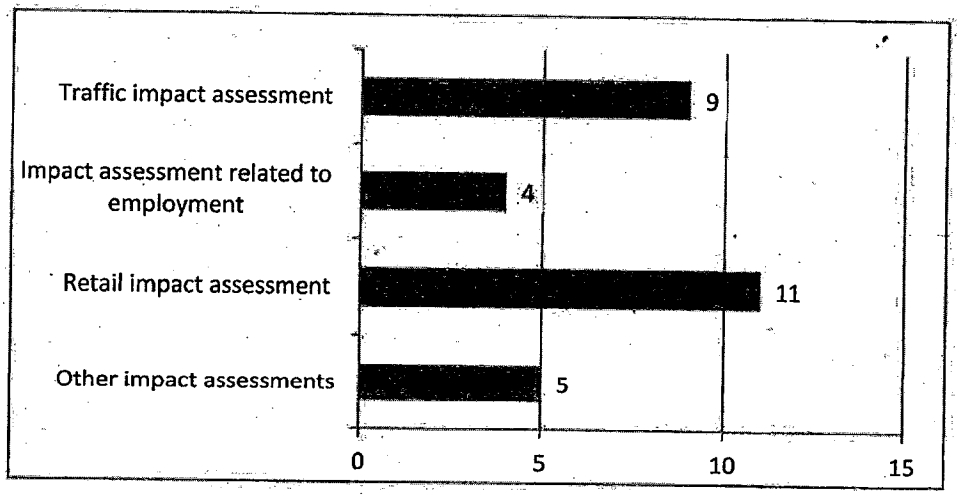
and for specific requirements linked to the size of a foreseen establishment. The figures below show which barriers occur most often across Member States[120].

Figure 22 - Number of countries requiring certain permits[121]



Source: Commission's analysis based on information from the legal study on retail establishment (HVG)122

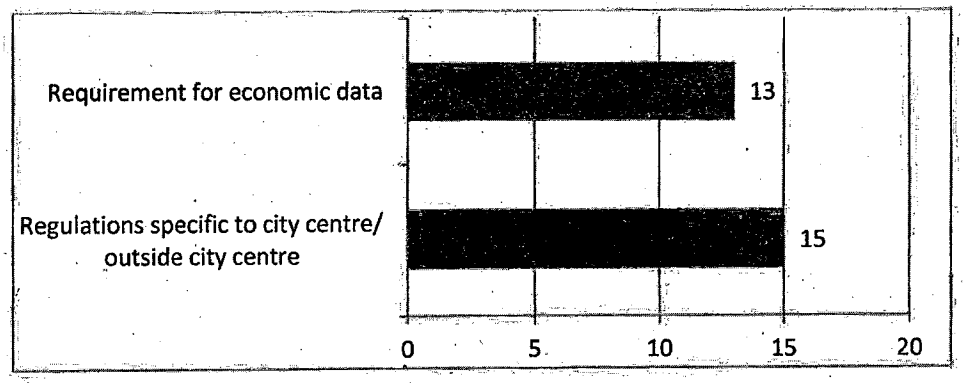
Figure 23 - Number of countries where certain impact assessments are required



Source: Commission's analysis based on information from the legal study on retail establishment (HVG)123

Figure 24 - Number of countries with other requirements

[120] Based on the regulatory situation in Member States in 2014.
[121] Some Member States require that permits are applied for separately, others have introduced integrated permits (a so called "all-in-one process") which can cover all permit requirements or only some of them (e.g. building permit may be incorporated in an all-in-one process).
[122] Holland van Giizen Advocaten, 'Legal study on retail establishment through the 28 Member States: Restrictions and freedom of establishment', forthcoming.
[123] *Ibid.*



Source: Commission's analysis based on information from the legal study on retail establishment (HVG)124

The level of restrictiveness of requirements linked to the size and location of retail outlets varies between Member States. In the least strict Member State, retailers are required to apply for an authorisation for the establishment of retail outlets above 2000 m². For retail outlets below this threshold, retailers are required to notify the opening of the outlet. In the most restrictive Member State, the establishment of retail outlets above 1000 m² is banned, with a possible derogation for outlets between 1000 and 3500 m² and a total ban for those above 3500 m². For shops below 1000 m² retailers need to apply for an authorisation.

Operational restrictions

In addition to establishment restrictions, retail businesses face restrictive regulations which may have a negative impact on their daily operations. Such regulations sometimes become a significant burden for companies, affecting their efficiency, productivity and the quality and price of services provided to consumers. Excessively restrictive and complex regulations can also make market entry more burdensome. Because they often differ between markets they create obstacles to cross-border e-commerce sales.

Since 1998 the OECD has regularly assessed the restrictiveness of regulations governing the operation of retail companies and outlets such as shop opening hours, sales of certain products under state monopoly, as well as rules on promotions and discounts.

The Commission has already carried out an analysis of the requirements for retail establishment to assess the level of regulatory restrictiveness per Member State[125] and the economic impact of such restrictions on the market structure and market dynamics in the retail sector. It will also analyse the operational restrictions that have significant effects on the competitiveness of the retail sector or on cross-border trade and investment.

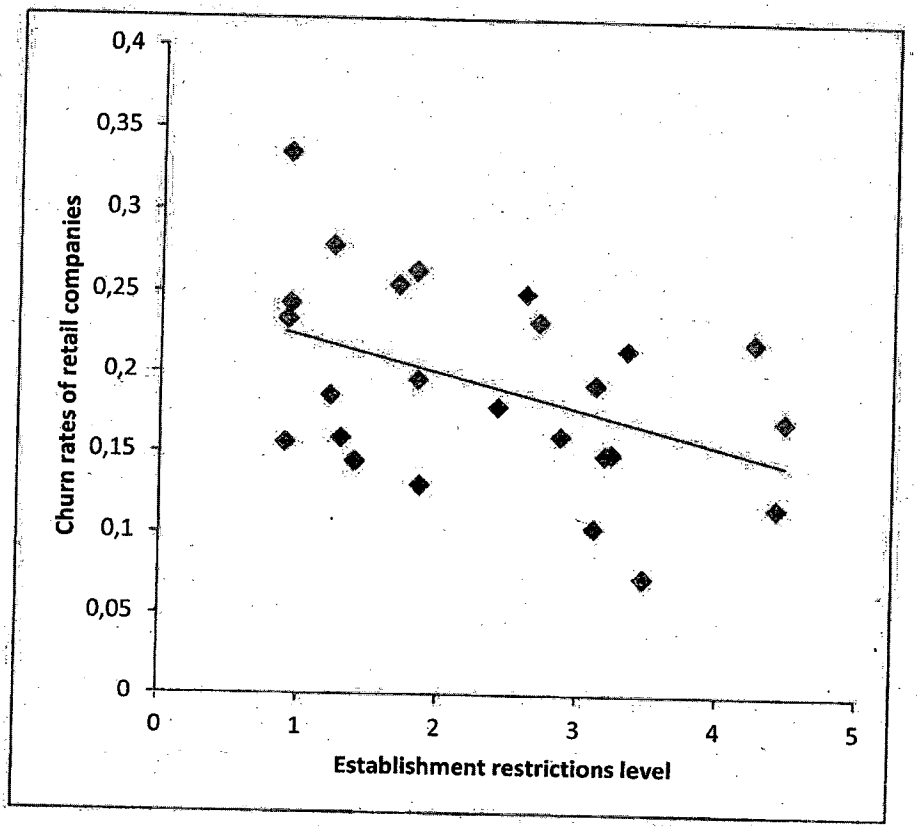
Impact on competition

Impacts on competition are measured by linking the restrictiveness of retail establishment to market concentration, and the birth rate and churn rate of retail companies. Results indicate that in countries with higher establishment restrictions, less new retail companies enter the market. In countries where more permits are required, the growth of concentration indices (CR5 and Herfindahl) is higher. Concentration also seems to be higher in countries with

[124] *Ibid.*
[125] The level of restrictiveness is presented on a scale from 0 to 6, where a higher value corresponds to stricter regulations.

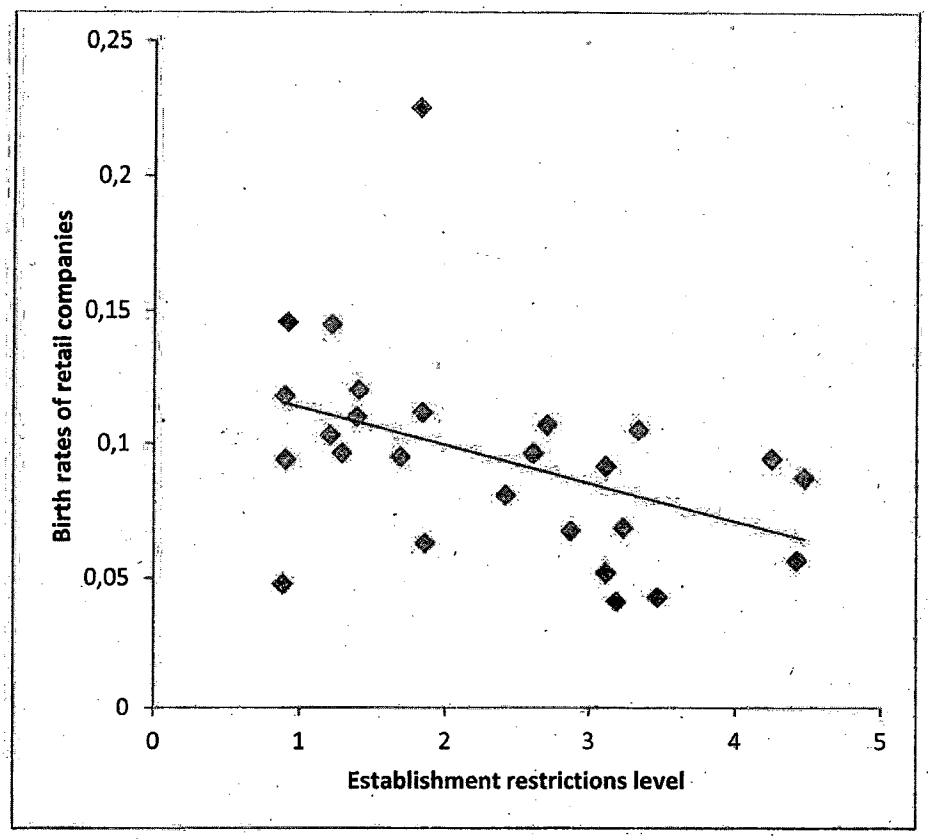
regulations concerning the location of retail outlets and the potential involvement of competitors. In addition, prices tend to be higher in countries which are more restrictive and have a more concentrated retail market.

Figure 25- Correlations between the level of restrictiveness of retail establishment and churn rates of retail companies



Source: Eurostat 2012, Commission analysis

Figure 26 - Correlations between the level of restrictiveness of retail establishment and birth rates of retail companies



Source: Eurostat 2012, Commission analysis

The links revealed by the correlation analysis are confirmed by the results of a regression analysis. As indicated in the tables below, there appears to be a statistically significant positive impact of the level of establishment restrictions on the price level index as well as a negative impact on companies' birth rate and churn rate.

Table 3 - Impact of the level of retail establishment restrictions on various indexes

	Price level index	Birth rate	Churn rate
Level of retail establishment restrictions	15.49***	-0.0141**	-0.0228**
	(3.156)	(0.00631)	(0.00991)
Constant	54.54***	0.128***	0.246***
	(8.241)	(0.0163)	(0.0260)
Observations	28	26	25
R-squared	0.481	0.171	0.187

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Source: Eurostat 2012 (2013 for price level index), Commission analysis

Several aspects of the establishment process, such as the number of permits required in the authorisation procedures, regulations specific to the location of a retail outlet and regulations leaving room for potential involvement of competitors show a positive correlation with market concentration measured by the Herfindahl index. This is confirmed by the results of the regression analysis.

Table 4 – Impact of aspects of the retail establishment process on market concentration

	Concentration (HHI index)
Number of permits	0.156*
	(0.0830)
Constant	-0.0242
	(0.187)
Observations	25
R-squared	0.133
Standard errors in parentheses	
*** p<0.01, ** p<0.05, * p<0.1	
Regulations on outlet location	0.00319*
	(0.00161)
Constant	0.0284***
	(0.00668)
Observations	25
R-squared	0.146
Standard errors in parentheses	
*** p<0.01, ** p<0.05, * p<0.1	
Involvement of competitors	0.00363*
	(0.00204)
Constant	0.0333***
	(0.00547)
Observations	25
R-squared	0.121
Standard errors in parentheses	
*** p<0.01, ** p<0.05, * p<0.1	

Source: Euromonitor 2014, Commission analysis

A recent Commission study[126] shows that less strict regulation of the retail sector, measured by the OECD's Product Market Regulation (PMR) index[127] fosters competition and hence reduces firms' mark-ups. Mark-ups, i.e. the difference between the cost and the selling price of a good or service, are an important determinant of the producer and consumer surplus. Lower mark-ups increase purchasing power for consumers and downstream users and are generally seen as welfare enhancing.

[126] Thum-Thysen A. and Canton E., 'Estimation of service sector mark-ups determined by structural reform indicators', *European Economy Economic Papers 547*, 2015.

[127] http://www.oecd.org/eco/growth/indicatorsofproductmarketregulationhomepage.htm#indicators

Schiantarelli[128] argues that a reduction in mark-ups may lead to less productive firms exiting the market, and thereby lead to a reallocation of resources to more productive firms and to further increases in growth.

A positive effect of the PMR indicators on mark-ups indicates that an increase in the strictness of product market regulations increases mark-ups. Conversely a loosening of product market regulations would reduce mark-ups. The table below shows that the retail sector displays a positive effect.

Table 5 – Effect of OECD PMR indicator on mark-ups in different sectors

VARIABLES	(1) retail	(2) communication	(3) energy	(4) profservices	(5) airlines	(6) rail&road
X*PMR	0.0461***	0.0116	0.0306***	0.0511***	0.0171	0.0134*
	(0.00500)	(0.00731)	(0.00702)	(0.00684)	(0.0139)	(0.00769)
X*output growth	0.155***	-0.0472	-0.0615	-0.145	-0.165***	0.135***
	(0.0477)	(0.0436)	(0.0390)	(0.100)	(0.0247)	(0.0206)
Observations	252	241	240	240	241	232
Number of groups	25	24	24	23	24	23

Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Source: European Commission

The following table shows that in the retail sector, when controlling for all PMR sub-indicators, the strongest indicator seems to be regulations in registration and licensing. This indicator is based on whether licenses and registrations are needed for commercial activity and outlet siting. Tightening regulation in this area corresponds to a significant increase in mark-ups in retail.

[128] Schiantarelli, F. 'Product market regulation and macroeconomic performance: A review of cross-country evidence', *Boston College Working Papers in Economics No. 623*, 2008.

Table 6 – Effect of various OECD PMR sub-indicators on mark-ups

	communication	airlines	rail&road	energy	prof services	retail
entry regulations	-0.00110	0.00627	0.00459	0.00589	0.0431***	
	(0.00635)	(0.00615)	(0.00493)	(0.00367)	(0.00714)	
public ownership	-0.00264	0.00986		0.0220***		
	(0.00640)	(0.00966)		(0.00806)		
market structure	0.0154***			0.00727		
	(0.00557)			(0.00620)		
vertical integration				-0.00980		
				(0.00612)		
conduct regulations					-0.00391	
					(0.0129)	
registration and licensing						0.0214***
						(0.00742)
special regulation large outlets						-0.00613
						(0.0105)
shop opening hours						-0.00385
						(0.00766)
protection of existing firms						0.00205
						(0.00616)
price controls						0.0178
						(0.0111)
promotions and discounts						0.0126
						(0.0110)
Observations	241	239	232	180	240	201
Number of countries	24	24	23	23	23	20

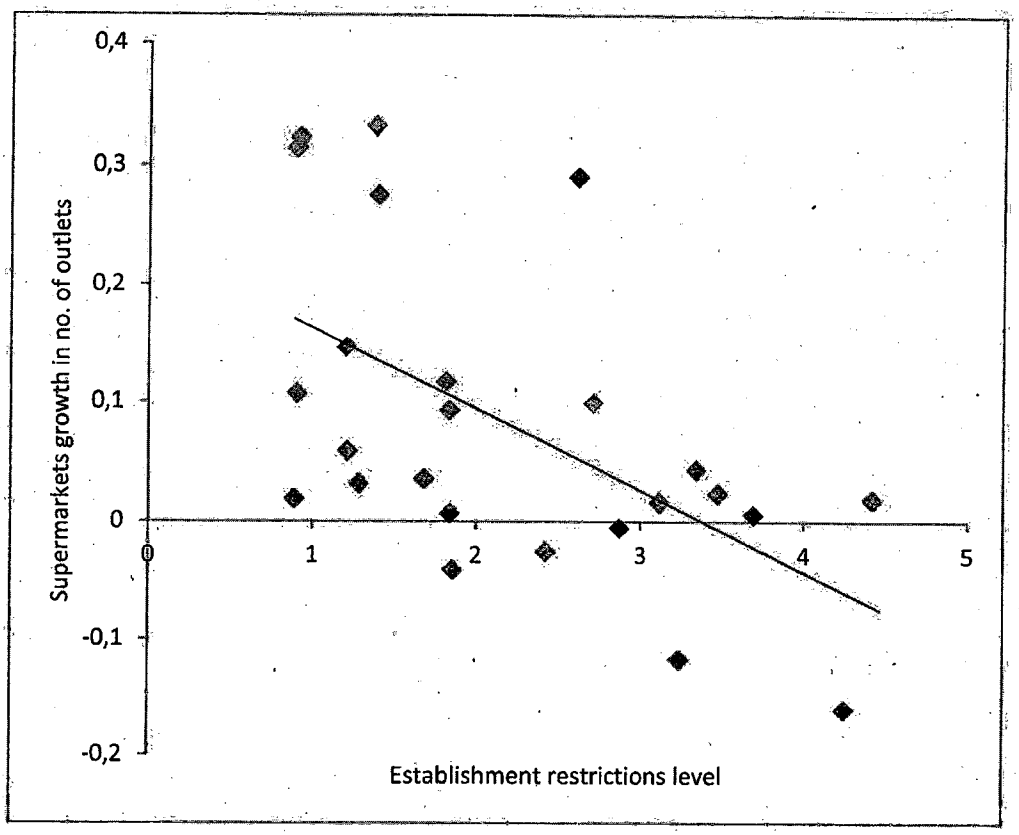
Robust standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Source: European Commission

Impact on consumer accessibility and choice

Consumers benefit from improved competition through lower prices, greater choice of retailers and better access to retail outlets. Both the correlation (an example in the following graph) as well as the econometric analysis show that retail establishment restrictiveness impacts negatively on changes in the number of outlets and selling space for most store formats (such as supermarkets, hypermarkets and convenience stores). As a result, less shops (and smaller shops) are opened in more restrictive countries, which can be indirectly linked to the accessibility and choice of retailers, as well as price levels.

Figure 27 - Correlation between the level of restrictiveness of retail establishment and growth in the number of supermarket outlets



Source: Euromonitor 2014, Commission analysis

Here as well, the regression analysis showed that the observed links were statistically significant. As indicated in the tables below, there appears to be a statistically significant negative impact of the level of establishment restrictions on the growth of the selling space of convenience stores, non-grocery stores and supermarkets, as well as on the growth of the number of outlets of convenience stores, hypermarkets and supermarkets.

However, positive links were found between the level of establishment restrictions and the development of discount stores. It has to be noted that the discount sector has been growing dynamically over the past years, benefitting from consumers' increasing orientation towards lower prices. The results may also reflect the fact that discounters display a certain flexibility in terms of location compared to other similar store formats. They become profitable on a smaller surface than supermarkets[129] and can serve both as neighbourhood stores and outskirt outlets, thus replacing both supermarkets and convenience stores on the map of the retail market. The number of discount outlets and their selling space per capita are higher in countries with stricter requirements for entry linked to size thresholds.

[129] As they do not sell a full range of products.

