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Delivering a Stronger Single Market

Nordic Innovation
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Preface

Nordic Innovation has commissioned Copenhagen Economics to carry out the current study with the title ‘Delivering a Stronger Single Market’. The study is motivated by the increasing focus on whether we as EU citizens and business are getting enough out of the growth enhancing initiatives taken by the EU. In other words: is the legislation coming out of EU with the aim of increasing economic growth and prosperity in the EU actually having the effect in real life that we initially anticipated?

In order to answer this question, we have identified a number of databases and information sources indicating if EU legislation has been properly implemented and applied in Member States. We have used information on EU Commission infringement procedures, EU pilot, SOLVIT and TRIS. This led us to identify four areas where we detected problems with implementation and application. We then went on to describe the nature of the problems ending up with a first estimate of how much poor implementation and application is holding back EU growth. Finally, we have proposed recommendations for principles for future instruments and fora that we believe will increase the quality of implementation and application of EU law.

Throughout the process we have received invaluable input and feedback from Nordic Innovation, the Danish Business Authority and the Swedish National Board of Trade.

The study has been carried out by Copenhagen Economics with The Centre for European Policy Studies (CEPS) as subcontractor.

However, any statements, errors and mistakes are the full responsibility of Copenhagen Economics.

Executive summary

The EU is currently facing its most severe economic crises ever, with unemployment rising and Gross Domestic Product (GDP) not returning to its earlier growth path. In the face of this situation, in April 2011, the European Commission launched 12 new initiatives under the Single Market Act with the aim of boosting the Single Market and exploiting its potential as a driver of economic growth in the EU.

However, there is a significant risk that the EU will not be in a position to reap the entire growth potential of the Single Market Act. The reason is the current poor performance of what we in this study call 'Governance after adoption' of EU legislation in important areas such as taxation (VAT), services, goods governed by mutual recognition and public procurement.

More specifically, we find that Member States not always fully adapt their national law framework so as to truly and completely comply with new EU legislation. In turn, this reduces the functioning of the legislation. Furthermore, we find that actual 'real life' application by civil servants and case handlers in national authorities is in some instances also too poor. Again, this reduces the effectiveness of the EU legislation and thus the contribution from the legislation to the EU economy.

We find rough indications that the lack of proper implementation and application in the four areas of tax, services, goods and public procurement may be reducing the expected economic gains from the core directives and regulations in these areas by 1/3; equivalent to a large two digit billion loss in euros. This is worrisome as those four areas are important parts of the Single Market Act.

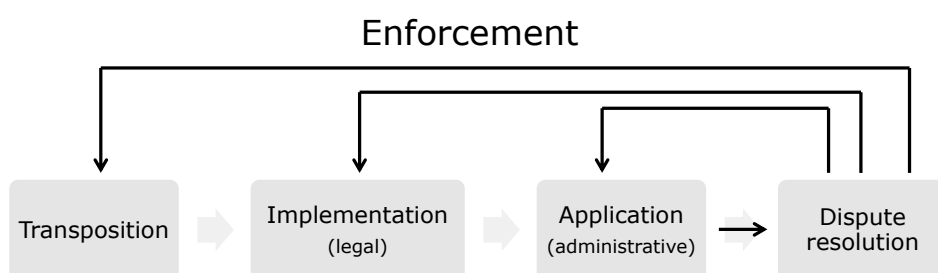
We suggest new principles that instruments and fora designed to improve on the performance of governance after adoption ought to consider.

Chapter 1

Main findings

To analyse the significance of the concept of ‘enforcement’ of EU legislation, we have developed a consistent terminology for what happens after a piece of EU legislation such as a directive, has been adopted by the Member States. First is the formal transposition into national law, followed by actual implementation leading to real-life application, cf. Figure 1. Following the application phase there are a number of tools and fora for detecting inconsistencies and resolving disputes resulting from incomplete execution of any of the first three phases. The knowledge and experiences are eventually fed back into better transposition, implementation and application in the future.

Figure 1 Governance after adoption



Note: Please note that we here adopt the terminology ‘dispute resolution’ as the fourth phase. We use this terminology as we believe that this is how business and citizens regard infringements of EU-law. As a dispute between themselves and another party that needs a resolution. Hence, professionals in the field may view the terminology as imprecise. Furthermore, as will be presented later, we include monitoring instruments, coordination fora etc. in ‘dispute resolution’ in addition to formal infringement procedures and other fora where business and citizens can go to argue for a counterpart’s infringement of EU law.

Source: Copenhagen Economics

1.1 Transposition

By *transposition* of a directive into national law we mean the formal activity of making sure that the directive is officially added to national law. The Member States have full responsibility for this, but the transposition must be carried out within the time limits laid down by the Directives themselves. For regulations which are by definition binding in all Member States as soon as they are passed, there is no transposition phase.

Traditionally, the transposition of directives seems to have been the issue of greatest concern within the European institutions when it comes to governance after adoption. This has led to effective monitoring of Member States' transposition performance by the means of the 'transposition deficit' measuring the share of directives not transposed in time compared to all directives which have been adopted. In line with this – you get what you measure – 11 Member States have transposed more than 99 per cent of all directives (a transposition deficit below 1 per cent) and an additional 14 Member States have transposed 98 per cent.

For this reason, we conclude that the lack of transposition poses less of a problem today (however, this is not a reason to be less vigilant in the future).

1.2 Implementation and application

Member States must adapt their national law framework so as to truly and completely comply with the EU directive. This we refer to as the *implementation* phase. However, the mere transposition and implementation of a directive into national law does not ensure correct application of the law. Therefore, the *application* phase implies the practical, real-life use of the new legislation in the Member States.

We find that incorrect implementation and wrongful application is where the problem lies. We establish that most problems concerning poor implementation and application of EU-legislation primarily takes place within taxation, goods covered by mutual recognition, services and public procurement, cf. Table 1.

Table 1 Areas with largest implementation and application issues

	Taxation	Goods	Services	Public procurement
EC infringement Proceedings	✓		✓	✓
EU Pilot	✓		(✓)	✓
SOLVIT	✓	✓	✓	
TRIS (goods only)		✓*		

Note: Each of these sources, The EU Commission infringement procedures, The EU-pilot, SOLVIT and TRIS provides indications of where problems of poor implementation and application lie. We will present indicators in a later chapter *: The three dominating industries are food and agricultural produce, building and construction and telecommunication equipment.

Source: Copenhagen Economics, based on our analyses in subsequent chapters.

Based on our analysis, we suggest that poor implementation and application in these four areas has dampened EU GDP by 0.6 to 0.8 per cent, which is equivalent to 1/3 of the initial expected economic gain from relevant EU legislation, cf. Table 2.

Table 2 Economic impact by areas, EU GDP

Sector covered by legislation	Expected gain GDP (%)	Potential not reaped, GDP (%)
Taxation (1)	1.0	-0.3*
Service sector (2)	0.6 to 1.2	-0.2 to -0.4
Public procurement (3)	0.2	-0.1*
Mutual recognition (4)	1.8	?
Total without mutual recognition	1.8 to 2.4	-0.6 to -0.8

Note: We were not able to come up with an estimate of the potential not reaped from mutual recognition legislation, therefore we have not included the expected gain in the total. (1). Primarily VAT directive 2006/112/EC; (2). Primarily services directive 2006/123/EC; (3). Primarily procurement directive 2004/18/EC; (4) primarily regulation 764/2008.

Source: See relevant subchapters in chapter 3.

1.3 Dispute resolution

The European legislative framework is provided with an ex-post enforcement phase. We call this the *dispute resolution* phase and it is the fourth step in the process of governance after adoption, as visualised in Figure 1.

The phase covers everything from monitoring and surveillance instruments over dispute resolution fora, such as the formal Commission infringement proceedings and the informal SOLVIT network, to information sharing networks, such as the Internal Market Information system (IMI). These instruments and dispute resolution fora including the feedback they provide we refer to as *enforcement*, marked by the dark arrows in Figure 1.

As focus shifts from issues in the area of transposition to issues in the areas of implementation and application, so must the instruments and fora to ensure enforcement.

The issues shift from being of a general nature to issues of a more specific nature. Thus, they might go from being dealt with at central level in Member States where the Commission could effectively engage the responsible individuals representing the Member State, for instance transposition deficit, to be dealt with at local level in Member States by different case handlers.

Regarding implementation and application, the latter is likely to be the more difficult to enforce. This is the case as resistance from both lower-level public sector employees and employees higher up in the bureaucracy can lead to wrong application. Administrative change as e.g. brought about by new EU legislation is rarely uncomplicated and civil servants often play a pivotal role in the implementation of such changes.¹

Much of EU legislation requires civil servants to change their ways. Consider for example the public procurement directive, which promotes transparency and a level playing field

¹ Fernandez & Rainey (2006).

for domestic and foreign competitors. Yet we see cases of the opposite. Perhaps this is due to a lack of knowledge or opposition to new procedures. The same is true for the regulation governing mutual recognition for goods, where national authorities must now carry the burden of proof as to why a company wanting to sell its goods cross border into the Member State is not allowed to do so due to e.g. national safety standards. Before the regulation the burden of proof was on the company. This requires new procedures and behaviour on the part of the national agency and in the end the individual civil servants.

This may be a significant challenge, one that has not attracted much focus when discussing EU legislation. However, findings from organisational and management literature suggests that changing the way people behave on their jobs is not simple. In a 2008 survey of 1,500 managers in 21 different industries around the world², IBM found that only 41 per cent of projects involving organizational changes were described as successful. In similar studies, McKinsey & Co have found that only one third of transformational efforts are in fact successful.³

We therefore recommend increased focus on dispute settlement instruments and fora that address knowledge and behaviour at local Member State level. This suggests a stronger focus on informal and preventive procedures; for example strengthening fora such as IMI and SOLVIT, but also experimenting with new fora that incentivise detection of poor application at local level. This could be something similar to Directive 98/34 that requires Member States to notify new technical regulations concerning product's technical regulation which may be in breach with EU-law. Other Member States have the possibility and a strong incentive to check and potentially object to such regulation.

