

STUDY

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Legal obstacles in Member States to Single Market rules



Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-General for Internal Policies
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PE 658.189 - November 2020

EN

Legal obstacles in Member States to Single Market rules

Abstract

This study analyses the current state of national obstacles to free movement in the EU Single Market. It focuses on various aspects of obstacles related to free movement of goods and services, the right to establishment, the Digital Single Market, consumer protection and public procurement.

This document was provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the committee on Internal Market and Consumer Protection (IMCO).

This document was requested by the European Parliament's committee on Internal Market and Consumer Protection.

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Original: EN

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Manuscript completed: November 2020

Date of publication: November 2020

Republished with some corrections (including the deletion of three case studies on pages 85, 88 and 90 of the previous version): February 2021

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This document is available on the internet at:

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For citation purposes, the publication should be referenced as: Dahlberg, E. et al., *Legal obstacles in Member States to Single Market rules*, Publication for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020.

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B2B	Business-to-Business
B2C	Business-to-Consumer
CEN	European Committee for Standardisation
CENELEC	European Committee for Electrotechnical Standardisation
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
CPB	Central Procurement Body
CPR	Construction Products Regulation
CRD	Consumer Rights Directive
CSGD	Consumer Sales and Guarantees Directive
DG	Directorate-General
DSA	Digital Services Act
DSM	Digital Single Market
EC	European Communities
EEA	European Economic Area
EEC	European Economic Community
ELA	European Labour Authority
EP	European Parliament
EPE	European Parliament of Enterprises
EPO	European Patent Office
EPR	Extended Producer Responsibility
ESPD	European Single Procurement Document
ETSI	European Telecommunications Standards Institute

EU	European Union
FCM	Food Contact Materials
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GBR	Geo-blocking Regulation
GDP	Gross Domestic Product
GMP	Good Manufacturing Practices
GS	Geprüfte Sicherheit (<i>Tested Safety</i>)
ICT	Information and Communications Technology
IMCO	European Parliament's committee on Internal Market and Consumer Protection
IMI	Internal Market Information [system]
IOT	Internet of Things
LVCR	Low Value Consignment Relief
MEAT	Most Economically Advantageous Tender
MFN	Most Favoured Nation
MS	Member State/Member States
NOC	Negotiated Procedure without prior publication
OECD	Organisation for Economic Co-operation and Development
OJEU	Official Journal of the European Union
OSS	One Stop Shop
PCP	Product Contact Points
PCPC	Product Contact Points for Construction
PD A1	Portable Document A1 [form]
PID	Price Indication Directive

PMR	Product Market Regulation [indicator]
PPP	Public Private Partnership
PSCs	Points of Single Contact
RRI	Retail Restrictiveness Indicator
SME	Small or Medium-sized Enterprise
STRI	Services Trade Restrictiveness Index
TED	Tenders Electronic Daily
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRIS	Technical Regulations Information Systems Database
UCP	Unfair Commercial Practice
UCTD	Unfair Contract Terms Directive
UK	United Kingdom
US	United States (of America)
VAT	Value Added Tax
WFD	Waste Framework Directive
WSR	Waste Shipment Regulation
WTO	World Trade Organisation

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EXECUTIVE SUMMARY

The functioning of the Single Market is a shared responsibility between the EU and the Member States. Differences in interpretation and application of EU law are inevitable. Despite years of hard work and substantial real progress, we appear to be some distance from having a well-functioning Single Market, free from unjustified or inappropriate obstacles to free movement. In addition to the obstacles that we highlight in this study, many obstacles fly under the radar. It remains very difficult to fully assess the extent and magnitude of national obstacles restricting free movement.

Even though the root cause of the problem is clear, it does not lend itself to a single, simple solution. Member States understandably seek to ensure that national objectives are met in terms of, for instance, consumer protection, safety, public health and the environment. In these sensitive areas, risk preferences of Member States can differ, and there may be objectively valid grounds for divergence among Member States. However, although justification is required, it is not always clearly or specifically provided. Moreover, Member States often neglect to balance any domestic justification against possible adverse impacts on free movement in the Single Market.

To make progress, a more localised scrutiny of proposed national rules that potentially conflict with Single Market rules and principles may be needed. Local EU bodies could help not only by being better placed to scrutinise national measures, but also by providing expertise, guidance and assistance to facilitate the ability of national, regional and local bodies to comply with EU law. This type of localised enforcement of EU rules already exists in e.g. EU competition law.

Free movement of goods

Around 82% of products traded in the Single Market are subject to harmonised rules and some 18% of intra-EU trade in goods fall under mutual recognition. Member States' technical rules (where EU harmonisation is limited or absent) appear to have improved in quality over recent years, reflected by a decrease in detailed opinions issued by the Commission under the procedure to notify the EU of national technical rules.

However, there are still new instances, year after year, of national technical rules that appear to be contrary to EU law. Consider for example requirements for national certificates or marks, which can represent obstacles for providers from other Member States. The issues are often relatively detailed and sector-specific. In addition, one cannot be certain that all national technical rules that should be notified under the designated notification procedure are in fact notified, nor that the relevant rules are applied correctly or uniformly in individual cases.

There has also been a recent surge in national labelling requirements for food and beverage products. The measures are rarely outright discriminatory, but they are likely to effectively promote domestic producers over foreign ones without objectively promoting consumer safety or any other justifiable objective in the least restrictive way possible.

It would help if more detailed information, also on justification and proportionality, were required when Member States notify technical rules. It is also important to ensure that notified requirements receive the appropriate scrutiny regardless of which notification procedure is used.

There are still substantial problems with businesses' access to relevant information about applicable product rules, although the impact of the issue appears to have decreased over recent years. It is hoped that the Single Digital Gateway will improve businesses' (and citizens') access to information and, perhaps more importantly, the *quality* of the available information.

The principle of mutual recognition is not functioning as well in practice as it does on paper. Despite procedural obligations and commitments about more cooperation between Member States, mutual recognition remains seriously underused. Authorities still often fail to show an evidence-based rationale in case of refusals. However, the recently adopted Regulation on Mutual Recognition may improve the situation. It may also make the SOLVIT process more effective in resolving obstacles to the free movement of goods, using the principle of mutual recognition, given the new option of requesting a Commission opinion on the case.

Free movement of services and right to establishment

The Single Market for services is governed by the horizontal Services Directive (covering service activities that account for some 45% of EU GDP), complemented by the horizontal E-commerce Directive for information society services, and a range of sectoral directives for transport, financial services, network sectors and – to a limited extent – professional services.

There are nearly 6,000 national rules on professions across the EU, and they tend to have restrictive effects on the cross-border intra-EU movement of professional service providers. It takes painstaking analysis to find out whether these restrictions are contrary to EU law or not. We highlight a number of cases in this study that are very restrictive to the right to establishment in another Member State and appear to be unjustified under EU law.

One common type of restriction is national rules that require a qualification/certificate to be obtained in that specific State, without taking due account of service providers' qualifications or certificates already obtained in other Member States. Another common type of restriction is that service providers are required to be permanently established in a Member State – or strict requirements on the organisation of the professional service company – despite the absence of a clear link between such requirements and their objective (often to ensure the quality of the services provided) or assessments that the objective cannot be achieved in a less restrictive way.

In services (much more than in goods), widespread "regulatory heterogeneity" between Member States adds to the costs of doing business across the entire Single Market. This study shows how costly such regulatory heterogeneity can be, but the regulations that cause the heterogeneity comprise elements that fall under EU law as well as elements that do not. The shared competences between the EU and the Member States largely explain why European businesses often express dissatisfaction with the functioning of the free movement of services.

The retail sector has recently experienced a surge in national restrictions, such as authorisations and local content requirements. Some restrictions are outright protectionist, but when they are brought to light the process to remove them is often slow and burdensome, thus keeping such restrictions for retailers in place far too long.

The notification procedure under the Services Directive is not functioning as well as it should. It is likely that barriers to services trade are introduced without proper scrutiny from the Commission and other Member States. A proposal for improving the notification procedure under the Services Directive was recently withdrawn by the Commission. One possible track to explore now would be to establish local bodies in Member States with a link to the European Commission, monitoring and publicly signalling whether and when local service requirements comprise unjustified or disproportionate restrictions.

The economic significance of cross-border intra-EU posting of workers is limited, except for some sectors and countries. The process of posting workers is often cumbersome and a lack of transparency about relevant requirements and processes make posting of workers difficult but also induces dubious and exploitative practices affecting posted workers negatively.

The EU co-legislators have passed three laws in the last six years which justify firm expectations that the regime and enforcement are improving and that dubious practices will be punished or pre-empted. What is lacking, however, is a stronger legal mandate for the European Labour Authority to check documents themselves and an agreement on the revision of social security coordination.

Franchising as a business model opens cross-border expansion opportunities for firms who do not have the capacity to expand as corporate chains. However, franchising is not as common in the EU as it is in the US and Australia. This is likely due to unfavourable and diverse regulatory framework conditions, both at the EU level and Member State level. With a more suitable regulatory framework, franchising might be more utilised in practice.

Digital Single Market

E-merchants and consumers view the challenges to cross-border e-commerce as substantial, although survey data suggest that dissatisfaction on the part of merchants is somewhat less than it was a few years ago. Many of the obstacles identified are not specific to digital services, but rather stem from national rules for goods, services, taxation, and consumer protection.

Dozens of legislative measures enacted as part of the Digital Single Market (DSM) strategy sought to address impediments to cross-border online sales. Most of them are promising, but it is too soon to say how well they are working. Surveys of consumers and of merchants suggest that there is no overall trend of increasing problems or dissatisfaction with fragmentation in the Single Market. Meanwhile, the COVID-19 crisis has led to a surge in e-commerce sales and it is likely that this will lead to an intensified focus on restrictions to cross-border digital trade.

The basic mechanisms for Value Added Tax (VAT) are common among the Member States, but implementation differences are widespread. The EU-wide shift from country of origin to a country of destination regime was positive overall, but it has negative implications for e-merchants since it makes them subject to these divergent VAT rules in each of the Member States in which they do business. DSM legislation attempted to broaden the mini One Stop Shop (OSS) to simplify VAT filing for merchants, especially for small e-merchants. Legislation has also sought to eliminate anomalies such as the Low Value Consignment Relief (LVCR).

European consumers have been subjected to geo-blocking of goods and services. The Geo-blocking Regulation of 2018 (GBR) attempted to solve most of these issues, but omits goods that require shipment, as well as services that mostly exist to distribute copyrighted material.

Going forward, the approach needs to shift to a more integrated view of the Single Market as a whole, of which the DSM is only one part, albeit an important and growing part. This shift is already somewhat visible in the Commission's preparations for a Digital Services Act (DSA).

Consumer protection

Despite a generally horizontal approach to consumer protection in the EU, the use of minimum harmonisation means that Member States can and do go beyond the consumer protection measures enacted at EU level.

Under *Rome I* rules, consumers can choose to exercise consumer protection rights that are available in their Member State of residence (except for passive sales). In practice, this means that merchants must know the consumer protection rules in every Member State to which they actively sell. Although problems are substantial, it does not seem that things are getting markedly worse over time.

Merchants regularly report that lack of understanding of consumer protection rules among the Member States is a problem for them. Once it becomes available, the Single Digital Gateway might play a useful role in making Member State rules visible to merchants, possibly mitigating the negative impacts of the use of minimum harmonisation at the EU level.

In order to address the problem at its core, a further legislative shift from minimum harmonisation towards maximum harmonisation would be needed. The legislation enacted in the most recent legislative term sought to do this, but it is not clear that it achieved a net reduction in complexity. Very detailed analysis would first be needed of the degree to which Member State divergence from EU harmonised rules is objectively justified.

Public procurement

Businesses suspect that local companies win public contracts more easily than those based in other Member States. Nonetheless, it is important to realise that local companies must submit quality offers at restrained prices, knowing that they potentially compete against firms from all over the EU. The EU framework for public procurement is now well developed. However, considerable investment in guidance, best practices and practical support from central procurement agencies, especially for "strategic" purchasing, is indispensable, especially for the many authorities only rarely making large purchases.

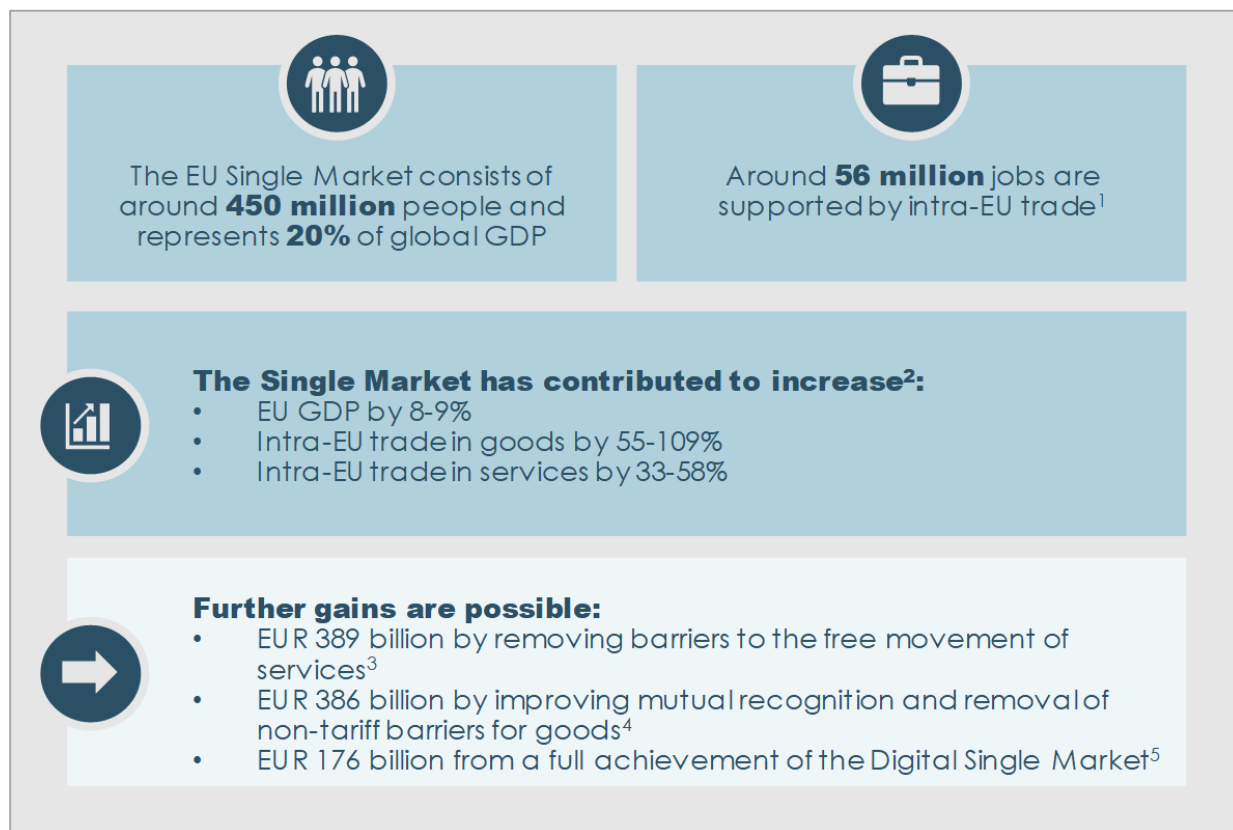
The overall performance indicators of Member States' public procurement are not satisfactory. In the 2019 public procurement scoreboard of performance indicators, 140 of the 324 Member States entries are "unsatisfactory". Sixteen Member States have a single bidder in 20% or more of the bids. There are also many procurements without any public tender which is perhaps even worse.

Still, many trends are moving in the right direction: public procurement grows faster than Gross Domestic Product (GDP) or intra-EU trade, eProcurement increases and intensifies rapidly, the SME share of winning contracts has increased, and the weaknesses of the fragmented remedies system are hesitantly beginning to be addressed. Where the share of above-threshold tenders is conspicuously low (i.e. in Germany), however, local practices turn out to be problematic.

1. INTRODUCTION

The EU Single Market is the world's largest and most successful example of economic integration among sovereign states, see Figure 1. The step-by-step integration achieved ever since the Treaty of Rome is the result of the objective of establishing what was then called a Common Market. Via successive Single Market Programmes and numerous pieces of secondary EU law (court rulings, regulations, directives, and more), barriers to the free movement of goods, services, persons and capital have been removed, bringing the EU closer to a true Single Market. The empirical evidence has shown that the integration has contributed to increased trade, competitiveness and GDP within the EU¹.

Figure 1: The EU Single Market – achievements and further potential



Source: 1) Højbjerg Brauer Schultz, 2018; 2) In 't Veld, J. 2019; Mayer, T., et al., 2018; and Felbermayr, G., et al., 2018, 3) Pelkmans, J., 2018; 4) Poutvaara, P., et al., 2018; and 5) Marcus, S. J., et al., 2018.

However, the EU Single Market is never a finished project. Rather, as the EU and the world economy progress with technological, societal and environmental developments, new potential obstacles to the proper functioning of the Single Market may well arise. A prominent example is the increased focus on the Digital Single Market and e-commerce in recent years, as online and data-driven solutions have taken an increasingly prominent role in the economy. Another, very recent, example is the COVID-19 crisis which has posed new, albeit temporary, challenges to free movement within the EU.

In addition to the need for the Single Market to constantly adapt to exogenous developments and new economic and societal realities, legal obstacles exist and remain at national and local levels that contradict Single Market rules and freedoms in part or in full.

¹ National Board of Trade Sweden, 2015, *Economic Effects of the European Single Market – Review of the empirical literature*.

It has been noted that the trade cost reductions for services trade within the Single Market fall substantially short of the trade cost reductions achieved for manufactured goods, and even more so than for agri-food products².

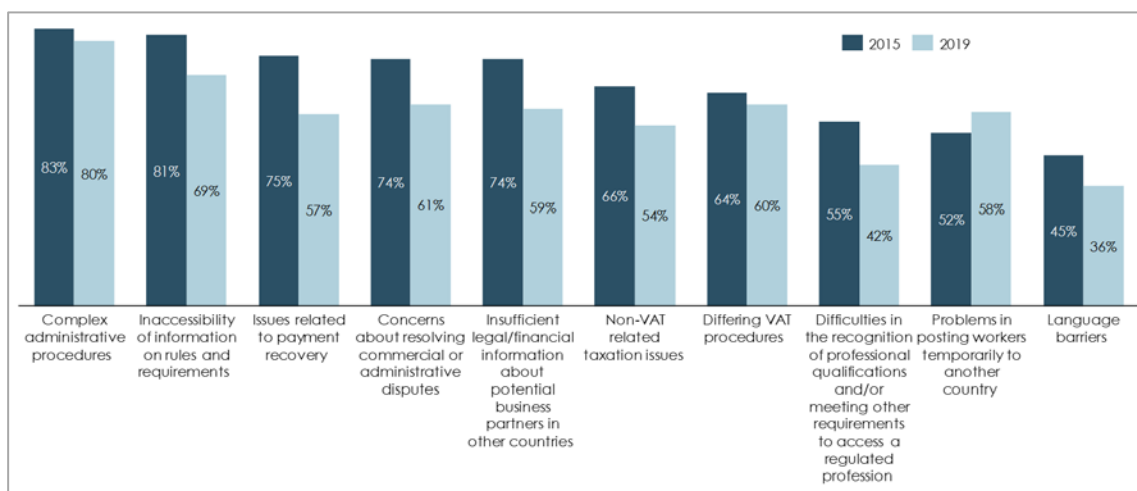
Given the substantial potential to be gained from further Single Market integration, it is important to understand in more detail the various barriers that stand in the way of this happening. This study contributes by identifying the prevalence of national legislation, regulations or enforcement practices that contradict or counteract Single Market rules.

This study highlights how the Single Market largely and rightfully can be described as a successful example of EU integration, whereby obstacles to free movement have for the most part been removed. However, the study also shows that many different obstacles remain in Member States' laws, regulations, requirements and administrative procedures. While few of them are outright contrary to EU law (although some appear to be), many of them relate to how EU rules – or perhaps rather the principles of free movement – are implemented and enforced in the Member States.

Eurochambres noted at their October 2018 European Parliament of Enterprises (EPE)³, that 69.3% of entrepreneurs replied "No" to the question "Is the Single Market sufficiently integrated, allowing your company to operate and compete freely?". During a previous edition of the EPE in 2014, the percentage was at 84%. While the percentage is undeniably better, there still is a clear majority of businesses believing that the Single Market is not sufficiently integrated."

A comparison of results of the 2019 Eurochambres survey to a similar survey from 2015 suggests that businesses perceived slightly fewer problems in nearly all categories of problems in 2019 than in 2015, see Figure 2. Note, however, that these are net effects. The evidence does not reveal the drivers of the decrease in barriers, but it does suggest that the combined EU and Member State actions have led to a net decrease in Single Market obstacles. This means that it is possible that the reductions reflect opposing forces of increased barriers in the Member States and mitigating legislation at EU level. We do not see a way to untangle the impact of these opposing forces analytically.

Figure 2: Share (%) of EU business respondents who viewed a barrier to the Single Market as being "significant" or "extremely significant", 2015 and 2019



Source: Authors' own elaboration based on Eurochambres, 2015; Eurochambres, 2019.

² Copenhagen Economics, 2018, *Making EU trade in services work for all*.

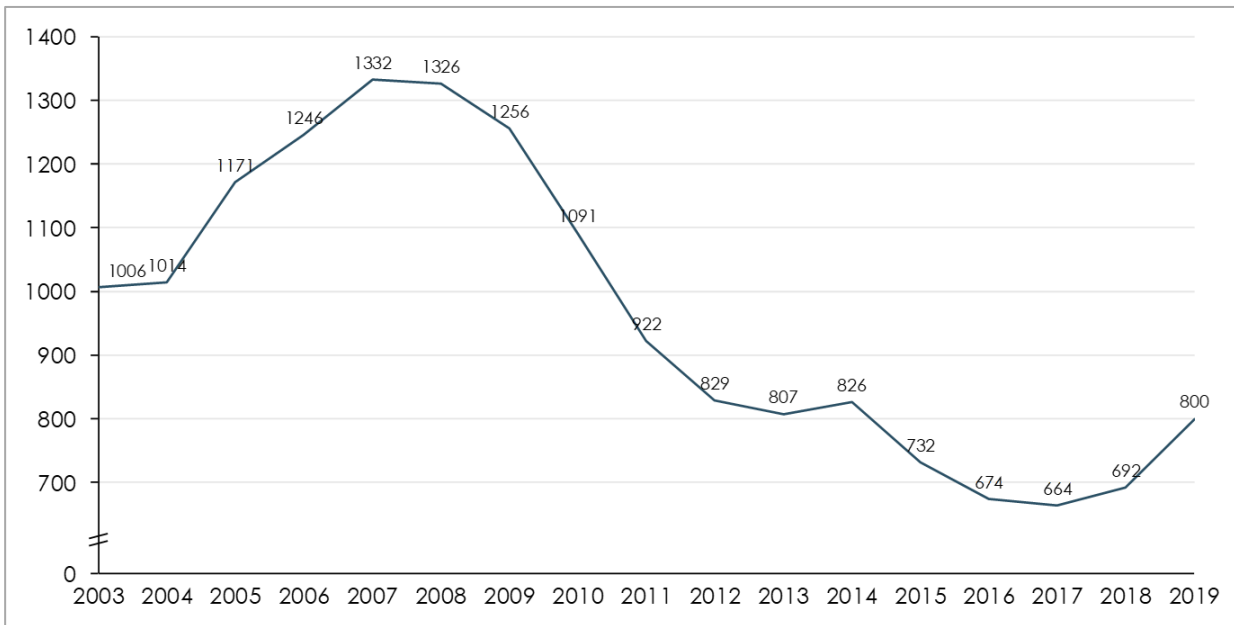
³ The European Parliament of Enterprises (EPE) is organised every two years, see: <https://www.parliament-of-enterprises.eu/>.

Multiple sources suggest that things are getting somewhat better over time, but not at the pace that stakeholders would wish for. One is reminded of the observation attributed to Eric Hoffer: "A grievance is most poignant when almost redressed"⁴. Barriers to the Single Market are still far from being fully redressed, but they appear to be moving in that direction according to the business community, which makes the remaining barriers all the more irritating to those who must live with them.

However, other indicators are pointing in a more worrying direction. For example, the number of infringement proceedings against Member States in the field of the Single Market has been rising over the last three years and reached 800 in 2019, its highest level since 2014, see Figure 3. It should be noted that this development may not solely reflect a deterioration in Member States' compliance with Single Market rules, since two other factors have impacted the number of infringement proceedings. First, the Commission decided in December 2016 to rely less on the EU Pilot's dialogue-based problem-solving mechanism and instead to move more quickly to infringement proceedings. Second, the Juncker Commission made an explicit aim to focus more actively on major breaches of EU law while restricting its actions on smaller breaches.

The first factor can reasonably have been expected to increase the number of cases, while the latter's expected impact is more ambiguous (reasonably, more cases related to major breaches of EU law and fewer cases related to minor breaches). While the Commission communicated six to seven infringement packages per year during 2017-2019, so far during 2020 the Commission has only communicated four (each package containing a similar number of infringements as before). We do not expect that this reflects a decrease in Member States' restrictions, but it may be impacted by the COVID-19 pandemic.

Figure 3: Number of infringement cases related to the Single Market, 2003-2019



Source: Single Market Scoreboard, Infringements.

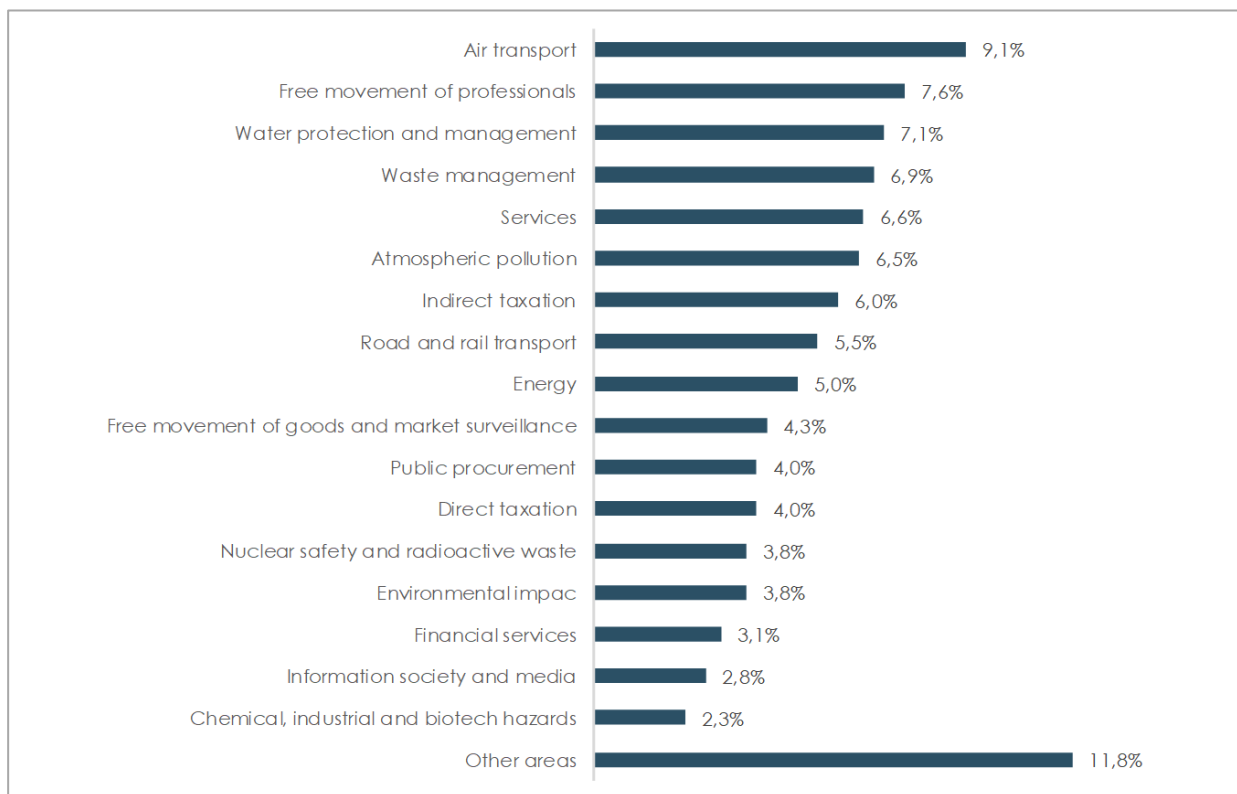
The Member States with the highest number of pending proceedings are Spain (57), Italy (49) and Germany (47), while Luxembourg (11), Latvia and Finland (both 12) have the lowest.

⁴ Hoffer, E., 1951, *The True Believer: Thoughts on the Nature Of Mass Movements*, Harper & Brothers. A similar observation appears in Brinton, C., 1938, *The Anatomy of Revolution*, Vintage.

However, 24 Member States had more pending cases as of December 2019 than one year before, while only two (Belgium and Czechia) had fewer pending cases.

30% of the pending cases relate to environmental issues (primarily cases related to water protection, waste management and air pollution), see Figure 4. Greece, Italy and Spain were the countries with the most cases related to environment with 8% of the environmental cases each. Several cases relate to free movement of professionals – every Member State had a pending case in that area as of December 2019. For cases relating to free movement of goods, the distribution across Member States is uneven – Germany alone accounts for 15% of the cases and Spain for 12% (a number of them related to construction products, see Section 3.3.1), while nine Member States had no pending case in this area.

Figure 4: Share of pending infringement by Single Market area, December 2019



Source: Single Market Scoreboard, Infringements.

A recent Commission communication rightly points out that the functioning of the Single Market is a shared responsibility between the centralised EU machinery and the Member States⁵. The legal systems and traditions of the Member States differ from one another and from those of the EU⁶. These differences can often lead to different interpretations of what constitutes free movement across the Single Market, especially when measures are applied in individual cases.

Over the years, considerable attention has been paid to harmonising and improving Member States implementation, application and enforcement of Single Market law.

⁵ European Commission, 2020, *Long term action plan for better implementation and enforcement of single market rules*, COM(2020) 94 final.

⁶ National Board of Trade Sweden, 2019, *Reforming compliance management in the Single Market*. For a summary, see: <https://eulawenforcement.com/?p=1675>.

Even so, we appear to be far from having a fully functioning Single Market, free from unjustified and/or disproportional obstacles to free movement.

The problem is clear, but it does not lend itself to a single, simple solution. Member States understandably seek to ensure that national objectives are met in terms of, for instance, consumer protection, public health and the environment. In doing so, they do not necessarily take due account of the impact of their actions on the free movement of goods and services.

To make progress, Member States must ensure that any restrictive measures are objectively justified and proportional. As we discuss in this study, based on the publicly available evidence, we do not see a clear trend of increasing obstacles to free movement, save for in a few cases.

Rather, we see a situation of long-lived problems that only slowly seem to be disappearing. However, by definition, it is next to impossible to assess the magnitude of obstacles that fly under the radar, e.g. situations where restrictive measures are imposed and the affected firm (or citizen) simply comply with them. Furthermore, a recent report on compliance in the Single Market notes that "*Anecdotal evidence suggests that in some extreme cases, there may be a culture of impunity with regard to the application of Union law [...] whereby local authorities would justify their lack of compliance with spurious explanations such as the facts that they are solely accountable to their national government, that other countries would do the same and, ultimately, that the risk of sanctions was remote*"⁷.

Thus, in addition to continued efforts to ensure that Member States comply with commonly agreed rules and the upholding of existing and soon-to-be established processes and mechanisms to promote free movement in the Single Market, more innovative ideas deserve consideration. One such idea is for the EU to consider the possibilities for establishing local public bodies in Member States, with the aim of functioning as a bridge between the EU and the national (regional and local) political, legal and economic spheres. Such "national EU bodies" could serve to facilitate compliance with EU law by offering relevant expertise, as well as acting in a scrutinising function of national measures⁸.

A similar solution is envisaged in the European Parliament's resolution on the Digital Services Act (DSA), where the Commission is called on to "...consider the setup of a hybrid system, based on coordination and cooperation of national and Union authorities, for the effective enforcement oversight and implementation of the DSA"⁹. We believe that such a solution can be considered also in the broader context of the Single Market as a whole. Indeed, such a solution would aim to address the problems at its core, although we note that more consideration and discussion is needed as to the details of how such a hybrid model can be established in practice.

In order to preserve the benefits that the EU Single Market has generated in terms of increased trade, competitiveness and GDP growth, it will be important going forward that the commonly agreed principles and procedures underpinning the free movement of goods and services are duly respected when drafting, implementing and enforcing EU and national laws and regulations.

The study focuses on the areas that fall within the competence of the European Parliament's IMCO committee. **Chapter 2** provides a brief introduction and overview to the legal framework of the Single Market. In **Chapter 3**, we discuss legal obstacles to the free movement of goods, while **Chapter 4** deals with obstacles to the free movement of services and the freedom of establishment. **Chapter 5** discusses issues related to the Digital Single Market (DSM), **Chapter 6** discusses consumer protection,

⁷ Ibid, p. 10.

⁸ Ibid.

⁹ European Parliament, 2020, *Digital Services Act, Improving the functioning of the Single Market*, Resolution of 20 October 2020.

and **Chapter 7** deals with public procurement.

In addition, even though the EU customs union is also within the IMCO committee's competence, customs union issues primarily relate to the export and import of goods from and to the EU (extra-EU trade), while the remaining headings generally relate to free movement *within* the EU. Thus, we will only bring up relevant issues related to extra-EU trade to the extent that they impact the free movement of goods within the EU.

Furthermore, the study focuses on national obstacles to the Single Market in general. Thus, the focus is on the broader development of obstacles to the Single Market and, therefore, we pay only limited attention to possible obstacles raised in response to the COVID-19 pandemic.

Lastly, the authors wish to thank representatives of the European Commission, BusinessEurope, EuroCommerce, Eurochambres and the National Board of Trade Sweden for sharing their insights and expertise during the preparation of this study.

2. THE LEGAL FRAMEWORK OF THE SINGLE MARKET

KEY FINDINGS

- The Single Market refers to one integrated market without any internal borders or other regulatory obstacles to the free movement of goods, services, persons and capital, encompassing the European Union (EU) Member States and Norway, Iceland and Liechtenstein.
- The Single Market is based on a number of key principles: free movement, mutual recognition, subsidiarity and proportionality. The latter two are governing the use of EU measures in areas that are not exclusive EU competence, such as the Single Market. In addition, the principle of non-discrimination is a general principle of EU law that applies to the Single Market.
- Some areas of the Single Market are regulated at EU level and are subject to harmonised rules, others are governed at national level. This results in fragmented legal frameworks and diverging administrative practices across Member States.
- Practices of "gold-plating" (national requirements going beyond harmonised requirements) are common regarding services provisions.

2.1. The legal basis of the Single Market

The Single Market, also known as the Internal Market, enables persons, services, goods and capital to move more freely from one EU Member State to another, offering opportunities for both businesses and consumers. It is one of the main achievements of the European Union and the backbone of economic integration within the EU. The free movement from one EU Member State to another of goods, persons, services and capital is referred to as the "four freedoms". The Single Market does not only encompass the 27 EU Member States; Iceland, Norway and Liechtenstein participate through the Agreement on the European Economic Area (EEA)¹⁰. At the time of writing of this study, The United Kingdom (UK) is part of the Single Market until 31 December 2020. Switzerland is not formally a part of the Single Market but is closely integrated to it via more than 100 bilateral agreements.

The Single Market finds its legal basis in Articles 4(2)(a), 26, 27, 114 and 115 of the Treaty on the Functioning of the European Union¹¹ (hereafter referred to as the TFEU). In particular, under Article 114 of the TFEU¹², the EU legislator can adopt measures for the approximation of laws in the Member States which have as their objective the establishment and functioning of the Single Market. Approximation is intended to ensure harmonised legislation across the EU and limit regulatory differences between Member States to achieve the objective of Article 26¹³, which is to establish or ensure the functioning of the Single Market.

¹⁰ Agreement on the European Economic Area [2016], (OJ L 1, 3.1.1994).

¹¹ Consolidated version of the Treaty on the Functioning of the European Union (TFEU) [2012], OJ C 326, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT>.

¹² Article 114 of the TFEU concerns the EP and Council's adoption of measures for the approximation (via ordinary legislative procedure) of the provisions laid down by law, regulation or administrative action in Member States which have as their objective the establishment and functioning of the Single Market (para 1) and exemptions from approximation measures for fiscal provisions, provisions relating to the free movement of persons and those relating to the rights and interests of employed persons (para 2).

¹³ Article 26 of the TFEU concerns the adoption by the EU of measures with the aim of establishing or ensuring the functioning of the Single Market in accordance with Treaties (para 1). The Single Market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured (para 2).

In order to achieve approximation in line with Article 114 of the TFEU, the European Parliament and the Council adopt harmonisation measures in the form of Directives or Regulations. Directives are legislative acts that set out a goal that Member States must achieve, leaving them free to decide how whereas Regulations are binding acts that must be applied in their entirety across the EU.

In this regard, it is important to distinguish between minimum and maximum harmonisation. In the case of minimum harmonisation, a Directive or a Regulation sets minimum rules and EU Member States can set higher rules on top of those established in the EU legislative act. Therefore, if a Directive sets a threshold level which national legislation must meet, Member States may adopt national legislation that exceeds that threshold. For example, the EU Directive for fruit jams, marmalades and jellies stipulates that jam must contain at least 350 grams of pulp or purée for each 1000 grams of jam, in order to be marketed as jam in the EU Single Market¹⁴. However, individual Member States may require that jam should include at least 400 grams of pulp or purée, in their national legislation that implements the Directive.

In the case of maximum harmonisation, EU Member States may not introduce rules that are stricter than those laid down in EU law. For instance, the EU Directive on consumer rights fully harmonises key provisions on distance contracts, including pre-contractual information and rights of withdrawal – Article 4 of the Directive explicitly states that: "*Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive*"¹⁵.

Based on Article 114 of the TFEU, some areas of the Single Market have been harmonised at EU level and are, thus, subject to uniform rules. The latter ensure homogeneous standards across the EU and provide a clear legal framework for businesses and consumers which enhance legal certainty. However, where the EU has no or limited legislative competences¹⁶, the competence of Member States comes into play. As a result, it is common that divergent and restrictive regulatory approaches between different Member States occur. The practice of "gold-plating"¹⁷ (national requirements going beyond harmonised requirements) is regarded as necessary at national level to attain certain public policy purposes such as the protection of health or the environment. It is particularly common with regard to the provision of services¹⁸.

The Court of Justice of the European Union (CJEU)¹⁹ has stated that recourse to Article 114 of the TFEU is justified where the differences between the laws, regulations, or administrative provisions of

¹⁴ Council Directive 2001/113/EC of 20 December 2001 relating to fruit jams, jellies and marmalades and sweetened chestnut purée intended for human consumption [2002] OJ L 10.

¹⁵ Directive (EU) 2011/83 of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011], OJ L 304, Article 4.

¹⁶ The limited role of the EU is often derived from the principles of subsidiarity and proportionality, as explained in more detail in Section 2.3.

¹⁷ Gold-plating refers to the practice of national legislators enhancing the requirements of measures introduced at a level beyond that which is required by EU law. This can happen for a variety of reasons, but most prominent is the effect of domestic politics, i.e. preference fit or goodness of fit. For example, where a measure is deregulatory in an area of national sensitivity (e.g. tax or financial stability), national parliaments may introduce requirements and restrictions which inhibit (or prevent entirely) the effective implementation of that law on the ground. Gold-plating can mean extending the scope of the substance of the measure, wider domestic terms than required by EU law, and proscribing sanctions or reporting requirements that increase the overall regulatory burden and make implementation of EU law more difficult. (European Parliament, Briefing on Challenges in the implementation of EU Law at national level, 2018).

¹⁸ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

¹⁹ Case C-547/14 *Philip Morris Brands and Others* [2016] EU:C:2016:325, paras 57-60, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=F22C38F31FD17B9914A3025BED8ECF9D?text=&docid=177724&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5518315>.

Member States hinder the fundamental freedoms and, thus, have a negative impact on the functioning of the Single Market. The CJEU has further narrowed the interpretation of Article 114 by clarifying that measures adopted on the basis of Article 114 should genuinely aim to improve the conditions for the establishment and functioning of the Single Market²⁰. Therefore, simple disparities between national rules or not clearly defined risks of future obstacles to trade or a distortion of competition are not considered sufficient. Thus, in line with this reasoning, regulatory divergence across Member States that do not have a negative impact on the Single Market cannot be classified as obstacles to free movement.

2.2. The principles of the Single Market

This section briefly introduces the key horizontal principles of the Single Market, while Section 2.3 introduces the freedoms.

The **principle of mutual recognition**, which was established by the CJEU in its interpretation of Articles 28-30 of the EU Treaty and applied in areas that are not harmonised at EU level. The principle was set by the CJEU in the *Cassis de Dijon*²¹ judgement of 1979 in relation to the free movement of goods. According to it, a product lawfully produced and marketed in one Member State must be accepted in another given that the legislation of another Member State is equivalent in its effects to the domestic legislation. In this specific case, Germany refused the placement on the German market of a French liqueur on the ground that it did not correspond to the minimum alcohol percentage required by German law for beverages to be marketed as "liqueur". The CJEU ruled that Germany breached Article 34 of the TFEU²².

The CJEU also referred to the "*rule of reason*" regarding the national mandatory requirements that EU Member States could invoke in order to protect public interests such as health and safety. On the basis of this rule, Member States must acknowledge that if products are manufactured in accordance with other Member States' national regulations, standards or procedures, they cannot be denied access to their market if these other norms guarantee a comparable level of safety²³.

Regarding services, Article 56 of the TFEU imposes an obligation on the Member States to remove restrictions on the free movement of services²⁴. Measures that affect the ability of service providers to provide the service, measures increasing the service costs, measures discouraging provision of the service, and measures preventing consumers from receiving the service, are prohibited²⁵.

According to the analogy²⁶ with the landmark judgement in *Cassis de Dijon*²⁷, Member States may not prohibit the provision of services in their own territory as long as the service is lawfully provided in another Member State, even where the conditions to provide the service are different in the Member

²⁰ Case C-376/98 *Advertising and sponsorship of tobacco products* [2000] ECLI:EU:C:2000:544, paras 83-84, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61998CJ0376>.

²¹ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECLI:EU:C:1979:42, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0120>.

²² Article 34 of the TFEU states: "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States".

²³ Case 120/78 (cited above), para 8.

²⁴ Article 56 of the TFEU (cited above).

²⁵ Pelkmans, J., *Mutual recognition in goods and services: an economic perspective* (European Network of Economic Policy Research Institutes - Working Paper No. 16/March 2003), Brussels, 2003.

²⁶ Between free movement of goods and free movement of services.

²⁷ Op cit., footnote 21.

State of establishment²⁸.

Compatibility of derogations with the Treaties is then tested by the CJEU using a three-step approach:

- a restrictive justification test (overriding reasons of public interests)²⁹;
- a non-duplication test (for statutory conditions, if equivalent, already satisfied in the home country)³⁰; and
- the proportionality test (barriers should be indispensable and the least restrictive)³¹.

Moreover, when it comes to the recognition of professional qualifications in relation to the provision of professional services, mutual recognition of diplomas is often complicated by barriers flowing from codes of conduct (i.e. self-regulation of an anti-competitive nature)³².

The **principles of subsidiarity and proportionality** are also important building blocks of the Single Market. They enable a definition of the issues that fall within EU competence and those that can be handled at national level. The principle of subsidiarity authorises EU action only when the following three preconditions are met, as set out in Article 5(3) of the Treaty on European Union (TEU)³³:

- The area concerned does not fall within the Union's exclusive competence (i.e. non-exclusive competence);
- The objectives of the proposed action cannot be sufficiently achieved by the Member States (i.e. necessity); and
- The action can therefore, by reason of its scale or effects, be implemented more successfully by the EU (i.e. added value).

The principle of proportionality determines how the EU should act by avoiding unnecessary restrictions and guaranteeing that EU action only does what is necessary to achieve the aims of the action. Proportionality is enshrined in Article 5(4) of the TEU but it has been primarily developed by the CJEU in its jurisprudence.

The Better Regulation Guidelines and the accompanying "Toolbox"³⁴ require the Commission to undertake a subsidiarity and proportionality analysis when considering a new initiative in areas where the EU does not have exclusive competence and when evaluating the relevance and European added value of an existing intervention.

²⁸ Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* (cited above).

²⁹ See e.g. Case C-98/14 *Burlington Hungary and Others* [2015] ECLI:EU:C:2015:386, paras 58 and 61, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=164955&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5569403>.

³⁰ See e.g. Case C-215/01 *Schnitzer* [2003] ECLI:EU:C:2003:662, paras 30 and 40, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=48799&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5569796>.

³¹ See e.g. Joined cases C-447/08 and C-448/08 *Sjöberg and Gerdin* [2010] ECLI:EU:C:2010:415, para 38, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=83128&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=5570194>.

³² Pelkmans, J., *Mutual recognition in goods and services: an economic perspective* (op cit.).

³³ Consolidated version of the Treaty on European Union [2012] OJ C 326.

³⁴ European Commission, Better Regulation Toolbox (2017), available at: https://ec.europa.eu/info/sites/info/files/file_import/better-regulation-toolbox-5_en_0.pdf.

The **principle of non-discrimination** is a general principle in EU law which applies to the Single Market as well as to other areas of EU law. Enshrined in Article 18 of the TFEU³⁵, it prohibits "*any discrimination on the grounds of nationality*". For example, it means that it is prohibited for Member States to treat imported goods differently from domestic goods. The scope of this principle has been extended through the interpretation of the CJEU that has adapted it to other circumstances such as in the context of services, where cases of discrimination were considered from the point of view of both nationality and residence.

Two main forms of discrimination can be distinguished: direct and indirect discrimination. Direct discrimination on grounds of nationality or residence is prohibited under Articles 56, 49, 18 of the TFEU³⁶. More common are cases of indirect discrimination, in which a measure is not directly linked to nationality, but nonetheless puts foreign actors at a disadvantage compared to local actors. Examples of such measures include generally applicable residence requirements and domestic language skills³⁷. Such conditions typically affect foreign businesses as they do not have their registered office or place of residence in the country of destination of the service/good. The same applies to laws that require national degrees or qualifications to access certain professions³⁸.

2.3. The freedoms

The European Single Market is based on four fundamental freedoms: free movement of goods, services, persons and capital. The sections below provide an overview of the free movement of goods and services, which is the focus of this study.

2.3.1. Free movement of goods

Established in Articles 28-30 of the TFEU, the free movement of goods is one of the key elements of the Single Market as it gives access to Member States' markets for producers and to a broad variety of goods for consumers. The freedom is based on the principle of equivalence: a product made and marketed legally in one Member State must be allowed on the market of any other Member State. EU Member States must not impose duties on goods produced in the EU or imported to the EU from third countries when they are sold cross-border (Article 30 of the TFEU). Any charge that has the equivalent effect of a customs duty on trade is prohibited. Quantitative restrictions are also banned (Article 34 of the TFEU). Therefore, any kind of restriction that directly or indirectly hinders free movement of goods is forbidden.

The concept of freedom of movement has evolved over time through the interpretation of the jurisprudence. In several cases, the CJEU has ruled that any charge "*which, if imposed upon a product imported from a Member State to the exclusion of a similar domestic product has, by altering its price, the same effect upon the free movement of products as a customs duty*", may be regarded as a charge having

³⁵ Consolidated version of the Treaty establishing the European Community [2012] OJ C 325, Article 12 of EC Treaty amended by Article 18 of the TFEU.

³⁶ The CJEU has found the following measures to be directly discriminatory: reservations on the part of nationals for certain professional activities, licensing requirements or residence requirements only for foreigners. See: Case C-47/08 [2011] ECLI:EU:C:2011:334, Case C-71/76 [1977] ECLI:EU:C:1977:65 and Case C-350/96 [1998] ECLI:EU:C:1998:205).

³⁷ For example, Case C-39/75 *Coenen* [1975] ECLI:EU:C:1975:162, paras 5 ff; Case C-33/74 *Van Binsbergen* [1974] ECLI:EU:C:1974:131, paras 10 and 12; Case C-224/97 *Ciola* [1999] ECLI:EU:C:1999:212, para 14; Regarding freedom of movement for workers, see: Case C-263/99 *Commission v Italy* [2001] ECLI:EU:C:2001:293, para 20.

³⁸ Kainer, F., 2019. *Contribution to Growth: Free Movement of Services and Freedom of Establishment. Delivering Improved Rights to European Citizens and Businesses*, Study for the committee on the Internal Market and Consumer Protection., Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

equivalent effect, regardless of its nature or form (Joined cases 2/62 and 3/62³⁹, and Case 232/78⁴⁰). Likewise, the *Dassonville* judgment⁴¹ established that "all trading rules of Member States which are capable of hindering, directly or indirectly, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions" (see also Case C-320/03)⁴². Thus, it is sufficient that a national measure has the potential to hinder free movement for it to be considered unlawful.

The Court's reasoning was further developed in the *Cassis de Dijon* judgment where it was recognised that Member States may make exceptions to the prohibition of measures having an equivalent effect to restrictions (e.g. with regard to the protection of public health etc.). Finally, the *Keck* judgment⁴³ defined the field of application of Article 34 of the TFEU, establishing that certain selling arrangements fall outside the scope of this Article, provided that they are non-discriminatory (i.e. they apply to all relevant businesses operating within the national territory and they affect in the same manner the marketing of domestic products and products from other Member States).

While some areas are subject to harmonised rules, others are still governed by national provisions and subject to the principle of mutual recognition. A description of these areas is provided in the sections below.

Harmonised areas

Harmonisation of product rules has two main objectives: ensuring the free movement of goods and guaranteeing a high level of protection of the public interest objectives referred to in Article 114(3) of the TFEU. In some sectors (e.g. automotive, chemicals), the EU has adopted harmonised rules that provide detailed technical requirements for certain types of products that make it mandatory for products to have the same technical specifications. However, in the majority of sectors (e.g. electronic and electric equipment, machinery, lifts, medical devices), EU legislation only lays down essential health, safety, and environmental protection requirements, thus leaving room for national requirements and procedures for aspects that are not covered by the harmonisation measures. European harmonised standards are often developed and available for manufacturers to voluntarily use to demonstrate that their products comply with the requirements, as they imply a presumption of conformity with the relevant EU requirements⁴⁴.

The new legislative framework was adopted in 2008 to reinforce market surveillance and the quality of conformity assessments of goods and to clarify the use of the CE marking⁴⁵. It also established a common legal framework for industrial products in the form of a toolbox of measures for use in future legislation. This included definitions of terms commonly used in product legislation and procedures to allow future sectoral legislation to become more consistent and easier to implement.

³⁹ Joined cases 2/62 and 3/62 *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* [1962] ECLI:EU:C:1962:45, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61962CJ0002>.

⁴⁰ Case 232/78 *Commission of the European Communities v French Republic* [1979] ECLI:EU:C:1979:215, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61978CJ0232>.

⁴¹ Case 8-74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECLI:EU:C:1974:82, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61974CJ0008>.

⁴² Case C-320/03 *Commission of the European Communities v Republic of Austria* [2005] ECLI:EU:C:2005:684, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62003CJ0320>.

⁴³ Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECLI:EU:C:1993:905, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61991CJ0267>.

⁴⁴ European Commission, *Free movement in harmonised and non-harmonised sectors*, available at: https://ec.europa.eu/growth/single-market/goods/free-movement-sectors_en.

⁴⁵ European Commission, *New legislative framework*, available at: https://ec.europa.eu/growth/single-market/goods/new-legislative-framework_en#:~:text=To%20improve%20the%20internal%20market%20for%20goods%20and,toolbox%20of%20measures%20for%20use%20in%20product%20legislation.

Non-harmonised areas

Non-harmonised areas are regulated at national level. The principle of mutual recognition, the 2015/1535 notification procedure⁴⁶ and the application of Articles 34-36 of the TFEU play a crucial role to guarantee the free movement of goods in these areas. In particular, the mutual recognition principle⁴⁷ applies to the extent that the requirements in Member State A achieve the same level of protection (of, for example, consumers, public health or the environment) as in Member State B. However, if Member State B requires a higher level of protection, it may require additional tests and procedures *on top of* those that the product complies with in Member State A, so long as the additional requirements are objectively justified and proportional.

The principle has recently been further defined in Regulation (EU) 2019/515⁴⁸ which sets out the rights and obligations in relation to the mutual recognition principle for competent authorities and businesses when selling goods in another EU Member State (see Table 1).

Table 1: Key aspects of the Mutual recognition Regulation (EU) 2019/515

	Key aspect
1	An assessment procedure to be followed by competent authorities when assessing goods' obligatory elements to be included in an administrative decision that restricts or denies market access.
2	A voluntary "mutual recognition declaration", which businesses can use to demonstrate that their products are lawfully marketed in another EU Member State.
3	A business-friendly problem-solving procedure, based on SOLVIT, that includes the possibility of an assessment from the Commission on the compatibility of a decision restricting or denying market access with EU law.
4	Stronger administrative cooperation to improve the application of the mutual recognition principle.
5	More information to businesses through reinforced product contact points (the latter are established in each EU Member State to provide free advice related to the Mutual Recognition Regulation within 15 working days) and the Single Digital Gateway.

