

CONTENTS

Background

- Introduction
- Existing situation
- Parliament's starting position
- Council starting position

Proposal

- Preparation of the proposal
- The changes the proposal would bring

Views

- Advisory committees
- National parliaments
- Stakeholders' views

Legislative process

References

- EP supporting analysis
- Other sources

Reform of services notification procedure

The 2006 Services Directive requires Member States to notify the European Commission of changes to national rules on services, providing the EU executive and other Member States with the opportunity to examine potential incompatibility with EU legislation early in the process. Based on its own assessments and public consultation, the Commission proposed in January 2017 to reform the current procedure in order to address various shortcomings identified in the preparatory process. The new procedure seeks to allow intervention by the Commission or other Member States before the law is adopted. The Council reached its general position in May 2017 proposing a number of modifications with regard to the scope, timing and requirements concerning the Member States and the Commission. The rapporteur published his draft report on 19 June 2017 and a deadline for amendments has been set for 6 September 2017.

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

COM(2016) 821, 10.1.2017, 2016/0398(COD), Ordinary legislative procedure (COD) (Parliament and Council on equal footing – formerly 'co-decision')

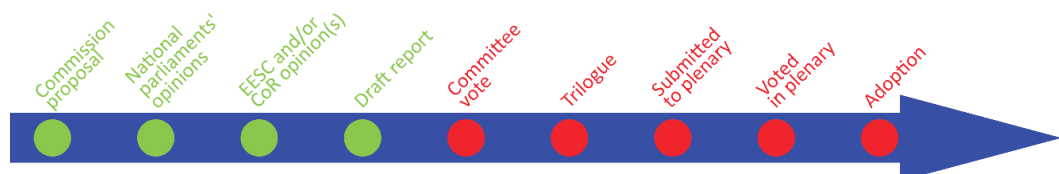
Committee responsible:	Internal Market and Consumer Protection (IMCO)
Rapporteur:	Sergio Gutiérrez Prieto, S&D, Spain
Shadow rapporteurs:	Ivan Štefanec, EPP, Czech Republic Vicky Ford, ECR, United Kingdom Kaja Kallas, ALDE, Estonia Igor Šoltes, Greens/EFA, Slovenia Marco Zullo, EFDD, Italy
Next steps expected:	Vote in committee

29 August 2017

First edition

The 'EU Legislation in Progress' briefings are updated at key stages throughout the legislative procedure.

Please note this document has been designed for on-line viewing.



[Introduction](#)[Existing situation](#)[Parliament's starting position](#)[Council starting position](#)

Introduction

The main objective of the [Services Directive](#), adopted in 2006, is to advance and deepen the single market for services in Europe by removing legal and administrative barriers to trade. It makes it mandatory for each Member State to 'ensure free access to and free exercise of a service activity within its territory'. As such it [offers](#) service providers and recipients a freedom of establishment and a freedom to provide services across borders.¹

The Services Directive also states that certain national rules and requirements, which may in effect restrict the right of establishment and the freedom to provide services,² must meet three criteria: (i) non-discrimination (e.g. regarding nationality or residence), (ii) proportionality (appropriate for attaining the objective, not exceeding what is necessary, and not substitutable by less obstructive means to achieving the same objective) and (iii) justifiable by public interest objectives. To ensure that all legal requirements introduced on national level fulfil these criteria, the Services Directive provides for a procedure under which Member States shall notify the Commission and other EU states about new or modified legal requirements affecting services.

However, Commission assessments of implementation of the Services Directive show that barriers at national level persist in the market for services. Some of them are caused by new measures introduced by Member States, which the existing notification procedure did not prevent. For example, 40% of structured dialogues³ launched in 2015 to ensure compliance with the Services Directive were related to newly introduced measures on services markets. The Commission, the Court of Auditors and the consulted stakeholders identified a number of shortcomings in the current procedure. Accordingly, the European Parliament and the Council have called for its improvement and the Commission, in its 2015 [Strategy on Upgrading the Single Market](#), announced that it will propose a reform.