However, this thinking could be taken further. In essence 'full application' of legislation is actually about truly *exploiting* the opportunities granted by the EU legislation in order to improve market access and competition. Civil servants and case handlers can make a great difference in this respect.

Looking ahead, our study points to the need for stepping up the effort to improve implementation and application of EU-legislation if we are to reap the full benefits of the Single Market Act as fast as possible. In April 2011, the European Commission launched 12 new initiatives in the Single Market Act with the aim of boosting the Single Market and EU growth in face of the most serious economic crises the EU has ever faced.

"The Single Market has always been the driving force behind our economic development and prosperity and, now more than ever, it remains our best asset in facing the crisis. The twelve projects that we are launching today will make it possible to give it new momentum which will significantly benefit businesses, workers and consumers. Our objective is a stronger Single Market in 2012!"

(Jose Manuel Barroso, president of EU Commission)

² IBM (2008).

³ McKinsey & Co (2010).

We roughly estimate the Single Market Act initiatives to be able to boost EU GDP by around 1 per cent, perhaps more⁴. However, keeping in mind that EU GDP dropped by around 4 per cent in 2009 alone⁵, the Single Market Act initiatives need to be fully exploited in order to help restore growth and wealth in the EU. The implication is that in addition to agreement on the initiatives across the Member States swift and correct application is crucial.

We fear that without a new approach to implementation, application and enforcement, the Single Market Act will not be as successful as anticipated. This follows from a particularly lack within taxation (which matters also for digital services), services and public procurement, some of the areas the Single Market Act relies on the most.

⁴ See Appendix.

⁵ See Eurostat.

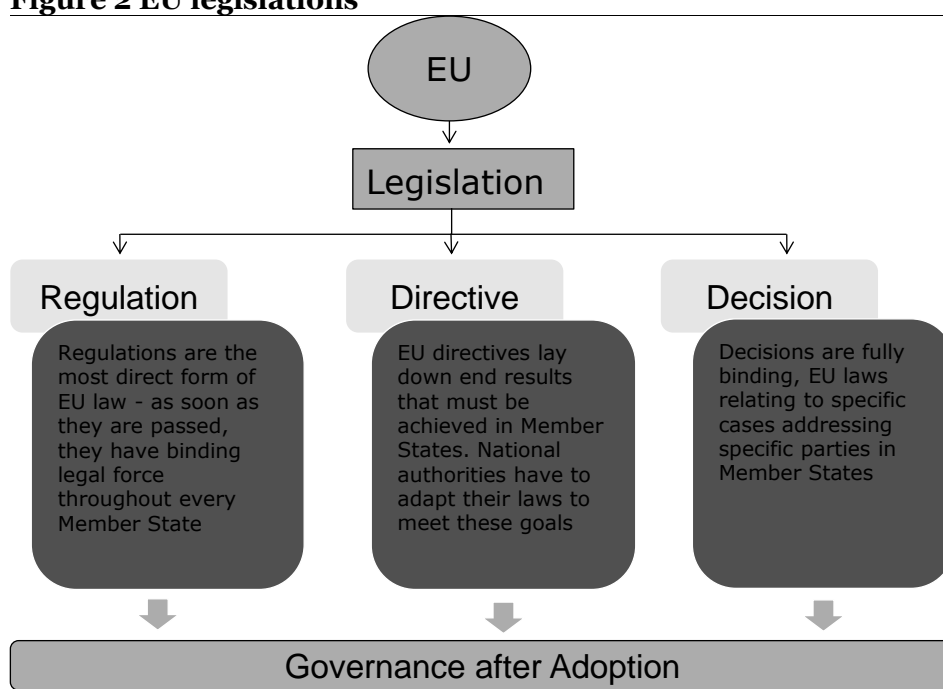
Chapter 2

Identifying the areas of importance

In this chapter we present and illustrate four data sources for identifying state of governance after adoption by Member States. More specifically, we use data on the European Commission infringement proceedings, TRIS, SOLVIT and EU Pilot.

The EU can decide on new legislation in three main ways: through Regulations, Directives and Decisions, cf. Figure 2.

Figure 2 EU legislations



Source: Copenhagen Economics based on EU Commission websites.

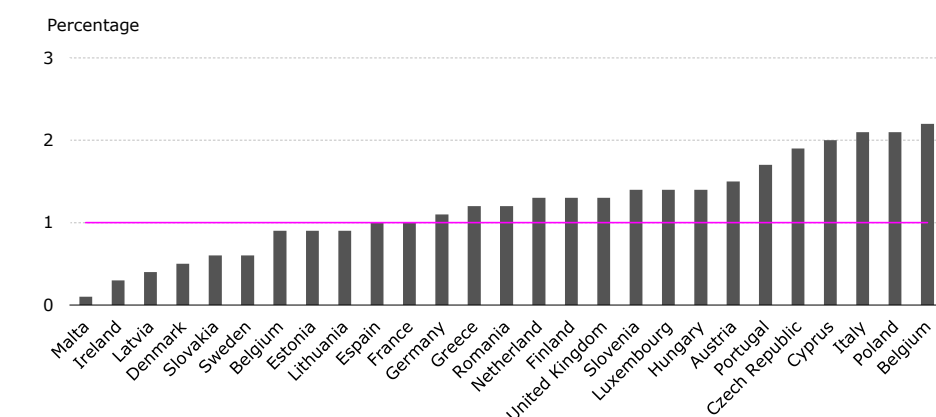
Regulations are binding and apply simultaneously in all Member States. Directives, on the contrary, need to be implemented into national law in each Member State. Thus, the Member States itself may decide how the goals of the directives are to be implemented into national legislation. As legislation in Member States are somewhat different, risks are generated for differences in implementation and application in different Member States.

Once either a regulation, decision or directive have been adopted by the Council of Ministers and the EU parliament, it goes into the process of 'Governance after adoption' as

described in the previous chapter, thereby going from transposition to implementation to application.

Traditionally, transposition has been the governance after adoption-issue of greatest concern within the European institutions. For this reason, the Commission calculates a ‘transposition deficit’. It shows the percentage of Single Market directives, which are not yet notified to the Commission, in relation to the total number of directives that should have been notified by the deadline. For instance, as of 10th of November of 2011, Member States had still not transposed Single Market directives according to planned deadlines. Sixteen Member States still fall behind the target of 1 per cent, agreed by the European Council in March 2007⁶, cf. Figure 3. When a Member State fails to transpose the Directive, the Commission has the power of its own to try to bring the infringement to an end. This process is based on the so-called *infringement proceedings for non-communication*⁷.

Figure 3 Transposition Deficit, 2011



Note: Transposition deficit by Member State as of 10 November 2011

Source: European Commission (2011m)

In Belgium, Poland and Italy, almost 2 per cent of approved Single Market directives are currently experiencing infringement proceedings for non-communication.

2.1 EC infringement proceedings

Once the European legislation has been approved and transposition has been communicated by Member States, two potential infringements exist:

⁶ European Commission (2011m, p. 9)

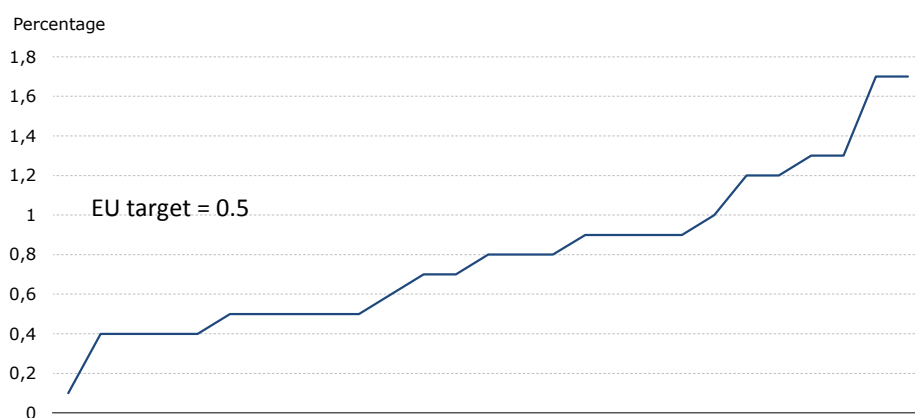
⁷ In most cases infringement proceedings for non-communication refers to non-transposition. Nevertheless, this might include cases where Member States have truly forgotten to notify the Commission once a law implementing a directive has been adopted nationally.

1. **Non-conformity Infringement Proceedings:** It refers to the cases when the national law does not comply with the directive's claims, even though the directive has been transposed
2. **Wrong-application of Directives, Regulations, Articles and Decisions Infringement Proceedings :** It refers to the infringement proceedings opened due to a lack of correct application of the national law within the country. These proceedings relate to legislative instruments which are directly applicable and directives which are correctly transposed, but where the national authorities are not properly applying or respecting them.

The total of pending infringement procedures on November 1st, 2011 is 922, including infringement procedures for non-conformity and wrong-application of Single Market legislations against the Member States (522 cases upon Directives and 400 upon other legislations).

The Commission has established a 0.5 per cent target for 'compliance deficit' which is far from being reached by a large number of Member States. For instance, Italy, Poland and France hold the highest deficits across the EU, cf. Figure 4.