Table 7 - Impact of retail establishment restrictions on the growth of selling space

	Growth of selling space in:			
	Convenience stores	Discount stores	Non-grocery stores	Supermarkets
Level of retail establishment restrictions	-0.0895**	1.55e-05**	-0.0381*	-0.0612***
	(0.0328)	(6.38e-06)	(0.0192)	(0.0182)
Constant	0.279***	1.25e-05	0.0569	0.225***
	(0.0816)	(1.57e-05)	(0.0471)	(0.0447)
Observations	24	25	25	25
R-squared	0.253	0.204	0.146	0.330

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Source: Euromonitor 2014, Commission analysis

Table 8 - Impact of retail establishment restrictions on the growth of the number of outlets

	Growth of the number of outlets of:			
	Convenience stores	Discount stores	Hypermarkets	Supermarkets
Level of retail establishment restrictions	-0.0808*	2.42e-05**	-0.0831*	-0.0685***
	(0.0424)	(1.00e-05)	(0.0409)	(0.0211)
Constant	0.247**	1.25e-05	0.373***	0.232***
	(0.106)	(2.46e-05)	(0.101)	(0.0520)
Observations	24	25	25	25
R-squared	0.142	0.203	0.152	0.314

Standard errors in parentheses
*** p<0.01, ** p<0.05, * p<0.1

Source: Euromonitor 2014, Commission analysis

A further analysis of possible scenarios revealed that if certain restrictions were removed and others limited to a minimum level, this could help to increase of the number of outlets and the selling area for most store formats, in particular in countries with the highest restrictions. It would also have a positive impact on churn rates, and could therefore increase competition in the sector.

Results of the regression analyses indicate that, in general, restrictive regulation on establishment may hamper the development of supermarkets, hypermarkets, non-grocery and convenience stores, in terms of the growth of their selling space and the number of outlets. In countries with stricter establishment rules, the number of retail companies entering the market also appears to be lower and the level of concentration of the retail sector higher. Competition may therefore also be lower. In these countries, price level indices for many product

categories are also higher, as well as the sales value of existing shops for certain store formats.

2.5. Preventing discrimination of consumers and entrepreneurs

Policy context

Consumers are in theory well equipped to reach out for the best offers available in the Single Market. They can travel, buy products and services online and use credit cards across borders. However, too often both consumers and firms are still discriminated as regards access to services/goods as well as in terms of prices and sales conditions based on their country of residence or nationality. Discrimination undermines the trust of consumers and increases reluctance to engage in cross-border trade, thus reducing the opportunities created by the Single Market to consumers and businesses.

These situations are addressed by the Article 20 (2) of the Services Directive; which prohibits discrimination against service recipients on the basis of their nationality or country of residence. The purpose of this provision is to help service recipients, who can be either consumers or entrepreneurs, to access offers available on the markets of other Member States and make the most of the Single Market.

To put such high-level principles in practice and tackle territorial restrictions and geographically based discrimination, particularly in the digital domain, the Commission has already launched a sector enquiry regarding anticompetitive restrictions in e-commerce and has announced in its Digital Single Market Strategy a legislative action to address unjustified geo-blocking[130].

Discrimination based on nationality and place of residence has already been effectively eliminated in the transport sector[131]. Passengers of different modes of transport (air, maritime, bus and coach) can purchase travel tickets without any discrimination based on their nationality or place of residence or on the place of establishment of carriers or ticket vendors. The situation in other sectors is, however, not as encouraging, even in cases in which customers of different nationalities and residences receive the same service/good in the same location.

On 24 September 2015, the Commission launched a public consultation allowing stakeholders to present their views on how best to tackle geographically based restrictions imposed by traders to final consumers and firms[132]. The results from this public consultation will complement the analysis contained in this Staff Working Document.

Problem and impact

Consumers and firms are often discriminated against in two different ways based on their country of residence or nationality: (1) outright refusals to sell (consumers cannot access the

[130] The Digital Single Market Strategy already announced that such action could include targeted change to the e-Commerce framework and the framework set out by Article 20 of the Services Directive.
[131] Article 23(2) of Regulation 1008/2008/EC (Air transport), Article 4(2) of Regulation 1177/2010/EU (sea and inland waterways), Article 4(2) of Regulation 181/2011 (bus and coach transport).
[132] European Commission, Open consultation on geo-blocking and other geographically-based restrictions when shopping and accessing information in the EU: https://ec.europa.eu/eusurvey/runner/geoblocksurvey2015/

service/product at all); and (2) application of different prices or other sales and after-sales conditions. When shopping online, consumers may also experience geo-blocking, i.e. being blocked upfront from accessing a specific webpage or content on a webpage. In some cases, customers are able to access the webpage but are then not allowed to purchase the product or service based on their place of residence. Outside copyright issues, these practices may concern the purchase of both digital goods/services (downloads, apps) and tangible goods that involve physical delivery.

The European Consumer Organisation BEUC reported in 2015[133] that there are important barriers to a genuine Single Market for consumers in financial services, since restrictions linked to residence prevent consumers from opening a bank account, getting a mortgage or buying an insurance policy in another country than the one in which they reside, thus preventing them from enjoying the opportunities of cheaper loans, higher interest rates or lower premiums available in other Member States.

Discrimination often takes place when customers of different nationalities or residences book services or products in the same location. Examples include car rental pick-up in a certain location on a certain date for a particular duration with the same car and options, amusement park entrance on a particular date, hotel room booked on a particular date and for a particular duration, museums, mobile phone subscription, electricity bill, and pick-up of a product in a store in a particular city after having purchased it online. For example, in 2013 the Commission services commissioned a web-scraping study covering car rental companies that found large price differences (up to 470 euros) for consumers based on their country of residence[134]. Similarly, a web-scraping study commissioned by the Commission services in July 2015 discovered that the prices of the entry tickets to Disneyland Paris were 15 % higher for the UK residents compared to other European customers. Moreover, Disneyland Paris offered certain deals only to Belgian and French residents. After a public reaction by the Commission, the discount tickets for the Belgian and French customers were removed, but the differences in the ticket prices remained. In such cases, different treatment on the basis of nationality or residence is a particular source of frustration and dissatisfaction for customers, whether consumers or companies, who legitimately expect equal treatment.

Justifications given for discrimination

Companies use a wide range of justifications for treating consumers differently based on their country of residence, as observed in a 2009 Commission study on business practices. [135] For example, the following reasons have been given by companies to justify price differences based on the consumers place of residence: regulatory environment (e.g. compliance costs, fragmentation of consumer or environmental legislation, regulatory uncertainty, etc.),

[133] Letter to the European Commission, 23 April 2015.

[134] In this particular case, the price was EUR 581.15 for the customers whose country of residence was Romania, Slovenia or Poland and up to EUR 887.84 for the consumers from other countries, with the UK consumers having the highest price. The average standard deviation in prices for the 29.322 car-trip options for different countries of residence was EUR 12.90 and the average price range (difference between the highest and lowest price) for a given car-option EUR 24.12. The car rental company set different prices based on asking consumers explicitly to state their country of residence.

[135] European Commission, 'Study on business practices applying different condition of access based on the nationality or the place of residence of service recipients – Implementation of Directive 2006/123/EC on Services in the Internal Market', 2009. The study covered car rental, digital downloads, online sales of electronic goods and tourism.

different marketing costs in different Member States (e.g. online ads and costs for translating brochures); corporate structure (e.g. franchisees having their own pricing policy); exchange-rate fluctuations; need for a bank account in the country where the company is established, taxation and credit card processing fees; operational drivers (e.g. costs such as re-registration of cars or verification of foreign driving licenses in the car rental sector); competition; market growth, risks related to stricter consumer protection laws; seasonality (e.g. different holiday periods) and simply the fact that the cost for different services varies between the Member States. These justifications have been given by companies operating in different fields including car rental, leisure parks and rental of summer accommodations and were confirmed in recent interviews with the European Consumer Centres and Your Europe Advice.

Different treatment of consumers based on residence or nationality should not be allowed unless justified in a convincing and verifiable way. One of the main reasons why the non-discrimination principle is not effectively enforced on the ground is that the Article 20 of the Services Directive provides a list of justifications that is potentially too broad. In addition, the effectiveness of the current legal framework is hampered by the lack of means of redress and proper enforcement across all Member States.

Consumers' behaviour on the market is greatly influenced by their perception of fairness regarding market conditions and prices[136]. In the Single Market, this sensitivity is amplified by the fact that the prices charged in one Member State are often used as 'reference prices' by consumers in other Member States.

Complaints

The European Consumer Centres (ECCs) analysed all complaints related to discrimination cases in the field of services received in the period of 2010-2012. As this research was limited to the Services Directive, it generally excludes telecoms and transport cases. Most frequent are cases related to the distribution of goods and services (including downloads), which make up 73 % of the case-load. Services in the field of tourism and leisure (including accommodation and food) amount to 20 % of the cases. The results also show that discrimination is much more often based on residence (75 % of cases) than on nationality (25 % of cases). The highest number of complaints relates to the refusal to deliver, which concerns about two thirds of all reported cases. Significant differences in prices come second with slightly more than 30 %. Furthermore, ECCs analysed all complaints received in 2014 regarding discrimination cases in the field of services covered by the Services Directive. Complaints regarding recreation and culture services amount to 36 %% of all cases. The main causes of complaints are refusal to sell or non-delivery (43 %) and differences in prices (14 %). One out of four complaints is related to purchases made by consumers on the premises of the provider. The Commission also received complaints through Your Europe Advice. Since 2008, 53 % of all such complaints concerned offline transactions, 30 % online ones and 17 % both. 37 % concerned transport services (including car hire), 15 % concerned retail of tangible goods and 22 % tourism services. 31 % were linked to nationality and 69 %

[136] Kahneman, D. et al., 'Fairness and the Assumptions of Economics', *The Journal of Business* Vol. 59 (4), 1986 or Kahneman, D. et al., 'Fairness as a Constraint on Profit Seeking: Entitlements in the Market', *American Economic Review* Vol. 74 (4), 1986. Other relevant research includes Anderson, E. T. and Simester, D. I., 'Does Demand Fall When Customers Perceive That Prices Are Unfair? The Case of Premium Pricing for Large Sizes', *Marketing Science* Vol. 27 (3), 2008.

were linked to residence. 57 % resulted in a price difference, and 15 % in an outright refusal to sell.

These findings are broadly in line with the results of the 2013 Eurobarometer survey[137], which enquired about discrimination of customers when shopping online based on where they live, with 12 % of total respondents and 22 % of those being active online shoppers confirming this.

Regulatory responses so far

The current EU competition law framework[138] can deal with the concerns related to cross-border trade that are based on agreements between companies. Contractual restrictions that ban retailers from serving consumers from another Member State in response to unsolicited orders in competition law terminology are traditionally referred to as 'passive sales restrictions'. Thus, according to the EU competition law, retailers/licence holders should be free to sell 'passively' over the internet to consumers outside their Member State. Where a restriction is, in contrast, due to unilateral action by (non-dominant) companies, or the result of regulatory barriers, then competition law does not provide recourse. The e-commerce sector inquiry that started in May 2015 aims at identifying potential competition concerns hampering cross-border e-commerce. It complements the legislative actions planned to remove obstacles to cross-border trade.

Addressing discrimination based on consumers' place of residence and nationality will have positive impacts on transparency, which can be a powerful tool to drive changes in a marketplace, given the importance of companies' reputation. In particular, by prohibiting unjustified geo-blocking practices, consumers will be granted access to information on the different prices that companies charge in other EU countries. Moreover, the consumers will be able to access offers available to consumers in other EU markets if the service/good is received at the same location. This will put additional pressure on companies to stop unjustified price discriminations and remove existing discriminatory barriers to cross-border trade. Due to more transparency and the reduction of the barriers, it is expected that the level of cross-border sales will increase. Addressing the geo-blocking of news and political broadcasting will help foster the democratic participation and interest in the political life at Union level.

Article 20 of the Services Directive, which has been in force since 2009, has not been the object of dedicated enforcement actions by Member States, some of which even failed to identify clear enforcement authorities. It covers discriminations of service recipients (consumers and businesses) both in online and offline situation. Despite the recurring complaints received from consumers, the Commission is not aware of any company having been sanctioned for infringing the non-discrimination provision of article 20 (2) of the Services Directive. The current legal framework does not offer concrete solutions for consumers and businesses.

[137] European Commission, 'Special Eurobarometer 398', 23 September 2013.

[138] In particular, certain practices can be stopped through the application of Article 101 of the Treaty prohibiting any agreement or concerted practice that restricts competition together with the Block Exemption Regulation on vertical agreements and the corresponding guidelines or via enforcement of Article 102 prohibiting abuses of dominance.

Article 8(3) of the Consumer Rights Directive does not prohibit territorial restrictions and simply places on traders an obligation to inform about such restrictions. It thus cannot address the root of the matter.

Dispute resolution mechanisms (such as ADRs and ODRs) currently cover contractual arrangements and do not apply to pre-contractual relationships, such as the ones where discrimination could take place.

3. ENCOURAGING MODERNISATION AND INNOVATION

3.1. Modernising our standards system

3.1.1. European Standardisation System

Policy context

European Standardisation is a cornerstone for the functioning of the Single Market as well as a powerful tool in support of European policies for product and services market integration. Standardisation is relevant for everyone, industry and consumers, public authorities and civil society.

The strategic vision for European Standardisation was set out by the Commission Communication[139] for standards, while the legal framework is set by Regulation (EU) No 1025/2012[140], in force since 2013.

The new Regulation establishes the rules of transparency for the development of standards requests sent by the Commission to the European Standardisation Organisations (ESOs), and for reporting obligations for the different actors. It promotes the inclusiveness of the less-represented stakeholders in the standardisation process (SMEs, consumers, trade unions and environmental interests). In addition to European standards, it recognises ICT technical specifications for public procurement purposes.

The current system is mainly focused on products, but there is significant potential for further integration both in products and in service markets through the use of standards. To this end, the Council conclusions on Single Market Policy (paragraphs 9 and 10) which were adopted by the Competitiveness Council on 2 March 2015 support the Commission and stakeholders' joint endeavours to promote, where appropriate, the position of European standards as a recognised reference point in facilitating compliance with EU legislation. This includes areas such as the Digital Single Market, business services, new and high-end technologies as well as e-policies (e-procurement, e-government, e-governance), as well as international trade and global EU interests.

Problem and impact

European Standardisation has been a cornerstone of the Single Market for the last 30 years. Today however, the European industry is faced with a difficult and fast changing global

[139] Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, 'A strategic vision for European Standards: 'Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020', COM (2011) 311.
[140] Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012.

environment where frontiers between manufacturing, digital and services are increasingly blurred. The main challenge lies in keeping and enhancing the competitiveness of EU industries in global trade. Standardisation plays an important role in this and the European Standardisation System (ESS) needs to be fit for current and future challenges.

The European Standardisation System is a private sector based system, which the EU utilizes for its legislative purposes and to implement EU policies. About 20 % of all European Standardisation activities stem from EU policy objectives and priorities. The remaining 80 % European standards are elaborated bottom-up and strictly based on industry needs. Standardisation is mostly financed by industry (up to 95 %) while the EU co-finances the system (about 2 %).

Many national studies demonstrate that standards positively influence economic growth due to the resulting improved diffusion of knowledge. Studies from Germany, the UK and France confirmed that standardisation contributes to increase a country's GDP by reducing general industrial costs, improving interoperability, fostering the quality of products and services and facilitating the access to European and global markets.

For France the impact on growth is estimated at 0.8 %, for United Kingdom at 0.3 % and for Germany at 0.9 % of GDP. To put this in monetary terms, DIN estimates that in Germany alone, standards generate up to EUR 17 billion a year. A more recent study from the UK 'The Economic Contribution of Standards to the UK Economy' also confirms that the use of standards benefits the national economy: standards contributed to around EUR 11 billion of the EUR 40 billion GDP growth in 2013 (2014 prices) and to around EUR 8.5 billion to UK exports. The same study shows that standards help to enhance quality, with 70 % of respondents stating that standards had contributed improving the quality of supplier products and services[141].

An 'Independent Review of the European Standardisation System' was conducted to assess if the system is fit for future challenges and how it copes with five strategic objectives[142] identified by the Commission Communication of 2011, i.e.: speed of the process, tool for competitiveness, support EU policies, inclusiveness of societal stakeholders and global impact. As part of the review, an online consultation was launched and generated around 800 answers. The Independent Review resulted in a number of recommendations calling for a better interaction between the actors of the European Standardisation System, its governance and the communication within the system.

This review covered the standardisation system as a whole: goods, services, ICT and other standards. There are, however, specific issues on service standards which need to be addressed.

Standards rely on a system that is created and operated by the industry for the industry. The challenge is to ensure that European Standardisation continues to be at the heart of industrial modernisation and innovation in Europe. Thus, the Commission wants to explore strategic avenues to optimise the European Standardisation impact, and to this aim the public-private partnership between the Commission and the European Standardisation Organisations should become more visible and tangible for all.

[141] British Standards Institution (BSI), 'The Economic Contribution of Standards to the UK Economy', 2015.
[142] Identified in the Commission Communication of 2011.

Therefore, the Commission proposes a 'Joint initiative on Standardisation' to be concluded with all actors in order to enhance and modernize the current system. The Joint initiative will encompass a joint vision in order to develop solutions to issues arising from servicification, digitalisation and focus on interoperability as a result of the Priority ICT standards plan. It will also explore how the gap between research/innovation priorities and European Standardisation could be analysed in a more systematic and forward looking way and more effectively bridged, as well as how to produce timely standardisation deliverables.

The Joint initiative is a way to enable Europe to become a global standardisation hub. This means keeping a system able to impact on growth (between 0.3 and 0.9 % depending on the current figures registered from different Member States), contributing to the GDP growth, maintaining and increasing competitiveness of the EU economy.

3.1.2. Standardisation for services

Policy context

In addition to product standards, the Services Directive recognises standards[143] as one of the quality enhancing measures that will benefit recipients of services, especially consumers. Regulation (EU) No 1025/2012 on European standardisation[144] also recognises the potential of service standards. However, unlike goods standards, which are widely used and accepted to be beneficial, there are only few services standards in Europe (approximately 2 % of all standards). While their number is growing, most existing and newly emerging services standards are national (fewer than 20 % of existing service standards are European).

Problem and impact

In contrast to goods, the development of service standards has been much more limited, both within Member States and at EU level. As a result, service standards account for only 2 % of all EU standards.

Yet, voluntary European service standards could and should yield many of the same benefits for the services sector, raising standards across Europe, giving consumers and businesses confidence in cross-border services and consequently enhancing cross-border trade. It could be a key element in the delivery of an integrated European services market.

At a national level, the number of national service standards is very likely to increase considerably in the coming years. Such a proliferation however makes it harder for European service providers to operate cross-border, by subjecting them to ever more different standards every time they enter a new market.

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[143] Article 26(5) states that: 'Member States, in cooperation with the Commission, shall encourage the development of voluntary European standards with the aim of facilitating compatibility between services supplied by providers in different Member States, information to the recipient and the quality of service provision'.

[144] European Union, 'Regulation (EU) No 1025/2012 of the European Parliament and of the Council of 25 October 2012 on European standardisation, amending Council Directives 89/686/EEC and 93/15/EEC and Directives 94/9/EC, 94/25/EC, 95/16/EC, 97/23/EC, 98/34/EC, 2004/22/EC, 2007/23/EC, 2009/23/EC and 2009/105/EC of the European Parliament and of the Council and repealing Council Decision 87/95/EEC and Decision No 1673/2006/EC of the European Parliament and of the Council', 2012.

Differing voluntary national service standards as well as integrating standards or certificates in mandatory authorisation requirements (as described in the section on services passport for companies) can create barriers to European companies trying to trade cross-border. Results of a Commission survey on barriers to the services Single Market show that 19 % of companies providing or buying services cross-border experienced difficulties related to service standards and the linked usage of national certificates. Certificates were problematic for 18 % and products standards for 15 % of respondents. Problems reported concern mostly construction and business services (technical services) areas. They often refer to installation, maintenance and repair services, or to requirements concerning products used for the service provision. Insufficient awareness and understanding of standards (by businesses, public authorities, etc.) also create unnecessary costs and bureaucracy.

Barriers emerge in particular when standards and certification schemes, although in principle voluntary, are made *de facto* mandatory through the requirements set in national legislation (e.g. in authorisation and licensing procedures). On top of that, the authorities may require the provision of national certificates as a condition for access to their market. Companies may then need to obtain a new certification in addition to the one obtained in their country of establishment.