Existing situation

According to the Services Directive, it is mandatory for Member States to notify legislative changes affecting the [freedom of establishment](#) and the [free movement of services](#) (i.e. provision of temporary cross-border service) to the Commission and to the other Member States. Regarding the former, there is a closed list of national requirements⁴ that automatically fall within the scope of the procedure, while the latter covers any national requirements unless specifically exempted.⁵ The new requirements concerning freedom of establishment may be defended by the Member State, which must provide overriding reasons related to public interest as upheld by the Court of Justice, such as consumer protection and combatting fraud.

1 Certain economic sectors are exempted: non-economic [services of general interest](#), financial services, electronic communications, healthcare, temporary work agencies, audiovisual services, gambling, social services, private security, notaries and bailiffs and taxation. The directive does not address or affect national social security legislation.

2 An example could be a requirement for a specific legal form of a company in a given services sector applying to both domestic and foreign providers.

3 This is stage two out of four in EU infringement procedures. For more information see '[Stages of EU infringement procedure in a nutshell 2015](#)'.

4 Detailed list is outlined in Article 15(2) of the Services Directive.

5 Derogations are outlined in detail in Article 17 of the Services Directive.



Introduction

Existing situation

Parliament's starting position

Council starting position

Furthermore, the new requirements concerning free movement of services may only be justified on the grounds of public policy, public security, public health or protection of the environment.⁶

Once notified, the Commission assesses the compatibility of requirements with EU law within a three-month period (deadline valid only for freedom of establishment related measures). It may issue a decision requesting the notifying country not to adopt the requirements or to abolish them (if they have been adopted already). The decisions may be issued only on requirements affecting the freedom of establishment and not on matters related to temporary cross-border service provision.

Commission decisions under the Services Directive are legally binding upon the Member States concerned. In case the decision is not respected, the Commission may issue a 'letter of formal notice' for non-compliance with EU law under an [infringement procedure](#). It may also launch an '[EU Pilot](#)' procedure without having to resort to the infringement procedure.⁷ If the disagreement persists, the final resort is for the Court of Justice of the European Union to rule on the legality of the decision.

Existing notification procedure under the Services Directive

The notifying Member State (via a designated 'notification coordinator') uploads a notification into the [Internal Market Information System](#) (IMI), an IT-based network linking over 7 500 national, regional and local authorities across the EU and the European Economic Area (EEA). It must contain the following information: (i) level of requirement (national, regional, local); (ii) status of the act with date (or expected date) of entry into force; (iii) provision/article in the act where the notified requirement is incorporated; (iv) services to which the notified requirement applies; (v) type of requirement and concise description; (vi) the justification and statement of ground; and (vii) proportionality analysis.

All other Member States and the Commission receive an automatic e-mail of the notification and of any additional documents uploaded into the system (also when there is an update at a later stage). They can upload their comments and/or questions into the IMI and the notifying Member State is invited to take these comments into consideration and to respond to them via IMI. The notification does not prevent Member States from adopting the provisions in question.

Significantly, the existing system does not contain an obligation to notify draft legislation. As a result, the Commission received only 1 639 notifications between the implementation date of the Services Directive (end 2009) and the end of 2015. Similar but stricter procedures used for national laws that can affect intra-EU trade in products and information society services, have generated around 700 notifications annually.

6 In addition, the Services Directive established a mutual evaluation system between the Member States. Any new requirements or changes to existing requirements introduced by a Member State not covered in the mutual evaluation exercise should also be notified to the Commission together with a justification. The Commission shares this information with the other Member States.

7 The EU Pilot procedure is operated by the Commission and national governments using an online database and communication tool to share information on the details of the case. The government has 10 weeks to reply and the Commission has the same amount of time to assess whether the response has been satisfactory. If deemed otherwise, the Commission may start infringement proceedings.