Figure 4 Specific Compliance Resolution Deficit, 2011



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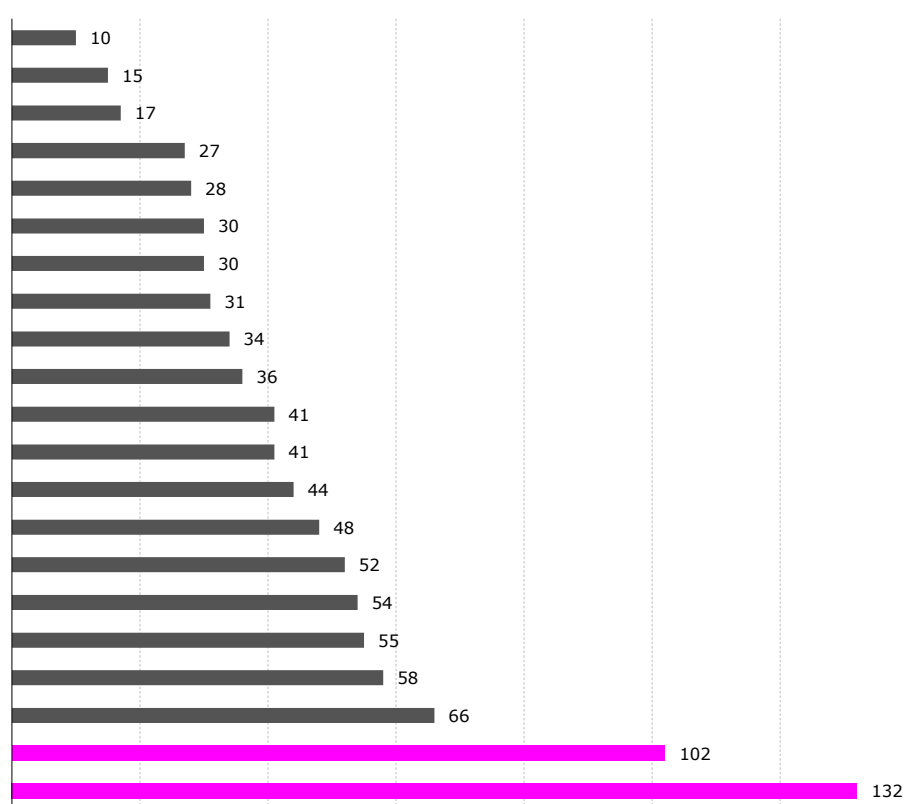
Note: Compliance deficit is defined as the number of transposed directives for which infringement proceedings for non-conformity and wrong-application have been initiated by the Commission as a percentage of the number of Single Market directives communicated to the Commission as having been transposed (as of 1 November 2011). The total number of infringements opened on directives is 522.

Source: European Commission (2011m)

Almost 25 per cent of these infringements are concerned with tax law, which may seriously hamper movement of business and people, cf. Figure 5. Furthermore, 13.8 per cent of the cases concern free movement of professionals, workers and services in general, which may particularly be hampering the functioning of the Single Market for services; services

constituting more than 70 per cent of the EU economy. Finally, public procurement, waste and water management and energy are important areas of the Single Market.

Figure 5 Share of Infringement Procedures for non-conformity and wrong-application across sectors, 2011



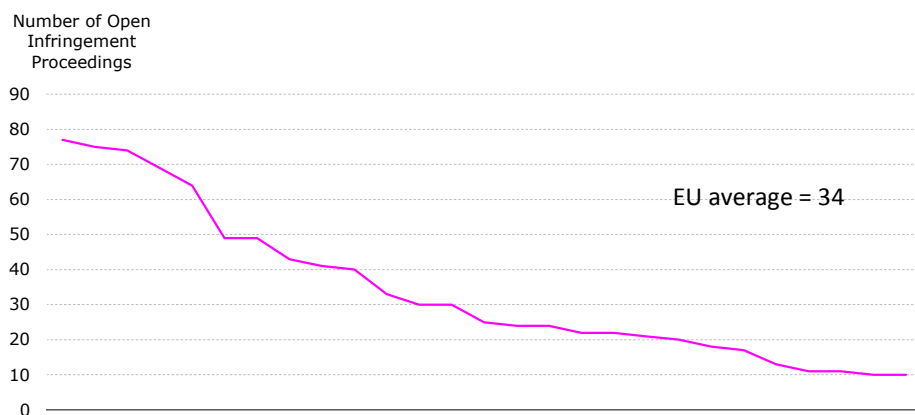
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Note: Percentages calculated upon open infringement proceedings as of 1st May 2011. Total number of open infringement proceedings for non-communication and wrong-application is 951, different from the previous graph as this is calculated six month later i.e. 1st May 2011.

Source: European Commission (2011l)

The 6 largest Member States – France, Germany, Italy, Poland, Spain, and United Kingdom – representing 73 per cent of EU GDP, are involved in more than 40 infringement cases each, cf. Figure 6.

Figure 6 Non-conformity and wrong-application open infringement cases as of 1st of November 2011



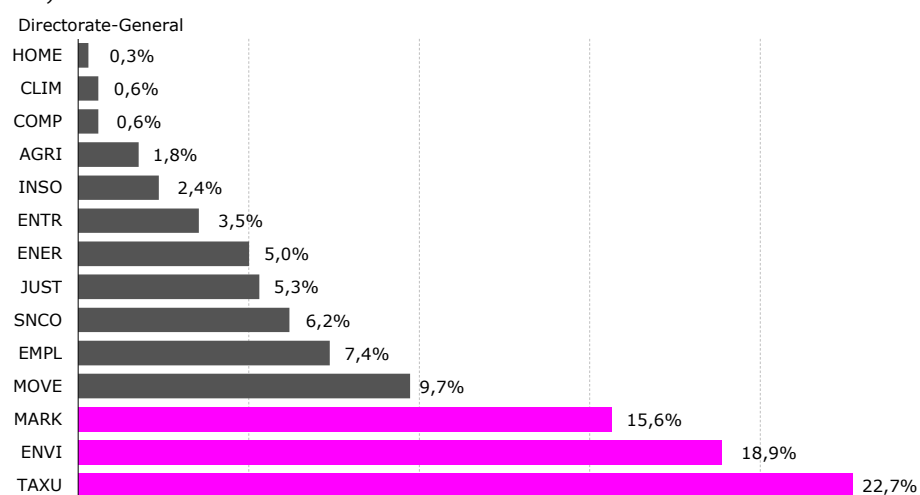
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Note: Total number of Open Infringement Proceedings is 922.

Source: European Commission (2011m)

If those six Member States have infringement cases within largely the same area, this indicates a Single Market that is not performing at its best in those areas, implying lower economic growth in the EU than what otherwise could have been expected. The six Member States experience most infringement cases within the domain of DG Environment, DG TAXUD and DG Internal Market and Services, cf. Figure 7.

Figure 7 Share of non-conformity and wrong-application open infringement cases in the 6 Member States as of 1st of November 2011, across sectors

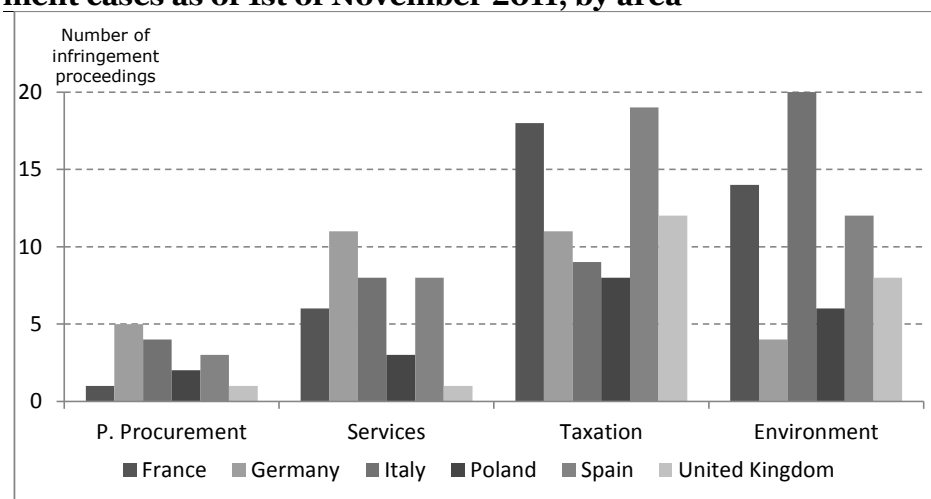


Note: Total number of open infringement proceedings in the six Member States is 339. MARK is DG MARKT, ENVI is DG Environment, TAXU is DG TAXUD

Source: Data provided by the European Commission on open infringement proceedings, as of 1st of November 2011.

Hence, by this indicator, it is in these three areas that EU economic growth prospects are suffering the most. This is confirmed by the fact that all six Member States are indeed experiencing infringements, which means that these six Member States, representing 73 per cent of the EU economy, are not performing to their potential in the above mentioned three areas, Figure 8.

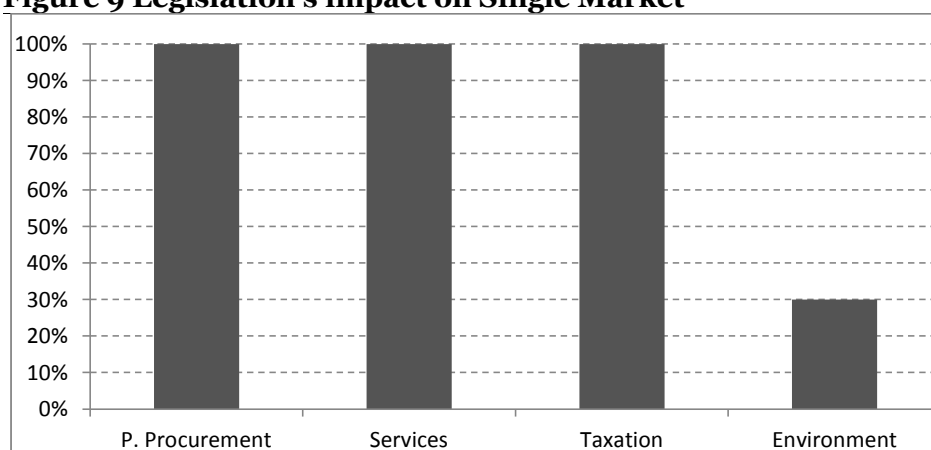
Figure 8 Non-conformity and wrong-application open infringement cases as of 1st of November 2011, by area



Source: Data provided by the European Commission on open infringement proceedings, as of 1st of November 2011.