National certificates can be required both in the absence of a European standard, where diverging national standards and certification schemes exist, or in situations where even though a European standard exists, a national certification procedure is still required. Such certificates are not necessarily recognised in other Member States[145]. Mandatory compliance with standards can in certain cases be justified if this is non-discriminatory and proportionate. However, in many cases, requirements appear to exceed the necessary means of achieving public policy objectives.

In addition to duplicate standards and certificates that are not recognised across borders, there might be conflicting national systems or practices, which make it harder and more costly for service providers to comply.

In conclusion, there is still significant untapped potential from the development and use of voluntary European service standards to address servicification and deliver an integrated European services market. The Commission will therefore issue dedicated guidance, exploring the issues, including ensuring that such standards are demand-led and adopted where they are most needed.

3.2. More transparent, efficient and accountable public procurement

3.2.1. For better governance in procurement: better data and more effective remedies systems

Policy context

Government expenditure on works, goods and services represents around 19 % of EU GDP, accounting for more than EUR 2.3 trillion annually[146]. Efficient public procurement is key to

[145] Mutual recognition of certificates is mandatory if these are requested by public authorities, but only if the certificates are delivered by accredited certification bodies.

[146] This is the latest estimate including spending by utility companies. Newer estimates give values only for non-utility procurement, which is around 14 % of EU GDP, i.e. roughly EUR 1.8 trillion.

addressing major policy challenges, including growth and jobs, fiscal discipline, the modernisation of public administration, the fight against corruption and collusion, market access for SMEs, the trust of citizens in public authorities and democracy, innovation and environmentally and socially sustainable growth. It is also crucial to the recovery of public investment spending, which fell in 2012-2014 (in terms of percentage of GDP) compared with 2000-2007, in almost half of the EU Member States and all the stressed economies.

The EU has recently seen a major reform of the procurement framework, which is now being implemented. The new provisions will allow for simplified and more flexible procedures and better access to the market for SMEs. They also seek to ensure greater inclusion of social and environmental considerations in the procurement process.

Efficient public procurement relies on good governance at national level. It has many components and each must perform well. Above all, public procurers must be equipped to act with the greatest professionalism in order to get best value for money for each purchase. The integrity of decision-makers and their staff must also be beyond doubt. Institutions or mechanisms must be in place to coordinate procurement between public authorities in order to secure economies of scale, audit public contracts and efficiently and rapidly manage complaints lodged by companies. Finally, the public sector must be able to respond to threats of collusion by suppliers.

Problem and impact

The governance of the procurement systems needs to be improved in the EU; further efforts are still required to ensure the efficiency, transparency and integrity of the process. Some of the main missing links are the lack of relevant quality data, the inability to match related data from different databases, the insufficient sharing and reuse of data, and a shortage of skills and tools for analysing available information. These barriers are widely acknowledged having been identified by the G-20 and the World Bank,[147] the OECD[148] and the European Court of Auditors and the Commission[149] itself. The increasing use of information technology in public administrations, including the transition to mandatory e-procurement in 2018, offers opportunities to tackle these problems.

Better data would allow Member States to improve governance. This means better evidence-based policy and management by public authorities and increased transparency by opening up data. Sharing data triggers feedback from the public, which can be used to improve aspects of procurement practice at all levels, from local procurement to national legislation. Furthermore, better information on the vulnerabilities of their public procurement systems would help Member States take remedy measures and promote good procurement practices.

[147] World Bank, 'Benchmarking Public Procurement', 2015.

[148] OECD, 'Discussion Paper on Public Procurement Performance Measures', GOV/PGC/ETH(2013), 2013 (p.2); OECD, 'Recommendation of the OECD Council on Fighting Bid Rigging in Public Procurement', C(2012)115 - C(2012)115/CORR1 - C/M(2012)9, 2012.

[149] European Commission/PWC, 'Stock-taking of administrative capacity, systems and practices across the EU to ensure the compliance and quality of public procurement involving European Structural and Investment (ESI) Funds', 2015, forthcoming; Europe Economics, 'Estimating the Benefits from the Procurement Directives', 2011.

Limited data availability

However, procurement in Europe is currently largely data blind. Four categories of shortcomings can be identified:

(i) insufficient data is available;

(ii) existing data is often of poor quality;

(iii) frequently data cannot be linked when it comes from different sources and even when available;

(iv) it is often not sufficiently analysed and used for policymaking purposes.

Currently, the main source of data is in procurement notices. These notices are used to inform about tender opportunities and results and their publication in the Tenders Electronic Daily (TED) website is obligatory for procurement above thresholds defined by the Directives[150]. However, the transparency and the quality of data reported vary among Member States. According to the most recent Single Market Scoreboard (2015)[151], in many Member States the proportion of contract awards notices containing no information about the value of the contracts awarded is higher than 50 %.

Transparency of below threshold procurement also varies greatly. National thresholds for publication on national websites range from less than EUR 10 000 in Portugal to EUR 134 000 in Italy for goods and services, and there is similar diversity in works[152]. This means that the spending of a large portion of taxpayers' money is not transparently accounted for, data for management is not collected, and most importantly, fewer bidders are attracted and thus less value for money is achieved[153].

This opaqueness of public spending also means that procurement rules can still be circumvented by simply awarding contracts below the radar of national authorities and of the public scrutiny - if contracting authorities decide not to apply all procurement rules, this may go undiscovered. The exact terms and conditions under which a purchase was made are often not transparently communicated. Where transparency is lacking, misconduct grows.

Furthermore, audits are not used to their fullest potential. According to the Report on spending of ESI Funds by the European Court of Auditors[154], the valuable data from audits is not sufficiently collected and used. For example, data on irregularities from auditors' findings are not always electronic and structured for automated process and often cannot be linked to data on procurement procedures. This is the case for audits of both national and European funds.

Finally, even for already existing data, public authorities in Member States do not always analyse it and use the results for decision-making, nor do they share it with other parties. For example, while in the Czech Republic the procurement performance of each municipality,

[150] Directive 2004/18/EC on the coordination of procedures for the award of public works contracts public supply contracts and public services contracts and Directive 2004/17/EC coordinating the procurement of entities operating in the water, energy, transport and postal services sectors.

[151] European Commission, The Single Market Scoreboard: http://ec.europa.eu/internal_market/scoreboard/index_en.htm

[152] PWC, 'e-Procurement Uptake study', 2015, Figure 3, p.19.

[153] Coviello, D., and Mariniello M., 'Publicity requirements in public procurement: Evidence from a regression discontinuity design', *Journal of Public Economics 109*, 2014, pp.76-100.

[154] European Court of Auditors Special report No 10/2015: Efforts to address problems with public procurement in EU cohesion expenditure should be intensified, http://www.eca.europa.eu/en/Pages/DocItem.aspx?did=32488

based on data analysis, is available online, in most other Member States this is not the case, even though comparable data is often available.

A recent survey identified nine obstacles to participation in public procurement including uncompetitive practices (such as collusion, bid rigging and corruption), lengthy procedures, low quality of eProcurement services and risks of litigation by unsuccessful tenderers[155]. However, the monetary value of such inefficiencies is hard to estimate, especially in areas such as professionalization or corruption[156]. Nevertheless, on the basis of available studies, there are approximate estimates of impact.

PWC, Ecorys, and the University of Utrecht have estimated[157] that costs of corruption are around 3.7 % of procurement expenditures. Using this as a conservative[158] ballpark estimate, this indicates that just out of the EUR 420 billion advertised at EU-level annually [159] around EUR 16 billion are wasted on corruption.

Concerning professional procurement skills, according to Bandiera, Pratt, and Valetti[160], the problem is even more important than for corruption. Their estimates indicate that corruption is responsible for 17 % of waste in spending, as compared to 83 % which can be attributed to too low professionalization. Using again a back-of-the-envelope calculation based on the above estimates, this means that the potential economic gains from solving problems of professionalisation are more than EUR 80 billion.

Data is widely acknowledged as an important solution to procurement governance problems. Besides the studies by international organisations mentioned above, data is also recognized as an issue in Member States, with dedicated studies being conducted for instance by the British[161], German[162], and Swedish[163] governments and the non-governmental sectors in Croatia, Czech Republic, and Hungary[164].

Not all public procurement problems will be solved by data. However, even with a very conservative estimate where better governance could solve 10 % of waste due to insufficient professionalization and to corruption, this would still represent a benefit of around EUR 50 billion annually. This estimate should be further extended to benefits such as fighting collusion, as well as increased trust in government.

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[155] European Commission, 'Flash Eurobarometer 417', 2015.

[156] E.g. Heywood, P. M., and Rose, J. 'Close but no Cigar: the measurement of corruption', *Journal of Public Policy 34(03)*, 2014, pp.507-529.

[157] PWC, ECORYS, University of Utrecht, 'Identifying and Reducing Corruption in Public Procurement in the EU', 2013 (p. 211). Study based on a sample of procurement procedures, sectors (road and rail; water and waste; urban/utility construction; training; research and development) and countries (FR, IT, HU, LT, NL, PL, RO, ES).

[158] The study covers only the direct costs of detected corruption. Furthermore, public spending covered by EU directives is only a small part of overall expenditures on works, goods, and services.

[159] European Commission, 'Public Procurement Indicators 2013', 2015. This figure excludes utility spending.

[160] Bandiera, O., Prat, A., and Valletti, T. M., 'Active and passive waste in government spending: evidence from a policy experiment', 2008.

[161] Harrower D., 'Measuring public sector ICT expenditure, Approaches and evidence from the United Kingdom', 2014.

[162] BMWi, 'Public Procurement Statistics for Germany', *Research project commissioned by the Federal Ministry for Economic Affairs and Energy (IC 4 – 80 14 34/45)*, 2015, forthcoming.

[163] Konkurrensverket Swedish Competition Authority, 'Public Procurement Thresholds and Data in Sweden', *Uppdragsforskningsrapport 2015:3*, 2015.

[164] See http://integrityobservers.eu/, http://zindex.cz/ and http://k-monitor.hu/ respectively

The Commission will take a number of initiatives to address these data shortcomings.

First, in order to improve data on procurement above the EU thresholds, the Commission will define a data structure for procurement reporting before end-to-end eProcurement becomes mandatory in 2018. The new standard will be fit for the digital age (e-standard forms), simple to implement and use, fulfil business, governance, and transparency needs of procurement, and fulfil the legal obligations required in the standard forms. It will be designed in cooperation with the Publications Office of the EU, take in account existing work done within the CEN Workshop on Business Interoperability Interfaces for Public Procurement in Europe[165] as well as other existing standards. Member States will be consulted on the project.

Second, the Commission will encourage national collection of data on below-threshold *procurement,* for instance through the use of the data standard defined for above-threshold procurement which will take in account below-threshold procurement practices in the EU. This will enable the Member States to harmonize their structures for collecting data about below- and above-threshold procurement. The Commission will promote this goal through policy dialogues with the Member States on data transparency.

The Commission will also promote, *inter alia* through financial support and bilateral policy dialogues, the usage of contract registers. They are a cost-efficient tool for managing contracts, and also for the promotion of good governance through enhanced transparency. They store digitalized contracts, their structured summaries as well as full wording, including contract performance conditions, terms of delivery, and subsequent modifications. In some countries these registers are accompanied by the requirement that any contract not published in the register is void. These registers help contracting authorities manage their contracts and help improve the governance of public procurement. The Commission will facilitate, through the relevant expert group and a peer review, the exchange of best practices such as the recent successes from Slovakia[166] and Portugal. If deemed useful by Member States, the Commission will support the development of standards for contract registers. It will also develop a contract register of Commission tenders for its own use and in the interest of transparency.

Audits are a source of valuable information instrumental for improving public procurement systems. The Commission will support the creation of irregularity databases, which will contain digitalised audit reports. These reports must be structured (e.g. contain a classification of irregularities found, provisions infringed and corrections imposed) and capable of being matched with other procurement data. First, the Commission will ensure the availability and appropriate structure of its own audit. Furthermore, it will encourage Member States to improve their reporting capacities: it will facilitate the exchange of best practices (e.g. from the Czech Republic, Italy and Spain) and, possibly, standards. Finally, the Commission will provide guidance on the monitoring reports under Article 83 of Directive 2014/24/EU in order to help Member States to structure the information (including the use of the anomaly detection tools presented below).

The Commission will consolidate current work streams[167] on anomaly detection tools. It will provide feedback to Member States on the robustness of their public procurement systems, for

[165] http://www.cenbii.eu/

[166] Transparency International Slovakia, 'Not in Force Until Published Online', 2015.

[167] There are many examples of best practices in the area of data analysis. Member States, the World Bank, researchers and NGOs work on developing methodologies for benchmarking, measuring the cost of corruption in public procurement and monitoring public procurement. Tools for facilitating data analysis and anomaly detection are also being developed by or with the support of the Commission. ARACHNE, a Commission tool

instance through a performance (governance and transparency) scoreboard. Furthermore, the Commission will encourage the Member States to improve their data analysis capacities, notably by building on the latest technological developments in the field of data analytics including through financial support and facilitating the exchange of best practices and standards.

Besides the actions above, other initiatives will be taken. In line with the Digital Market Strategy, the Commission will support the establishment of connections between procurement data and various existing data and IT systems, most importantly business and public body registries. Following the same logic, the Commission will strive to enable the combining of procurement data with data on financial flows through opening up and standardizing data on budgets, financial statements of public administrations, and invoicing[168]. Finally, the Commission will make efforts to improve the structure of data on ESI funds[169], their connection with procurement data, and their sharing as open data.

More efficient remedies systems

Good governance in procurement also include an effective and efficient review system: companies must be able to find recourse when they believe rules have not been respected. The Remedies Directives[170] ensure that procurement decisions may be reviewed effectively and rapidly. However, there are strong discrepancies in the functioning of the review bodies between Member States, in particular on delays and costs. In addition, the Directives allow great flexibility as to the nature and institutional place of the bodies which should conduct these reviews. Subsequent to the transposition of the Directives, review mechanisms with ultimate judicial guarantees will have been established in each Member State. These mechanisms rely either on (i) newly created first instance specialised public procurement administrative review bodies or (ii) existing administrative bodies with enlarged functions for first instance review or (iii) the judiciary.

The knowledge of the full extent of these discrepancies and their impact is still limited. This is largely due to the lack of relevant data. In most Member States, the information on complaints lodged by economic operators is not collected in a structured manner and rarely used for policy making purposes. This impacts both the efficiency of the remedy system (e.g. by preventing accurate assessment of the resources needed to deal with complaints; identifying abusive complaints, consistency of decisions due to a lack of effective searching tools) as well as the general procurement system (e.g. identifying the contracting authorities against which successful complaints are lodged most often, or which aspects of procurement procedures are being appealed against successfully).

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for managing authorities to highlight risky EU Funded projects, is currently promoted as "best practice" for Member States. The project "Digital Whistleblower", funded by Horizon 2020, is designing an easy-to-use risk assessment software which will be offered to public authorities to assess procurement procedures by 2018. See Website: http://digiwhist.eu/

[168] Harrower D., 'Measuring public sector ICT expenditure, Approaches and evidence from the United Kingdom', 2014; Czech Ministerial audit based on matching invoicing and procurement data, 2014 http://www.anobudelip.cz/file/edee/2014/06/proverka-hospodareni.pdf

[169] K-monitor in Hungary - Fazekas, M., Chvalkovska, J., Skuhrovec, J., and János, I., 'Are EU funds a corruption risk? The impact of EU funds on grand corruption in Central and Eastern Europe', *CRCB-WP/2013:03*, 2013, p.30.

[170] Directive 89/665/EEC and Directive 92/13/EEC, as amended by Directive 2007/66/EC.

A study commissioned by the Commission services[171] on the economic efficiency and legal effectiveness of review and remedies procedures for public contracts underlines widespread stakeholders' positive perceptions of the relevance of the remedies procedures and of their impact in improving the openness and transparency of public procurement. Furthermore, public consultations carried out by the Commission from 24 April to 20 July 2014 also point at the conclusion that effective remedies improve the openness, transparency, fairness and help public procurement process to become more compelling for contracting authorities. Notwithstanding these elements, the study clearly demonstrates that the efficient functioning of the remedy systems varies considerably across Member States and that data collection on remedy system performance is deficient.

The most telling examples from this study, which demonstrate the need to strengthen public procurement remedy systems, relate to time taken and costs:

- The length of review procedures across Member States is particularly divergent. The five greatest duration values for first instance pre-contractual cases are observed in Member States relying on judicial review (Ireland – over 500 days, Greece and Belgium– over 400 days, Luxembourg and Finland – over 300 days). For most Member States relying on non-judiciary bodies at first instance[172] the median estimated review length is below 100 days – which can be considered a satisfactory length. The median estimated length of review for second instance pre-contractual cases are 700 – 1 000 days in Austria and Spain; around 600 days in Cyprus, the Czech Republic, Denmark, Finland and Latvia; and 0-200 days in Bulgaria, Germany, Estonia, France, Lithuania, Luxembourg, Portugal, Romania and Sweden;

- The fee for a review also varies widely across Member States: in some countries the fee is a fixed flat rate, irrespective of the size and characteristics of the contract; in others the costs are determined by a scale criterion or by a value-range that depends on the size or type of contract (for works, supply or services), i.e. for a EUR 250 000 contract fees, vary from 0 (Spain, Luxembourg, Latvia and Sweden) to EUR 5 000 (Slovenia);

- Median additional costs of review for contracting authorities as a percentage of contract value in individual Member States range from around 0.1 % (in Greece, Poland, Slovenia and Slovakia) to around 2 % (Austria). Among suppliers, litigation median additional costs of review range from 0.3 % (Spain, Lithuania, Romania, and Sweden) to 1.5 % (Cyprus, Greece and Slovenia).

The level of fees and additional costs[173] might in some cases discourage economic operators from launching complaints.

Finally, the study points to a wide variety in the number of first instance decisions, be they of administrative or judicial nature, taken in Member States from 2009 to 2012[174]. This could be partially explained by disparities in the effectiveness of the national remedies systems.

[171] Europe Economics and Milieu, 'Economic efficiency and legal effectiveness of review and remedies procedures for public contracts', 2015.

[172] The Study points at Austria, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Hungary, Latvia, Malta, Poland, Romania, Slovenia and Slovakia.

[173] Around 69 % respondents to the public consultation claim that in their jurisdiction costs (such as the cost of legal advice and representation) may have an impact in access to justice.

The Commission will at this stage propose different initiatives which will be complemented by the REFIT evaluation report on the Directive 2007/66/EC.

The Commission intends to create a network of first instance review bodies, which would facilitate exchanges of information and best practice, promote optimal model solutions, help identify needs, develop different assistance programmes and training activities (e.g. exchanges programmes, study visits) and conduct similar activities. The main purpose of the network would be to promote effectiveness. The Commission will particularly encourage and (technically and financially) assist Member States willing to create or strengthen their specialised first instance administrative review bodies.

The Commission will also propose increasing transparency regarding the performance of national remedy systems. To begin with, data need to be collected in an automated fashion without imposing an additional administrative burden. In that context, it will develop a limited number of objective indicators (number of complaints, number of successful complaints, costs, length of procedures, etc.) in agreement with the Member States. These indicators will be published via a performance scoreboard, integrated in the Single Market Scoreboard, to monitor the effectiveness of the national review systems. This will allow Member States and the business community to compare the efficiency of the remedies systems in different Member States. It will also give the Commission a better overview of the situation.

3.2.2. Efficient large-scale infrastructure projects

Policy context

Large scale infrastructure projects are particularly important segments of public procurement. They are generally public or partially private investments, and can take the form of public works or concessions. Such projects can vary in nature and could concern the construction of a power plant (as the one in 2011 in Estonia) or of a road viaduct in the Netherlands (award in 2012) each with a budget of around EUR 1 billion[175]. They are essential for the proper functioning of the Single Market. Without a European transport network, a pan-European technical platform for communication and data exchange, or appropriate energy infrastructures to ensure Europe's security of supply, the Single Market cannot deliver its full potential. The investment plan for Europe[176] will complement Member States efforts in this area.

There are many factors which determine whether the projects can ultimately contribute to growth, the creation of jobs and enhancing Europe's competitiveness. Alongside the availability of financial resources, correct planning and proper identification of the technical solutions for infrastructure projects, efficient and timely public procurement procedures play an important role, by ensuring that the broadest scope for competition is warranted and that

[174] The number of first instance decisions reported in the study from 2009 to 2012:

AT -932	CZ-2,778	EL-620	HR-6,939	LT-1,410	NL-1,111	SE-11,144
BE- 711	DE-4,222	ES-1,323	HU-2,419	LU-39	PL-10,570	SI-1,864
BG – 4,411	DK-580	FI-2,191	IE-21	LV-3,775	PT-86	SK-1,259
CY-380	EE-879	FR-40	IT-340	MT-240	RO-1,672	UK-47

[175] Information extracted from TED notices.

