



NOTE

April 2016

Danish response to consultation on the proposal to reform the notification procedure under the Services Directive

General remarks

The Danish government fully supports the Commission's initiative to create a level playing field for businesses, including the need to address unlawful national barriers that hamper cross-border trade. Every year between 800-1000 national requirements are notified to the Commission, making it difficult for businesses to operate cross-border since they have to follow different rules in different Member States. To achieve this goal the Commission should strive towards an ambitious proposal for a revision of the notification procedure under the Services Directive, ensuring that the procedure applies to draft laws and is effective, transparent and introduces guidelines for binding proportionality tests as well as strengthens the follow-up mechanisms by the Commission.

The Danish government agrees with the objective of the forthcoming proposal to reform the notification procedure for services (proposal) and the shortcomings of the current model for notifications. This calls for action at different levels and this paper contains suggestions on how to improve the functioning of the notification procedure for services.

Comments and suggestions

Draft laws

Member States often notify already adopted regulation. This limits the possibility for the Commission, Member States and stakeholders in terms of commenting legislation before it enters into force. As a result, there is a risk to encumber the free movement of services.

Suggestion:

- The procedure should **apply to draft laws** to ensure that all new national measures could be examined before they enter into force.

Clarify the obligation to notify

Today, it is unclear which regulatory measures that should be notified, and it appears that Member States have not implemented the notification procedure in a uniform manner resulting in various interpretations of the scope, the concept of proportionality and the reasons of justification in accordance with the Services Directive. It is, therefore, essential to ensure a more common approach to the assessment of new national requirements.

The Danish government finds it necessary that the proposal clarifies the scope of the notification procedure more precisely, thereby making it clear, which regulatory measures Member States are obliged to notify under the Services Directive. Furthermore, we welcome the idea to assess whether the procedures and enforcement measures concerning temporary cross-border provision of services and establishments should be aligned.

Suggestion

- The Commission should **clarify the scope** of the notification obligation (i.e. what should be notified) and assess the potential of aligning the notification process for temporary cross-border provision of services and establishments.

Procedural clarifications

There is currently no streamlined process for handling notifications, leaving national authorities in a limbo when discussing notifications with the Commission. The Danish government urges the Commission to present a thorough framework of all steps in the notification process i.e. how comments from the Commission and other parties should be handled (e.g. obligations to respond and follow-up etc.) and by setting fixed deadlines applicable for both the Commission and the Member States.

Moreover, a consultation period (stand-still) with a proper timeframe allowing Member States, the Commission and stakeholders to react to notifications should be introduced. In this way new national measures could be examined before they are brought in, as is the case for goods. The Commission should, however, consider different models e.g. the possibility to shorten the period and present specific cases of exemptions to meet the concerns of some Member States in regard to the national procedures.

National authorities should not obtain prior approval from the Commission before adopting legislation, but the Commission should be required to follow-up in cases of reactions to Member States' notifications. In that way Member States get a better understanding of the whole process i.e. clarifying any potential uncertainty in relation to other Member State and Commission comments.

Suggestion

- The proposal for a revision should provide **procedural clarification** to ensure that the process for notification is transparent, clear and structured.

Better proportionality assessments

Today, Member States provide insufficient or in some cases non-existing proportionality assessments. The Danish government would like to see the introduction of guidance on proportionality, including the reasons of justification in accordance with the Services Directive, to help Member States decide if new national measures are disproportionate.

Suggestion:

- The proposal should contain an obligation for Member States to provide a thorough proportionality assessment. This must go hand in hand with an improved level of information and guidance e.g. **analytical framework for binding proportionality tests**. In this way new rules would be subject to the same level of examination in all Member States.

More transparency

The notification procedure for services lacks transparency, as Member States notifications are presently circulated in a closed system (IMI) between Member States and the Commission. Furthermore, Member States are allowed to notify some requirements for service providers through the notification procedure for goods. This has the adverse effect of not registering all service notifications in the same system, which makes it more difficult for all parties to become aware of and react to the notifications.

The Danish government welcomes the focus on transparency in the consultation. To obtain a fully functioning Single Market it is important to find a solution that ensures that stakeholders can be granted access to notifications, and the reasoning for them. This would indeed enable stakeholders to identify applicable rules as well as actively intervene in case of doubtful rules.

The IMI-system could be used for that purpose. However, it is a prerequisite that the system is combined with a public dimension and improved in regard to translation and search functions. All parties should be able to easily search for and navigate among the notifications, including the possibility to subscribe to email alerts to make it easier to react to notifications within their field of responsibility.

Suggestions

- Member States notifications should be made **public online (at EU-level)** in an open user-friendly database so that businesses and relevant authorities have the opportunity to react to them before they are introduced.
- In order to avoid unlawful barriers in cross-border trade the Commission should evaluate the possibility to **integrate the notification procedures for goods and services** since changes in the regulation of services are very likely to impact the manufacturing production and vice versa.

Better enforcement

Currently, there are no legal consequences when Member States refrain from notifying and it is unclear how the Commission chose, examine and follow-up on national requirements and to what extent unlawful measures are in fact enforced within the procedure. Thus there is a need to create consistent and transparent follow-up mechanisms to prevent unlawful measures from being adopted, but also to strike the right balance between informal dialogue and enforcement measures, keeping in mind that informal discussions in some cases may be more fruitful.

Suggestions

- The proposal for a revised notification procedure should **clarify the legal consequences of non-notifications**. Preferably in line with the legal jurisprudence for goods where in case of failure to notify, the new requirement is inapplicable.
- The Commission could assess whether it could be an idea to distinguish between comments, i.e. **comments vs. detailed opinion**, following the model in accordance with the Transparency Directive. This could create more clarity about the level of consequences related to questions posed by the Commission.

- The Commission could take a more **targeted approach**, based on clear and transparent criteria, including economic cross-border significance and prevalence of permitted restrictions.

Final remarks

The proposal to reform the notification procedure under the Services Directive may require changes in the Danish legislative process in regard to timing if e.g. an obligation to notify draft legislation, proportionality assessments and a consultation period is introduced. The proposal should, however, also entail changes in the Commission. It is important to ensure the Commission performs effective follow-up and enforcement to overcome the unlawful national barriers hampering cross-border trade in EU.