

## Understanding non-tariff barriers in the single market

### SUMMARY

Despite the achievements of single market integration, many non-tariff barriers (NTBs) persist, preventing realisation of its full economic potential. These arise from laws, technical regulations and practices, and create obstacles for trade. NTBs can be of a general character, such as problems with the implementation and enforcement of EU law at the national level, missing or differing e-government solutions, or complex VAT requirements in intra-EU trade. NTBs can also be sector-specific and concern only specific markets for goods, services or retail.

Accordingly, the EU is tackling NTBs with a mix of general and sectoral initiatives, often cutting across various policy areas. The Juncker Commission, now at the mid-term of its mandate, made deepening the single market one of its main priorities. The Commission's single market and digital single market strategies address many NTBs. However, greater Member State involvement, stronger monitoring, and increased political emphasis on the single market are likely to be needed to remove the barriers and deepen single market integration.

NTBs are also increasingly mentioned in the context of debates on the United Kingdom's withdrawal from the European Union. The impacts of Brexit on the single market and NTBs are as yet unclear, but early analysis points to the likelihood of legal uncertainty and the need to address a multitude of often challenging issues.



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## Main concepts

The [United Nations](#) (UN) defines non-tariff measures (NTMs) as 'policy measures<sup>1</sup> other than ordinary customs tariffs that can potentially have an economic effect on international trade in goods, changing quantities traded, or prices or both'. The [World Bank](#) estimated that the effects of these measures are almost twice as trade restrictive as tariffs. It also underlined that the [number](#) of NTMs has been rising and that, even though many can be justified on the basis of health and safety standards, they nevertheless may be used to act as barriers to trade which have a protectionist purpose. The UN noted that the incidence of technical [barriers](#) to trade has in particular increased substantially over the last two decades and that the trend is likely to continue. This occurs simultaneously with a general fall in tariffs in many markets, notably in the Organisation for Economic Co-operation and Development (OECD) countries.

Similarly, the [European Commission](#) found that a substantial body of evidence suggests the increasing importance of NTMs in trade policy, underlining that these measures are 'mostly non-discriminatory regulations aimed at preserving legitimate interests such as protection of security and health of consumers or the environment'. However, it also distinguished a subset of NTMs called non-tariff barriers (NTBs) which have a protectionist and discriminatory intent, when they are 'excessive, dissimilar and unjustifiably unrelated to equivalent measures elsewhere or simply poorly implemented. The dividing line between an NTM and an NTB is not always clear, often requiring complex legal and economic analysis'. The situation in Europe is somewhat similar to that in international trade: obvious barriers such as tariffs have been removed, whereas NTBs persist.

In the EU's [single market](#), NTBs are generally forbidden. [Article 34](#) of the Treaty on the Functioning of the European Union (TFEU) states that 'quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'. Such measures may only be introduced for general, non-economic considerations such as public morality, public policy or public security. Furthermore, they must be proportional and have direct effect on the protection of public interest. Importantly, these exceptions must not become means of arbitrary discrimination or a concealed barrier to trade between Member States.

In the context of the single market, the [European Parliament](#) understands NTBs as 'disproportionate or discriminatory regulatory action which results in a burden or cost to be borne by a firm which seeks to enter a market, and which is not borne by firms already in the market, or a cost which accrues to non-national firms which is not borne by domestic firms, without prejudice to the Member States' right to regulate and the pursuit of legitimate public policy objectives such as protection of the environment and consumer or employment rights.' This definition, from an April 2016 resolution, encompasses NTBs in the single market for goods as well as for services.

### Important case law

The European Court of Justice has [determined](#) that [trading rules](#) enacted by Member States which are capable of hindering – directly or indirectly, actually or potentially – intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. Furthermore, the Court considered that any product [legally manufactured](#) and marketed in a Member State in accordance with its fair and traditional rules, and with the manufacturing processes of that country, must be accepted on the market of any other Member State. Selling arrangements may fall outside the scope of this jurisdiction only if they are [non-discriminatory](#) (applying in the same manner to domestic and external traders).