All the infringed directives in public procurement, services and taxation were created to ensure a strong and broader Single Market and growth across the European Union, cf. Figure 9. Regarding environmental directives most were designed to cope with environmental issues, not single market and growth.

Figure 9 Legislation's impact on Single Market



Note: To conclude state whether this legislation have an impact on Single Market and growth we have looked at the argumentation in the legislation for why they were proposed.

Source: Data provided by the European Commission on open infringement proceedings, as of 1st of November 2011.

2.2 TRIS

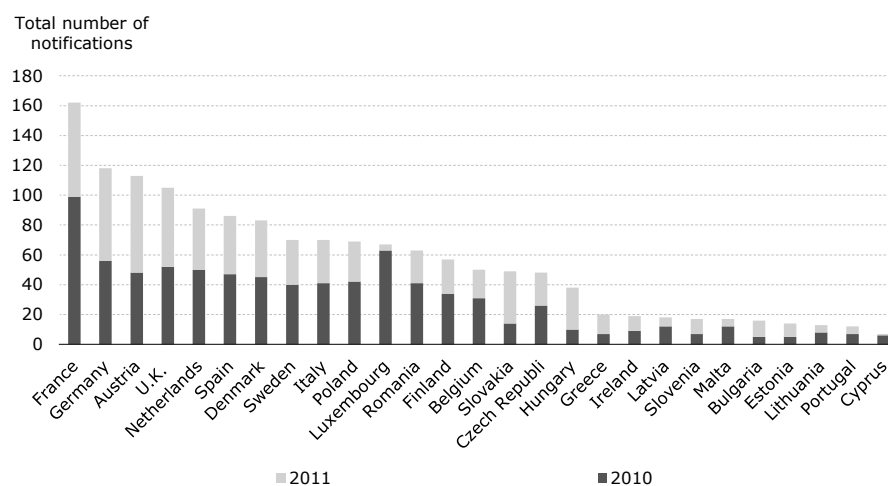
TRIS is an abbreviation for Technical Regulations Information System (TRIS). Under Directive 98/34/EC, the European Commission receives compulsory notifications from the Member States of all national draft laws containing technical regulations on goods (and, a minor part, information services) falling outside the 'harmonised' area. The notified national draft laws, collected in TRIS, are verified so as to enable the Commission as well as the Member States to detect potential (new) technical barriers or other (new) regulatory barriers to intra-EU cross-border trade.

A high number of detailed opinions per TRIS notification may indicate a high propensity of implementation problems built into a Member State's national legislation, as in the second step of the procedure Member States and the Commission alike are allowed to add comments or detailed opinions. In a third step, in cases where a detailed opinion is put forward, the commission will expect some communication on the altered law before a possible enactment.

Large Member States in focus

The large countries notify most laws in TRIS, cf. Figure 10.

Figure 10 Total number of notifications by country (2010-2011)



Source: TRIS database

A high number of detailed opinions per notification indicate that a Member State's draft legislation is often suspected of raising trade barriers, cf. Table 3. This illustrates that TRIS has a great success in preventing thousands of incipient barriers. Again the largest Member States dominate this picture. This is probably the case because large countries have large markets, and other Member States will on average be more concerned about access to these markets.

Table 3 Number of detailed opinions

Country	Detailed opinions 2010	Detailed opinions 2011	Rank 2010	Rank 2011	Average rank
France	11	14	4	1	1
Germany	15	8	2	4	2
Italy	16	5	1	9	3
Spain	8	7	5	6	4
Finland	2	11	15	2	5
Czech Republic	3	5	11	8	6
Denmark	1	8	17	3	7
Latvia	6	2	6	15	8
Austria	2	4	13	10	9
Sweden	4	3	10	14	10

Source: TRIS database

Food and agriculture is the top potential barrier-generator regarding TRIS in 2011, followed closely by building and construction material and Transports, cf. Table 4.

Table 4 Share of detailed comments, industries

	2010	2011
Building and construction	7,0	13,1
Food and agricultural produce	24,6	26,6
Chemical	2,5	5,3
Pharmaceutical products	4,1	1,2
Domestic and leisure equipment	1,6	1,6
Mechanics	7,0	1,2
Energy, minerals, wood	7,0	4,9
Environment, packaging	4,1	7,8
Health, medical equipment	2,0	1,6
Transports	9,0	10,7
Telecommunications	9,5	10,2
Gambling, Games of chance, related	4,1	4,9
Other products	12,9	9,0
Information Society services	2,5	1,6
Total	100,0	100,0

Source: TRIS database

2.3 SOLVIT

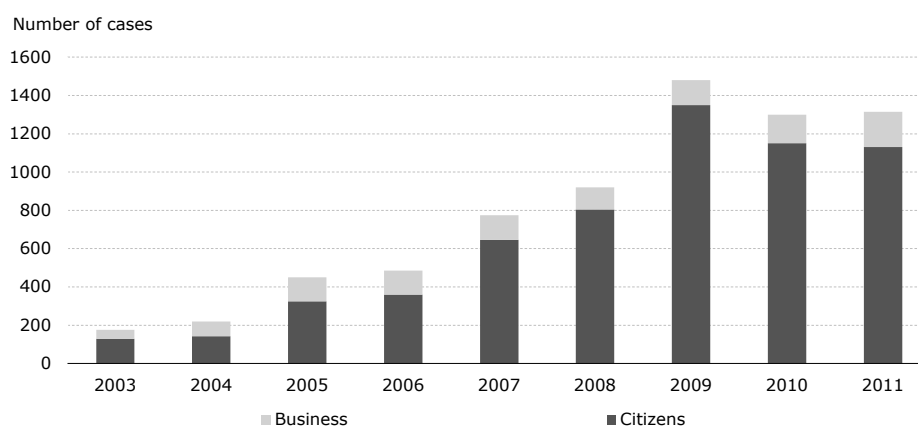
SOLVIT, created in 2002, is a service free of charge designed to help EU citizens and businesses to find fast and pragmatic solutions to their Single Market problems. SOLVIT

consists of a network of 30 centres⁸, which work together to solve problems arising from the incorrect application of EU law by national administrations. It delivers services for both business and citizens.

The majority of the 1,306 cases solved in 2011 were have been initiated by citizens rather than businesses, cf. Figure 11.

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Figure 11 SOLVIT Resolution Rates



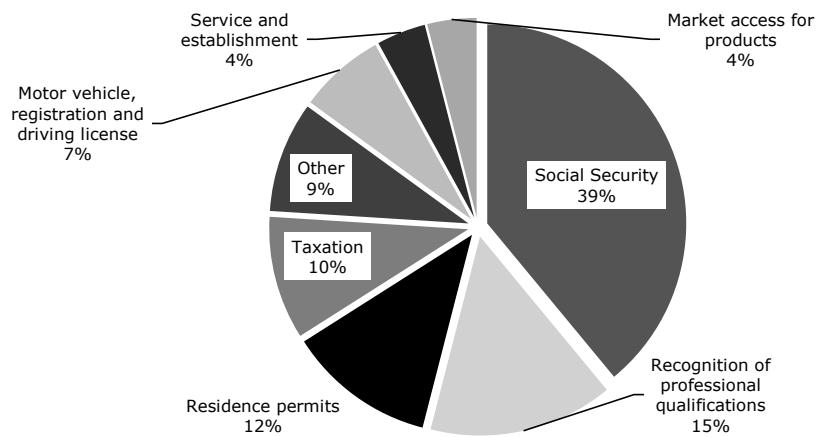
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Source: European Commission (2011m)

The majority of the were in areas of social security and recognition of qualifications, cf. Figure 12.

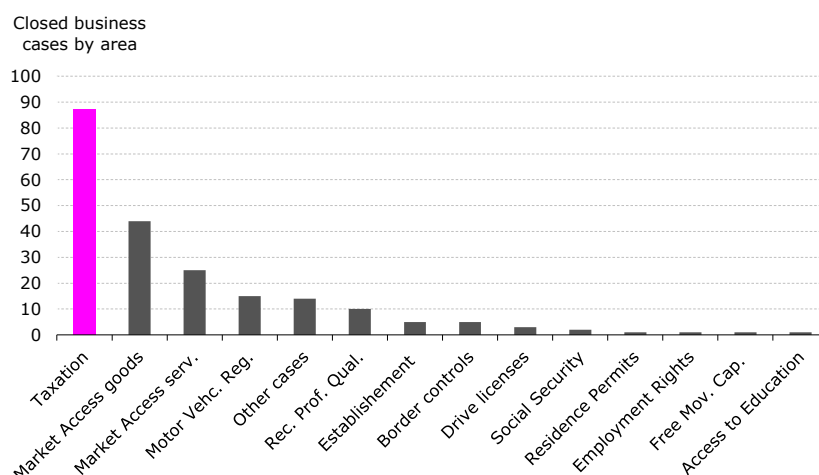
⁸ 27 EU countries as well as in Norway, Iceland and Liechtenstein.

Figure 12 SOLVIT, 2011 case distribution



Source: European Commission (2011m)

For business cases, taxation, goods trade and services trade are most often represented, cf. Figure 13.

Figure 13 SOLVIT closed business cases by area, 2011

Comment [c6]: Mark the three highest with pink

Source: CEPS based on data made available to the authors by the European Commission

2.4 EU-pilot

The EU Pilot was launched in April 2008, following the European Commission adoption of Communication on "A Europe of Results – Applying Community law"⁹.