Source: Authors' own elaboration based on Regulation (EU) 2019/515.

Moreover, the notification procedure, established in Directive (EU) 2015/1535 (known as the Transparency Directive) has been introduced with the aim to prevent the creation of national technical barriers to trade by ensuring the compatibility of national legislation with EU law and Single Market principles. According to this Directive, Member States must inform the Commission of any draft technical regulation for products and information society services before its adoption. From the date of the notification, the EU Member State must refrain from adopting the technical regulation in question for a three-month period. During this period, the Commission and other EU Member States can examine the proposed text and respond.

⁴⁶ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services [2015] OJ L 241.

⁴⁷ The mutual recognition principle means that any good lawfully sold in one EU Member State can be sold in another Member State even if the good does not fully comply with the technical rules of the other country.

⁴⁸ Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008 [2019] OJ L 91.

2.3.2. Free movement of services

The Single Market for services is based on two core freedoms: the freedom to establish a business in another EU Member State and the freedom to provide or receive services in an EU Member State other than the one where the business or consumer is established. These freedoms are enshrined in Articles 49 and 56 of the TFEU respectively.

According to them, self-employed persons and professionals or legal persons who are legally operating in one Member State:

- shall not be restricted to carry out an economic activity in a stable and continuous way in another Member State (right of establishment, Article 49 of the TFEU); or
- offer and provide their services in other Member States on a temporary basis or provide them from their country of origin (freedom to provide services, Article 56 of the TFEU).

The right of establishment includes the right to carry out and pursue activities as a self-employed person and to set up and manage undertakings for a *permanent* activity of a stable and continuous nature, under the same conditions as those laid down by the law of the Member State concerned regarding its own nationals. A business from Member State A shall not be discriminated against if it wants to establish itself in Member State B, and it should follow the applicable rules and regulations of the *host* Member State (here, Member State B).

In turn, by exercising the freedom to provide services, a person providing a service may temporarily perform his activity in another Member State, under the same conditions as those imposed by that Member State on its own nationals. Discrimination on the grounds of nationality is prohibited. A service provider in Member State A may sell services cross-border (e.g. online) to consumers in Member State B, consumers of Member State B may consume the service in Member State A, or the service provider may temporarily provide the service in Member State B – in all such cases, the service provider in Member State A should in principle only follow the rules of the *home* Member State, but several exceptions exist. In other words, a mix of *home* and *host* Member State rules typically apply in practice.

Harmonising areas

While a broad range of EU rules have been adopted in the goods sector, the service sector has been less harmonised at EU level. Nonetheless, the EU has established a number of EU law instruments to promote the integration of the EU services markets. However, the fact that most of these instruments follow a minimum harmonisation approach means that there is substantial scope for fragmentation of rules across countries and the adoption of "gold-plating" practices by Member States.

In particular, the Services Directive⁴⁹ aims to remove barriers to trade in services in the EU by simplifying administrative procedures for service providers, enhancing the rights of consumers and businesses, and fostering cooperation among EU Member States. It reinforces the principle of mutual recognition according to which Member States shall accept services of providers established in another Member State, allowing for the imposition of national requirements only if they are non-discriminatory, necessary and proportionate. The Directive also sets up Points of Single Contact (PSCs) where foreign service providers can access relevant information about applicable requirements as well as contact details of the competent authorities.

⁴⁹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376.

The Directive is a big step forward in ensuring that both service providers and recipients benefit more easily from the freedom of establishment and the freedom to provide services across borders. While the Directive in principle covers all services, several services are excluded from its scope such as financial services, electronic communications services, transport services, healthcare services, private security services, audiovisual services and gambling. Most of these services are instead covered by sector-specific EU legislation.

Since services are often produced as they are consumed, regulations and requirements typically target the service provider (while goods regulations typically target the product itself). Hence, an important measure in order to strengthen the free movement of services is the Professional Qualifications Directive⁵⁰ which sets up a system for the recognition of professional qualifications between the EU, non-EU European Economic Area (EEA) countries and Switzerland. With the aim to make labour markets more flexible, the Directive introduces a mutual evaluation of national professional regulations and a transparency exercise (i.e. screening the entry restrictions to professions and analysing their necessity).

The Directive applies to both temporary mobility and permanent establishment. Regarding the former, if professionals want to provide their services in another EU Member State on a temporary basis, they can do so on the basis of their establishment in their home country. The country of destination might require from them a prior declaration, but recognition procedures are not necessary. In relation to permanent establishment, the Directive establishes three types of qualification recognition systems (see Table 2 below).

Table 2: Qualification Recognition systems

	Type of recognition
1	Automatic recognition for professions whose minimum training conditions are harmonised at European level: doctors, nurses responsible for general care, dentists etc.
2	Automatic recognition for certain occupations: professionals in crafts, trades and industry can request automatic recognition of their qualifications based on their professional experience.
3	The general system for the above-mentioned professions which do not fulfil conditions for the automatic recognition regime is based on the principle of mutual recognition of qualifications.

Source: Authors' own elaboration based on Directive 2005/36/EC.

Another step towards further integration is Directive (EU) 2018/958⁵¹, laying down rules for proportionality assessments to be conducted by EU Member States before adopting new professional regulations. According to it, Member States must ensure that new rules in EU Member States which restrict access to or the pursuit of regulated professions are justified and proportionate with regard to public interest objectives such as public policy, public security, public health, consumer protection, etc. In assessing the proportionality of new or amending rules, EU Member States must consider a number of proportionality criteria established by the CJEU, including whether the measure can achieve the public interest objective, whether existing rules, such as product safety law or consumer protection

⁵⁰ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255.

⁵¹ Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions [2018] OJ L 173.

law, are not able to achieve the same objective or whether less restrictive means could achieve the public interest objective, etc.

2.3.3. Posting of workers

Employers can make use of their freedom to provide services by temporarily sending workers abroad. This is for example the case if a business is contracted to construct a building in another Member State, and it can send its construction workers to carry out the construction. Posted workers are not covered by the EU rules on free movement of workers, since they remain in the *host* Member State only temporarily and do not integrate in its labour market.

Posted workers are instead protected by the Posting of Workers Directive⁵², according to which, even though workers posted to another country are employed by the sending business and subject to the law of the *home* Member State, they are entitled to a set of core rights in the *host* Member State. These rights include minimum rates of pay, maximum work periods and minimum rest periods, minimum paid annual leave, the conditions of hiring out workers through temporary work agencies, health, safety and hygiene at work, and equal treatment between men and women.

The Directive does not apply whenever the working conditions applicable to the worker in accordance with the rules of the *home* Member State are more favourable to the worker than those in the *host* Member State that would result from the application of the Directive.

⁵² Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L 173.

3. FREE MOVEMENT OF GOODS

KEY FINDINGS

- The free movement of goods is largely well-functioning. Most products traded in the Single Market are subject to (at least partially) harmonised rules, and the share has increased since the mid-1990s.
- Member States' technical rules (where EU harmonisation is limited or absent) appear to have improved in quality over recent years. However, there are still instances of national technical rules that are likely to be contrary to EU law, and one cannot be certain that all national technical rules that should be notified are in fact notified.
- In addition, there are still sector-specific examples where national obstacles remain in place despite EU harmonisation, or where market and technological development have made existing rules outdated. Three sectors are prominent in this regard: construction products, industrial machinery and waste.
- For food and beverages, recent years have seen a surge in national labelling requirements which may pose unjustified obstacles to trade.
- Beyond national rules being restrictive to trade, one cannot rule out the possibility of numerous instances of incorrect implementation of EU law in individual cases that "fly under the radar". However, evidence on the severity and occurrence of such obstacles is, by definition, hard to come by.
- It is also clear that businesses rarely utilise the informal problem-solving SOLVIT network to resolve cross-border issues when they arise.
- While there is still a substantial problem with businesses' access to relevant information about applicable product rules in different Member States, the issue appears to have decreased over recent years. The Single Digital Gateway has potential to further improve access to relevant information.
- Regarding mutual recognition, authorities often fail to show an evidence-based rationale in case of refusals and companies usually adapt to the national requirements instead of using their right to mutual recognition.
- The EU should continue to closely scrutinise national technical rules, especially concerning labelling requirements. It may also be wise to evaluate whether a merger of other notification procedures (e.g. related to food information for consumers) could promote a uniform assessment of national technical rules across all relevant sectors.
- It can also be worth considering introducing more detailed requirements on Member States' motivations of necessity and proportionality when notifying technical rules under the Transparency Directive's notification procedure.
- The new Regulation 2019/515 on mutual recognition is better than its 2008 predecessor, and Member States will now be involved in permanent cooperation, exposed time and again to EU law applications. However, insofar as a lack of cross-border trust prevails, frustrating national action remains possible or even likely.
- The major source of unjustified national obstacles to the Single Market lies in the national implementation and enforcement of Single Market rules.

The free movement of goods is often referred to as one of the success stories of the European project, as it has benefited both businesses and consumers, from facilitating intra-EU trade to broadening the range of products available both offline and online⁵³. However, obstacles to the free movement of goods still exist within the EU – 1.1% of SOLVIT cases in 2019 concerned the free movement of goods (see Section 3.1.3)⁵⁴.

While many of the benefits of the free movement of goods have been reaped, a further improved functioning of the principle of mutual recognition and full removal of all non-tariff barriers for goods in the EU have the potential to bring gains of EUR 386 billion to the EU economy⁵⁵. Despite substantial harmonisation, different rules and regulations exist nationally or regionally which hinder businesses' ability to trade cross-border within the Single Market. Approximately 18% of the value of intra-EU trade in goods is in products that are not (fully) harmonised within the EU, supporting approximately 8 million jobs in the EU⁵⁶.

However, it is **important to separate obstacles to trade from businesses' point of view and obstacles to trade from a strict EU legal point of view**. While we utilise information regarding obstacles to trade reported by businesses, we focus on those obstacles that are linked to national rules and requirements that are, or feasibly can be, linked to Single Market legislation. Thus, while we note that EU competition rules are integral for a well-functioning Single Market, this study focuses on rules and requirements that are related to free movement. This also means that we do not focus on obstacles related to, for example, lack of consumer demand or lack of information about consumer preferences, since such obstacles hardly can be addressed by EU law.

The chapter begins with presenting evidence of national requirements that create obstacles for cross-border trade in goods, in **Section 3.1**. That is, such national obstacles that in themselves constitute barriers to free movement of goods. In turn, **Section 3.2** deals with the related, although slightly different, issue regarding lack of access to information about applicable rules. Such obstacles differ in that the national rules are likely not to be contrary to EU law, or possibly not even very restrictive to trade, but the lack of available information constitutes an obstacle to free movement. **Section 3.3** describes the problems related to the principle of mutual recognition in the goods area. While this is also relatable to the first two sections, we focus on the specific issue of how the principle of mutual recognition is not often properly applied in practice across the EU Single Market. **Section 3.5** presents our recommendations for how the identified problems can be removed and/or prevented.

3.1. Difficulties in meeting requirements to sell goods

Despite the progress that has been made in integrating and realising the free movement of goods, examples of fragmentation still exist between Member States. On an empirical basis, the so-called home bias is still pronounced in intra-EU goods trade: the average EU Member State trades 45 times more within its borders than it does across intra-EU borders⁵⁷. While there are several natural factors that can explain the difference between within-country and cross-country trade (e.g. the importance of geographical and cultural proximity for trade), it is perhaps more striking that the home bias for

⁵³ See, inter alia, National Board of Trade Sweden, 2015, *Economic Effects of the European Single Market – Review of the empirical literature*.

⁵⁴ European Commission, *Single Market Scoreboard*; European Commission, *Single Market Scoreboard*, SOLVIT.

⁵⁵ Poutvaara, P., et al., 2019, *Contribution to Growth: Free Movement of Goods. Delivering Economic Benefits for Citizens and Businesses*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

⁵⁶ EY, Tech4i2, Time.lex and CEPS, 2017, *Study on the costs and benefits of the Mutual Recognition Regulation (EC) No 764/2008*.

⁵⁷ European Central Bank, 2017, *Home sweet home: the home bias in trade in the European Union*.

cross-border goods trade has not decreased between 2000 and 2014. The home bias is strongest in central and eastern Europe, as well as in the peripheral EU Member States Finland, Ireland and Portugal (further demonstrating that geography plays an important role).

The underlying causes behind the fragmentation are multifaceted, but two general factors can be identified. The first factor relates to **insufficient implementation and enforcement of EU rules at the national, regional or local levels**, be it driven by insufficient resources, competence and/or interest to uphold Single Market rules⁵⁸. In other words, one cause for fragmentation is that common EU rules, which aim to integrate the Single Market, apply differently or incorrectly across Member States. In practice, the application of EU law in individual cases is often open to interpretation and it is rarely possible for an EU legal act (or a national implementing act) to foresee every possible situation in which the law needs to be applied. This is especially relevant in the EU legal context, since the relevant rules and their practical application and enforcement inherently span across both EU and national legal orders, which have their own logic, concepts, interests and traditions⁵⁹.

The second factor relates to **national, regional or local rules and requirements** that are in place across the EU. Foreign producers must comply with such rules in order to sell their goods. In principle, this should not be an issue in the Single Market since a vast majority of product rules and requirements are fully or partially harmonised across the EU. For every requirement that is not harmonised, mutual recognition applies so that a product lawfully marketed in one Member State should be allowed to be marketed anywhere in the EU.

However, it is important to note that unless it has been fully harmonised at EU level, **Member States are allowed to have national requirements in place, if they are motivated, justified and proportional**. Typically, the national, regional or local requirements for goods are motivated by consumer protection and wider health and safety-related reasons, which are all valid objectives. Member States are obliged to ensure that any requirement restricts free movement as little as possible, while achieving the objectively motivated public policy objective. However, in practice, it is not easy to assess that this is always the case. It is also not always easy for stakeholders – such as businesses and local authorities – to know if, when and how mutual recognition applies in individual cases⁶⁰.

Whether or not the national requirements are justified and proportionate, they can surmount to large additional costs and lengthy, burdensome administrative procedures, potentially disincentivising a business from trading cross-border.

However, there are notable differences across goods sectors, where in some sectors the complexity and volume of technical requirements are more pronounced than in others. Such sector-specific obstacles will be described in more detail in Section 3.1.1.

One can reasonably expect the restrictiveness of a Member State's regulatory environment to be linked to its level of intra-EU trade integration. The more cumbersome it is to market goods in a particular country, the less likely it is that other Member States will export there. To the best of our knowledge, there is no quantitative indicator of individual Member States' intra-EU goods trade restrictiveness.

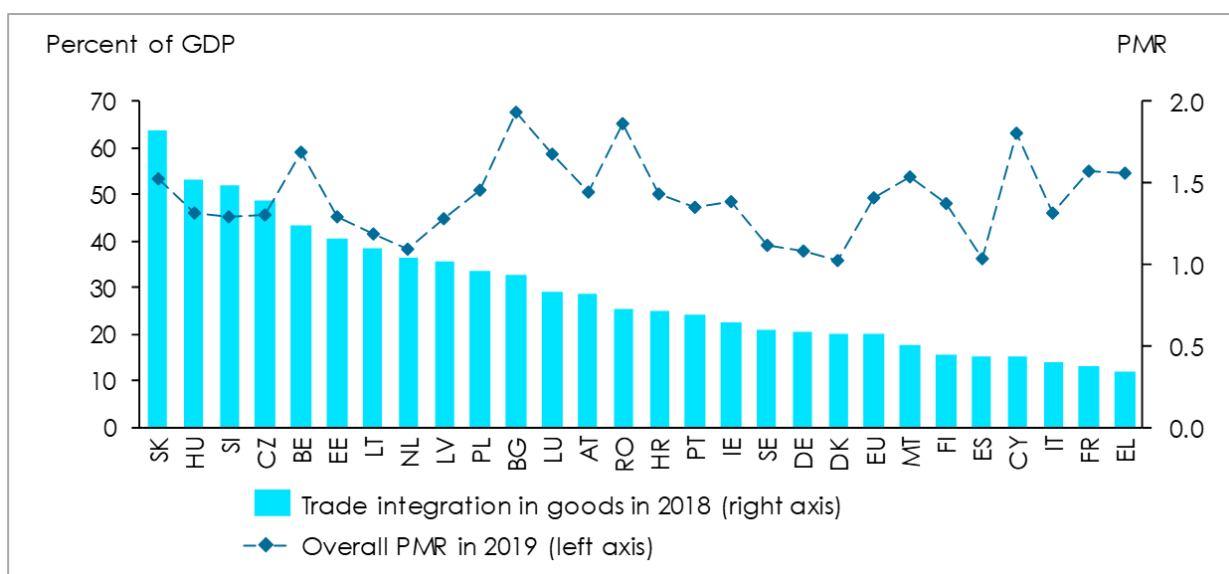
⁵⁸ European Commission, 2020, *Long term action plan for better implementation and enforcement of Single Market rules*, COM(2020) 94 final.

⁵⁹ National Board of Trade Sweden, 2019, *Reforming compliance management in the Single Market*.

⁶⁰ EY, Tech4i2, Time.lex and CEPS, 2017, *Study on the costs and benefits of the Mutual Recognition Regulation (EC) No 764/2008*.

However, the Organisation for Economic Co-operation and Development (OECD) Product Market Regulation (PMR) indicator⁶¹ assesses individual Member State's level of restrictiveness towards third countries (covering both national goods and selected service regulations), indicating the overall tendency of each country's restrictiveness. There does not seem to be a clear relationship between Member States' PMR and the level of intra-EU trade integration, see Figure 5. Although the PMR indicator may not fully capture the many restrictions that businesses face⁶², it indicates that the overall level of restrictiveness across sectors and Member States does not seem to be related to each country's intra-EU trade integration.

Figure 5: Intra-EU trade integration and Product Market Restrictiveness, 2018 and 2019, by Member State



Source: The EU Single Market Scoreboard and the OECD Indicators of Product Market Regulation.

Note: Intra-EU trade is measured as the average of intra-EU exports and imports.

However, a high-level, aggregate analysis does not take into account the fact that requirements placed on foreign companies, such as different product requirements or obtaining supplementary certification, can still have significant impacts on businesses. In the worst cases, such requirements are difficult to meet and may therefore entail a heavy administrative burden and high costs for firms that wish to sell their products in the Single Market. The burdens are relatively more problematic for SMEs with fewer resources and less cross-border experience than larger firms.

In the most recent business survey by Eurochambres, assessing the main obstacles associated with doing business within the Single Market, **69% and 78% of respondents respectively identified different national product rules and complex administrative procedures as significant or very significant obstacles**⁶³. Another study by KfW Research⁶⁴ on SMEs in France, Germany, the United Kingdom, Italy and Spain found that 37% of SMEs without exporting experience and 26% of SMEs with exporting experience believe that administrative procedures are too complicated.

⁶¹ Vitale, C., et al., 2020, *The 2018 edition of the OECD PMR indicators and database: Methodological improvements and policy insights*, OECD Economics Department Working Papers.

⁶² Pelkmans, J., 2017, *The New Restrictiveness Indicator for Professional Services: An Assessment*, Study for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

⁶³ Eurochambres, 2019, *The state of the Single Market: Barriers and Solutions*.

⁶⁴ KfW Research, 2018, *Internationalisation of European SMEs – Taking Stock and Moving Ahead*.

However, neither report reveals the extent to which the obstacles that firms face is unjustified or not. Thus, the evidence is sufficient to conclude that firms experience various obstacles in the Single Market, but they provide limited insights into the specifics of those obstacles.

Furthermore, even though the free movement of goods is largely well-functioning, there are individual sectors where obstacles are more abundant than in others. A recent Staff Working Document from the Commission represents a thorough exercise that maps out many of the obstacles that businesses face on their journey in the Single Market⁶⁵. In the following, we recap and elaborate on the obstacles identified by the Commission.

3.1.1. What are the current problems?

The complexity and quantity of national requirements varies across sectors, with some sectors being more regulated at national level than others. In this section, we focus on some of the key sectors that have been highlighted by the Commission, including the **construction products, industrial machinery, food and beverages, and waste management sectors**, chosen not only for their important economic contribution to the EU economy, but also because of the obstacles experienced in these sectors, as reported by businesses.

At an aggregate level, the European Policy Centre reports that EU businesses are struggling with increasingly complex technical regulations⁶⁶. They furthermore note that this is a particular concern for SMEs, since they have less capacity to ensure compliance with increasingly complex rules compared to larger firms. Increasing complexity is hard to capture in a quantitative indicator on restrictiveness and may thus fly under the radar of, for example, the OECD PMRs above. Unfortunately, even though it is reported that increasingly complex technical regulations are a major issue for EU businesses, there are no concrete examples of such complex regulations. Nonetheless, the lack of concrete examples does by no means indicate that the issue is not real.

However, the fact that rules are complex is not sufficient to be considered a barrier in the Single Market in itself. Ideally, national rules should be as simple as possible, but complex issues may require complex solutions. In such cases, **an assessment of the proportionality often requires in-depth technical expertise to evaluate if the complexity goes beyond what is necessary** to ensure, for example, the safety of the users of a product. This is especially difficult if the complexity does not have a clear discriminatory impact on foreign manufacturers of a product.

Thus, the responsibility largely falls on the competent national authorities to not adopt requirements that are unnecessarily complex. However, in order to facilitate this, the Commission or relevant EU authorities may be able to help by providing guidance and collecting best practices to increase the ability for national authorities to keep technical regulations as simple as possible, while achieving the necessary objectives also in complex situations.

Construction Products

The construction products sector is regulated at EU level by the Construction Products Regulation (CPR). The CPR is different from other EU product legislation in that it does not contain product-specific requirements. Instead, it establishes harmonised rules on how to assess and express the performance of construction products in relation to their essential characteristics (such as fire safety or mechanical resistance and stability).

⁶⁵ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

⁶⁶ European Policy Centre, 2019, *Making the Single Market work: Launching a 2022 master plan for Europe*.

The CPR also lays down harmonised rules on the CE marking of construction products. Harmonised European Standards are developed to enable manufacturers to draw up a Declaration of Performance of construction products – where such standards exist, it is mandatory for manufacturers to use them (unlike other product standards which typically are voluntary).

The reason for this oddity is that construction products are intermediate products by nature, and that it is Member States who are responsible for regulating and ensuring construction works' fire safety, mechanical resistance and stability. While it is a complex regulation, it has removed major restrictions to the free movement of construction products⁶⁷. The CPR prohibits the use of conflicting national marks or processes for products that are CE marked⁶⁸.

However, the CPR has been found to be underperforming in recent evaluations, both in terms of the scope of the regulation itself as well as its implementation⁶⁹. While there are 444 harmonised standards, which cover approximately 75-80% of the construction products on the market, all of these technical standards are based on mandates of the 1990s and early 2000s and many are outdated with respect to market and technical developments. **The lack of standards is problematic, since manufacturers cannot CE mark their products, which is the tool by which free movement of construction products is to be realised in practice.** Furthermore, the standardisation system under the CPR has not yet met the regulatory needs of Member States, and thus has not been able to prevent and remove unjustified (protectionist) national requirements.

As stated by the Commission: "*When the CPR was proposed, national marks and certifications were expected to disappear. This has, however, proven not to be the case: such national systems remain in place in several Member States*"⁷⁰.

National regulatory activity is relatively high for the construction sector in general across EU Member States. This is reflected in the number of notifications for draft technical rules, where the construction sector has historically had a high level of notifications relative to other sectors⁷¹. This fragmentation in national requirements and rules hinders the functioning of the Single Market for construction products by imposing costs and cumbersome administrative tasks on businesses wanting to trade cross-border within the EU. In fact, the administrative burden and cost to comply with EU and national certification rules as well as the lack of harmonisation of existing rules across different countries were identified as the top barriers to trade (69% and 63% respectively) by construction product and service businesses in a 2016 study on the cross-border trade of construction products⁷². Other barriers included lack of clarity of existing rules (61%), existence of national quality marks (58%) and lack of continuity of existing rules (45%).

For harmonised products, several Member States require national quality marks and documentation beyond the CE marking in national building regulations, even though they should be freely allowed to enter another Member State as per the CE marking.

⁶⁷ European Commission, European Construction Sector Observatory, 2018, *Strengthening the Single Market for Construction*.

⁶⁸ European Commission, 2011, *Guidance document - The application of the Mutual Recognition Regulation to non-CE –marked construction products*.

⁶⁹ European Commission, 2019, *Evaluation of the Construction Products Regulation*, SWD(2019) 1770 final.

⁷⁰ Ibid, p. 23.

⁷¹ European Commission, Staff Working Document, 2017, *Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition on goods lawfully marketed in another Member State*, SWD (2017) 471 final.

⁷² CSIL, 2017, *Cross-Border Trade For Construction Products*, European Commission.

This is seen for instance with the requirement to obtain SITAC, NBN and ACERMI certificates⁷³, which include the same characteristics as the CE marking for fire safety in Sweden, Belgium and France respectively⁷⁴.

The Commission has recently (7 March 2019) sent a reasoned opinion to Germany, and an additional letter of formal notice to Czechia, since both Member States impose additional requirements on road safety barriers that have already been assessed under the CPR and are duly CE-marked⁷⁵. By imposing additional national requirements on already CE-marked products, Germany and Czechia are creating unjustified barriers to trade. Already in 2012, the Commission took Germany to court over their continued use of national marks and approvals for already CE-marked products⁷⁶, and the CJEU has subsequently ruled that additional requirements on already CE-marked construction products are contrary to the CPR (initially ruled to be contrary to the Construction Products Directive, subsequently confirmed to also apply with regards to the CPR)⁷⁷. However, some Member States argue that the harmonised standards are not detailed enough for all essential characteristics of construction products, and that they therefore need to maintain additional national assessment methods, criteria and marks – Germany has appealed one of the recent Court rulings⁷⁸.

In France, all construction products used indoors need to be labelled with their volatile pollutant emissions (VOC emission class label). The relevant Decree states the obligation to include this label, which must meet specific size requirements and include mandatory wording in French on the product when it has been incorporated into the building or applied on a surface⁷⁹. EuroCommerce argues that this label increases costs without clear benefit to consumers, since the different emissions size classes may not be understood by consumers in all countries and may be in contradiction with other existing national rules.

Furthermore, for construction products where there is no harmonised European standard, **manufacturers have reported recurrent problems with the application of the mutual recognition principle in construction products**, whereby their products are met with national standards and additional requirements at Member State borders⁸⁰, despite being lawfully marketed in another Member State.

In cases where the principle of mutual recognition does not apply, or rather, where it is not accepted, the costs of adaptation and re-certification can be very high for construction products, amounting to up to 0.5% to 10% of turnover depending on the size of the business⁸¹. The lack of acceptance of the mutual recognition principle for non-harmonised construction products is particularly a problem in Germany and Belgium, where national authorities typically require separate approval processes and retests⁸².

⁷³ SITAC: Swedish Institute for Technical Approval in Construction, NBN: Bureau voor Normalisatie / Bureau de Normalisation; ACERMI: l'Association pour la Certification des Matériaux Isolants.

⁷⁴ Confederation of Danish Industry, 2018, *The way forward for the European Single Market – based on the experience of Danish businesses*.

⁷⁵ Infringement numbers 20164141 (Germany) and 20174036 (Czechia).

⁷⁶ European Commission, 21 June 2012, *Free movement of goods: Commission takes Germany to Court over barriers to trade in construction products*, available at: https://ec.europa.eu/commission/presscorner/detail/EN/IP_12_648.

⁷⁷ European Commission, 2019, *Evaluation of the Construction Products Regulation*, SWD(2019) 1770 final.

⁷⁸ Case C-475/19P, appeal to Case T-229/17.

⁷⁹ EuroCommerce, 2020, *Single Market Barriers Overview*.

⁸⁰ European Commission, Staff Working Document, 2017, *Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition on goods lawfully marketed in another Member State*, SWD (2017) 471 final.

⁸¹ European Commission, 2015, *Evaluation of the Application of the mutual recognition principle in the field of goods*, ENTR/172/PP/2012/FC.

⁸² Ibid.

In Germany specifically, the authorisation body is considered to be so dominant on the market that **it is virtually impossible to market a foreign product, even though mutual recognition should apply, without adhering to their rules.**

The supplementary requirements for both harmonised and non-harmonised construction products required by Member State authorities contribute to the fragmentation of the Single Market for producers, distributors and end-users in the construction product sector. In order to ensure progress and continued innovation in the construction products across the EU, measures relating to the administrative simplification and regulatory coherence should be adopted, thereby strengthening the functioning of the Single Market for construction products⁸³.

Indeed, **the CPR is currently under review** with a view to improve the EU market for construction products (the indicative timeline for a legislative initiative is set to Q3 2021)⁸⁴. The Commission has identified a number of policy options that represent different possible ways to go: in addition to the standard options of no change and repeal, a number of areas of improvement have been identified, as well as the possibilities to either limit or expand the scope and depth of the CPR⁸⁵.

Industrial machinery

The Machinery Directive (2006/42/EC) is the central piece of legislation governing the harmonisation of requirements for machinery at EU level. It promotes the free movement of machinery within the Single Market and guarantees a high level of protection for EU workers and citizens working with industrial machinery. It is an example of the "New Approach", where harmonisation is achieved via the combination of mandatory health and safety requirements and voluntary harmonised standards (the CPR described previously is also a "New Approach" legislation, but it has some specific differences to most other "New Approach" legislation).

An evaluation of the Machinery Directive found that the overall view among stakeholders was that the Directive has had a positive impact on the free movement of machinery within the Single Market, by harmonising rules and requirements⁸⁶. Moreover, only 9% of stakeholders reported that the mutual recognition principle was not accepted for their product in another Member State.

However, the Directive as well as the Single Market for machinery has not met its full potential due to lack of enforcement, as well as differences in the interpretation and application of the Directive. **National standards continue to take priority over the requirements set out in the Directive in certain Member States**, such as the Netherlands, Belgium, Germany, Poland, Italy and France. For example, in addition to the requirements set out in the Directive, German authorities require the "GS" mark⁸⁷ for harmonised CE-marked products, and in France, industrial machines must meet Apave standards⁸⁸. These additional requirements not only increase compliance costs but create an administrative burden that leads to delays in accessing new markets.

⁸³ European Commission, 2018, *Strengthening the Single Market for Construction*, European Construction Sector Observatory.

⁸⁴ European Commission, Inception Impact Assessment (17 June 2020), *Review of the Construction Products Regulation*.

⁸⁵ See the European Commission's dedicated webpage for the Review of the CPR, available at: https://ec.europa.eu/growth/sectors/construction/product-regulation/review_en.

⁸⁶ European Commission, 2018, *Evaluation of the Machinery Directive*, SWD(2018) 160 final.

⁸⁷ GS: Geprüfte Sicherheit (*Tested Safety*).

⁸⁸ Apave Certification is a recognised third-party body with a network of auditors and laboratories that, *inter alia*, tests and issues certifications of products and services.

The Commission has recently announced that it **will propose a revision of the Machinery Directive** during the second quarter of 2021⁸⁹. While the details of the proposal remain to be seen, the Commission expects, *inter alia*, to "address the risks stemming from new technologies while allowing for technical progress"⁹⁰. Previous communication from the Commission suggest that these revisions could include for instance product standards for artificial intelligence and the Internet of Things (IOT)⁹¹.

Thus, while it is currently not reported as a barrier, the Commission takes precautionary action by avoiding future fragmentation of the Single Market if Member States impose national requirements related to the modern, digital technologies in relation to industrial machinery. The EU legislators have already adopted a similar, pre-emptive approach to avoid obstacles in the Single Market, for example in the Regulation of the free flow of non-personal data which explicitly mentioned the risk of increased fragmentation in the future, as Member States are expected to regulate the issues more actively⁹².

Food and beverages

The food and beverages sectors are **highly harmonised** in the EU and considered an example of Single Market success, as reflected in the considerable increase in intra-EU trade in food and drinks⁹³. However, businesses in the food and beverages sectors are still witnessing a **lack of acceptance of mutual recognition of non-harmonised products, as well as an increasing trend by Member States to adopt national requirements for food and drink products**, which hinder the industry's ability to reach its full potential within the Single Market⁹⁴. Lack of acceptance of the mutual recognition principle is for instance seen with the temperature requirements imposed on semi-preserved foods in Denmark, as reported by a Swedish food business. The latter were required to send their products to an external cooling facility prior to entering Danish stores in order to meet the lower temperature requirements, leading not only to longer transport times, and thereby shorter shelf life, but also higher direct costs⁹⁵.

Recently, there appears to have been an **increase in fragmentation of food policy measures with regard to food labelling**. The Food Labelling Regulation (Regulation (EU) 1169/2011) allows Member States to have additional labelling requirements for specific categories of foods and for which there are no harmonised rules at EU level. However, the diversification of requirements in the field of food labelling has been found to have a negative effect on the EU food supply chain and constitutes a barrier to the Single Market⁹⁶.

Specifically, there is an increased trend of origin labelling requirements, which specifies the place of origin of the food product. Member States are able to adopt origin labels under certain conditions set out in the harmonised legislation despite the existence of common EU rules on origin labelling⁹⁷.

⁸⁹ European Commission, 2020, *Annexes to the Commission Work Programme 2021*, COM(2020) 690 final.

⁹⁰ *Ibid.*, p. 11.

⁹¹ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

⁹² Regulation (EU) 2018/1807.

⁹³ See the European Commission's dedicated webpage for the food and drink industry, available at: https://ec.europa.eu/growth/sectors/food_en.

⁹⁴ FoodDrinkEurope, 2018, *For a Single Market with a Purpose. A FoodDrinkEurope Manifesto*.

⁹⁵ Confederation of Danish Industry, 2018, *The way forward for the European Single Market – based on the experience of Danish businesses*.

⁹⁶ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

⁹⁷ As per Regulation (EU) 1169/2011, these conditions include: a) protection of public health; b) protection of consumers; c) prevention of fraud; d) protection of industrial and commercial property rights, indications of provenance, registered designations of origin and prevention of unfair competition.

In essence, as with Single Market rules in general, national labelling requirements must be motivated and proportional.

Within the EU, harmonised rules for origin labelling apply to pre-packaged pork, beef, poultry, honey, fruit, eggs and olives. However, the way in which the origin needs to be labelled and specified differs between groups of food. For instance, the place of birth, rearing and slaughter needs to be identified for pre-packaged beef, whereas for honey, the label needs to only identify whether the product comes from outside or inside the EU⁹⁸.

Eight Member States have adopted national mandatory origin labelling requirements on non-harmonised food groups. For instance, Italy has imposed a mandatory origin label on pasta and rice, where for the former, the label must show where the wheat was grown and milled, and for the latter, the label must indicate country of cultivation, processing and packaging⁹⁹.

A special Eurobarometer survey of 2019 found that "Where the food comes from" was the most important factor for EU consumers when they buy food¹⁰⁰. Typically, Member States motivate that such origin labelling requirements help protect consumers by increasing the information and transparency available to the consumer and helping the consumer to make an informed choice when purchasing food and drinks. Such mandatory requirements are **rarely not outright discriminatory**, since they typically do not contain requirements that only products from a certain location can be sold. Nonetheless, **they can have a restrictive effect on cross-border trade** in the Single Market, insofar as consumers prefer products from their home country. Thus, mandatory origin labelling would give local products an advantage over foreign products.

In addition, labelling requirements induce additional costs on producers. France was the first country to impose origin labelling on milk and milk used in dairy products, as well as meat used as an ingredient in pre-made foods¹⁰¹. As a result of this requirement, Belgian exports of milk to France declined by 17% prior to the implementation of the origin labelling requirement, and even more following the implementation. Operating costs can increase by an estimated 15-20% and as much as 50% when required to meet origin labelling criteria for their products. This is especially the case for SMEs, which generate almost 50% of the turnover in the food and beverages industry¹⁰², which typically have limited resources and opportunity to meet additional product criteria.

However, the important aspect to keep in mind is that restrictive measures are allowed if they are motivated and proportional. Insofar as mandatory origin labelling has a restrictive effect on trade (e.g. because consumers prefer local products because they are local), it must be motivated that mandatory origin labelling is the least restrictive way to achieve the desired level of consumer protection. **The CJEU has historically been reluctant to justify measures that restrict trade based on consumer protection**, but the Court has not yet provided guidance on how national origin labelling is to be interpreted in this regard¹⁰³. It would likely assess the extent to which the location of production is sufficient to say anything about the quality and safety of a product, compared to other types of consumer information requirements (e.g. those that are harmonised under EU law).

⁹⁸ National Board of Trade Sweden, 2020, *Made in EU. How country-of-origin labelling affects the Single Market*.

⁹⁹ European Parliament, 2018, Briefing. *Mandatory origin-labelling schemes in Member States*.

¹⁰⁰ EFSA, 2019, *Food safety in the EU*, Special Eurobarometer Wave EB91.3.

¹⁰¹ European Commission, 2013, *Report from the Commission to the European Parliament and the Council regarding the mandatory indication of the country of origin or place of provenance for meat used as an ingredient*, COM(2013) 755 final.

¹⁰² FoodDrinkEurope, 2019, *Data & Trends – EU Food & Drink Industry 2019*.

¹⁰³ National Board of Trade Sweden, 2020, *Made in EU. How country-of-origin labelling affects the Single Market*.

Lastly, mandatory labelling requirements are notified under the EU's notification procedure for technical rules¹⁰⁴ and for food information to consumers¹⁰⁵. Interestingly, when Spain proposed to adopt a mandatory origin labelling of milk, it notified its draft law in both procedures. The Commission did not comment on the proposal under the food information procedure, but the Commission and Member States reacted to its restrictive effect under the technical rules' procedure¹⁰⁶. This suggests that the choice of notification procedure impacts the level of scrutiny received by a labelling requirement that is (potentially) restrictive.

Waste management

The Waste Framework Directive¹⁰⁷ (WFD) provides a general legislative framework for waste management requirements and sets the basic waste management definitions for the EU. For waste that has undergone a recovery operation and thereby ceases to be waste, otherwise known as end-of-waste, there are harmonised EU-wide criteria only for iron, steel, aluminium¹⁰⁸ and copper scrap¹⁰⁹ and glass cullet¹¹⁰.

For all other materials, Member States are responsible (either at the national or sub-national level) to implement their own set of criteria or apply single-case end-of waste decisions, which can result in a fragmented approach and market distortions for the same materials. The Single Market for end-of-waste is therefore **predominantly non-harmonised and national criteria are often not recognised beyond borders**, making it difficult to trade such goods across borders¹¹¹. In the case of recycled plastics, Plastic Recyclers of Europe describe that the unstandardised and unharmonised collection and sorting schemes across the EU can lead to inconsistent quality of recycled materials, which hinder recyclers' ability to compete with virgin materials¹¹². Obviously, this also means that the transition to a circular economy is inhibited.

Extended Producer Responsibility (EPR) is an environmental policy tool used across the EU, whereby producers are held accountable for the collection, sorting and treatment of products at the post-consumer stage, therefore internalising the environmental externalities associated with their products. However, the EPR schemes can be complicated and are not harmonised at EU level, whereby they are implemented in a heterogeneous way across the Member States¹¹³.

This fragmentation increases the administrative and compliance costs for producers, but also creates opportunities for free-riding, where producers avoid the EPR obligations at their place of sale by not having a physical or legal entity there¹¹⁴. In addition, EPR schemes are typically designed for and target larger players, so that the administrative and financial burden of registering can be too high for SMEs selling only small volumes.

¹⁰⁴ Established in Directive (EU) 2015/1535.

¹⁰⁵ Established in Regulation (EU) 1169/2011.

¹⁰⁶ National Board of Trade Sweden, 2020, *Made in EU - How country-of-origin labelling affects the Single Market*, p. 18.

¹⁰⁷ Directive 2008/98/EC.

¹⁰⁸ Regulation (EU) 333/2011.

¹⁰⁹ Regulation (EU) 715/2013.

¹¹⁰ Regulation (EU) 1179/2012.

¹¹¹ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

¹¹² Plastic Recyclers of Europe, *Challenges and opportunities*, 2020.

¹¹³ Pouikli, K., 2020, *Concretising the role of extended producer responsibility in European Union waste law and policy through the lens of the circular economy*, ERA Forum, 20, 491-508.

¹¹⁴ Hilton, M., et al., 2019, *Extended Producer Responsibility (EPR) and the Impact of Online Sales*, OECD Environment Working Papers, No. 142.

The efficiency and effectiveness of EPR schemes and the Single Market for recycled products could be improved with more transparency (including availability of information online) and the application of harmonised EPR minimum requirements across the Single Market¹¹⁵.

As regards the market for secondary raw materials, there is a recognised **untapped potential in the remanufacturing and refurbishment of waste** internationally, and huge potential in better and more aligned functioning of the EU waste management sector. For instance, furniture and garment companies have expressed that it is too complex and costly to reprocess their secondary raw materials, limiting the potential for reuse as companies will instead treat them as waste rather than a reusable resource¹¹⁶. Minimising the administrative burdens associated with trading non-hazardous secondary raw materials, for example by harmonising definitions and criteria and aligning them more with existing EU legislation, could improve the functioning of the market for secondary raw materials in the EU.

The Waste Shipment Regulation¹¹⁷ (WSR) sets the procedures for the shipments of waste across borders. However, it has been argued that the regulation is outdated, and the **cross-border transport of waste is both expensive and difficult**, thereby further hindering the functioning of the market for secondary raw materials in the EU¹¹⁸. Its main aim was and is to limit the shipment of waste. As environmental considerations are becoming increasingly recognised and technological solutions are being developed for highly specialised waste treatment facilities, such as Apple's recycling robot Daisy in the Netherlands¹¹⁹, the scale advantages and high-technological waste treatment is inhibited when waste cannot cross borders in the EU.

Essentially, **waste is to a larger extent becoming a tradable product category, and the EU should ensure that the free movement of goods also applies to waste**, while ensuring the health and safety of consumers and the environment. A worst-case scenario would be that actors refrain from making large-scale investments in modern waste treatment and recycling solutions because they fail to reach sufficient scale (of waste to process) due to intra-EU cross-border barriers.

In addition, some estimates indicate that the non-compliance rate of the WSR could be as high as 25%¹²⁰, where illegal shipments still take place within the EU. The main obstacles behind the poor implementation of the Regulation are the burdensome and lengthy notification procedures, as well as different interpretations of waste classifications by Member States¹²¹. The table below includes a ranking of the main drivers behind the regulatory failures associated with the WFD and the WSR in the EU waste markets, as identified by a Commission study in 2016¹²². These obstacles hinder the free movement of waste for recovery around the EU, as waste operators are faced with high compliance costs and increased uncertainty.

¹¹⁵ Eunomia, 2020, *Study to Support Preparation of the Commission's Guidance for Extended Producer Responsibility Scheme*.

¹¹⁶ BusinessEurope, 2020, *Improving Waste Shipment Regulation to facilitate Circular Economy in EU*.

¹¹⁷ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste.

¹¹⁸ Business Europe, 2020, *Improving Waste Shipment Regulation to Facilitate Circular Economy in the EU*.

¹¹⁹ Apple, *Apple expands Global Recycling Programs* [Press Release], 18 April 2019.

¹²⁰ European Commission, *Waste Shipments*.

¹²¹ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

¹²² European Commission, 2016, *The efficient functioning of waste markets in the European Union*, final report.

Table 3: Main causes behind regulatory failures in EU waste markets

Ranking	Description
1	Different interpretations of the definition of "waste" according to the WFD.
2	Divergent classifications of waste as "hazardous" or "non-hazardous" according to the WFD.
3	Application of national end-of-waste criteria established in accordance with the WFD.
4	Application by national authorities of the provisions concerning waste shipments through transit countries in accordance with the WSR.
5	Application of the system of notification and consent requirements in accordance with the WSR.

Source: European Commission, 2016, *The efficient functioning of waste markets in the European Union*, final report.

3.1.2. Concluding remark: Is there a growing trend of these problems in the EU?

Based on the available evidence and reports on obstacles and barriers, **there does not appear to be a clear, conclusive indication that there is an increasing trend of obstacles** in the EU regarding difficulties in meeting requirements to sell goods cross-border in the EU. Even more so, any restriction that emanates from national legislation or administrative practice must be analysed in comparison with its objective – only restrictions that go beyond what is objectively motivated and proportional to achieve that objective are considered as contrary to EU law. Thus, even if it is the case that restrictions are increasing, it must also be assessed to what extent they are unjustified.

However, it would be premature to conclude that there is no growing trend of national obstacles to the free movement of goods in the Single Market. The analysis shows that there are **a number of obstacles that are sector-specific**, so any aggregate or overall assessment may not fully capture the development in individual sectors. In addition, there are quotes from reports that rules are getting increasingly complex, but they lack concrete examples and it is therefore not possible to assess whether the increase in complexity is justified or not.

For the construction products sector, national obstacles do not necessarily appear to be increasing, but rather that "old" obstacles are still in place. There are still national requirements, marks and processes in place across the EU, despite them covering the same aspects as the CE mark.

For the industrial machinery and the waste sectors, there is equally not a strong suggestion of increasing obstacles, but rather that the markets are shifting so that regulations are becoming outdated. Thus, the impact on free movement is similar to if new obstacles were introduced.

Lastly, in the food and beverages sectors, there certainly appears to be an increased introduction of national mandatory origin labelling requirements. There is a strong suspicion that such requirements are restrictive and possibly unjustified, however there is of yet no concrete guidance from the CJEU as to their compliance with EU law. However, the Commission and Member States have pointed out the possible restrictive impact of such requirements.

3.1.3. What tools exist at EU and national level to address these problems?

a. Directive (EU) 2015/1535 – the Single Market Transparency Directive¹²³

One of the major tools to prevent obstacles to free movement of goods is the notification procedure for draft national technical rules established in Directive (EU) 2015/1535. Such national rules are introduced on top of, or in the absence of, harmonised rules at the EU level (indeed, where there is full EU harmonisation, Member States are not allowed to introduce national rules). The procedure allows for transparency, whereby both **the Commission and Member States can scrutinise draft technical legislation** and, ideally, prevent protectionist measures from being implemented. Following the notification of a draft technical rule, a three-month standstill period begins during which the Member State cannot adopt the rule. If a technical rule has not been notified under the procedure, it is unenforceable in individual cases.

In 2019, there were 694 notifications made under the procedure, which is slightly lower than previous years¹²⁴. By far the most common sector for notifications is construction products, followed by agricultural, fish and food products (approximately 160 notifications each). In the latter category, several notifications concern labelling and quality requirements. There is also a tendency that notified rules concern sustainability, for example with regard to single-use plastic products.

The Commission gave a detailed opinion – its strongest tool under the procedure where national rules appear to be contrary to EU law – in 38 cases. This forces the Member State to report how it will respond to the detailed opinion (i.e. explain further or make changes to the technical rule). 38 detailed opinions are on par with 2018 and 2017, but significantly lower than in 2016 and especially 2015 (where the Commission gave 78 detailed opinions). It is not possible to draw a definitive conclusion, but it **may reflect that Member States have improved the drafting of technical rules, avoiding imposing unjustified obstacles**.

In 2019, one draft technical rule was withdrawn following the detailed opinion, and 15 were changed and then approved by the Commission. The Commission did not find the changes satisfactory in three cases, which may lead the Commission to intensify the consultation with the notifying Member State(s). The Commission can also choose to initiate infringement proceedings against the Member States over the restrictive national technical rules. The remaining 19 cases have yet to be concluded.

In addition to the detailed opinions, the Commission gave a comment – the least strong tool, requiring clarification of the notified technical rules so as to ensure that they do not impose an unjustified barrier to trade – in 180 cases. This is slightly fewer comments than in previous years. While a comment is not as strong a tool as a detailed opinion, they do reflect a concern that the notified draft regulation is constituting an unjustified restriction to the free movement of goods.

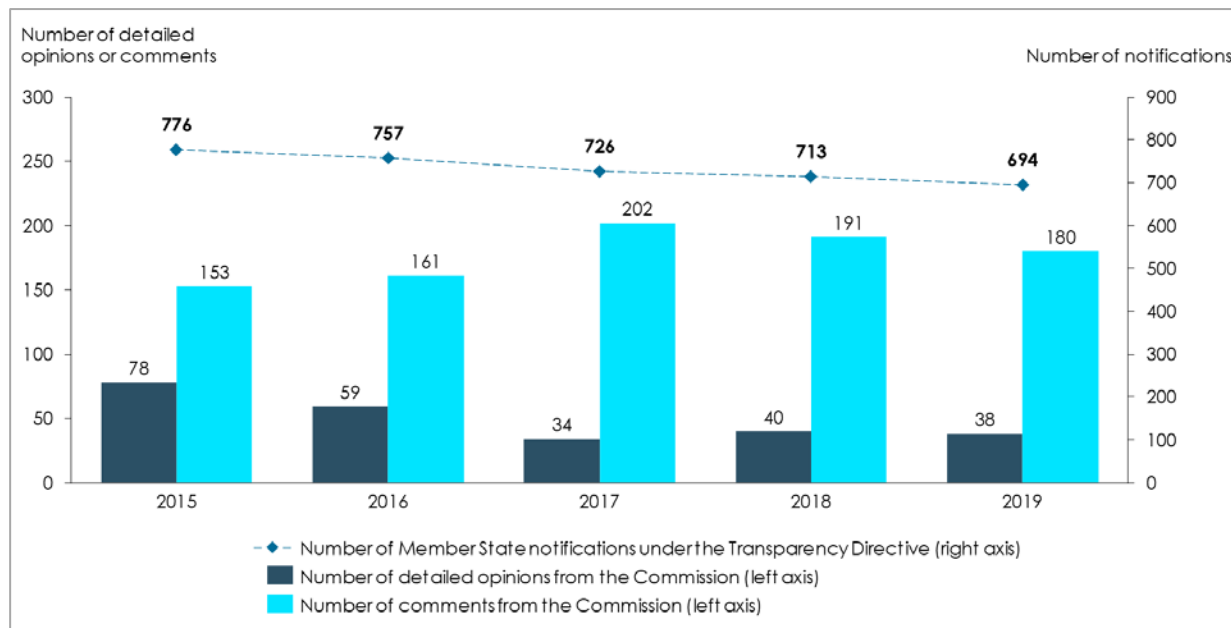
Figure 6 provides an overview of the notifications and the Commission's reactions to them, over the past five years. In relative terms, it is clear that the Commission issued fewer detailed opinions and more comments in 2019 compared to 2015.

¹²³ Dating back to 1983 as Directive 83/189, aiming to facilitate the disciplining of newly proposed national technical rules by waiting periods for (sometimes in-depth) comments by other Member States and the Commission, possibly fearing new barriers to free movement. In Pelkmans & Correia de Brito (2012), an attempt is made to estimate how many barriers have probably been pre-empted by the working of this directive and its committee over two decades: this runs into the thousands. Note that the Directive's scope is solely on non- or partially harmonised goods (i.e. the scope is in the area for mutual recognition). Preventing new technical barriers from arising has of course also helped mutual recognition.

¹²⁴ National Board of Trade Sweden, 2020, *Årsrapport 2019 - Ett europeiskt remissförfarande som förebygger otillåtna handelshinder Anmälningar av tekniska föreskrifter enligt direktiv (EU) 2015/1535*.

While the Commission has reacted to around 30% of the notifications each year, in 2019 the Commission issued a detailed opinion to 5% of the notifications and a comment to 26% of them, the corresponding shares were 10% and 20%, respectively, in 2015.

Figure 6: Number of notifications, detailed opinions and comments under the Transparency Directive, 2015-2019



Source: National Board of Trade, 2020, Årsrapport 2019 - Ett europeiskt remissförfarande som förebygger otillåtna handelshinder Anmälningar av tekniska föreskrifter enligt direktiv (EU) 2015/1535, and the TRIS database.

b. SOLVIT – the EU-wide informal problem-solving network

Please note that SOLVIT is available to businesses and citizens when they encounter restrictions to free movement in the EU. It is a tool that encompasses virtually all types of obstacles that we highlight in this report. Thus, this section gives a broad and general overview of SOLVIT, as well as addressing issues related to free movement of goods. In order to avoid repetition, any subsequent section of this study will mention SOLVIT only briefly and/or in relation to the potential specificities related to specific types of obstacles of that section.

When firms encounter obstacles to the free movement of goods, they can turn to the informal problem-solving SOLVIT network that exists in all Member States in the Single Market. The aim of SOLVIT is to remove unjustified obstacles to free movement via informal means of dialogue and cooperation, thus avoiding more complex and lengthier formal, legal procedures. The system appears to generate benefits for those who use it – in 2019, 89% of the SOLVIT cases were resolved.

However, there is substantial room to improve the *efficiency* of the SOLVIT network. The Single Market Scoreboard monitors the performance of the national SOLVIT centres, primarily by measuring the timeliness of the SOLVIT centres' operations, which is a measure of efficiency¹²⁵.