Despite progress in the integration of the single market achieved since the 1986 [Single European Act](#), many NTBs [persist](#), which hampers achievement of its [full potential](#) and realisation of the potential gains for the European economy. [Estimates](#) show that remaining NTBs, particularly in services sectors, 'limit intra-EU trade to a level about four times smaller than the intensity of trade between United States (US) states. By completing the single market, the EU could generate significant income gains.'<sup>1</sup>

A study for the European Parliament found that [evidence](#) of market barriers in the single market is spread across many varied sources, and due to this diverse nature, developing a comprehensive list or ranking is extremely complex. Some NTBs that have recently received policy-makers' attention, particularly that of MEPs, are discussed below.

### Cross-cutting barriers

One of the main persisting barriers to the full integration of the single market relates to the actual enforcement of EU legislation at national level. This is a general problem which goes beyond the single market's rules. For example, the 2017 [Annual Report](#) on monitoring the application of EU law showed that, in 2016, the Commission launched 986 new infringement procedures by sending a letter of formal notice and issued 292 reasoned opinions. At the end of 2016, as many as 1 657 procedures were still open. Compared to 2015, the number of new late-transposition infringement cases increased significantly from 543 to 847. Open infringement cases reached a five-year high. The [European Parliament](#) also stressed that these variations in the pace of transposition and implementation of EU law at national level create legal uncertainty for businesses.<sup>2</sup>

The internal market remains one of the areas where the most infringement cases were opened. The report shows that, in 2016, the Commission set infringement procedures in motion against most of the Member States for failure to transpose directives on public procurement, legal metrology, advanced engineering and manufacturing systems, explosives for civil use and defence-related products and the Internal Market Information System.<sup>3</sup> In the services sector, the Commission requested removal of excessive and unjustified obstacles in nine Member States. Furthermore, seven Member States failed to fulfil their obligations under EU vehicle type-approval legislation.

Another reporting tool deployed by the Commission is the [Single Market Scoreboard](#), which focuses on the state of implementation of EU single market legislation. It evaluates how the Member States apply these rules, and identifies the areas in which improvement is necessary. The Scoreboard examines performance in a series of governance tools and policy areas, granting Member States above average, average, or below average status. Furthermore, the Scoreboard evaluates how the Member States assist citizens and businesses with issues related to the four freedoms and the single market via various EU tools such as the [Your Europe](#) portal, [Your Europe Advice](#), [Solvit](#), and [EURES](#). The Scoreboard also monitors Member States' openness to trade and investment and their efforts in opening up and liberalising sectors such as public procurement, professional qualifications and postal services.

Taking all these areas into account, Denmark, Estonia, Lithuania, Malta, Austria and Slovakia recorded the best performance in 2016. Looking in more detail, Bulgaria, the Czech Republic, Denmark, France, Hungary, Malta, Slovenia, Slovakia, Sweden and the United Kingdom performed above average in the transposition of EU law, while Belgium, Germany, Ireland, Spain, Lithuania, Netherlands, Austria and Finland performed below the EU average. Considering infringements, Belgium, Germany,

Ireland, Greece, Italy and the United Kingdom were all below the EU average. Taking evaluation of integration and market openness into account, Belgium, Denmark, Luxembourg, and the Netherlands scored above the EU average in both trade in goods and services and foreign direct investment.

Another problem often discussed in the context of transposition of EU law is what is referred to as [gold-plating](#), which is a process by which a Member State that is obliged to transpose EU directives into its national law, or to implement EU legislation, uses the opportunity to impose additional requirements, obligations or standards that go beyond what was foreseen or intended in the EU legislation. [Gold-plating](#) is frequently assumed to increase costs, create unnecessary regulatory burdens and competitive disadvantages for business, and a fractured single market, which hampers growth and job creation. Gold-plating is one of the issues addressed in the [Better Regulation Package](#) and the related [Interinstitutional Agreement](#) which called for clear communication by the Member States to their public when it comes to transposing or implementing EU law. Efforts to improve regulation and to cut red tape (such as [REFIT](#)) are taking place in some key areas of the single market which suffer from NTBs, such as VAT and financial reporting simplification or public procurement.

Levels of cross-border [public procurement](#) remain relatively low despite recent [reforms](#) undertaken with the aim of creating conditions conducive to its growth. Recent [data](#) show that while about 22 % of all public procurement calls in the EU are published on the EU-wide Tenders Electronic Daily platform, only 3.6 % of contracts were awarded to companies from other Member States in the 2009-2015 period. The overall trend is rising, but there are considerable differences among the Member States. Access to cross-border procurement is particularly difficult for [small and medium-sized enterprises](#) (SMEs). Contracts for supplies are awarded abroad [more often](#) than for works or services.