[176] European Commission, 'Communication on an Investment Plan for Europe', COM(2014) 903.

the best possible offers are chosen, in terms both of quality and cost. Successful, well-managed projects should therefore be a priority of the Single Market.

If run efficiently, large-scale infrastructure projects can have an important positive impact on the overall economy. According to the IMF, if carried out in certain conditions, an increase of 1 percentage point of GDP in investment spending raises the level of output by about 0.4 % in the same year and by 1.5 % four years after the increase.[177]

Problem and impact

Nine out of ten of such large-scale infrastructure projects do not go according to plan, either concerning the budget and/or the time-frame. Cost overruns of up to 50 % are common[178]. Delays are also common in all stages of the process, from the planning, to the implementation of the project and the execution of the contracts. For example, the costs for the Slovenia-Hungary rail connection were 52 % higher than foreseen. The railway line linking Rotterdam to the German border costs 3 times more than initially estimated and 27 % more than planned at the start of the implementation. This project is also subject to significant time delays[179].

Many factors have been identified as contributing to these difficulties. One is the complexity, length and duration of the public procurement process.[180] Many legal aspects have to be clarified before the launch of the procedures — ranging from the type of public procurement procedure to the definition of selection and award criteria to the contract conditions, including the allocation of risks between the parties. Discussions at political and technical levels on these aspects tend to be lengthy. While Member States sometimes consult the Commission on the most sensitive issues at an early stage, this is rarely done in an orderly manner. As there are currently no clear procedures, Member States may be hesitant to obtain the necessary clarifications and the consultation process tends to take a long time.

The elements presented above weigh even more in cross-border projects. This is because two or more Member States need to agree on many legal aspects, which may also vary because the transposition by 2016 of the new Public Procurement Directives[181] introduces additional elements to be agreed upon. Any legal uncertainty in the legal framework can lead to considerable delays, due to the need for corrections and the possibility of legal proceedings.

Investigations and infringement procedures initiated by the Commission or proceedings in national courts, often at an advanced stage in the procurement process, can have a significant impact on the duration and the costs of a project. In certain circumstances, proper remedies may no longer even be available, e.g. due to the advanced stage of contract execution.

Another important issue is transparency. Such big projects may not follow the information requirements for public procurement (not all the information is published on TED) or may not be published at all when they are awarded directly as a result of an inter-governmental agreement. These practices restrict competition in the Single Market.

[177] http://www.imf.org/external/pubs/ft/survey/so/2014/res093014a.htm

[178] Flyvbjerg B., 'What You Should Know About Megaprojects, and Why: An Overview', 2014.

[179] European Parliament, 'TEN-T large Projects – Investments and costs', January 2013.

[180] The Directorate-General for Regional Development considers public procurement errors to be the single most common cause of administrative errors and financial corrections across all EU funds.

[181] Directive 2014/24/EU on public procurement (and Repealing Directive 2004/18/EC); Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors (and repealing Directive 2004/17/EC); Directive 2014/23/EU on the award of concession contracts.

All of these elements are especially important for particularly big infrastructure projects aimed at expanding existing capacities or developing completely new components of infrastructure. The sectors most affected are transport, ICT and energy.

Problems that have not been solved before launching public procurement procedures will generate delays later on, not only due to complaints and legal review, but also to corrections by the contracting authorities themselves. Projects over EUR 700 million generally take substantially longer to contract than other tenders[182] and the reason is not longer time to tender. If the duration of a typical procedure, from the dispatch of the invitation to tender to the award of the contract, is 3 and a half months, for large-scale infrastructure projects it is approximately 25 months, increasing to 35 months for negotiated procedures. However, the time the tenderer has to submit a proposal is often quite similar to a lower value procedure.

An investigation by the Commission takes at least 4 months for initial exchanges with the Member State and at least an additional year for an infringement procedure up to the potential referral to the ECJ. It can intervene at any moment of the procedure. Blocking a project during this process to avoid subsequent difficulties engenders high costs, but by pursuing the project a Member State risks paying fines or penalties for cancelling contracts.

The costs resulting from delays depend on the value of the project, its advancements as well as the source of funding or the Member State in which the project is implanted (different inflation and interest rates).

However, one could compute a rough estimation of the opportunity costs of delaying a large infrastructure project. A project worth EUR 10 billion which would, for some reason, be delayed in its implementation by 2 years could generate additional costs of more than EUR 600 million considering only two factors: opportunity costs on the financial market (EUR 400 million) and inflation (EUR 200 million).

Other significant additional costs include social and economic costs for the beneficiaries/population at large, which would have benefitted from the project, but also significant administrative costs for both the authority dealing with the project and for the tenderer/contractor that has to internalise a significant degree of uncertainty regarding the project.

Public procurement uncertainties contribute to the general cost overruns. Considering that 9 out of 10 big transport infrastructure projects run over budget on average by 28 %[183], the overall cost increase of projects above EUR 700 million registered in TED could amount up to EUR 4 billion per year. Although the factors leading to overruns are many, improving this situation even marginally, due to better public procurement procedures, can imply large savings for EU tax payers.

Considering the complexity of large infrastructure projects, the Commission will propose a three-stage approach: a helpdesk, an ex-ante assessment and a system for exchange of information. All the projects with a total value of more than EUR 700 million will be covered

[182] The duration for the large-scale projects is calculated based on TED data for contracts awarded between 2010-2014, the calculations for a typical project come from European Commission, 'Impact and Effectiveness of EU Public Procurement Legislation', Staff Working Paper, SEC(2011) 853 of 27 June 2011.

[183] Flyvbjerg B.,Skamris Holm, M. K and Buhl, S.L. 'What Causes Cost Overrun in Transport Infrastructure Projects?', 2003.

by the initiative. In order to determine the threshold, an analysis has been carried out on TED data. The threshold was chosen for the increased economic impact of delays for such projects, keeping in mind the resources needed to assess the notifications, and a relative good coverage of Member States.

During the planning phase of such a project, many questions can arise which delay the process significantly. A helpdesk could assist Member States in clarifying these issues upfront and before the project is mature enough to be notifiable under the mechanism described below. It can play a particularly important role for cross-border projects in helping to find mutually acceptable solutions. The helpdesk could also continue to perform its advisory role throughout the execution of the project.

The Commission will develop a specific procedure with a view to providing an ex ante assessment of a specific project with EU procurement rules. Member States will have the possibility to notify, on the basis of a standard information sheet, projects early enough to ensure that the Commission can assess the compatibility of the project before irreversible decisions are taken. The project would have to be notified at the latest before publishing notices directly linked to the implementation. If no publication is intended, the Commission should be notified before any binding commitment or communication to potential contractors or other partners (including Member States and third countries) is undertaken. The Commission will deliver its opinion within a specific timeframe which should in principle not exceed three months following the notification of the project.

Due to their complexity it is not uncommon that procurement plans are subsequently changed or the contracts amended. Therefore, it could be envisaged that the Member States will also be asked to notify any substantial changes to the prior notification that might have an influence on the outcome of the assessment; e.g. the change of the public procurement procedure from a standard to an exceptional procedure or significant modifications of the contracts awarded.

In addition, an information exchange mechanism between Member States and/or promotors of cross-border projects, coordinated by the Commission, will be introduced. The aim will be to build up reference classes of similar projects and to profit mutually from experiences. The Member States would be encouraged to submit information on large-scale infrastructure projects. This collection of data will also be instrumental to the achievement of the broader objective of better governance through data as described above.

3.3. Consolidating Europe's intellectual property framework

The crisis had a significant impact on the private sector's innovative activity, with the commercial uptake of innovation constituting a particular weakness, and the number of innovative firms in decline. SMEs' innovations also suffered, as did patent applications, exports of high-tech products, venture capital investments, and sales of innovative products. While there have been improvements in human resources, business investments in R&D and the quality of science, these have not been enough to result in a stronger performance overall in terms of innovation. All of this has posed risks for the long-term growth potential of the EU, as have other aspects relevant to innovation performance. From the perspective of SMEs, lack of financial resources is viewed as the main problem in the commercialisation of innovative products or services. The few innovative businesses that receive public financial support for R&D or other innovation activities consider it insufficiently effective. In this context, it is necessary to consolidate and modernise the intellectual property (IP) framework.

3.3.1. A comprehensive strategy to support the use of IP by SMEs

Policy context

SMEs represent 99 % of all businesses in the EU. 85 % of net new jobs in the EU between 2002 and 2010 were created by SMEs[184]. This figure is considerably higher than the 67 % proportion of SMEs in total employment and shows that SMEs are the main drivers of job creation in Europe. To enable more growth in business and employment, the Commission's entrepreneurship and innovation policies are especially focused on SMEs, and aim to assist SMEs to enhance their business and innovation models through better education and information, and improving their access to finance.

The Single Market holds the promise of a bigger market for products and therefore of more and faster growth for companies. However, SMEs and especially start-ups often do not make use of the possibility to expand cross-border. This decreases their chances of becoming sustainable or competitive at international level. While there are different views on what stimulates high growth firms or how best to measure sustainable firm growth[185], helping SMEs benefit from the Single Market is an important driver behind the Commission's Single Market policy. Moreover, the proliferation of out-sourcing and of network innovation as a means for SMEs to be competitive also suggests that a smooth functioning Single Market should enhance their possibilities to find and work with ideal business and innovation partners that might not be found at national level. These dual objectives, to facilitate cross-border trade and cross-border partnerships, combined with the view that innovation is the driver of competitiveness in a knowledge-based economy, provide the rationale for European policy IP rights in this field.

One of the means to improve returns on investment in innovation and to protect intangible assets, which are at the heart of the competitiveness of EU enterprises, is the application of an amenable and efficient IP rights framework.

The EU's harmonisation of industrial property rights (through the recently modernised European trademark *acquis*, design rights and the forthcoming unitary patent) has sought to reduce the costs of applying and maintaining IP rights across the Single Market. This should make it easier for SMEs to exercise these rights and help companies invest in innovation, as the potential scale of the Single Market could make those innovations commercially viable.

Furthermore, the Commission adopted an action plan against infringements of IP rights in 2014[186], which focused specifically on SMEs. This includes general initiatives to improve small claims procedures and the review of national schemes that have been established for IP protection. These range from the establishment of specialised mediation and arbitration centres (that allow for faster and generally less expensive out of court procedures), to specialised IP courts (that potentially allow for faster and more predictable outcomes) and to improved access and information on IP enforcement procedures. Furthermore, the

[184] European Commission press release, 'Small companies create 85 % of new jobs', 6 January 2012: http://europa.eu/rapid/press-release_IP-12-20_en.htm

[185] Coad, A., Daunfeldt, S., Hölzl, W., Johansson, D. and Nightingale P., 'High-growth firms: introduction to the special section', *Industrial and Corporate Change*, 2014, volume 23, number 1, pp. 91–112, 2014.

[186] European Commission, 'Towards a renewed consensus on the enforcement of Intellectual Property Rights: An EU Action Plan', COM(2014) 392.

Commission has established an IPR Helpdesk, and through the Iporta project[187] it has worked with national IP offices to provide better access to IP information. The European Observatory on infringements of IP rights[188] provides similar services. Finally, the Commission also announced in its action plan that it would review nationally funded schemes to assist SMEs in applying for and enforcing their IP rights. This includes a review of unsuccessful attempts to develop national IP legal expense insurance schemes in certain Member States.

In the field of IP enforcement, the Commission's proposal to harmonise civil redress against the unlawful misappropriation of confidential business information (also known as trade secrets)[189], which are an essential form of IP but not an exclusive right, seeks to assist innovative SMEs. Companies are fearful of sharing such information with privileged partners in cross-border innovation networks precisely because the legal framework for civil redress against such misappropriation is fragmented within the EU. In the public consultation on the need for such harmonisation, 73 % of responding SMEs called for EU action[190]. The impact assessment for this proposal[191] revealed that SMEs depend heavily on secrecy as a means to protect their know-how and that this dependency is accentuated by their difficulty in accessing and enforcing IP rights.

Problem and impact

There is evidence that EU SMEs significantly underexploit the potential of IP rights to enhance their competitive performance, and that the economic benefits of changing this situation are sizeable. Recent evidence shows that the schemes put in place at national and EU level do not fully address the problem of missed IP opportunities for SMEs for various reasons, including duplication and lack of coordination, difficulties to reach out to SMEs effectively, amenability problems, etc.

The above-mentioned Commission's action plan against infringements of IP rights includes the results of a public consultation on the impact of the 2004 IP rights enforcement directive[192], which indicates that the high costs and complexity of litigation have a dissuasive impact on SMEs both as regards using and enforcing IP rights. This leads to SMEs in the EU under-using IP rights as a means to ensure that they earn sufficient returns on their investments in innovation.

The Observatory on infringements of IP rights, hosted by OHIM[193], is currently undertaking a survey of SMEs in IP intensive sectors in Europe to evaluate their needs in this field. The final report will be available in autumn 2015. The preliminary results show that there would

[187] EU Accessible Intellectual Property.
[188] Established by Regulation (EU) 386/2012 of 19 April 2012.
[189] European Commission, proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, COM(2013) 813. Inter-institutional discussions between the European Parliament and the Council to finalise the text of the directive are currently at an advanced stage.
[190] European Commission, 'Public consultation on the protection against misappropriation of trade secrets and confidential business information – summary of responses', 2013.
[191] 'Commission Staff Working Document – Impact Assessment - Accompanying the document proposal for a Directive of the European Parliament and of the Council on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, SWD(2013) 471.
[192] European Commission, 'Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights', OJ L 195/16, 2004.
[193] Office for Harmonization in the Internal Market, based in Alicante, Spain.

be a greater willingness to apply for EU IP titles if the process was more accessible and easier to use[194]. The main inhibitors seem to be access to information and costs of application/enforcement.

IP intensive industries account directly for 26 % of all jobs in the EU and generate almost 39 % of total EU economic activity (GDP). They pay higher remuneration than non-IP intensive industries, with a premium of more than 40 %[195].

Although survey results from May 2014[196] suggest that 63 % of companies with between one and nine employees have introduced at least one innovation since 2011, this proportion rises to 85 % of companies with 500 employees or more. Moreover, 71 % of companies with between one and nine employees encountered difficulties in commercialising their innovations due to a lack of financial resources, as compared with 48 % of companies with 500 employees or more.

Another recent OHIM study for the Observatory[197] reveals that only 9 % of SMEs in Europe own IP rights but that, on average, they generate 32 % more revenue per employee than those that do not. Only 0.8 % of EU SMEs were found to own patents. The study also finds that, compared to large companies, SMEs tend both to use national rights more often than European rights and that they have a relatively greater reliance on trademarks.

A recent study by Eurostat (2014) has estimated the proportion of patents filed[198] by European companies and coming from SMEs in different fields of technology. Combining different databases, the study found that 79 % of all patent technologies can be attributed to large firms while only 17 % can be attributed to SMEs.

The need for an EU wide scheme to help innovative SMEs has most recently been confirmed by the European Patent Office (EPO) Select Committee[199] that is working on the establishment of the unitary patent. In the context of the negotiations on fees for the unitary patent, Member States requested that the Commission identify possible actions to support SMEs which apply for a unitary patent and other EU IP titles.

The cost exposure for IP rights and particularly patent litigation is significant, hits SMEs disproportionately hard and acts as a serious deterrent for SMEs to engage in patenting in the first place. Indeed, under the Unified Patent Court, firms that lose a legal dispute will have to pay the court fees of the winner (provisionally estimated at a fixed fee of EUR 11 000 plus a value based fee of up to EUR 220 000). To this have to be added the winner's legal costs, which on the basis of the draft Unified Patent Court rules could amount to up to EUR 3 million. In addition, the losing party will typically also be required to pay damages. Such

[194] Based on a pilot of 10 % (900) of the sample of 9 000 EU SMEs involved in this telephone survey, 42 % of respondents noted that they had an intangible assets that could be protected by an IP right but was not and 33 % noted that they would have applied for IP rights if the process to do so was simpler and more accessible.
[195] OHIM, 'Intellectual property rights and firm performance in Europe: an economic analysis', Firm-Level Analysis Report, 2015.
[196] Flash Eurobarometer 394, 'The role of public support in the commercialisation of innovations', Report, 2014
[197] OHIM, 'Intellectual property rights and firm performance in Europe: an economic analysis', Firm-Level Analysis Report, 2015.
[198] To the European Patent Office and Patent Cooperation Treaty applications and US Patent and Trademark Office patent grants.
[199] EPO Select Committee, http://www.epo.org/about-us/organisation/select-committee.html

exposure can only be effectively addressed through a functioning IP litigation insurance market. Once the unitary patent (including the court and the official procedures) is in force, such a market – which did not develop at national level due to the too limited size of the market - could start to grow. An insurance scheme would not only counter the risks of such legal fee exposure: the security of insurance and the possibility of a valorisation of IP assets could in turn lead to more investment by banks and other financial institutions into innovative start-ups and SMEs.

Building on the initiatives already in place, the Commission will consider extending its efforts to the following measures:

- better co-ordinate information desks and assistance programmes with the aim of moving to a common EU portal, possibly based in OHIM;
- ensure that funds available in the networks of national IP offices with the EPO and OHIM are earmarked for activities to support awareness and access to specialist services on the new unitary patents and other European IP titles among SMEs;
- work towards reducing the costs of post-grant management of IP portfolios, specifically for SMEs through engagement with specialised IP/patent management service providers and IPOs;
- ensure that COSME funds seeking to encourage innovative European SMEs are used to assist the latter in applying for European IP titles including the new unitary patent;
- ensure that the SME investment instrument in Horizon 2020 is used to encourage European 'disruptive' innovators to protect their investments with unitary patents so that they exploit them commercially at EU level, rather than at national level where they may not be commercially viable;
- facilitate the development and launch of a European commercial IP legal costs insurance market that has not grown at national level because of the small scale of national markets. This would be launched when the unitary patent comes into effect; and
- improve the monitoring of the take-up of EU IP titles by ensuring that the EPO and OHIM report on the relevant data systematically.

3.3.2. Interaction between the unitary patent and national patent systems

Policy context

The upcoming unitary patent system will play an essential role in enabling innovation in the participating Member States[200]. Europe is now on the cusp of putting this patent into force and establishing the European patent specialised court - the Unified Patent Court - for which

[200] Commission Decision (EU) 2015/1753 of 30 September 2015 on confirming the participation of Italy in the enhanced cooperation on unitary patent protection in the EU. This has brought the total number of participating Member States to 26, with Croatia and Spain not participating.

industry has been calling for decades. Now, the key challenge is to get the end-game right, including addressing uncertainties over how the unitary patent will work together with national patents and current EU rules on national supplementary protection certificates (SPC) granted under the EU SPC arrangements [201] and the creation of a unitary SPC (see next sub-section). The objective of the unitary patent package is to offer European innovators, especially SMEs, a patent with a truly European dimension and more affordable patent protection. The exclusive competence of the new specialised jurisdiction, the Unified Patent Court, will result in much greater legal certainty and allow innovators to save on costs, as it will avoid multiple parallel legal disputes.

Problem and impact

In spite of the work already done by the EPO Select Committee, some provisions of the two Regulations[202] creating the unitary patent system and the language arrangements still require additional clarification in order to ensure that the unitary patent offers the highest level of legal certainty for future users. The issues involved concern the following:

- coherence between the upcoming unitary patent and current EU rules on SPC - in the absent of a unitary SPC title – will be important. SPCs are instrumental for industry sectors whose products are subject to regulated market authorizations;
- the consequences of the rejection of a request for unitary effect, and the revocation of a unitary patent due to defeating national prior art[203] and the possible acceptable conditions to convert such a putative unitary patent into a bundle of national patents;
- the principle of non-double protection deriving from unitary patent and national patents, except in very limited circumstances; and
- possible issues stemming from the obligation to designate all participating Member States for the purpose of obtaining a unitary patent[204].