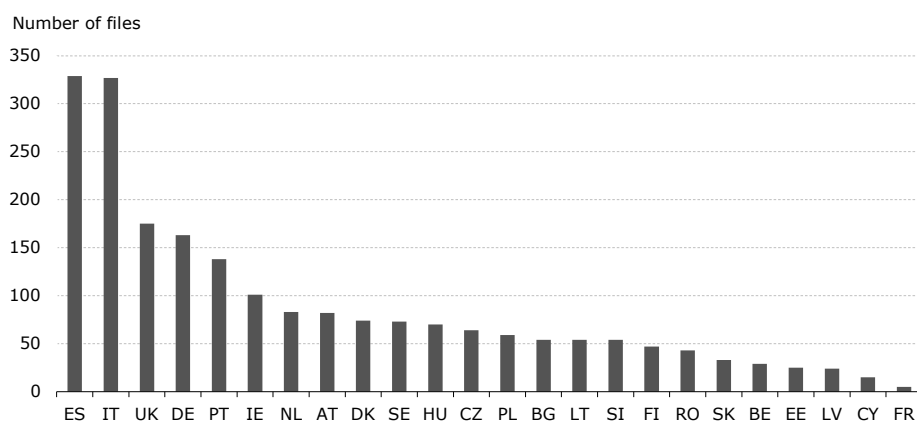
The idea of the system is to provide quicker and better solutions to problems arising in the application of EU laws and rapid and better responses to inquiries for information, as well as to promote a less formal cooperation between the Commission and the Member States. In fact, the EU Pilot has become a replacement of the informal phase of the infringement procedure. The EU-Pilot aims at providing an informal, rapid and effective solution to problems arising from the misapplication of EU law.

As citizens and business do not submit cases directly to the EU Pilot, the complaints are submitted to the Commission. Consequentially, the Commission has to decide which system to use. This method would help to correct infringements of EU legislative framework at an early stage, without the need to recourse infringements proceedings.

It appears that large countries experience more complaints in EU-pilot, cf. Figure 14. For example, together, Spain, Germany, Italy and United Kingdom, account for almost a thousand files within the system.

⁹ See Communication from the Commission "A Europe of results – Applying Community Law", COM (2007) 502 final, Brussels 5.9.2007.

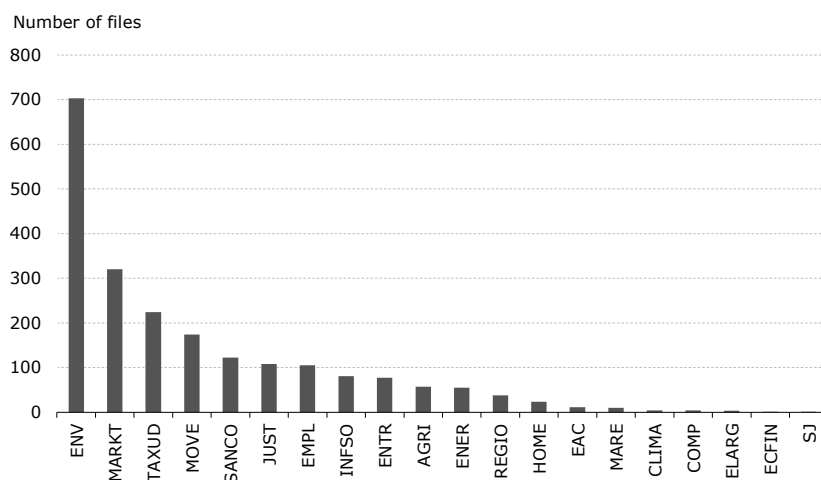
Figure 14 Number of files by Member State (14 April 2008 to 09 September 2011)



Source: European Commission (2010c)

Furthermore, the areas concerning most of these EU-pilot files are DG Environment, DG MARKT and DG TAXUD, cf. Figure 15.

Figure 15 Volume of files submitted - Breakdown by DG's



Source: European Commission (2010c)

DG MARKT will typically be concerned with services and public procurement. Indeed, there is a significant share of public procurement cases. Public procurement EU-Pilot cases accounted for around 50 percent of all cases in DG Internal Market and Services from 2008 until 2010 (50 percent in 2010, 43 percent in 2009 and 50 percent in 2008).

Comment [c7]: Mark the three top scorers with pink

Additionally, the system has been used in a very proactive way, resulting in 90 percent of the EU-Pilot cases being closed in 2009.

Chapter 3

Understanding the areas of importance

In the previous chapter, we identified the four areas of taxation, services, public procurement and mutual recognition to be the areas with potentially the greatest problems with Governance after adoption. This came from looking across the four sources of information, EC Infringement cases, SOLVIT, TRIS and EU pilot.

Consequently, in this chapter we describe more closely the nature of the implementation and application issues in the areas. For each area we suggest a rough estimate, based on available studies, on how much poor governance after adoption is costing the EU in terms of reduced economic growth.

3.1 Taxation

The taxation business cases in the SOLVIT database indicate that a large share of the cases involve cross-border problems related to VAT reimbursement (Tax return). In particular, they involve situations where the application for refunding the VAT charged must be submitted to the local authorities of another Member State where the respective company is not established. Notably, it is about delays on the reimbursement of the VAT to companies which imported goods or exported goods and services from that Member State. The rules governing VAT refund to taxable persons not established in the Member State of refund are laid down by Directive 2008/9/EC, including its base Directive 2006/112/EC also known as the 'VAT directive'.¹⁰

The European Commission infringement proceedings show that the highest number of cases concern the VAT directive (Directive 2006/112/EC) across the six largest Member States (UK, France, Germany, Italy, Spain, Poland). This is the case as 27 out of 38 (71 per cent) of the open infringement proceedings on taxation has to do with the VAT directive cf., Table 5.

Table 5 Legislation behind taxation infringement proceedings

Directives and Regulations	Number of Open Infringement Proceedings for						
	Non-conformity and Non-application						
	FR	DE	IT	PL	ES	UK	TOTAL
Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States	0	1	0	0	0	0	1

¹⁰ See Directive 2008/9/EC of 12 September 2008, laying down detailed rules for the value added tax, provided for in Directive 2006/112/EC, to taxable persons not established in the Member State of refund but established in another Member State.

Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products	1	0	0	0	1	0	2
Council Directive 95/60/EC of 27 November 1995 on fiscal marking of gas oils and kerosene	0	0	0	0	0	1	1
Council Directive 2003/96/EC of 27 October 2003 restructuring the Community framework for the taxation of energy products and electricity (Text with EEA relevance)	1	0	1	0	1	0	3
Commission Regulation (EEC) No 2719/92 of 11 September 1992 on the accompanying administrative document for the movement under duty-suspension arrangements of products subject to excise duty	0	0	0	0	1	0	1
Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code	0	0	1	0	0	0	1
Thirteenth Council Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes - Arrangements for the refund of value added tax to taxable persons not established in Community territory	0	1	0	0	0	0	1
Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax	7	4	3	6	5	2	27
Council Directive 2008/7/EC of 12 February 2008 concerning indirect taxes on the raising of capital	0	0	0	0	1	0	1
TOTAL	9	6	5	6	9	3	38

Note: This table shows proceedings on non-conformity and wrong application

Source: Data provided by the European Commission on open infringement proceedings, as of 1st of November 2011.

Some of the most common issues related to the VAT directive are:

- “VAT bookkeeping in sufficient detail for inspection by tax authorities” – Article 242, Council Directive 2006/112/EC;
- “Issuance of an invoice” - Article 220, Council Directive 2006/112/EC;
- “Submission of an intra-Community sales listing” - Articles 262–267, Council Directive 2006/112/EC;
- “Storage of invoices for inspection” - Articles 244 – 247, Council Directive 2006/112/EC;
- “Communication of the start of the activity as a taxable person” - Article 213, 1, Council Directive 2006/112/EC;
- “Application for a VAT refund” - Article 171,1 Council Directive 2006/112/EC and Article 3 (a), Council Directive 79/1072/EC;
- “Submission of a periodical VAT return” - Article 250–251, Council Directive 2006/112/EC;

The cause of problems due to the VAT directive is primarily due to a lack of harmonisation of the VAT rules between the Member States. This can make proper application difficult.

Furthermore, different VAT rates on similar goods or services in the different Member States increase business incentive to apply country of origin VAT instead of country of destination VAT, as dictated in the VAT directive (when yearly revenue is above the threshold of € 35,000 or € 100,000 depending on the EU country). This is not always effectively enforced, cf. Box 1.

Box 1 Færch A/S

The Company

Færch is a Danish importer and online retailer of cosmetic products. The company sells its products directly to end-users in Denmark, as well as to retailers in the cosmetology and beautician industry.

Single market challenges

Færch is experiencing unfair competition from online businesses based in the UK and Jersey, who are selling cosmetic products to Danish retailers and end-users. Though Færch has the rights to a number of cosmetic products, the rights are very hard to protect.

EU-rules state that local VAT regulations apply when sales exceed € 35.000 in a specific country. Færch believes that this rule is not being enforced. As VAT rates in the UK and Jersey are much lower than the Danish rates (17 and 0 per cent respectively compared to 25 per cent in Denmark), Færch believes that foreign companies operating out of these jurisdictions avoid paying the Danish VAT. As a consequence, they are able to sell at much lower prices than Færch. Færch estimates that 30-40 per cent of the Danish market is currently supplied by non-Danish online providers.

Proving a breach of the VAT regulation is difficult, as documentation of the merchandise being sold by a non-Danish online retailer is needed case by case. Thus Færch incurs costs from building up the brand in Denmark, without being able to protect and exploit it efficiently.

Single market solutions

National tax authorities should enforce that VAT has been accounted for in the country of destination.

Source: Based on CE interview June 2012 and company website.

EU VAT registrations take different lengths of time within Member States. Some countries are very quick, for instance 10 working days in Germany. However, in other Member States the procedure is lengthy for non-local businesses. This increases businesses' time

to market, reducing competition leading to higher prices. This is illustrated by the case of a US company which has operated in the EU for 6-8 months and has received VAT registration all over Europe except in Bulgaria, Estonia and Lithuania. Consequentially, the company is not able to sell its product in these three countries.

An indication of the cost due to a lack of enforcement

The VAT directive (2006/112/EC) is a prominent source of infringement cases and disputes. For estimating the cost arising from lack of proper implementation and/or application and enforcement, we make use of a recent study from 2010 by Capgemini, Deloitte and Ramboll¹¹.

The study estimates the cost incurred due to inefficient implementation and gold plating of the VAT directive by Member States. We interpret these as proxies for lack of proper implementation. The study finds that the cost on business reaches around €24 billion.