Some of the shortcomings identified by the [Commission](#) are: (i) frequent use of negotiated procedure without publication, which decreases transparency; (ii) low number of bidders (21 % of calls at EU level had only one bid, in the 2009-2015 period); (iii) insufficient use of demand aggregation by public authorities, which hampers achievement of economies of scale benefits (only 7 % of contract award notices where the contracting authority was purchasing on behalf of other authorities); (iv) varying degrees of procedure efficiency, with procedures often lengthy; (v) varying use of quality criteria, which often results in excessive use of the lowest price as an award criterion but does not always lead to best value for money; (vi) insufficient data on procurement, which prevents systematic analysis and enabling improvement. In order to combat these shortcomings, it is [important](#) that the new rules on procurement<sup>4</sup> are enforced effectively, and that the 250 000 public buyers in the EU are ready to increase the use of digital procurement, cut red tape and make procedures more efficient and user-friendly. To further open up procurement markets, the Commission is undertaking a range of initiatives under its single market strategy. On 3 October, it adopted a [communication](#) on 'making public procurement work in and for Europe', setting out priorities to improve procurement in practice and boost investment. In parallel, it adopted a [communication](#) on ex-ante assessment for large infrastructure procurement projects, and a [recommendation](#) aimed at professionalising public-sector buyers.

The EP recognised the national-level differences in [product market](#) regulation as NTBs which may force businesses to adapt products and services to comply with multiple

standards and repeat the testing process. Furthermore, it leads to reduced economies of scale since it may mean running different product lines. The [OECD](#) examined product market regulation and concluded that among OECD countries, the Netherlands has the most competition-friendly regulatory environment, followed by the UK, Austria and Germany. Other Member States are around the OECD average, while Croatia is below.

The cost of compliance with [VAT requirements](#) is higher in the single market than in domestic trade, and constitutes a significant NTB. The current system is generally found to be fragmented, complex, prone to fraud, and particularly costly for [SMEs](#). This in effect restricts cross-border trade, reduces accuracy and declaration timelines and increases the burden of doing cross-border business. To address these issues a number of initiatives have been undertaken recently at EU level (e.g. new [tax rules](#) to support e-commerce and online businesses, stemming from the [digital single market \(DSM\) strategy](#), and [action plan on VAT](#)) and more are expected in the coming months as the commission reiterated in a [communication](#) adopted on 4 October (most notably a legislative proposal for a definitive VAT system for cross-border trade based on the principle of taxation in the country of destination of the goods, and the [SME VAT package](#)). The EU is also advancing work on [transparency and corporate taxation](#) which will help to tackle unjustified NTBs such as tax deals between states and multinationals.

The EP has underlined that many national administrative practices constitute unjustified NTBs, particularly obligations to formalise documents by national bodies or offices. In this aspect the e-governance solutions which advance interoperability and digital signatures are important to modernise public administrations. [Digital government services](#) reduce the administrative burden on businesses and citizens, by making their interactions with public administrations faster, more efficient, accessible, transparent, and less costly, and as such are important for further integration of the single market. Recent [EU initiatives](#) in the DSM, such as the Single Digital Gateway as well as the [eGovernment action plan 2016-2020](#) aim to improve access to information and the use of digital tools in this respect and reduce administrative burdens on businesses and citizens.<sup>5</sup>

Within the framework of the DSM strategy, the EU is also [addressing the concerns](#) of [consumers](#) and businesses with, for example, contracts on online and other distance sale of goods; revising the Consumer Protection Regulation; measures to improve parcel delivery, geo-blocking (to clarify grounds on which access to a service can be denied depending on residence or nationality); reforming the copyright regime, data flows, e-privacy and cybersecurity. These measures are likely to boost e-commerce and services in Europe and further contribute to removal of NTBs on the single market, affecting, for instance, its retail markets. Furthermore, the recent plan for reforming [SOLVIT](#) by increasing its capacity, awareness-raising activities, and refining data collection is also likely to assist in tackling NTBs.