[Introduction](#)[Existing situation](#)[Parliament's starting position](#)[Council starting position](#)

Furthermore, five Member States⁸ have not made any notification since the end of 2009. A significant number of Member States have between 1 and 7 notifications.⁹ At the same time, the top seven notifying Member States account for 86 % of all notifications. Between 2009 and 2015 only 13 % of notified measures were at draft stage and not yet adopted (they originated primarily from four Member States). This meant that in 87 % of all notified measures, the only option for the Commission was to revert to administratively heavy and resource- and time-consuming enforcement actions, and there was no possibility for pro-active preventive action.

Accordingly, from 2009 to 2015 the Commission had to launch 30 EU Pilot cases concerning newly introduced regulatory measures covered by the Services Directive and suspected to be incompatible with EU law. This represents 27 % of all EU Pilot cases initiated by the Commission over this period related to the Services Directive. The number seems to be on the rise, however, since in 2015 it stood for as many as 40 % of all EU Pilot cases related to the directive. In 2016 the European Court of Auditors published a special [report](#) on implementation of the Services Directive. It also noted the relatively low level of notifications and concluded that the Commission is rather reluctant in questioning the proportionality aspect. Furthermore, the consulted Member States expressed dissatisfaction with the Commission's treatment of notifications sent and with the lack of clarity in notifications received. The report recommended introduction of a 'standstill period' before a notified measure becomes applicable as well as creating a publicly accessible website containing notified requirements enabling access of interested parties and stakeholders for scrutiny.

Parliament's starting position

In its [resolution](#) of 7 February 2013 on the governance of the single market, the Parliament called on the Commission to consider a notification system for draft national laws that impair the functioning of the single market. It suggested supplementing the procedure laid down in Directive 98/34/EC (goods and information system services) to create a horizontal instrument with a reinforced preventive nature.

An example of notification for goods as a guide to review of current procedure was also been given in the [resolution](#) of 26 May 2016 on non-tariff barriers in the single market. It emphasised that the notification procedure has been neglected by national authorities and the Commission. The MEPs welcomed improving

Single Market Transparency Directive

The system of notification concerning goods and information society services has been set up under the Transparency Directive (ex 98/34/EC, now 2015/1535/EU) and completed by Court of Justice case-law. It requires mandatory notification of new or changed national measures, in the absence of which they are inapplicable. There is also a non-adoption phase (a standstill period of a minimum of three months) during which the Commission and other Member States examine the notification. External stakeholders also have access to notification through an online tool. Assessments of the notification system under the directive show that it is rather effective, since the number of notifications is higher than in case of the Services Directive and, being given a chance to modify their legal acts before adoption, the Member States tend to take actions that limit the number of infringement proceedings.

⁸ Finland, Greece, Ireland, Malta and Slovenia.

⁹ Poland (1), Romania (2), Estonia (4), Luxembourg (4), Bulgaria (7), Portugal (7) and the United Kingdom (7).



Introduction

Existing situation

Parliament's starting position

Council starting position

the procedure in ways that encourage early engagement, so that national measures can be revised to resolve problems before they occur. The Parliament stated that Member States should be required to provide more detailed justifications when introducing new regulatory measures. Finally, in its [resolution](#) of 26 May 2016 on the Single Market Strategy, the Parliament welcomed the proposal to improve notification under the Services Directive, since the current procedure is inefficient and not transparent. It underlined the importance of notification being given at an earlier stage in the legislative process, in order to allow for timely feedback from stakeholders and Member States and to minimise delays in adoption. It agreed to extend the notification procedure used for goods to all the sectors not covered by it.