Copenhagen Economics has found, using an economic (CGE) model that 1 billion in compliance costs translates into 1.4 billion in GDP loss¹². Using this conversion factor, we find that €24 billion business cost result in a €38 billion loss of EU GDP, or around 0.3 per cent of GDP. This we take as a first rough estimation of the potential loss of GDP due to improper implementation of the VAT directive. This could be compared to the initial expectation of the VAT directive boosting EU GDP by 1.0 per cent¹³.

3.2 Services

Ensuring the freedom to provide services requires the elimination of all kinds of discrimination based on the nationality, as well as the prohibition of the obligation on the provider to have residence or an establishment in the territory of the Member states where the service is provided. The Member State to which the service is provided can only enforce its own requirements in as much as these are non-discriminatory, proportional and justified for reasons of public order, public safety, public health or environmental protection.

In order to facilitate the freedom of establishment for providers in other Member States and the freedom of provision of services between Member States, two Directives were enacted: the Services Directive 2006/123/EC and the Recognition of professional qualifications 2005/36/EC (Professional Qualifications Directive). In addition, the E-commerce directive 2000/31/EC also plays a role for certain services¹⁴.

The directives being part of EC infringement procedures in the six Member States of the UK, France, Germany, Italy, Spain and Poland, include all three directives in addition to six additional ones, cf. Box 2.

¹¹ Capgemini, Deloitte and Ramboll (2010)

¹² The Danish Ministry of economic and business affairs (2005)

¹³ See Appendix.

¹⁴ See European Commission (2012e)

Box 2 Directives under EC infringement procedures

Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other qualifications in dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services

Council Directive 89/48/EEC of 21 December 1988 on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration

Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')

Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision

Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications

Council Directive 2006/100/EC of 20 November 2006 adapting certain Directives in the field of freedom of movement of persons, by reason of the accession of Bulgaria and Romania

Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability

Source: See Appendix.

One concrete example of a barrier for cross border service provision is that of a Portuguese company in the construction sector that was facing problems in Poland, where it had won a series of public tenders. Only engineers who were members of the Polish professional body could be designated as responsible for construction works in Poland. In addition to becoming a member of this body, foreign engineers had to be approved in a complex exam only available in Polish. Hence, the language barrier made it impossible for the Portuguese engineers to become members. To be able to carry out its activities, the Portuguese company engaged young Polish engineers to be officially designated as responsible for its public work in Poland, but in fact each work had a senior Portuguese engineer, acting as team leader¹⁵.

Another instance of wrong implementation or application of the directives covering services is that certain Member States do not allow providers to acquire insurance in other Member States. A further example regards cross-border service provisions where businesses (when providing services both online and offline) are often confronted with additional requirements to those to which they are subjected to in the Member State where they are established¹⁶.

¹⁵ Copenhagen Economics interview with the Portuguese SOLVIT centre.

¹⁶ Examples taken from European Commission (2012e)

An indication of cost due to a lack of enforcement

The findings so far strongly suggest that services are not provided free of obstacles across the EU. In fact, the service industry is one of the industries where the most barriers remain.

To get an indication of how much remaining barriers are hampering economic growth, we turn to the recent EU Commission 'evaluation' of the performance of Services Directive. It is not an actual evaluation as data is insufficient at this point but rather a modelling-based exercise making use of the actual state of implementation of the provisions in the Services Directive in the Member States¹⁷.

The Commission finds that the impact on EU GDP of the current implementation of the Services Directive is 0.8 per cent. It finds that many Member States have opted to partially reduce or even keep specific requirements (this is allowed by the Services Directive if duly justified). Under a scenario, where each country would reduce barriers so as to reach the average current level of barriers in each sector, the further additional gain would be 0.4 per cent of GDP. Hence, the Commission finds that the total gain from the Services Directive under this scenario is a 1.2 per cent increase in EU GDP.

Hence, we interpret the current cost of lack of implementation to be 0.4 per cent of GDP. However, some of this is not actual cost due to lack of enforcement, as Member States can chose to only partially reduce or even keep specific requirements, creating barriers for cross border service provision. This means that the 0.4 per cent mark represents the maximum costs that could potentially be incurred.

However, 0.4 per cent also underestimates the actual cost, as the Commission study only covers service industries reflecting half of the actual coverage of the Services Directive¹⁸. Even more important in this context, the analysis does not cover the lack of actual application of the provision, only the lack of implementation. This means that barriers may have been lowered 'on paper', but not in real life. As the example with the Portuguese construction company demonstrated, barriers may often be due to behaviour of case handlers. Hence, there is a real danger that the Services Directive so far has reaped less than 0.8 out of 1.2 per cent of GDP.

Other ex-ante impact assessments of the potential of the Services Directive exist. These are addressed in the Commission study¹⁹. A central estimate of these are 0.6 per cent impact on EU GDP. Taking the share of 1/3 of the potential not reaped due to poor implementation from the Commission study for granted, this estimate suggest that 0.2 per cent of GDP has not been reaped so far. Hence, we estimate a potential GDP impact of 0.6-1.2 per cent of which 0.2-0.4 per cent has not yet been harvested.

¹⁷ European Commission (2012h, p. 2)

¹⁸ The Commission also speculates that since the modelling only covers around half of the industries covered by the services directive, it may be that the full potential is 2.4 (instead of 1.2) and that the current gap is 0.8 (instead of 0.4). However, we keep the most conservative estimate, as that seems to be the estimate that the Commission most often presents in the study. It is also in more line with previous studies of the expected impact of the Services Directive.

¹⁹ European Commission (2012h).

3.3 Public procurement

The first procurement directives were adopted in the 1970s to regulate bids and contracts for works and supplies for public bodies. Since then they have been extended and amended many times. At present, the rules on contract award procedures are, mainly, contained in two directives adopted in 2004:

- Directive 2004/18/EC (the so-called Public Sector Directive or Classic Directive). This regulates tender bids and contracts awarded by public bodies, in particular of supplies of goods and services and some public works
- Directive 2004/17/EC (so-called Utilities Directive), which regulates procurement in four specific areas of activity, namely water, energy, transport and postal service.

The directives impose a number of steps that public purchasers must follow before awarding public contracts. These include three types of rules²⁰. First, ensure transparency through publication of notices in the Official Journal (OJEU), apply pre-announced criteria in particular the award criteria that will be used to designate the winner and eventually award the contract on the basis of objective criteria. Second, establish a menu of common procedures such as the introduction of the competitive dialogue and provisions on other procurement techniques such as electronic auctions and dynamic purchasing systems²¹. Third, define the subject-matter of the purchase through non-discriminatory technical specifications.

These provisions make the directives ‘coordination directives’, which do not harmonise public procurement rules in detail. This means that the Member States are allowed to go beyond the minimum requirements set in the directives and it is left much to themselves how to apply the directives in practice.

In 2011 the European Commission released their Evaluation Report on the Impact and Effectiveness of EU Public Procurement Legislation²². The study was based on a sample of 78 infringement procedures opened by the Commission from 2005 onwards, issued with a reasoned opinion and not related with the late transposition of the Directive. It found that 62 of the 78 cases concerned the Classic Directive and that 48 of the cases concerned the awarding of a contract without a previous award procedure with prior publication at EU level.

Furthermore, the Evaluation Report found that direct cross-border procurement has not increased as much as was anticipated. Many economic operators still appear to be deterred from competing for tenders in other Member States by a combination of competitive, structural and legal or administrative factors. As the Report points out:

²⁰ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004

²¹ In Directive 2004/18/EC defined in article 33. It is a system whereby all the tenderers satisfying the selection criteria and having submitted an indicative tender which complies with the specification and any possible additional documents shall be admitted to the system. Indicative tenders may be improved at any time provided that they continue to comply with the specification.

²² Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004

“Direct cross-border procurement does not seem to have increased as much as might have been anticipated or expected. [...] To this extent the Directives have not yet fully achieved their objectives”.
(European Commission, 2011u, p. 152)

Compared to cross-border procurement in the private sector, there seems to be significant potential to increase the share of foreign suppliers in the public procurement process.²³

The evaluation also found that differences in implementation and application of the Directives have led to different outcomes in different Member States. The time taken to complete procedures and the cost to public purchasers vary widely across Member States.

Concrete examples of discrimination in the area of emergency medical services illustrate what kind of barriers a foreign firm might encounter, cf. Box 3.

Box 3 Falck

The Company

Falck is a Danish company providing Emergency Medical Services (EMS) in 34 different countries, eleven of which are EU member states. EMS is a common denomination for pre-hospital and hospital services associated with ambulance services, emergency doctor's services and patient transportation.

- Worldwide revenue (2011): DKK 10.2 billion (approx. €1.3 billion)
- Worldwide Employees: 25,262 employees

Single market challenges

One of the core objectives of the European public procurement procedures, specifically directive 2004/18/EC which regulates tender bids and contracts awarded by public bodies, in particular of supplies of goods and services and some public works, is to enable cross-border competition to improve efficiency in service provision. EMS-services are tendered out in some member states such as Denmark, Germany and Poland, and Falck is one of the main actors in the market, participating in more than 100 public procurement cases yearly.

Considerable success has been achieved through the single market since the introduction of the first public procurement procedures. Nevertheless, there are improvements to be made in the EMS-service area. Companies competing in EMS-tenders in another member state face barriers, specifically:

- Lack of transparency in procedures
- Unfair competition
- Discriminatory measures favouring national service providers and legislative practices seeking to avoid tendering of EMS

Case 1- ISO certification

²³ London Economics, Ecorys, pwc (2011), Public procurement in Europe – cost and effectiveness.

In Poland, a barrier to competition is the different requirements of certification for national service providers and foreign companies. While Falck needs to obtain certificates for all of their medical emergency teams, national providers are limited to obtaining ISO certificates for the healthcare establishment within which medical emergency teams operate.