## Sector-specific barriers

### *Single market for goods*

[Regulatory obstacles](#) have been tackled<sup>6</sup> for over 80 % of goods through common rules and, in the absence of EU law, the principle of [mutual recognition](#). The latter allows goods lawfully marketed in one Member State to be sold in another Member State. The Commission considers that national authorities often require proofs of lawful marketing, additional documentation and tests, or may even refuse market access. Furthermore, many businesses are not aware of the principle. A [public consultation](#) indicated that lack of rapid remedies for challenging national decisions denying market

access and insufficient communication among authorities are the main problems for stakeholders. The Commission consequently announced that it will prepare an [action plan](#) to increase awareness of the principle as well as the revision of the [Mutual Recognition Regulation](#) which will address administrative fragmentation and streamline the documentation required to prove that a product is being marketed lawfully.

#### Pan-European standards

Standards help to [remove trade barriers](#) for both goods and services. Differences in standards hamper the development of pan-European supply chains and specialisation in the EU. Furthermore, while services account for 70 % of the EU economy, services standards account for only around 2 % of all European standards, which acts as a barrier to the cross-border provision of services. The modernisation of the standardisation system, first announced in the [single market strategy](#), has been complemented by the communication on [ICT standardisation priorities for the digital single market](#), [standardisation package](#) and the [joint initiative on standardisation](#). During 2016 and 2017 the EU has focused on the services and ICT sectors.

#### *Single market for services*

Services account for 70 % of European Union (EU) GDP and for a similar share of jobs, but only 20 % of these services, representing 5 % of EU GDP, are provided across borders. The market is much more open to EU-wide competition than in the past, but many obstacles to greater integration remain. The [implementation](#) of existing legislation is often imperfect and national regulation differs, making it difficult for businesses, particularly SMEs, to provide services abroad. The Commission has estimated that the [average economic added value](#) of the Services Directive between 2012 and 2014 was +0.1 % of GDP over five to ten years, when between +0.8 and 1.8 % could have been delivered. A [reduction](#) of the regulatory barriers to service provision has been shown to result in more dynamic markets, which puts stronger pressure on profit rates and improves the allocation of production factors.

NTBs include duplicate obligations, access restrictions and differences in the regulation of professions, and requirements on the legal form of service-providers, shareholding or management structures. Both the Commission and the [OECD](#) assessed that removal of regulatory restrictions is slow, with best results in the countries requiring financial assistance. However, these stalled in general after the crisis and many Member States fail to act on services-related [country-specific recommendations](#). Sometimes, new forms of NTBs are created. Furthermore, activities in the [construction value chain](#) and [business services](#) have low productivity levels and are exposed to many restrictions and high costs, resulting in low cross-border trade activity.

In order to tackle these NTBs the Commission dedicated a significant part of its single market strategy to measures improving the integration of services markets, with a broad range of actions such as legislative proposals, providing guidance and encouraging best practices. Some of the major proposals the EU is currently considering are: (i) a [European services e-card](#) which introduces a simplified electronic procedure for providers of business and construction services to fulfil the administrative formalities required to provide services abroad; (ii) a [proportionality assessment](#) of national rules on professional services, setting out criteria for conducting an ex-ante proportionality assessment when introducing new or modifying existing provisions which restricts access to or the pursuit of regulated professions; (iii) guidance on national reform needs in the [regulation of professional services](#) with high growth and jobs potential; (iv) a [notification procedure](#) under the Services Directive aimed at

improving timeliness, completeness and relevance of notifications on new regulatory measures concerning services (from Member States to the Commission and external stakeholders). Furthermore, the Commission adopted a communication on the [collaborative economy](#), providing guidance on how EU law can be applied to this sector in areas such as market access, consumer protection, liability, and taxation.

#### *Single market for retail*

Recent studies and evidence mentioned by the Commission<sup>7</sup> conclude that restrictive regulations create significant barriers to entry to retail markets. This leads to fewer new outlet openings for most store formats, hampers competition and results in higher prices for consumers.

The retail sector faces: (i) restrictions on establishment, which may prevent them from obtaining the right location for retail development and a timely start to their operations, and (ii) operational restrictions, e.g. on mandatory shop opening hours, on sales below cost, on promotions and discounts, or retail-specific taxes and fees. Some rules discriminate against economic activity on the basis of the area of operation, origin of capital or the size of the enterprise. Even though the rules on establishment and operation of the retail sector are primarily the responsibility of the Member States, they may not unduly limit single market freedoms. In order to promote well-functioning and less-disruptive solutions from across the EU, the Commission is therefore planning a communication or recommendation in 2017, on best practices in retail regulation.