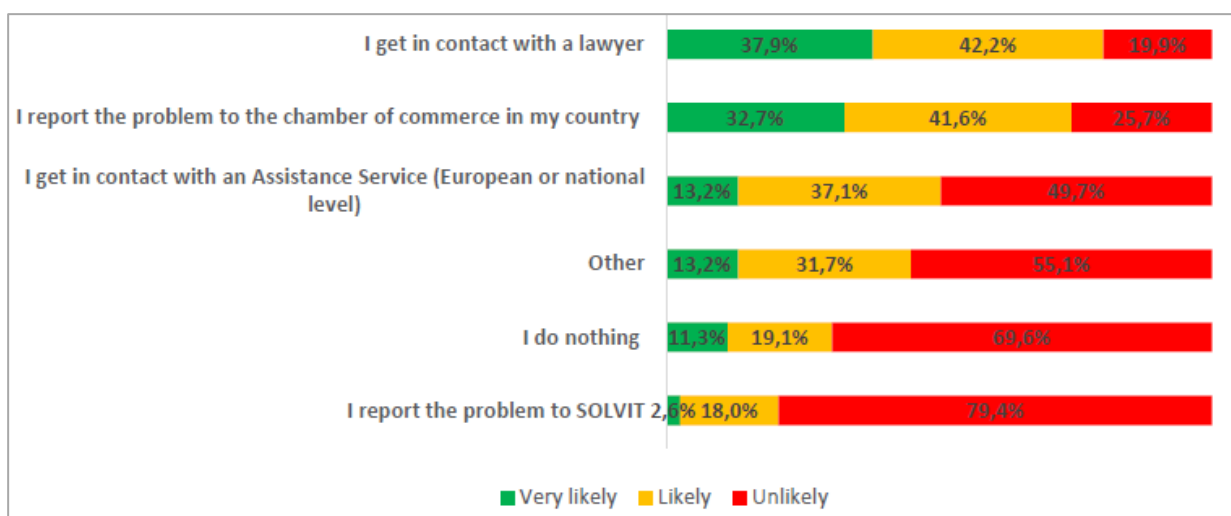
¹²⁵ The Scoreboard measures each SOLVIT centres' performance regarding: (1) sending an initial reply within the 7-day target; (2) submitting case to lead centre within 30-day target; (3) accepting a proposed solution within 7-day target; and (4) not accepting a complaint within 30 day target. For businesses, they measure (5) accepting a case within 7-day target; (6) handling a case within 10-week target; and (7) the resolution rate. Detailed data across each parameter per Member State is available in the Single Market Scoreboard.

No less than eleven Member States have an overall performance that falls below target, notably including all five of the largest Member States (Germany, France, Italy, Spain and Poland). 15 Member States had a resolution time beyond the targeted 10 weeks in more than 25% of the cases. 12 Member States had more than 10% of the cases unresolved.

However, while SOLVIT handled 2,387 cases in 2019, **a mere 128 (5%) of these were reported by businesses**¹²⁶. The trend shows no sign of improvement, since the number of business cases has never reached beyond 212 (in 2011), while issues reported by citizens have remained above 2,000 every year since 2014. The majority of cases relate to social security issues (60%) and free movement of persons (19%), and only 1.1% of SOLVIT cases in 2019 concerned free movement of goods. If one only looks at business cases reported to SOLVIT, free movement of goods represent 18% of the total business case load (taxation is the most common issue, 36% of cases).

In a survey among its members, Eurochambres found that only 2.6% of respondents were very likely to turn to SOLVIT for help, see Figure 7. Far more common was to call in a lawyer, or to report the problem to the chamber of commerce in the home Member State. **Interestingly, "Doing nothing" was actually more common than invoking assistance by means of SOLVIT.**

Figure 7: Actions that businesses take when confronted with a Single Market obstacle, 2019



Source: Eurochambres, 2019, Business Survey: The State of the Single Market.

Thus, it is clear that only a minority of situations where firms encounter obstacles to their free movement of goods are actually reported to SOLVIT.

There are likely many reasons for this lack of utilisation of the SOLVIT network. **Lack of awareness** of its existence is certainly a prominent reason, but it is also likely that businesses consider it **less costly to simply comply with national requirements instead of claiming their rights** (e.g. due to an interest to not get into a conflict with the local authorities in the importing Member State, or due to an uncertainty of the timing and/or outcome of the SOLVIT procedure).

It is also possible that SOLVIT is not used by businesses when they encounter restrictions to free movement because it is required that a business (or an individual, for that matter) receives an individual negative decision from an authority in the importing Member State, before the SOLVIT process can begin.

¹²⁶ Ibid.

Thus, if a business has discovered a national rule that is restrictive to free movement before they begin exporting (e.g. during their market assessment and analysis of relevant applicable rules in the importing Member State), the SOLVIT process cannot be initiated against that rule. Instead, the business has to start exporting, receive a negative decision against their exports of their product from the local authority (including possibly being fined), in order to start the SOLVIT process.

Furthermore, it happens that businesses which turn to SOLVIT are informed that the restrictions to free movement that they have encountered are not considered barriers to free movement in the meaning of EU law¹²⁷. In 2019, SOLVIT received **2,977 complaints that were not within its remit** (to be compared to the 2,387 handled cases – a majority of complaints are therefore not within SOLVIT's remit). Naturally, SOLVIT cannot (and should not) address issues that are not contrary to EU law. Nonetheless, a business may leave disappointed and is unlikely to spread the word about SOLVIT's benefits to other businesses.

3.2. Insufficient information about applicable rules

3.2.1. What are the current problems?

In addition to the sometimes complex national regulatory requirements that exist in the market for goods across Member States, businesses have expressed problems in obtaining sufficient information about product-specific rules and processes, which are often the prerequisite to marketing a specific good in a Member State¹²⁸. In fact, **inaccessibility to information on rules and requirements was identified as the third most significant obstacle to selling cross-border** by 67% of producers according to a 2019 business survey¹²⁹. Among the same group of respondents, 87% of producers identified better information regarding all necessary procedures and formalities to operate in another EU Member State as a necessary improvement to doing business cross-border within the EU.

This problem with lack of access to information is **likely to be more pronounced for SMEs** than large businesses **and for companies with limited or no exporting experience**, since it requires both market access experience and resources to find relevant information. Another study found that 31% of SMEs without exporting experience in the five largest Member States, compared to 9% with exporting experience, experienced that not knowing the rules which have to be followed is a major obstacle to exporting to different Member States¹³⁰.

Each Member State is responsible to administer a Product Contact Point (PCP)¹³¹. The PCPs provide information about the principle of mutual recognition in the field of goods, as well as providing personalised assistance to queries from businesses regarding specific (non-harmonised) product requirements in individual Member States within 15 working days.

¹²⁷ In 2019, SOLVIT received 2,977 complaints that were not within its remit (to be compared to the 2,387 handled cases – most complaints therefore do not fall within SOLVIT's remit). In addition, a recent report has noted that SOLVIT Sweden received 9 cases related to COVID-19 measures in EU Member States since March 2020 but considered neither of them to be contrary to EU law and therefore the SOLVIT procedure was not initiated. See National Board of Trade Sweden, 2020, *COVID-19 och den fria rörligheten – Preliminära lärdomar från hälsokrisen*.

¹²⁸ Association of German Chambers of Commerce and Industry, 2019. *Survey on Single Market Obstacles 2019*.

¹²⁹ Eurochambres, 2019, *The state of the Single Market: Barriers and Solutions*.

¹³⁰ KfW Research, 2018, *Internationalisation of European SMEs – Taking Stock and Moving Ahead*.

¹³¹ Currently established via the Mutual Recognition Regulation (EU) 2019/515 but they were first introduced via the preceding Regulation (EC) No 764/2008.

However, as noted in recital 7 of the 2019 Mutual Recognition Regulation (EU) 2019/515, "...**the Product Contact Points network [...] is barely known or used by economic operators**" and that "...national authorities do not cooperate sufficiently". In addition, a 2015 evaluation report pointed out that PCPs rarely were able to determine which documentation was necessary from a business to prove that their product is lawfully marketed in another Member State, that many PCPs were not sufficiently staffed to carry out their obligations in a useful manner, and that it was common that the relevant information was not communicated within the stipulated 15 working days¹³².

Thus, the PCPs hardly achieved their objective of increasing access to information about applicable rules and facilitate free movement of goods in the Single Market.

Similarly, each Member State is required to have a specific Product Contact Point for Construction (PCPC)¹³³. The PCPCs have a similar obligation as the PCPs, but with a specific focus on construction products, as well as additional obligations to provide information about rules relating to incorporation, assembly or installation of construction products, or national provisions relating to fulfilling the basic requirements for construction works. However, while not formally wrong, the Commission's 2019 evaluation report pointed out that **the PCPCs appear to mostly be used in a national context** (i.e. local businesses asking about local rules), rather than serving to inform about rules for business that wish to sell construction products across borders in the Single Market¹³⁴. In its tentative policy options for a possible revision of the CPR (see Section 3.1.1), the Commission has suggested that an investigation could be launched on how the PCPCs are currently being used. If it turns out that they are rarely being used for their current purpose, a different purpose could be adopted, such as providing information on the harmonised system created by and under the CPR¹³⁵.

The inaccessibility to information could therefore be considered a two-dimensional problem. On the one hand, **national rules can be either too complex or too general**, whereby compliance is made difficult with unclear specifications. On the other hand, **information on rules is not accessible online or is incomplete**, in which case a business needs to seek further information elsewhere¹³⁶. The fines for non-compliance are sometimes substantial, so the lack of access to relevant information about applicable requirements is an important deterrent for firms wishing to trade cross-border¹³⁷. In other cases, when product standards are not available online, businesses might turn to third-party certification or other means of demonstrating compliance with relevant rules, before they can export their products to Member States where requirements are missing. Obtaining third party certification is both a costly and time-consuming process and might result in the decision not to market a certain product.

In the area of waste management, data on secondary raw materials are not available from a single source and are incomplete and inconsistent within the EU, making them difficult to use and compare. Plastics Recyclers Europe describe that the European market for plastic recycling lacks sufficient traceability and transparency, where information about recycled plastics is missing or unclear. The lack of data about stocks and flows of raw materials prohibits access to sustainable raw materials for European manufacturing industries.

¹³² European Commission, 2015, *Evaluation of the Application of the mutual recognition principle in the field of goods*.

¹³³ Established via the Construction Products Regulation (EU) 305/2011.

¹³⁴ European Commission, 2019, *Evaluation of Regulation (EU) No 305/2011*, SWD(2019) 1770 final.

¹³⁵ European Commission, 2020, *Refined indicative options for the review of the Construction Products Regulation*.

¹³⁶ European Commission, Staff Working Document, 2017, *Synopsis report on the stakeholder consultation on the Single Digital Gateway*, SWD(2017) 212 final.

¹³⁷ BusinessEurope, 2020, *Examples of Single Market barriers for businesses*.

Better data availability, both in terms of the amount and consistency of information and being accessible from a single source, is needed in order to improve the Single Market for recycled products and secondary materials.

3.2.2. Is there a growing trend of these problems in the EU?

There **does not appear to be a growing trend per se related to a lack of information about applicable rules**. Rather, it appears to be a problem that remains broadly unchanged, albeit with signs of a slight improvement: Eurochambres finds that while 69% of business respondents found that inaccessibility of information on rules and requirements was a significant factor in the 2019 survey, the corresponding share in their 2015 survey was 81%. The fact that 69% of firms still consider this to be a significant factor (26% consider it to be "extremely significant") nonetheless suggests that there is room for improvement.

3.2.3. What tools exist at EU and national level to address these problems?

The requirements for the PCPs were **recently updated with the entry into force of the Mutual Recognition Regulation (EU) 2019/515**. For example, the scope of the PCPs has been expanded to be the principal providers of information on all product-related rules (including, but not limited to) technical rules covered by mutual recognition, and a strengthened requirement to ensure that they are appropriately equipped and resourced to carry out their responsibilities. PCPs shall also provide information relating to the assessment procedure for goods that the new Regulation introduces. Furthermore, the Mutual Recognition Regulation explicitly establishes that the PCPs should live up to the quality criteria established in the Single Digital Gateway Regulation (EU) 2018/1724.

For construction products, dedicated Product Contact Points for Construction (PCPCs) exist in each Member State to inform about relevant rules and regulations for construction products, but as previously mentioned **their purpose may be updated** to ensure that they usefully provide relevant information to businesses and facilitate cross-border trade of construction products in the Single Market.

In addition, the Single Digital Gateway will become a reality by the end of 2020, which is expected to facilitate businesses' awareness and ability to access relevant information via a single entry point (see Section 4.2.3 for a more detailed elaboration on the Single Digital Gateway). The fact that there indeed will be a **single entry point** may help to overcome the aforementioned issue of businesses not being aware of the available sources for information channels. Indeed, a recent study for the European Parliament concludes that the disparity and number of various EU contact points has created a problem for businesses and citizens¹³⁸. It also notes that the Single Digital Gateway is likely to remedy this problem by simplifying and improving the available assistance.

¹³⁸ Salsas-Forn, P., et al., 2020, *The role of Points of Single Contact and other information services in the Single Market*, Publication for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

3.3. Problems with mutual recognition affecting the free movement of goods

Free movement of goods can be combined with diversity or heterogeneity between the laws of the Member States. In order to achieve and maintain this remarkable combination, several conditions have to be fulfilled, which may well become rather detailed and technical in specific cases. However, in many goods markets, mutual recognition is not practical and EU harmonisation of the relevant technical aspects based on agreed equivalence of objectives of health, safety, environment and consumer protection has been chosen. Nowadays, **some 18% of intra-EU trade in goods falls outside the harmonised categories**¹³⁹. **It is in these goods markets where mutual recognition is relevant.** These goods are either only partially harmonised on some aspects or not harmonised at all. Some of these sectoral goods markets are regulated (often differently between the Member States), some goods are not regulated at all¹⁴⁰, and some are regulated in one Member State and not in another.

The fundamental idea behind mutual recognition is as simple as it is brilliant. The TFEU provisions on the free movement of goods (dating back to the Rome Treaty of 1957) entitle Member States to prohibit or condition goods imports from other EU Member States in case of (what the CJEU has called) "*overriding reasons in the public interest*". Usually, these refer to health, safety, environment and consumer protection objectives in that Member State. In other words, mutual recognition is interwoven with "risk regulation" related to these four broad objectives of goods regulation. Enforcement (say, in the 1960s or 1970s) used to be simple: if imported goods do not adhere to domestic (risk) regulation, they cannot enter or must be adapted.

What mutual recognition changed is that a fundamental distinction is (indeed, must be) made between risk regulation objectives (the overriding reasons) and technical instruments (usually technical annexes to laws or decrees, or references to technical standards). The purpose of the Member States' rights to block the free movement of goods is to protect its citizens against undue risks in the four broad objectives mentioned. For EU law, what matters is that national governments can always protect its citizens against imported goods undermining these objectives.

But when is that the case? Between EU Member States, risk objectives are usually "equivalent", although the precise technical laws about ensuring such objectives may differ (and indeed often did, especially still in the 1970s). Hence, if risk regulation objectives are "equivalent", goods from other EU countries do not endanger the citizens of the importing country. **It is this fundamental insight that underlies the CJEU's case law prompting mutual recognition.**

And the practical test employed by the CJEU is equally straightforward: if a product has been lawfully produced and marketed in another Member State, why would a second Member State have "overriding" reasons in the public interest to block imports of this product? The fact that technical provisions in its laws would not be adhered to is not relevant for the CJEU, only the equivalence of risk objectives, unless the importing Member State can demonstrate that its objectives are indeed undermined. Ever since the *Cassis de Dijon* ruling, many hundreds of CJEU cases have tested this basic idea, most frequently in the food sector.

¹³⁹ EY, Tech4i2, Time.lex and CEPS, 2017, *Study on the costs and benefits of the revision of the Mutual Recognition Regulation (EC) 764/2008*, p. 22.

¹⁴⁰ Although there might be broader horizontal obligations of safety or environment for example. Thus, the market for teaspoons is not regulated, but teaspoons cannot be so sharp as to cause injury or made of materials inimical for the environment (plastic teaspoons). If certain teaspoons would be regarded as risky products causing injury, in the absence of regulation, they would be subject to the General Product Safety Directive 2011/95/EC and probably reported to the Rapid Exchange of Information system (RAPEX alert system) by Member States (and presumably taken off the market).

The long-term significance of mutual recognition for the free movement of goods is further discussed here. The importance of the distinction between risk regulation *objectives, if indeed equivalent between Member States*, and (technical) regulatory *instruments* has **greatly helped to accomplish far-reaching free movement of goods in the EU in two complementary ways.**

One way is that it transformed the method of EU goods harmonisation for many goods considered outside the high-risk categories. Rather than trying to agree on numerous technical specifications, this "New Approach" begins by jointly defining the relevant risk objectives in directives (hence, by definition "equivalent") and subsequently refers to European technical standards based on those risk objectives. These European harmonised standards are written by the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI), the three European standardisation bodies recognised for this purpose. Companies greatly appreciate reference to European standards, as they are clear to enterprises and provide a *presumption of conformity* to the relevant risk objectives, thereby allowing free movement.

The result is that harmonisation in the EU/EEA consists of an "Old Approach" with very detailed prescriptive technical regulation for cars, tractors, chemicals, medicines, etc. and a "New Approach"¹⁴¹ consisting of directives specifying common risk objectives, reference to European standards and some administrative or procedural provisions. Even when focusing on mutual recognition, it is crucial to realise that the new methods of goods harmonisation have greatly facilitated harmonisation, as it is simply much easier (in most cases) for governments to agree on or align with common risk objectives than on endless series of highly technical specifications¹⁴². In turn, this implies that the scope of mutual recognition – where no common EU regulation exists – has reduced in the last three decades. Indeed, the 1997 Atkins report¹⁴³ still estimated that harmonisation covered roughly 50% of intra-EU goods trade, the rest being unregulated or nationally regulated, but under mutual recognition. Their estimate of trade under mutual recognition was 25%, some 7% higher than today.

The other way is that mutual recognition – based on CJEU case law – has become more operational. At first, this was not at all the case. Judicial mutual recognition was mainly a question of cases in courtrooms. In actual business practice ("on the ground"), it turned out that mutual recognition did not work well at all due to the invisibility of mutual recognition for national officials and the high costs of realising it¹⁴⁴.

Making mutual recognition much more operational has proven to be like sailing towards a receding horizon, for some four decades. Progress in ensuring mutual recognition has been made due to a seemingly never-ending series of cases before the CJEU (although today far fewer than in the 1980s and first half of the 1990s). In addition, occasional regulatory reforms at the Member State level have facilitated mutual recognition. Explanatory guidance papers by the European Commission in 1999, 2002, 2003 and 2013 also helped, as well as several sectoral "guidances".

¹⁴¹ Meanwhile renamed as the New Legislative Framework Regulation EC/765/2008 and Decision 768/2008.

¹⁴² An illustration: The Machinery Directive 2006/42/EC covers an estimated 84,000 *types* of machines. It induced no less than over 1200 European standards. It is simply unthinkable that national governments could have negotiated these successfully under the Old Approach, and it would have been excessively slow. It might also have caused inflexibilities hindering innovation which is critical in this huge sector.

¹⁴³ Atkins, W., 1997, *Technical Barriers to Trade, study for the Single Market Review (led by Commissioner Mario Monti)*, Luxembourg, Office of Official Publications & Kogan Paul (London). Chapter 19 p. 3 finds 34% under the Old Approach, 17% under the New Approach (so, 51% of intra-EU goods trade harmonised in the mid-1990s); 25% of this trade falls under mutual recognition; 19% of intra-EU trade enjoys mutual recognition agreements for testing and certification bodies (now automatic for New Approach products under Regulation 765/2008) and 15% of trade is not aided either by harmonisation or mutual recognition.

¹⁴⁴ See Pelkmans (2002) and (2007).

In addition, progress has been made by stronger procedural protection (against Member States) for companies trying to access a national market relying on mutual recognition provided by Regulation 2008/764. The principle was recently further improved with Regulation 2019/515. In addition, other pieces of EU legislation are indirectly supporting the principle such as Regulation 1025/2012 on European standardisation and Directive 2015/1535 on the (obliged) notification to the Technical Regulations Information System (TRIS) database and the relevant committee (for discussing such notifications) by Member States of technical regulations and rules (in non-harmonised areas of goods as discussed above).

SOLVIT has also been used, but only sparingly, as businesses (unlike individuals) are less interested in SOLVIT – **the typical mutual recognition cases are legally complex**, and companies are of the view that SOLVIT is not suitable for these (although it should be noted that Regulation 2019/515 introduces the possibility to request an opinion from the Commission which could strengthen the effectiveness of the SOLVIT procedure for cases regarding mutual recognition). The previously mentioned Directive 2015/1535 (the Single Market Transparency Directive, see Sections 2.3.1 and 3.1.3) disciplines Member States when adopting new technical rules by encouraging mutual recognition clauses and discussing, with other Member States and the Commission, the possible impact of the proposed new rules on other EU partners. The CJEU has supported the credibility of this directive's operation in the *Securitel* case by ruling that a proposed measure which has not been notified can be declared null and void by a national court once having become a national law¹⁴⁵.

3.3.1. What are the current problems?

When goods are not (or not fully) harmonised, Member States remain free to regulate rules with respect to designation, form, size, weight, composition, labelling, etc., but these rules cannot act as barriers to free movement in the sense of Articles 34-36 of the TFEU and are also subject to mutual recognition as developed from the *Cassis de Dijon* ruling. In other words, if a business is lawfully selling a good in one Member State, it should be able to sell it in other EU Member States without having to adapt it to national rules because it can reasonably be supposed to fulfil equivalent levels of protection. However, such **mutual recognition is not absolute**: an importing Member State may forego mutual recognition if the risk regulation objectives (of health, safety, environment, consumer protection)¹⁴⁶ are not equivalent, justifying overriding the principle of free movement. In this case, **the measure taken by the importing Member State must be proportionate**. Numerous CJEU rulings have ensured that exceptions to mutual recognition must be narrowly interpreted and are subject to a **cooperation duty with other Member States**. Over time, EU law and guidance have insisted that Member States have to provide **detailed and thorough evidence before blocking or conditioning access to their market**.

This summary reflects how the CJEU and EU law handbooks explain mutual recognition. And in food and a few other instances it has worked like that with considerable success. But for lots of other businesses in the EU, it did not deliver unhindered market access. In fact, the application of mutual recognition turns out to be very complex and sometimes technical indeed.

¹⁴⁵ Case C-194/94.

¹⁴⁶ Such objectives may require greater detail or precision, in light of the risks at issue. A helpful way to understand it is by remembering how EU impact assessments approach this question, in which three levels of increasing precision of objectives are distinguished: general, specific and operational objectives. Even when there is equivalence in general and specific risk objectives, there might be (sound) reasons for possible non-equivalence of operational objectives in complex areas or where science is not yet firm enough in risk assessment.

There are essentially three kinds of problems with mutual recognition in goods:

1. **A lack of awareness.** This is true especially among SMEs, which brings considerable consequences. Businesses are not experts in the fine variations of EU law, and they do not want to be. When selling, they check the national law in the country of destination¹⁴⁷ and adapt or do not sell there. Some businesses try and (too) often run into refusals, frequently without much explanation other than non-compliance – this should be corrected. The Member State at stake must provide a detailed explanation – in fact, it ought to show that the product to be imported does not only contravene their law¹⁴⁸, but endangers citizens or workers or the environment. Thus, their risk objective(s) would be undermined. The latter risk should be an "overriding reason" to block free movement. However, such undermining of risk objective is exceedingly rare in the EU, although some categories are problematic in this respect (see below). SMEs will typically adapt their product, either before (due to unawareness) or after refusal, as they are averse to suffer from the costs and delays when contesting the local decision.
2. **Various "horizontal" problems.** These have to do with insufficient respect for agreed procedures, lack of compliance with EU rules for mutual recognition by national authorities, late or no follow-up of CJEU rulings (fortunately rare), a failure to cooperate with other Member States' authorities in order to be informed of why they do not agree to allow the product on the market, and the failure to notify national proposals for new technical rules for goods to the TRIS database¹⁴⁹ under Directive 2015/1535 (which is obligatory in order to prevent new technical barriers from arising). Since most of these problems are legal in nature, the literature about mutual recognition is understandably heavily biased towards these issues. As noted, since the late 1990s, there has been increased attention on these issues and, apart from a series of "guidances" from the Commission, two successive procedural Regulations have been enacted. Regulation 2019/515¹⁵⁰, an improvement on the first procedural Regulation 764/2008, has six interesting features:
 - A well-defined assessment procedure of the product (in the interest of the Single Market and the exporting company) for competent authorities – largely about careful technical assessment, deadlines, proper contact with the relevant company and possibly even with the Member State where the product was first brought to the market (usually the home market), etc;
 - Requirements for an administrative decision restricting or denying access (with a copy to the Commission), also facilitating appeal;
 - The Mutual Recognition Declaration, a new feature to help the exporting company, on an agreed EU template, for demonstrating that their product(s) are lawfully marketed in another Member State (backed up by evidence);
 - A business-friendly problem-solving procedure based on SOLVIT, but with an added element: the Commission can be requested to assess the compatibility of the administrative decision with EU law (this opinion may well count);

¹⁴⁷ And this is nowadays easier with the national Product Contact Points, established following EU initiatives to facilitate mutual recognition.

¹⁴⁸ That it does not comply in a technical sense is not and cannot be sufficient, as that is what mutual recognition is all about.

¹⁴⁹ The TRIS database lists all national notifications of intended draft laws with technical requirements as required under the Directive.

¹⁵⁰ Regulation (EU) 2019/515, applicable since 19 April 2020.

- Stronger administrative cooperation between Member States (and the Commission) via a mutual recognition special committee and the help of an expert group – although these kinds of constructions are sometimes criticised, the technical issues behind mutual recognition are simply too specialised to forego such expert advice; and
 - Better information through reinforced Product Contact Points (PCPs) and via the new Single Digital Gateway.
3. **A range of highly specific and complex sectoral problems.** It is impossible, given the space available in this study, to survey the nature and specifics of sectoral issues leading to barriers that cannot be easily overcome. By way of illustration, the case study below provides some insights into the regulatory and compliance labyrinth of Food Contact Materials (FCMs).

We highlight here a number of relevant infringement procedures relating to mutual recognition of products. One example is the active procedure against Spain, in which the Commission sent a letter of formal notice arguing that Spain is restricting imports of structural steel and concrete¹⁵¹. The products are not subject to harmonised EU rules, but the relevant Spanish rules do not have any mechanism to recognise quality marks by other Member States.

The principle of mutual recognition implies that marks granted in one Member State should be recognised in other Member States and granted an equivalent mark for the same level of performance. As stated previously, there may be practical difficulties in assessing whether or not the quality marks of other Member States indeed are equivalent, but not even having a mechanism for such an assessment is clearly making it impossible for businesses to rely on the principle of mutual recognition.

The Commission has also sent a letter of formal notice to Czechia for imposing a requirement to use the Czech standard to demonstrate that Early Streamer Emission active lightning conductor systems comply with the relevant national legislation¹⁵². The Commission argues that this is done despite the fact that the Czech standards do not provide for a higher level of safety than other available standards (French and Slovak) – thus, the requirement appears to constitute an unjustified restriction to free movement of goods (although it should be noted that the authors of this study are not in a position to evaluate the comparability of the available standards).

In a similar vein, Slovenia only allows installing and using such Early Streamer Emission active lightning conductors based on other Member States' standards, if they are installed in addition to installations that comply with Slovenian technical rules, but not as a standalone protection of buildings¹⁵³. Furthermore, the level of safety must be demonstrated for each installation of the system, despite the product being lawfully marketed in other Member States.

One can also note the infringement procedure against Czechia's refusal to recognise hallmarks for precious metals affixed by a Dutch assay office, initiated in 2011 and subsequently ruled to be contrary to EU law in 2016 by the CJEU¹⁵⁴.

¹⁵¹ Infringement number 20184030.

¹⁵² Infringement number 20194055.

¹⁵³ Infringement number 20184003.

¹⁵⁴ Case C-525/14.

Comparing the four analytical reports on mutual recognition written for the Commission in the last 25 years¹⁵⁵, one finds four lists of problem sectors which are quite different.

Reasons may include that some sectors have meanwhile been harmonised or otherwise found solutions, yet some sectoral problems have been around for decades and have not yet been resolved. The horizontal approach (see point 2 above) should help in resolving some sectoral issues, although by now this contribution is likely to be rather marginal (some issues may be overcome via harmonisation). However, after so many years, what really matters for the economic credibility of mutual recognition in the EU is the resolution of specific sectoral issues.

Case study: Food Contact Materials: mutual recognition or completing harmonisation?

Whereas packaging rules are harmonised in the EU, this is largely but not entirely the case for FCMs. It is a highly complex area of regulation and compliance testing, involving lunchboxes, electronic kitchen appliances, drinkware, stainless steel bottles, cutlery, bowls, jugs and tableware. The risk is that chemicals or contaminants migrate to the food, especially when heated. There are myriad EU regulations on FCMs, based on the Framework Regulation 1935/2004, with important elements such as traceability, (recognised) laboratory testing, the Plastic Materials Regulation 10/2011, Regulation 321/2001 on bisphenol in plastic infant feeding bottles, Regulation 282/2008 on recycled plastic materials, the Ceramics Directive 2005/31, the Regenerated Cellulose Film Directive 2007/42, the Active and Intelligent Materials Regulation 450/2009, Regulation 284/2011 on products originating or consigned from China or Hong Kong (on certain kinds of plastic kitchenware with too much polyamide or melamine) and the general Good Manufacturing Practices (GMP) Regulation 2023/2006. There are also problems with epoxy derivatives, falling under Regulation 1895/2005.

Despite this large regulatory blanket, some EU countries (including, Germany and France) maintain their own (stricter) regulation, with some specific tests, e.g. higher risk materials such as paper, board, bamboo and wood. Belgium has introduced new provisions about food contact varnishes and coatings which the EU has not regulated so far. Of all institutions, surprisingly it is actually the Council of Europe which has come to the rescue with its many resolutions in this area which act as guidance documents (e.g. on coatings, paper and board, metals and alloys, rubber, silicones, etc.) and which are widely accepted. It is remarkable – to put it mildly – that the Council of Europe (with all EU countries as members) succeeds in putting in place (non-binding, but respected) regulations and the EU does not, at least in these areas.

3.3.2. Is there a growing trend of these problems in the EU?

As observed before, **there are no adequate statistics of mutual recognition issues and/or their resolution (or failure) over certain periods**, let alone reliable statistics about all the many instances where the principle works and is respected. If reports or position papers are published, inevitably they are about failures or complaints about mutual recognition and lack of easy market access. It is therefore an illusion to hope for a reliable set of trends. Nevertheless, a few points can be made that may help to develop a longer-term perspective.

¹⁵⁵ See the Ramboll study of 2004 on mutual recognition of goods, written for the impact assessment of the proposal of what later would become Regulation 2008/764; the Technopolis et al. study of June 2015 in http://ec.europa.eu/growth/single-market/goods/free-movement-sectors/mutual-recognition/index_en.htm; the study by EY et al., (2017) on the costs and benefits of the mutual recognition Regulation 768/2008 – see <https://op.europa.eu/en/publication-detail/-/publication/ae9e45ce-1203-11e8-9253-01aa75ed71a1>; all preceded by the Atkins et al., (1997) study.

First, over a longer time span of decades, **mutual recognition is better understood** than in, for example, 1995 when European business, represented in the Molitor Group¹⁵⁶ on simplification of EU regulation, distanced itself from mutual recognition and pleaded for a renewed emphasis on harmonisation¹⁵⁷. But "better understood" is a relative concept here. Numerous SMEs do not know about it and several awareness campaigns in the past, even with the help of national and EU business associations, have been unable to change this more than marginally. Much more and systematic information is available nowadays, yet it is not clear whether and how much this helps businesses. As one official from one of the EU bodies in Brussels noted recently: *"I have never seen a company explicitly basing its export strategy on mutual recognition, even though later in the process this might be seen as an opportunity once difficulties arise"*.

Second, the **product scope of mutual recognition has shrunk** over the last three decades (see before) and this alone has reduced the areas of possible difficulties.

Third, when assuming a sectoral perspective to mutual recognition, and ignoring some rare stand-alone cases, there are, in reality, **only two classes of sectoral recognition issues**. One is a cluster of typical consumer goods which tends not to be or only very partially harmonised, or indeed regulated, differently in some Member States than in other ones. This cluster includes children's clothing, labelling of clothing, childcare products, tableware and furniture. A common factor here are chemicals in the coating (e.g. furniture) or chemicals in, for example, tableware which is regarded as FCMs (for instance in a microwave, chemicals might migrate from a plate to the food), or chemicals in children's clothing or childcare products or indicated by labelling. There is no real trend visible here – these **problems are long-standing, and the basic issue is that some Member States regard such issues as a sensitive part of consumer protection**. However, the practical problem for businesses (often SMEs) is largely avoided by using the German "GS" marking which is widely accepted in these segments. This private solution for a public policy problem is less than ideal, but pragmatic.

The other class of sectoral problems is a disparate group of product categories with great complexity for different reasons. Included are the infamous construction products (a large market), FCMs (a highly dispersed group of otherwise unrelated products), food supplements, water taps (another big market) and precious metals. All these categories are known to have caused **mutual recognition issues for several decades** – there is no trend.

3.3.3. What tools exist at EU and national level to address these problems?

After decades of CJEU cases and some 25 years of attempting to make mutual recognition function better, some degree of modesty would seem to be appropriate when suggesting solutions. Nevertheless, one can discern a road ahead to significantly reducing these issues and this direction will be set out below.

Before doing so, however, the root cause of many (though indeed not all) mutual recognition problems has to be identified first: the positioning and mindset of the Member States, be it a few specialised officials, rigid consumer organisations (sometimes going beyond or irrespective of science), lobby interests or local traditions. When discussing mutual recognition, it sometimes seems that Member States claim a kind of absolute "right" to protect citizens, workers and the environment in their way as if other Member States doing it differently are, by definition, doing it wrong.

¹⁵⁶ Molitor et al., 1995, *Report of the group of independent experts on legislation and administrative simplification*, Brussels, COM (95) 288.

¹⁵⁷ UNICE (now BusinessEurope) did the same in more straightforward terms in UNICE, 1995, *Releasing Europe's potential through targeted reform*.

The inter-Member State cooperation called for in Regulation 764/2008 was barely taken up – without explicitly institutionalising such cooperation on a permanent basis, the prospect of truly recognising other solutions is dim. There is too rarely a mutual recognition culture and the importance of the Single Market for all of the EU appears to play no role when it comes to some specific imports. Even when the Mutual Recognition Regulation 764/2008 came into force, the written refusals of access by Member States apparently did little more than confirm that the goods to be imported were non-compliant with the technical regulation in the destination country, whereas what is required is an evidenced-based rationale of the justification.

Changing the mindset of Member States' officials in the technical arena, who of course are charged with enforcing compliance with the national rules, and yet have to facilitate technically non-compliant imports under mutual recognition, cannot be expected to be smooth and easy. **The only structural way of resolving this is a permanent exposure to EU law and practices in joint committees and via other forms of cooperation between Member States where risk assessment and proper justification (and proportionality) are routinely discussed** with respect to mutual recognition cases. The very notion that the Single Market begins at home¹⁵⁸, also for mutual recognition, is critical for any structural improvement in this area.

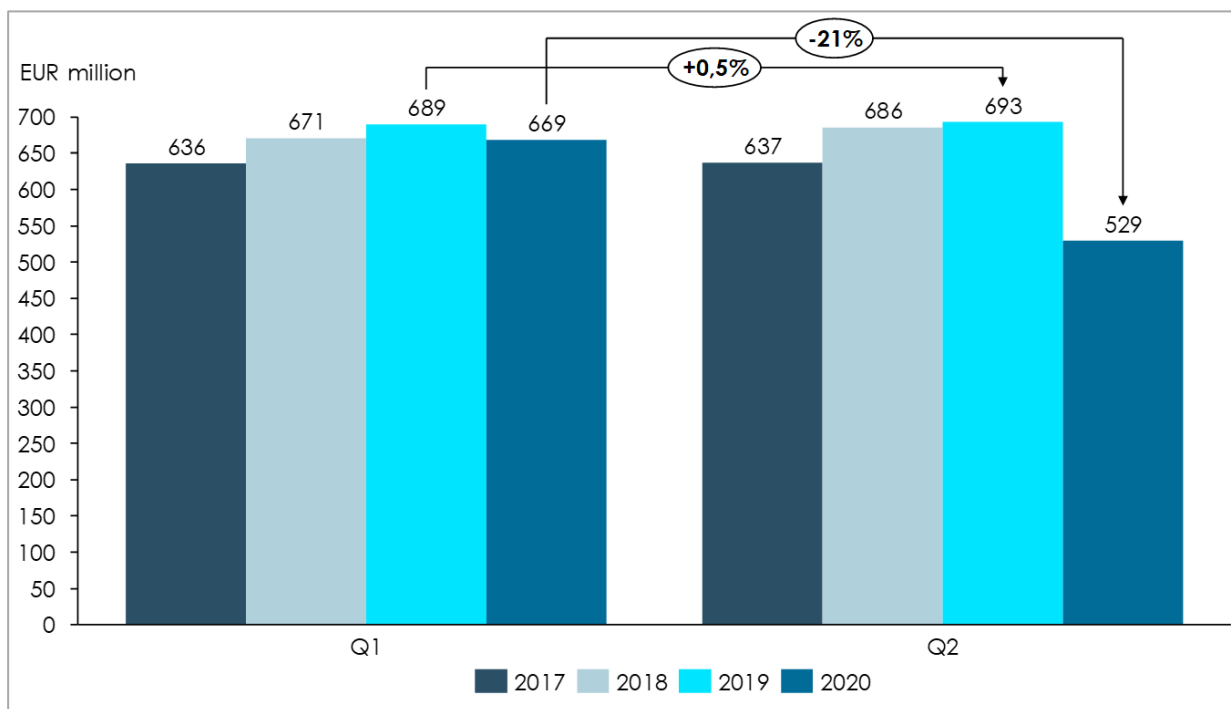
3.4. A note on the impact of COVID-19 on intra-EU trade in goods

Large parts of the EU economy stopped functioning, or were severely restricted, during the outbreak of the COVID-19 pandemic and the lockdown measures enforced by national governments. This had a negative impact on intra-EU trade in goods, primarily due to factory closures, transportation queues and various trade restrictions, primarily related to health-related products such as face masks¹⁵⁹. Intra-EU exports of goods decreased by 21% during the second quarter of 2020, compared to the first quarter, see Figure 8. The corresponding development during the second quarter of 2019 was a marginal increase of 0.5% compared to the first quarter.

¹⁵⁸ See Pelkmans, J., 2016, *What strategy for a genuine single market*, CEPS Special Report, January.

¹⁵⁹ National Board of Trade Sweden, 2020, *COVID-19 och den fria rörligheten – preliminära lärdomar från hälsokrisen*.

Figure 8: Intra-EU exports of goods, Q1 and Q2, 2017-2020



Source: Eurostat, Balance of payments by country - quarterly data (BPM6) [bop_c6_q], excluding Ireland, Greece and Malta because of a lack of data for the entire time period.

Following the outbreak of COVID-19, there was a sudden surge in demand for critical health-related products, by both healthcare systems and households, which led to (a fear of) shortages of medicines, medical equipment, disinfectants, and protective gear across the EU Member States. The EU restricted exports of personal protective equipment to third countries during the outbreak of the pandemic¹⁶⁰.

However, at least 11 Member States unilaterally restricted exports of various health-related products also to other EU Member States to secure supply for the local population and healthcare system¹⁶¹.

The total number of notifications of technical rules (see Section 3.1.3.a) has reached 712 until the end of October 2020 – this is more than the 694 notifications during the entire 2019. However, the exact number of national, regional or local decisions relating to COVID-19 is difficult to know, but it is expected to be in the hundreds. Many of them have been continuously adapted, and it also appears that most have been removed¹⁶².

Member States' notifications of technical rules related to COVID-19 concern temporary export restrictions including pure export bans and requisitions, introduction of export authorisation requirements, price regulation, stock holding requirements and quotas for distribution in pharmacies. Such national export restrictions can negatively affect the security of supply across the EU (and indeed the world) that are relying on cross-border value chains¹⁶³.

An example of this was the Swedish medical technology company Mölnlycke, where the French government seized 5 million protective masks from Mölnlycke's factory in Lyon, thereby preventing

¹⁶⁰ See Regulation (EU) 2020/402.

¹⁶¹ Including Belgium, Bulgaria, Czechia, Denmark, Estonia, France, Germany, Italy, Poland, Romania, Slovakia, based on the TRIS database.

¹⁶² National Board of Trade, 2020, op cit.

¹⁶³ Hoekman et al., 2020, *Export Restrictions: A Negative-Sum Policy Response to the COVID-19 Crisis*, EUI working papers.

the company from exporting the masks to other critical Member States directly from France¹⁶⁴.

Almost all measures constitute barriers to trade but most, if not all, of the imposed measures were motivated by the need for Member States to secure public health, in an uncertain and urgent situation. Thus, **it is likely that most of the national measures relating to protecting public health actually were in compliance with EU law, since Member States have relatively large discrepancies to introduce measures to protect public health**¹⁶⁵. However, it is of course possible that many of the measures went beyond what was strictly necessary to achieve the policy objective. It is in that sense somewhat positive under that many restrictions on the movement of goods in an effort to secure local supply, such as the Romanian government's decision to suspend the export of grains, oilseeds and related products¹⁶⁶, were quickly revoked.

With that said, it is perhaps more questionable whether Member States' measures respected the EU principles of solidarity and the security of medical supplies across the EU¹⁶⁷.

3.5. How can these obstacles be removed and prevented?

The major source of unjustified national obstacles to the Single Market lies in the national implementation and enforcement of Single Market rules. The Commission's long-term action plan for better implementation and enforcement of Single Market rules is an important step to address such issues. However, **the legal framework of the Single Market is inherently crossing between the EU and the national legal traditions and systems**. Thus, it is unlikely that issues relating to national implementation and enforcement will ever completely disappear unless drastic, possibly politically difficult, changes are made to the functioning of the EU Single Market.

The action plan for implementation and enforcement does contain several useful steps within the achievable remit. In addition to a sound set of actions to improve the functioning of the Single Market, it also reinforces the notion that the Single Market is to a large extent the responsibility of Member States. Indeed, it is the Member States that are responsible for correctly implementing EU law, and to avoid succumbing to domestic pressure to adopt national rules and requirements that go beyond, or sometimes against, EU efforts to integrate the Single Market. **At the high level, Member State support for the Single Market is firm and it is important that this is also the case in practice when Single Market legislation is drafted in the EU legislative process.**

Furthermore, we have pointed out a number of sectors where national obstacles are prevalent. As regards construction products, a review of the CPR is underway with the aim to improve the functioning of the Single Market for construction products. For industrial machinery and waste, continued attention should be paid towards analysing and understanding how market and technological developments may impact the suitability of the relevant EU legislation.

The EU should continue to closely scrutinise national technical rules, especially concerning labelling requirements, as well as making sure that the seemingly well-functioning notification procedure for technical rules indeed lives up to its objective.

In that regard, it may be wise to evaluate whether a merger of other notification procedures (e.g. related to food information to consumers) could provide added value in collecting all procedures in

¹⁶⁴ Ibid.

¹⁶⁵ National Board of Trade, 2020, op cit.

¹⁶⁶ Dobrescu, M., 2020, *Romania Reverses Decision to Ban Grain Exports*, United States Department of Agriculture – Foreign Agricultural Service Official Website.

¹⁶⁷ European Commission, 2020, *Guidelines on the optimal and rational supply of medicines to avoid shortages during the COVID-19 outbreak*, 2020/C 116 I/01.

one place. This should promote a uniform assessment of national technical rules across all relevant sectors.

It can also be worth considering introducing more detailed requirements on Member States' motivations of necessity and proportionality when notifying technical rules under the Transparency Directive's notification procedure (Directive (EU) 2015/1535). This has become more apparent during the COVID-19 crisis¹⁶⁸, where restrictions have been imposed in haste and often without due consideration of proportionality. A stricter requirement regarding the necessity and proportionality assessment of national technical rules would be beneficial to further increase transparency and the ability for the Commission and other Member States to assess notified rules. However, any increase in administrative requirements must be carefully balanced against the increased administrative burden it puts on the notifying Member States.

The functioning of mutual recognition may well improve in three aspects: improvements with regard to the horizontal (mainly institutional, administrative and legal) approach, selected progress in the area of consumer goods and selected progress in other sectors proven problematic so far.

- The **horizontal approach** with the new Regulation 2019/515 and the six features mentioned earlier is likely to be strengthened. Nevertheless, like every piece of EU regulation, it may also have potential weaknesses. Of course, it is far too early to assess the actual working of the Regulation, as it only came into force in the spring of 2020. As Benjamin Jan (2020) has pointed out, there is a risk that the clear improvements in the Regulation may nevertheless fail to be effective given the lack of trust between national governments, especially in the difficult sectors and the (mis?)use of the prior authorisation tool in specific cases. New tools like the Mutual Recognition Declaration can still be obstructed to some degree. Overcoming the lack of trust necessitates what has been noted before: a permanent exposure to EU-wide good practices of science-based risk assessment and inter-Member States' cooperation on each and every specific case, keeping options open of partial harmonisation so as to eliminate sources of (possibly justified) discontent.

With the Mutual Recognition Committee and experts' groups this badly needed permanent exposure can be and indeed should be promoted. The SOLVIT option in the new Regulation is not in itself likely to be more attractive than before, but that the Commission can be requested to give its opinion should be expected to have a considerable impact on the effectiveness of the SOLVIT option. One might also go beyond the current state of affairs about the neglect of notification of newly proposed technical laws or decrees in Member States.

The *Securitel* case (1996)¹⁶⁹ essentially implies that a national court can declare a law emerging from non-notified proposals null and void – but for SMEs going to a national court is a costly route perhaps scaring them. Jan (op. cit.) proposes to regulate that such inapplicability ought to become automatic. However, this idea raises complex legal questions and these need to be carefully considered. Finally, the Commission is preparing a Guidance document for Regulation 2019/515 which should be available by the end of 2020.

A few years ago, there were ideas such as an Action Plan for the improvement of mutual recognition by Member States, but this initiative seems to have faded away. However, this does not mean that nothing is happening.

¹⁶⁸ National Board of Trade Sweden, 2020, *COVID-19 och den fria rörligheten – Preliminära lärdomar från hälsokrisen*.

¹⁶⁹ Case C-194/94, *CIA Security International SA v Signalson SA and Securitel SPRL*.

- On the **group of consumer goods** mentioned before, there is selected good news with respect to furniture and Food Contact Materials (FCMs). A prominent issue for furniture is related to fire protection for upholstery¹⁷⁰ with deviant positions of the UK and Ireland based on different technical (chemical) solutions. With the UK exiting the EU and new chemical technologies being developed and becoming available, solutions now seem feasible. In FCMs, a highly complex area with irregular national initiatives to regulate aspects slightly differently (see the case study on p. 55), there is finally a realisation that matters can be much improved while carefully guarding against risks.

An ex-post evaluation has been made (for the first time in 40 years) and the conviction is that a newly amended FCM regulation is required. The announcement from the Commission can be found in the Farm-to-Fork strategy. Given the complexity, the attachment of some Member States to their own systems (and some degree of vested interest in testing as well) and the selective sensitivity of consumers will render this a difficult exercise. Nevertheless, it presents a credible opportunity to improve the functioning of the single market here, even if this cannot be accomplished by mutual recognition but by harmonisation.

- On **other sectoral questions**, there is also selected good news. In fertilisers, as a result of a long saga¹⁷¹, further harmonisation was finally accomplished with Regulation 2019/1009¹⁷². The controversial national cadmium limits have now been harmonised (also stricter over time) and organic fertilisers (nearly 50% of what farmers utilise today) now fall under the EU regulation (though as a voluntary option). This is surely a major improvement. What remains is a curious relic of the 1970s: there are "EC fertilisers" and "national fertilisers", the latter solely for domestic use, not for intra-EU trade¹⁷³. The national fertilisers are nationally regulated. This fragments the Single Market, but the economic costs are not very high, as fertilisers are heavy and the margins are thin. However, mutual recognition issues with intra-EU traded fertilisers have now much reduced.

For precious metals, the central issue is hallmarking. It is irrational to have national and distinct hallmarking rules and certificates, yet this is still the case. The strongest proponent of this insular system is the UK, now leaving the EU, which amounts to an opportunity to undertake action to either move to genuine mutual recognition or a centralised regulatory system with competing hallmarking bodies all over the EU working with identical rules.

¹⁷⁰ In 1989 in the UK, several terrible fires broke out in dancing clubs and other closed spaces where it turned out that upholstery was fuelling the fire. Since then, the UK and Ireland have imposed fire-throttling chemicals (however, generating much more smoke) and other EU countries disagreed.

¹⁷¹ For example, on cadmium limits in phosphate fertilisers, the debate has taken at least 25 years.

¹⁷² OJEU L 170 of 25 June 2019, pp. 1-114.

¹⁷³ In the 1970s, with vetoes in Council, progress in harmonisation was sometimes accomplished by having EU rules for intra-EU trade, whilst allowing national rules for purely domestic commerce.

4. FREE MOVEMENT OF SERVICES AND RIGHT TO ESTABLISHMENT

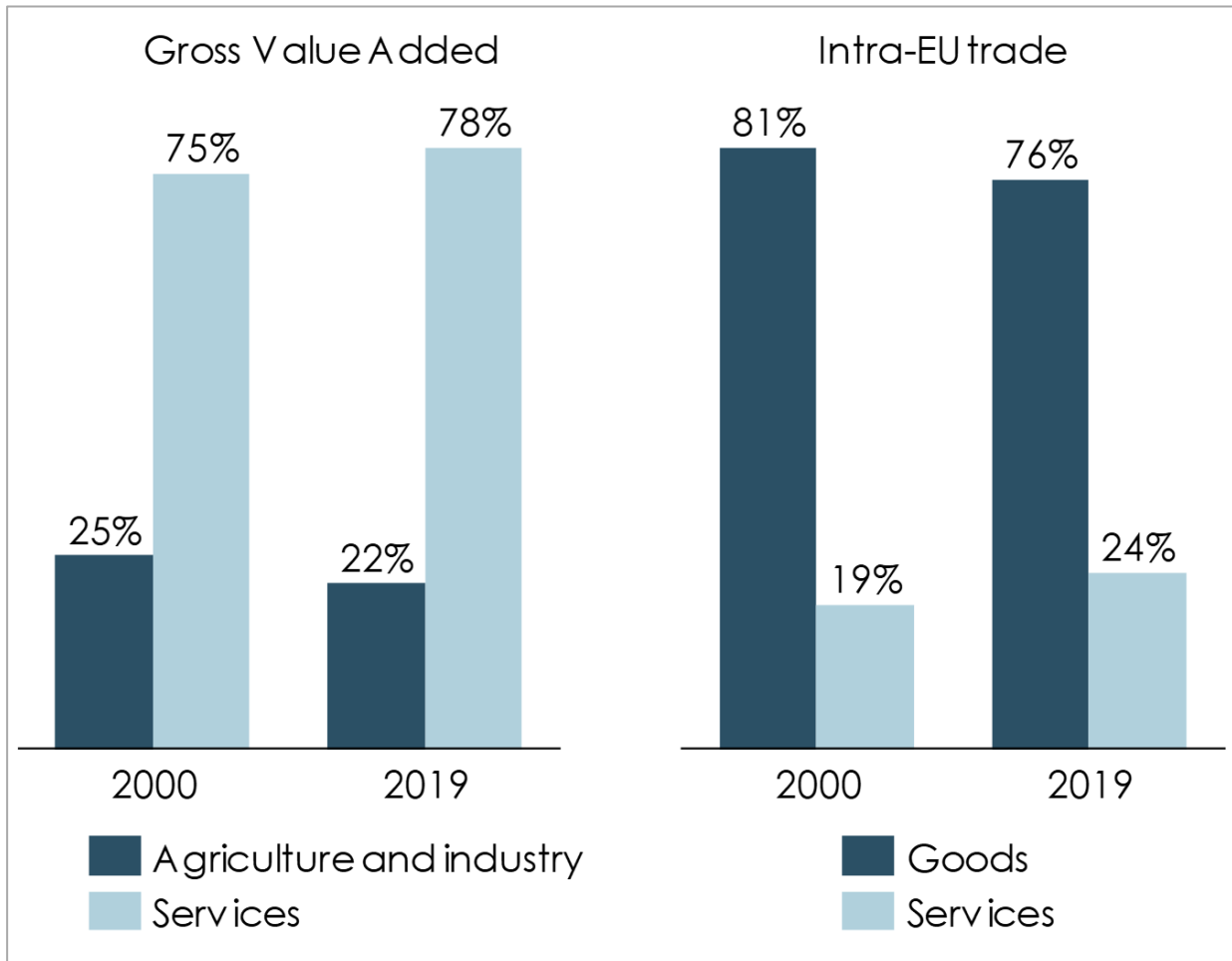
KEY FINDINGS

- The Single Market for services is governed by the horizontal Services Directive (covering service activities that account for some 45% of EU GDP), complemented by the horizontal E-commerce Directive for information society services, and a range of sectoral directives for transport, financial services, network sectors and – to a limited extent – professional services.
- In services (much more than in goods), widespread "regulatory heterogeneity" between Member States adds to the costs of doing business across the entire Single Market.
- The notification procedure under the Services Directive is not functioning as well as it should, it is likely that many national rules are adopted without being notified. This means that barriers to services trade are introduced without proper scrutiny from the Commission and other Member States. There is no sign of improvement in this regard, especially since the proposal for a revised procedure was withdrawn.
- The retail sector experiences restrictions such as authorisations and local content requirements – the latter has increasingly become a problem in recent years. When they are brought to light, the process to remove the restrictions in the retail sector is often slow and burdensome, thus leading to restrictions on retailers.
- Businesses often experience difficulties in accessing the relevant information on applicable rules and requirements in different Member States. The national Points of Single Contact are underperforming. The Single Digital Gateway is expected to improve the situation but will only gradually be available by the end of 2020, 2022 and 2023.
- There are approximately 6,000 national regulations on professions in the EU, and this has a restrictive effect on trade. It is likely that at least some are unnecessarily restrictive, but an individual case-by-case analysis is needed to assess whether they are contrary to EU law or not – we highlight five case studies.
- The economic significance of cross-border posting of workers is limited, except for some sectors and countries. The process of posting workers is often cumbersome and a lack of transparency about relevant requirements and processes make posting of workers difficult.
- The two EU co-legislators have passed three laws in the last six years which justify firm expectations that the regime and enforcement are improving and that dubious practices will be punished or pre-empted. What is lacking is a stronger legal mandate for the ELA to check documents themselves and a solution of the disagreement between the EP and the Council on revised social security coordination (Directive 883/2004/EC).
- Franchising as a business model is not as common in the EU as it is in the US and Australia. With a more suitable regulatory framework franchising might be more utilised in practice, thereby opening cross-border expansion opportunities for firms who do not have the capacity to expand as corporate chains.