The National Health Fund in Poland, which is responsible for organization of the healthcare benefits market, ruled in favour of Falck's competitors in 2011. Falck has objected to the decision.

Case 2 - National test in Health Care for qualification

In an EMS public procurement in Cologne 2010, companies competing for a service were required to complete a test of the German health care system to qualify as a bidder. A minimum of 15 employees were supposed to participate in the test, which was to be taken in German. As Falck was in the phase of establishing their service, they only had one manager occupied in Germany, and were not able to fulfil the minimum demand. The minimum requirement of 15 participants favoured German companies with business organisations already in place.

Case 3 - Prolongation of existing contracts

Some German states deliberately avoid public procurement procedures by extending existing contracts. Many states are preparing new legislative initiatives to introduce a provision that ensures and protects existing providers from competition. For example, in Sachsen-Anhalt a new Law on Emergency Medical Services was passed in December 2010 prolonging existing contracts. In Thüringen (Gotha) decision makers have explicitly expressed the "threat" of foreign participants as a reason for prolonging existing contracts.

Case 4 - Red tape

In March 2012, Falck bid on a tender requiring the filling out of 57 individual documents. Based on what the procurer felt was an unclear formulation about management of one of the stations, Falck was disqualified. Falck has appealed the decision.

Single market solutions

The following solutions are proposed for the single market problem

- Increased use of e-procurement to make the procurement process more efficient reducing red tape
- Removing political and administrative barriers to implementing European public procurement procedures in EMS-services by EU authorities
- Mandatory procurement for EMS-services

Source: Based on CE interview June 2012, company website and other material.

An indication of the cost of lack of enforcement

The Commission has estimated the market value of public procurement in the EU-27 to be around 16 per cent of GDP. When zooming in on public procurement open for cross-border competition it is somewhat less: some € 420 billion (about 3.6 per cent of EU GDP) in 2009 was published in the EU's Tender Electronic Daily (TED) as required when the purchase is above the relevant threshold value²⁴.

However, only a small proportion of contracts are actually awarded to firms from another Member State. Direct cross-border procurement accounts for 3.5 per cent of the total value of contract awards published in TED during 2006-9. In addition to direct cross-border procurement, however, there is a considerable volume of indirect cross-border procurement: 13.4 per cent by value during 2006-9.

This seemingly low share of successful foreign business could indicate 'too few' foreign competitors. In a study on private procurement, more than half of the companies covered stated that the majority of their offers came from other countries. In some cases the share of foreign bids was over 90 per cent²⁵. A broader selection of suppliers allows the companies to identify those suppliers with the lowest cost structures, superior technologies and highest quality levels. It allows the companies to exploit the opportunities for global sourcing and e.g. reduce prices.

Examining the relationship between the initial estimated total and the final total values published in contract award notices in 2007, the Commission also finds a correlation between number of bidders and price. In general, it found that the greater the number of bids for a contract the greater the apparent savings²⁶.

The Commission has previously estimated that overall prices for EU-advertised procedures, and as such the directives, are 2.5-10 per cent lower than contracting authorities initially expected. The Commission then estimates the economic impact of the directives. Assuming savings of 5 per cent realised for the €420 billion of public contracts which are published at EU level the Directives could generate an increase in GDP of around 0.1 per cent (0.08 to 0.12 per cent) after one decade.

Based on the high share of cross-border procurement in the private sector, the potential for cross-border public procurement should be significant. To estimate what savings such an improvement might bring, we make the assumption that savings could reach the 'maximum' potential of 10 per cent as a result of more foreign bidders pushing down prices. This would be in line with the findings in the private sector that cross-border procurement gives access to more firms with low-cost business structures. Assuming the Commission's model can be extrapolated in a linear fashion, a doubling of savings from 5 per cent to 10 per cent would translate into a doubling of the impact on GDP: from an increase of 0.1 per cent to an increase of 0.2 per cent.

²⁴ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004

²⁵ London Economics, Ecorys, pwc (2011), Public procurement in Europe – cost and effectiveness.

²⁶ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004

Hence, we suggest that the 0.1 per cent GDP increase due to the procurement directives only realizes half of the maximum potential increase. GDP could rise by another 0.1 per cent if procurement in the public sector were as successful at attracting cross-border suppliers as the private sector is.

3.4 Mutual recognition

The principle of mutual recognition is one of the means of ensuring the free movement of goods within the Single Market. Mutual recognition applies to products which are not subject to EU harmonisation legislation (or to aspects of products falling outside the scope of such legislation).

Under the principle of mutual recognition national technical rules continue to coexist within the Single Market. Mutual recognition ensures, in principle, that a Member State cannot prohibit the sale on its territory of goods which are lawfully produced and/or marketed in another Member State, even if those goods are produced to technical or qualitative specifications that differ from those required of its own goods. However, the Member States may depart from the principle of mutual recognition and take measures prohibiting or restricting access by such goods to the national market. Technical obstacles to the free movement of goods within the EU occur when national authorities apply national rules that lay down requirements to be met by products (e.g. relating to designation, form, size, weight, composition, presentation, labelling and packaging) to products coming from other Member States where they are lawfully produced and/or marketed.

Until 2008, a major problem for implementation of mutual recognition principle had been lack of legal certainty about the burden-of-proof, and which authority in the destination Member State is responsible for proving that a product is not up to the national standards.²⁷ This was one of the reasons for adoption of Regulation (EC) No 746/2008 laying down procedures relating to the application of national rules to products lawfully marketed in a another Member States.

Regulation 764

The EU regime for mutual recognition (until then, based on CJEU case law) has decisively changed with Regulation 764/2008.²⁸ First, in principle, Member States must have a single contact point for free information for business and reference to the competent authorities (thus, spending resources should now be minimized). Second, if mutual recognition is incorrectly applied, the burden-of-proof is now on the Member State, with considerable protection of the company wanting market access with its good.

The Regulation 764 thereby protects the company seeking market access by setting out procedural requirements for denying mutual recognition. The regulation comes into force when an administrative decision will have the effect of:

- Prohibiting the placing on the market of a product

²⁷ European Commission(2012i), New legislative framework for marketing of products <http://ec.europa.eu/enterprise/policies/single-market-goods/regulatory-policies-common-rules-for-products/new-legislative-framework/>

²⁸ Regulation EC/764/2008 of 9 July 2008 laying down procedures relating to the application of certain technical rules to products lawfully marketed in another Member State, OJEC L 218 of 13 August 2008.

- Requiring modification or additional testing of that product before it can be placed on the market
- The product being withdrawn from the market

Actual application of Regulation of 764

The Commission has recently evaluated Regulation 764²⁹, now three years after it came into effect. The findings, which are of a qualitative nature, seem to conclude that the regulation with its change in burden of proof and national contact points (PCP) is disciplining national authorities, improving businesses' access to other Member States' markets and reducing costs for businesses. An interview carried out with the Commission points to a number of incidents where national authorities have changed decision after being made aware of the provisions in 764.

However, it is worth giving attention to three issues while considering the actual application of Regulation 764:

First, both from our interview of businesses operating cross border in the EU, cf. Box 4 and Box 5 and from the information gathered from SOLVIT database and TRIS database, we understand that there is still improper application of regulation 764 which creates technical barriers for free movement of goods within Member States.

An example of a technical barrier is found in the case of Danish VOLA, cf. Box 4.

Box 4 VOLA

The Company

VOLA is a Danish manufacturer and distributor of taps and mixers with headquarters and production in Horsens, Denmark. The company has affiliates in Sweden, United Kingdom, Belgium, Holland, Germany, Austria and Switzerland.

- Worldwide Revenue (2011): 250 DKK million (approx. €33 million)
- Worldwide Employees: 220 total employees

Single market challenges

An innovation of VOLA is a safety cover around the fixture point where the tap connects with the piping. This is hidden in the wall of e.g. the bathroom. The safety cover makes sure that in the case of a leak around the fixture point, the water does not drip inside the wall but is led from back through the pipes eventually ending up in the drain. The device is used in Denmark, Switzerland, Norway and many other countries.

However, regulation BBR6:625 in Sweden, dictates that the fixture point between tap and pipe cannot be placed inside a wall, due to the risk of a water leak going undetected resulting in water inside the wall. Instead, the fixture point must be placed on the outside of the wall, e.g. hidden in a closet. The

²⁹ European Commission (2012i)

Swedish HVAC trade organisation 'Säker Vatten' claims that VOLAs safety cover solution must therefore not be distributed in the Swedish market as the fixture point is placed on the inside the wall, instead of outside the wall.

The regulation is a national technical barrier which keeps VOLA out of the Swedish market and protects domestic producers from outside competition. The regulation is also a barrier to innovation, as innovative products cannot be sold in the Swedish market.

Single market solutions

- Compliance with mutual recognition by changing BBR6:625 so that it encompasses any solution, which ensures that water will not leak inside the walls.
-

Source: Based on CE interview June 2012 with VOLA and other material provided by VOLA.

Box 5 Junckers

The Company

Junckers is a Danish producer of hardwood floors, with headquarters and production in Køge, Denmark. The company has sales offices in seven EU Member States besides Denmark (UK, Ireland, Sweden, Germany, France, Italy and Spain). The company also sells its products in the US and Asia through local vendors.

- Worldwide Revenue (2011): DKK 450 million (approx. €59 million)
- Worldwide Employees: 380 total employees

Standards in Germany

Satisfying EN-standards allows Junckers to label their products with a CE label, which is a guarantee that the product conforms with the essential requirements in terms of safety, health, environmental protection requirements etc. The stamp enables the company to market and sell its product anywhere in the EU.

However, for products sold in Germany, the relevant authority Deutsche Institut für Bautechnik (DIBt) requires more stringent requirements. In addition to the CE label, additional health and environmental impacts of products need to be tested and monitored by an external, German party.