Council starting position

In the 2011 [conclusions](#) on a better functioning of the single market for services, the Competitiveness Council urged the Commission to consolidate the notification system and provide guidance to national administrations on how to use it to increase the transparency. The Council had also [stressed](#) in 2013 the need for more analysis and more use of the notifications received in the IMI. In its 2015 [conclusions](#) on single market policy, the Council stressed importance of the notification procedure and the 'standstill period' as used under the Directive 98/34/EC for the effective functioning of the single market. It noted the benefits of requiring Member States to notify new requirements on services and service providers, calling upon the Commission and Member States to improve the effectiveness of the notification procedure under the Services Directive by measures such as clear guidance on the notification obligations and making the notifications public and transparent (as is the case for goods). It also invited the Commission to propose a reform of the current system. Finally, in its 2016 [conclusions](#) on the Single Market Strategy, the Council asked the Commission to ensure a more consistent proportionality assessment of regulatory requirements and restrictions applicable to services markets.



Proposal

Preparation of the proposal

When elaborating the 2015 Strategy on Upgrading the Single Market the Commission carried out an [evaluation](#) of the procedure followed by another assessment included in the [impact assessment](#) accompanying the proposal. The Commission noted that since the introduction of IMI in the beginning of 2014, the number of notifications has not increased but the number of comments of Member States has risen.

However, the assessments identified a number of shortcomings which hamper effectiveness of the procedure and contribute to low integration of services markets: (i) Low number of notifications coming from the majority of Member States, which can occur due to lack of consequences at EU level if the countries do not notify. There is no case law clarifying the legal consequences of not fulfilling the obligation. (ii) Restricted possibilities to intervene proactively, which can also be attributed to the lack of an obligation to notify draft regulations. This is compounded by the fact that the Member States are not obliged to take the comments into account. In addition, notifications are not communicated to stakeholders and the business community at large, since the Services Directive does not allow granting third parties access to notifications.¹⁰ (iii) Lack of thorough proportionality assessments, resulting in the Commission regularly detecting cases of regulation which cannot be considered proportionate to achieve the intended policy result. Notifications often contain incomplete and insufficient proportionality assessments and there is no framework or criteria which can improve it nor mandatory level of detail required. (iv) Differences between the notification obligations concerning establishment (Article 15) and temporary service provision (Articles 16 and 39) in the Services Directive lead to different legal consequences even though both areas can be affected by one national measure. The Commission may adopt a decision regarding the former but not the latter, which contributes to legal uncertainty. At least 86 % of notifications consider temporary cross-border service provision cases when such a decision is not even legally possible. On the other hand, a closed list of requirement notifications on establishment means that some important ones, such as authorisation schemes or insurance requirements, are not covered at all by notification obligations. Furthermore, some important requirements (e.g. on authorisation schemes) are not covered. (v) The Commission has never issued a decision requesting Member States to refrain from adopting, or asking them to abolish a measure, because the three month period is insufficient to hold a dialogue. By contrast, in the case of notifications of goods the time limit is between 3 and 18 months.

The preferred option of the impact assessment was a legislative instrument which clarifies steps and tasks, improves quality of information, extends the scope of covered requirements and stipulates legal the consequences of non-compliance. EPRS has published an [initial appraisal](#) of the impact assessment.

¹⁰ Lack of transparency is visible when compared to notifications of goods procedure, where between 300 and 400 external comments are received annually.