Based on a single application, the unitary patent will automatically deploy its effect in the territories of all the Member States taking part in the enhanced cooperation. For equivalent patent protection (i.e. outside the framework of the unitary patent), this will represent a decrease in the administrative costs related to obtaining a unitary patent of up to 80 %. The Commission has estimated that the full implementation of the unitary patent could lead to a gain of 0.25 % in EU GDP[205]. This effect captures the possible net productivity impact resulting from the reduction of validation and maintenance fees in the Member States for

[201] Existing nationally granted SPCs are regulated in the EU by the Council Regulation (EEC) No. 1768/92, codified as Regulation (EC) No. 469/2009 concerning the SPC for medicinal products, and Regulation (EC) No. 1610/96 concerning the creation of a SPC for plant protection products.

[202] Regulation (EU) No. 1257/2012 of the European Parliament and of the Council implementing enhanced cooperation in the area of the creation of unitary patent protection, and Council Regulation (EU) No. 1260/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection with regard to the applicable translation arrangements.

[203] Prior art is any evidence that an invention is already known.

[204] Article 3(1) of Regulation (EU) No. 1257/2012 provides that only European patent granted with the same set of claims for all the participating Member States shall benefit of the unitary effect. However, participating Member States have not joined the European Patent Organisation at the same date and some of them only became members in recent years. Consequently, old pending applications cannot designate these Member States (they were not member of the Organisation at the time of filing) and unitary effect could not be granted for these applications when becoming European patents.

[205] Mejer M. and Rutkowski A., Analysis of the country-specific effects of the unitary patent adoption, forthcoming: http://ec.europa.eu/growth/about-us/chief-economist/index_en.htm

patents granted by the European Patent Office and, subsequently, the increase in the number of non-national patent rights enforced. The potential economic gains for individual Member States could vary, due to differences across Member States regarding the current cost of patenting (fees), the sensitivities of patents to fees, and the sensitivity of productivity to patents.

The Commission will address uncertainties over how the unitary patent will work together with current EU rules on SPCs. The other issues identified will be analysed further together with participating Member States with the view to bringing legal certainty to these matters.

3.3.3. Optimising the legal framework for industry sectors whose products are subject to regulated market authorisations

Policy context

Industry sectors whose products are subject to regulated market authorisations, such as the pharmaceutical, medical devices and agrochemical industries, rely heavily on industrial property protection through patents, SPCs and data/market exclusivity. This protection ensures the recovery of the very high investments necessary over a long development period to bring a successful innovative product to the market[206]. SPCs[207] in particular are critical for these sectors. Existing national SPCs complement national patents to ensure an extra period - up to five years - of protection for patent holders, to offset the time required to obtain marketing authorisation for their patented products.

SMEs and start-ups are playing an increasing role in these highly innovative sectors both in Europe[208] and in the USA, as reported in an OECD study[209] on the pharmaceutical sector.

Problem and impact

The specific industrial property legal framework in the EU for industry sectors whose products are subject to regulated market authorisations might present several features not fit for purpose in today's global economy and in the light of new regulatory requirements. This may create obstacles for the full development of these sectors in the EU. Firstly, existing SPCs are granted and enforced at national level, which can result in Single Market fragmentation. The advent of the unitary patent will make such fragmentation more evident. A coherent articulation between the unitary patent and the existing national SPCs will therefore be important, providing an initial solution for users of the SPC system to use the unitary patent system (in the absence of a unitary SPC). However, such a solution will still require multiple administrative procedures in multiple jurisdictions, limiting the full benefits of a unitary system.

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[206] Mestre-Ferrandiz, J., Sussex, J. and Towse, A.K., 'The R&D Cost of a New Medicine', London: Office of Health Economics, 2012.

[207] Existing nationally granted SPCs are regulated in the EU by the Council Regulation (EEC) No. 1768/92, codified as Regulation (EC) No. 469/2009 concerning the SPC for medicinal products, and Regulation (EC) No. 1610/96 concerning the creation of a SPC for plant protection products.

[208] http://www.ema.europa.eu/docs/en_GB/document_library/Report/2015/02/WC500181837.pdf

[209] Osabe, J. & Jibu, M., 'SMEs playing a key role in drug R&D: Analysis by new drug R&D indicators', as presented at European Policy for Intellectual Property (EPIP) Conference, 4-5 September 2014.

Secondly, Member States implement the patent research exemption and the 'Bolar exemption'[210] in different ways. On the one hand, some Member States do not allow the supply of active pharmaceutical ingredients (APIs[211]) to EU-based generic manufacturers for the purpose of seeking marketing authorisation[212]. On the other hand, in a number of Member States, it is not certain whether testing in the EU by originators and biosimilars[213] can benefit from these exemptions for the purpose of seeking marketing authorisation in the EU and in non-EU countries, or for meeting emerging regulatory requirements such as those related to health technology assessment. Providing clarity on the application of the EU 'Bolar exemption' would also be important with the advent of the unitary patent and its centralised jurisdiction[214].

Thirdly, manufactures of generic and biosimilar medicines based in non-EU countries where SPC protection does not exist (e.g. in Brazil, Russia, India and China) enter markets in which patent protection expired up to five years earlier than EU-based manufacturers. This is possible because EU-based manufactures are not allowed to produce in EU Member States during the period of the SPC protection of the reference medicine. Furthermore, this situation, under certain circumstances, gives an untended lead-time advantage to non-EU based operators to enter EU Member States following the expiry of that SPC protection. Such a situation could have the effect of encouraging European manufacturers of generic and biosimilar medicines to move their production outside the EU - either via delocalisation or long-term outsourcing contracts - to overcome these legal hurdles and to stay competitive.

In Europe, the originator pharmaceutical industry employs 116 000 staff in R&D activities, and about 15 % of its sales are reinvested in R&D. Producers of generic medicines and biosimilars devote 7 % of their revenues to R&D activities; a similar proportion of investment in R&D is found in the agrochemical industry, which employs 5 500 staff on technical support, including R&D[215].

Expenditure on medicines amounts to 1.6 % of EU GDP and accounts, on average, for 15 % to 20 % of national health budgets. Timely and predictable entry of generics and biosimilars play a key role for the sustainability of public health budgets: the Commission[216] has estimated that generics' entry on the first day after patent expiry could lead to additional savings of the order of 20 %.

Some EU pharmaceutical industry have moved to the USA and emerging economies in recent decades[217]. Countries such as China, Korea, Singapore, Brazil and India are emerging as major competitors in this sector. In 2014, the Brazilian and Chinese markets grew by 12.6 %

[210] Art.10 (6) of Directive 2001/83/EC, and Art. 13(6) of Directive 2001/82/EC on the EU code of human and veterinary medicines respectively. Art. 27(d) of the Unified Patent Court Agreement includes a cross-reference to those Articles of the cited Directives.
[211] An API is the ingredient in a pharmaceutical drug that is biologically active.
[212] As described in C-661/13, Astellas versus Polpharma case.
[213] Sanofi-Aventis vs Lilly France, Order of December 15, 2014, Paris TGI. A biosimilar is defined as a biological medicinal product similar to a reference medicinal product authorised in the EU.
[214] Art. 27(d) of the Unified Patent Court Agreement refers to Directive 2001/83/EC and Directive 2001/82/EC
[215] Data from European industry associations EFPIA, EGA and ECPA.
[216] Sector inquiry and follow-up, http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/
[217] Gambardella et al., Global Competitiveness in Pharmaceuticals: A European Perspective (2001).

and 11.6 % respectively, as compared with an average market growth of 2.4 % for the total EU market and 12.5 % for the US market[218].

Global spending is expected to shift toward generic medicines, with an expected rise from 27 % in 2012 to 36 % of total sales by 2017. Generics and biosimilars could represent 80 % of the volume of medicines by 2020[219]. An SPC manufacturing waiver for export purposes to non-EU countries with no SPC protection could allow the EU generics and biosimilars industries both to create thousands of high-tech jobs in the EU and start many new companies[220].

Between 54 % and 70 % of the active pharmaceutical ingredients market in Europe (depending on the Member States) is supplied by India, China and Israel. Active pharmaceutical ingredients manufactured in Poland, for example, have significant penetration in some of its neighbouring markets, but a negligible one in the EU-15 market[221].

Following stakeholder consultation, the Commission will consider, and as appropriate bring forward, a recalibration of the patent and SPC regulatory framework in the EU, including on the following issues:

- a unitary SPC, which would enhance the value, transparency and legal certainty of the protection of medicines and plant protection products. This would provide a one stop shop for the granting of SPCs in Europe, and give enhanced certainty to European health authorities, to patients and to generic companies on the status of a regulated product's IP protection;
- a targeted SPC manufacturing waiver for export purposes that could allow EU-based manufacturers of generic and biosimilar medicines to compete on equal footing with competitors from non-EU countries;
- the scope of patent 'Bolar' and research exemption in the EU, notably in view of the upcoming establishment of the Unified Patent Court, and taking into account best practice implemented in certain Member States.

3.3.4. Review of the Intellectual Property Rights enforcement framework

Policy context

The 2004 directive on the enforcement of intellectual property rights[222] approximates the laws of the Member States in the area of civil enforcement of IP rights. It contains rules on measures and remedies available to right holders in order to enforce their IP rights. The directive covers all types of IP rights, notably copyright, trademark, patent and design. As regards copyright, it complements the Directive on the harmonisation of certain aspects of copyright and related rights in the information society[223].

[218] IMS Health, April 2015.
[219] Vicente V. and Simoes S., 'Manufacturing and export provisions: Impact on the competitiveness of European pharmaceutical manufacturers and on the creation of jobs in Europe', 2014.
[220] *Ibid.*
[221] European Commission, 'Economic study on the EU SPC system', preliminary findings, 2015.
[222] Directive 2004/48/EC of 29 April 2004.
[223] Directive 2001/29/EC of 22 May 2001.

The protection of IP is an essential element for the success of the Single Market and plays a role not only for promoting innovation and creativity, but also for developing employment and improving competitiveness. IP-infringing activities, in particular those carried out on a commercial scale (where the infringer makes money on the back of the right holder's investment), dissuade investment in innovation, undermine job creation and put consumers and businesses at risk. A comprehensive enforcement policy is required to successfully combat IP infringements at EU and national level, especially given the borderless nature of the internet.

Therefore, the Digital Single Market Strategy announced a modernisation of the IP enforcement framework, focusing on commercial-scale infringements (the 'follow the money' approach) as well as on its cross-border applicability. Furthermore, to be fully comprehensive, enforcement should go beyond digital and look at the role intermediaries play in the entire supply chain.

Problem and impact

Stakeholder consultations[224] have highlighted a number of issues as regard the IP Enforcement Directive. A number of key provisions may not be functioning properly or not delivering expected results, especially in the online environment and in a cross-border context. This concerns in particular the possibility to receive information on infringing goods or services, preliminary and permanent injunctions to prevent infringement and their cross-border execution, calculation of damages, reimbursement of legal costs, and publication of judicial decisions.

Also, the role of intermediaries (e.g. advertising agencies, media operators, payment service providers and shippers) in IP enforcement seems significant, yet they are not covered by the current rules.

IP infringements on a commercial scale have steadily increased in recent years, dissuading investments in innovation and creativity and affecting all types of IP rights. A recent Europol/OHIM report concludes that while the exact scope and scale of the counterfeiting business is not known, it is probably fair to assume that the reality exceeds all projections[225]. For instance, it is estimated that the perfumes and toiletries sector alone loses approximately EUR 4 700 million in revenue annually due to the presence of counterfeit cosmetics (perfumes, beauty and make-up) and other personal care products (7.8 % of the sector's sales)[226]. The manufacture and distribution of fake clothes, shoes and accessories (such as ties, scarves, belts and gloves) generates losses of over EUR 26 billion every year for legitimate EU businesses. This equals nearly 10 % of total sales in the sector throughout the EU and translates into 363 000 lost jobs and over EUR 8 billion in government revenue that is not collected, due to unpaid tax, social contributions and VAT[227]. Value losses due to piracy

[224] European Commission, 'Synthesis of the comments on the Commission report on the application of Directive 2004/48/EC, COM(2010) 779; and the Commission's, Synthesis of the responses to Civil enforcement of intellectual property rights: Public consultation on the efficiency of proceedings and accessibility of measures', 2013.

[225] OHIM study, '2015 Situation Report on Counterfeiting in the European Union - A joint project between Europol and the Office for Harmonization in the Internal Market', April 2015.

[226] OHIM study, 'The economic cost of IPR infringement in the cosmetics and personal care sector: report of a pilot study', 2013.

[227] OHIM study, 'The economic cost of IPR infringement in the clothing, footwear and accessories sector', 2015

in the creative and cultural industries are estimated to be in the range of about EUR 35 to 50 billion for the 2008-2011 period[228].

Commercial-scale IP rights infringements result in economic harm for inventors and creators but also for society as a whole, and efficient and effective cross border enforcement of IP rights should stimulate investment in innovation and creation[229]. Improving IP enforcement would help inventors and creators to derive legitimate profits from their works and would reduce the negative economic impact on those consumers and businesses that unintentionally purchase IP infringing products.

As announced in the Digital Single Market Strategy, the Commission will review the existing IP rights enforcement framework. It intends to focus its efforts on fighting commercial scale infringement (the 'follow the money' approach), including the role intermediaries play in the process and strengthening cross border enforcement of IP rights. The Commission will also look at whether enforcement could benefit from the creation of courts specialising in IP. Other issues for consideration include the need for better cooperation between Member States (e.g. at the level of enforcement authorities), and assisting SMEs in enforcing their IP rights.

3.3.5. Indications of geographical origin for non-agricultural products

Policy context

Europe has a rich landscape of authentic products that rely on specific - often traditional - know-how. These products have a special quality, reputation or other characteristics, essentially due to their deep roots in their place or region of origin. Beyond wines, spirits, foodstuffs and other agricultural products, some 'geographically rooted products'[230] are non-agricultural. Those products may be in different economic sectors, e.g. stones and minerals, jewellery, ceramics, pottery and porcelain, textile and tapestry (including lace and embroidery), leather products, glass and crystal, wooden and paper products, steel products (e.g. knives), cosmetics, and handicrafts.

In contrast to agricultural products, there is no harmonised approach at EU level as regards the protection of indications of geographical origin for non-agricultural products. National rules exist in 14 Member States providing for specific protection of indications of geographical origin as *sui generis* rights[231]. They differ in many aspects: definitions (appellations of origin versus geographical indications, genericity), procedures (application, opposition and registration), competent authorities and fees. Therefore, non-agricultural producers who wish to protect an indication of geographical origin throughout the EU need to seek separate protection in each Member State, to the extent such protection exists at national level.

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[228] Benzoni, L., 'The Economic Contribution of the Creative Industries to the EU in terms of GDP and Jobs', TERA Consultants, 2014.

[229] Border enforcement with non-EU countries is regulated by Regulation (EU) No 608/2013 of 12 June 2013 concerning customs enforcement of intellectual property rights.

[230] 'Geographically rooted products' are defined as products which could be entitled to benefit from the protection schemes for indications of geographical origin pursuant to Article 22(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[231] Belgium, Bulgaria, Croatia, Czech Republic, Estonia, France, Germany, Hungary, Latvia, Poland, Portugal, Romania, Slovak Republic and Slovenia.

In July 2014, the Commission launched a green paper entitled 'Making the most out of Europe's traditional know-how: a possible extension of geographical indication protection of the EU to non-agricultural products'[232]. The objective of this public consultation was to ascertain stakeholder views on the potential merits and modalities of extending EU-level geographical indication protection to non-agricultural products. Following on from the green paper process, the European Parliament adopted a Resolution on 6 October 2015[233] which welcomed the Commission's work in this area.

Problem and impact

In the absence of a specific legal framework, it is difficult for producers of non-agricultural geographically-rooted (and authentic) products to effectively use this uniqueness as a marketing and sales asset. First, the use of individual trademarks would not be possible: an enterprise cannot register a trademark containing signs or indications which serve primarily to designate the geographical origin, since the sign or indication would be considered descriptive and the application refused. Secondly, competitors may use similar names or indications serving to designate the same geographical origin without necessarily meeting the associated quality or characteristics or without a link to the place of origin, therefore free-riding on the reputation of the original geographically rooted products. Consumers trusting the quality features of the authentic products could therefore be misled and deceived.

General rules on competition, unfair trading practices or consumer protection may be invoked against free-riders, in the sense that the relevant business practice can involve the misuse of an indication designating the geographical origin. However, this is often uncertain, if no specific rules are set out in the first place as regards the quality and/or characteristics of the products associated with a specific geographical origin.

Protecting the collective reputation connected to the indication of geographical origin from misuse and dilution acts as an incentive for investing in maintaining a certain minimum level of quality and authenticity on the products, thereby meeting consumer expectations. If such protection is fragmented and insufficient, incentives are lower, including the financial incentive both to invest in innovation on the production of geographically rooted products on the one hand, and to grow beyond regional boundaries on the other. Moreover, the protection of indications of geographical origin may have positive effects on promotion of cultural heritage. This could also have a positive spill-over as regards the provision of linked services, such as tourism (e.g. the indication of geographical origin publicises localities and regions and may attract tourism). In the Commission's 2014 public consultation, the above issues were all identified as important elements by participating stakeholders[234]. The consultation revealed large support for an initiative in this field, while pointing out at the same time potential trade restrictions, high costs for SMEs and the risk of extra regulatory burden.

[232] COM(2014) 469 of 15 July 2014.
[233] European Parliament resolution of 6 October 2015 on the possible extension of geographical indication protection of the European Union to non-agricultural products, 2015/2053(INI).
[234] A report setting out the results of the public consultation and a stakeholder conference of January 2015 is available at: http://ec.europa.eu/growth/tools-databases/newsroom/cf/itemdetail.cfm?item_id=8254

A case study in the context of an external study carried out for the Commission examined the economic impact within the EU of non-agricultural geographically rooted products[235]. The study identified a sample[236] of 127 relevant products[237] from 22 EU Member States[238] within a range of sectors. While the study cannot be considered fully representative, trends can nevertheless be observed. The study also presented turnover data in relation to 72 products of the sample, totalling EUR 4 174 million in 2010[239]. Concerning the destination of sales, the study was able to present figures for 90 products: for 16 of those products at least 50 % of their sales were in international markets; and for 65 of them, more than 50 % of the sales remained domestic.

Regarding infringements (understood as copies of products protected by an IP right, such as trademark or *sui generis* rights) and imitations (understood as copies of non-protected products), data was obtained for 94 products. Out of these 94 products, infringements were considered a major problem in 57 % of the cases and some producers indicated losses of over 50 % of turnover due to infringements. Furthermore, the study found that most of the products are produced by micro- or small-size enterprises (80.1 %)

As regards employment, the sample presented data on 99 products showing that the total number of jobs provided by the geographically rooted products is significant: the average number of full-time equivalent jobs is 1 622 jobs per product. The contribution of several of these products to local employment is significant (above 30 %).

Finally, experience in the agricultural sector shows a direct relationship between the protection of indications of geographical origin and the promotion of the economic development of the territory concerned, most notably rural areas. This protection has helped maintain local infrastructure and employment, especially in poorer areas[240].

The Commission will take work forward on how to make the most of Europe's traditional know-how, and in the light of its 2014 green paper, it will follow up the public consultation on the protection of non-agricultural geographical indications.

4. ENSURING PRACTICAL DELIVERY

4.1. A culture of compliance and smart enforcement

Single Market legislation includes measures considered to have an impact on the functioning of the Single Market, as defined in Articles 26 and 114 (1) in the Treaty on the Functioning of

[235] Insight Consulting, REDD and OriGIn, 'Study on geographical indications protection for non-agricultural products in the internal market', Final Report, 18 February 2013, p. 115 *et seq.*

[236] The sample was the result of two criteria: firstly, relevance of the products in terms of reputation and socio-economic impact, and secondly, the availability of producers' groups to provide data.

[237] Stones and minerals; jewellery; ceramics, pottery and porcelain; textile and tapestry (including lace and embroidery); leather products; glass and crystal; wooden and paper products; steel products (e.g. knives); cosmetics; firearms; music instruments; watches and clocks; and handicrafts generally. In 34 % of cases, products used local raw material, Insight Consulting et al, *op. cit.*, p. 118-119.

[238] All but Cyprus, Denmark, Greece, Croatia, Latvia and Malta.