Services account for 78% of Gross Value Added in the EU and the share has been increasing from 75% in the early 2000s¹⁷⁴.

Thus, the service sector is an important contributor to economic growth in the EU. Services account for 24% of intra-EU cross-border trade of goods and services, and the share has been increasing from around 20% in the early 2000s¹⁷⁵, see Figure 9.

Figure 9: Services' share of total EU Gross Value Added and intra-EU trade, 2000 and 2019



Source: Authors' own elaboration, based on Eurostat, Gross value added and income by A*10 industry breakdowns [nama_10_a10] and Eurostat, European Union and euro area balance of payments - quarterly data (BPM6) [bop_eu6_q]. The construction sector is included in the service sector.

However, two points are important to keep in mind when looking at and comparing data on trade in services. Firstly, data on cross-border services trade, and thus the shares reported above, do not include cross-border establishments. This leads to an under-appreciation of the total value of cross-border service activity in the Single Market, since *at least* 58% and probably more, of the total turnover and value added by foreign-controlled enterprises based in other EU Member States (i.e. intra-EU

¹⁷⁴ Eurostat, Gross value added and income by A*10 industry breakdowns [nama_10_a10]. Our calculation includes construction in the service sector.

¹⁷⁵ Eurostat, European Union and euro area balance of payments - quarterly data (BPM6) [bop_eu6_q].

establishments) are generated in the service sector¹⁷⁶.

Furthermore, for EU services exports to non-EU Member States, 61% is generated via establishments abroad (i.e. GATS mode 3), and the remaining 39% are generated via cross-border service provision¹⁷⁷.

Secondly, when a product is traded across borders, it is registered as goods trade and it does not consider how large a share of the value added of the product that is generated in service sectors¹⁷⁸. This too leads to an underestimation of cross-border service activity in the Single Market. At an aggregate level, the value-added share of services in EU manufacturing output and exports was 40% in 2011¹⁷⁹. Thus, traditional trade data do not fully reflect that services to a large extent are indirectly traded.

The chapter is structured as follows. **Section 4.1** explains difficulties in meeting requirements to sell services cross-border, while **Section 4.2** deals with the related issues of difficulties to find information about the applicable rules. **Section 4.3** analyses the specific issues relating to difficulties in accessing a regulated profession in cross-border situations, whereas **Section 4.4** deals with the more specific issue of restrictions on corporate ownership. **Section 4.5** addresses issues relating to posting of workers. **Section 4.6** provides a brief account of franchising in the EU. Lastly, **Section 4.8** presents our suggestions for how the identified obstacles can be removed and/or prevented.

4.1. Difficulties in meeting requirements to sell services

4.1.1. What are the current problems?

Although services typically are not as tradeable as goods, it appears that the free movement of services has not met its full potential. The Single Market for services has fallen short of expectations, having contributed to only a 7% reduction in trade costs for services trade within the EU compared to trading on World Trade Organisation (WTO) terms – the corresponding trade cost reduction within the Single Market for manufactured goods is 21% and 43% for agri-food products¹⁸⁰. In 2019, 0.9% of SOLVIT cases concerned the free movement of services¹⁸¹.

The Services Directive aims to ease establishment and cross-border provision of services by removing administrative and legal barriers across Member States in the Single Market. However, the effectiveness of the Services Directive has fallen short due to **poor implementation and complex national regulatory environments**, leading to fragmentation in the Single Market for services¹⁸². Not all Member States have transposed the Directive into their national legislation in a sufficient manner,

¹⁷⁶ Eurostat, Foreign control of enterprises by economic activity and a selection of controlling countries (from 2008 onwards) [fats_g1a_08]. Data refers to the years 2017 and 2016. No data available for financial and insurance activities. If we instead look at intra-EU stocks of Foreign Direct Investment (FDI), which include the financial and insurance sector, services represented 73% of total intra-EU FDI in 2018 (Eurostat, *EU direct investment positions, breakdown by country and economic activity (BPM6)*).

¹⁷⁷ Eurostat, *Services trade by modes of supply*, 2017 data.

¹⁷⁸ For example, a case study of Swedish toolmaker Sandvik Tooling revealed that the production and supply chain to produce tools involves approximately 55 different service activities (National Board of Trade, 2010, *At your service – The Importance of Services for Manufacturing Companies and Possible Trade Policy Implications*). One can also think of the value of a smartphone for example, where part of the phone's value relates to the raw materials and the manufacturing of the device (the product), but by and large it is a product whose value is almost exclusively derived from its software and programs – nonetheless, when a smartphone is exported, it is registered as goods trade in the traditional trade statistics.

¹⁷⁹ Copenhagen Economics, 2018, *Making EU trade in services work for all*.

¹⁸⁰ Ibid.

¹⁸¹ European Commission, *Single Market Scoreboard, SOLVIT*.

¹⁸² World Bank Group, 2016, *Growth, Jobs and Integration: Services to the rescue*.

which fragments the Single Market for services¹⁸³. The economic potential associated with the full implementation of the Services Directive is considerable, increasing the level of EU GDP by an estimated 2%¹⁸⁴.

Another recent estimate found an economic benefit since 2010 through 2018 of some 1.5% of EU GDP and remaining potential benefits of some 2.28% of EU GDP¹⁸⁵.

Most Member States largely treat service providers from other EU Member States like domestic providers, albeit often requiring additional obligations¹⁸⁶. These obligations, including for instance additional occupational licensing or restrictions on retail formats, make compliance and potential intra-EU expansion expensive and time-consuming. The administrative costs associated with establishing a business in a foreign Member State alone costs an estimated EUR 5,000-10,000 (which can be quite burdensome for an SME)¹⁸⁷. The fragmentation in the Single Market for services hampers competition, productivity and thereby economic growth. In fact, service sector productivity growth in the EU has been slow in comparison to that of the US. In 2017, the services productivity growth was twice as high in the US than in the EU¹⁸⁸.

In a 2019 survey among businesses, **different national service rules and complex administrative procedures were identified as the two most serious obstacles to intra-EU trade by service providers**, with 81% ranking them as significant obstacles to the Single Market¹⁸⁹. This is reflected in businesses' willingness and ability to trade services, where the more restrictive a Member State is towards foreign service providers, the less likely is it that a business will expand its operations into that Member State.

The OECD intra-EEA Services Trade Restrictiveness Index (STRI)¹⁹⁰ captures Member States' level of restrictiveness for services establishment in the Single Market, across different service sectors. Foreign Direct Investment (FDI) or establishment is one of four modes of trading services. In other words, the STRI does not refer to direct cross-border trade in services (mode 1 in the GATS, such as digitally delivered services). For the OECD, the EU – with much more developed and liberal mode-1 trade in services – is considered an exception worldwide: other OECD countries and the BRICS countries¹⁹¹ engage in cross-border trade in services almost exclusively via establishment. Thus, using the OECD STRI is therefore less than ideal to assess the restrictiveness in the EU. In principle, all modes of services are free (hence, restrictions are residual for the most part, certainly when compared with non-EU countries) and mode 1 is also quite important inside the EU. These aspects matter when combining the STRI for EU countries and "services trade integration" based on measuring mode 1 (direct intra-EU cross-border trade in services), as is done in Figure 10 below.

Nonetheless, there appears to be a weak correlation between the level of restrictiveness and intra-EU trade integration. For instance, countries like Ireland, Estonia and the Netherlands are among the countries with the highest level of intra-EU cross-border trade integration in services as a share of GDP;

¹⁸³ ECIPE, 2016, *What is wrong with the Single Market?*

¹⁸⁴ Copenhagen Economics, 2018, *Making EU trade in services work for all*.

¹⁸⁵ Pelkmans, J., 2018, *Contribution to growth: The Single Market for Services. Delivering economic benefits to citizens and businesses*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

¹⁸⁶ Godel, M. I., et al., 2016, *Reducing costs and barriers for businesses in the Single Market*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

¹⁸⁷ European Commission, 2017, *Annual Report on European SMEs 2016/2017*.

¹⁸⁸ Copenhagen Economics, 2018, *Making EU trade in services work for all*.

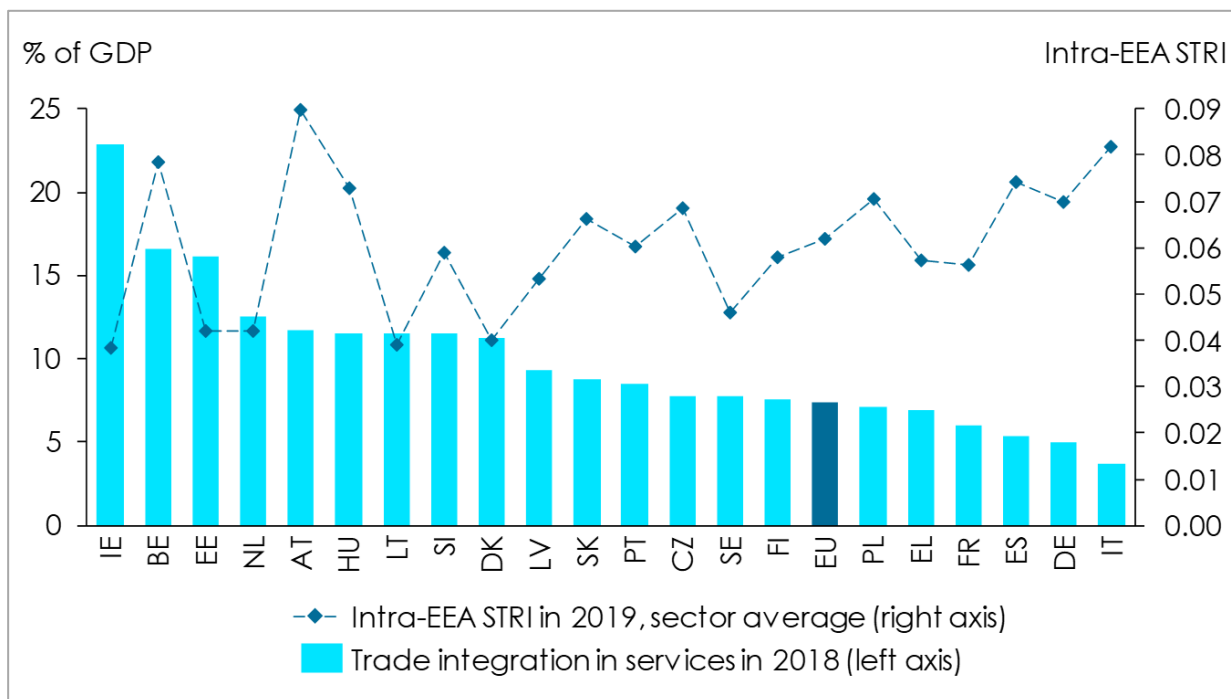
¹⁸⁹ Eurochambres, 2019, *The state of the Single Market: Barriers and Solutions*.

¹⁹⁰ OECD, *Services Trade Restrictiveness Index*, Statistical database, 2020.

¹⁹¹ Brazil, Russia, India, China, South Africa.

they are also among the countries with the lowest levels of restrictiveness.

Figure 10: Intra-EU service trade integration and intra-EEA STRI, 2018 and 2019, by Member State



Source: The EU Single Market Scoreboard and the OECD Intra-EEA Services Trade Restrictiveness Index.

Note: Intra-EU trade is measured as the average of intra-EU exports and imports. Luxembourg is excluded from the figure for visibility reasons but has an intra-EU trade integration of approximately 100% of GDP.

In contrast, Italy, Germany and Spain have the lowest level of service trade integration in the EU and have among the highest levels of services trade restrictiveness. However, there are a few outliers that break the pattern, for example Belgium and Austria with relatively high levels of trade integration and restrictiveness. Another reason why Figure 7 has to be dealt with carefully is that the restrictiveness within the EU is relatively low, compared to STRIs outside the EU. In addition, one should also note that the countries with the lowest levels of intra-EU services trade integration in relation to GDP are the largest EU Member States, who typically have lower levels of services (and goods) trade-to-GDP ratios. However, empirical research has shown that higher levels of the STRI have a negative impact on cross-border services trade and service sector productivity¹⁹².

Member States regulate up to 368 distinct professional service occupations, with approximately 25% of them being regulated in only one Member State¹⁹³. While it is possible that the specific, national legislations are justified and proportionate, **the fact that one quarter of the occupations is only regulated in one Member State suggests that there may be scope for a reduction in national legislation of service occupations.** It would be valuable to assess the regulations that only exist in one Member State to analyse in-depth how those regulations are justified, shedding light on the reasoning in the regulating Member States and why other Member States do not find it necessary to

¹⁹² Nordås, H., and Rouzet, D., 2017, *The Impact of Services Trade Restrictiveness on Trade Flows*, *The World Economy* 40:6, p. 1155-1183.

¹⁹³ Godel, M. I., et al., 2016, *Reducing costs and barriers for businesses in the Single Market*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

impose such regulations.

In addition to the different national requirements that exist for digital services (see Chapter 5), several new Directives concerning digital services have been adopted at the EU level, which are partially overlapping in scope with the Services Directive¹⁹⁴. This further adds to the complex regulatory framework that applies to digital services, increasing both the uncertainty and difficulty in complying with requirements.

Sectoral and country differences in restrictiveness to establishment – but an overall reduction in restrictiveness over the past years

Even at the relatively low levels of STRIs in the EU compared to non-EU STRIs, there are **notable differences between countries' restrictiveness to establishment across service sectors**. Member States may have restrictive regulations in place in some service sectors, but being less restrictive in others, see Box 1. For instance, Czechia had the highest intra-EEA STRI for establishment for the local provision of legal services in 2019 but is more in line with the EU average for accounting services.

Among the five sectors highlighted below (accounting services, engineering services, architecture services, legal services and construction services), accounting services are on average the most restrictive across countries, followed by legal services. Engineering services are the least restrictive.

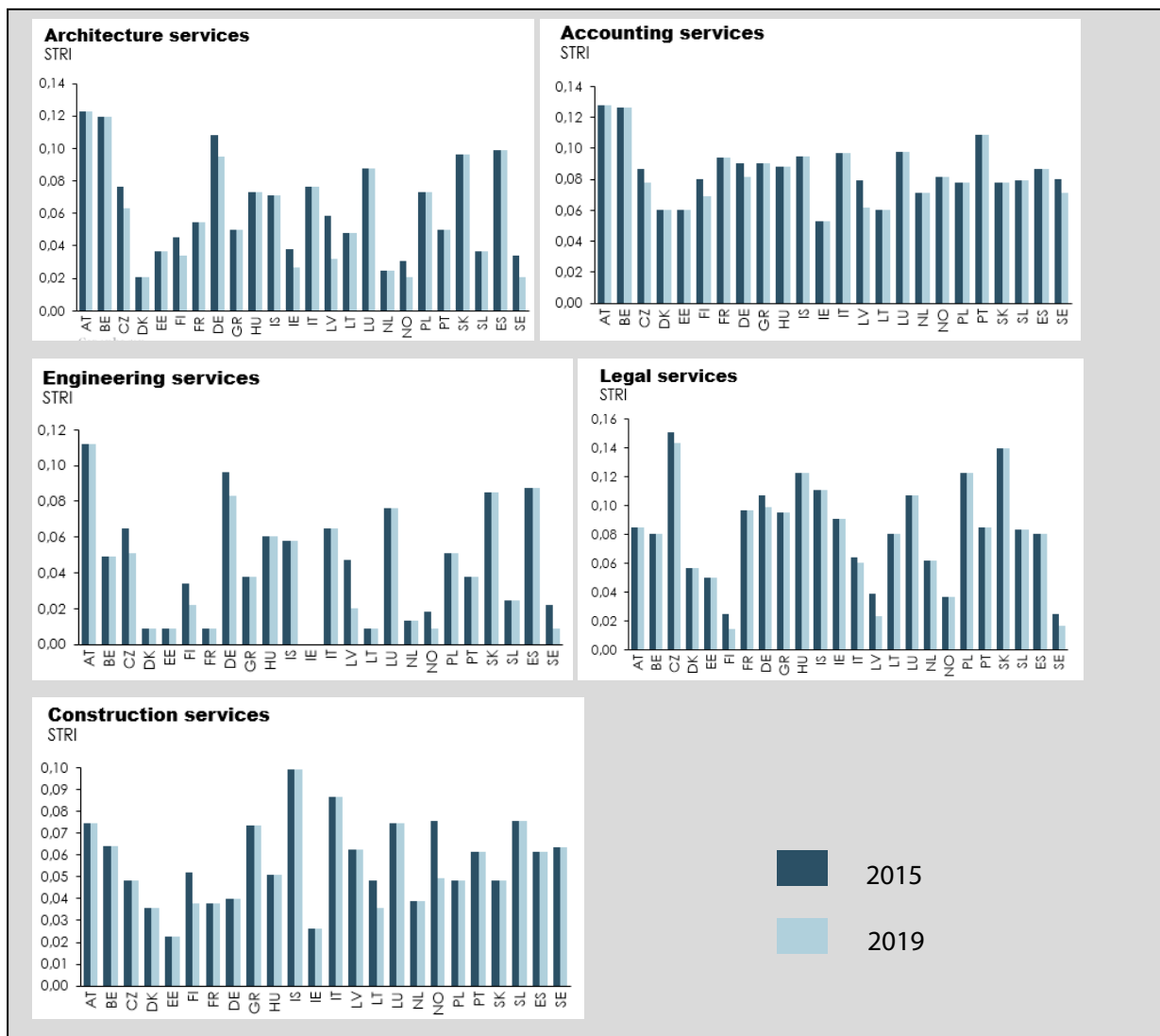
In general, there has been a **slight decrease in the level of restrictiveness** for establishment across all countries in all five sectors between 2015 and 2019. The largest reduction in restrictiveness is seen for architectural services, followed by engineering services.

Finland is the only country that has decreased its restrictiveness in all five sectors highlighted below. Czechia, Germany, Latvia and Sweden have decreased their restrictiveness in four of the sectors (all but construction services).

In contrast, Austria, Belgium, Denmark, Estonia, France, Greece, Hungary, Luxembourg, the Netherlands, Poland, Portugal, Slovakia, Slovenia and Spain have not reduced their restrictiveness in any of the five sectors during 2015 and 2019.

¹⁹⁴ National Board of Trade Sweden, 2020, *Handelshinder på den inre marknaden – en litteraturoversikt*.

Box 1: Intra-EEA STRI per country in 2015 and 2019 for five key sectors



Source: OECD Intra-EEA Services Trade Restrictiveness Index.

Regulatory heterogeneity in the Single Market – underrated and costly

Although the EU Single Market has made enormous progress, European businesses retain strong sentiments about practical instances of fragmentation. Fragmentation may have many reasons and the focus on "barriers" – useful as it is – does not fully reflect how businesses appreciate the issues. Business complaints about undue fragmentation go back four or five decades and some "evergreens" are still around.

Moreover, the deepening and widening of the Single Market has led to the recognition of other forms of fragmentation to which EU businesses call attention. To a considerable extent, an emphasis on how EU businesses perceive the Single Market and the fragmentation in it can be found in the recent European Commission papers, referred to frequently in the present study¹⁹⁵.

Such perceptions of fragmentation can be quite discouraging for SMEs and irritating for all businesses.

¹⁹⁵ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

It is outright counterproductive in the case of certain start-ups in fast-moving businesses where rapid scaling up to efficient minimum size is critical for competitiveness, and indeed for short-term survival. The infamous example of Spotify incapable of scaling up rapidly in Europe due to (often petty forms of) fragmentation is not the only one and not the last one.

This can have to do with numerous small and often slow administrative procedures in all Member States¹⁹⁶ that are legally legitimate given the division of competences in the EU but questionable for a business mindset: **if national values are not at stake (as these clearly ought to be respected), what is the rationale of making business life difficult in an EU-wide Single Market?** The well-known Doing Business indicators published annually by the World Bank¹⁹⁷ are based on the notion that the 12 types of policy or administrative instruments can be organised in a better way so as to minimise costs of time spent by business and of delays. These are typically national or even regional interventions, with no direct EU role.

However, the indicators provide an interesting proxy of the business climate and hence influence the propensity of European businesses to invest in that EU Member State. For some of the indicators, there is also an impact on (intra-EU) trade of goods and services. Thus, Canton & Petrucci (2017) have shown that the Doing Business indicators in EU Member States have improved over time. The point is that these indicators are not part and parcel of the usual "barriers" to an unrestricted Single Market, yet profoundly influence business perceptions and attitudes about "doing business" in that Single Market. This is a greater problem for services than for goods and ignoring it will perpetuate business sentiments about the single market.

Introducing "regulatory heterogeneity"

A relatively new approach to a better understanding of businesses' perceptions about the costs of doing business in Europe, adding to the difficulties of exploiting the business potential of the EU Single Market, is the awareness of "**regulatory heterogeneity**" between Member States in the Single Market. The idea behind this notion is that rules and obligations in different Member States serving similar or identical objectives are nevertheless distinct, that is "heterogeneous", thereby raising costs of cross-border intra-EU business. Such costs vary, but can be high or indeed very high and this is likely to have negative effects on intra-EU trade and FDI, or (far) worse, than explicit regulatory restrictions called "barriers" usually have.

For a proper understanding, there are national "barriers" to free movement and the right of establishment (i.e. what most Single Market reports and EU policy intentions are all about) *and* there is "heterogeneity" in national measures and obligations. Often, the heterogeneous national measures are serving equivalent purposes, which do not fall under EU competences, but nevertheless unduly hinder and render more costly European businesses in making good use of the Single Market. The perceptions and irritation of European businesses are of course caused by both types of cost-raising issues. The following pays explicit attention to the feature and costs of "regulatory heterogeneity", which might include some remainders of national restrictions which are dubious or even illegal in EU law, but is preponderantly about provisions in Member States' laws *not* touching on issues of free movement or establishment. Regulatory heterogeneity may show up in the area of goods regulation but is **principally found in the area of service regulation.**

¹⁹⁶ For a survey, see ECORYS et al. (2017), with some key figures.

¹⁹⁷ See World Bank (2020). The twelve indicators are: starting a business; employing workers; dealing with construction permits; getting electricity permits; registering property; getting credit; protecting minority investors; paying taxes; trading across borders; contracting with the government; enforcing contracts; resolving insolvency.

Regulatory heterogeneity is important for businesses and the EU

A first impression of how important reducing regulatory heterogeneity is for the Single Market can be had from the following pieces of empirical economic literature:

- Kox & Lejour (2006), based on the OECD's PMRs, found that drastically reducing regulatory heterogeneity under the Services Directive 2006/123 could boost intra-EU services trade by 30-60%;
- In a stylised exercise for all OECD countries, the reduction of regulatory heterogeneity is shown by Kox & Nordås (2007) to potentially augment OECD trade by up to 60%;
- In Nordås & Kox (2009), the Doing Business indicators are used to reflect heterogeneity between countries (so, a more limited set of measures). A simulation of this heterogeneity being harmonised to the lowest degree of heterogeneity amongst OECD countries alone would yield between 13-30% more FDI;
- New OECD work on heterogeneity (in services) is based on the STRI, the Services Trade Restrictiveness Index, which measures national restrictions in five categories, the most important one of which is restrictions on foreign entry (establishment via FDI, i.e. mode 3)¹⁹⁸. As Nordås (2016) shows, at the lower levels of the STRI, the average OECD regulatory heterogeneity index is 0.26. For this average, dependent on what OECD countries one studies, the trade costs¹⁹⁹ amount to a range between 20% and 75%. Needless to say, this is very high indeed. In this respect, it is good news that Benz & Gonzalez (2019) show that regulatory heterogeneity affecting services trade (in the sense of restricting FDI) is far lower within the Single Market than vis-à-vis third countries. In Figure 11, Figure 12 and Figure 13 below, we update these results and include a positive short-term trend of five years up to 2019; and
- It pays to address regulatory heterogeneity: Nordås (2016) shows rigorously that on average a reduction of heterogeneity by 0.05 points yields a rise in services exports of 2.5%.

Further reflections on regulatory heterogeneity

Four aspects are relevant in order to assess the economic impact on the Single Market and trends. First, as services frequently cannot be supplied from a distance (i.e. from another Member State), FDI is often a necessary condition, but precisely for that reason businesses run into obligations and procedures which must be "undergone" in each and every EU Member State. These can be quite costly and – more often than not – are different in details and addressed by different administrative organs time and again. Mutual recognition usually plays no or a minor role.

¹⁹⁸ The other four elements are: restrictions of the movement of people (as linked to mode 4, i.e., the temporary provision of cross-border services), "other" discriminatory measures, barriers to competition and regulatory transparency. For these other four, there is no quantified indicator as empirical details and ranking are unavailable. Thus, in actual practice, when using the STRI today it is about restrictiveness for incoming FDI.

¹⁹⁹ In ad valorem equivalence. In other words, such trade costs add 20% to 75% to the basic non-physical costs of establishment.

Box 2: The OECD Regulatory Heterogeneity Index in services

The OECD's Regulatory Heterogeneity index in services was greatly facilitated once the STRI had been developed between 2010 and 2014. The STRI is based – in a simplified way – on assessing the degree of restrictiveness of national measures impacting establishment by non-local (EU or OECD, as the case may be) enterprises providing services. Such assessments are generated by experts and given a ranking, thus turning a qualitative assessment into a quantitative one (between zero and one, where zero is completely open and one is completely restricted). This is done for 22 sectors and all OECD countries as well as some non-OECD countries. It goes without saying that the data requirements are massive, but OECD national administrations are employed to complete and verify the qualitative data.

The Regulatory Heterogeneity Index is always binary: comparing countries A and B at the level of sectors and subsequently individual measures and the nature and level of their restrictiveness. It is of course very convenient that the STRI indices are based on the very data needed for the Heterogeneity Indices as well. Note that the Heterogeneity Index only focuses on the differences or disparities of rules between A and B (score of zero if rules on a specific aspect are completely identical) or indeed on their similarity (maximum score of 1 for completely different), without any judgment of restrictiveness or justification of the rule. Scores are aggregated using the same weights as far the STRI indices. The index therefore reflects the concerns in business circles that differences in rules as such matter for the propensity to invest in another country. In the Single Market, businesses can be disillusioned by costly to very costly regulatory heterogeneity, even when FDI is relatively free in legal terms. It should be kept in mind that this index only refers to FDI and not (yet) to rules affecting direct cross-border trade in services.

Source: OECD Regulatory Heterogeneity Index.

Kox & Lejour (2005) show in their analytical model that such heterogeneity can severely hinder small players as the "fixed costs of market access" have to be earned back first in each and every market (unlike in goods), with the upshot that the Single Market is only partially exploited and many SMEs are discouraged. Note that these costs are high even when the requirements in each Member State would be identical, let alone when they are disparate. With deep administrative cooperation (e.g. like some "compacts" between US states²⁰⁰) based on common templates that can be used in all Member States, possibly complemented by mutual recognition where appropriate, such costs could be cut significantly.

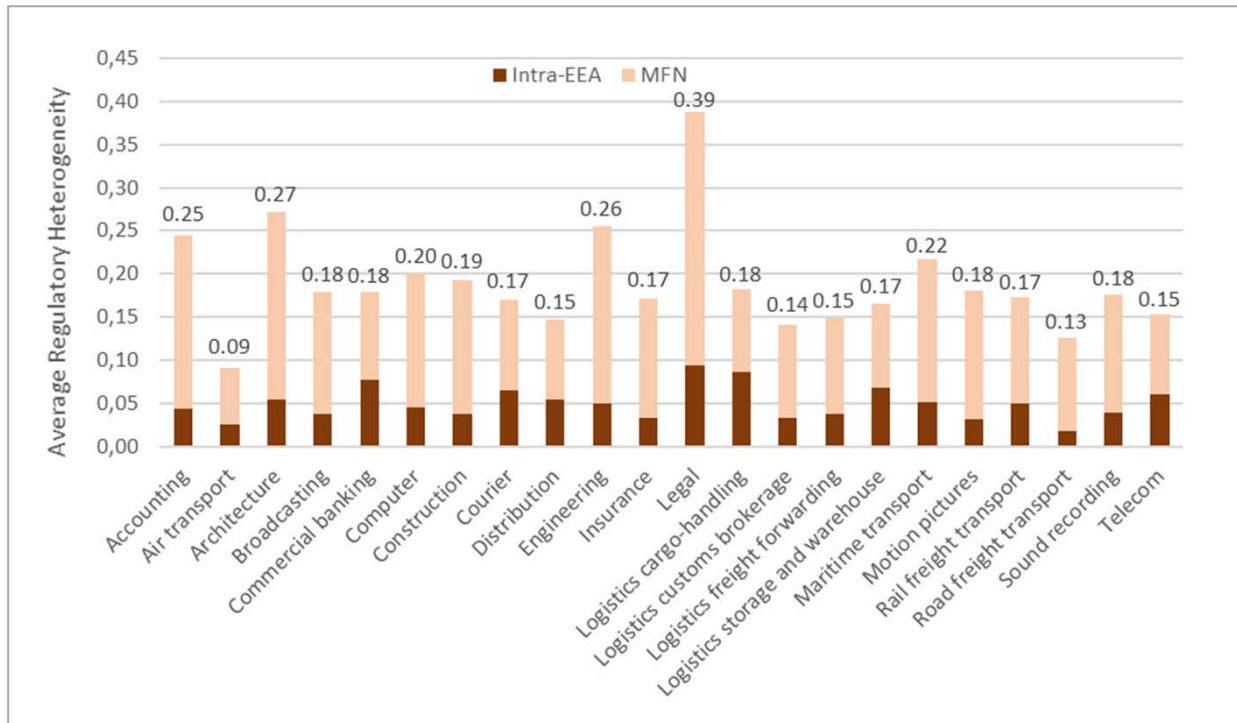
Second, there is a direct relation between deepening the Single Market and regulatory heterogeneity in services: the deeper the Single Market (i.e. the fewer and less problematic the restrictions of intra-EU trade and FDI and the greater harmonisation), the lower regulatory heterogeneity will be. Fournier (2015) demonstrates this empirically for the EU. This is partly explained by the fact that some restrictions (differing between Member States) that fall under EU law also end up in the measured indicators, and partly by domestic reforms and revisions of domestic laws initiated due to the acceptance of intra-EU liberalisation of market access.

Third, because of the steady, decades-long intra-EU liberalisation and the powerful role of the CJEU protecting the four freedoms and the right of establishment, intra-EU (or EEA) regulatory heterogeneity in services has declined quite significantly.

²⁰⁰ Among US states there is a tradition of (often) avoiding federal regulation by concluding "compacts" between a number of states on highly specific sectoral or technical issues. Some 1,200 compacts exist and more are under negotiation.

Irritating as it still might be, especially for SMEs and in some sectors, it has fallen to low levels compared to the GATS/MFN scores of EU Member States vis-à-vis third countries. Figure 11 provides a striking illustration of the very considerable discrepancies of regulatory heterogeneity under the GATS-committed obligations by EU Member States and that inside the EU. For the 22 sectors, the intra-EU average index hovers between 0.02 and 0.09, whereas the index under the GATS regime hovers between 0.09 and 0.39. Per sector, the GATS-based index is mostly 2.5-5 times the intra-EU index.

Figure 11: Services trade regulatory heterogeneity, intra-EU and EU-GATS commitments, 2019



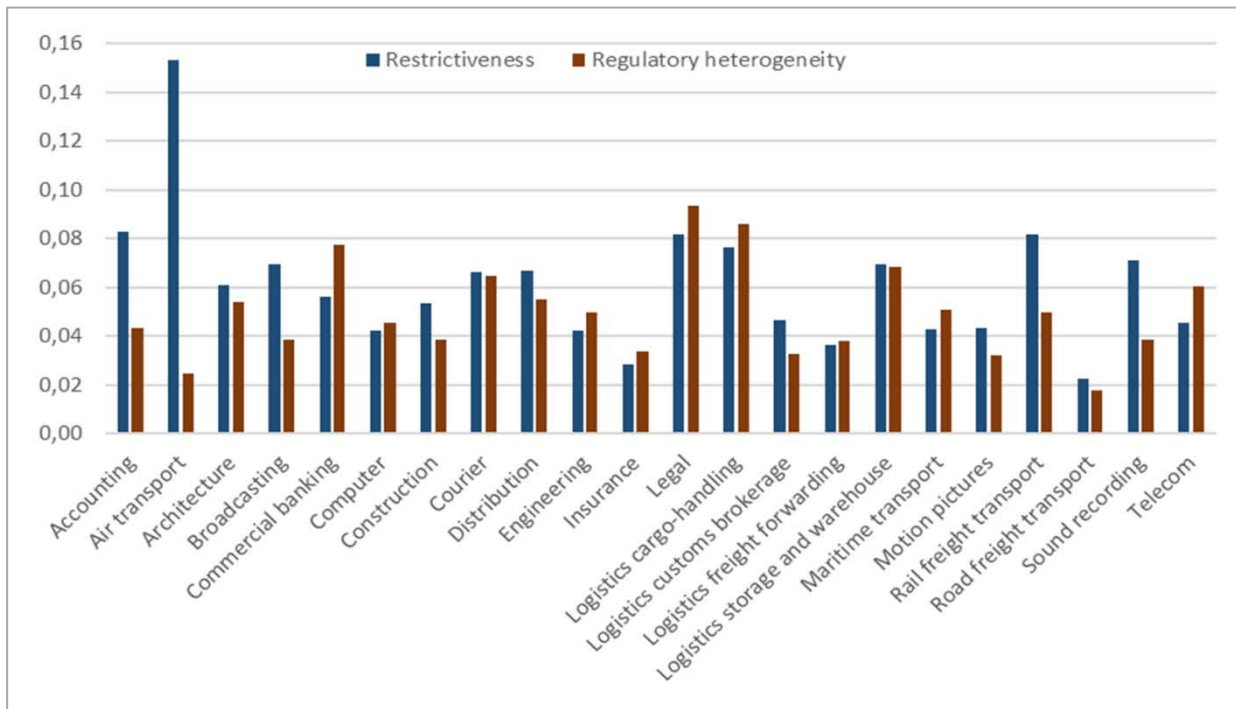
Source: OECD STRI database.

Note: Results based on scores for the 22 EU-OECD countries.

Fourth, in Figure 12, the apparent connection between decades-long liberalisation inside the Single Market and the decline of regulatory heterogeneity in the EU can be empirically shown for the last five years (2014-2019). Figure 12 zooms in on the intra-EU average scores for both restrictiveness in services and regulatory heterogeneity.

Between 2014 and 2019, services trade restrictiveness among the 22 EU-OECD countries has fallen, on average, by 7.2%, compared to 0.1% in the General Agreement on Trade in Services/Most Favoured Nation (GATS/MFN) hypothetical scenario. Similarly, regulatory heterogeneity has fallen by 7.6% vis-à-vis 3.4% in the GATS/MFN scenario.

Figure 12: Intra-EU services trade restrictiveness and regulatory heterogeneity, 2019



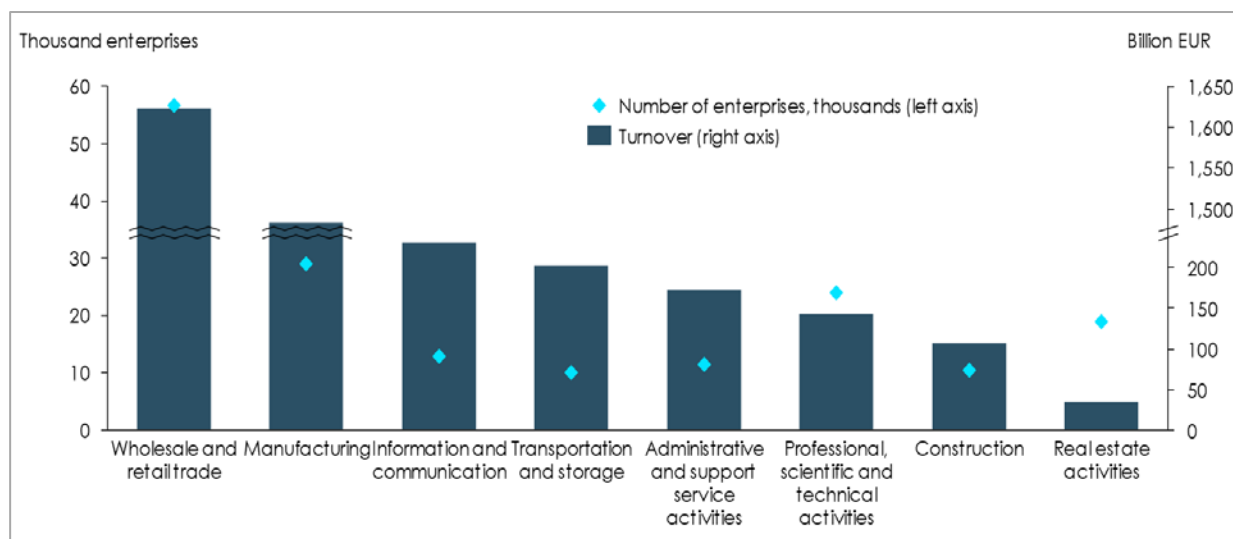
Source: OECD STRI database.

Note: Results based on scores for the 22 EU-OECD countries.

In fact, except for restrictiveness in trade of logistics storage and warehouse services, intra-EEA restrictiveness and regulatory heterogeneity has decreased across all sectors, see Figure 13. Yet, sectors with the highest heterogeneity in 2019 are also those exhibiting among the lowest decrease, below 5% (i.e. Legal, Logistics cargo-handling and Commercial banking). Sound recording instead is among the sectors with the highest change in both dimensions, while Air transport shows a limited decrease in restrictiveness, but a considerable increase in regulatory heterogeneity. Overall, most sectors fall within the range of an 8% to 13% decrease for restrictiveness, compared to 3.5% to 7.5% for regulatory heterogeneity.

With harmonisation and justified regulatory reform at home, the EU can harvest economic gains, with care taken that the social adjustment costs remain minimal. What rarely, if ever, is underlined is this additional benefit of lower regulatory heterogeneity.

Figure 14: Number of intra-EU cross-border established enterprises and their turnover, by sector, 2017



Source: Eurostat, Foreign control of enterprises by economic activity and a selection of controlling countries (from 2008 onwards) [fats_g1a_08]. No data available for financial and insurance service activities.

Note: Number of enterprises for Information and Communication (ICT) refer to 2016 data.

With the discretion to set national requirements on retail establishment, Member States need to ensure that the requirements are justified on the grounds of public interest and proportional as per the Services Directive.

In the analysis below, we illuminate with the help of detailed case studies the profound and varied issues in retail, as these case studies are effective for a deeper understanding of these regulatory hindrances. It is useful to know, in addition, that the European Commission (DG GROW and DG ECFIN) has developed a new Retail Restrictiveness Indicator (RRI) with a considerable amount of detail about the regulatory restrictiveness for both establishment and operation of retail outlets. Unfortunately, given significant data intensity – also for Member States – there is only one RRI available for the year 2017, so no trend comparison is possible yet²⁰². Nonetheless, the RRI is very clear on one characteristic: Member States are far more restrictive on cross-border establishment issues, than on operational issues.

Case study: Local content requirements

Over the past years, retail businesses have experienced a **continuous increase in national laws and regulations that require a minimum threshold of local products to be sold in stores**²⁰³. It is primarily the case in central and eastern Europe, whereby laws in e.g. Bulgaria, Czechia, Slovakia and Poland require that a certain share of the (agricultural) products sold by retailers on their territory is sourced from local producers. Such requirements may not only constitute a barrier for retailers (insofar as they need to adapt their supply chain to meet the requirements), but may also put producers from other EU Member States at a disadvantage when retailers are forced to have a certain share of local products in the assortment.

²⁰² The RRI can be found in SWD (2018)236 of 19 April 2018, p. 106, accompanying European Commission, 2018, *A European retail sector for the 21st century*, COM (2018)219 of 19 April 2018, p. 125.

²⁰³ EuroCommerce, 2020, *Single Market Barriers Overview*, 27 August 2020.

On 30 October 2020, the Commission sent a reasoned opinion to Bulgaria regarding a law that requires retailers to offer distinct exposure and sale space for domestic food products²⁰⁴. The law is likely to be contrary to the free movement of goods, since the legal requirements give an advantage to domestic products vis-à-vis foreign products, making the latter less attractive to consumers. It is also likely to be contrary to the free movement of establishment, as it restricts the sourcing options for retailers to e.g. offer diversified product offerings or rely on cross-border value chains. In the end, consumers and retailers stand to lose from less product diversity and likely higher prices.

A similar law in Romania, requiring large retailers to sell at least 51% locally produced food was subject to a Commission infringement procedure launched in 2017 for being contrary to the free movement of goods²⁰⁵. The procedure led to a withdrawal of the Romanian requirement in 2020²⁰⁶. Thus, the case is an example of how the Single Market governance system can act to remove unjustified obstacles to trade. However, it also shows how lengthy such procedures can be, and producers and retailers were indeed subject to the requirement and the negative consequences during the entire period until the law was withdrawn.

Case study: Complex establishment procedures and planning laws

In practice, businesses report that retail establishment procedures are often time-consuming, complex and non-transparent, with considerable discrepancies between Member States²⁰⁷. These establishment procedures include requirements associated with size thresholds, spatial planning laws and location-specific rules, as well as impact assessments and economic data.

In many instances, **Member States impose size thresholds on retail establishments on the grounds of spatial planning objectives**. However, there are wide discrepancies in both the use and the extent of these thresholds across Member States both at the national and sub-national levels²⁰⁸. For example, in Italy the size threshold is sometimes as low as 150-250 square metres, depending on the area in question, whereas in France, the threshold is set at 1,000 square metres across the country. In the event that a retail outlet is above a certain size threshold, a retailer may need to apply for special authorisation, additional impact assessments and other complex procedures in order to be able to establish their outlet in a given Member State.

Retailers may also have to comply with spatial plans and location-specific rules specified by public authorities, which are often detailed and stringent, leaving little flexibility for retailers to establish themselves in a given location. Such planning laws are not within the scope of the Services Directive. For instance, even in zones which are dedicated to commercial activities, the **spatial plans may prohibit the entry of a certain type of retail outlets**, such as in Belgium where distinctions are made between food and non-food retail, or of a certain type of products that may be sold²⁰⁹. Location-specific rules also include restrictions on the centre-relevant range of products when wanting to establish retail outlets outside central supply areas, such as in Germany where large-scale retail outlets may only be planned outside central supply areas if they do not provide city centre relevant assortments (with the exception of marginal goods accounting for no more than a certain share of the total sales area)²¹⁰.

²⁰⁴ Infringement number 20200231.

²⁰⁵ Infringement number 20162148, see also Business Review, 15 February 2017, *EC starts infringement proceedings against Romania for food products marketing*.

²⁰⁶ Romania-Insider, 17 June 2020, *Large retailers no longer required to promote Made in Romania food products*.

²⁰⁷ European Commission, 2018, *A European retail sector fit for the 21st century*, COM (2018) 219 final.

²⁰⁸ Ibid.

²⁰⁹ Ibid.

²¹⁰ Para 11(3) of the BauONVO, available at: <https://dejure.org/gesetze/BauNVO/11.html>; EuroCommerce (2020). *Single Market Barriers overview*.

Complying with these rules and the accompanying procedures is an additional burden for retailers, especially when looking to establish in various Member States with distinct rules, where even just obtaining the right information can be difficult and time-consuming.

The Services Directive prohibits such economic needs tests, where a retailer may need to prove for instance the existence of market demand or the potential economic effects of their activity on existing competition. Planning laws are excluded from the scope of the Services Directive, but a **recent CJEU case has made it clear that if planning laws include requirements that fall under the Services Directive, such as authorisations or economic needs tests, those aspects do fall within the scope of the Services Directive** (and should for instance be notified)²¹¹. Although the requirement for economic needs tests in retail establishment procedures has been removed in most Member States (including Belgium, France, Luxembourg, Italy, Romania, and most regions of Spain), economic needs tests remain *de facto* or *de jure* in place in some Member States such as Germany, the Netherlands, Austria, and Greece²¹². For example, despite an explicit prohibition on the application of economic needs tests in the Dutch zoning legislation, economic criteria are still applied for the establishment of certain retail outlets at the local level in the Netherlands²¹³.

Case study: Economic test requirements for retail outlets in Germany

Article 14 of the Services Directive²¹⁴ lists particularly restrictive requirements that Member States are prohibited from imposing on service providers. Those requirements are generally incompatible with Article 49 of the TFEU which prohibits restrictions on the freedom of establishment.

Specifically, Article 14(5) of the Services Directive requires Member States to abolish any legal requirements concerning the application of economic tests within their territory. Thus, the granting of authorisations to access or exercise a service activity cannot be subject to a test of the economic need or market demand for that service, an assessment of the economic effects of the activity or the appropriateness of such an activity in light of economic planning objectives set by the competent authorities. Nevertheless, overriding reasons relating to the public interest, such as the protection of the urban environment²¹⁵, are not subject to the prohibition under this provision if such tests are the least restrictive way of achieving such an overriding reason.

An example of an economic needs test can be found in the German regional²¹⁶ and national law regulating retail outlets. The German system limits the establishment opportunities for large retail outlets with a gross surface area that exceeds 800 square metres.

²¹¹ The Visser case, C-360/15-X.

²¹² European Commission, 2012, *Detailed information on the implementation of Directive 2006/123/EC on services in the Single Market*, SWD(2012) 148 final; European Commission, 2018, *A European retail sector fit for the 21st century*, COM (2018) 219 final.

²¹³ *Ibid.*

²¹⁴ Article 14(5) of Directive 2006/123/EC stipulates: "Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with any of the following: the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest".

²¹⁵ Joined Cases C-360/15 and C-31/16 *College van Burgemeester en Wethouders van de gemeente Amersfoort v X BV (C-360/15)*, and *Visser Vastgoed Beleggingen BV v Raad van de gemeente Appingedam (C-31/16)*, [2018] ECLI:EU:C:2018:44, paras 112-137.

²¹⁶ The example of North Rhine Westphalia was used as a representative example for this study.

According to the German Building Code²¹⁷, large retail outlets that have the potential to have negative impacts on the achievement of the objectives of regional development and planning and/or on the urban development and organisation²¹⁸ are in principle only permitted in designated areas or within built-up areas, so-called "core areas"²¹⁹.

In order to establish a large retail outlet in areas other than those designated or core areas, it is thus required to assess and show that the retail outlet does not have such potential impacts. These impact assessments need to take into account impacts on the supply of the population with basic goods, and other factors like traffic impact, environmental impact, etc. The economic effects of a proposed retail establishment project are examined by the local authorities, especially when adopting land-use plans for large-scale retail establishments.

In order to assess whether a large-scale retail outlet may have an effect on the development of supply in the catchment area, such effect is assumed for retail outlets larger than 1,200 square metres unless proven otherwise. The assortment of goods of the large-scale retail outlet must also be considered²²⁰. Large-scale retail outlets with "city centre relevant core assortments" are often only allowed inside the central supply areas of the cities and municipalities. Hence, large scale retail outlets may only be planned outside those designated or core areas if they do not provide city centre-relevant assortments (except for "marginal goods", which means that those goods must generally have a share of less than 10% of the total sales area)²²¹.

Economic tests of this kind are not only highly burdensome to carry out by service providers, but they also often hinder the establishment of new market entrants and thus competition. In accordance with the established CJEU case law, reasons of economic nature such as maintenance of a certain market structure or protection of certain economic operators cannot justify restrictions to the freedom of establishment²²². Furthermore, the CJEU has repeatedly held that restrictions in national (or regional/local) legislation that make the pursuit of an activity conditional on the economic or social needs for such activities are incompatible with the Single Market, as they limit the number of service providers²²³.

It appears that the economic test requirements under German law are not limited to impact assessments aimed at the protection of the environment and road safety. Therefore, the requirements may be considered as restrictive of the freedom of establishment in light of the above-mentioned jurisprudence of the CJEU and the relevant legislation, since it is possible that the requirements may potentially **go beyond what is necessary to achieve the legitimate public interest objectives.**

²¹⁷ Para 68 Abs. 1 S. 2 Nr. 4 and S. 3 Nr. 1 Bauordnung für das Land Nordrhein-Westfalen (BauO NRW), available at: https://recht.nrw.de/lmi/owa/br_text_anzeigen?v_id=74820170630142752068; and Paras 29 ff., 204 Baugesetzbuch (BauGB), available at: <https://www.gesetze-im-internet.de/bbaug/BauGB.pdf>.

²¹⁸ HDE Handelsverband Deutschland, 13 March 2016, *Umgang mit dem § 11. Abs. 3 BauNVO*, available at: <https://einzelhandel.de/themeninhalte/standortundverkehr/1259-themen/standortpolitik/bau-und-planung-recht/3516-umgang-mit-dem-11-abs-3-baunvo>.

²¹⁹ Section 11 (3) of the BauONVO, available at: <https://dejure.org/gesetze/BauNVO/11.html>.

²²⁰ Local supply-relevant assortments are primarily the goods of the daily need, especially for the basic supply with food and drugstore items. They are also a subset of the assortments relevant to the centre; see guidelines for dealing with para 11 (3) BauNVO in relation to food retail businesses, available at: https://wm.baden-wuerttemberg.de/fileadmin/redaktion/m-wm/intern/Dateien_Downloads/Bauen/Bauvorschriften/LeitfadenLebensmitteleinzelhandel.pdf.

²²¹ Section 11 (3) of the BauONVO, available at: <https://dejure.org/gesetze/BauNVO/11.html>.

²²² Judgment of 4 June 2002, *Commission v Portugal*, Case C-367/98.

²²³ Joined cases C-570/07 and C-571/07 *Blanco Perez* [2010] ECR I-4629, paras 53, 54, 55; Case C-169/07 *Hartlauer* [2009] ECR I-1721, paras 36, 63, 64, see also: Case C-63/99 *Gloszczuk* [2001] ECR I-6369, para 59; and Case C-255/04 *Commission v France* [2006] ECR I-5251, para 29.

4.1.3. Is there a growing trend of these problems in the EU?

There appears to have been an **increase in recent years of local content requirements for retailers in the Single Market**, especially in central and eastern EU Member States. A recent closure of an infringement procedure against Romania led to the withdrawal of such a requirement, but similar laws are still in place or under consideration in other Member States. Furthermore, it has been argued that **Member States are reluctant to notify such requirements**, thus making it difficult for the Commission or other Member States to scrutinise the draft laws.

The issue of **economic needs tests and other forms of authorisations appear to be a long-standing issue in the Single Market**, with no marked growing trend over the past years. Rather, the ruling of the CJEU has made the issue more pertinent in the EU by stipulating that authorisation requirements (within the Services Directive) included in planning laws (outside the Services Directive) are to be considered subject to the Services Directive. This was to be clarified in the proposed revision of the notification procedure under the Services Directive that was recently withdrawn by the Commission²²⁴, due to an unbridgeable gap between the objectives of the proposed revision and the Council's view that the proposal did not appropriately respect the principles of proportionality and subsidiarity²²⁵.