#### **Ways forward**

Advancing the single market and the DSM strategies in an ambitious way is likely to help to remove many persisting NTBs. A [study](#) for Parliament's IMCO committee on reducing barriers recommended that both these strategies, product market and sector regulation as well as public procurement, need to be prioritised as areas of action due to the size of expected benefits. Another study, by EPRS, recommended that, taking into account the experience of removing NTBs in the Services Directive process, a [mapping](#) of national market structures and functioning would be a good basis for shaping future policy design and implementation. This is in line with the EP recommendation to the Commission to prepare a comprehensive [overview of NTBs](#) in the single market and an analysis of the means for removing them.

Furthermore, the EP emphasised the role of the Member States, asking them to perceive the single market as a joint initiative which requires dedicating more time to horizontal concerns, coordinated and collective maintenance, and a strong compliance culture. The Estonian Presidency of the Council underlined that the single market only works as well as its [rules are enforced](#), asking that compliance and rules application be common goals addressed by Member States and the Commission together. A [high-level panel of experts](#) suggested that a dedicated regular Single Market Council is formed with the Member States; a future direction is mapped by a 'Five Presidents'-type report'; the annual review of integration is enhanced with evidence-based indicators and supported as part of the [European Semester](#) process; compliance and enforcement are enhanced, with comprehensive training at all levels of Member States' administrations; and incentives for active involvement of all stakeholders are developed.

At the present time the impact of Brexit is unclear. NTBs are likely to play an [important role](#) (for exporters, they are two or three times more costly than external tariffs applied by the EU, and at the same time NTBs cause trade costs to be two to three times higher

in [services](#) than in goods). A recent [paper](#) for Parliament on the effect of Brexit on services signalled forthcoming 'massive legal uncertainty', and considered common standards, mutual recognition, effective enforcement, and historical rights of establishment to be the main challenges. Significant uncertainties and impacts are also expected in the area of [public procurement](#). A [study](#) for the IMCO Committee concluded that if the future trade relationship only aims at reducing costs linked to trade barriers (without legislation or standards adopted by the trading partner), all the existing and future *acquis communautaire* will constitute NTBs to goods and services coming from the UK.

## Main references

European Parliament resolution of 26 May 2016, [Non-tariff barriers in the single market. Reducing costs and barriers for businesses in the single market, study for the IMCO Committee](#), Policy Department for Economic and Scientific Policy, European Parliament, April 2016.

European Commission, [The European single market](#) website.

V. Assilloux, A. Bénassy-Quéré, C. Fuest and G. B. Wolff, [Making the best of the European single market](#), Bruegel Policy Contribution, February 2017.

## Endnotes

- <sup>1</sup> The UN [classification](#) distinguishes between technical measures, such as sanitary or environmental protection measures, as well as other instruments of commercial policy, e.g. quotas, price control, exports restrictions, or contingent trade protective measures, and also other behind-the-border measures, such as competition, trade-related investment measures, government procurement or distribution restrictions.
- <sup>2</sup> For details on the EP position on NTBs please consult the May 2016 [resolution](#) and related [EPRS briefing](#).
- <sup>3</sup> For more details, see [Monitoring the Application of European Union Law 2016 Annual Report](#), pp 8-9.
- <sup>4</sup> The framework comprises [Directive 2014/24/EU on public procurement](#), [Directive 2014/25/EU on procurement by entities operating in the water, energy, transport and postal services sectors](#) and [Directive 2014/23/EU on the award of concession contracts](#). The new rules aim to make it easier and cheaper for SMEs to participate in procurement, introduce simpler procedures for contracting authorities, improved digitalisation of procurement markets and better ways to include environmental, innovative and social considerations into the process.
- <sup>5</sup> The action plan introduces some key principles, such as 'digital-by-default', 'once-only' and 'cross-border by default' and sets out 20 [actions](#), such as mandatory interconnection of business registers designed to increase the role of e-services in the integration of the single market.
- <sup>6</sup> NTBs on single market for goods still exist, as evidenced in the EPRS [study](#) on the Cost of Non-Europe in the single market, which found that NTBs, such as a lack of harmonised rules, insufficient mutual recognition and less favourable treatment of foreign suppliers, prevent realisation of full economic gains from the single market. Removal of NTBs could potentially increase total intra-EU goods trade by €103-€171 billion, with SMEs likely to benefit the most.
- <sup>7</sup> See for example [analysis and evidence](#) accompanying the single market strategy, or findings mentioned in the [Roadmap](#) for best practices in retail regulation.

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