General Affairs

EU Commission Services Package

ACE response to Commission's proposal for a Notifications Directive

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Subsidiarity principle: the proportionality of the proposal is questionable

The proposal for a *Directive on the enforcement of Directive 2006/123/EC on Services in the Internal Market, laying down a notification procedure for authorisation schemes and requirements related to services - amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System* seeks to implement stricter notification requirements for draft "laws, regulations or administrative provisions introducing new, or amending existing authorisation schemes and certain requirements falling under the scope of Directive 2006/123/EC".

European law already obliges Member States to notify amendments to national rules on services to the European Commission so that any concerns regarding possible inconsistencies with EU law can be raised before implementation. The European Commission stresses, in the explanatory memorandum, that the foreseen measures do not extend beyond what is necessary to solve identified problems and achieve identified objectives.

The ACE believes that this is dubious, to say the least:

- First, the direct impact of the proposal on national legislative procedures seems considerable and the intended notification procedure alone could cause not only a small but a quite significant increase in effort /costs and further restrictions for national legislators:

During the proposed "consultation period", each notifying legislator is not only obliged to answer comments from the European Commission and all other Member States, but must also explain, in each case, why comments may not have been integrated in the notified measures (or how they will be integrated). This procedure alone represents a considerable additional effort and could become quite burdensome.

Also the weight of the measure is also significant: according to the current requirements of the Services Directive – Art 15 (7) - notification does not prevent the Member State from adopting the measure. Conversely, according to the new procedure, Member States are not allowed to adopt the notified measure during in the consultation period. Additionally the EC can "alert" Member States regarding any concerns it may have as to compatibility with the Services Directive and thus prevent the adoption of the measure for a further three months after the consultation period.

It is indeed questionable whether all of this does not in fact impose disproportionate costs / effort on Member states, as the European Commission states in the explanatory memorandum.

While the aim to foster dialogue between the Commission and the Member States is understood in order to prevent the introduction of standards that hinder the Internal market, the role of the national Parliaments as legislators must be upheld as must the ability to undertake reforms within a short space of time.

- Second, it is questionable - in principle – whether it is really is proportionate to interfere in national legislative procedures – especially where matters are covered by the subsidiarity principle – to such an extent, when at the same time there is a perfectly adequate procedure foreseen for "worst cases" e.g. where a Member State adopts a measure that is in contradiction with the Services Directive (Decision to require abolition of a regulation / infringement procedure).

It has to be kept in mind that in many regards, the interpretation of the Services Directive varies considerably between the European Commission and the Member States. Some of these different approaches may only be resolved by independent jurisdiction. ACE does not believe that it is frequently the case that Member States are unable to understand sufficiently well the requirements of the Directive, to the extent that they need "legislative support" from the European Commission to implement European law correctly. Nevertheless the approach of the proposed "tightening" of notification procedures seems to imply exactly this. Also, the fact that - according to the proposal - the European Commission would be able to require the repeal of a measure that has not been notified, implies that the European Commission seems to know better than the Member State itself which national measures fall under the scope of the Directive.

On the contrary, ACE believes that a vast majority of Member States are very well aware of the requirements of the Services Directive but do not always share the compliance assessment of the European Commission. As already mentioned, the European Commission has good and efficient measures at its disposal to force the Member States to amend their rules if they are not in accordance with the Services Directive (decision to require abolition / repeal of a regulation / infringement procedure). They also ensure that where interpretations differ, the final decision is taken by an independent jurisdiction.

So the added value of additional *ex-ante* measures - that are not even based on independent juridical assessments - certainly does not seem to justify such substantial interference in national legislative procedures.

- Third, the proposal has to be seen in connection with the proposal for a *Directive on a Proportionality Test before adoption of new regulation of professions*. Practically, where professional regulations are concerned - measures would also fall under the scope of both Directives in many cases. Therefore, from the viewpoint of the profession it is necessary to regard them together:

In the notes about the proposal for a *Directive on a Proportionality Test before adoption of new regulation of professions* the EC very much stresses – in regard to subsidiarity –

that although the application of the Test itself is mandatory, the legislator is still free to decide. Taken on its own, this is already a very theoretical freedom because should the Proportionality Test be negative and the legislator decides still to establish the measure, it will hardly be possible for it to argue that the measure complies, nevertheless, with the Directive.

When additionally applied in conjunction with the proposal for a *Directive on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System* - not much of this "freedom" seems to remain: the notification obligation – in Art. 3 Point 5 – also requires provision of information demonstrating compliance with the Services Directive, including overriding reasons of public interest, proportionality and an assessment as to why less restrictive means are not available. So, where both Directives apply, this would in fact be the result of the proportionality test – and seen in this context, no legislative freedom remains whatsoever.

ACE argues against full alignment with the procedure set out in Directive 2015/1535, and in particular against having a standstill period which, if not respected, would lead to standards already adopted becoming void. Even if this procedure might work for goods, it is far too crude a measure to be applied to services. Moreover, this would slow potential reforms at national level and would counteract the efforts of Member States especially in the context of the European Semester.

For these reasons, ACE questions the benefits and the proportionality of this proposal.