[239] Insight Consulting et al, *op. cit.*, p.140 *et seq.*

[240] European Commission, Study commissioned to AND International, 'Value of production of agricultural products and foodstuffs, wines, aromatised wines and spirits protected by a geographical indication (GI)', October 2012.

the European Union (TFEU)[241]. Since 1992, the Single Market has brought tremendous benefits and created new opportunities. However, the full potential of the Single Market remained unexploited, due notably to existing obstacles and insufficient enforcement.

In 2012, the Commission adopted a Communication which called for a renewed commitment to make the Single Market deliver more effectively for growth and jobs[242]. In particular, it proposed an ambitious course of action involving swift progress in certain key areas with the greatest growth potential, and concrete measures to further improve the way Single Market rules were designed, implemented, applied and enforced. The key areas in question included services, financial services, transport, the digital Single Market and energy. It also called for a 'zero tolerance' approach: Member States should transpose and implement EU legislation listed in the annex to the Communication swiftly and correctly, so as to reduce both the transposition and compliance deficits to 0 %. It also called for a more rigorous approach and enforcement in these key areas, with a maximum 18-month average duration of infringement procedures when there are indications that key pieces of legislation are breached.

In light of the current economic challenges, there is a need for further improvement to allow businesses and consumers to fully benefit from their rights. The Single Market Strategy aims to unleash the full potential of the Single Market by further promoting a compliance culture in cooperation with Member States and economic operators, applying a smart enforcement approach, and bringing forward a proposal for a Single Market Information Tool which would allow the Commission to collect information on selected markets.

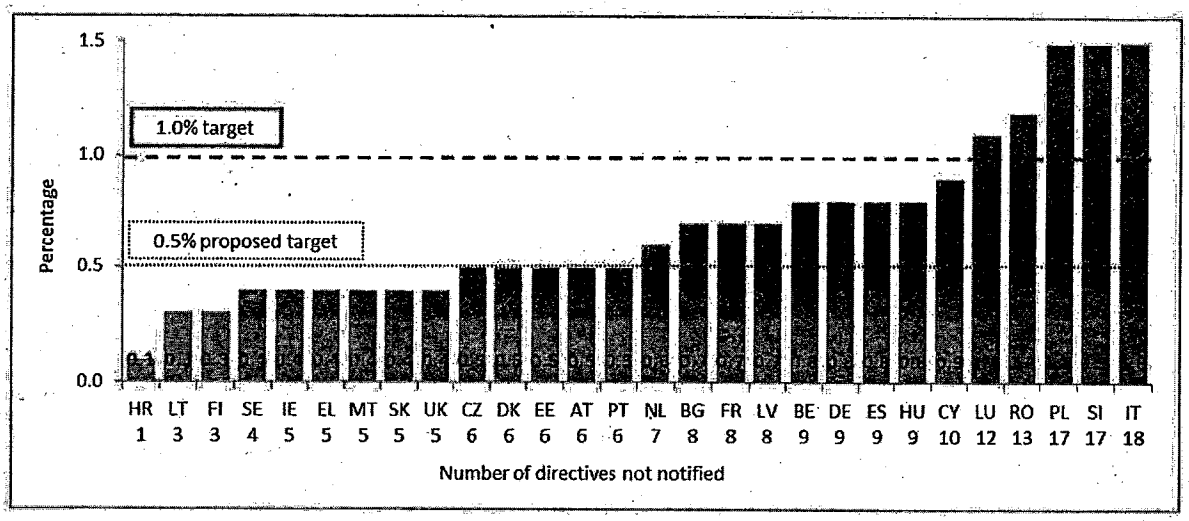
4.1.1. A culture of compliance

Policy context

The Single Market Scoreboard of October 2015[243], which covers the period from November 2014 to May 2015, notes that the average of the EU transposition deficit stands at 0.7 %. Moreover, five Member States exceed the 1 % target (see graph below).

Figure 28 - Transposition deficit (as of 10 May 2015)

[241] On 30 April 2015, 1 115 directives and 2 953 regulations were in force in the field of internal market.
[242] European Commission Communication, 'Better governance for the Single Market', COM (2012) 259.
[243] European Commission, 'The Single Market Scoreboard – Transposition – Achievements', http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm#maincontentSec2



Source: Online Scoreboard (Governance tools-Transposition), Commission 2015

Fourteen Member States met the 0.5 % target proposed by the Commission in the 2011 Single Market Act. The fact that half of Member States have now achieved this objective shows that it could be reached with some additional efforts by the majority of Member States. Only three Member States have matched or beaten their best ever result, while five other Member States have equalled or improved on their last score.

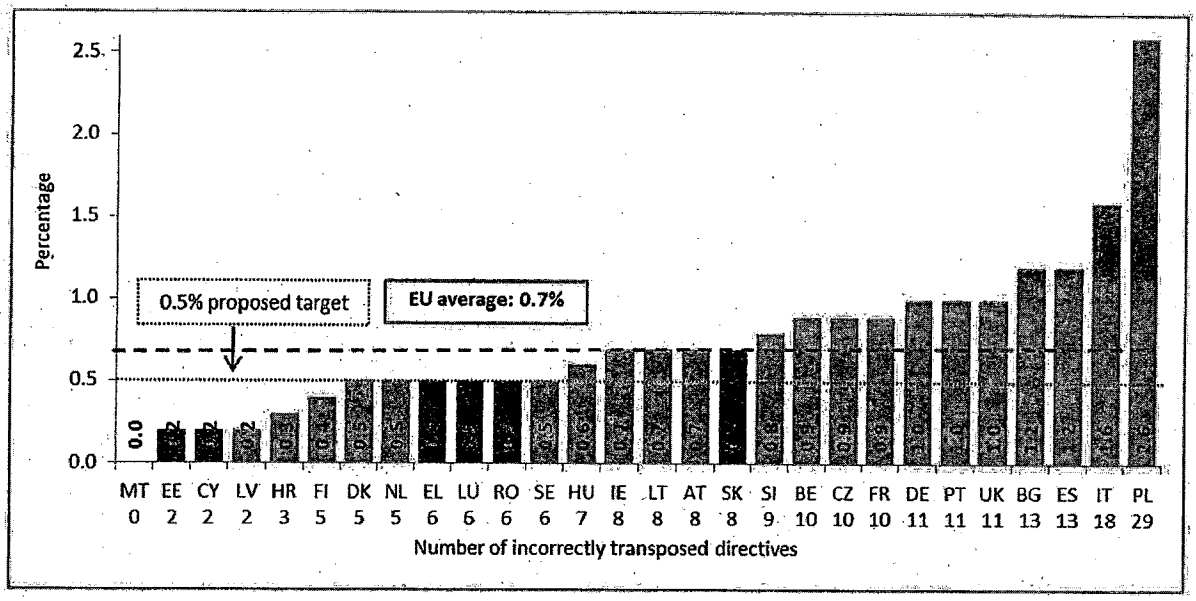
On the matter of long-overdue directives, fewer directives and Member States are concerned. Seven Member States have long-overdue directives and five long overdue directives are not fully notified. It should be noted that considering the 'zero tolerance' target established by the European Council in 2002 for delays of two years or more in transposing directives, the number of these long overdue directives remains too high.

In a nutshell, the EU average deficit has been decreasing steadily for the past sixteen years (i.e. since 1997). It has more or less been stable since November 2012 (between 0.5 % and 0.7 %). Member States have beaten the average 1 % target for the last three years. After the lowest ever score of 0.5 %, reached in November 2014, the current score stands at 0.7 %. This slight increase is partly due to the noticeable reduction in the total number of Single Market directives since November 2014. However, the results show that the Commission and Member States should work with an objective of full compliance (i.e. a 0 % deficit).

In addition to the transposition deficit, there is a need to verify the compliance of national measures taken pursuant to directives, in order to ensure the proper functioning of the Single Market.

According to the information provided by the Single Market Scoreboard (see graph below), the average compliance deficit stands at 0.7 %. In particular, twelve Member States have a compliance deficit of 0.5 % or less, four Member States show the highest deficits (more than 1 %) and two other Member States have hit the 1 % mark.

Figure 29 - Compliance deficit (incorrectly transposed directives) (as of 10 May 2015)

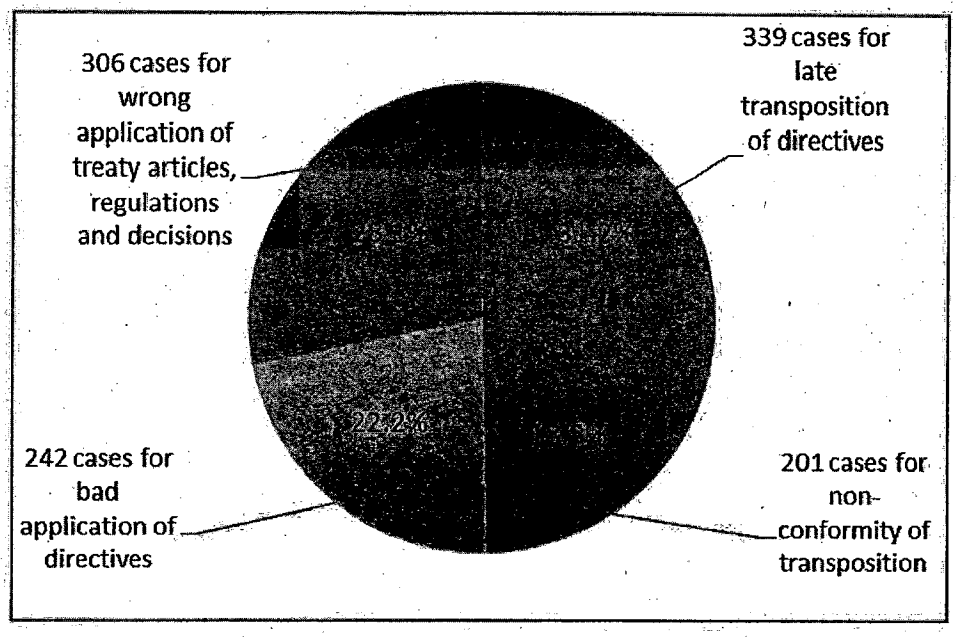


Source: Online Scoreboard (Governance Tools-Transposition) Commission 2015

The 2015 Single Market Scoreboard states that the number of pending infringement proceedings has gone down to 749 (from 826 in November 2014), which represents a decrease of 10 %. This reduction in cases is in line with the increased use of early problem solving systems (SOLVIT and EU-Pilot). It appears that 50 % of cases are for late or incorrect transposition of directives, and 22 % of cases are for bad implementation of directives. Thus, 72 % of total cases related to enforcement of directives[244].

[244] European Commission, 'The Single Market Scoreboard – Transposition – Achievements', http://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/transposition/index_en.htm#maincontentSec2

Figure 30 - Types of cases



Source: Online Scoreboard (Governance Tools-Transposition) Commission 2015

However, despite the reasonably good results obtained until now, late and incorrect transposition of Single Market directives remains a problem hindering delivery of tangible benefits for consumers and SMEs. Reducing both the transposition deficit and the compliance deficit to 0.5 % are long-established priorities for the Commission. Enforcement of Single Market rules continues to be a challenge for many Member States, so the Commission will continue its active monitoring, including by providing them with necessary assistance. Only if directives are transposed in a timely and correct manner into national law, will citizens and firms be able to take full advantage of the opportunities offered to them by the Single Market.

This approach is in line with the Commission's 'Report on the Single Market Integration'[245], which stressed that whilst a number of Member States have improved their transpositions records in the key areas identified in the Communication of 2012, many still fail to respect transposition deadlines. In the same areas, the average duration of infringement proceedings is 29.4 months, which as still far from the target of an average of 18 months, as set out in the 2012 Communication.

Problem and impact

Taking into account the current situation related to the transposition and conformity of Single Market directives and the negative effects for the consumers and companies of non-compliance, there is still a need to further reinforce work in partnership with the Member

[245] Report from the Commission to the European Parliament, the Council, the European Central Bank, the the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank 'A Single Market for Growth and Jobs: an analysis of progress made and remaining obstacles in Member States- A contribution to the Annual Growth Survey 2014', COM(2013) 785.

States to reach 0 % transposition and compliance deficits. For this purpose, enhancing cooperation with Member States, as well as the use of adequate tools, will be very important to ensure a swift implementation of EU law. Therefore, a new culture of compliance in partnership with the Member States should be promoted. In addition to other actions already ongoing, the Commission will support Member States to achieve compliance with the Single Market rules through the following initiatives.

Implementation plans for new legislation

As part of the Better Regulation Agenda[246], the Commission should ensure efficient monitoring of EU law throughout the full regulatory life-cycle from the proposal of new legislation, to its adoption, transposition, notification, implementation, enforcement and evaluation, with the overall objective of ensuring clarity, operability and enforceability of EU legislation.

In line with the better regulation principles, implementation plans must accompany proposals for major directives and regulations whose requirements are similar to those of directives. An implementation plan should be prepared when the implementation of the legal act concerned - due to its nature or complexity - could benefit or be facilitated by supportive measures. The plan should describe implementation challenges and relevant support actions to be taken by the Commission.

In the framework of the Single Market Strategy, the Commission will examine and agree with the Member States, once the legislation is adopted by the co-legislators, on the need of revising and/or preparing an implementation plan to assist them with the timely and correct implement of the new measure.

Compliance dialogues with Member States on a yearly basis

Over the past years, the Commission and Member States have joined forces to ensure swift transposition and effective implementation of EU rules.

These efforts to enhance the transposition and implementation of the Single Market rules should be reinforced. The Commission will streamline the structured dialogues with Member States and will organize with each Member State the strategic meeting on a yearly basis to take stock of the state of the Single Market in that Member State, in particular the state of play of transposition and ongoing infringement proceedings.

Development of a data analytics tool

Effective policies need to rely on data and evidence which are accurate and meaningful. In order to foster conformity checks as part of the new compliance culture, the Commission will seek to develop a data analytics tool[247] to analyse national transposition of directives and better detect patterns of bad implementation. The data analytics tool should offer a wide range

[246] European Commission, Communication on 'Better regulation for better results – an EU Agenda', COM(2015) 215.

[247] Data analytics encompasses gathering and analysing large and diverse data sets in order to be able to establish patterns to design, prioritise and monitor policies.

of functionalities and should help to carry out various checks to verify compliance of national legislation with EU law.

The feasibility of developing such a data analytics tool will be assessed through a pilot project. It will analyse two sample Single Market directives: Directive 2014/60/EU of 15 May 2014 on the return of cultural objects unlawfully removed from the territory of a Member State[248]; and Directive 2011/7/EU of 16 February 2011 on combating late payments in commercial transactions[249].

The pilot project should allow for a first quick glimpse into the state of compliance of national legislation with the above-mentioned directives and facilitate any decision to examine the situation in more depth and eventually on the steps to be taken to remedy the non-compliance. It would provide a means for generating an automated vision of the quality of Member States' transposition of these directives in 2016. The pilot project should also provide quantitative estimations of deficiencies in transposition, allowing detection of 'general under or over performance' in the EU Member States that would require an ad-hoc approach.

More specifically, the tool will help carrying out the analysis related to: i) the completeness of the transposition, indicating shortcomings; ii) the compliance or adequacy with the EU rule and iii) the existence of 'gold plating' (i.e. extra obligations or requirements set out in the national acts issued for the purpose of transposition of the concerned directives) in the 28 Member States.

Upon completion of the project and in the light of the overall results, the Commission will assess the possibility of considering whether to apply the data analytics tool in priority sectors identified in the follow-up to the 2012 Communication on better governance for the Single Market.

4.1.2. Develop a smart enforcement strategy

Policy context

The Single Market is Europe's best asset in times of increasing globalisation. Effective compliance is essential to delivering its opportunities and benefits to citizens and businesses.

In this context, the timely and correct transposition of legislation - in compliance with Treaty obligations and having due regard to relevant case-law - is of utmost importance for ensuring that businesses and consumers enjoy the rights that were envisaged for them and that the objectives of Single Market legislation are attained.

In overseeing the application of EU law, the Commission has relied to a great extent on complaints. They represent one of the main sources of detecting (potential) violations of EU law and the Commission will continue to make use of this important source of evidence and information.

[248] European Commission, 'Commission Delegated Regulation (EU) No. 574/2014 of 21 February 2014 amending Annex III to Regulation (EU) No. 305/2011 of the European Parliament and of the Council on the model to be used for drawing up a declaration of performance on construction products', 2014.
[249] Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions.

Problem and impact

In recent years, the focus in the handling of infringements has increasingly shifted to a broader and more targeted approach, based on identification of dysfunctional sectors and on evaluations/complaints as indicators of compliance deficiencies in a given territory or a sector of economic activity. This work should be further pursued, with a more strategic approach to enforcement.

To that end, the Commission possesses various tools, such as mechanisms for structured cooperation, workshops and fora for discussion, package meetings, the European Semester, etc., and it should further exploit them. To help Member States improve overall compliance, the Commission will also look at the coherence of its approaches across policy areas.

The Commission will develop an active and holistic approach to case handling – through a smart enforcement strategy - which will include new working methods aimed at a more strategic way of identifying problematic sectors and proceeding on the basis of systematic stock-taking exercises. This will include the mapping of infringements and the use of a new Single Market Information Tool.

The mapping of the Commission's case load will enable the Commission to divide cases into groups of thematic issues. The outcome of such a mapping exercise should give the Commission the opportunity to propose packages of cases in future decision-taking exercises on infringements. This has the advantage of pursuing cases on the basis of a more complete picture, which will allow the identification and tackling of the most perceptible and pressing obstacles to the functioning of the Single Market.

4.1.3. Single Market Information Tool (SMIT)

Policy context

The enforcement of Single Market rules requires, first and foremost, reliable information about the conduct of market operators, in particular market conduct by private firms. In addition, such conduct can itself create barriers which fragment the Single Market. Examples include geo-blocking, unjustified price differentiation in cross-border parcel delivery, cross-border insurance provision, customer segmentation through the territoriality of copyright licensing, or financial market fragmentation. In responding to such Single Market failures, the Commission must be able to obtain an adequate factual basis both for its enforcement action and to determine where regulatory solutions are needed.

Problem and impact

The Commission needs to ensure that enforcement of Single Market rules is done both correctly and in a timely and efficient manner. Currently, Member States are the Commission's primary information source in enforcing Single Market *acquis*, pursuant to the principle of sincere cooperation between EU institutions and Member States. Furthermore, the Commission also relies on other information sources, such as public consultations, reports by stakeholders, studies and complaints. However, with the increasing role of economic analysis in the assessment of Single Market malfunctioning, the Commission may need additional information directly from market players, given that publicly available sources may be insufficient and Member States may not have the required information either.

Publicly available statistics are often produced with a time delay and at a level of aggregation that might not match firm-level policy making. While studies commissioned to third parties can often gather more information, they suffer from similar limitations, as consultants often cannot obtain firm-level data nor corroborate evidence submitted by firms. The Commission might not entirely rely either on the accuracy of external voluntary submissions from market participants, without access to the underlying raw data, as firms may have incentives to present the facts in a particular way or not to provide certain information at all.

The ability to obtain timely, comprehensive, reliable and robust quantitative and qualitative information directly from affected firms would improve enforcement of the Single Market *acquis* and help addressing flaws in existing legislation. The introduction of a Single Market Information Tool (SMIT), which will allow the collection of information directly from selected market participants, will help the Commission to ensure the optimal enforcement of the Single Market *acquis*.

The use of the SMIT by the Commission will be decided on a case by case basis and will be adequate and proportionate to the intended objectives. This tool will not be a blanket right to require information from any firm at any time. First of all, before engaging into such an exercise, the Commission will analyse whether already available data are sufficient to address the issues at stake. Second, information request will only be addressed to a subset of the most affected firms. Third, the data sought through the SMIT will normally be readily available to the market players concerned, such as questions relating to the market behaviour, cross-border trade and business model and will typically cover factual market data (e.g. market size and share, level of imports etc.), company data (e.g. cost structure, profits, volumes, new products, ownership, control, participations in other companies, etc.) and facts-based analysis of the market functioning (e.g. regulatory and entry barriers, entry cost, growth rate of the market, growth perspectives or overcapacity). The Commission will consider existing best practice, including from the competition law domain, when shaping the procedural and administrative process of the SMIT, notably with regard to confidentiality-related issues.

Information gathered through the SMIT will be made publicly available in a report, once confidentiality issues have been addressed. Such information will help the Commission to better target its cooperation with Member States, reinforce the basis for infringement action and determine where regulatory solutions are needed.