4.1.4. What tools exist at EU and national level to address these problems?

As noted above, the **EU infringement procedure is in place and able to remove unjustified obstacles to free movement**. However, it is a relatively lengthy procedure and it would often be preferred if obstacles can be prevented before they are introduced.

This is the purpose of the notification procedure under the Services Directive. Member States are required to notify all new or changed requirements for services that fall within the scope of the Services Directive, before they are adopted. The Commission and Member States can scrutinise and comment on the notified requirements.

However, unlike the notification procedure for technical rules for goods and information society services (see Section 3.1.3), failure to notify requirements under the Services Directive procedure does not have any strong consequences for Member States. For example, failure to notify a service requirement does not mean that it is unenforceable in individual cases, which is the case if a Member State has not notified a technical rule. In addition, the wording of the Services Directive means that it is not clear *when* a measure has to be notified. Indeed, 90% of the notified requirements have already been adopted, thus making it virtually impossible to make any substantial changes to the requirements based on the Commission's or other Member States' comments²²⁶. Due to the lack of clear wording on when a measure should be notified, it is **difficult for the Commission to take legal action against failures to notify service requirements**.

Furthermore, it has been noted that the notification procedure is not transparent as **businesses and consumers have no access to the notifications** (again, this is in contrast to the notification procedure for technical rules which is available via a public database). It has also been noted that the current framework does not allow for a proper assessment of the proportionality assessment that the notifying Member State has undertaken.

²²⁴ European Commission, 2020, *Annexes to the Commission Work Programme 2021*, COM(2020) 690 final, p. 24.

²²⁵ See the European Parliament's Legislative Train Schedule: *Deeper and fairer Internal Market with a strengthened industrial base / services including transport*, available at: <https://www.europarl.europa.eu/legislative-train/theme-deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file-services-notification-procedure>.

²²⁶ Ibid.

These problems led the Commission to propose a revision of the notification procedure – however, the Council voiced concerns that the proposal may breach the principles of proportionality and subsidiarity. On 19 October 2020, the Commission announced²²⁷ that it will withdraw the proposal due to "*prospects of finding a compromise without jeopardising the objectives of the proposal are unlikely. The Commission will take measures to ensure the full enforcement of the Services Directive*". Thus, improving the notification procedure via legal revision is currently off the table. It remains to be seen how the full enforcement of the Directive can be achieved within the existing procedure.

Nonetheless, during 2019, **a total of 146 notifications were made under the procedure**²²⁸. This was more than twice as many as in 2018 (71 notifications), possibly because of the Commission urging Member States to improve compliance with the procedure in June 2019. The most common sector to be targeted by the notifications was the general "other services" sector, including requirements for example concerning funeral services and chimney sweeping. The second most common sector was tourism followed by services to individuals. More than half of the notifications were motivated by the need to ensure public order, followed by consumer protection and public health.

During 2019, the Commission gave 34 comments to the 146 notifications. This does not necessarily mean that 34 notifications were considered contrary to EU law, but can also refer to requests for clarifications, etc. However, some of the 34 comments were indeed related to a risk that the notified requirement was contrary to the Services Directive, or how it applies the principle of mutual recognition.

One example concerned an Estonian requirement that all shares in a company that provides patent agency services must be held by patent agents. The Commission commented by referring to a CJEU ruling on a similar case for veterinary services that was deemed contrary to the Services Directive. The comment led the Estonian government to communicate that they will withdraw the draft requirement²²⁹.

It should be noted that only 18 countries made a notification during 2019, and some countries have not made a single notification during the past years. While it is *per se* difficult to draw any conclusions based on the absence of notifications, the Commission argues that **there are many national requirements that have not been notified even though they should have been**²³⁰.

This is further suggested by the fact that only a few notifications have been made during the first half of 2020, despite the fact that the COVID-19 pandemic has led to several restrictions to free movement²³¹.

4.2. Insufficient information about applicable rules

4.2.1. What are the current problems?

The difficulties in meeting requirements to sell services, accessing a regulated profession as well as posting workers to another Member State are often associated with limited knowledge of the required procedures. In fact, 32% of respondents in a survey by the Architects' Council of Europe reported insufficient knowledge of planning or building regulations as a notable obstacle to practising their

²²⁷ European Commission, 2020, *Annexes to the Commission Work Programme 2021*, COM(2020) 690 final, p. 24.

²²⁸ National Board of Trade Sweden 2020, *Årsrapport – Anmälningsproceduren enligt tjänstedirektivet 2019*.

²²⁹ Ibid. The notification refers to notification no. 83389.

²³⁰ European Commission 2015, *A Single Market Strategy for Europe – Analysis and Evidence*, SWD(2015) 2020 final.

²³¹ National Board of Trade Sweden 2020, *Årsrapport – Anmälningsproceduren enligt tjänstedirektivet 2019*.

profession abroad²³². However, it is not clear whether the relevant planning or building regulations are unnecessarily complex or difficult to obtain.

Insufficient knowledge is not only due to lack of experience in establishing a business or practising a profession in another Member State, but it points to the elemental issue concerning the quality, availability and accessibility of essential information. **The inaccessibility of information on rules and requirements was perceived as the third most significant obstacle by service providers to doing business in another Member State**, whereby 71% of service businesses rated this as a significant or a very significant obstacle²³³.

The Services Directive obliges Member States to provide national rules and requirements in an easily accessible manner through the national Points of Single Contact (PSCs). **As far as PSCs are concerned, they have not been adequately implemented by Member States**²³⁴. Member States should, *inter alia*, ensure that businesses can complete relevant procedures online and from another Member State. However, only one Member State (Estonia) offered all procedures online in 2017 (the year with latest available data) and no Member State had made the relevant procedures possible to access from other Member States²³⁵. To that, it should also be noted that 17 Member States offered only 75% or fewer procedures online, and 16 Member States offered access to procedures from other Member States in 75% or fewer of the procedures. Furthermore, across a sample of 20 relevant procedures for services providers²³⁶, only 60% of the relevant information was sufficiently available online via the national PSCs, see Figure 15. Several Member States were well below 50% in terms of online availability of information.

Figure 15: Share of procedures with sufficient information available online, 2017



Source: European Commission's Single Market Scoreboard, Points of Single Contact. The data is based on a self-assessment by national PSCs on their performance in supplying information online for 20 different procedures.

²³² Architect's Council of Europe, 2018, *The architectural profession in Europe 2018 – ACE sector study*.

²³³ Eurochambres, 2019, *The state of the Single Market: Barriers and Solutions*.

²³⁴ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

²³⁵ The Single Market Scoreboard, Points of Single Contact, available at: https://ec.europa.eu/internal_market/scoreboard/performance_by_governance_tool/points_of_single_contact/index_en.htm.

²³⁶ Including general procedures, such as registering a company name or obtaining a tax identification number, as well as more specific procedures, such as obtaining a permit to open a cafeteria or obtaining a license/permit related to IT services.

This shows that the national PSCs are generally underperforming and do not serve their purpose to facilitate access to information and the possibility to complete necessary procedures. As a consequence, in June 2019, **the Commission sent Letters of Formal Notice to all EU Member States, requesting them to comply with the Services Directive and improve their Points of Single Contact**²³⁷. The letters covered several aspects of the PSCs, including calls on Member States to:

- provide user-friendly one-stop shops for service providers and professionals;
- help service providers overcome administrative hurdles in the access to service activity;
- address issues related to online availability and quality of information on requirements and procedures; and
- ensure ability to access and complete procedures online through the PSCs, including from other Member States (with reference to the importance of complying with Regulation (EU) 910/2014 on electronic identification).

The Commission is currently consulting with Member States to remedy the shortcomings that the letters point out²³⁸. Additionally, it has been pointed out that the quality criteria that are collected and reported in the Single Market Scoreboard (and in this section) may not sufficiently reflect the end-user experience. For example, the existence of information translated into a language that is understood by the end-user does not necessarily mean that the end-user is readily able to complete, or even understand, the information provided therein²³⁹. It is expected that the requirements to consistently collect and report on user feedback, as part of the Single Digital Gateway, will improve the situation in this regard.

The Commission's synopsis report on the stakeholder consultation of the Single Digital Gateway²⁴⁰ revealed that approximately 78% of businesses have tried to find relevant information about applicable rules online, of which 80% deemed it to be a difficult task. The main difficulties were identified as lack of findability (48%), quality of information (40%) the language in which the information was available (24%). Poor findability was also identified as a major obstacle to selling services in other Member States by 33% of Dutch entrepreneurs, according to a Dutch panel survey on the Single Market²⁴¹.

It can be both costly and burdensome for businesses to establish and sell services cross-border, which is only exacerbated by the lack of sufficient information. Further, even when online information exists, it can be difficult to find and understand, due to reasons concerning availability of different languages and the use of legal jargon²⁴². Some of the necessary changes to improving the accessibility and availability of online information about applicable rules include better monitoring tools to ensure proper implementation of PSCs by Member States, a common governance platform and the possible introduction of infringement procedures in cases of non-compliance²⁴³.

²³⁷ European Commission, 2019, *June infringement package: key decisions*, 6 June 2019, available at: https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_2772.

²³⁸ Salsas-Forn, P., et al., 2020, *The role of Points of Single Contact and other information services in the Single Market*, Publication for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

²³⁹ Ibid.

²⁴⁰ European Commission, 2017, *Synopsis Report on the Stakeholder Consultation of the Single Digital Gateway*, SWD (2017) 212 final.

²⁴¹ KvK Ondernemerspanel, 2016. *Panel survey on the European Single Market*.

²⁴² European Commission, 2017, *Synopsis Report on the Stakeholder Consultation of the Single Digital Gateway*, SWD (2017) 212 final.

²⁴³ European Parliament, *Single Digital Gateway, EU Legislation in Process*, Briefing, EPRS, 2018.

4.2.2. Is there a growing trend of these problems in the EU?

As with many other types of obstacles analysed in this study, **there is little evidence pointing to the fact that access to information has become worse over time**. Rather, it may be understood as an issue that has not been appropriately addressed and, thus, an obstacle that has not been removed.

However, given that more and more contact points have been introduced by different pieces of EU legislation across the Single Market, it may be reasonable to assume that the **difficulty in finding the correct contact point has been aggravated**. This is noted in the recitals of the Regulation establishing the Single Digital Gateway²⁴⁴: *"There are discrepancies in the availability of online information and procedures, there is a lack of quality in relation to the services and a lack of awareness regarding that information and those assistance and problem-solving services. Cross-border users also experience problems finding and accessing those services"*.

4.2.3. What tools exist at EU and national level to address these problems?

As mentioned above, there are problems with the functioning of the PSCs. However, **the Single Digital Gateway** (established via Regulation (EU) 2018/1724) aims to address many, if not all, problems related to access to information across the EU²⁴⁵. A recent study for the European Parliament concludes that it is likely to address most of the current problems²⁴⁶. Importantly, as the name suggests, the Single Digital Gateway will gather all relevant information points relating to free movement in one place, but it will also improve the quality of the information available.

Thus, it is not just a centralisation of existing information, it is also an upgrade of the quality of information. This includes an improvement in the availability of online procedures, which has also been acknowledged as a problem, as well as easier access to assistance services if users need help finding the right information and/or procedure.

The Single Digital Gateway will offer a portal function that will provide:

- **Information:** Citizens will be able to easily find reliable, qualitative information on EU and national rules that apply to them when they want to exercise their right(s) to free movement;
- **Procedures:** Citizens will find out exactly how to carry out administrative procedures and what steps they need to follow; and
- **Assistance services:** If users are still confused about which rules apply or have trouble with a procedure, they will be guided to the EU or national assistance service most suited to address their problem.

If the Single Digital Gateway is well implemented, and if it is well used, it could play an important role in closing the information gap as regards cross-border provision of goods and services in the EU. However, it is much too early to say how effective it will prove to be in practice.

However, it is important to note that the Points of Single Contact were also aiming to do almost exactly this, and it nonetheless led to a situation with incomplete information in several cases.

²⁴⁴ Regulation (EU) 2018/1724, recital 11.

²⁴⁵ See the European Commission's dedicated webpage: https://ec.europa.eu/growth/single-market/single-digital-gateway_en.

²⁴⁶ Salsas-Forn, P., et al., 2020, *The role of Points of Single Contact and other information services in the Single Market*, Publication for the committee on Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

Thus, an important priority for the EP – together with other relevant actors, notably the Commission – is to **closely follow up on the implementation of the Single Digital Gateway to ensure that it is done in a way that corresponds to the objective of the Regulation**, ensuring that relevant information, online procedures and language options indeed are made available in a useful way to businesses and citizens in the Single Market.

This is possibly a relatively substantial evaluation exercise, given the multitude of national regulations and procedures in place across the EU (see, for example, Section 4.3 on access to regulated professions). However, the benefits are likely to be large, since ensuring that the relevant rules and procedures are available to businesses in an accessible manner is not only likely to reduce obstacles and costs to cross-border trade in the Single Market, but it can also bring the added benefit of increasing the transparency and legitimacy of the national requirements that are in place.

While it may be expected that the Single Digital Gateway will not be perfect already from its inception, it provides a tool that should make it easier for the EU to assess and compare the quality of Member States' information and procedures. It should also be helpful to issue recommendations for improvement, since they can be related on a common interface that businesses and Member States will grow increasingly familiar with.

4.3. Difficulties with accessing a regulated profession

4.3.1. What are the current problems?

Under EU legislation, EU citizens have the right to live and work in another EU Member State. Although mutual recognition should apply, there is an inconsistent recognition of professional qualifications across EU Member States. As specified under the Professional Qualifications Directive of the EU²⁴⁷, the recognition of a professional qualification allows *"the beneficiary to gain access in that Member State to the same profession as that for which he is qualified in the home Member State and to pursue it in the host Member State under the same conditions as its nationals"*. The Directive applies both to unregulated professions and particularly to regulated professions, which are subject to specific qualification criteria due to regulatory, legislative or administrative provisions at national level. However, **Member States have the right to require additional certificates or procedures if there is a justified objective such as health or consumer protection, and if the additional requirement is proportional, i.e. does not go beyond what is necessary to achieve the objective.**

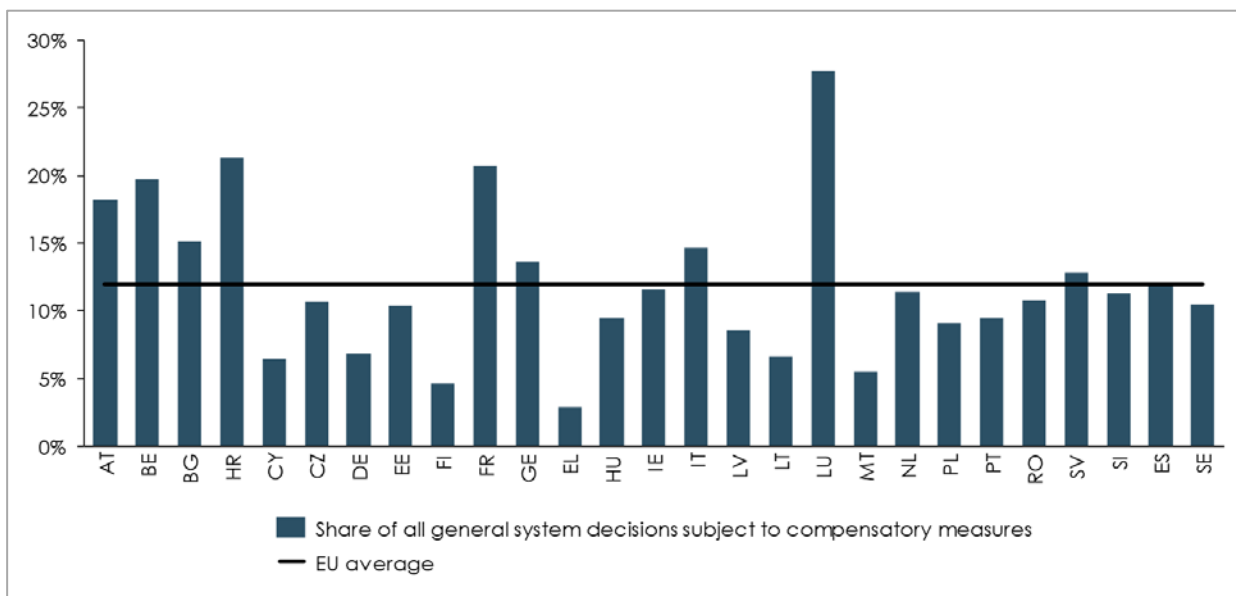
In practice, there are differences in qualifications (e.g. different level or length of education) and even in the rules regarding the recognition of professional qualifications in different Member States, thereby fragmenting the market and posing difficulties for service providers to practise their profession within the Single Market. Moreover, both the recognition process as well as receiving the right to practise a professional service (with foreign qualifications) can be troublesome, lengthy and costly. For instance, the document requirements as well as the complementary authentications, certified copies and translations of the documents often exceed what can be considered justified and proportionate in Member States²⁴⁸. According to Eurochambres' 2019 business survey, approximately **42% of respondents reported that the difficulties in the recognition of professional qualifications and/or meeting other requirements to access a regulated profession were a major obstacle to doing business in other Member States.**

²⁴⁷ Directive 2005/36/EC.

²⁴⁸ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

There are considerable differences among professions, whereby the recognition process can be less troublesome for a certain profession than for another. This is for instance seen with the seven sectoral professions which are regulated in all EU Member States ("automatic sector professions"), including nurses, midwives, doctors, dentists, pharmacists, architects and veterinary surgeons, which benefit directly from the automatic recognition process in which no compensatory measures are required²⁴⁹. Two other routes of recognition include automatic recognition based on professional experience and a general system for all other professions. Under the general system, recognition is granted to any individual who can demonstrate their qualifications in their home country, under certain conditions. Where the qualifications between two Member States differ substantially or where a profession is not regulated in the home country, an individual may be subject to compensatory measures, including either an adaptation period or an aptitude test.

Figure 16: Share of general system decisions (both negative and positive) that were subject to compensatory measures (aptitude tests or adaptation period)



Source: EU Regulated Professions Database.

On average, 12% of all general system recognition decisions in the EU have been granted after compensatory measures, see Figure 16. In Luxembourg, approximately 28% of general system decisions were subject to compensatory measures, compared with Greece, where only 3% were subject to compensatory measures. As such, there are considerable discrepancies in the use of compensatory measures across Member States. Among those general system decisions which were positive, 87.5% were granted without any compensatory measures. The requirement to fulfil compensatory measures can be a significant obstacle to the free movement of professionals, thereby limiting the mobility of human capital around the EU and reducing the number of opportunities for qualified professionals and the number of qualified professionals available to businesses overall.

In terms of other requirements for accessing a regulated profession in another Member State, the Professional Qualifications Directive allows Member States to carry out language tests after the recognition of a qualification, but before the professional accesses their profession. It is, however, the discretion of Member States to implement this in accordance with their national systems.

²⁴⁹ European Commission, webpage, *Automatic recognition*, available at: https://ec.europa.eu/growth/single-market/services/free-movement-professionals/qualifications-recognition/automatic_en.

The question if additional requirements and compensatory measures associated with general system recognitions are properly justified and proportional requires detailed and individual assessments in almost all cases.

In fact, as with any national requirement that restricts free movement, one must assess it in relation to its objective and proportionality. The Services Directive requires Member States to undertake a proportionality assessment when introducing requirements that fall within the scope of the Directive (indeed, Member States are obliged to always make a proportionality assessment before adopting measures that restrict free movement). Thus, while there are reports and evidence of restrictive obstacles and cost-increasing barriers in the Single Market, **one can only say that they are unjustified if they are not duly motivated or if they are more restrictive than necessary. Thus, one must assess the individual restrictions in quite some detail to conclude whether they are justified or not.**

Since it is not possible within the scope of this report to make a thorough in-depth analysis of all national requirements for services, we highlight five cases that represent the most common types of national obstacles²⁵⁰. The obstacles have been chosen because they can be considered very restrictive to free movement. However, it must be noted that **in the end it is the CJEU that determines whether a restriction is justified or not.**

Case study: Discriminatory requirements for lawyers based on nationality/residency, Slovenia

Another common type of legal obstacles is discriminatory requirements based on nationality or residency of companies or professionals that wish to establish themselves within the territory of another Member State. Article 14(1) of the Services Directive (2006/123/EC) prohibits any restriction on the provision of services which is based on nationality or on conditions of residence. This is further reaffirmed in two EU Directives pertaining to the legal profession, namely Directive 77/249/EEC concerning the effective exercise by lawyers of freedom to provide services²⁵¹ and Directive 98/5/EC facilitating practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained²⁵². National legislation has to comply with the requirements set in these Directives.

The CJEU acknowledged in its earlier case law, in particular the *Factortame* case²⁵³, that a residency requirement imposed on companies effectively results in discrimination on the grounds of nationality. While the majority of nationals of the Member State in question are resident and domiciled in that Member State and therefore meet that requirement automatically, nationals of other Member States would, in most cases, have to move their residence and domicile to that Member State in order to comply with the requirements of its legislation. Companies' members from another EU Member State would have to move their residence to the Member State where they wish to establish the company

²⁵⁰ The authors are convinced that the case studies will greatly help readers to appreciate the difficulties in the Single Market for professional services. But there is also a more general quantified overview of the regulatory restrictiveness for seven professions and all Member States for the year 2016. This PRO-SERV indicator has been developed by the European Commission (DG GROW and DG ECFIN) and is in fact a major elaboration of the OECD PMRs for professional services. Rather than the ten restrictiveness sub-indicators of the PMRs, PRO-SERV has 21 and catches practically every element that plays a role in the market. Unfortunately, it is available for only a single year and an update would be most welcome. All sources and a full graphical exposition of the seven professions and 28 Member States are found in Pelkmans, J., 2017, *The new restrictiveness indicator for professional services: an assessment*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

²⁵¹ Directive 77/249/EEC.

²⁵² Directive 98/5/EC.

²⁵³ Case C-221/89 *Factortame Ltd* [1991] ECR I-3905 para 32.

(for example a subsidiary).

Thus, restrictions on residence constitute obstacles equivalent to discrimination on the basis of nationality, as they also restrict the freedom of establishment in the Single Market.

In contrast with the case law cited above, the Slovenian Company Act in the past required law firms to be registered in Slovenia, either through the parent company or its subsidiary²⁵⁴. In order to practise the profession of a lawyer after having obtained a Slovenian qualification, a professional was required to be a citizen of the Republic of Slovenia²⁵⁵. Therefore, the Slovenian Act imposed discriminatory requirements on the basis of residency for legal persons and on the basis of nationality for natural persons. In order to remedy this, the 2019 amendment to the Attorneys Act removed the discriminatory requirements of Slovenian nationality for lawyers and extended the profession also to citizens of EU Member States, EEA countries and Switzerland²⁵⁶.

Case study: Requirements fixing the number of employees in law firms, Greece

Requirements listed under Article 15 of the Services Directive are not prohibited as such, they still need to be evaluated by the Member States and checked against the criteria of non-discrimination, necessity and proportionality set in Article 15(3)²⁵⁷. Article 15(2)(f) of the Services Directive refers to the obligation of Member States to evaluate requirements concerning the fixing of minimum number of employees for service providers. Greek national law imposes an obligation on law firms to have at least two lawyers for the law firm to be established and thereby to obtain authorisation to exercise their activities. Moreover, partners in the law firm are forbidden from participating in another law firm (in Greece or elsewhere) or practicing law individually²⁵⁸. While the problem lies essentially with the geographical restriction and the obligation of participating in only one law firm, fixing the number of employees may be indirectly inferred.

According to the CJEU, the obligation for undertakings to have a minimum and/or a maximum number of employees in order to obtain authorisation is contrary to the right of establishment and the freedom to provide services under the Treaties²⁵⁹. The CJEU further clarified that requirements to have a minimum number of employees may only be justified in a limited number of cases. For instance, such a requirement may be justified by considerations of security when applied to the specific activity of transport of explosives, but not with regard to other more common activities in the field of security involving a lower risk for the public, such as activities carried out by watchmen²⁶⁰.

²⁵⁴ Zakon o gospodarskih družbah (ZGD-1), 4 May 2006, available at: <http://www.pisrs.si/Pis.web/pregledPredpisa?id=ZAKO4291>.

²⁵⁵ Article 25(1) of the Attorneys Act.

²⁵⁶ Article 25(1) of the Zakon o odvetništvu (ZOdv) (Attorneys Act), as amended on 7 June 2019, available at: <http://pisrs.si/Pis.web/pregledPredpisa?id=ZAKO265>.

²⁵⁷ Article 15.2 of the Services Directive stipulates: "Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following non-discriminatory requirements: (a) quantitative or territorial restrictions, in particular in the form of limits fixed according to population or of a minimum geographical distance between providers; (b) an obligation on a provider to take a specific legal form; (c) requirements which relate to the shareholding of a company; (d) requirements, other than those concerning matters covered by Directive 2005/36/EC or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity; (e) a ban on having more than one establishment in the territory of the same State; (f) requirements fixing a minimum number of employees; (g) fixed minimum and/or maximum tariffs with which the provider must comply; (h) an obligation on the provider to supply other specific services jointly with his service".

²⁵⁸ Articles 1 and 11 P.D. 81/2005, available at: <https://www.lawspot.gr/nomikes-pliروفories/nomothesia/proedriko-diatagma-81-2005> and Article 49 (2) L. 4194/2013, available at: <https://www.lawspot.gr/nomikes-pliروفories/nomothesia/nomos-4194-2013>.

²⁵⁹ Case C-465/05 Commission v Italy [2007] ECR I-11091 para 130.

²⁶⁰ Judgment of 26 January 2006, Commission v Spain, Case C-514/03.

In addition, Article 10 of Directive 98/5/EC facilitating practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained²⁶¹ obliges Member States to apply equal treatment to lawyers from other Member States.

Taking into account the jurisprudence of the CJEU and the relevant legislation, it may be argued that undertakings which want to establish themselves in Greece will be discriminated in practice, as they will be forced to comply with the requirements as to the minimum number of practising lawyers under Greek law and to terminate their activities in other countries. Such requirements may therefore constitute restrictions on the freedom of establishment, which are only justified on the basis of implications arising from a conflict of interest²⁶². Minimum staff requirements are particularly burdensome for micro and small businesses, since they may be forced to not enter the market if they are not able to afford employing more staff.

4.3.2. Is there a growing trend of these problems in the EU?

There does not appear to be a growing trend of problems with regard to access to regulated professions. If anything, **the trend seems to be towards slightly reduced restrictiveness** (see previous section on intra-EEA STRI). On the other hand, it should be noted that in 2015, 93% of recognition decisions were positive, while in 2018 the share had decreased to 91% (the total number of decisions had also decreased, from more than 21,000 in 2015 to almost 18,000 in 2018)²⁶³.

However, while the trend does not appear to be increasing, **it is also clear that detailed professional regulation is common in the EU**. Currently, there are 5,921 regulated professions (or, rather, 5,921 sets of rules related to professions) in the EEA and Switzerland²⁶⁴. 38% of the regulations relate to professions in the health and social services sector, 14% relate to professions in the business services sector and 10% relate to professions in the transport sector.

While it **may be argued that the sheer volume is a sign of the EU being too restrictive**, it is not possible to know the extent to which these are unjustified. Empirical analyses have shown that **service sector restrictions have a negative impact on trade**²⁶⁵, and there does not seem to be a clear positive correlation between service regulation and service quality²⁶⁶. EU law allows for restrictive measures if they are objectively motivated and proportional. Thus, the fact that the share of positive decisions has decreased in more recent years says little or nothing about whether the negative decisions were unjustified or not.

4.3.3. What tools exist at EU and national level to address these problems?

Throughout this study, we stress the importance of proportionality and justification, but it should also be noted that **lack of transparency can be deemed contrary to EU law**. It may be that a requirement in itself is justified, but if it is too difficult to access relevant information and/or go through the necessary procedures, it can be considered as an unjustified obstacle to free movement.

As we have discussed in the previous section, the Services Directive has a notification procedure where

²⁶¹ Directive 98/5/EC.

²⁶² See Article 49 (2) L. 4194/2013.

²⁶³ Our calculations of the share of positive decisions exclude "neutral" decisions, i.e. decisions that have been appealed, are in an adaptation period, or are being examined.

²⁶⁴ European Commission, *Regulated Professions Database*, 2020.

²⁶⁵ Nordås, H., and Rouzet, D., 2017, *The Impact of Services Trade Restrictiveness on Trade Flows*, *The World Economy* 40:6, pp. 1155-1183.

²⁶⁶ European Commission, 2018, *Effects of Regulation on Service Quality – Evidence from six European cases*.

Member States must notify national requirements related to professional regulations.

However, the procedure is not functioning well, and it is therefore not certain that all national requirements are notified, and therefore one cannot be certain that only justified and proportional requirements are in place across Member States.

With regard to professional qualifications, each Member State is required to administer a **dedicated contact point for professional qualifications** (assistance centres). The national contact points are there to provide information on recognition of professional qualifications and to guide individuals through the administrative procedures and formalities.

If a professional service provider encounters an obstacle when seeking to establish or exercise their profession in a different EU Member State, they can turn to SOLVIT for an informal problem-solving procedure. In 2019, **5.2% of the SOLVIT cases concerned issues related to recognition of professional qualifications**²⁶⁷. However, those cases are not recorded as business cases but as citizen cases (since it is the individual who holds the professional qualification), but they may nonetheless concern a service provider wishing to exercise his/her right to free movement of services or right to establishment.

4.4. Restrictions on corporate ownership

4.4.1. What are the current problems?

Economic globalisation has led to an increase in the interdependence of national, regional, and local economies within the EU through an intensification of cross-border movement of goods, services, people and capital. Despite such an intensification, service providers across a range of sectors in the EU are affected by restrictions on corporate ownership that hinder their freedom of establishment²⁶⁸.

There are primarily two main restrictions in this regard: restrictions on shareholder structures and on the allocation of voting rights. In some countries, the freedom to establish a service is subject to certain **conditions such as the shareholder belonging to a certain profession or the voting rights being allocated in a certain way. Other conditions concern the shareholders' residence in the country in question or the possession of a specific professional qualification** (a minimum percentage of the shares must be held by professionals with the required qualifications). Restrictions on the use of certain corporate forms also exist.

Such restrictions represent a serious problem for those individuals and businesses willing to operate cross-border. As highlighted by the Commission²⁶⁹, the restrictions can lead to a de facto prohibition of entry as legal entities would be forced to change their corporate structure, business model or replace shareholders by others in order to establish themselves in another EU Member State. Changes to the business' shareholding structure and any other adjustment of the service provided or the economic activity established imposed by the national law of some EU Member States result in additional costs for cross-border activities of service providers which distort competition and are contrary to the Single Market²⁷⁰. Market adjustment costs may lead to a weakening of the competition in the Single Market.

²⁶⁷ European Commission, *Single Market Scoreboard, SOLVIT*.

²⁶⁸ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

²⁶⁹ Ibid.

²⁷⁰ Kainer, F., 2019, *Contribution to Growth: Free Movement of Services and Freedom of Establishment. Delivering Improved Rights to European Citizens and Businesses*, Study for the committee on the Internal Market and Consumer Protection., Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

Businesses may lose competitive cost advantages through the obligation to adapt to the law of the host Member State and may, thus, refrain from entering a cross-border market or may not be able to exploit the cost advantages of their country of origin²⁷¹.

Although restrictions on corporate ownership exist at national level, they can be justified on the grounds of public policy, security, health, etc. under Articles 15 and 16 of the Services Directive²⁷² or may benefit from a derogation under Article 17.

4.4.2. Is there a growing trend of these problems in the EU?

With increased EU economic integration, more and more individuals and businesses are willing to enter the markets of other Member States and offer cross-border services. Strict national requirements on shareholding can significantly limit business opportunities abroad. Restrictions vary across countries – while some Member States impose heavy requirements on corporate ownership, others have few or no similar conditions.

Overall, in 2016, **16 Member States imposed restrictions on corporate form and shareholding**²⁷³. The heavier requirements on corporate form or shareholding were found in Belgium, Cyprus and Romania. For architectural services, Cyprus, Malta and Romania required a 100% shareholding by professionals and prohibited the provision of architectural services through public limited liability companies. Cyprus also imposed a residence requirement in order to practise the lawyers' profession in breach of the Lawyers' Directives. In Belgium, 60% of the shares and voting rights had to be held by architects. Austria, Czechia, France, Germany, Slovakia and Spain required that at least 50% of the shares be held by professional architects.

Restrictions on corporate ownership are still prevalent in the Single Market. Restrictions on the legal form, shareholding structure and voting rights still exist in several Member States, with some sectors being more restrictive than others (e.g. shareholding/voting rights restrictions occur in the architectural field in 16 Member States; in ten Member States for accountant services and in most Member States for the legal professions)²⁷⁴.

Thus, **barriers to corporate ownership still affect a broad range of service providers across the EU, especially lawyers, architects, engineers, accountants etc.** Table 4 below provides some examples of such barriers across service sectors and countries.

²⁷¹ Ibid.

²⁷² Directive 2006/123/EC.

²⁷³ European Commission, Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on reform recommendations for regulation in professional services [COM/2016/0820 final] Brussels, 2017, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52016DC0820&print=true>.

²⁷⁴ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

Table 4: Examples of restrictions on corporate ownership across sectors and Member States

	Examples of restrictions
Accountants	<ul style="list-style-type: none"> In Cyprus, in order for a firm to provide accounting or administrative services, a practising certificate needs to be obtained by the Institute of Certified Public Accountants of Cyprus, provided that the following conditions are met: the majority of the voting rights of the partners or shareholders of the accounting firm, depending on the case, are held by accounting firms to which a practising certificate has been granted to carry out accounting activities²⁷⁵.
Lawyers	<ul style="list-style-type: none"> In Belgium, both shareholding and voting rights are reserved for lawyers or legal persons whose aim is to exercise the legal profession. Only lawyers who practice within the association or within linked associations of lawyers may be managers²⁷⁶. In Austria, only lawyers who are shareholders may be on the board²⁷⁷.
Engineers	<ul style="list-style-type: none"> In Cyprus, a 51% shareholding requirement applies to members of the Chamber of Engineers²⁷⁸. In Czechia, partners of a public business company may only be authorised architects, authorised engineers or authorised technicians. The majority of partners and executives of a limited liability company must be authorised architects, authorised engineers or authorised technicians²⁷⁹.
Architects	<ul style="list-style-type: none"> In Belgium, 60% of shareholders and 100% of managers must be members of the national Chamber of Architects²⁸⁰. In Cyprus, a 100% shareholding requirement applies to members of the Chamber of Engineers²⁸¹. In Czechia, partners of a public business company may only be authorised architects, authorised engineers or authorised technicians. The majority of partners and executives of a limited liability company must be authorised architects, authorised engineers or authorised technicians²⁸².

Source: Information collected and analysed by VVA Brussels.

In addition, some Member States have restrictions of entry for both domestic and foreign service providers regarding company forms²⁸³. This is the case in Bulgaria, where only a limited number of legal forms are possible for legal firms, whereas shareholding requirements provide for 100% capital ownership for lawyers. Similarly, in Czechia, architects and certified engineers are allowed to carry out their activities in a limited liability company, where authorised persons must represent the majority both among partners and executives in such a company.

²⁷⁵ See: Law 53(I)/2017 of Auditors, as amended.

²⁷⁶ The Belgian law states that all shares of a cooperation agreement between lawyers need to be linked with the name of the owners and declared in the shares register. This implies that only lawyers may have shareholding and voting rights in this association. See Article 171.7 of the Codex Deontologie voor Advocaten.

²⁷⁷ See: § 21c pt 9a RAO.

²⁷⁸ See: Law of the Cyprus Scientific Technical Chamber, as amended.

²⁷⁹ See: Articles 15a, 15b and 15c of the Act No 360/1992 Coll., as amended by Act No 459/2016 Coll.

²⁸⁰ See: Article 2 of the Law from 20 February 1939 protecting the title and the profession of architect.

²⁸¹ See: Law of the Cyprus Scientific Technical Chamber, as amended.

²⁸² See: Articles 15a, 15b and 15c of the Act No 360/1992 Coll., as amended by Act No 459/2016 Coll.

Even though restrictions on corporate ownership still exist across sectors and countries, positive steps towards the removal of such obstacles have started to take place. Since 2014, accountants can choose any legal form of their company (civil or commercial corporate forms) in France. Other countries, such as Estonia, have adopted national action plans aimed at reducing the level of restrictiveness of regulated professions. The Netherlands, Poland and Portugal have recently opted for deregulation of certain professions such as real estate agents²⁸⁴.

4.4.3. What tools exist at EU and national level to address these problems?

Although there is **no codified EU company law as such, the EU has adopted minimum harmonisation measures to promote the freedom of establishment** and to implement the fundamental right to conduct a business laid down in Article 16 of the Charter of Fundamental Rights²⁸⁵. These measures cover areas such as the protection of interests of shareholders and their rights, divisions and mergers etc. The objective is to increase the ability for businesses to establish and operate in any EU Member State, enjoying the freedom of movement of persons, services and capital, to protect shareholders and to make businesses more competitive.

In this regard, Directive 2007/36/EC²⁸⁶ (amended by Directives 2014/59/EU and 2017/828/EU) on the exercise of certain rights of shareholders in listed companies eliminates the main obstacles to a cross-border vote (i.e. foreign investors voting in cross-border situations) in listed companies that have their registered office in a Member State by introducing requirements for a certain number of shareholder rights at the general meeting. According to the Directive, shareholders in listed companies have the right to timely access to relevant information on general meetings and easier proxy voting. In turn, Directive 2017/828 encourages shareholder engagement and introduces requirements in relation to identification of shareholders, transmission of information, facilitation of exercise of shareholders' rights, etc.

Moreover, the Services Directive prohibits discriminatory requirements based directly or indirectly on nationality, including nationality requirements of shareholders. According to Article 15(2), Member States must assess whether their legal system makes access to a service or its exercise subject to, among other things, the following non-discriminatory requirements: an obligation on a provider to take a specific legal form and; requirements which relate to the shareholding of a company. It obliges Member States to assess and ensure that national requirements are non-discriminatory, justified by an overriding reason of public interest and proportionate (Article 15(3))²⁸⁷. Thus, Member States may require that the entire capital or a part of it be directly owned by members of a regulated profession. However, the conditions of non-discrimination, proportionality and necessity must be respected.

²⁸³ European Commission, 2016, *Reform recommendations for regulation in professional services*, SWD(2016) 820 final.

²⁸⁴ Ibid.

²⁸⁵ Charter of Fundamental Rights of the European Union [2012] OJ C 326, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT>.

²⁸⁶ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007L0036>.

²⁸⁷ Article 15(3) of the Services Directive states: Member States shall verify that the requirements referred to in paragraph 2 satisfy the following conditions: (a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office; (b) necessity: requirements must be justified by an overriding reason relating to the public interest; (c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

Over the years, **the CJEU has narrowed the scope of what constitutes legal national requirements** by considering them as not justified when they can be replaced by less restrictive arrangements to respect the freedom of establishment. For example, the CJEU has ruled that the requirement to hold a minimum amount of capital restricted the freedom of establishment and could not be justified on the basis of the protection of creditors, since less restrictive measures, such as obliging the provider to lodge a guarantee or to take up insurance, is sufficient to attain the same objective²⁸⁸.

Likewise, according to the Court, imposing a given level of participation of opticians in the share capital could not be considered as proportionate for achieving the objective of protecting public health²⁸⁹. It was argued that the high quality and professionalism of the service can be ensured by less restrictive measures, for example by requiring the physical presence of qualified professionals in each shop, by requiring civil liability for the action of others or professional liability insurance.

Finally, as mentioned in Chapter 2, Directive 2018/958 lays down rules for proportionality assessments to be conducted by EU Member States before adopting new professional regulations²⁹⁰. The Directive establishes a common framework that EU Member States must use to assess proportionality before introducing new, or amend existing, legislative, regulatory or administrative provisions restricting access to or the pursuit of regulated professions. This also covers rules and requirements on corporate ownership in regulated professions.

4.5. Burdens and obstacles in the context of posting workers to other Member States

4.5.1. What are the current problems?

The posting of workers in another EU Member State enables the temporary provision of intra-EU cross-border services. Legally, posting can happen in one of three ways:

- The company in Member State A sending a worker has a service contract with a party in Member State B;
- The company in Member State A has an establishment in Member State B to which the worker is posted; and
- A temporary employment agency or placement agency in Member State A hires out a worker to a user company in Member State B in order to provide temporary services.

Although the question of posted workers has received a lot of attention for decades, and it is regarded by many as a manifestation of labour mobility in the EU, **it is a derivative of the free movement of services** (i.e. temporary cross-border provision of services). Indeed, many cross-border services cannot be provided directly via cross-border trade from a distance (WTO/GATS mode 1). Many temporary services necessitate qualified workers to deliver the service(s) on the spot (WTO/GATS mode 4). Since all four modes of services provision between EU Member States are free, in principle there should not be an issue at all. However, this is not the case in practice.

The meaning of posted workers is therefore primarily economic: it is an option to tap into specialised services from across intra-EU borders or an option for tendered services with the right price/quality ratio or an option to remain competitive in specific activities despite difficulties in attracting local

²⁸⁸ Case C-171/02 *Commission v Portugal* [2004] ECLI:EU:C:2004:270 and Case C-514/03 *Commission v Spain* [2006] ECLI:EU:C:2006:63.

²⁸⁹ Case C-140/03 *Commission v Greece* [2005] ECLI:EU:C:2005:242.

²⁹⁰ Directive (EU) 2018/958 (cited above).

workers. These options are used time and again by businesses. Nonetheless, the meaning of posted workers in the EU has gradually become socio-political in a negative sense.

One has to be careful when asserting this: **most posting in the EU occurs inside the EU15** (i.e. the "old" EU Member States) and a considerable share takes place from "West" to "East" and both are only rarely plagued by the pejorative implications of posting.

However, there may still be problems in terms of bureaucracy and lack of cooperation as will be discussed below. Today, posted workers from Central Europe (mostly) sent to EU15 countries constitute the sensitive category. Three decades ago, the issue emerged with Portuguese workers (e.g. in France and Belgium). The root cause is the wage disparities across the EU, which are far greater than the social and economic costs of cross-border mobility. Therefore, the structural remedy is clear: the long-term convergence between national economies in the EU should reduce the disparities and thereby gradually eliminate the hitherto powerful incentives to exploit these wage discrepancies. However, in the short run, that is little consolation and the problems must be faced and addressed.

The economic significance of the posting of workers in the EU is small overall. In 2017, there were 1.73 million posted workers, around 0.4% of EU employment²⁹¹. However, the average posting time is some four months, so **in full-time equivalents, posted workers as a share of total EU employment is rather a maximum of 0.2%, possibly less. In some sectors like construction, horticulture, meat processing and some low-wage services these shares are far higher.** It should also be noted that posting grew faster since 2008 than either intra-EU trade or EU economic growth (some 80%).

Before going into some of the problems in the Single Market, it is good to realise and remember that the Single Market, while imperfect, nevertheless enjoys a much deeper integration than WTO/GATS mode 4 (cross-border posting) does. In Table 5 and Table 6 below, OECD data are utilised from the STRIs (Services Trade Restrictiveness Index) for the 22 EU Member States which are OECD members and for 22 service sectors.

Both for countries and for sectors, the restrictiveness inside the EEA for all EU Member States is at most 0.004, a small fraction of what it is when EU Member States apply their GATS mode 4 commitments (which are representative of the OECD countries). Therefore, **in terms of OECD measures of restrictiveness (which are a little less ambitious than intra-EU standards), the Single Market is basically free with regard to posting of workers.**

As to sectors, and given that the OECD probably does not catch all refined or bureaucratic hurdles in its score – 17 of 22 sectors have no intra-EU restrictions at all for mode 4 and for five of the sectors, the intra-EU score is at worst one sixth of the Most Favoured Nation (MFN, GATS) score (accounting). In construction, the GATS score is ten times the intra-EU score, implying that posting construction workers from a non-EEA country to an EEA country is ten times more restrictive than intra-EEA posting of construction workers.

The core problem of posted workers in the Single Market is the balance between, on the one hand, the free movement of services (and, here, the implied free movement of workers) and on the other hand the proper protection of the social and economic rights of these workers. Again, there seems to be few problems with the more than 60% of workers originating from a relatively high-wage EU Member State. The problems in these cases are on the side of companies suffering from unnecessary bureaucratic hurdles thrown up by some Member States.

²⁹¹ De Wispelaere & Pacolet, 2018, *Posting of workers: report on A1 portable documents issued in 2016*, Brussels, European Commission.

Such hurdles come in three categories:

- fragmented or unclear information;
- administrative delays and burdens; and/or
- practical constraints to meet requirements.

Businesses suspect occasionally that the heavy red tape or arbitrary processes are meant to stall the process of posting workers.

Table 5: Restrictiveness of cross-border posting, by sector: intra-EEA vs EU GATS (MFN) mode 4

Sector	MFN score	Intra-EEA score
Accounting	0.121	0.022
Air transport	0.019	0.000
Architecture	0.158	0.011
Broadcasting	0.026	0.000
Commercial banking	0.027	0.000
Computer	0.081	0.000
Construction	0.074	0.007
Courier	0.033	0.000
Distribution	0.022	0.000
Engineering	0.141	0.008
Insurance	0.040	0.000
Legal	0.163	0.012
Logistics cargo-handling	0.034	0.000
Logistics customs brokerage	0.040	0.000
Logistics freight forwarding	0.039	0.000
Logistics storage and warehouse	0.034	0.000
Maritime transport	0.063	0.000
Motion pictures	0.057	0.000
Rail freight transport	0.040	0.000
Road freight transport	0.053	0.000
Sound recording	0.054	0.000
Telecom	0.023	0.000

Source: Authors' own elaboration, based on the OECD STRI database.

Note: Results based on average scores for the 22 EU-OECD countries.

Table 6: Restrictiveness of cross-border posting, by country: intra-EEA vs. EU GATS mode 4

Country	MFN score	Intra-EEA score
Austria	0.066	0.004
Belgium	0.065	0.003
Czechia	0.039	0.004
Denmark	0.063	0.002
Estonia	0.085	0.003
Finland	0.058	0.001
France	0.070	0.002
Germany	0.045	0.003
Greece	0.060	0.004
Hungary	0.077	0.004
Ireland	0.068	0.002
Italy	0.082	0.004
Latvia	0.030	0.001
Lithuania	0.045	0.003
Luxembourg	0.047	0.004
Netherlands	0.058	0.002
Poland	0.093	0.003
Portugal	0.068	0.004
Slovak Republic	0.053	0.004
Slovenia	0.101	0.003
Spain	0.030	0.003
Sweden	0.041	0.001

Source: Authors' own elaboration, based on the OECD STRI database.

Note: Results based on average scores for the 22 service sectors covered.

The problems of posting from new Member States to the "old" ones are considerable, sensitive and not so easy to address. Administratively, posting is heavily regulated on the basis of the PD A1 form (Portable Document A1)²⁹², its requirements and the non-harmonised application of the use of the form. Precisely because posting is for a short period, delays and uncertainties tend to be costly. Due to restrictive bureaucratic requirements, the "free" movement is conditioned.

²⁹² A standard form issued by the social security institution of the home country that certifies an individual's social security benefits when moving within the EU.

At the root of these obstacles is a lack of trust because the wage wedges between high-wage and low(er)-wage countries attract dubious businesses attempting to maximise profits with dubious or outright illegal constructions. These generally come at the peril of the posted workers, whether wages are very low due to circumventive constructions, and/or housing and travel costs are deducted, housing being at a substandard level of quality, whether workers are caught in extremely tight working conditions (and even taking in their passports), etc²⁹³.

Based on CJEU rulings and Directive 96/71/EC (the first posted workers Directive), **a "nucleus" of rights/entitlements for the workers at stake is guaranteed.** Normally, the local minimum wages should be paid and a series of other terms such as paid minimum vacation period, health and safety at the workplace, housing away from the workplace and maximum work periods per week. A very serious weakness of the functioning of this Directive was the monitoring and enforcement, by definition by Member States' authorities. Moreover, there were no sanctions, and cooperation between national authorities was feeble at best.

With enforcement Directive 2014/67/EU, this has been addressed to some extent, but the approach must be far more European and cooperative between Member States in order to be effective. **A breakthrough was accomplished with an upgrade of the Posted Workers Directive** in the form of Directive 2018/957, which widened "minimum rates of pay" to "remuneration" (in a wider sense), shortened the maximum posting period (max. 1.5 years) and imposed on temporary work agencies that they guarantee to posted workers the same terms and conditions as apply to temporary workers in the country where the work is carried out.

Also, informational requirements have been upgraded. An even more important political decision was made with the adoption of Regulation 2019/1149 establishing a European Labour Authority (ELA). The ELA is an agency supporting Member States individually and jointly to enforce relevant EU labour law, including issues of posting, facilitating joint inspections, mediating between national authorities in case of cross-border labour disputes and more generally facilitating access to information on labour rights and services.

However, social security contributions remain with the sending country of origin. Here is another source of problems, as social security is coordinated for cross-border purposes under **the basic Regulation 883/2004 and the implementing Regulation 987/2009, which use different definitions of posted workers and can come to different calculations of social entitlements.** A Commission proposal of December 2016 to revise the regulations in order to clarify the relation between the two regimes and strengthen the administrative tools (including some implementing powers for the Commission) is stranded with the EU co-legislators.

However, the problems run deeper²⁹⁴. In fact, the way enforcement has been approached in Member States is insular. Inspectors have been quoted to say that their inspection "*stops and must stop at the border*" which precisely facilitates regulatory arbitrage and circumventive constructions. **Unlike in competition, safety of goods or consumer affairs in the EU, joint inspections or close cooperation between national authorities is absent or does not even have a legal basis in some countries.**

²⁹³ Indeed, Directive 2014/67/EU on enforcement of the Posting of Workers Directive (96/71/EC) and Directive (EU) 2018/957 amending the Posting of Workers Directive are reactions to such problems and address most of them. However, the adoption of those directives does not automatically mean that full trust among all relevant actors in detailed and effective cross-border enforcement of EU rules has been established, since perceptions can often be long-lived.

The consequences have been dire in some cases²⁹⁵. No EU Member State has bilateral agreements with all other EU Member States to pursue joint cross-border inspections. Hence, it is not uncommon that workers from Central Europe are hired via temporary work agencies at far too low wages, i.e. workers are exploited, and law-abiding businesses face unfair competition. Enforcement can also be hampered by the lack of liability for fraudulent behaviour (e.g. via letterbox companies) of subcontractors. Finally, there is no reliable dataset to monitor posted workers and what happens on the ground. Statistics available are estimates based on the PD A1 form, with all the shortcomings involved²⁹⁶.

4.5.2. Is there a growing trend of these problems in the EU?

It is next to impossible to "measure" whether, where and when obstacles are met, be it for bona-fide businesses to conduct posting for good commercial reasons or be it for social aspects (not) to be in place properly. At the EU level, **there is a conviction that the trend is bent in a positive direction** because the 2014 enforcement Directive has helped to some degree and national courts have become far more critical.

The 2014/67/EU Enforcement Directive has especially addressed the administrative and information shortcomings in its text. It improves the cooperation between national authorities in charge of posting, addresses "letter-box" companies circumventing the law, defines Member States' responsibilities to verify compliance with the rules on posting, specifies requirements for posting companies to improve transparency of information and inspections, empowers trade unions and others to lodge complaints and take legal or administrative action if rights are not respected, ensures the protection of posted workers in subcontracting chains and improves on the collection of penalties and fines across Member States.

All this does not immediately overcome all national constraints or impracticalities with respect to proper enforcement of abuses in posting, but there is little doubt that these features will contribute to filling the gaps of enforcement domestically and jointly to some extent. Although the Directive came into force only in 2016, already in 2019 the Commission published an evaluation concluding that inter-Member State cooperation works better and that a rapidly increasing number of information exchanges were made (in particular via the Internal Market Information (IMI) system for officials), some 4,789 exchanges in 2018²⁹⁷.

The Commission is of the view that there is no reason to propose amendments to the Directive.

However, that view might be more inspired by the start of the work of **the new European Labour Authority (ELA)**. The ELA responds to the quest for a more European or at least the cross-border cooperative approach mentioned before. The ELA will reach its full capacity only by 2024.

²⁹⁴ Cremer, J 2020, *The European Labour Authority and rights-based labour mobility*, ERA Forum (2020), available at: <https://link.springer.com/article/10.1007/s12027-020-00601-1>.

²⁹⁵ A telling example about what the change from national enforcement to cooperative enforcement (here, joint inspection between Belgium and the Netherlands of a suspected construction company) can imply is found in Helen Burke & Christian Welz (2019) of Eurofound, see www.eurofound.europa.eu/nl/publications/blog/member-states-still-getting-to-grips-with-the-single-labour-market. It should be noted that, following joint inspections, the evidence should be allowed to be used in court, but only 14 Member States do allow this.