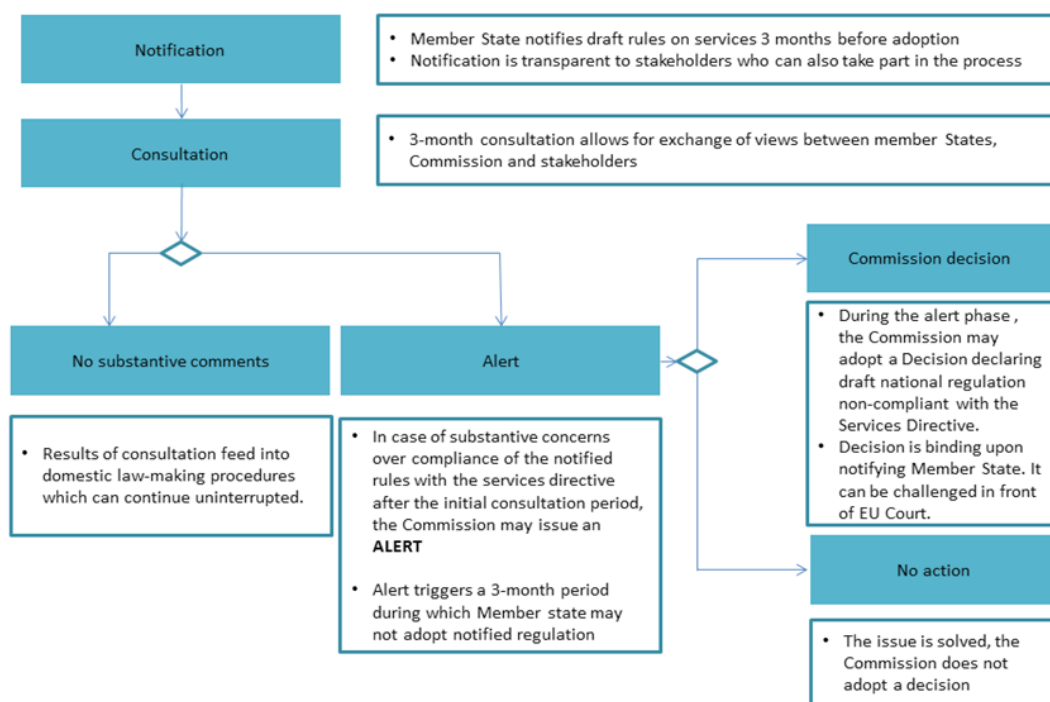
Preparation of the proposal
The changes the proposal would bring

The changes the proposal would bring

On 10 January 2017, as part of the [services economy package](#), the European Commission adopted its [proposal](#) for a reformed procedure. The proposed new instrument is a self-standing directive implementing the existing Services Directive without modifying its substance.

It introduces an obligation to notify measures at least three months before final adoption. Substantive subsequent amendments of a notified measure require a new notification. The scope has been widened by adding authorisation schemes, professional liability insurance, guarantees or similar arrangements, and multi-disciplinary restrictions. The process has also been modified, with a three month consultation period after notification (Commission and Member States have two months to comment, and the notifying part has a month to respond). If the concerns over compliance persist the Commission may issue an alert implying that the measure cannot be adopted for another three months. After the alert the Commission may adopt a legally binding decision on non-compliance which requests the Member State not to adopt the measure in question. Furthermore, the proposal requires that notification provides information sufficient to assess compliance (in particular on proportionality)¹¹ and allows third parties access to notified draft measures, accompanying information and the final adopted measures.

New notification procedure for better implementation of EU services rules



Source: European Commission, Fact Sheet [A services economy that works for Europeans](#).

11 It should explain how the notified measure is necessary and justified to meet its objective and how it is proportionate in doing so. Furthermore, it should explain why it is suitable, why it does not go beyond what is necessary and why no alternative and less restrictive means are available (accompanied by evidence and an analysis of proportionality).



Views

Advisory committees

The European Social and Economic Committee in its May 2017 [opinion](#) stressed that the direct impact of the proposal on national legislative procedures seems significant. It argued that broadening the scope and complexity of the procedure and introducing the standstill period and alert mechanism will obstruct the ability of national authorities to legislate within a short period of time and hence restrict their freedom. It called for negative decisions to be non-binding and for the present post-adoption procedures to be used.

The European Committee of the Regions' Commission for Economic Policy in its draft [opinion](#) suggested that the proposed binding decision of the Commission on notified measure should be replaced by a non-binding recommendation suggesting launching an action before the European Court of Justice (ECJ) in case of adoption. The vote in plenary session is envisaged for October 2017.