4.2. Improving the delivery of the Services Directive by reforming the notification procedure

Policy context

The 2006 Services Directive established that national rules restricting the right of establishment and the freedom to provide services falling under the directive must be non-discriminatory, proportionate and justified by certain public interest objectives. To ensure that all new regulatory measures imposed by Member States fulfil these conditions, the Services Directive introduced a procedure whereby Member States must notify the Commission of any new or changed legislation introduced in the Member State. This should allow the Commission to assess whether such adopted measures are justified and proportionate. However, the notification scheme under the Services Directive is not working properly, therefore hampering the effective and preventive enforcement of the Directive in the Member States.

Problem and impact

Experience with the application of the current notification procedure under the Services Directive points to a number of difficulties which, taken together, mean that it is not possible to ensure that all new and changed national regulation is non-discriminatory, justified and proportionate.

In 2012, the Commission called for a continued ambitious implementation of the Services Directive. The objective of the Directive remains to remove unjustified barriers, but also to avoid the introduction of new barriers which would further slowdown the integration of services markets. The continued low integration of the Single Market for services - hampered by the introduction of new barriers - causes important economic costs and leads to unused economic potential:

- Slow productivity growth harms competitiveness, growth and employment creation in services. Over the last decade, labour productivity growth in the EU services sector has been outperformed by the manufacturing sector. Also, in comparison with average annual labour productivity growth in the USA, recent estimates show that EU services underperformed in several sectors;

- Studies have shown that mark-ups in services tend to be larger than in manufacturing and have a higher variation across countries. This implies that consumers and businesses across the EU are currently missing out on potential savings;

- Inefficient allocation of resources prevents innovative and competitive companies from growing. Services sectors are in general - and also when compared to manufacturing - not showing an efficient flow of resources to its most competitive firms.

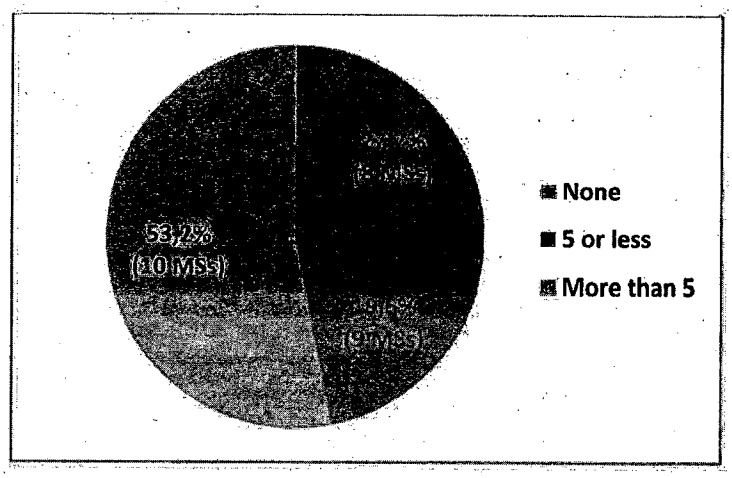
There is a need for strong preventive enforcement to ensure disproportionate barriers are tackled before they are introduced.

Four main problems have been identified in relation to the notification of regulatory measures by Member States under the procedure of the Services Directive:

Lack of notifications by more than half of the Member States since 2012

The figure below shows a breakdown of EU GDP covered by the Services Directive in three groups of Member States. 8 Member States (representing 27.2 % of total EU GDP covered by the Services Directive) have never notified any new regulations over the period 2012-2014. 9 Member States have only notified very few (5 or less) new regulations. This is in clear contrast to other Member States, who each communicated more than 50 notifications during the same period.

Figure 31 - Member States notifications % of Services Directive (EU GDP)



Source: Eurostat, Commission assessment, 2015

These differences cannot be explained by different degrees of regulatory intensity as some of the top-notifying Member States are countries with highly liberalised services markets. There are no legal consequences for Member States at EU level if they do not notify. However, examples of such consequences do exist at national level, for instance if a region does not notify new restrictions under the Services Directive to the federal level[250].

Limited possibilities for the Commission, other Member States and stakeholders to intervene in a proactive manner

There is no requirement for Member States to notify draft regulations. In practice, from the 277 notifications received via the Internal Market Information system during the period September 2013 to February 2015, 198 referred to final legislation and 79 to draft legislation (which means either not yet adopted or not yet into force). Therefore, the large majority of measures notified have already been adopted in a Member State, severely limiting the possibility for the Commission to intervene to verify and ensure compliance with the Services Directive and only leaving infringement action as a last resort.

In addition, notifications are not transparent to stakeholders and the business community at large. The Services Directive does not allow granting third parties access to the contents of the notifications (contents of national rules, any explanation by a Member State). As a result, service providers do not have the possibility to react and will be confronted with new regulation on the ground. This is in contrast to the goods area, where measures are notified before being adopted at national level and such notified measures are made public.

Lack of thorough proportionality assessments

The Services Directive imposes a proportionality test which requires Member States to take into account less restrictive alternatives to meet public policy objectives. In particular, the assessment of proportionality requires that due consideration be taken of the global environment in which the service activity takes place including other mechanisms and safeguards. The principle of proportionality has become even more important following the recent judgement by the Court of Justice in the Riina case (C-593/13) in which the Court

[250] Italy where regional measures are considered void if not notified to the Commission.

confirmed that only a limited number of the overriding reasons of public interest can be used as justification.

Nevertheless, the Commission is on a regular basis still detecting cases of existing or new regulation which cannot be considered proportionate to achieve the intended public policy objectives. For example, the Commission launched infringement proceedings in 2015 against various Member States for excessive shareholding requirements and compulsory tariffs[251].

This shows the need for more careful reflections on proportionality when introducing new restrictions. Member States are nevertheless often providing incomplete and insufficient proportionality assessments when notifying national measures. At present, no framework is in place to ensure that in-depth proportionality assessments are carried out before introducing new restrictions. As a consequence, Member States appear to have difficulties applying the principle and often seem to introduce requirements which have indeed not undergone a thorough proportionality test.

Unclear legal consequences

Differences between the notification obligations regarding establishment (Article 15) and temporary service provision (Articles 16 and 39) currently in the Service Directive lead to different legal consequences even though one national measure could affect both the right of establishment and the freedom to provide services. On the basis of Article 15(7), the Commission may adopt a decision requesting the Member State in question to refrain from adopting the notified measures or abolish them[252]. The possibility to adopt such decisions is not possible for temporary provision of services.

These four shortcomings have been reflected in debates on the notification procedure in the Council, which adopted Conclusions on 2 March 2015 calling upon the Commission 'to increase the effectiveness of the notification procedure under Directive 2006/123/EC, including by investigating the possibility of introducing a "standstill period", where appropriate, and providing clear guidance as to the notification obligations and as well as making notifications public and transparent as is the case for goods'. The Council therefore 'invites the Commission to address this issue and to propose the necessary action, in its forthcoming Single Market strategy'.

Impact

The implementation of the 2006 Services Directive prompted the adoption of more than one thousand national regulatory measures reducing or abolishing previously existing barriers. The majority of Member States adopted new horizontal laws to introduce the general principles and provisions of the Directive. In addition, Member States have modified sector specific legislation to eliminate discriminatory, unjustified or disproportionate requirements imposed on service providers.

[251] European Commission, Press release - Commission launches infringement procedures against six Member States for lack of compliance with the Services Directive in the area of regulated professions, 2015.
[252] This does however not apply in case where a Member State already notified a draft measure under Directive (EU) 2015/1535 (former Directive 98/34/EC).

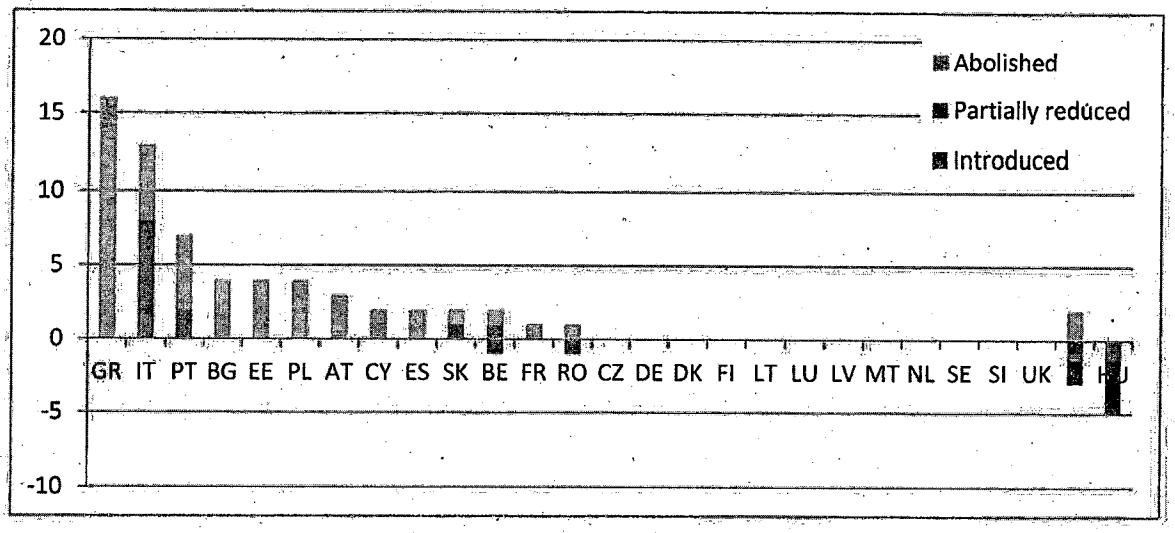
In 2012, the Commission estimated the EU-level long-term impact of these reforms (implementation status end of 2011) at 0.8 % of EU GDP. The economic potential of additional reforms stemming from a more ambitious implementation of the Services Directive was estimated at up to 1.8 % EU GDP[253]. On the basis of these estimates, the Commission called for a more ambitious implementation of the Services Directive and announced a zero tolerance policy where Member States fail to comply with unequivocal obligations (e.g. abolition of residence requirements)[254].

In 2015, the Commission updated its 2012 assessment of reform progress made and the economic effect[255]. The assessment of reform progress over the period 2012-2014 showed that the pace of national reforms slowed considerably compared to the period following the entry into force of the Services Directive (see figure below).

Member States where most reforms have been adopted recently include those Member States having implemented economic adjustment programmes or reform agenda under market pressures. Beyond these Member States, only a few others have made important reform progress. In some cases this can be explained by the fact that previous reforms already led to light regulatory regimes, but in other cases there has been little reform progress despite the fact that such reforms have been recommended to them by the EU Council under the European Semester. In some isolated cases, previously achieved reforms have even been reversed.

[253] Monteagudo J., Rutkowski A. and Lorenzani D. 'The economic impact of the Services Directive: A first assessment following implementation', *European Commission economic paper 456*, 2012.
[254] European Commission, 'Communication on the implementation of the Services Directive', 2012.
[255] For further details on this update see:
http://ec.europa.eu/DocsRoom/documents/13327/attachments/1/translations/en/renditions/native

Figure 32 - Evolution number of restrictions 2012-2014



Source: Commission assessment, 2015

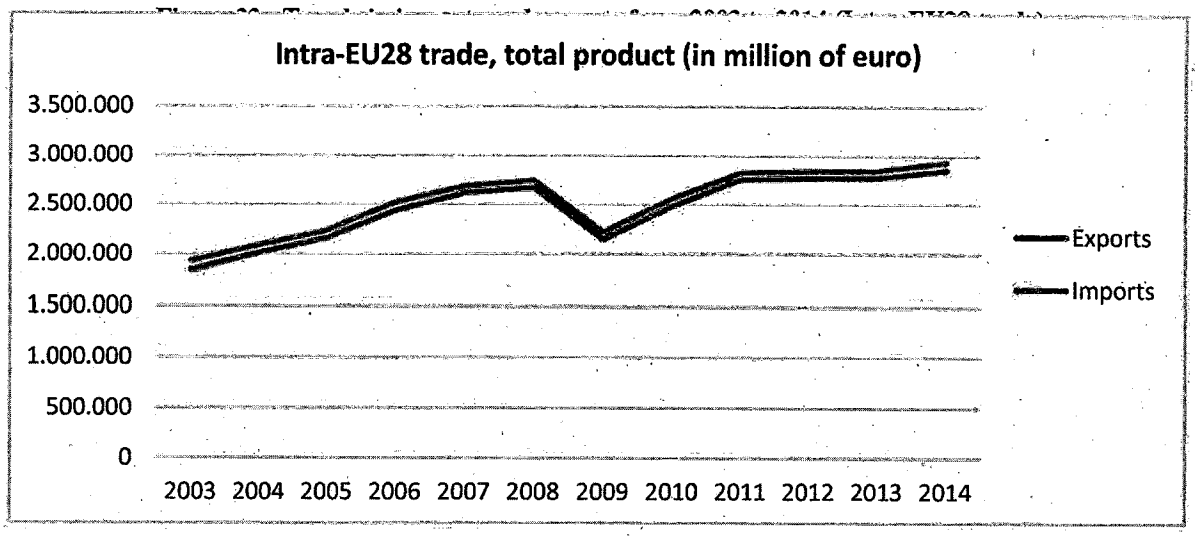
As a result, the additional economic gains to be achieved from reforms carried out in 2012 to 2014 are limited. Of the 1.8 % potential additional GDP growth estimated by the Commission in 2012, reforms adopted by mid-2014 are estimated to yield a limited EU GDP long-term growth of no more than 0.1 %.

This lack of progress shows the need for an improved notification procedure allowing for more preventive enforcement.

4.3. Strengthening the Single Market for goods

Policy context

The EU accounts for around one sixth of the world's trade in goods. Within the Single Market, free movement of goods is the most developed of all four fundamental freedoms and generates around 25 % of EU GDP, 75 % of intra-EU trade. Trade in goods between EU Member States (intra-EU trade) was valued at EUR 2 900 billion in 2014.



Source of Data: Eurostat (last update 17.06.2015)

In the Single Market for goods, where no EU rules exist (non-harmonised areas), regulatory obstacles within the EU are overcome by the principle of mutual recognition or at an earlier stage prevented by Directive (EU) 2015/1535 (the former Directive 98/34/EC). In the case of harmonised areas, regulatory obstacles are prevented and removed through relevant EU legislation on specific products (i.e. through EU harmonisation legislation). Furthermore, Member States are responsible for effective implementation and enforcement. To this end, they carry out market surveillance to ensure that goods are compliant with the applicable legislation. Goods which are lawful should thus move freely within the EU.

Wide harmonisation of EU legislation became possible through the 'New Approach' method, according to which only the essential requirements of products are harmonised, supported by voluntary technical standards. Outside the area of harmonized goods, Member States still have national (and often very different) rules on products. While these national rules may conflict on paper, in practice mutual trust among Member States should apply: if a product is compliant in one Member State, it should be allowed to be marketed in all Member States by applying the principle of mutual recognition.

EU harmonisation legislation on products enabled businesses to access a larger market for their products, while at the same time ensuring high levels of product safety, and led to fairer and more intense competition. EU legislation for industrial products has gradually expanded, covering industrial sectors that are essential for EU competitiveness[256].

Better access to the Single Market for goods and global markets has led to greater economies of scale and more employment. Nevertheless, inherent potential still exists to further bring growth and jobs, foster industrial competitiveness, and protect consumers. Changing economic patterns, such as servicification and new technologies, as well as challenges brought by digital transformation, mass customisation, e-commerce, the increasing

[256] There are currently more than 30 directives and regulations covering specific areas of industrial products (e.g. pressure equipment, gas appliances) and horizontal directives that apply across many different product groups, such as the RoHS (hazardous substances), REACH (chemicals) and Ecodesign.

fragmentation of the value chain, the gradual blurring of traditional industry boundaries and globalisation, have to be considered.

Problem and impact

The main challenges for the Single Market for goods today are the need both to ensure market access and to prevent unfair competition generated by non-compliant products.

Products not covered by EU common rules: the principle of mutual recognition

In areas where no specific EU legislation is in place, national rules co-exist that lay down requirements to be met by such products. In principle, national regulations may still create barriers to intra-EU trade if rules in different Member States are divergent. The principle of mutual recognition requires that a product lawfully marketed in one Member State and not subject to EU harmonisation enjoys the basic right to free movement, as guaranteed by the Treaty. Such a product should be allowed to be marketed in any other Member State, even when the product does not fully comply with the technical rules of the Member State of destination.

Exceptions to this principle only allow the receiving Member State to prevent the marketing of a product and impose its own technical rules for a limited number of reasons, such as protection of public morality, public security or protection of the health and life of humans, as set out in the Treaty[257] and further refined through case law. In addition, the Member State of destination must also demonstrate that it has chosen the least trade-restrictive measure.

In practice, many businesses are not aware of the principle of mutual recognition and believe that they have to comply with national regulations in the Member State of destination when trading in the Single Market. Furthermore, legal uncertainty, imperfect implementation of the principle of mutual recognition by the Member States and lack of administrative cooperation constitute a further barrier preventing the principle of mutual recognition from reaching its full potential. Recurrent barriers to the application of the principle of mutual recognition in goods can be found across markets, but tend to concentrate in certain areas such as construction products, food supplements and fertilisers.

The discrepancy between the annual reports of Member States on the application of the 2008 Mutual Recognition Regulation[258] on the one hand, and feedback from economic operators on the other, should be mentioned from the outset. The small number of administrative decisions denying or restricting mutual recognition notified by Member States to the Commission could be misinterpreted as smooth application of the principle.

On average, Member States notify 400 notifications per year, though with an uneven distribution, since 90 % are notified by Portugal and regard articles of precious metals[259]. However, complaints or cases submitted to SOLVIT seem to indicate that not all decisions are

[257] TFEU Article 36.

[258] According to Article 12(1) of Regulation (EC) No. 764/2008, Member States have to report on yearly basis on the application of the Regulation, and notably on the number of decisions denying or restricting mutual recognition and the type of product concerned, along with the grounds on which negative decisions were based.

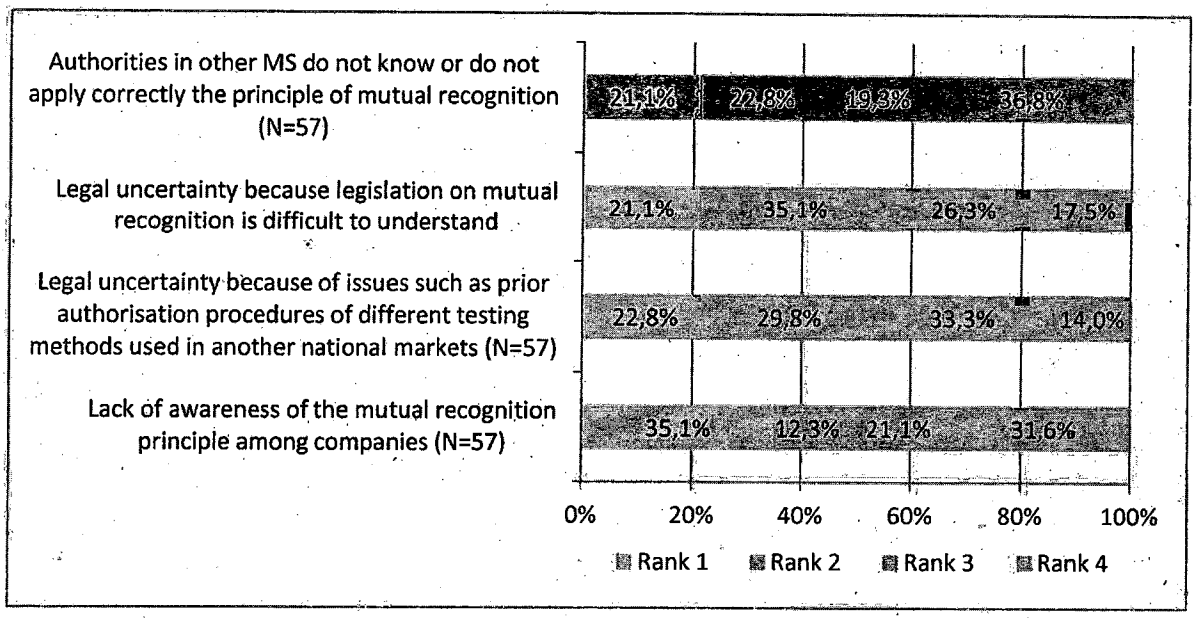
[259] Pursuant Articles 6(2) and 7(2) of the Mutual Recognition Regulation Member States have to notify to the European Commission their administrative decisions denying the application of mutual recognition to a given product.

notified[260], in particular for sectors most affected by poor application of the principle. Thus, businesses do not enjoy the procedural protection put in place by the Mutual Recognition Regulation. The flaw in the notification procedure renders the identification of recurrent obstacles across Member States difficult.