²⁹⁶ Barslund, M, Busse, M & de Wispelaere, F 2017, *Posted workers – for some it matters*, CEPS Policy Insights no. 2017/37 of 26 October 2017; Eurofound 2020, *Improving the monitoring of posted workers in the EU*.

²⁹⁷ Normally, that is not done before five years of application. See COM(2019) 426 of 25 September 2019, report ... on the application and implementation of Directive 2014/67 (etc.), available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52019DC0426&from=EN>; and the SWD(2019) 426 background document.

Another reason why the trend is bending in the positive direction is the greater recourse to national courts²⁹⁸. A major problem here is that national courts (e.g. in the host country) will inevitably have to apply the law of the home country, too. Moreover, national courts clearly struggle in interpreting the exact right to (what) remuneration and with various suspect legal constructions used by dubious enterprises. Clearer legislation as to what legal constructions are not allowed would help national court rulings. Nonetheless, what recent literature shows is that national courts have begun to play a much more significant role and, with all the difficulties, this tends to reign in abuse and deceit.

With respect to arbitrary or overly heavy administrative obstacles for bona-fide businesses practising posting, the Commission has promised to inspect these practices without any further detail (yet) about intended action. The presumption is that some degree of further harmonisation in administrative requirements is most desirable, besides improved enforcement of EU law (which is asserted to be violated). In a position paper from BusinessEurope, the association holds that there is an increasing trend in throwing up administrative barriers and provides a telling example of a German company suffering from overly heavy French requirements with the PD A1 form²⁹⁹. BusinessEurope requests an **EU-wide PD A1 form valid everywhere and covering several work trips**; besides, it wants much more direct action of enforcement when measures are discriminatory and/or disproportionate.

4.5.3. What tools exist at EU and national level to address these problems?

After the three accomplishments with respect to posting (the enforcement Directive, the revision of the posted workers Directive and the ELA), this would not seem the time for new legislative initiatives. **However, the revision of Regulation 883/2004 on social security coordination is necessary**, as it is inconsistent with the above EU rules and thereby hinders effective application as well as judicial processes. EU co-legislators should recognise the purpose and thus find a way to resolve the outstanding issues.

What is hard to appreciate is the layering of existing and new administrative barriers for posting by bona-fide businesses. This is not all that new, but given the progress made on other aspects of posting and given that the ELA now begins to function, it should be possible to engage in further administrative harmonisation, rather than frustrate the cross-border provision of services done in a proper way.

4.6. Franchising in the EU

Franchising is a way of expanding a business by selling products and services. The franchisor creates the trademark and the business system, while a franchisee pays a fee (e.g. a royalty and often a start-up fee to the franchisor) for the right to do business under the franchise name and business system³⁰⁰. *"At its core, franchising is about the franchisor's brand value, how the franchisor supports its franchisees, how the franchisee meets its obligations to deliver the products and services to the system's brand standards and most importantly – franchising is about the relationship that the franchisor has with its franchisees"*³⁰¹.

²⁹⁸ See Rasnaca, Z & Bernaciak, M., 2020, *Posting of workers before national courts*, Brussels, June, ETUI. The authors analyse court rulings in 11 EU Member States, both net sending and net receiving countries (note that some countries – e.g. Germany – both send and receive).

²⁹⁹ BusinessEurope 2020, *Examples of Single Market barriers for businesses*.

³⁰⁰ International Franchise Association, webpage, *What is a franchise?*, available at: <https://www.franchise.org/faqs/basics/what-is-a-franchise>.

³⁰¹ Ibid.

Franchising is a way for franchisors to expand into new markets (both domestically and cross-border), and a way for franchisees to establish a business using a proven concept. Typically, **franchising is an alternative route to expansion compared to expanding a network of company-owned business units (e.g. subsidiaries)**. The franchise solution has a number of benefits compared to the company-owned solution³⁰²:

- The franchisor's capital requirements for expansion are lower, since it is often the franchisee who provide the capital to open the franchise outlet;
- The franchisor needs to hire fewer employees in order to operate a multitude of outlets;
- The franchisor's brand can reach consumers faster and to a greater degree by co-using the franchisee's assets;
- The arrangement eases cross-border expansion, since the franchisor can utilise the franchisee's knowledge of the local market and preferences; and
- The arrangement can provide additional benefits, such as limited risk and liability, efficient advertisement and promotion campaigns and strategies and reduced day-to-day involvement.

Some of the world's largest and most renowned companies operate as franchisors. The franchise can serve as a route to expansion that is suitable for SMEs, since it allows for expansion cross-border without the need to solely bear the start-up costs that international expansion typically include.

However, there is ample evidence that **the possibilities for franchising are underutilised in the Single Market**. For example, franchising represents 11% of GDP in Australia and 6% in the US – but a mere 2% in the EU (and the share is likely to be lower after Brexit, since the UK is a significant franchising country)³⁰³.

It has been claimed that **the regulatory framework across the EU for franchising is dysfunctional, across several main dimensions**. First, the EU wishes to promote franchising as a source of macroeconomic gains. To the extent that EU competition law concerns itself with franchising, it tends to focus on intra-brand issues such as price maintenance. Price maintenance or any arrangement that establishes a fixed or minimum price for franchisees is considered to be anti-competitive *per se*. The same applies to multichannel sales and marketing strategies, where intra-brand restrictions are prohibited³⁰⁴. By contrast, just as territorial restraints are not considered *per se* anti-competitive but rather assessed on a case-by-case basis, so too can intra-franchise price or sales restrictions be pro-competitive if there is sufficient inter-brand competition. However, the fact that **EU competition law rules out such arrangements in franchisor-franchisee relationships puts the franchise model at a disadvantage** compared to the company-owned business network model.

Secondly, national law is concerned with the franchisor-franchisee relationship: how franchises are sold to franchisees and management of the ongoing relationship. It is concerned with the perceived need to stop franchisors from mis-selling franchises to naïve and uninformed individuals with little or no previous business experience and abusing the franchisee during the term of the agreement.

³⁰² Francity Franchise Experts, webpage, *The benefits of franchising*, available at: <https://francity.com/about-franchising/the-benefits-of-franchising/>.

³⁰³ Abell, 2016, *Legal Perspective of the Regulatory Framework and Challenges for Franchising in the EU*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

³⁰⁴ Ibid.

Some countries have specific franchise regulations. In other countries, such as Germany, the franchisee is essentially considered an employee of the franchisor, which erodes much of the benefits of the franchise business model. It has been argued that **Member States' focus on protecting the franchisee works at cross-purposes with the EU's focus on promoting overall macroeconomic gains of franchising**³⁰⁵.

Third, national laws are not harmonised across the EU, adding further to the burden of a franchisor who wishes to sell their franchise in several EU Member States. Thus, while it is not included in the intra-STRI database, the national laws that govern franchising across the EU are both relatively restrictive, as well as heterogeneous.

Given that the overall EU regulatory framework is discouraging towards the franchise business model, and that the benefits of the franchise model are particularly attractive to firms with relatively limited capital, cross-border business opportunities and competition by means of the franchise model is taken up less frequently than could otherwise be the case in the EU.

However, while there are compelling arguments that the EU should seriously consider the possibility to improve its franchise regulatory framework, possibly via a harmonising legal act, there appear to be very few reports or databases available that address franchising in the context of the Single Market³⁰⁶. This absence may of course be explained by the fact that franchising is rare in the EU (possibly because of the unfavourable regulatory environment), but there is **to our knowledge no study that examines the economic potential of how improved regulatory framework conditions for franchising may impact the Single Market**. Thus, an impact assessment of how an improvement of the EU-wide regulatory framework for franchising would be a welcome addition to the evidence base on how to improve the functioning and competitiveness of the EU Single Market.

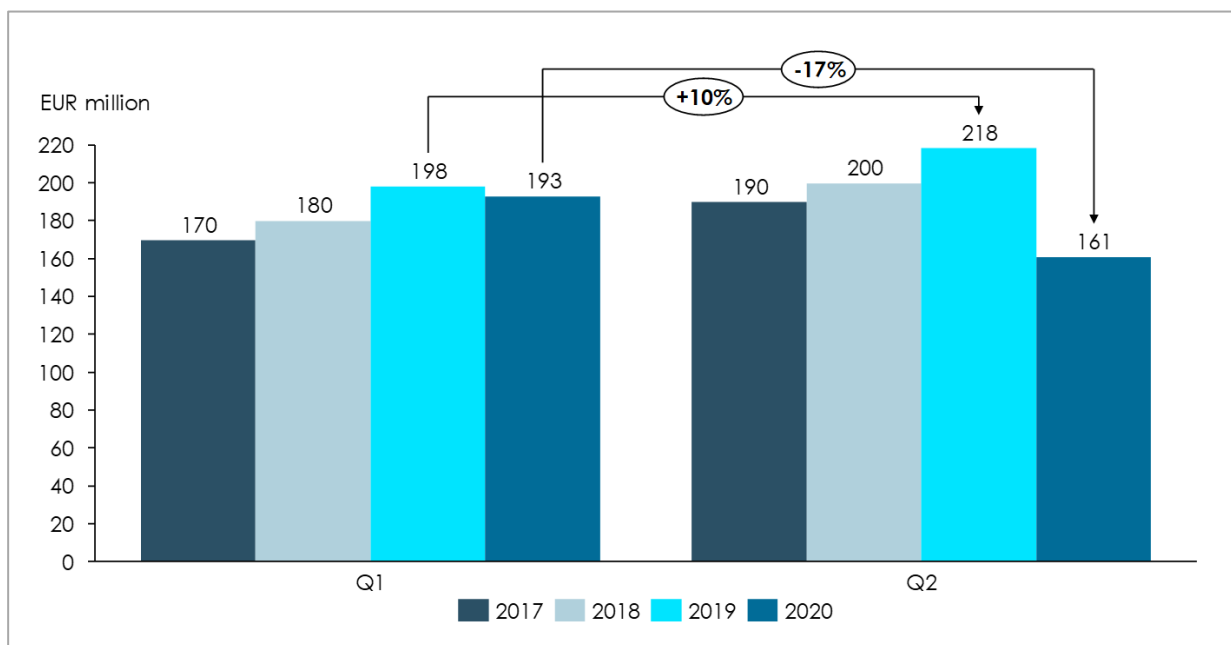
4.7. A note on the impact of COVID-19 on intra-EU trade in services

Free movement of services within the EU has been adversely affected during the COVID-19 pandemic, largely due to lockdown measures imposed by national governments including reintroduction of border controls, restrictions or bans on passenger transport, and bans on entry and exit at national borders. Intra-EU exports of services (again, excluding cross-border establishment) decreased by 17% during the second quarter of 2020 compared to the first quarter. This is in stark contrast to the development during the second quarter of 2019, where intra-EU exports increased by 10% compared to the first quarter. Thus, the quarterly growth in intra-EU trade in services was 27 percentage points lower in 2020 than in 2019 – for intra-EU trade in goods, the corresponding decrease was 21 percentage points (see Section 3.4).

³⁰⁵ Ibid.

³⁰⁶ In addition to the Abell, 2016, study cited in this section, see also Wiewiórowska-Domagalska, A., 2016, *Franchising*, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2016. In addition, there is an ongoing Review of the Vertical Block Exemption Regulation, see: https://ec.europa.eu/competition/consultations/2018_vber/index_en.html.

Figure 17: Intra-EU exports of services, Q1 and Q2, 2017-2020



Source: Eurostat, *Balance of payments by country - quarterly data (BPM6) [bop_c6_q]*, excluding Ireland, Greece and Malta because of a lack of data for the entire time period.

Furthermore, it is likely that the COVID-19 restrictions on free movement played a more direct role for the free movement of services than it did for the free movement of goods (the latter was more indirectly affected by general production lockdowns and supply chain disruptions). Restrictions to ensure social distancing on personal mobility, whereby service providers whom cannot sell their services to the same degree digitally, have been physically prevented from providing their services across (and also within) Member State borders. This is prominent with transport and logistics services, but also with seasonal workers in the agri-food sector³⁰⁷ or with electricians performing repairs and maintenance work across Member State borders³⁰⁸. Indeed, there is a legitimate fear that the reliance on posting of workers has suffered greatly due to restrictive measures engendered by COVID-19 but statistical evidence on posting tends to be delayed significantly.

As stated in Section 3.4, although the free movement of persons has been severely restricted during the COVID-19 pandemic, it is likely that the restrictions are to be considered justified and proportionate given that their objective have been to protect public health, and not protectionist. However, it is possible that some restrictions have gone beyond what is strictly necessary, both in terms of the severity of restrictions and the time they have been kept in place.

However, as previously stated in Section 4.1.4, only a few notifications under the procedure established under the Services Directive have been made during the first half of 2020, despite the fact that the COVID-19 pandemic has led to several restrictions to free movement³⁰⁹. This is clearly a cause for concern as it is likely that many of the imposed measures indeed have a restrictive effect on the free movement of services across the EU.

³⁰⁷ Clarke et al., 2020, *Practical Responses to Pandemics: Evidence and recommendations from case studies of agri-food trade in the EU, Asia-Pacific and American regions during COVID-19*.

³⁰⁸ National Board of Trade, 2020, op cit.: example of a company that manufactures cancer treatment equipment, who reported difficulties in sending equipment and service technicians to other Member States during COVID-19.

³⁰⁹ National Board of Trade Sweden 2020, *Årsrapport – Anmälningsproceduren enligt tjänstedirektivet 2019*.

4.8. How can these problems be removed and prevented?

To remove the existing and prevent future legal obstacles in the Single Market, sector-specific requirements of service providers and regulated professions set by the national law should be carefully assessed. In this regard, **the proportionality test** plays a crucial role and Member States' governments should provide motivations behind those requirements and balance the freedom of establishment and the freedom to provide services against other justifiable interests under the applicable legislation (e.g. public interest).

The new Proportionality Test Directive³¹⁰ requires Member States to undertake a proportionality test, in accordance with the common framework set therein, before they adopt legislation restricting access to or the pursuit of regulated professions. This is, *inter alia*, to complement the existing provisions of the Professional Qualifications Directive³¹¹. Thus, the Proportionality Test Directive could potentially improve the competitiveness of the Single Market and create favourable business conditions for providers of professional services.

Based on the sample of the examined legal obstacles, it appears that the proper implementation of EU law still poses difficulties to the Single Market in services, even a decade after the transposition of the Services Directive³¹² by EU Member States. With the number of regulated professions in the EU being rather high³¹³, it is of utmost importance that the relevant EU legislation is correctly implemented into the national legal order of all Member States.

Furthermore, the recently withdrawn proposal for a revision of the notification procedure of the Services Directive means that other means of ensuring the full enforcement of the Services Directive must be considered³¹⁴. Given that the notification procedure is not functioning as well as it could, it is important to consider measures that can improve the use of it within the existing framework, ensuring the objective of preventing unjustified national restrictions to the free movement of services and the right to establishment.

There are examples of how the current notification procedure serves to prevent unjustified obstacles to free movement, so any measure to improve Member States' use of the procedure should be welcomed. With that said, it is of course important to note that an improvement of the notification procedure should not be circumvented by narrowing the scope of requirements that should be notified (e.g. by exempting planning laws from the notification requirement). In essence, it is unlikely to be beneficial to the functioning of the free movement of services and the right to establishment if the notification procedure is given more "teeth", while at the same time the scope of requirements that should be notified under such an improved procedure is limited. This appears to have been the major motivation behind the Commission's withdrawal of the proposal.

The Commission has communicated that it will ensure the full enforcement of the Services Directive, but the details of that work remains to be seen. Since the Council raised concerns over the principles of proportionality and subsidiarity with the proposal, it can be considered if **some form of local bodies at e.g. national, regional or local levels** can be established³¹⁵.

³¹⁰ Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions. OJ L 173, 9.7.2018.

³¹¹ Directive 2005/36/EC.

³¹² Directive 2006/123/EC.

³¹³ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

³¹⁴ European Commission, 2020, *Annexes to the Commission Work Programme 2021*, COM(2020) 690 final, p. 24.

³¹⁵ See for example National Board of Trade, 2019, *Reforming compliance management in the Single Market*, for a discussion on the possible merits of decentralised enforcement of EU law.

Those bodies would have the responsibility to **oversee and facilitate the adoption of service requirements that are not unduly restrictive to free movement, and to flag up problematic issues to the Commission whenever relevant**. While such a solution requires more thought and debate as to its details, it appears that it could alleviate the concerns regarding subsidiarity (the Commission would not be seen as "approving" every piece of national, regional or local legislation that fall under Member State competence) and proportionality (national, regional or local bodies would not have to notify an enormous amount of laws and regulations to the Commission, and the Commission and other Member States would similarly not "drown" in the task of scrutinising those notifications).

Most of the work related to **posting of workers is likely to be developed in the realm of ELA work and will be dominated by the cooperation of Member States' authorities**. It is recommended that the EP keeps a close watch on what happens in the ELA and seeks to encourage and stimulate inter-Member State cooperation as much as possible.

Nevertheless, there are some shortcomings in the ELA design that should still be addressed³¹⁶. First, **there is no competence to check the reliability of documents which underlie cross-border activity**. An EU mandate for national competent authorities in both sending and receiving countries to do just that ought to be accomplished. The ELA could have that mandate and be capable of taking measures to detect and investigate as well as bring about the cessation of abuses. Currently, such a mandate is missing, and even joint inspections are subject to the prior agreement of the participating Member States. Second, **Member States must urgently begin to verify (and amend where needed) the (in)consistencies of their own national arrangements of competences related to posting**: some powers may well be fragmented over different institutions, other competences might not be helpful for enforcement of labour questions with cross-border aspects. Third, fines are weak in this transnational context. The power to deregister fraudulent establishments lies outside the competences of the compliance authorities. The ELA should develop the main rules for an EU-wide fining policy and for procedures in case of violation of the law.

In its 2016 country recommendations³¹⁷, the Commission recommended to reduce restrictive requirements on legal form and shareholding in the area of services, remove unjustified regulatory barriers hampering access to and the practice of regulated professions and increase competition in the service sector. Specifically, the Commission advised Austria, Belgium, Cyprus, Czechia, France, Germany, Romania, Slovakia and Spain to consider the impact of the shareholding and company form restrictions they have in place. Countries were encouraged to assess the proportionality of the shareholding requirements.

Taking this into account, **it is recommended that the Commissions issues guidelines addressed to Member States on how to assess the proportionality of the shareholding requirements**. These guidelines would ensure a consistent approach across countries based on the criteria laid down by the CJEU and those contained in Article 15(3)(c) of the Services Directive.

The guidelines should also take into account the **newly adopted Proportionality Test Directive**³¹⁸ introducing a harmonised proportionality test to be used by all Member States before adopting or amending national regulations on professions.

³¹⁶ Cremer, op. cit., also suggests that social fraud is only rarely considered as a major offence.

³¹⁷ European Commission, 2016, *Reform recommendations for regulation in professional services*, COM(2016) 820 final.

³¹⁸ Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions. OJ L 173, 9.7.2018.

The Directive reflects the case law of the CJEU and gives guidance to the Member States on how to conduct the proportionality test. To enhance legal certainty and uniformity, the scope of the Proportionality Test Directive could be extended and applied to all services, not only on professional qualification requirements³¹⁹.

Restrictions on corporate ownership should then be assessed in light of other aspects, such as the level of independence of the profession and the corresponding supervisory arrangements. Consideration should also be given to the **cumulative effect of such requirements** in cases where their effects might be intensified. For example, in the case of lawyers, such restrictions may be justified for activities related to representation in court, but not in relation to other activities also reserved for lawyers (e.g. legal advice).

An exchange of good practices between Member States on the effective removal of barriers in this area could also contribute to support national reforms intended to eliminate unjustified barriers to cross-border corporate ownership. Removing such barriers is likely to have a positive impact on the productivity and competitiveness of the EU economy³²⁰.

Lastly, given the conspicuous lack of material on franchising's impact on the EU Single Market, an **impact assessment of the EU-wide regulatory framework for franchising** would be useful to understand the economic case for regulatory reform and EU-wide promotion of the franchise business model.

³¹⁹ Kainer, F., 2019, *Contribution to Growth: Free Movement of Services and Freedom of Establishment. Delivering Improved Rights to European Citizens and Businesses*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

³²⁰ Ibid.

5. DIGITAL SINGLE MARKET

KEY FINDINGS

- E-merchants and consumers view the challenges to cross-border e-commerce as substantial. Many of the obstacles are not specific to digital services, but rather stem from national rules for goods, services, taxation, or consumer protection. However, such rules often hit small or medium-sized enterprises (SMEs) that sell online particularly hard.
- Dozens of legislative measures enacted as part of the Digital Single Market strategy sought to address impediments to cross-border online sales. Nearly all are promising, but it is too soon to say how well they are working. It is important to closely monitor the mid-term evaluation reports on the various DSM measures as they become available in order to determine whether further legislation is in order.
- Lack of reliable information on relevant laws and regulations in the Member States is a problem for nearly all aspects of e-commerce. When it is in place, the Single Digital Gateway may help make the needed information readily available.
- However, surveys of consumers and of merchants suggest that there is no overall trend of increasing problems or dissatisfaction with fragmentation in the Single Market. Rather, the balance of evidence suggest that things are getting better, not worse.
- The basic mechanisms for Value Added Tax (VAT) are common among the Member States, but implementation differences are widespread in practice. The EU-wide shift from country of origin to a country of use regime was positive overall, but it had negative implications for e-merchants since it made them subject to divergent VAT rules in each of the Member States in which they did business.
- A barrage of legislative measures has attempted to broaden the mini One Stop Shop so as to simplify VAT filing for merchants, especially for small e-merchants. Legislation has also sought to eliminate anomalies such as the Low Value Consignment Relief (LVCR).
- European consumers have been subjected to geo-blocking of goods and services in various ways. The Geo-blocking Regulation of 2018 attempted to solve most of these, but omits goods that require shipment, as well as services that mostly exist to distribute copyrighted material.
- Meanwhile, a new set of challenges has emerged as regards digital services, such as "fake news", illegal content, risky uses of big data and artificial intelligence such as facial recognition, and unresolved questions as to product and service liability where artificial intelligence and machine learning are involved. These issues have huge salience for the EU, but not all of them are Single Market issues. Many of them are expected to be addressed in a legislative proposal for a Digital Services Act (DSA), which is expected to be submitted in December 2020.

In this chapter, we distinguish between established and emerging problems. Some problems have been well known for many years and have already been subject to substantial legislative attention during the previous legislative term.

Others have become prominent more recently with the increasingly widespread availability and use of the internet and associated digital services, the increasing public reliance on digital platforms (many of which are based in third countries), and the crucial role that digital services are playing in the EU's response to the COVID-19 pandemic.

A major focus of the EU during the 2014-2019 legislative term was to ameliorate barriers to cross-border e-commerce as a means of strengthening the Single Market.

The Commission put forward a Digital Single Market (DSM) strategy³²¹ in 2015 that ultimately led to more than 30 legislative measures. Several of them are directly relevant to this chapter.

Many of the barriers to the Single Market that impact e-merchants are not uniquely digital problems. Many of them (such as lack of harmonised rules for VAT, or for consumer protection) impact all goods and services. A particular concern, as noted by the Commission, is that impediments such as these "...*disproportionately small businesses that offer innovative online services*"³²².

Two 2019 studies for the Parliament³²³ provide a detailed breakdown of the many legislative measures introduced during the 2014-2019 legislative term. The more than 30 relevant legislative measures that were proposed (and in most cases enacted) covered a wide range of topics (see Table 7), including geo-blocking (covered in Section 5.3), copyright (covered together with geo-blocking in Section 5.3), Value Added Tax (VAT) (covered in Section 5.2), consumer protection (covered in Chapter 6), cross-border parcel delivery services, and privacy and security.

Some of the DSM legislative measures are not discussed further in this study either because they seem to have only a limited link to the Single Market, or else because they do not appear to fall within the IMCO committee's remit. Cross-border parcel delivery and privacy, for example, are topics that are clearly relevant to cross-border e-commerce, but they do not appear to be IMCO topics. Aside from that, we chose not to cover electronic communications issues such as international mobile roaming because it is not clear that a problem remains today that the Parliament needs to tackle.

Issues related to digital services have increased hugely in prominence since the DSM was put forward in 2015. Today, many Europeans are heavily reliant on digital platforms such as Google, Facebook, Amazon, and/or Apple. **During the COVID-19 pandemic, many of us depend on e-commerce, and many of us make daily use of videoconferencing systems** such as Zoom, Cisco Webex, or Microsoft Teams.

A legislative and regulatory framework that has been in place since 2000, the E-Commerce Directive (Directive 2000/31/EC), has played a huge positive role in promoting the development and adoption of digital information society services³²⁴ in the EU. In recent years, however, there has been an increasing recognition that **the E-Commerce Directive is overdue for an update**.

Particular concerns have been raised over the growing power of digital platforms based outside of the EU to unfairly exploit their relationships with their business customers in the EU.

³²¹ European Commission, 2015, *A Digital Single Market Strategy for Europe*, COM(2015) 192 final.

³²² European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final, p. 29.

³²³ For a detailed discussion of the legislative measures and their economic consequences, see respectively de Streel, A., and Hocepić, C., 2019; and Marcus et al., 2019.

³²⁴ For a working definition of information society services, see Recital 1 of Directive 2000/31/EC.

An extensive body of EU law protects consumers, but comparable rights have for the most part not historically been available to businesses.

The Regulation on promoting fairness and transparency for business users of online intermediation services (Regulation (EU) 2019/1150, also known as the Platform-to-Business (P2B) Regulation) took first steps to address these concerns.

The Regulation prohibits a number of unfair practices, prohibits arbitrary suspension of an account, and requires greater transparency in a wide range of business practices. It has applied since 12 July 2020.

The European Commission has announced its intention to go further with a Digital Services Act (DSA) in December 2020. In anticipation, three Parliamentary committees have issued legislative initiative reports³²⁵: the Legal Affairs committee, the Civil Liberties committee, and the Internal Market and Consumer Protection committee.

The European Parliament resolution on the DSA³²⁶, which is generally in line with publicly available studies on the topics covered, provides a good starting point for identifying the problems to be addressed. The issues that have been identified include:

- **Country of origin, country of use:** In the course of expanding and updating the E-Commerce Directive, it will be important to retain the benefits of the *country of origin* principle as much as possible. This principle greatly reduces the burden on service providers that operate in more than one Member State, even though derogations from the country of origin principle have always been possible;
- **Scope:** To what extent should service providers established in third countries be subject to new rules when directing their services to consumers or users in the EU? What risks might flow from asserting extraterritorial jurisdiction?;
- **Illegal, counterfeit and unsafe products:** What policies can help ensure that consumers are as safe when shopping online as when shopping in stores? An obligation for businesses to know more about their business customers might help them to protect end-users from harmful or illegal products or services;
- **Notice-and-action mechanism:** How can we achieve more transparency and greater speed when taking down potentially illegal content? How can we reconcile this with limiting the liability of content intermediaries that serve solely as passive conduit?;
- **Distinction between illegal and harmful content:** How should the rules distinguish between content that is illegal, versus content that is legal but harmful (such as hate speech and disinformation)?;
- **AI-driven services:** What consumer protection measures, beyond those already in the GDPR, are needed to ensure that consumers know when decisions about them are being made using AI, and know what options they have for redress?;
- **Online advertising, profiling, and personalised pricing:** What measures might make targeted advertising less intrusive, and less invasive of privacy?; and

³²⁵ The Parliament can employ legislative initiative reports to invite the Commission to propose legislation. See European Parliament, *Parliament's right of legislative initiative*, Briefing, EPRS, 2020.

³²⁶ European Parliament, 2020, *Digital Services Act - Improving the functioning of the Single Market*, Resolution of 20 October 2020.

- **Measures to deal with big digital platforms that may act as "gatekeepers" of market access:** The Commission has already indicated that they are anxious to improve the effectiveness and timeliness of existing *ex post* competition law, and that they also intend to implement new *ex ante* rules to try to address competitive threats that are not well dealt with today by competition law alone.

All of these issues are highly relevant to the Single Market; however, not all are relevant to the topic of this study, which concerns itself with national legislation that contradicts Single Market rules or creates new unjustified obstacles to the Single Market, with a specific focus on national technical rules and regulatory and non-regulatory requirements governing products, service providers and terms of service provision, including retail. We address those aspects that are relevant in Section 5.6.

Section 5.1 provides an overview of the range of challenges that fragmentation within the EU poses for e-commerce before proceeding to a more detailed discussion of VAT (Section 5.2), copyright and geo-blocking (Section 5.3), insufficient information about the rules (Section 5.4). Section 5.5 notes issues specific to the pandemic. A discussion of unfinished business left over from the DSM, together with new business that might be expected in the coming DSA, appears in Section 5.6.

Table 7: Digital Single Market legal instruments adopted or proposed during the 8th Legislature (2014-2019)

E-commerce, Content and online platforms	Intellectual Property	Data and AI³²⁷	Trust and security	Consumer protection	E-Government	Electronic communications networks and services
Regulation on cross-border portability of online content services (2017)	Directive Trade Secret (2016)	Regulation General Data Protection (2016)	Directive on Network Information Security (2016)	Regulation on Consumer Protection Cooperation (2017)	Regulation establishing a Single Digital Gateway (2018)	Regulation Open Internet/TSM (2015)
Regulation addressing unjustified geo-blocking (2018)	Regulation and Directive permitted uses in copyright for print-disabled persons (2017)	Regulation on Free flow of non-personal data (2018)	Regulation on the EU Cybersecurity Act – P2017	Directive on contracts for the supply of digital content - P2015	Directive on the re-use of public sector information (recast) P2018	Decision on use of 470-790 MHz frequency band (2017)
Council Regulation and Directive VAT for e-Commerce (2018)	Directive on copyright in the Digital Single Market – P2016	Regulation e-privacy – P2017	Directive on the combatting fraud and counterfeiting of non-cash means of payment – P2017	Directive on contracts for sales of goods - P2015, M2017		Regulation on wholesale roaming (2017)

³²⁷ Also, Regulation on protection of personal data by the Union institutions and bodies – P2017.

E-commerce, Content and online platforms	Intellectual Property	Data and AI ³²⁸	Trust and security	Consumer protection	E-Government	Electronic communications networks and services
Regulation on cross-border parcel delivery services (2018)	Regulation on Copyright and broadcasting organisations – P2016	Council Regulation establishing the European High-Performance Computing Joint Undertaking – P2018		Directive Better enforcement and modernisation of EU consumer protection rules – P2018		Regulation to promote Internet Connectivity in local communities (Wi-Fi4EU) (2017)
Directive Audiovisual and Media Services (2018)	Council Directive on VAT for e-publications – P2016			Directive Collective redress – P2018		Directive on European Electronic Communications Code (2018)
Regulation on promoting fairness and transparency for business users of online intermediation services – P2018						Regulation BEREC (2018)

Source: Marcus et al., 2019³²⁹.

³²⁸ Also, Regulation on protection of personal data by the Union institutions and bodies – P2017.

³²⁹ For a detailed discussion of the legislative measures and their economic consequences, see respectively de Streel, A., and Hocepić, C., 2019; and Marcus et al., 2019.

5.1. Overall fragmentation of rules for cross-border e-commerce

5.1.1. What are the current problems?

In assessing the level of current problems, it is important to keep in mind the progression of events. The DSM Strategy was put forth in 2015, but it took time to enact and transpose legislation to implement it. Most of the measures were enacted in 2017 or 2018, see Table 7, which typically means that transposition would not have been complete until 2019 or 2020 in most cases. Statistics and survey data must consequently be interpreted in terms of the date on which they were collected. Even today, the effects of the legislative measures put forward are visible only to a limited extent.

The DSM Strategy was largely a response to a wide range of challenges to cross-border e-commerce that e-merchants and consumers had identified in surveys in 2015, when the strategy was formulated. Firms that sell cross-border (or that had sold cross-border in the recent past) identified a wide range of challenges at the time, including delivery costs that were too high, differences in consumer protection, the complexity of dealing with foreign taxation, concerns with data protection when selling abroad, payments from other countries that are not sufficiently secure are especially prominent, copyright restrictions and (relatedly) restrictions imposed by suppliers are prominent³³⁰. Lack of language skills was also identified as a barrier, but policymakers have only limited tools to deal with this in the near term.

A recent survey of businesses suggests that, as of 2019, these problems were still with us³³¹. In their survey (see Table 8), the following percentages of businesses found the corresponding barrier to the Single Market to be either "significant" or "extremely significant".

³³⁰ TNS (2015), *'Companies engaged in online activities'*, Flash Eurobarometer 413, p. 22.

³³¹ The survey was carried out between 2 September and 2 October 2019. 1,107 entrepreneurs from 27 EU countries responded to the poll. UK respondents were excluded. The survey is useful and indicative but cannot be presumed to be fully representative because the respondents are largely self-selected.

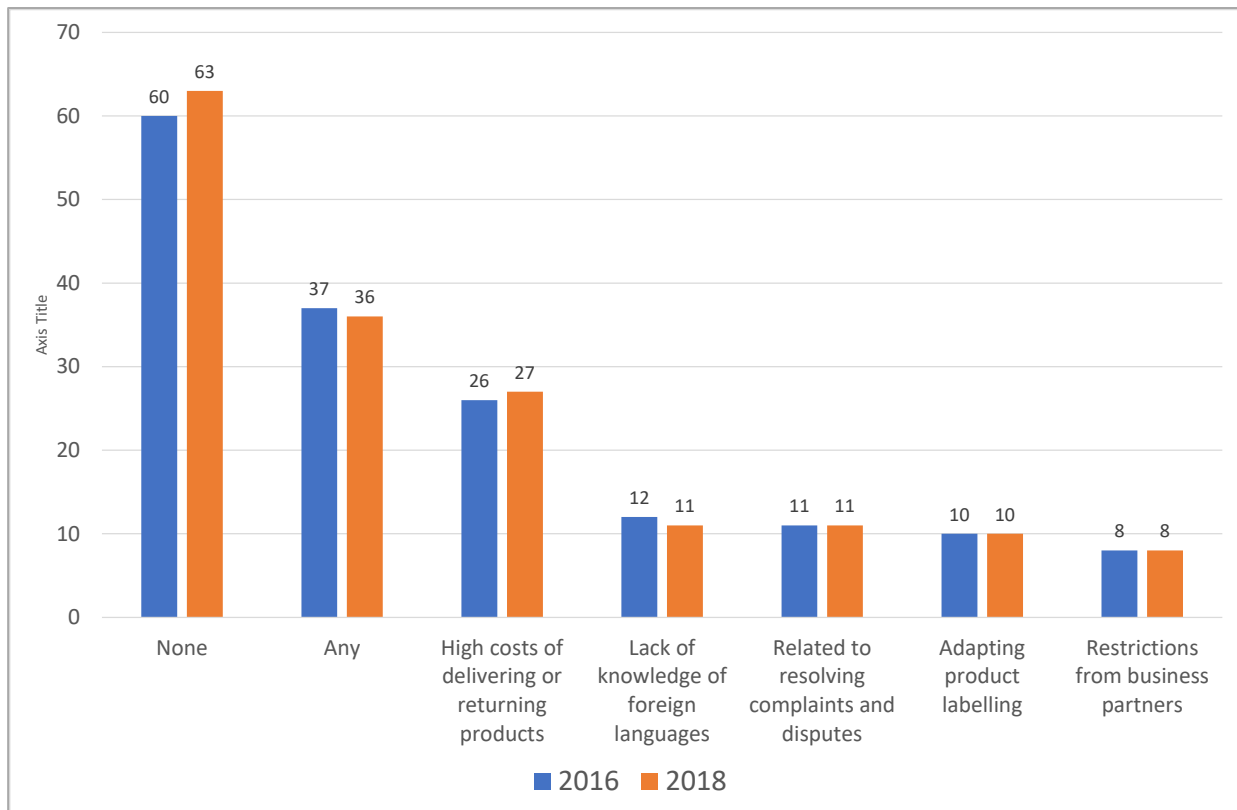
Table 8: Share (%) of all EU merchant respondents who viewed a barrier to the Single Market as being "significant" or "extremely significant", 2019

Type of barrier	Share
Complex administrative procedures	79.5%
Different national service rules	71.6%
Inaccessibility to information on rules and requirements	69.1%
Different national product rules	67.0%
Different contractual/legal practices	65.6%
Concerns about resolving commercial or administrative disputes, also because of deficits in legal protection before national or European authorities and courts	60.5%
Differing VAT procedures	60.4%
Insufficient legal/financial information about potential business partners in other countries	58.9%
Problems/uncertainties in posting workers temporarily to another country	58.1%
Issues related to payment recovery	57.4%
Non-VAT related taxation issues	54.2%
Discrimination of foreign enterprises by legislation or national authorities	46.8%
Difficulties in the recognition of professional qualifications and/or meeting other requirements to access a regulated profession	42.2%
Arbitrary public procurement practices	38.2%
Differences in national (online) consumer rights	36.3%
Language barriers	35.8%

Source: Authors' own elaboration, based on Eurochambres, 2019.

Eurostat data provides the opportunity to compare data from 2016 with data from 2018, see Figure 18. The difficulties reported by retailers are, in order of the frequency with which they are cited, the **high cost of delivering or returning products; lack of knowledge of foreign languages; resolution of complaints and disputes; product labelling; and restrictions from business partners**. In the figure, "all" or "none" refer to the five specific difficulties mentioned.

Figure 18: Difficulties that e-merchants experience when selling to other EU Member States, 2016 and 2018 (% of enterprises with web sales to other countries)



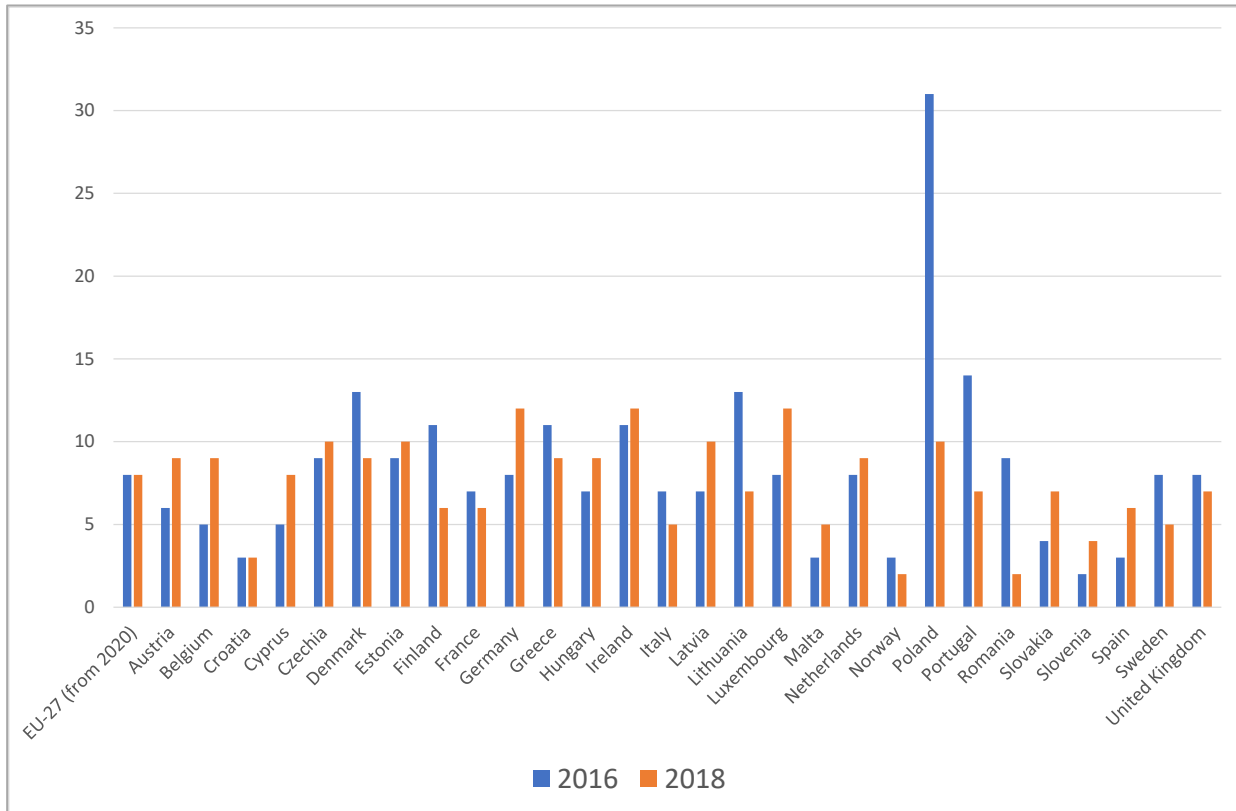
Source: Authors' own elaboration, based on Eurostat data (isoc_ec_wsobs_n2).

It is worth noting that the data reported in Figure 18 **do not in and of themselves suggest that these problems are getting better or worse on average over time**³³². Very little change is visible in the EU-wide average sentiment of merchants. This observation is not definitive for many reasons, but it is suggestive.

At the same time, the absence of an overall trend does not mean that there was no movement. Considerable movement is visible within individual Member States, as can be readily seen in Figure 19, which deals specifically with restrictions imposed by business partners. The survey results show modest worsening of conditions in a number of the Member States, coupled with substantial improvements in for instance Poland, Portugal and Lithuania.

³³² If anything, there is a very modest average improvement from 2016 to 2018.

Figure 19: Restrictions imposed by business partners when selling to other EU Member States (selected Member States, 2016 and 2018) (% of enterprises with web sales to other countries)

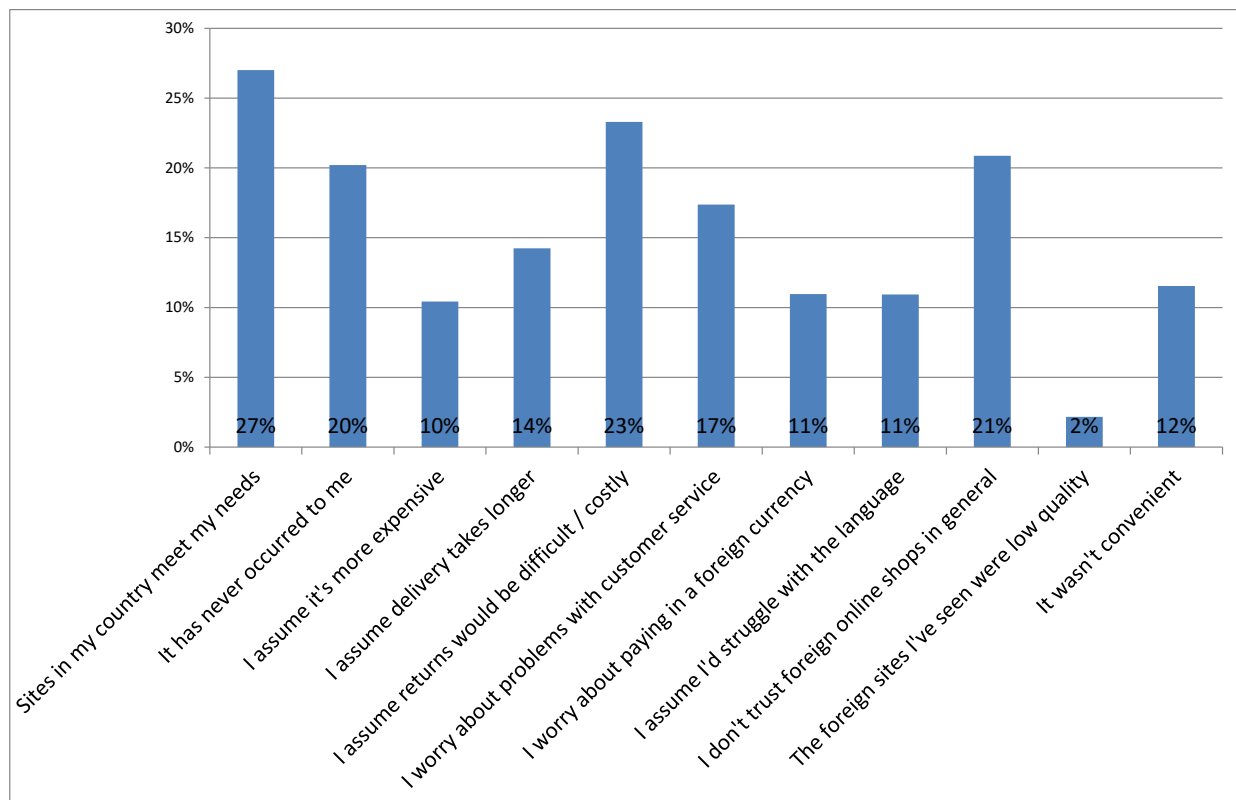


Source: Authors' own elaboration, based on Eurostat data (isoc_ec_wsobs_n2).

Consumer surveys on behalf of Google (see Figure 20) show concerns over **price** (reported by 10% of respondents in a simple average across the Member States³³³), **delivery costs** (14%), **customer service** (17%), **possible difficulty with returns** (23%), **payment arrangements** (11%), **the complexity of possibly having to deal with a foreign language** (11%), and **lack of trust in general** (21%). There is, however, significant variation across the Member States for all characteristics, including the important aspects of price, delivery time, and perceived challenges in dealing with customer service. These results are generally in line with surveys and consultations conducted on behalf of the European Commission. In sum, the concerns identified by European consumers largely mirror those identified by businesses, but the relative magnitude is not necessarily the same – for instance, suppliers appear to be more aware of delivery cost issues than consumers.

³³³ The data here correspond to the EU28 plus Switzerland and Ukraine.

Figure 20: Reasons for consumers not to purchase a product online from abroad, averages across the Member States (2014/2015)



Source: Google Consumer Barometer³³⁴.

5.1.2. Is there a growing trend of these problems in the EU?

Dozens of legislative measures were introduced as part of the DSM. Most of them had the goal of reducing impediments to cross-border trade, typically by enhancing harmonisation across the Member States. Assuming the barrage of new legislation was effective, we would expect impediments to the Single Market to have become less over time, not greater. This is not guaranteed – the added complexity introduced by some legislative measures might have reduced or wiped out any Single Market gains from harmonisation or simplification.

As noted in Section 5.1.1, the measures came into force too recently for their effects to be directly visible in statistics. It is consequently not possible to directly measure their effectiveness; however, **survey data of merchants do not suggest that overall dissatisfaction with fragmentation was growing even prior to the enactment of DSM legislation.** On the contrary, dissatisfaction seems to be quite stable overall across the EU, albeit with either improving or worsening prospects in some of the Member States (consider the comparisons of 2016 and 2018 data in Figure 18, Figure 19, and Figure 24, and also the comparison of 2015 data to 2019 data in Figure 2 in Chapter 1).

The more important development is that **a number of challenges, which were less evident or at least less obvious when the DSM was formulated in 2015, have emerged in recent years.**

³³⁴ Bruegel analysis based on the Consumer Barometer, survey conducted on behalf of Google, at www.consumerbarometer.com, viewed 21 February 2017. The question asked was: "Why have you never purchased a product online from abroad?" The data are based on a random survey conducted by telephone and can be assumed to be reasonably representative and free of systematic bias.

These include the emergence of the power of large digital platforms, "fake news", illegal content, risky uses of big data and artificial intelligence such as facial recognition, and unresolved questions as to product and service liability where artificial intelligence and machine learning are involved.

All of these play out in a world that has been further complicated by trade tensions between the US and China, and where e-commerce and other electronic services play an expanded and increasingly crucial societal role thanks to the pandemic.

5.1.3. What tools exist, or could exist, at EU and national level?

In that sense, it is clear that there is a growing need for attention to digital services – a need that the European institutions have already recognised, and that will hopefully be addressed in part by a **Digital Services Act** (DSA) legislative proposal that the Commission is expected to introduce toward the end of 2020.

The degree to which these new issues have a Single Market dimension is not clear in all cases, but a Single Market element seems to be present for at least some of these issues. For example, the Commission has observed that Member States implement their own rules to address distribution of illegal content³³⁵.

5.2. Burdensome issues related to Value Added Tax

There are many taxation issues that are relevant to the Single Market. Not least among them is competition among the Member States, especially as it relates to corporate taxation of (digital) firms. In this report, however, we have chosen to limit our focus to those issues that are most directly relevant to the remit of the IMCO committee.

To the extent that lack of an EU-wide harmonised approach to Value Added Tax (VAT) represents a barrier to cross-border e-commerce among the Member States, the lack of harmonisation of VAT procedures constitutes such a barrier.

5.2.1. What are the current problems?

The basic mechanisms for VAT are common among the Member States and are set out in EU legal instruments. EU law allows Member States considerable flexibility, however, as to (1) what rates to set for VAT, and which products and services qualify for discounted VAT rates; (2) actual mechanisms by means of which merchants must pay VAT to national authorities; and (3) actual mechanisms by means of which VAT for cross-border purchases are charged, credited and/or refunded across the Member States.

In addition, the system historically was subject to many strange distortions, such as for instance the *Low Value Consignment Rule (LVCR)*, as we explain shortly.

The lack of harmonisation leads to tax competition among the Member States. One can debate whether this is harmful – tax competition might perhaps play a small role in disciplining Member States that would otherwise set unreasonably high rates for various taxes. Be that as it may, it is hard to argue that VAT tax competition is in line with the principles of an integrated EU Single Market.

Legislation in recent years has corrected some of these problems, as we explain later in this section, but **VAT continues to be a complex area that poses a burden both to conventional merchants and to e-merchants who operate cross-border within the EU.**

³³⁵ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

The burdens posed by a lack of harmonisation have been compounded by an important legislative change enacted a few years ago. Prior to 2015, VAT for cross-border online purchases was in effect charged on a *country of origin* basis. This was helpful for e-merchants inasmuch as it meant that the e-merchant needed in general to be familiar only with VAT rules for its country of establishment. In 2015, the EU switched to a *country of use* regime in order to reduce the risk of various forms of tax arbitrage.

This change could be said to have been positive, and was in line with principles promoted by the OECD³³⁶, but it had negative implications for e-merchants since it made them subject to VAT rules in each of the Member States in which they did business. As a result, e-merchants (except for very small e-merchants that are below the relevant thresholds, which however are different for each Member State) now need to familiarise themselves with the VAT rules of every single Member State in which they do business. The basic VAT mechanism is the same, but the detailed implementation is different.

These differences pose challenges for all e-merchants, but especially for SMEs. Before they can comply with VAT rules in another Member State, they need to locate the relevant rules, which may not be easy. Once the rules have been located, they will not necessarily be published in a language that the SME e-merchant understands. **Businesses have been arguing for years that better access to information about VAT practices in all of the Member States needs to be improved.** *"There is an urgent need for quick and accurate access to the relevant information about the implementation of the VAT system in the different Member States. [Information must be accessible] swiftly, easily and in a language that SMEs can understand. We therefore urge Member States to establish an EU VAT Web Information Portal for businesses with a particular focus on SMEs"*³³⁷.

Lack of VAT harmonisation can moreover lead to double taxation, or to gaps in taxation. These anomalies run counter to the general principle, promoted by the OECD and WTO, that VAT should be neutral in order to minimise distortions to international trade. *"The full right to deduct input tax through the supply chain, except by the final consumer, ensures the neutrality of the tax, whatever the nature of the product, the structure of the distribution chain and the technical means used for its delivery (retail stores, physical delivery, Internet)"*³³⁸.

In some cases, however, VAT that is paid in one Member State and that should in principle be credited for refund by another is not in practice refunded. There are mechanisms for dealing with this, but they are burdensome, they do not always work, and the frequency with which they needed to be invoked has doubled from 2013 to 2018³³⁹.

As previously noted, the current system is prone to numerous distortions, some of which have been mitigated, others of which remain. The various distortions in taxation create an uneven playing field among a wide range of commercial firms.

The Low Value Consignment Relief (LVCR) stands out among the distortions. The LVCR historically waived VAT for goods below a given threshold of value. It was put in place in the 1980s to exempt small shipments into the EU from third countries from VAT, and thus to reduce administrative burden on the Member States; however, **it also caused economic distortions, and disadvantaged EU e-merchants in comparison with foreign merchants.** Distortions in the wholesale prices charged by national postal operators in the EU to their counterparts in third countries such as China compounded the problem.

³³⁶ "VAT is neutral in international trade since it is normally destination based ... This means that exports are free of VAT and imports are taxed on the same basis and at the same rate as domestic supplies." (OECD, 2011, pp. 3-4).

³³⁷ BusinessEurope, 2018, *Proposed amendment to VAT treatment of SMEs*, Position Paper 20 March 2018.

³³⁸ OECD, 2011, OECD International VAT/GST Guidelines: Guidelines on Neutrality.

³³⁹ European Commission, 2020, *An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy*, COM(2020) 312 final.

An EY study conducted on behalf of the European Commission describes some of the bizarre distortions resulting from the LVCR. At one point in time, for instance, half of all Danish language magazines were printed in the Åland Islands (i.e. outside of the EU) and shipped into Denmark in order to avoid paying VAT. Distortions such as these were estimated to have cost Member State governments more than EUR 600 million in lost revenue in 2013 alone³⁴⁰.