National parliaments

The [French Senate](#) and [National Assembly](#) issued reasoned opinions stating that the proposal allows the Commission and other Member States to interfere in the national legislative process. They argued that it disrupts the work of national legislators and constrains their market intervention capacity. The [German Bundestag](#) and [Bundesrat](#) also issued reasoned opinions arguing that the proposal lacks a legal basis in the EU Treaties, that preventive scrutiny goes beyond what is allowed by mutual recognition, that it would expose elected parliaments to scrutiny by the Commission and fundamentally change the relationship between the Commission and Member States vis-à-vis the ECJ. They considered the measures as disproportionate on the basis that there was insufficient justification and no exceptions allowed.

Stakeholders' views¹²

The Commission carried out a public [consultation](#) of stakeholders in early 2016. It also entered into discussions with Member States and other EU institutions. A large majority of stakeholders (70 % of public authorities; 60 % of businesses) supported a legislative solution to reform the notification procedure for various reasons: to increase clarity on which measures are to be notified and when, to introduce the possibility of examination before adoption, to introduce clear rules in order to ensure compliance and to make notifications transparent to the public. Stakeholders supported a legislative proposal clarifying and aligning the steps of the notification procedure (80 % of public authorities and 80 % of businesses), making notifications transparent (60 % of public authorities and 80 % of businesses), notifying measures at draft stage (50 % of public authorities; 70 % of businesses), more information on proportionality assessments (60 % of public authorities; 50 % of businesses), broadening the scope of the notifications to other key requirements falling under the Services Directive (60 % of public authorities; 75 % of businesses), and

12 This section aims to provide a flavour of the debate and is not intended to be an exhaustive account of all different views on the proposal. Additional information can be found in related publications listed under 'EP supporting analysis'.



Advisory committees

National parliaments

Stakeholders' views

strengthening the compliance of Member States with the notification obligation (80 % of public authorities and 80 % of businesses). Views on the standstill period were divided.



Legislative process

On 29 May 2017 the Council agreed on its [general approach](#). It proposed to exclude from the scope professional liability insurance measures, guarantees or similar arrangements, already notified measures and those which implement EU law as well as rules laid down in collective agreements, and sought to mention that it only applies to requirements affecting the access to, or the exercise of, a service activity. The Council also asked to remove part of the justifying information,¹³ and allow countries to act in a very short space of time due to serious and unforeseeable circumstances.¹⁴ A three month consultation of the draft measure is valid, apart from when Member States modify a notified draft measure, in which case it should be subject to a one month consultation period. National Parliaments are to be allowed to substantially modify and adopt an already notified draft measure (and notify this within two weeks of adoption). Before the closure of the consultation period and three months after the modification by Parliaments of a notified measure, the Commission may issue a notice about concerns, giving the Member State two months to deliver an explanation. Notice shall not prevent the adoption of measures. The Commission may within three months and only in case of measures on freedom of establishment, adopt a decision requesting non-adoption or repealing adopted acts.

The IMCO Committee's draft [report](#) was published on 19 June 2017. The rapporteur proposed to exclude from the notification obligation amendments or modifications to draft notified measures introduced by legislative assemblies or national parliaments. These should be notified after adoption. Otherwise, adding substantive amendments to draft law under notification is to be communicated at least a month before the adoption. The draft report supports giving the Commission power to issue alerts that give the Member State one month from their receipt to comply or explain the adequacy of the draft measure under the Services Directive. Alerts should not hinder the adoption of new laws. If after adoption the Commission issues a negative decision (i.e. alert not respected) and decides to bring the matter to the ECJ, the disputed law should be automatically suspended.

13 Namely those requirements specified in the second sentence of endnote 11 above.

14 Specifically, the protection of public policy, public security, public health or the environment.



References

EP supporting analysis

[Notifications of new restrictions on services. Reforming the existing procedure under the Services Directive](#), EPRS Implementation Appraisal, September 2016.

[Services in the internal market: Notification procedure for authorisation schemes and requirements related to services](#), EPRS Initial Appraisal of the Commission IA, September 2017.

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Other sources

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