Economic operators on the other hand regularly point to a sub-optimal application of the mutual recognition principle. A recent evaluation[261] identified lack of awareness, lack of functional understanding, imperfect implementation by Member States and lack of administrative cooperation as the main obstacles to the effective application of the mutual recognition principle.

[260] The European Commission already pointed in its 2012 Report on the implementation of the Mutual Recognition Regulation at low level of notifications and at discrepancies between the number of notifications reported by the Member States in their annual reports and the number of effectively received notifications.
[261] European Commission, 'Study commissioned to Technopolis Group: 'Evaluation of the application of the principle of mutual recognition in the field of goods,' 2015.

Figure 34 - Obstacles to effective mutual recognition? Rank from 1 (most important) to 4 (least important)



Source: DTI Survey among companies (October 2014 - January 2015)

The results of this evaluation include were as follows:

- Nearly 30 % of the surveyed companies relied on the principle of mutual recognition, but it turned out that it did not work in practice;
- 60 % estimate that retesting their products to meet technical requirements has a significant or very significant cost[262];
- More than 40 % of the companies simply assumed it was necessary to undertake steps to adapt their product to the requirements of the host country market;
- More than 30 % were required to adapt their products in view of acceptance in the local market and did not check whether the mutual recognition principle could apply;
- 35 % identified lack of awareness among interested parties as the main obstacle for an effective application;
- A majority of businesses either does not know about the principle (26 %) or while having heard of it does not know how it functions (28 %);
- National administrations still feel insecure about whether, when and how to implement the principle of mutual recognition.

[262] *Ibid*, The evidence gathered is anecdotal: testing costs vary considerably, depending on the sector and the product, and may reach up to 20 % of the turnover.

Access to a national market is frequently linked to legal uncertainty because of differences in testing methods, the use of prior authorisation procedures, the legislation being difficult to understand, or the authorities in the destination Member State not applying the legislation correctly. Moreover, it is often unclear for economic operators to which categories of products mutual recognition applies[263]. Almost half of the companies surveyed identified this as a significant bottleneck.

After regulatory approval, another approach is the non-harmonised path towards market access, i.e. the rating of the comparative clinical and economic value of health technologies are potentially source of uncertainty and delay of access for innovators. Technology assessments are fragmented across borders and not mutually recognised. In particular for medicinal products but also medical devices, multiple assessments trigger duplicity of administrative costs for innovators but also clinical evidence generation costs when varying clinical requirements are imposed by lack of coordination of HTA bodies. The EUnetHTA Joint Action[264] provides scientific cooperation between Member States authorities since 2006 but it does not have binding mechanisms[265] for mutual recognition of joint assessments.

The effective implementation of the principle of mutual recognition is primarily the responsibility of the Member States. More than half of the companies surveyed consider there are still problems impeding correct application of the principle[266]. Sometimes, 'traditional' rules, or old pieces of legislation, act as obstacles to the free movement of goods, often unintentionally. In other cases, technical barriers may be intentionally adopted to protect national or regional markets (e.g. requirements for compulsory nationally conducted tests; extra labelling requirements; stringent rules on the use of languages[267]; mutual recognition clauses[268] that amount to denying recognition of products by requiring fulfilment of technical standards; reference to mandatory national conformity marks; or voluntary standards which are *de facto* compulsory). Furthermore, considering the increasing link between some products and their accompanying services, even where a product would benefit from the application of the principle of mutual recognition, accompanying services may not be equally accepted, thus rending the benefits of mutual recognition void.

Finally, another obstacle is the lack of cooperation between Product Contact Points (PCPs) established with the view to provide information on technical rules on products to enterprises and to competent authorities in other Member States[269]. Three-quarters of PCPs mention unduly long delays for replies, while two-thirds report lack of reaction from their counterpart in another Member State[270].

When the Mutual Recognition Regulation was adopted, it provided a procedural framework to boost the application of the principle of mutual recognition, in particular through placing the

[263] *Ibid.*
[264] http://www.eunethta.eu/
[265] http://ec.europa.eu/health/technology_assessment/docs/reuse_jointwork_national_hta_activities_en.pdf
[266] European Commission, Study commissioned to Technopolis Group, *op. cit.*
[267] Requesting for example that solely the official language(s) of the country of destination be used in the labelling and barring the use of multilingual labels.
[268] European Commission, 'Commission interpretative communication on facilitating the access of products to the markets of other Member States: the practical application of mutual recognition', (2003/C 265/02). The Communication established standard mutual recognition clauses for national technical regulations on products.
[269] Established pursuant to Article 9 of the Mutual Recognition Regulation.
[270] European Commission, Study commissioned to Technopolis Group, *op. cit.*

burden of proof on the national authorities denying market access and establishing PCPs in each Member State.

A deeper Single Market should provide businesses a more predictable regulatory framework for the free movement of products lawfully marketed in another Member State. It should also enhance confidence of businesses that they can sell their products and build trust among national authorities within the EU.

More market integration will not be achieved unless the emergence of new barriers within the Single Market is prevented, in particular through a more strategic approach as enshrined in Directive (EU) 2015/1535 (former Directive 98/34/EC) on the one hand, and through overcoming national obstacles by means of more and better mutual recognition on the other.

A genuine right to free movement of products lawfully marketed in another Member State, along with a strengthened role for PCPs to also cover harmonised products, their integration into a wider network, as well as better cooperation among national administrative bodies should lead to an optimal application of the principle of mutual recognition and thus to smooth market access especially for SMEs. Furthermore, eliminating current obstacles can create an incentive for companies to make better use of Single Market opportunities and engage more in cross-border trade.

It is expected that the current costs for companies wishing to trade in another Member State are likely to decrease if obstacles such as unnecessary retesting of their products are eliminated.

Being at the forefront of the effective application of the principle of mutual recognition, Member States should facilitate its correct functioning and ensure appropriate resources for strengthening the PCPs.

Products covered by EU harmonisation legislation

EU legislation covers a wide range of products such as machines, radio equipment, electrical and electronic devices, toys and many others. For these products, the requirements are harmonised at EU level and products manufactured according to those requirements can move freely across the EU.

There are a growing number of products found in the EU Single Market which are not in compliance with the applicable EU legislation on industrial products. The growing number of non-compliant products is to a large extent due to the fact that the current level of product checks is insufficient to deter rogue operators. The responsibility to check products lies with national market surveillance authorities, working within national boundaries, and facing the challenge to check a substantial number of products, with limited resources available.

There are several reasons which may explain non-compliance[271]:

a) Manufacturers and importers of industrial products must ensure that their products are designed and manufactured in accordance with the requirements set out in EU legislation. A

[271] These are based on research by the OECD showing the conditions which need to be fulfilled to ensure regulatory compliance by businesses, http://www.oecd.org/regreform/regulatory-policy/1910833.pdf

lack of clarity in a rule may bring about unintentional non-compliance. The Commission's 'Evaluation of the Internal Market Legislation for Industrial Products'[272] pointed out that familiarisation with EU legislation on industrial products is an important and ongoing task for all firms. Information about EU legislation on industrial products, technical standards and administrative requirements is obtained from a variety of sources (the legislative authorities, suppliers, industry and trade associations, market surveillance authorities, etc.). However, there is a low level of knowledge among SMEs and especially micro-firms about EU legislation on industrial products, and the specific requirements for different economic operators in the value chain (i.e. manufacturers, importers and distributors). Furthermore, the evaluation also showed that e-commerce with third countries presents serious challenges related to non-compliant products, mainly due to ignorance or ambiguity over responsibilities for importing products or placing products on the market in the case of e-commerce.

b) Suppliers often deliver from premises outside the jurisdiction of the competent authorities of the place where the final client of the product is established, hence the risk of sanctions for those suppliers - established in another Member State and selling non-compliant products - is smaller than the risk of sanctions for domestic suppliers.

c) Enforcement of EU harmonisation legislation relies on efficient and effective controls carried out by market surveillance authorities operating in the different Member States. Market surveillance is a crucial tool to ensure that all economic actors stick to the rules and protect consumers and other users from unsafe and non-compliant products.

Unfortunately, market surveillance does not operate effectively in the EU mainly because of weak coordination among market surveillance authorities in different Member States, sub-optimal functioning of EU procedures for exchange of information on product risks and inconsistent enforcement of EU-wide product safety action. Furthermore, market surveillance authorities face significant practical problems to trace and intercept non-compliant products imported from third countries via e-commerce and to identify the responsible entity within their jurisdiction. As a result, the risk of being caught and effectively sanctioned might not be an effective deterrent for businesses selling non-compliant products on the EU market.

High number of non-compliant products

Non-compliance often passes unnoticed; the exact share of non-compliant products on the market can therefore not be quantified. In a public consultation organised by the European Commission in 2010[273], 92 % of economic operators considered that their sector was affected by non-compliance.

The share of inspections reported by Member States in the period 2010-2013 on non-compliance with EU harmonised rules was on average 32 % in the field of toys, 55 % in the field of construction products, 30 % in the field of low voltage equipment, 30 % in the field of electromagnetic equipment, 53 % in the field of radio equipment and 40 % in the field of

[272] European Commission, 'Commission Staff Working Document - Part 1: Evaluation of the Internal Market Legislation for Industrial Products - Accompanying the document the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - A vision for the internal market for products', SWD (2014) 23.

[273] European Commission, 'Commission Staff Working Paper – Impact Assessment - Accompanying document to the 10 Proposals to align Product Harmonisation Directives to Decision No 768/2008/EC', SEC(2011) 1376.

personal protective equipment[274]. In the case of the Ecodesign Directive dealing with products such as electric equipment, air-conditioning systems, machines tools etc., non-compliance was estimated to be 10 % - 20 %[275]. In other areas (e.g. gas appliances, personal protective equipment), existing studies indicate non-compliance levels of 5 % - 10 %[276].

In the field of radio equipment, the impact assessment on the proposed Radio Equipment Directive cited evidence from market surveillance authorities that products fully compliant with the essential requirements ranged between 28 % and 56 %[277]. Administrative compliance has been estimated at an even lower level by market surveillance authorities at about 20 %.

Market surveillance performed on radio equipment and telecommunications terminal equipment by 24 market surveillance authorities in 2012[278] shows that, out of 9 918 inspected pieces of equipment, 6 155 were non-compliant:

Table 9 - Non-compliance in the R&TTE sector - 2012

Element of inspection	Equipment inspected	Non-compliances	%
Declaration of conformity	9693	3960	40.8%
CE marking	9683	3192	32.9%
Geographical area for use	8281	2036	24.9%
Essential requirements	1678	613	36.5%
Technical documentation	868	327	37.7%

Source: ADCO R&TTE report to TCAM on market surveillance statistics for 2012

During a campaign to verify the compliance of LED lighting equipment with the Directive on electromagnetic compatibility, 168 products were checked by 18 market surveillance authorities[279], 76.8 % of the products complied with CE marking requirements while only 39.9 % complied with the Declaration of Conformity requirements. The technical assessment indicated that 61.5 % complied with the emissions assessment while 91.3 % passed the immunity assessment. Only 17.3 % of the assessed LED lighting equipment was fully compliant.

[274] According to data provided by 16 Member States on number of inspections carried out and on number of findings on non-compliances. This figure represents the weighting average of percentages at national level
[275] European Commission, 'Evaluation of the Ecodesign Directive (2009/125/EC) - Final Report', 2009.
[276] European Commission, 'Impact assessment study on the review of the Gas Appliances Directive' (Directive 2009/142/EC), 2009.
[277] European Commission, 'Executive summary of the impact assessment accompanying the Proposal for a Directive of the European Parliament and of the Council on the harmonisation of laws of the Member States to the making available on the market of radio equipment', SWD (2012) 300.
[278] Telecommunications Conformity Assessment and Market Surveillance Committee (TCAM), 'ADCO R&TTE report to TCAM on market surveillance statistics for 2012', ADCO R&TTE 43(13)02 Annex 7, 2012.
[279] Bundesnetzagentur, 'Market surveillance statistics 2011', 2012.

A study by the Consumer and Industrial Products Committee (No. 39) of IFIA on electrical products for household use performed in 2014[280] shows that there a significant number of non-compliant products with safety issues imported from the outside of the EU which circulate within the Single Market.

A total of 2 435 notifications on dangerous products were submitted by Member States in 2014 through RAPEX, the European rapid alert system for dangerous products. This is 3 % more than in 2013 and almost 90 % of all notifications concerned products which posed a serious risk to consumers.

The necessary controls on products are carried out by market surveillance authorities operating in different Member States. However, market surveillance does not operate effectively in the EU. Given the fragmentation of responsibilities along national (or even local) borders, the principal causes of ineffective market surveillance in the Single Market are (i) a weak coordination of market surveillance authorities of different Member States, (ii) the sub-optimal functioning of EU procedures for exchange of information and (iii) inconsistent enforcement of EU-wide action. Furthermore, in order to have a real impact on businesses' willingness to comply, the overall number of product checks need to be sufficiently high. Unsafe consumer products also constitute an immediate threat to the safety of consumers and undermine consumer confidence. Consumers have confidence in products available on the EU market if products are safe, irrespective of the place in which they are produced. The latest Eurobarometer data shows a decrease in confidence on the part of consumers with regard to the safety of products sold in the EU (25 % in 2011 - compared to 20 % in 2010 - think that a significant number of products are unsafe, while 12 % in 2011 - compared to 16 % in 2010 - think that essentially all products are safe).

Competitive disadvantage from competition by non-compliant products – costs of compliance

Businesses selling compliant products face competition from traders who either deliberately ignore the rules or are not aware of them, thereby gaining an unwarranted competitive edge. To determine the costs of complying with the legislation and thus the corresponding competitive advantage of rogue traders, a distinction should be made between costs related to administrative compliance (costs of preparing documentation and direct fees), and costs related to substantive compliance (investments necessary to comply with the law).

Table 10 - Administrative and substantive compliance costs

Type of costs	One-off costs	Recurring costs
Administrative costs	Familiarisation with Single Market legislation and standards Notified Bodies fees for Single Market legislation and mandatory testing	Development and updating of technical files Production of a Declaration of conformity and CE marking Conformity assessment: preparation of technical files in parallel with testing activities
Substantive	Modifications to product design (during	Conformity assessment: preparation of

[280] International Federation of Inspection Agencies (IFIA), 'Consumer Product Safety Study 2014', 2014.

compliance costs	new product development phase/ R&D) Modifications to product design once products have been placed on the market Costs of temporarily or permanently withdrawing products from the market	technical files in parallel with testing activities testing for conformity with the applicable modules defined in Internal Market legislation

Source: CSES

The 'Evaluation of the Internal Market Legislation for Industrial Products'[281] pointed out that while the amount of time that firms spend on familiarisation was found to vary, most firms indicate that they spend quite a lot of time on such activities, commonly 15 % - 20 % of the total in terms of human resources. This leads to higher costs for the operators abiding by the rules which negatively impacts their competitiveness vis-à-vis their competitors who deliberately ignore them or are simply not aware of them.

The total estimated annual costs of compliance with EU legislation on industrial products across eight harmonised product areas (electric motors, laptops, domestic refrigerators/freezers, lifts, gardening equipment, petrol pumps, air conditioners and integrated circuits) were estimated at EUR 342 million[282].

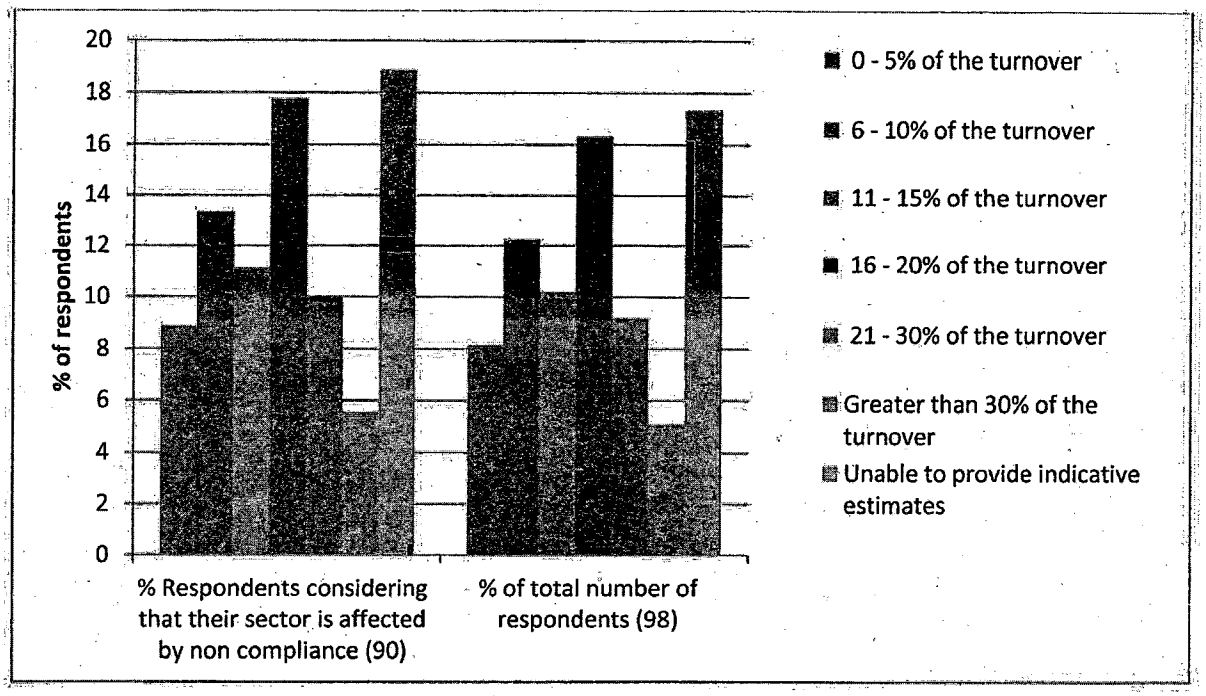
When consulted in the context of the revision of ten EU harmonisation directives, 87 % of economic operators considered that they suffer from distortion of competition due to this situation[283]. Economic operators also provided estimates of the size of their losses in terms of their annual turnover, as outlined in the Figure below:

Figure 35 - Perceived losses in % of annual turnover

[281] European Commission, 'Commission Staff Working Document - Part 2 Results of the case studies - A vision for the internal market for products - Accompanying the document the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - A vision for the internal market for products', SWD (2014) 23.

[282] European Commission, 'Commission Staff Working Document - Part 1: Evaluation of the Internal Market Legislation for Industrial Products - Accompanying the document the Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee - A vision for the internal market for products' SWD (2014) 23.

[283] European Commission, 'Commission Staff Working Paper – Impact Assessment - Accompanying document to the 10 Proposals to align Product Harmonisation Directives to Decision No 768/2008/EC', SEC(2011) 1376.



Source: European Commission, 'Commission Staff Working Paper – Impact Assessment - Accompanying document to the 10 Proposals to align Product Harmonisation Directives to Decision No 768/2008/EC', SEC(2011) 1376

Tackling the main drivers for non-compliance of products should result in reducing the number of unsafe and non-compliant products in the EU. Setting up an easily identifiable 'first port of call' available for firms, particularly SMEs, and expanding the role of 'Product Contact Points' and other already existing tools such as the Your Europe portal, through the Single Digital Gateway, should ensure that business are able to easily find out more about which EU legislation on industrial products is applicable to their products and which standards could be applied to meet essential requirements.

Strengthening market surveillance for products will provide the necessary incentives for economic operators to place only compliant products on the EU market. By giving enhanced powers, or providing new common rules on the control of products, closer coordination on the treatment of infringements, markets surveillance will be strengthened and made more efficient. Better cooperation between compliant companies, market surveillance authorities, consumers and the Commission should facilitate targeted action on the sources of non-compliant products.

By reducing non-compliance in the EU, compliant business should face less unfair competition from illegal and non-compliant products from rogue traders, meaning safer and more compliant products will be available for consumers in the Single Market.

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