Finally, the current fragmentation enables various forms of creative tax fraud. Among these is a form of "tromboning" where goods are purchased in the EU nominally for export to a third country (no VAT paid) and are then in fact sold within the import country or another EU Member State (VAT collected). This fraudulent practice can be associated with fake invoices and the like.

A wide-ranging reform was initiated as part of the DSM strategy. Multiple legislative measures (collectively referred to as the VAT e-commerce package) served (1) to extend the computerised mini One Stop Shop (mini OSS) to cover not only Business-to-Business (B2B) VAT, but also nearly all Business-to-Consumer (B2C) VAT; (2) to establish EU-wide levels for a number of thresholds that had previously been at the Member States' discretion; and (3) to eliminate the aforementioned LVCR, the exemption from VAT for low value goods entering the EU from third countries.

These measures were intended to enter into force in 2021. Regrettably, the availability of the mini OSS, which is arguably the most important of the reforms, is reportedly delayed for at least six months but more likely for years, ostensibly due to the COVID-19 crisis³⁴¹.

The Commission continues to be active in trying to reduce tax fraud and at the same time to simplify tax administration. Their 2020 Action Plan³⁴² sketches out **a number of promising initiatives that could serve to further simplify and harmonise VAT implementation across the Member States, thereby creating benefits for e-merchants who sell cross-border.**

5.2.2. Is there a growing trend of these problems in the EU?

The shift of VAT liability from country of origin to country of use in 2015 definitely made things worse, since it meant that merchants were exposed to divergent rules in every Member State in which they did business.

VAT provisions continue to change over time, including provisions inspired by the COVID-19 pandemic (e.g. in Germany, where VAT rates were reduced until the end of the year). These changes in VAT provisions necessitate updates to software maintained by the merchants. **It is not clear that Member States pay sufficient attention to the impact of these costs on merchants, especially on SME e-merchants in other Member States.**

The EU institutions have taken a number of steps to try to mitigate the harmful effects of the 2015 change in VAT arrangements. The strengthening of the mini OSS and the elimination of the LVCR should generate substantial improvements for EU merchants; however, they are not yet in effect. If the mini OSS works well and gains sufficiently widespread acceptance, it could play an important role in addressing many of the challenges that e-merchants face today as regards VAT. These measures should be given a chance to show their effectiveness – there is a good chance that they will go a long way toward mitigating long-standing problems with VAT.

³⁴⁰ Council Directive (EU) 2017/2455, Council Regulation (EU) 2017/2454, Council Implementing Regulation (EU) 2017/2459, Council Directive (EU) 2019/1995, Council Implementing Regulation (EU) 2019/2026, Implementing Regulation (EU) 2020/194, see: https://ec.europa.eu/taxation_customs/business/vat/modernising-vat-cross-border-ecommerce_en#heading_1.

³⁴¹ Gothmann, R., 2020, *Offiziell: Verschiebung des VAT E-Commerce Package (One Stop Shop) um mindestens sechs Monate*.

³⁴² European Commission, 2020, *An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy*, COM(2020) 312 final.

5.2.3. What tools exist at EU and national level to address these problems?

Lack of information on the part of merchants about VAT rules in the various Member States appears to be quite a serious problem. A small, informal poll of 70 tax and finance experts in 2020 found that "around two thirds (65%) of businesses have heard of OSS but know little about its practical details"³⁴³. About 10% had not even heard of the mini-OSS until they were polled.

Once the **Digital Single Gateway** has been implemented, it will have the potential to make information about VAT arrangements in the Member States readily available to merchants and consumers in a common European language that they can understand (Section 5.3.3). This in line with an urgent 2018 request from BusinessEurope, (as noted in Section 5.2.1) to ensure "quick and accurate access to the relevant information about the implementation of the VAT system in the different Member States" by means of an "EU VAT Web Information Portal for businesses with a particular focus on SMEs"³⁴⁴.

SOLVIT is already in place and can in principle provide a convenient means of informally resolving cross-border disputes over Member State rules that may be in conflict with EU rules. It appears, however, that SOLVIT is only rarely used by businesses, as discussed in more detail in Section 3.1.3. Only 3.7% of SOLVIT cases relate to Customs and Taxation in 2019 (this includes both citizen and business cases)³⁴⁵. Interestingly, **out of the (few) business cases that are reported to SOLVIT, taxation is the most common issue** with 36% of the SOLVIT case load from businesses.

In sum, tools that might address the outstanding problems with lack of understanding of Member State VAT practices are enacted in EU law, but the Single Digital Gateway is of unknown effectiveness and is not yet in effect. This mirrors the situation with the mini OSS, which is on possibly extended hold (see Section 5.2.1).

5.3. Copyright and Geo-blocking: Obstacles to cross-border sales

Geo-blocking occurs when merchants operating in one EU Member State block or limit the ability of prospective customers from other Member States to order their goods or (online) services, a practice that restricts cross-border commerce and specifically cross-border e-commerce³⁴⁶. Surveys demonstrate that **European consumers are frustrated by the level of geo-blocking**; moreover, it can be viewed as a significant barrier to the Single Market.

Geo-blocking practices can be divided into four main categories (see Figure 21):

- denial of access to a website and/or involuntary or automatic re-routing to a website in a different country, typically with different prices, terms and conditions;
- refusal to sell based on the Member State of residence or establishment of the prospective customer;
- refusal to deliver a product or service to the Member State of the prospective customer's residence or establishment; and
- refusal to accept payment using payment mechanisms that are common in the Member State of the prospective customer's residence or establishment.

³⁴³ Bdaily News, 28 May 2020, *Accordance launches E-Commerce and VAT Whitepaper*, Member Article.

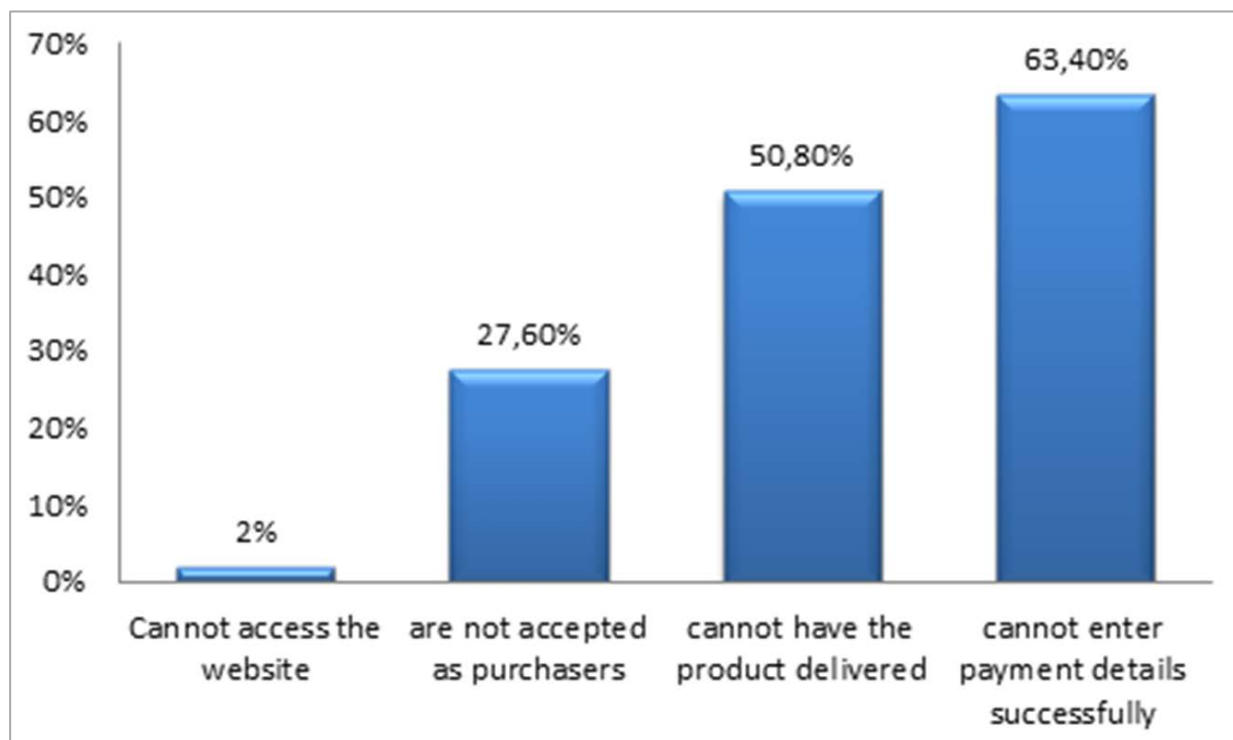
³⁴⁴ BusinessEurope, 2018, *Proposed amendment to VAT-treatment of SMEs*, Position Paper 20 March 2018.

³⁴⁵ European Commission, *Single Market Scoreboard, SOLVIT*.

³⁴⁶ Marcus, S. J., Petropoulos, G., 2017, *Extending the scope of the geo-blocking prohibition: An economic assessment*.

Each practice can take different forms and happen at different stages of the shopping process. Sometimes, geo-blocking happens immediately or automatically. However, in most cases, the consumer will have spent significant time and effort on a website, attempting to make a cross-border online purchase, before realising that the seller or service provider either will not sell to them, or will only sell under prices, terms and conditions other than those desired or expected.

Figure 21: Cumulative failure rate (%) in a 2015 online cross-border mystery shopping survey



Source: GfK Mystery Shopping Survey and JRC/IPTS calculations as quoted in European Commission, 2016.

In terms of pure economics, there is room to debate whether price and quality discrimination is a problem in and of itself. Many would argue that price discrimination can often be welfare-enhancing³⁴⁷.

Nonetheless, there are arguments to mitigate or eliminate geo-blocking because (1) it clearly runs counter to the spirit of the Single Market, (2) consumers are justifiably irritated when they waste time before discovering that they are unable to purchase or rent goods or services cross-border, and (3) the goods or services that should have been purchased cross-border but were not are a deadweight loss to society (unless purchased or rented in some other, presumably less efficient way).

For that reason, the EU institutions have been active in trying to address the problem; however, the work must be viewed as incomplete.

³⁴⁷ See Hotelling, 1929, *Stability in Competition*.

5.3.1. What are the current problems?

European legislation over the past legislative term (2014-2019) has tended to focus on three distinct problems:

- Obliging e-merchants to end practices that prevented or restricted prospective customers in other Member States from purchasing or renting their goods and services, with however very important carve-outs;
- Eliminating the ability of rightsholders to prevent distributors from accepting unsolicited requests to purchase or rent copyrighted content, even in cases where the distributor does not hold rights to distribute in the country where the prospective customer resides or is established; and
- Lowering transaction costs for firms such as broadcasters that seek to simultaneously assemble the rights to distribute works subject to copyright in multiple Member States.

EU merchants ranked copyright and other vertical geographic restrictions as 16th and 17th among 17 impediments to cross-border sales in a 2014 Eurobarometer survey³⁴⁸ (see Figure 18 in Section 5.1). There are other problems that rank higher, but the magnitude of the restrictions is still large enough to raise concerns. Specifically, 7% of respondents say that copyright is a major problem that either prevents them from selling abroad or makes it too expensive to sell abroad, while an additional 11% say it is a minor problem. Furthermore, 6% say that it is a major problem that their suppliers prevent them from selling abroad, while an additional 10% see this as a minor problem.

That the numbers are nearly identical is not surprising – for copyrighted goods, copyright is often the means by which geographical vertical restrictions are enforced. For services that distribute content subject to copyright, the two issues are closely intertwined.

Copyright is governed by the Directive on Copyright in the Digital Single Market (Directive 2019/790). Within the framework of the Copyright Directive, copyright is governed by Member State law. There are differences in the implementation of copyright and related provisions into Member State law; however, the vertical geographic restrictions imposed by rightsholders appear to represent a far greater impediment to cross-border sales of copyrighted content than do any differences in Member State transposition and implementation.

In 2018, the European institutions enacted the Geo-blocking Regulation (or GBR, Regulation (EU) 2018/302) to attempt to address these problems. The GBR deals with three of the four obstacles that were identified in the Sector Inquiry (see Figure 21):

- Article 3 prohibits a merchant from blocking or limiting a customer's access to the trader's online interface (or redirecting the customer to a different website than that which the customer sought) for reasons related to the customer's nationality, place of residence or place of establishment;
- Article 4 prohibits discrimination (different general conditions of access to goods or services) for reasons related to the customer's nationality, place of residence or place of establishment; and

³⁴⁸ TNS, 2015, *Companies engaged in online activities*, Flash Eurobarometer 413.

- Article 5 prohibits the imposition of different conditions for most electronic payment transactions made by credit transfer, direct debit or a card-based payment instrument when made in a currency that the trader accepts.

The GBR would appear at first glance to solve the problem; however, there are many exclusions and limitations that make the GBR less effective than it might have been.

First, the GBR deals with arrangements between merchants and consumers. Whatever restrictions producers might impose on merchants are not touched by the GBR (although vertical restrictions that limit the geographic scope of distribution are in principle subject to competition law).

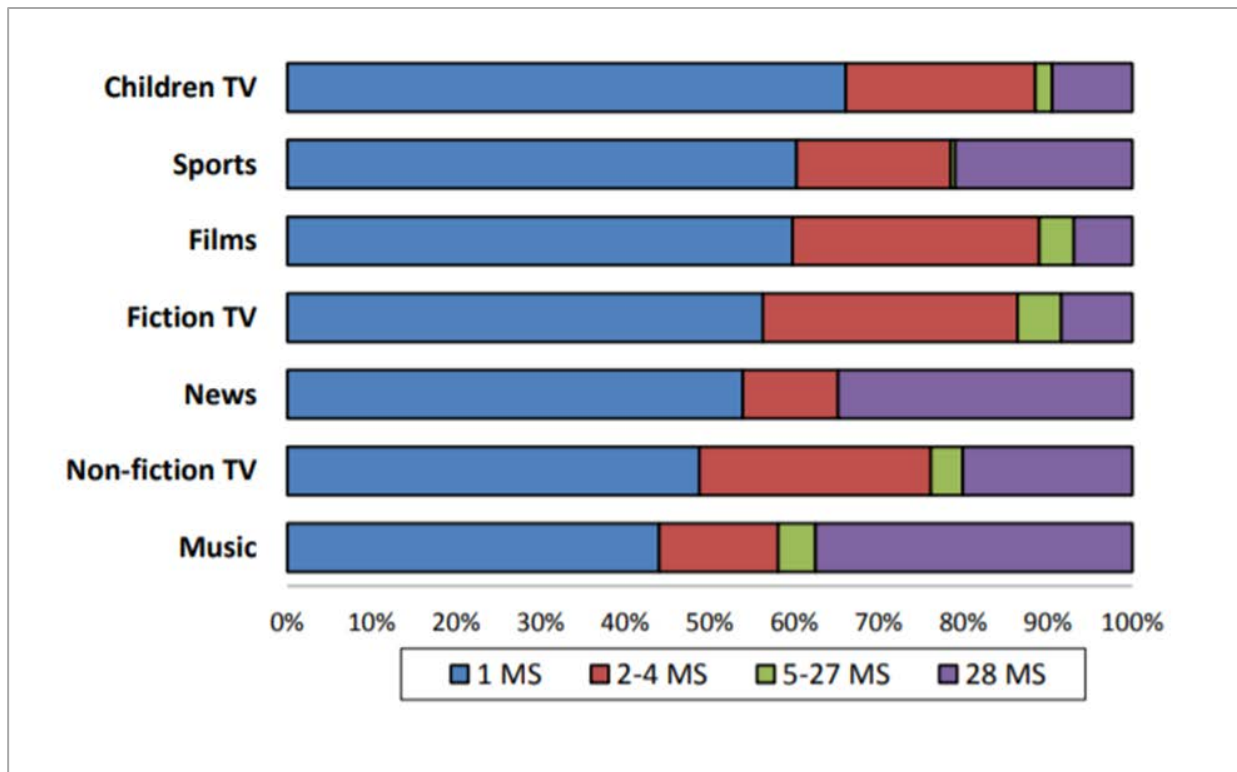
Second, the GBR completely excludes all categories of services that are excluded by Article 2(2) of the Services Directive, including *"audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting"*.

In addition, Article 4(1) of the GBR (non-discrimination) effectively excludes goods that require cross-border shipment unless the merchant already ships to the Member State in question. Furthermore, it excludes *"electronically supplied services the main feature of which is the provision of access to and use of copyright protected works or other protected subject matter, including the selling of copyright protected works or protected subject matter in an intangible form."*

Recital 3 of the regulation suggests that goods that require shipment are excluded not because of the shipment costs themselves, but rather because an obligation to ship them cross-border would expose merchants to all of the inconsistencies in Member State rules involving goods and consumer protection that we have identified in Chapters 3 and 6, respectively. We do not discuss them further here.

The exclusion of services primarily serving to distribute content subject to copyright, especially audiovisual content, is presumably irritating to consumers. The DG COMP Sector Inquiry found that licensing of rights on a national basis is particularly prevalent in relation to content types that may contain premium products, such as sports (60%), films (60%) and fiction TV (56%), see Figure 22.

Figure 22: Territorial scope of rights agreements submitted by digital content providers - by product type



Source: DG COMP Sector Inquiry, 2017, p. 226.

In general, geographic discrimination is prohibited under EU competition law; however, copyright in effect represents an exception. Copyright seeks to encourage the creation of new creative and intellectual content by effectively granting the creator or his/her agent the exclusive power to exploit the work for a limited period of time. A further aim was to make knowledge publicly available, and thus to promote the use of intellectual property and the enjoyment of creative content, once the term of the copyright expired. A serious challenge to this regime overall is that the "limited" period of time has progressively become longer over the past decades, to the point where it now extends far beyond the lifetime of the creator, thus restricting use for far longer than was initially intended when the copyright regime was initially put in place.

There have been **many court judgments over the years that have sought to oblige rightsholders to open copyrighted content so as to permit distributors (e.g. broadcasters) to respond to "passive" or unsolicited purchase requests.** Among these are the CJEU ruling in the joint cases C-403/08 and C-429/08 (the *Murphy ruling*)³⁴⁹, and the more recent European Commission decisions in the framework of the *pay-TV investigation* (also referred to as the *Sky UK case*)³⁵⁰. Under the commitments made in the pay-TV case, most Hollywood studios are prohibited from introducing, maintaining or enforcing provisions that would restrict broadcasters from responding to passive sales requests.

³⁴⁹ Judgment of the Court (Grand Chamber) of 4 October 2011, *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), available at: <http://curia.europa.eu/juris/liste.jsf?num=C-403/08&language=en>.

³⁵⁰ The Decision of 26 July 2016 making binding the commitments offered by Paramount Pictures; and the Decision of 7 March 2019 making binding the commitments offered by Disney, NBC Universal, Sony Pictures, Warner Bros and Sky.

These seemingly important rulings have had no impact at all on market practices to date, to the best of our knowledge. They left copyright rights in place, even though the clear intent of the rulings was to enable cross-border sales irrespective of any other obligations. Here we see the limitations of EU policy to date: copyright is viewed as an exogenous limitation, unrelated to vertical geographic restrictions on sales, when in fact copyright constitutes the means by which vertical geographic restrictions are enforced and is part and parcel of the same problem.

As regards facilitating collection of rights for multiple countries at once, a range of legal instruments are in place. In principle, rights can be licensed individually or collectively through a Collective Management Organisation (CMO). Specific rules exist for instance for cross-border licencing of musical works by CMOs³⁵¹.

The Satellite and Cable (SatCab) Directive (Directive 93/83/EEC) applies mandatory collective management of rights to simultaneous, unaltered and unabridged cable retransmission. It also applies the country-of-origin principle to communications to the public by satellite such that a licence for an EU-wide satellite broadcast needs only to be obtained in the country of origin (i.e. the place of uplink). However, the SatCab Directive did not apply the country-of-origin principle to internet transmissions.

The Online Television and Radio Programmes Directive (Directive (EU) 2019/789) addresses this gap by extending the country-of-origin principle to certain online transmissions. It is intended to simplify the clearance of rights and to encourage the cross-border distribution of online radio and television programmes. The ancillary services covered by the country-of-origin principle by Directive 2019/789 include simulcasting, catch-up services and other services that complement the main broadcast, such as previews. Within such services, the country-of-origin principle applies to all radio programmes, and television programmes which are news and current affairs programmes, or fully financed own productions of the broadcasting organisations.

As previously noted, divergent Member State rules as regards copyrighted content appear to represent a relatively minor impediment to cross-border sales in comparison with the vertical restrictions imposed by the rightsholders. With that said, however, we would note the **Member State rules that fix the price of printed books and (in Austria, Belgium, France, Germany, Greece, Slovenia and Spain) of e-books. These represent yet another aspect where e-merchants who sell cross-border must be well aware of rules in the country of use.**

5.3.2. Is there a growing trend of these problems in the EU?

In terms of impact on businesses, **survey data do not suggest any obvious tendency for e-merchant dissatisfaction over vertical restrictions to have increased in severity** between 2016 and 2018 (see Figure 18 in Section 5.1). However, there were numerous changes in individual Member States (see Figure 19 in the same section).

We might reasonably expect to see substantial positive movement since 2018, but survey data to demonstrate this are not yet available. The Geo-blocking Regulation (Regulation 2018/302) did not take effect until December 2018.

Relative to consumers, it will have removed a number of significant irritations – it is no longer permitted (1) to block the use of websites in a different Member State or to involuntarily redirect consumers to a website other than in the Member State to which they sought to connect, (2) to reject payment if made by one of the specified means of payment, or (3) to discriminate against the consumer based on

³⁵¹ Articles 24-31 of Directive 2014/26/EU.

nationality or the Member State of residence or establishment.

Relative to e-merchants, it will have enabled them to respond to passive sales requests from other Member States, which is to say that it will have ameliorated restrictions about which they previously complained. But it also imposes new obligations relative to consumers.

These gains are important, but once again, many transactions are not covered. Services that mainly deliver audiovisual copyrighted content are fully excluded. Services that mainly deliver non-audiovisual copyrighted content are excluded from the non-discrimination provisions, as are any goods that require delivery to a Member State other than the Member State in which the trader operates or offers delivery services.

Most other measures, however, probably have little or no visible effect. As previously noted, the various court decisions regarding passive sales of audiovisual content do not appear to have any effect whatsoever. Directive (EU) 2019/789 has presumably had a positive effect for ancillary services offered by broadcasters, but this will not be obvious to most consumers and is unlikely to have large enough effects to be visible in macroeconomic terms.

5.3.3. What tools exist at EU and national level to address these problems?

The GBR has come into force. However, it is too soon to say how effective it will be. Amendments of the GBR to include services whose main function is to make copyrighted content available should be considered. A Commission study on this issue is expected momentarily. The timing of any change that might impact sector revenues should be carefully considered, however, in light of the impact that the pandemic is having on the audiovisual sector.

5.4. Insufficient information about applicable rules

5.4.1. What are the current problems?

As regards numerous aspects of e-commerce, **e-merchants struggle to find reliable information from the Member States in which they do business.**

As regards VAT, for example, the lack of readily available information in the language used by the e-merchant is a long-standing problem. SMEs face particularly serious challenges inasmuch as these one-time costs of familiarising themselves with the rules of each Member State must effectively be amortised over only a small volume of sales. BusinessEurope has called on the Commission to implement a technological solution such as a website to make reliable information available in a form that most e-merchants can use³⁵² (see also Section 5.2.1).

As noted in Section 5.2.3, a small, informal poll of 70 tax and finance experts in 2020 found that "*around two thirds (65%) of businesses have heard of One Stop Shop (OSS) but know little about its practical details*"³⁵³. About 10% had not even heard of the mini OSS until they were polled.

Consumer protection is treated as a separate topic in this report because it is a major focus of the IMCO committee, but it was also one of the many areas of concern that the Digital Single Market (DSM) sought to address.

³⁵² BusinessEurope, 2020, *Examples of Single Market barriers for businesses*.

³⁵³ Bdaily News, 28 May 2020, *Accordance launches E-Commerce and VAT Whitepaper*, Member Article.

In a 2015 Flash Eurobarometer survey³⁵⁴, 15% of EU merchants involved in cross-border activity ranked "*not knowing the rules that have to be applied*" as a major problem while an additional 22% ranked it as a minor problem, thus ranking it fifth out of 17 impediments to cross-border sales (see Figure 18 in Section 5.1).

Survey results make it abundantly clear that both merchants and consumers are surprisingly confused as to important aspects of EU consumer protection law. The Flash Eurobarometer survey in 2015 asked consumers three questions concerning the cooling-off period, faulty product guarantees, and unsolicited products. Only 45.5% of EU27 consumers got all three questions right. Among merchants who were asked a slightly expanded set of questions, only 55% of the responses were correct (see Section 6.2.1).

5.4.2. Is there a growing trend of these problems in the EU?

For consumer protection, there are clear problems, but a general adverse trend is not visible (see Section 6.1.2). We have not located detailed data, but we expect that the same is true for other information needs relevant to e-commerce.

5.4.3. What tools exist at EU and national level to address these problems?

Once it is in place, the Single Digital Gateway could potentially play an important role in mitigating the problems related to insufficient information in the Digital Single Market (see Section 4.2.3).

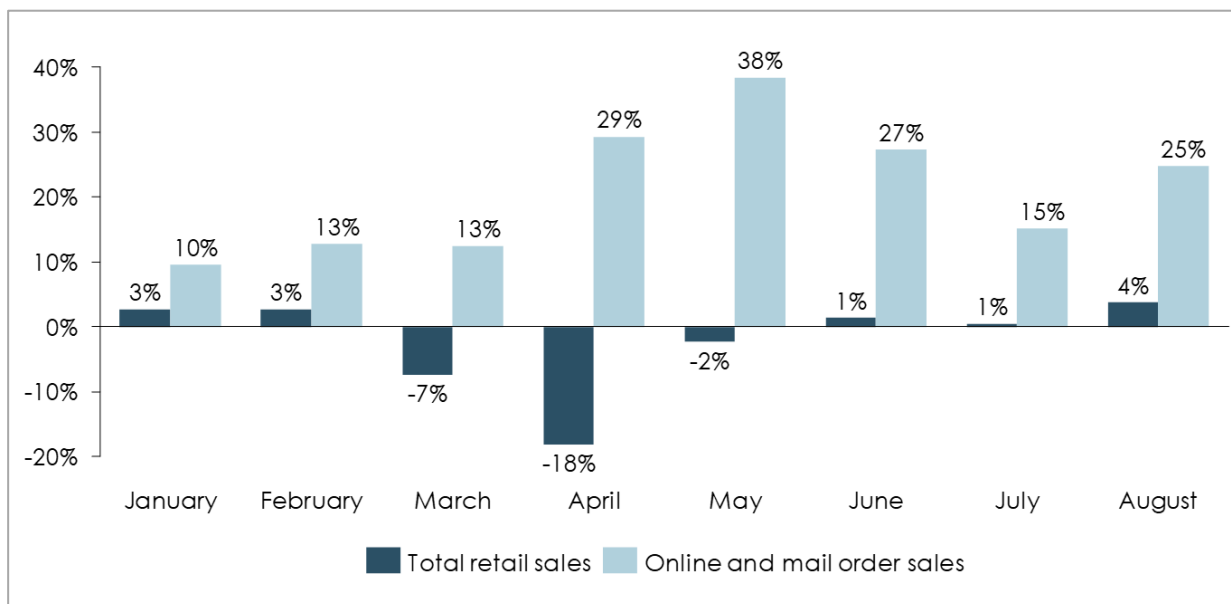
It is **specifically important for merchants that sell online in the Single Market that information and procedures relating to VAT (including online registration and payments) are sufficiently implemented**. The same goes for rights, obligations and rules related consumer rights (which are to be included in the Single Digital Gateway) and for consumer dispute resolution procedures. However, the wording in the Regulation is quite broad, and it is key to follow up among both businesses and consumers that the information and procedures that are made available cover the relevant areas.

5.5. COVID-19 and digital services

For the most part, the flow of online services has not been impacted by the pandemic. Indeed, the use of online conferencing services to enable remote work and remote learning, and of e-commerce as an alternative to conventional shopping, has been one of the most important factors in mitigating the impact of the pandemic. In April 2020, retail sales via the internet (i.e. e-commerce) or mail order increased by 29% compared to April 2019, while total retail sales decreased by 18% during the same time period. In May 2020, e-commerce increased by 38% compared to May 2019, while total retail sales decreased by 2%. E-commerce growth has remained high up until August 2020, while total retail turnover has somewhat rebounded, see Figure 23.

³⁵⁴ TNS, 2015, *Companies engaged in online activities*, Flash Eurobarometer 413.

Figure 23: Monthly growth (%) of total retail sales and online & mail order retail sales, January-August 2020 compared to January-August 2019



Source: Eurostat, Turnover and volume of sales in wholesale and retail trade - monthly data [sts_trtu_m].

Commission efforts to avoid lack of coordination in measures that directly employ artificial intelligence and big data to combat COVID-19 are worth noting. Initiatives that have been taken in the EU and elsewhere have tended to involve (1) the use of big data to provide strategic data to health policy planners, (2) the use of big data for contact tracing, and (3) the use of artificial intelligence for individual diagnosis. Commission actions have been highly visible in terms of contact tracing³⁵⁵.

When the crisis first emerged, many felt that an intensive approach similar to those employed in Asian countries (China, Korea, Taiwan, and to some extent Singapore) would be needed. Those countries often combined geolocation data from the smart phone with other data (health, immigration, even credit card data) in order to enforce quarantines and aggressively isolate individuals known to be infected. The European Data Protection Supervisor (EDPS) initially spoke of a willingness to do whatever is needed, somewhat reminiscent of the Draghi "bazooka approach" to the financial crisis of 2008. The European Data Protection Board (EDPB) comprised of data protection authorities from the Member States pushed instead for continued enforcement of the GDPR, even in times of crisis.

This implies a very different, and much more limited, approach to digital contact tracing than that which was taken in the previously mentioned Asian countries³⁵⁶. European apps will provide exposure notification, but few if any of the EU's so-called contact tracing apps will in fact do contact tracing. Over the summer, this appeared to have been a good choice – the EU came through the first wave of the pandemic in reasonably good shape without resorting to the use of invasive contact tracing apps. As we enter a second and even more intense wave of the pandemic, however, this choice might need to be reconsidered.

The Commission subsequently issued guidance as to how contact tracing apps should, and should not, work in order to reduce fragmentation among the Member States. In doing so, they called for a fully GDPR-compliant approach.

³⁵⁵ Marcus, S. J., 2020, *Big data versus COVID-19: opportunities and privacy challenges*.

³⁵⁶ Ibid.

Unfortunately, the European institutions took no visible steps to ensure the emergence of a single European app. This is presumably because responsibility for public health rests with the Member States. Nonetheless, the lamentable result as of today is that *if the person sitting next to you in a restaurant subsequently reports himself or herself as infected, you will probably never know it unless that person is running the same contact tracing app from the same Member State as you*³⁵⁷.

More recently, however, the Commission has taken steps to enable exposure notification apps based on Google/Apple technology to exchange information. When fully in place, this should hopefully provide the effect of a common exposure notification app for the 18 Member States that have based their respective exposure notification apps on Google/Apple technology³⁵⁸. Today, the German app is already interoperating with those of Ireland and Italy. The centralised exposure notification apps that are used in France and Hungary, however, will not interoperate with the rest for the foreseeable future.

5.6. How can these problems be addressed and prevented?

As at the beginning of the chapter, it is helpful to distinguish among the measures that have been addressed, with various degrees of success, under the Digital Single Market (DSM) strategy and those that are candidates for inclusion in the upcoming Digital Services Act (DSA).

Most of the dozens of measures implemented under the DSM strategy have not been in place long enough to have been evaluated. For most of these measures, it is not yet clear how well they are functioning in terms for instance of effectiveness and efficiency. Under the "evaluate first" principle of the Commission's *Better Regulation Guidelines*, (which guide all the European institutions), **it is arguably too soon to be proposing revisions.**

It is clear, however, that the European institutions need to be paying close attention as mid-term reviews of the DSM appear.

The recently adopted Regulation (EU) 2018/644 on cross-border parcel delivery services is a novel tool to improve the Single Market for e-commerce. Its intent and likely impact has been scrutinised upon its inception³⁵⁹. It promoted a new, consumer-facing initiatives in the form of a publicly available database of cross-border parcel delivery prices to increase transparency of the market³⁶⁰. The extent of transparency sought is two-fold: in addition to transparency to the consumers (including business consumers), the Regulation aims for greater transparency of the market functioning to the national regulatory authorities. Given that the implementation and effects of these measures depend on national level activities across the EU – and given the recently opened process of evaluation of the EU Postal Services Directive³⁶¹ – it will be particularly important to evaluate the effects of the above mentioned Regulation on cross-border parcel delivery prices and the functioning of cross-border e-commerce within the EU.

Amendment of the Geo-blocking Regulation to include services whose main function is the distribution of copyrighted content should also be considered.

³⁵⁷ Marcus, S. J., Poitiers, N., 2020, *Apps without borders? How COVID-19 apps show the limits of the EU digital single market*, Bruegel podcast.

³⁵⁸ Financial Times, 7 Aug 2020, *EU contact tracing scheme will not include French app*.

³⁵⁹ Marcus, S. J. et al., 2019, *Contribution to growth: The European Digital Single Market. Delivering economic benefits to citizens and businesses*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

³⁶⁰ See the Your Europe website on Shipping and Delivery, available at: https://europa.eu/youreurope/citizens/consumers/shopping/shipping-delivery/index_en.htm#shortcut-4.

³⁶¹ See the European Commission's dedicated website for the evaluation, available at: <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11965-Report-on-the-Application-and-Evaluation-of-the-Postal-Services-Directive>.

A Commission study on this issue is expected momentarily. The timing of any change that might impact sector revenues should be carefully considered, however, in light of the impact that the pandemic is having on the audiovisual sector.

For VAT, the measures already in place could address many outstanding problems once they are fully in place. Legislation that has already been enacted (but which is not yet in force) eliminates the Low Value Consignment Rule (LVCR) and broadens the mini-OSS.

A concern is that implementation of the mini-OSS has been postponed, possibly for years, ostensibly due to COVID-19. Beyond these measures, those that the Commission has proposed in its 2020 Action Plan seem promising³⁶².

The Geo-blocking Regulation (GBR) of 2018 solved some aspects of the problem but failed to address others. **An ongoing Commission study of the feasibility of adding services that exist primarily to distribute copyrighted content to the scope of the GBR suggests that there could well be scope to expand the GBR in this way,** but there are many complex details that would need to be resolved, and the timing would need to be carefully considered given that creators of copyrighted content face severe challenges in light of the pandemic.

As regards collecting the necessary rights to distribute copyrighted content in multiple Member States, the measures passed to date fail to address quite a few relevant cases. An obvious solution would be to make it possible to obtain an EU-wide copyright. This would not solve every problem, since presumably national copyright would continue to be available, but it would at least provide a simple way in which rightsholders could solve it if they so desire. Such a dual system would parallel the equivalent system for trademarks, where the *European Union trademark* exists in parallel with national trademarks and serves a complementary function.

As far as lack of information and awareness among e-merchants and consumers is concerned, there is considerable scope for the Commission to ensure that websites or similar tools provide easy access in widely used European languages to the content that is most needed (see also Section 5.4.1). Once it is in place, the *Single Digital Gateway* could provide a convenient depository for this information provided that it is well implemented and widely used.

An important success factor in the implementation of the DSM during the previous legislative term was that the measures were conceptualised as part of an integrated strategy, and a Commission Vice President was appointed with the mission of overseeing the whole set of initiatives. In previous work for the Parliament³⁶³, it was suggested that a broader initiative was needed for the current legislative term, dealing with all Single Market aspects and not just with e-commerce. This shift to a focus broader than the DSM seems to be reflected in the Commission's thinking going forward.

Notably, and as noted at the beginning of this chapter, **the Commission has announced its intent to propose a Digital Services Act (DSA) in Q4 2020** to "*upgrade our liability and safety rules for digital platforms, services and products, and complete our Digital Single Market*"³⁶⁴. It is expected to address a wide range of challenges, many of which are highly relevant to this report.

³⁶² European Commission, 2020, *An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy*, COM(2020) 312 final.

³⁶³ See Marcus, S. J., et al., 2019, op cit.

³⁶⁴ See European Commission webpage *New EU rules on e-commerce*, available at: <https://ec.europa.eu/digital-single-market/en/new-eu-rules-e-commerce>.

It is challenging to comment on a legislative proposal that has not yet been made³⁶⁵; however, the European Parliament's resolution³⁶⁶ invites the European Commission to consider a great many issues. All of the issues raised in the resolution are relevant to the EU Single Market; however, not all of the issues are particularly relevant to the topic of this study, which seeks to identify national legislation that contradicts Single Market rules or creates new unjustified obstacles to Single Market rules.

One of the key issues is the degree to which it will be possible to retain **the benefits of the country of origin principle**, which is established in the E-Commerce Directive. Under the country of origin principle, the national law of the country in which the service provider is established governs in most cases³⁶⁷. This principle greatly reduces the burden on service providers that operate in more than one Member State, even though derogations from the country of origin principle have always been possible.

The E-Commerce Directive does a great deal more to facilitate the functioning of the Single Market and the free movement of services, including ensuring freedom of establishment for information society services, and preventing Member States from blocking service provision by an information society service provider in another Member State³⁶⁸. At the same time, numerous derogations from these principles are permitted under the E-Commerce Directive³⁶⁹. Preserving cross-border market access and freedom of establishment going forward, together with low transaction costs in conducting digital cross-border business, is clearly important.

Striking a proper balance between EU and Member State prerogatives that is compatible with subsidiarity and proportionality is likely to be challenging. Supervision and enforcement at EU and at Member State level will require careful consideration³⁷⁰.

The e-Commerce Directive avoids imposing obligations on service providers established in third countries; the GDPR, by contrast, is fully applicable to services provided to end-users in the EU/EEA. Given that the perceived need for the DSA has largely been prompted by the actions of digital platforms located outside of the EU, it seems inevitable that some degree of extraterritorial application of the DSA will be needed. This is likely to raise a number of practical considerations; however, since this has little bearing on Member State legislation, we do not discuss it further here.

For artificial intelligence and machine learning, Article 22 of the GDPR already provides a "right of explanation", but many other topics are likely to need work going forward. In line with the resolution cited above, "*ensuring non-discrimination, transparency, ... as well as liability*" might benefit from more attention.

In the case of artificial intelligence (AI) and machine learning, product and service liability is likely to require legal clarification going forward.

³⁶⁵ The Commission's Inception Impact Assessment Report contains very little practical detail. A number of documents have been leaked to the press, but there is no way of knowing the degree to which they correspond to the legislative proposals that the Commission can be expected to make in December 2020.

³⁶⁶ European Parliament, 2020, *Digital Services Act - Improving the functioning of the Single Market*, Resolution of 20 October 2020.

³⁶⁷ Article 3(1) Directive 2000/31/EC.

³⁶⁸ Article 3(2) Directive 2000/31/EC.

³⁶⁹ Article 3(3) and Article 3(4) Directive 2000/31/EC. As the IMCO initiative report notes, "*under the Union rules on free movement of services, Member States may take measures to protect legitimate public interest objectives, such as protection of public policy, public health, public security, consumer protection, combating the rental housing shortage, and prevention of tax evasion and avoidance, provided that those measures comply with the principles of non-discrimination and proportionality*".

³⁷⁰ The IMCO initiative report contains helpful suggestions in paragraphs 82 through 89, and on p. 37.

A strict liability regime applies at EU level for goods, but not for services. In light of the complicated value chains associated with AI and machine learning, it is not always clear whether an offering is a product, a service, or both. Also, if artificial intelligence and/or machine learning generates a faulty conclusion that leads to property damage or loss of life, it is not clear who was at fault³⁷¹. The European Commission has already signalled concerns in this area³⁷².

The DSA is also likely to take a stronger line on illegal and harmful content than is in place today. For content that is harmful but not illegal (including hate speech and disinformation), it will be necessary to strike a delicate balance between restrictions versus the maintenance of freedom of expression.

Various additional provisions that are likely to appear in the DSA have to do with consumer protection. These are covered in Chapter 6.

³⁷¹ Marcus, S. J., 2018, *Liability: When Things Go Wrong in an Increasingly Interconnected and Autonomous World: A European View*, IEEE Internet of Things Magazine, Institute of Electrical and Electronics Engineers.

³⁷² European Commission, 2020, *Report on the safety and liability implications of Artificial Intelligence, the Internet of Things and robotics*, COM(2020) 64 final.

6. CONSUMER PROTECTION

KEY FINDINGS

- Despite a generally horizontal approach to consumer protection in the EU, the lack of full harmonisation means that Member States can and do go beyond the consumer protection measures enacted at EU level. For example, the liability of the trader for a lack of conformity must not be less than two years from the date of supply of the content or services, but Member States are free to set a longer time.
- Under Rome I rules, consumers can choose to exercise consumer protection rights that are available in their Member State of residence (except for passive sales). In practice, this means that traders must know the consumer protection rules for every Member State to which they actively sell.
- Merchants regularly report that lack of understanding of consumer protection rules among the Member States is a problem for them. Survey results indicate that there are gaps in the degree to which merchants and consumers understand consumer protection rules across the EU. Merchants regularly report that lack of understanding of consumer protection rules among the Member States is a problem for them. Survey results indicate that there are gaps in the degree to which merchants and consumers understand EU consumer protection rules.
- However, survey data do not suggest that things are getting markedly worse over time.
- Once it becomes available, the Single Digital Gateway might possibly play a useful role in making Member State rules visible to merchants. It may possibly mitigate the impacts of the lack of EU harmonisation.
- A more far-reaching measure that would address the problem at its core entail a further legislative shift from minimum harmonisation to maximum harmonisation. The legislation enacted in the most recent legislative term sought to do this, but it is not clear that it achieved a net reduction in complexity for merchants.

Despite a generally horizontal approach to consumer protection in the EU, the lack of full harmonisation means that Member States can and do go beyond the consumer protection measures enacted at EU level. As the Commission has observed³⁷³: "*While the Consumer Rights Directive and the Unfair Commercial Practices Directive follow, in general, a full harmonisation approach (with exceptions in certain areas and allowing Member States several regulatory choices), the other four substantive legal acts (Consumer Sales and Guarantees Directive 1999/44/EC (CSGD); Unfair Contract Terms Directive 93/13/EEC (UCTD); Price Indication Directive 98/6/EC (PID); and Geo-blocking Regulation) provide for minimum harmonisation*".

6.1. Differences in consumer protection

European consumers are generally well protected in the online world; however, current arrangements (1) are subject to fragmentation, which imposes burdens on online merchants; and (2) are subject to some gaps in consumer protection. Recall that surveys on behalf of Google (see Figure 20 in Section 5.1) demonstrated consumer concerns over customer service (reported by 17% of respondents in a simple average across the Member States), possible difficulty with returns (23%), the complexity of possibly having to deal with a foreign language (11%) and lack of trust in general (21%).

EU traders ranked the cost of resolving disputes cross-border second and "not knowing the rules that have to be applied" fifth among impediments to cross-border sales in a 2014 Eurobarometer survey³⁷⁴ (see Figure 18 in Section 5.1). 21% of respondents say that the expense of resolving cross-border complaints is a major problem, while 20% say it is a minor problem. Almost the same proportion, 19%, say that guarantees and returns being too expensive is a major problem, while 23% see this as a minor problem. 15% say that not knowing the rules which must be followed is a major problem, while 22% say that it is a minor problem.

Despite a level of consumer protection that we would view as quite high measured by global standards, consumers still encounter numerous problems. Consumers who were surveyed in 2018 reported (GfK, 2019):

- 37% - persistent sales calls;
- 25% - false limited offers;
- 20% - false free products;
- 14% - lottery scams; and
- 17% - other Unfair Commercial Practices (UCPs).

6.1.1. What are the current problems?

A number of horizontal measures, including the Consumer Rights Directive (CRD)³⁷⁵, the Unfair Contract Terms Directive (UCTD)³⁷⁶, and the Unfair Commercial Practices Directive (UCPD)³⁷⁷ have done a great deal to harmonise consumer protection arrangements across the Member States and to assure that all Europeans enjoy basic consumer rights.

Nonetheless, **there are classic problems of fragmentation due to minimum harmonisation of many aspects of the CRD. Member States can and do go beyond the provisions of the CRD**, thus introducing challenging compliance issues for online merchants who seek to conduct business cross-border.

³⁷³ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final, pp. 31-32.

³⁷⁴ TNS (2015) 'Companies engaged in online activities', Flash Eurobarometer 413. Unfortunately, newer Eurobarometer surveys do not provide this very helpful analysis of the data. The data may nonetheless be a fair representation of the current reality, inasmuch as consumer preferences might not have changed very much over time.

³⁷⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32011L0083>.

³⁷⁶ Directive 93/13/EEC.

³⁷⁷ Directive 2005/29/EC.

The Commission's Impact Assessment regarding the Directive on contracts for the supply of digital content³⁷⁸ expressed this complex concern as clearly as possible: *"The Consumer Rights Directive has fully harmonised certain rules for online sales of goods and supply of digital content (mainly pre-contractual information requirements and the right of withdrawal). [In the past, there were] no specific EU rules to protect consumers against non-conforming digital content. There are only minimum harmonisation rules on the notion of conformity with the contract and on remedies for non-conforming goods (under the Consumer Sales and Guarantees Directive) the implementation of which some Member States have chosen to extend to digital content. In addition, for both digital content and goods there are minimum requirements on unfair standard contract terms (under the Unfair Contract Terms Directive). Since these are minimum standards, Member States have the possibility to go further and add requirements in favour of consumers. Many Member States have used this possibility on different points and to a different extent"*³⁷⁹.

Consider for example the UCTD. As of 31 May 2019, based on notifications to the Commission pursuant to Article 8a of the UCTD, **only six of the 27 Member States (22%) have refrained from going beyond the minimum standards of the UCTD**: Croatia, Cyprus, Denmark, Ireland, Latvia, and Lithuania³⁸⁰. Eighteen have implemented black lists of contract terms that are unfair in all circumstances, and/or grey lists of contract terms that may be unfair under some circumstances, including Austria, Belgium, Bulgaria, the Czechia, Estonia, France, Germany, Greece, Hungary, Italy, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, and Spain. Many of these Member States have broadened the application of the UCTD in additional ways as well. Finland, Slovenia and Sweden have expanded the unfairness assessment, however without providing a black list or grey list. This is presumably a headache for e-merchants who do business in more than one Member State, since it implies that for three quarters of the Member States, the e-merchant must be aware of the specificities of how the UCTD has been implemented, even though the UCTD is intended to provide a broadly harmonised framework for consumer protection against unfair commercial practices.

At the same time, **survey results from 2017 suggest that EU businesses that trade cross-border perceive the consumer protection framework including UCTD and UCPD to be beneficial**, on average³⁸¹. *"Traders operating cross-border reap the most tangible benefits related to a consumer and marketing law framework which is to a significant extent harmonised across Member States, since their costs are likely to decrease as a result of a reduction in the level of legal fragmentation across Member States. In our business interviews, between 63% and 46% of the businesses that sell their products/services in other EU countries indicated that they benefited at least slightly from the EU legislative framework [for consumer protection]"*.

An odd corollary of the fragmentation problem is that, despite generally good coverage, there are vexing gaps in coverage. Many of these gaps flow once again from fragmentation in the legislative framework. Quoting again from the Commission's Impact Assessment: *"The Rome I Regulation"*³⁸² *allows contracting parties to choose which law applies to their contract and determines which law applies in the absence of choice. A trader who 'directs his activities' to consumers in another country may either apply the*

³⁷⁸ Directive (EU) 2019/770.

³⁷⁹ European Commission, 2015, *Impact Assessment accompanying the document 'Proposals for Directives of the European Parliament and of the Council (1) on certain aspects concerning contracts for the supply of digital content and (2) on certain aspects concerning contracts for the online and other distance sales of goods*, SWD(2015) 274 final/2.

³⁸⁰ European Commission, 2019, *Notifications under Article 8a of Directive 93/13/EEC*.

³⁸¹ Civic Consulting and KU Leuven, 2017, *Study for the Fitness Check of EU consumer and marketing law: Executive Summary*.

³⁸² Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

consumer's national law or choose another law (in practice almost always the trader's national law). In this latter case, however, the trader must also respect the mandatory consumer contract law rules of the consumer's country to the extent that those rules provide a higher level of consumer protection. When the trader does not direct his activities to consumers in a specific Member State but agrees to enter into a contract at the consumer's own initiative, consumers do not benefit from the more protective rules of their national law"³⁸³. The distinction as regards the consumer's initiative means that active sales are treated differently from passive sales.

In response to a range of perceived problems in EU consumer protection rules, the Commission adopted a New Deal for Consumers initiative³⁸⁴ in 2018. The Directive on the better enforcement and modernisation of Union consumer protection rules (Directive (EU) 2019/2161) was enacted pursuant to this initiative. This Directive amends many of the consumer protection Directives in order to provide (1) dissuasive penalties for large scale infringements of consumer rights (such as for instance "Dieselgate")³⁸⁵, and to make it possible for damages to flow to individual consumers (and not just to national authorities); (2) enhanced transparency in regard to online ranking, consumer reviews, personalised prices, and other potentially deceptive practices; and (3) tools to address deceptive advertising for "dual quality" goods (where goods that externally appear the same in fact have different qualities or properties in different Member States). These measures are to be adopted and transposed by 28 November 2021, and to be applied from 28 May 2022, so it is much too early to say whether they are effective.

Many of the issues that had been identified in 2017 can be expected to have been ameliorated by the measures that were subsequently enacted, namely the Directive on the sale of goods and the supply of digital content/digital services³⁸⁶ and the Directive on contracts for the sale of goods³⁸⁷. The former relates to digital content and services, while the latter relates to digital goods.

Recitals (2), (3) and (4) of Directive (EU) 2019/770 make clear that enhanced harmonisation as regards digital goods and services was a key goal: "*This Directive aims to strike the right balance between achieving a high level of consumer protection and promoting the competitiveness of enterprises, while ensuring respect for the principle of subsidiarity. Certain aspects concerning contracts for the supply of digital content or digital services should be harmonised, taking as a base a high level of consumer protection, in order to achieve a genuine digital Single Market, increase legal certainty and reduce transaction costs, in particular for small and medium-sized enterprises ('SMEs'). Businesses, especially SMEs, often face additional costs, stemming from differences in national mandatory consumer contract law rules, and legal uncertainty when offering cross-border digital content or digital services. Businesses also face costs when adapting their contracts to specific mandatory rules for the supply of digital content or digital services, which are already being applied in several Member States, creating differences in scope and content between specific national rules governing such contracts*".

Recital (3) of the Directive on contracts for the sale of goods (Directive 2019/771) expresses the same ambition: "*Certain aspects concerning contracts for the sale of goods should be harmonised, taking as a base a high level of consumer protection, in order to achieve a genuine digital Single Market, increase legal certainty and reduce transaction costs, in particular for small and medium-sized enterprises ('SMEs')*".

³⁸³ Ibid.

³⁸⁴ European Commission, 2018, *A New Deal for Consumers*, COM(2018) 183 final.

³⁸⁵ For an overview, see Clean Energy Wire, 25 May 2020, "*Dieselgate*" - a timeline of the car emissions fraud scandal in Germany.

³⁸⁶ Directive (EU) 2019/770.

³⁸⁷ Directive (EU) 2019/771.

Recital (6) explains the range of problems once again: "*Union rules applicable to the sales of goods are still fragmented, although rules on delivery conditions and, as regards distance or off-premises contracts, pre-contractual information requirements and the right of withdrawal have already been fully harmonised by Directive 2011/83/EU of the European Parliament and of the Council. Other key contractual elements, such as the conformity criteria, the remedies for a lack of conformity with the contract and the main modalities for their exercise, are currently subject to minimum harmonisation under Directive 1999/44/EC of the European Parliament and of the Council. Member States have been allowed to go beyond the Union standards and introduce or maintain rules that ensure that an even higher level of consumer protection is achieved. In doing so, they have acted on different elements and to different extents. Thus, national provisions transposing Directive 1999/44/EC significantly diverge today on essential elements, such as the absence or existence of a hierarchy of remedies*".

In other words, the problems have been clear for many years, and there has been an effort to address them. How much can be expected in practice from the measures that have been enacted in 2019? Note that the extensive materials documenting problems relate to the system *as it was*, not to the system *as it is*. **It is too soon to make firm statements on how it is working under the new Directives.** Indeed, most aspects of the new Directives do not even take effect until 1 January 2022³⁸⁸.

Directive 2019/770 takes a major positive step by imposing maximum harmonisation for some key provisions as regards the sale of digital content and services³⁸⁹. The Directive provides explicit definition as to (1) what constitutes conformity in the form of a fairly short operative text (two pages for Articles 6 through 9). It also clarifies (2) the liability of the trader, (3) who bears the burden of proof, and (4) the remedies available for failure to supply or for lack of conformity.

At the same time, many crucial aspects continue to be discretionary on the part of the Member States³⁹⁰. For example, the liability of the trader for a lack of conformity must not be less than two years from the date of supply of the content or services, but Member States are free to set a longer time³⁹¹. In light of Rome I provisions where merchants cannot apply Member State consumer rules that offer less protection than those of the Member in which the consumer resides, merchants are still effectively obliged to know the consumer protection obligations to which they might be subject in all of the Member States in which they do business.

Directive 2019/771 likewise imposes maximum harmonisation for some key provisions as regards the sale of digital goods. In fact, it is similar in structure and substance to Directive 2019/770. It (1) provides a definition as to what constitutes conformity, (2) who bears the burden of proof, and (3) the remedies available for lack of conformity, including repair, replacement, or a reduction in price.

As with Directive 2019/770, Member States remain free to go beyond the Directive in many areas, which once again presumably means in practice that merchants are effectively obliged to know the consumer protection obligations to which they might be subject in all of the Member States in which they do business.

³⁸⁸ Directive 2019/770 does not require transposition before 2021, nor application before 2022: "*By 1 July 2021 Member States shall adopt and publish the measures necessary to comply with this Directive. ... They shall apply those measures from 1 January 2022*". The same dates hold for Directive 2019/771.

³⁸⁹ Article 4 of Directive 2019/770: "*Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more, or less, stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive*".

³⁹⁰ See recitals (12), (13), (14) and (15) of the Directive.

³⁹¹ Article 11(2) of Directive 2019/770.

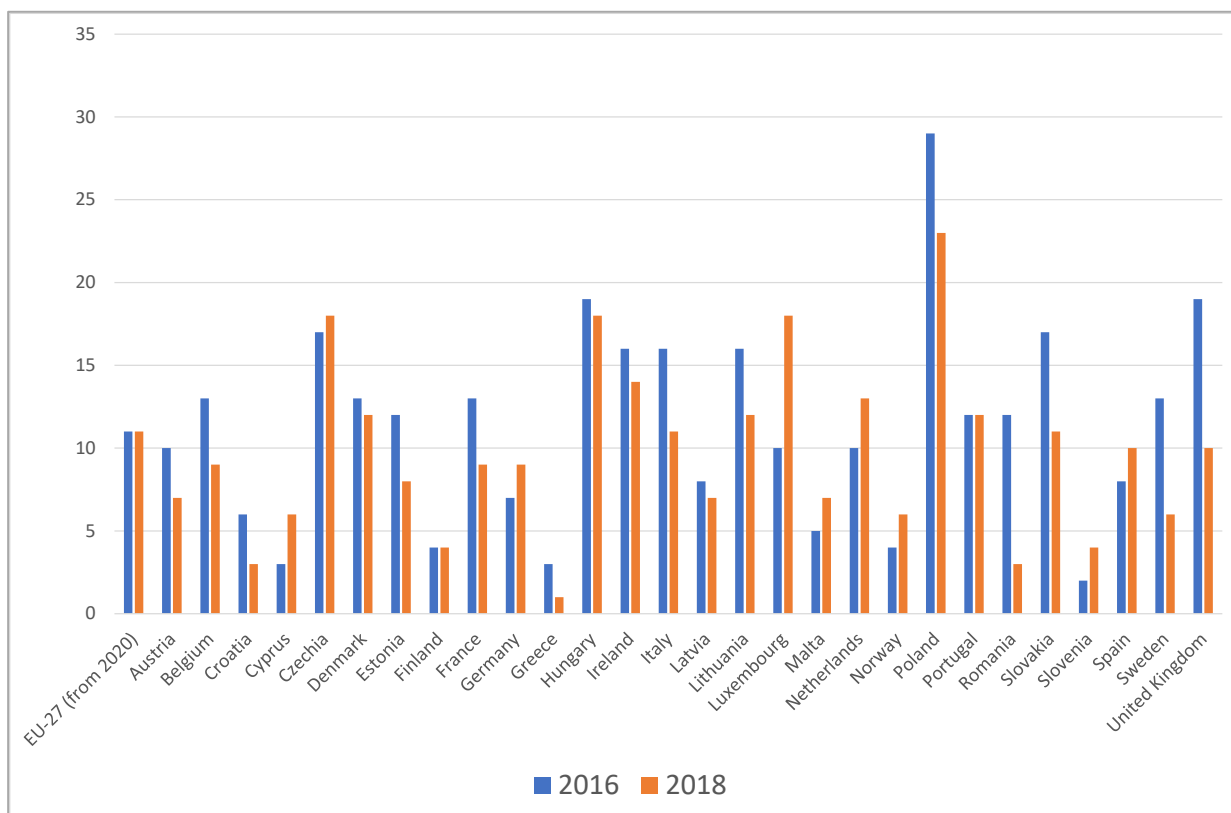
One must also bear in mind that the two new Directives deal only with digital content, digital services and goods. No new legislation has been enacted to address the same lack of harmonisation in other-than-digital content, services and goods (except for instance to the extent that non-digital goods "incorporate or are inter-connected with digital content or a digital service in such a way that the absence of that digital content or digital service would prevent the goods from performing their functions"). Digital is very widespread today, but not everything is digital.

6.1.2. Is there a growing trend of these problems in the EU?

Businesses clearly see resolution of consumer protection as an issue, but there does not appear to be a growing perception of a problem across the EU-27. The overall number of EU-27 business respondents expressing concern was 11% in 2018, just as it had been in 2016 (see Figure 18 in Section 5.1).

Many Member States showed either increasing or decreasing concern over difficulties related to resolving complaints or disputes (see Figure 24). A Eurobarometer survey from 2017 found, however, that 30% of EU businesses feel that the cost of consumer protection laws (consumer rights and liability) in the EU was increasing over time³⁹².

Figure 24: Difficulties related to resolving complaints and disputes when selling to other EU Member States (selected Member States, 2016 and 2018) (% of enterprises with web sales to other countries)



Source: Authors' own elaboration, based on Eurostat data (isoc_ec_wsobs_n2).

³⁹² TNS Political & Social, 2017, *Flash Eurobarometer 451: Business perceptions of regulation*.

6.2. Insufficient information about applicable rules

6.2.1. What are the current problems?

As previously noted, **merchants regularly report that lack of understanding of rules among the Member States is a problem for them.** EU merchants ranked "not knowing the rules that have to be applied" fifth out of 17 among impediments to cross-border sales in a 2014 Eurobarometer survey³⁹³ (see Figure 18 in Section 5.1). Specifically, 15% say that not knowing the rules which must be followed is a major problem, while 22% say that it is a minor problem.

There would appear to be numerous sources of information on consumer protection rules; nonetheless, there is clear-cut evidence that businesses (especially smaller businesses) and consumers have a poor understanding of the consumer protection rules that are in place at European and Member State level.

In survey work conducted for Eurostat in 2018³⁹⁴, consumers were asked to respond to three questions:

- **Withdrawal period:** Suppose you ordered a new electronic product by post, phone or the internet, do you think you have the right to return the product 4 days after its delivery and get your money back, without giving any reason?;
- **Faulty product guarantees:** Imagine that an electronic product you bought new 18 months ago breaks down without any fault on your part. You didn't buy or benefit from any extended commercial guarantee. Do you have the right to have it repaired or replaced for free?; and
- **Unsolicited products:** Imagine you receive two educational DVDs by post that you have not ordered, together with a 20-euro invoice for the goods. Are you obliged to pay the invoice?

Across the EU27, only 45.5% of respondents got all three questions right. This was 2.7% worse than in the survey in 2016. The 2016 results, however, had been 4.2% better than the 2014 results³⁹⁵. The best scores were in Czechia (59.5%), Slovakia (57.9%) and Denmark (54.8%); the worst were in Greece (25.2%), Lithuania (31.3%) and Croatia (34.7%). At EU27, differences by gender, age, level of education, urban versus rural, financial situation, language, and numeric skills were small – in no case was there a difference of more than 8 percentage points (pp).

Knowledge of the cooling-off period (the first of the three questions) at EU27 level was 61.0%, compared to 40.9% for the knowledge of faulty product guarantees (the second question) and 34.5% for the knowledge of consumer rights regarding unsolicited products.

Among retailers, knowledge of consumer rights was somewhat greater, especially among those in larger firms. Overall, 55.2% of the answers provided in 2018 were correct (Kantar, 2018).

When retailers were asked how long consumers have to change their minds after receipt of the goods (the cooling off period), only 41.9% gave the right answer. 18.2% said 7 days, 21.7% said 14 days from confirmation of purchase, and 18.2% responded "don't know".

Among retailers that sell non-food products, 20.1% answered "no" to the same faulty product guarantees question that was asked of consumers, while 42.1% answered that it depends on the product. Both answers are incorrect. An additional 4.6% answered "don't know". Only 33.2% answered correctly.

³⁹³ TNS, 2015, *Companies engaged in online activities*, Flash Eurobarometer 413.

³⁹⁴ GfK, 2018, *Consumers' attitudes towards cross-border trade and consumer protection*.

³⁹⁵ All differences are statistically significant in light of the large sample size, which in the case of the 2018 survey was 28,037 respondents.

When asked about a series of practices, about 10% said that they did not know whether the practice was prohibited or not. Those who knew the correct answer:

- 72.2% knew that it is not prohibited to promote products for children by directly targeting the parents in the advertisements;
- 67.8% knew that it is prohibited to describe a product as "free" although it is only available free of charge to consumers calling a premium rate phone number;
- 59.9% knew it is prohibited to include an invoice or a similar document seeking payment in marketing material; and
- 42.9% knew that it is prohibited to run a promotional campaign stating "*we offer a discount of 60%*" when the products offered with a 60% discount are almost out of stock.

The differences among retailers located in different Member States were however considerable³⁹⁶.

6.2.2. Is there a growing trend of these problems in the EU?

A number of tools have been introduced to strengthen consumer rights, and consumer awareness of their rights, but these are not yet visible in the numbers. **In terms of actual knowledge of consumer rights, the survey of retailers shows no significant difference at EU27 level** from 2016 to 2018. Among the Member States, the largest increase was visible among companies in Czechia (+5.7 pp), and the largest declines in Latvia (-7.9 pp), Estonia (-7.7 pp) and Cyprus (-7.4 pp). In terms of actual knowledge of consumer rights among consumers, consumers across the EU-27 scored 2.7% worse in 2018 than in the survey in 2016, but scored 4.2% better in 2016 than in 2014 as noted in Section 6.2.1.

6.2.3. What tools exist at EU and national level to address these problems?

As noted in Section 6.1.1, a Directive on the better enforcement and modernisation of Union consumer protection rules (Directive (EU) 2019/2161) was enacted pursuant to New Deal for Consumers initiative³⁹⁷. This Directive amends many of the consumer protection Directives, primarily in order to provide dissuasive penalties for large scale infringements of consumer rights (such as for instance "Dieselgate"); however, it also contains a number of provisions that enhance transparency, which helps to mitigate lack of information as well as information asymmetries. It is much too early to say whether it will be effective, since it is not due to be transposed until 28 November 2021, or to be applied until 28 May 2022.

The Commission has from time to time initiated **campaigns to raise awareness among consumers and merchants as regards consumer rights**, as they did in 2014-2015³⁹⁸, and more recently with the #YOUREURIGHT campaign³⁹⁹. There is also an EU-wide Consumer Law Ready programme which provides training in consumer law for SMEs⁴⁰⁰. **All of this is commendable, but the fact that it was perceived to be necessary suggests that there has historically been a gap, and we see nothing to suggest that the gap has yet been closed** – indeed, the survey results in Sections 6.2.1 and 6.2.2 suggest the opposite.

³⁹⁶ Kantar, 2018, *Retailers' attitudes towards cross-border trade and consumer protection*, p. 18.

³⁹⁷ European Commission, 2018, *A New Deal for Consumers*, COM(2018) 183 final.

³⁹⁸ See "Consumer Rights Awareness Campaign", available at: https://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=30149.

³⁹⁹ See the dedicate webpage to the #YOUREURIGHT campaign, available at: https://europa.eu/youreuright/home_en.

⁴⁰⁰ See the dedicated webpage of Consumer Law Ready, available at: <https://www.consumerlawready.eu/>.

Otherwise, the tools to address lack of information about consumer protection rules are substantially the same as those used for other aspects of the Digital Single Market, such as providing information about the various implementations of VAT among the Member States (see Section 5.4.3).

6.3. COVID-19 and consumer protection

In the area of travel and tourism, a huge number of flights, hotel stays, and package tours have been cancelled due to the pandemic. The Commission has sought to provide clarity as to the rights of passengers in the event of cancelled travel arrangements.

Under EU Passenger Rights Regulations⁴⁰¹, in the event of a trip cancellation by a carrier, travellers are entitled to choose between a refund and re-routing. However, re-routing is not a realistic possibility while the pandemic rages. Under the Package Travel Directive (PTD)⁴⁰², in the event of a travel package cancellation by an organiser due to "*unavoidable and extraordinary circumstances*", travellers are entitled to a refund. In both instances, passengers have the possibility of accepting a travel voucher in lieu of a cash refund, but in neither case is the passenger obliged to do so.

The travel sector (which includes not only airlines, ships and rail, but also hotels, restaurants and more) is incurring huge losses due to the pandemic. It was quickly recognised that an obligation to make large numbers of cash refunds to travellers was likely to lead to insolvencies, which would benefit neither the sector nor the impacted travellers.

In an effort to ensure consumer protection while mitigating needless harm to the sector, the Commission published a Recommendation encouraging a consistent approach to making travel vouchers available to consumers who are willing to accept them as compensation for travel that is no longer possible, feasible, or desirable⁴⁰³. It was felt that, by making travel vouchers more flexible and reliable, more passengers would accept them. The use of vouchers would substantially ease the cash flow burden on carriers and package tour organisers. Passengers who prefer a cash refund, however, are still entitled to it.

The enactment of this Recommendation was in large part motivated by concerns that significant numbers of firms in the sector might become insolvent, in which case passengers would have little or no prospect of obtaining the refunds for cancelled trips to which they might otherwise be entitled. Previous legislation did not protect EU consumers against insolvency of airlines or other providers of tourist services. With that in mind, the Recommendation seeks to ensure that vouchers (that are in line with the provisions of the Recommendation) "*be protected against insolvency of the carrier or of the organiser. Such protection could be set up by the private or the public sector, and should be sufficiently effective and robust*"⁴⁰⁴.

The Recommendation goes on to note that, if the Member State provides the guarantee, then the measure may constitute State aid, and may thus need to be notified to the Commission. However, it then says that the Commission is prepared in general to accept a State guarantee that "*[...] covers 100% of the value of vouchers to ensure full protection of all passengers and travellers [...]*"⁴⁰⁵.

⁴⁰¹ Regulations (EC) 261/2004(6), (EC) 1371/2007(7), (EU) 1177/2010(8) and (EU) 181/2011(9).

⁴⁰² Directive (EU) 2015/2302.

⁴⁰³ European Commission, 2020, *Tourism and transport in 2020 and beyond*, COM(2020) 550 final; European Commission, 2020, *Recommendation (EU) 2020/648 on vouchers offered to passengers and travellers as an alternative to reimbursement for cancelled package travel and transport services in the context of the COVID-19 pandemic*.

⁴⁰⁴ Ibid, Recital 16 and Article 2.

⁴⁰⁵ Ibid, Article 16.

The provisions of the Recommendation appear to have played a useful and important role at a time when consumer travel-related complaints were rampant. At a 9 November 2020 IMCO webinar on the impact of the pandemic on the Single Market, Karen Ghysels, the Director of the European Consumer Centre Network, noted that the number of pandemic-related consumer protection matters referred to her organisation and its affiliates in 2020 was twice as great as the *total* number of cases dealt with in 2019. Of the COVID-19 related matters, 51% were concerned with air passenger rights, 20% with accommodation, and 15% with package travel. Ms Ghysels went on to note that, prior to the enactment of the Recommendation, there had been enormous confusion over consumer rights for tourist services for which no general protection exists in EU law, such as car rental services and rental of accommodation. The Recommendation helpfully addressed a great many issues, but there continue to be gaps, for instance as regards online booking intermediaries. Also, problems with actually receiving reimbursement persist – even today, after many months, numerous consumers have not received refunds or vouchers to which they are entitled.

6.4. How can these problems be addressed and prevented?

The way forward for consumer protection seems to be largely the same as for other aspects of the Digital Single Market.

A shift from minimum harmonisation to maximum harmonisation legislation is clearly in order; however, this has already been attempted in legislation that has been enacted (but which is not yet in force). The detailed results remain to be seen, but there are so many exclusions from maximum harmonisation that one has to wonder whether there will really be a net reduction in divergence among the Member States.

As regards making information about rules in the Member States more readily available to consumers and merchants, the Single Digital Gateway (once implemented) seems to be the obvious choice for addressing the problems that are manifest today, provided that the implementation is good enough and the take-up broad enough.

As noted in Section 5.6, the Commission has announced its intent to propose a Digital Services Act (DSA) in Q4 2020⁴⁰⁶. What exactly the Commission will propose is not known⁴⁰⁷, but **improvements to consumer protection in regard to digital information society services have clearly been part of the discussion.** The IMCO committee has specifically called on the Commission to strengthen the principle that whatever is illegal offline is also illegal online, and to introduce a new "Know Your Business Customer" principle so as to oblige digital platforms to check and stop fraudulent companies that seek to use their services in order to sell their illegal or unsafe products or content.

⁴⁰⁶ See European Commission webpage *New EU rules on e-commerce*, available at: <https://ec.europa.eu/digital-single-market/en/new-eu-rules-e-commerce>.

⁴⁰⁷ The Commission's Inception Impact Assessment Report contains very little practical detail. A number of documents have been leaked to the press, but there is no way of knowing the degree to which they correspond to the legislative proposals that the Commission can be expected to make in December 2020.

7. PUBLIC PROCUREMENT

KEY FINDINGS

- Public procurement above the EU thresholds amounts to some EUR 500 billion and has been growing steadily. In defence procurement under EU rules, progress has been spectacular as it now amounts to some EUR 14 billion.
- Businesses suspect that local companies win more easily. Hence, some EUR 80 billion is contested in remedy procedures every year, although remedies are very uneven between Member States and much can be improved there.
- However, even when local companies win, they must submit quality offers at restrained prices, knowing that they (potentially) compete against firms from all over Europe. The EU framework for public procurement is now well developed. The transformation towards full eProcurement is in full swing, which is significantly cost reducing and increases speed and transparency.
- Despite the development of the EU framework, the overall performance indicators of Member States' public procurement are not satisfactory. 16 Member States have a single bidder in 20% or more of the bids, a plain denial of open competition. There are also too many procurements without any public tender which is perhaps even worse.
- Still, many trends move in the right direction: public procurement grows faster than GDP or intra-EU trade, eProcurement increases and intensifies rapidly, the SME share of winning contracts is higher than the share of all tenders and has increased between 2011 and 2017, and the weaknesses of the fragmented remedies system are hesitantly beginning to be addressed.
- The "strategic" purchasing for social or environmental purposes has taken off but is still modest. The most worrying feature is the lack of professionalism in procurement in regions or by sectoral agencies due to too little experience. Central procurement bodies (as is already happening in some Member States) should be helpful here.
- Finally, much too little is currently known about the actual functioning of the concessions Directive.

7.1. Uneven access to public procurement

7.1.1. The importance of EU rules-based public procurement

Public procurement in the EU is concerned with enormous sums of taxpayers' money, as high as 14-16% of EU GDP in some cases. For 2018, the reported public procurement of all EU Member States (including the UK) and EU institutions amounted to EUR 2,448 billion which is nearly 16% of EU GDP.

A lot of this procurement does not fall under EU rules as it applies only to contracts above certain

thresholds⁴⁰⁸. Also, defence procurement does not fall under ordinary EU procurement rules, but Directive 2009/18/EC has nonetheless facilitated such procurement on a voluntary basis. One can also infer a major gap between below and above threshold public procurement as indicated by the total number of tenders of EU Member States. **It turns out that what is published on TED (Tenders Electronic Daily) – mostly compulsory under EU rules, though not all – is a small fraction of the total number of tenders of EU Member States.**

In 2018, no less than 213,731 contract notices were published on the TED (Tenders Electronic Daily) website of the EU/EEA, up from 197,976 in 2017⁴⁰⁹. By adding up the total number of all procurement contracts reported on the EU website opentender.eu, one arrives at around 6.5 million for e.g. the year 2018 (although variations between years are considerable). In other words, there were approximately 32 times as many procurement contracts as there were contract notices published on the TED. If one leaves out the two outliers (Italy and Romania), there are still nearly 8 times as many procurement contracts than contract notices on the TED⁴¹⁰. The number of tenders has been increasing steadily for a number of years. The order of magnitude (prices are often not known beforehand) of the total annual procurement value under EU rules is around EUR 500 billion. Becker et al. (2019) compute all award values and come to a total of EUR 525 billion for the EU28, up from less than EUR 200 billion in 2009, an enormous increase of some 160% in eight years.

Procurement under the three basic Directives has increased gradually over time. The enormous switch Member States have made in defence procurement from insular national purchasing to procurement under EU (voluntary) rules is remarkable: amounting only to EUR 22 million in 2011, in 2018 this had been catapulted to EUR 14 billion. It is obvious that open and competitive tendering is in the enlightened self-interest of any government and the sums saved due to greater efficiency and competition are likely to be considerable.

In a study for the revision of the 2004 Directives (in 2011) the estimated savings amounted to EUR 20 billion⁴¹¹. Open and competitive procurement is also about finding good quality suppliers and even innovative solutions or indeed answering to certain needs such as various green objectives. **Even when national suppliers may be thought to often win national contracts, one should not forget that they will tender in the knowledge of having to withstand EU-wide competition in many cases.**

This expectation is likely to raise quality and discipline prices. Tas (2019) surveys recent analytical studies – and adds his own – showing that the quality of public procurement regulation (measured

⁴⁰⁸ Currently, the 2020 thresholds are organised along the Directives covering supply, services and works contracts (Directive (EU) 2014/24), as follows: for central government EUR 139,000, for other contracting authorities (e.g. regional) EUR 214,000, for works EUR 5,350,000 and contracts for social and other specific (and usually domestic) services EUR 750,000. For so-called utilities contracts, in supplies and services EUR 428,000, for works EUR 5,350,000 and for social and other such services EUR 1,000,000. For concessions (Directive (EU) 2014/25), only works and services are relevant, hence EUR 5,350,000. For defence and security contracts: supply and services EUR 428,000, for works EUR 5,350,000.

⁴⁰⁹ This number is for the EU27 (see James Farrell, <https://bidservices.ie/more-on-eu-public-procurement-stats-2018/>, 15 April 2019).

⁴¹⁰ A careful inspection of the number of tenders in Member States shows essentially two inferences: (a) for several Member States these numbers can vary enormously between years; (b) the propensity to tender formally also differs extremely between Member States. In other words, one has to be prudent using these statistics for one or only a few years and for one or only a few Member States. Examples of the first instance includes Italy with 15,256 tenders in 2010 and no less than 1,367,341 in 2015; or Lithuania with 27,498 in 2013 but only 1,035 in 2018 and 835 in 2019; or Romania with 2,636,462 in 2018 but only 644,929 in 2014; or Spain with 318,965 in 2018 and only 19,859 in 2013, but also downwards (Malta in 2017 having 1,017 yet only 159 in 2018). Examples of the second inference can be read from the above examples. More precisely, one can compare like with like (in size, roughly) and observe that Italy in 2018 tenders around 54 times the numbers of tenders in Germany, or that Latvia tenders around 13 times the number of Lithuania or that Portugal tenders some 20 times the number of Belgium or that Romania some 400 times (!) the number of the Netherlands.

⁴¹¹ Based on 5% lower prices, see European Commission, 2011, *EU Public procurement legislation: delivering results, summary of evaluation report*. Tendering is however quite involving and costly. The question is whether it is more costly under EU rules than it would be otherwise. The average tender costs in 2011 were estimated as EUR 28 000 which is considerable. It ought to be kept in mind that procurement under EU rules always concerns larger projects and some are very large indeed. This tends to increase the average costs.

with World Bank indicators) generates significant positive effects on competition and cost-effectiveness⁴¹².

This underlines how crucial actual and potential competition in procurement is. One indicator for that is the number of actual bidders which used to be almost five on average. However, there are signs that this number is falling and that, anyway, in some countries and with some types of contracts the number of bidders is just one, which means that there is no competition⁴¹³. Intra-EU cross-border contracts in the period 2009-2015 amount to roughly one-quarter of the contract total, consisting of direct and indirect (via subsidiaries) involvement, up from 17.5% in 2009⁴¹⁴. **This share is no longer trivial and in and by itself a sign of a vibrant Single Market where public procurement has gradually opened up in earnest.**

7.1.2. The EU regulatory framework for public procurement

The EU regulatory framework of public procurement is quite well-developed by now. Today's EU regulatory framework has emerged from several vintages in the past. There are three directives on public purchasing:

- Directive 2014/24/EU on public works, supply and service contracts, OJEU L 94 of 25 March 2014, with special rules on the procurement of social, cultural and health services;
- Directive 2014/25/EU on procurement by utilities not (yet) in competitive markets, OJEU L 94 of 25 March 2014, p. 243; and
- Directive 2014/23/EU on concession contracts (with some exceptions for transport), OJEU L 94 of 25 March 2014, pp. 1-64.

In addition, there is a series of legislative and guidance initiatives on aspects of e-procurement since 2012, with further updates in the strategic procurement strategy from the European Commission in COM (2017) 572. Examples include:

- Directive 2014/55/EU on electronic invoicing in OJEU L 133 of 6 May 2014; Commission implementation Regulation (EU) 2016/7 on establishing the standard form for the European Single Public Procurement Document (ESPD) in OJEU L 3 of 6 Jan. 2016; Directive 2014/55/EU refers to a European standard to be available by 27 May 2017 and to be used for e-procurement; note that the above directives a., b. and c. contain an e-procurement clause coming into force at the latest by March 2018; and
- Directive 2007/66/EC on remedies concerning national public procurement; an EU network of national first-review bodies was established in March 2018.

The basic principles are openness, transparency and equal treatment. The objectives remain undistorted EU-wide competition for tenders and better "value for money" for public spending.

⁴¹² Tas, B. K. O., 2019, *Effect of Public Procurement Regulation on Competition and Cost-Effectiveness*, Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 2019/22.

⁴¹³ Although bidders do not know this beforehand, only afterwards.

⁴¹⁴ See the Single Market performance report 2019 of 17 Dec. 2019, SWD (2019) 444, p. 39, available at: https://ec.europa.eu/info/sites/info/files/2020-european-semester-single-market-performance-report_en.pdf. To be more precise, the study by VVA, London Economics & JIP (2017) came to a cross-border value of 23.4% (of which 3% direct); see Measurement of impact of cross-border penetration in public procurement, available at: <https://publications.europa.eu/publication-detail/-/publication/5c148423-39e2-11e7-a08e-01aa75ed71a1>. Becker et al., 2019, a study for the EP, only measures direct award values for cross-border and arrives at 3.4%. They also find that this only applies to supplies; services and works hover between 2% and 3% between 2013 and 2017. Interestingly, Becker et al. trace evidence that cross-border contracts have on average higher values.

Both objectives support EU economic growth and a broad notion of socio-economic welfare.

The revision of the basic Directives in 2014 (see bullet list above) has led to a welcome modernisation, including some simplification⁴¹⁵ and more possibilities for "strategic" procurement, i.e. that specific social, economic and environmental needs met via procurement can be dealt with in a more flexible manner. Furthermore, the quite special contracting of "concessions" has been regulated in a special Directive.

This is most of the time about PPPs (Public-Private Partnerships), by definition complex, an area which led to considerable confusion in the past⁴¹⁶. The value of the EU market for PPPs hovers between some EUR 10 billion a year to over EUR 15 billion; in 2016 it is estimated to amount to EUR 10.3 billion⁴¹⁷.

A great variety of contracts and procedures exists under EU rules. Some 88% of 2018 notices still takes place under the "open procedure" (and another 9,000 under the utilities Directive) but some 6,800 under the restricted procedure and another 10,500 under the new competitive procedure with negotiation (a 55% increase over 2017).

One can conclude that this new mode answers to a manifest need, but there is a risk that powerful suppliers might acquire too much bargaining power here. Another fast riser is the competitive dialogue with a 46% increase over 2017, but the totals are small (774 in 2018). A unique feature of the 2014 reforms is the "innovation partnership" where governments (or other public authorities) conclude deals with businesses in order to develop new approaches or goods or services in order to better address e.g. carbon dioxide mitigation or other issues of public interest. A learning process is going on here and the conditions are strict; the take-up is small (77), but up from 39 in 2017.

What several of these new procurement instruments have in common is that the lowest price is not decisive – the tools can be used in a "strategic" fashion in order to serve the public interest by more than mere and plain low-cost purchasing. The general idea is to apply the Most Economically Advantageous Tender (MEAT) principle. **Nonetheless, these figures hide some problematic features, one of them is the avoidance of competition by using the NOC (Negotiated Procedure without Prior Publication).** Some 5% of EU tenders rely on the NOC and the trend is stable; in Slovenia, Bulgaria, Romania and Cyprus, however, the share of NOC is above 20%, which would appear to be unacceptable⁴¹⁸.

There are two other features of the regulatory framework which require attention. One is the assurance to bidders that there are credible and efficient systems of appeal, as public procurement is often regarded by businesses (rightly or wrongly) as less than neutral. The EU public procurement remedies Directive 2007/66/EC forms the legal basis for such remedies. However, remedies are national (i.e. not harmonised) given the national systems of enforcement for national procurement. After a long period of (non-public) haggling between Member States and the European Commission, a Network of First Instance Remedies Bodies was set up in 2017. There are signs that this initiative was a potentially good move⁴¹⁹. Remedies are often used, estimated to cover a total of EUR 80 billion of contracts annually.

⁴¹⁵ Singling out one cost-cutting improvement is that bidders do not have to actually hand in a range of documents when bidding; only the later winner has to do so. This is widely seen as a great relief.

⁴¹⁶ Compare the Report on the public consultation in SEC (2005) 629 of 3 May 2005 and the Commission guidance on 18 February 2008 (e.g. Memo/08/95 Press Releases).

⁴¹⁷ Data from the European Court of Auditors (2018, p. 15) based on EPEC data from the EIB.

⁴¹⁸ Single Market Performance report, op. cit., p. 41. Some are lock-in IT contracts.

⁴¹⁹ According to the Single Market Performance report (op cit.).

The other feature is joint procurement, officially called the Joint Procurement Agreement⁴²⁰, another initiative taken in 2014. However, this refers solely to "joint pandemic vaccines and other medical countermeasures" and was signed in Luxembourg in June 2014 by 15 Member States' health ministers. Nowadays, not least because of COVID-19, all EU/EEA countries as well as candidate countries are signatories. No major other joint procurement provisions seem to exist, except for defence and security. The latter is based on government-to-government contracts, an exclusion in Article 13(f) of Directive 2009/81/EC.

As noted above, national defence procurement under EU rules has rapidly been Europeanised. It is not known whether this rapid growth is also due to joint defence procurement, but in any event, this has been facilitated by two Commission guidance documents⁴²¹.

A highly significant new feature of EU public procurement is eProcurement. In fact, there is a medium-term strategy to reform the entire process of procurement into digital steps since 2012. This approach serves cost reduction, transparency, speed, easier communication and the broader idea of e-government. Thus, e-procurement goes beyond the mere shift to electronic tools. Step by step the introduction is promoted and subsequently becoming an obligation. It concerns eNotice, eAccess, eSubmission, eEvaluation, eAward, eOrdering, eInvoice⁴²² and ePayment. **Since October 2018, submissions must be digital and eInvoices compliant with the EU standard are obligatory since April 2019, a move which is expected to deliver considerable benefits.** There is a new electronic self-declaration for bidders called European Single Procurement Document (ESPD). Of course, TED and eCertis⁴²³ have already been digital for quite a while. The roadmap for completing e-procurement in the EU extends into the future, with all contract awards under e-invoicing in April 2020 and the mandatory use of eForms on October 2023. Given this strict framework, the progress is self-policing.

7.1.3. What are the problems and shortcomings?

There is a range of problems and shortcomings. Probably the most serious one of these is that professionalism in public procurement is highly uneven among the 250.000+ authorities at national, regional, local and at times sectoral level in the EU. Most of these authorities only rarely purchase for above-threshold amounts and are less familiar with procedures and good practices. Thus, it is not surprising (though regrettable) that businesses are of the view that they unduly suffer from a capacity shortage⁴²⁴. There are many attempts to install or strengthen CPBs (Central Public Procurement Bodies) in Member States and they can serve as advisors, trainers and/or provide guidance and templates or even be used as delegated buyers.

Some of the shortcomings can be read from public procurement performance indicators, published since a few years in the Single Market Scoreboard⁴²⁵. The 2020 scoreboard on public procurement is helpful and will be used below, but it is good to first underline that it is far from perfect. The indicators are based on (i) a qualitative policy judgment on what constitutes good practice, and (ii) recent national data. The data problems are considerable as shown for example in the lengthy in Section 7.1.1 on a

⁴²⁰ The legal basis is found in Decision 1082/2013/EU on serious cross-border threats to health, Article 5. Since this Decision there is a Permanent Health security committee, enabling the EU Member States and the Commission to act swiftly during the COVID crisis in 2020.

⁴²¹ See Notice of 30 Nov 2016 on cooperative defence procurement in OJEU C 450 (2 Dec) pp. 1-5 and Notice of 7 May 2019 in OJEU C 157 of 8 May 2019.

⁴²² See Directive 2014/55 in OJEU L 133 of 6 May 2014 and Commission Implementation Regulation 2016/7 in OJEU L 3 of 6 January 2016 on establishing a standard form for the European Single Procurement Document (ESPD).

⁴²³ A mapping tool for certificates requested in public procurement procedures.

⁴²⁴ See European Commission, 2020, *Business journey on the Single Market: Practical Obstacles and Barriers*, SWD (2020)54 final, pp. 33-36.

⁴²⁵ See the Single Market Scoreboard, Public Procurement, available at: https://ec.europa.eu/internal_market/scoreboard/performance_per_policy_area/public_procurement/index_en.htm.

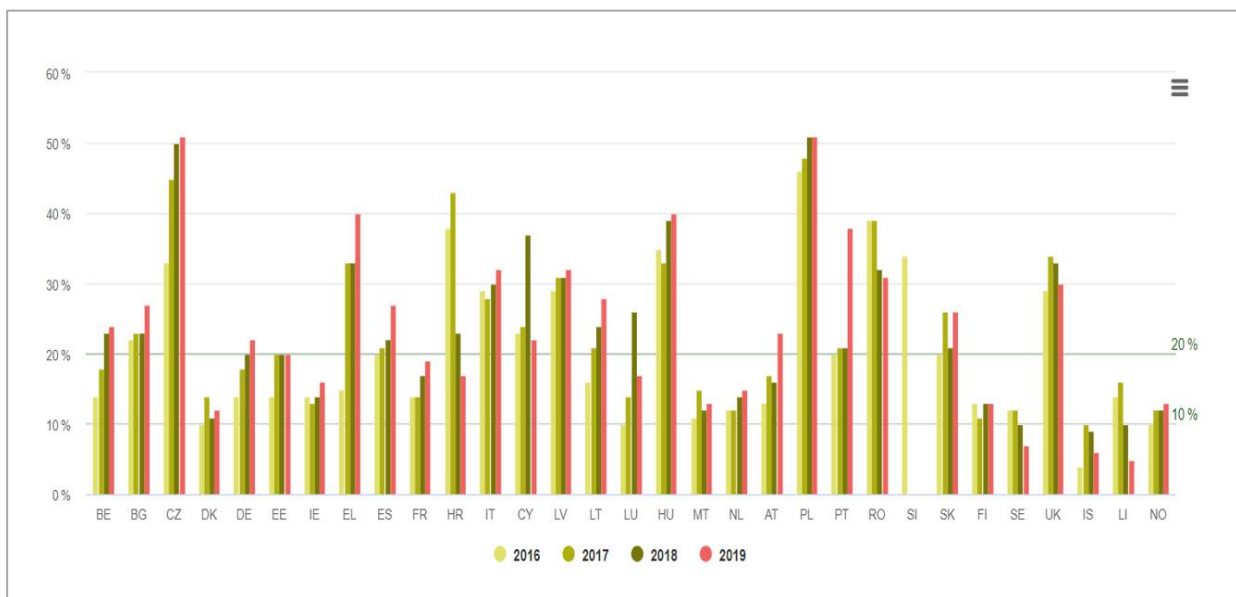
seemingly simple matter as the numbers of tenders and more generally on the background note (TED CSV open data) on data and methodology.

Moreover, the 12 indicators making up the overall public procurement scoreboard are not of equal weight; on the contrary, the three most sensitive indicators are triple-weighted and the focus will be mainly on those: single bidder, no-calls-for-bids and the publication rate. Nevertheless, focusing on the EU27, **the visual scoreboard has 324 entries and no less than 140 are red for 2019. Only one Member State has no red entry at all (Finland)**. Red stands for 'unsatisfactory'.

Despite the imperfections of the scoreboard, this overall score is disappointing and ought to be discussed regularly.

The following graphs depict Member States' performance in the three triple-weight indicators. One immediate conclusion is that the performance of Member States is highly disparate for all three.

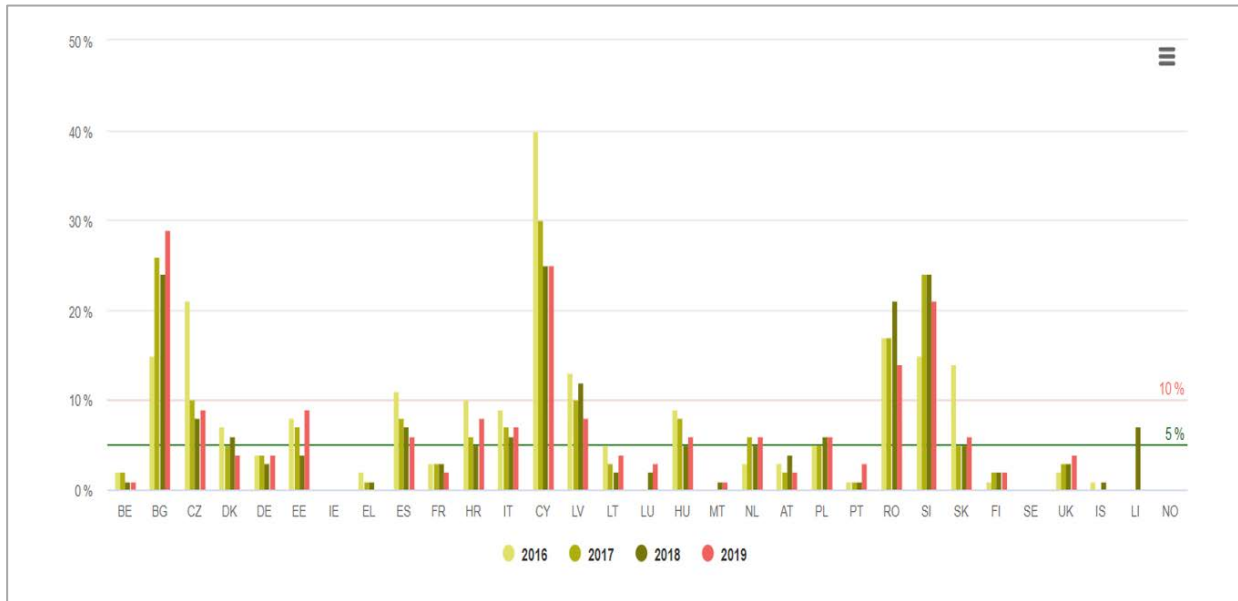
Figure 25: The EU Member States' single bidder indication



Source: Single Market Scoreboard.

Figure 25 shows that single bid tenders tend to become more frequent although not in all EU Member States. The average level of the indicator is worrying, since no less than 16 Member States have more than 20% of bids with a single bidder in 2019. Some reach as high as 40% or 50%. Clearly, this goes to the heart of the EU procurement regime: open competition. For a small share there might be good reasons but for high shares, concerns are legitimate, and an in-depth investigation of facts and underlying reasons is needed, with possible action undertaken afterwards.

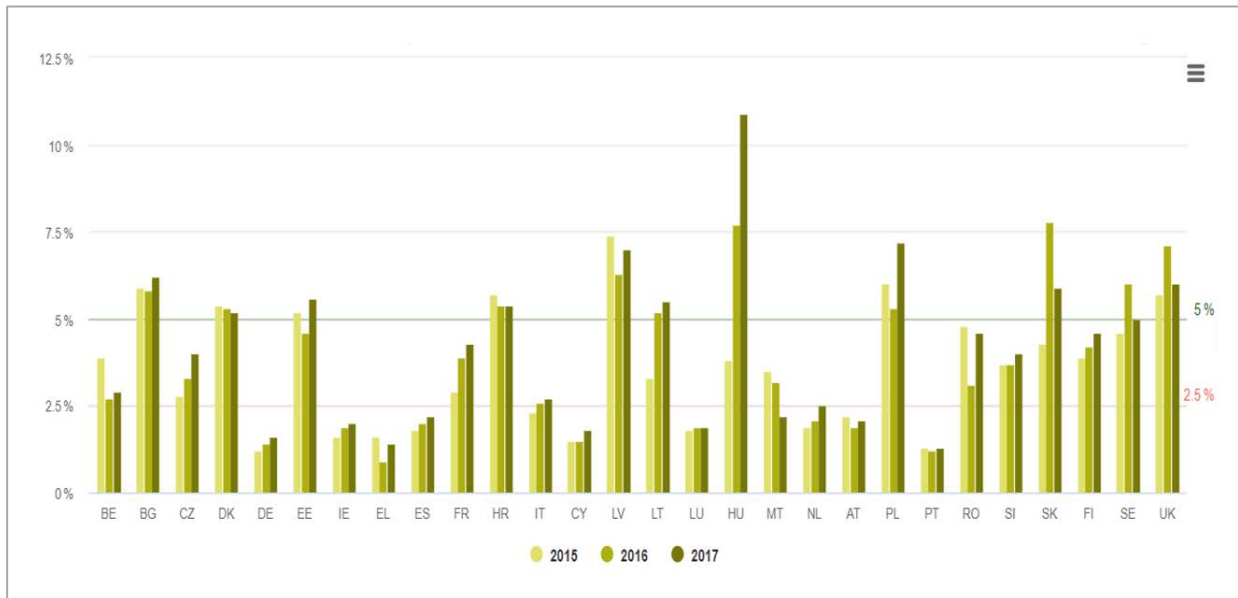
Figure 26: The no-calls-for-bids indicator of EU Member States



Source: Single Market Scoreboard.

Whereas a single bid is bad enough, having no public tender at all can only very exceptionally be justified. Hence, the 5% line as an upper limit, which is already generous. No less than 14 EU Member States exceed the 5% line, although six of them only marginally. For 2019, four countries exceed the 10% line.

Figure 27: Publication rate of contract values on TED as a proportion of GDP



Source: Single Market Scoreboard.

Figure 27 depicts the publication rate with a view of how attractive it is for businesses in the EU. This is about the relative size of public procurement markets and the accessibility as well as openness of them. Ignoring Hungary as an outlier, one might have expected not too great disparities in these shares. However, differences are nonetheless considerable ranging (in 2017) from 1.3% in Portugal to 7% in Latvia. It is worth remembering that, on average, 14-16% of GDP is spent on public procurement in Europe.

Figure 27 seems to tell us that the above threshold amounts in procurement differ greatly across Member States.

Of the other nine indicators, one may mention the award criteria (e.g. on low price alone or not) and the involvement of SMEs. In 2018, about half of the tenders in the EU applied the lowest price as the sole criterion. Only when the product or service is fully defined and no alternatives are wanted or available, is that criterion preferable – otherwise, some or significant room for applying the MEAT principle is desirable. SME participation is typically lower (some 55% across the EU) than the SME share in the economy. However, careful scrutiny by Becker et al. (2019) finds that 57.7% of all bids were tender bids by SMEs (in 2017) and SMEs won in 58.5% of the bids. This share is rising. **These data are showing that one of the aims of the 2014 directives – SMEs should do better in public procurement – seems at least to be addressed.** However, the average contract value for SMEs is about half (EUR 779,000) of the value of contracts awarded to non-SMEs.

This can partly be attributed to the relatively larger size of contracts in above-threshold contracts. Indeed, in below-threshold contracts the SME share is higher. A new study for the European Commission looks at SMEs *winning* contracts and finds that the trend is favourable for SMEs: from 58% in 2011 to 65% in 2017⁴²⁶.

However, in aggregated contract value, SMEs account for only 33%. The sectors in which SMEs are most active include a range of services (professional, scientific and technical services, and "other" services) as well as construction and retail and wholesale. It is also found that the division into smaller lots (seen as helpful for SME chances) only facilitates SMEs very marginally.

This study might well imply that there is a limit to the effectiveness of SME support for public procurement. On average, **SMEs tend to have a lower capacity to deliver on large and possibly complex contracts, and this is to be expected. The extreme splintering of projects for the purpose of SMEs (especially at the regional or local level), a practice frequently encountered in Germany, is not necessarily good for overall efficiency.** It is also sometimes held that national public procurement portals would be user-unfriendly by not providing texts in a language other than the local one, which is likely to be more problematic for SMEs than for larger firms. However, a check of the 27 portals does not lend much support for this contention: 17 Member States use two or more languages, plus Malta (only English). Only five Member States use only one language⁴²⁷.

The trend towards more green procurement might also become a problem for SMEs as the level of expertise and capacity required is much higher in case of innovative approaches expected in such "strategic" contracts. The entire area of green procurement is not well covered in statistics and not incorporated in the Scoreboard yet, but indications are that Member States move only slowly – despite various efforts – and the obstacles for SMEs seem to be considerable and multiple. It has also been held that public authorities have not sufficiently taken up the possibilities to use strategic public procurement, with sustainable, green, pre-procurement or innovation-focused tools⁴²⁸. For low-carbon, life cycle and circular approaches in public purchases, further EU action is required. **A voluntary approach is not sufficient.**

With respect to remedies, the situation was initially quite problematic, with huge differences between

⁴²⁶ de Bas, P., et al., 2020, *Analysis of the SMEs' participation in public procurement and the measures to support it*, European Commission.

⁴²⁷ The EU website did not have links to Hungary, Ireland, Denmark; and the link with Cyprus did not function (accessed 30 Oct 2020), available at: https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers/public-procurement-eu-countries_en.

⁴²⁸ Núñez Ferrer, J., 2020, *The EU's Public Procurement Framework*, Briefing for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

the speed and costs of review⁴²⁹. This seems to have been improved, but the differences in efficiency and costs are still stunning, as shown in the Single Market Performance report (p. 35). An interesting point is that the data are provided by the new Network of First Instance Review Bodies – it would be strange if such stunning differences would not serve as food for thought (and reform) for their members.

7.1.4. Is there a growing trend of these problems in the EU?

Most of what one might call trends move in the right direction: EU rules-based public procurement increases much faster than GDP or intra-EU trade, the share of cross-border awards (direct and indirect) has slightly increased to some 25%, electronic public procurement is rapidly replacing paper-based procedures (partly due to compulsory rules) and this will intensify, the SME share of winning contracts is higher than the share of tenders and has increased between 2011 and 2017, and finally there is some prospect of addressing the weaknesses of the fragmented remedies system.

Some problematic features are worrying, but seem not to get worse: the lack of professionalism in numerous tender procedures where the authority has little experience; the prominence of the lowest-price criterion (rather than of a form of the MEAT principle); the non-trivial, but disparate rates of "no call for bids".

There is one trend that is going in the wrong direction, namely the increased frequency of single bids in a number of Member States. Although trends are one thing, the overall level of performance of EU rules-based public procurement is not satisfactory.

7.1.5. What tools exist at EU and national level to address these problems?

In Section 7.1.2, the current EU regulatory regime has been described and it has **clearly improved the situation**. As will also be discussed below in Section 7.2, the Commission has proposed and worked hard on a Commission/Member States partnership on a permanent basis, precisely in order to be able to address the lingering problems with Member States in a cooperative fashion. The greatest problem – the single bid issue – is typically an issue that results from a range of factors such as the transparency of tenders, the sectors or requirements at issue, the local nature of the tender, perhaps a lack of trust of companies linked to integrity issues, lack of professionalism and so forth. Best practices and mutual support from other Member States (especially their centralised purchasers) can be very helpful and more easily accepted.

Applying the MEAT principle in complex procurement with, for example, innovation or green products or services application will also take time – experience will facilitate these processes. However, deep and substantive investments both at EU level (to develop tools, best practices and guidances) and at the Member State and local levels are required over a longer period of time for this to work effectively for green and innovative procurement⁴³⁰. Lessons should also be learned from remedy cases, not least in the new EU network.

Finally, the move towards eProcurement strictly disciplines and clarifies procedures and a host of other features which should be helpful as well. As eProcurement is central to the overall EU procurement strategy, recalled in the following section, these are all interwoven.

⁴²⁹ Pelkmans, J. and Correia de Brito, A., 2012, *Enforcement in the EU Single Market*, CEPS, Section 7.4.

⁴³⁰ Núñez Ferrer, 2020, op cit.

7.2. How can these problems be removed and prevented?

The principal and sound route of improving public procurement is to follow the six-fold strategy proposed by the European Commission in 2017⁴³¹. In a collaborative partnership with the Member States, six strategic priorities are pursued:

- The more flexible rules (like the competitive dialogue for purposes of innovation such as prototypes, for green goods and services with an explicit social character) need to be carefully exploited – this also goes for concessions – the MEAT principle should become more widespread and in selected ways become mandatory;
- Advocate and support professionalisation of public purchasers over a long period of time;
- Facilitate where possible access to public procurement, especially for SMEs⁴³²; SMEs are reported to rank access to public procurement as the primary barrier in the EU, despite the improving performance⁴³³;
- The "governance" of the procurement regime can and should be further improved with respect to transparency, integrity and data as well as remedies;
- eProcurement should be pursued vigorously – it should amount to a digital transformation also for cross-border procurement, including the setting-up of "contract registers" with full disclosure of all relevant data (as recommended by Becker et al., 2019); and
- There should be CPBs reaching out to smaller agencies and authorities, more cooperative procurement (e.g. between municipalities and/or other authorities)⁴³⁴ as well as cooperative procurement cross-border.

All six items are demanding and cannot be underestimated. In addition, the reasons behind the trend of single bids should be investigated, publicly reported and addressed. Single bids frustrate the very meaning of competitive open procurement in the Single Market. Also, the rate of publication is low and for some countries (e.g. Germany with 1.2%) very low. Surely, this needs to be addressed in earnest.

A report for the European Commission has uncovered a number of typically German aspects⁴³⁵. For example, they include localised federalism with numerous small budgets, fairly extreme budget rules (such as annual spending approvals for longer run projects, causing the artificial splitting of project sums staying below EU thresholds), a substantial in-house provision by other public entities (hence, not falling under EU rules), and other practices (even by hospitals) which undermine the very purpose of EU public procurement rules.

⁴³¹ European Commission, 2017, *Making public procurement work in and for Europe*, COM(2017) 572.

⁴³² Becker, J. et al., 2018, *Contribution to Growth. European Public Procurement. Delivering Economic Benefits for Citizens and Businesses*, Study for the committee on the Internal Market and Consumer Protection, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg.

⁴³³ European Commission, 2020, *Business Journey on the Single Market: Practical Obstacles and Barriers*, SWD(2020) 54 final.

⁴³⁴ Performance indicator no. 4 is on cooperative procurement, for 2019 it shows great variation (between Member States) in the number of procedures with more than one public buyer, with about half the Member States scoring 5% or lower.

⁴³⁵ Alfen Consult, 2018, *Economic and legal analysis of the factors leading to a low rate of publication of public procurement opportunities in Germany*, report for the European Commission.

The lack of transparency about statistics and about the operation of some procedures does not accord well with German traditions of legal precision and is surely not in tune with the thrust of EU rules and policies.

This analysis also shows that the scoreboard (see Section 7.1.3) is still not the best guide for judging public procurement because the assessment for Germany is "good procurement" whereas the report for the Commission shows significant deficiencies.

Finally, **too little is known about the functioning of the Concessions Directive**. No analytical and fact-based report on its functioning has been published, although a PPP report by the European Court of Auditors gives a first idea (and that report is not particularly encouraging)⁴³⁶.

⁴³⁶ European Court of Auditors, 2018, *Public Private Partnerships in the EU: Widespread shortcomings and limited benefits*, Special report no. 9.

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This study analyses the current state of national obstacles to free movement in the EU Single Market. It focuses on various aspects of obstacles related to free movement of goods and services, the right to establishment, the Digital Single Market, consumer protection and public procurement.

This document was provided by the Policy Department for Economic, Scientific and Quality of Life Policies at the request of the committee on Internal Market and Consumer Protection (IMCO).

PE 658.189
IP/A/IMCO/2019-12

Print ISBN 978-92-846-7475-6 | doi:10.2861/311513 | QA-02-20-967-EN-C
PDF ISBN 978-92-846-7476-3 | doi:10.2861/346801 | QA-02-20-967-EN-N