This has led to significantly increase in costs for Junckers. First due to the requirement of additional external monitoring. Second, because DIBt did not accept the Danish testing results produced to obtain the Danish Indoor Label. The validity of the Danish produced testing results were rejected without following the information procedure laid down in the Regulation 764 for products lawfully marketed in another Member State. This forced Junckers to procure additional testing in Germany. In addition to higher cost borne by

Junckers, it has also led Junckers to limit the number of products it offers in the German market as additional testing is counted in millions of Danish kroner per product.

Single market solutions

- A system where authorities that persistently acts in a way that allows barriers to persist should be identified for everyone to see.
-

Source: Based on CE interview with Junckers June May 2012 and company website.

Second, the regulation, in general, requires a change in behavior of national authorities of destination Member States in the way that they shall be active in identifying and then notifying the technical or scientific reasons of denying a product access to their market. The recent Commission evaluation concludes that such a change in behavior of national authorities will only come slowly. Furthermore, Member States are far from always notifying the Commission about decisions as they are supposed to. Change requires new procedures which is time-consuming.

Third, the commission³⁰ identifies some concerns which need further strengthening in the area of mutual recognition. Such as:

- difficulties to demonstrate that a product has been lawfully marketed in another Member State;
- difficulties in identifying which legal provisions apply and which are the relevant national authorities in charge;
- different testing methods relied upon by the Member States and their possible compatibility through mutual recognition; and
- the role of prior authorisation procedures

Considering such concerns actual application of mutual recognition in Member States might be difficult.

An indication of the cost of lack of enforcement

Mutual recognition in the Single Market for goods covers 15 per cent of EU intra-trade in goods, according to the European Commission.³¹

When Regulation 764 came into effect in May 2009, the impact assessment accompanying the proposal suggested a long run potential of a rise in EU GDP of up to 1.8 per cent from a 'perfect' functioning market for goods in the non-harmonized area where mutual recognition applies:

Successfully ensuring the perfect operation of mutual recognition inside the EU tomorrow would produce a maximum possible one-off increase in EU GDP of 1.8%.

(COM (2007) 36 final/SEC (2007), 113/2)

Comment [CvUD8]: Not in references

³⁰ European Commission (2012i)

³¹ European Commission (2012i)

The European Commission evaluation suggests that regulation 764 is working but that it will only fully demonstrate its merits in the long run. Considering the three issues discussed above, we also believe that lack of proper application is likely to play a pivotal role today. How much compared to the 1.8 we cannot say.

Chapter 4

Dispute resolution

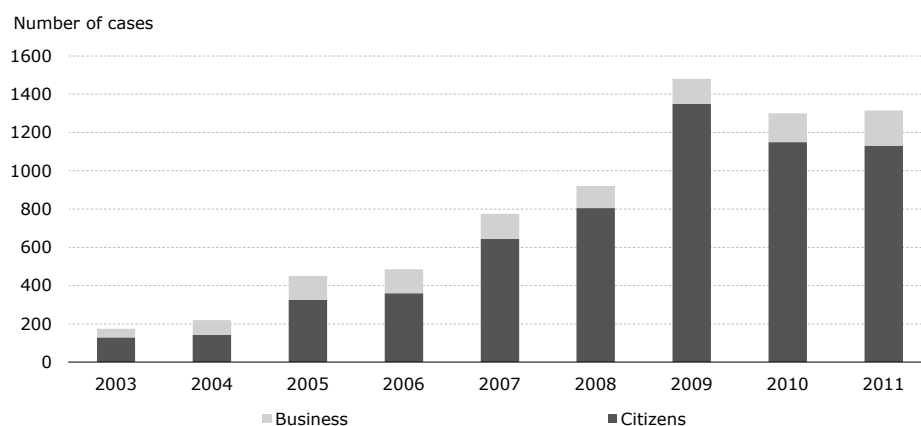
Having described the problems arising in the four areas of tax, services, public procurement and mutual recognition, we now turn to two dispute resolution fora that has shown promising results and that therefore may be of interest going forward.

Dispute resolution in our terminology covers everything from monitoring and surveillance instruments such as transposition deficit, pre-infringement and preventive initiatives such as SOLVIT and formal Commission infringement proceedings. It may capture lacking transposition, incorrect implementation or wrong application so as to ensure that Member States comply with the EU legislation.

In this chapter we focus on one specific dispute resolution forum, SOLVIT, and one instrument for detecting and preventing if national legislation is not conforming with EU-legislation, Directive 98/34 (TRIS). We focus on these, as we believe they hold important lessons for the design of future dispute resolution instruments and fora.

4.1 SOLVIT

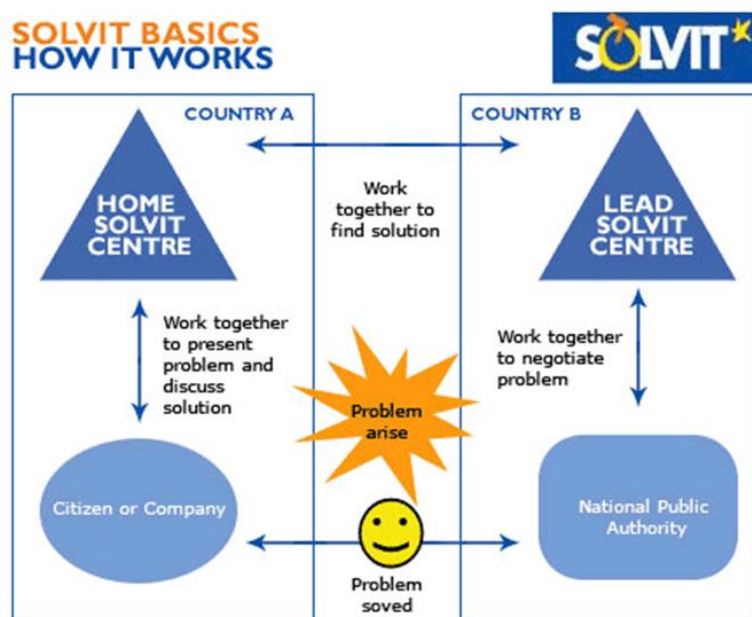
There has been more citizens' participation in SOLVIT than businesses' since its establishment in 2002. As of 2011, more than 75 per cent of the cases are from citizens, cf. Figure 16.

Figure 16 SOLVIT resolution rates

Source: European Commission (2011m) Making the Single Market deliver - Annual governance check-up 2011

Why few businesses are seeking help in SOLVIT

If we start looking into its business model, two SOLVIT centres are usually involved in handling a problem; the *home centre* that receives the request for help and the *lead centre* taking action in the country where the problem has occurred cf. Figure 17.

Figure 17 Basic functioning of SOLVIT centre

Source: SOLVIT Webpage (http://ec.europa.eu/solvit/site/index_en.htm)

SOLVIT, with the help of national public authorities, aims to solve the problem within a ten week deadline. This target is not sufficient to solve businesses' cases which are complex and time-consuming³². For example, procurement procedures generally come with their own deadlines which are often shorter than SOLVIT's own deadlines (often 10 days). Hence, relying on SOLVIT may not be a viable option for companies which provide procured goods and services, as pointed out by Falck, a Danish emergency medical services provider.³³

SOLVIT also has a scarcity of personnel and technical capacity to handle complex business' cases

*"SOLVIT's main weaknesses are scarce resources and limited legal expertise, in particular in light of the increasing variety of cases SOLVIT is called upon to address."
(EU commission³⁴)*

Moreover, SOLVIT centres in some of the larger countries such as Germany, France and UK are understaffed, cf, Table 6. Almost all SOLVIT centre staff has other responsibilities in addition to handle cases³⁵.

³² Interviewing SOLVIT centres confirms this story

³³ CE interview June 2012

³⁴ EC (2012g, p. 6)

³⁵ EC (2012c)

Table 6 Staff resources

	Adequate	Low
SOLVIT centres	Austria	Belgium
	Bulgaria	Cyprus
	Estonia	Czech Republic
	Italy	Denmark
	Latvia	Finland
	Liechtenstein	France
	Malta	Germany
	Poland	Greece
	Portugal	Hungary
	Romania	Iceland
	Slovakia	Ireland
	Slovenia	Lithuania
	Spain	Luxembourg
	Sweden	Netherlands
		Norway
		United Kingdom

Source: European Commission (2012c)

As a case in point, Junckers, a Danish producer of hardwood floors, has faced barriers in other EU member states. Being a small company of 380 employees, it does not have its own compliance department and therefore relies on efficient, effective and transparent dispute support. SOLVIT was an obvious choice for Junckers, as the services is free of charge and it frees up management resources at Junckers that would otherwise have been involved in solving the problem. The company asked the Danish SOLVIT centre to try and solve its problem. However, the process lasted for 1½ years; Junckers felt that the process was too long and opaque.³⁶

Lack of promotional activity about SOLVIT

Many SOLVIT centres have raised the issue that a significant number of businesses have not yet aware of SOLVIT existence. EU commission has also stressed that there is lack of promotional activity from SOLVIT side:

*“While national SOLVIT centres are expected to promote SOLVIT, with support from the Commission, limited staffing often means that SOLVIT centres cannot engage in promotional activities”
(EU Commission³⁷)*

³⁶ In the end, SOLVIT was unsuccessful in removing the barrier for Junckers. See Appendix for entire case description.

³⁷ European Commission (2012g, p. 6)

This might contribute to the fact that fewer businesses than citizens have shown up in SOLVIT.

Businesses may not have incentive to use SOLVIT

Business is reluctant to complain about countries where they want to expand their business or provide their services as it may either offend their customers or it may harm their reputation in the host Member State. Pursuing clients in another Member State is a strategic choice, where other factors than barriers play a much larger role. This leads to business being incentivized to comply with the local circumstances instead of fighting for their EU rights by seeking redress.

A contact from Portuguese SOLVIT centre has provided us the following example where a Portugal construction company faces a problem in Poland, but reluctant to take the case all the way down with SOLVIT as the company afraid to offend their client in Poland.

Box 6 Example from Portugal

"SOLVIT handled a case presented by a big PT company in the construction sector that was facing problems in Poland where it had won a series of public tenders. The case was handled without the name of the PT company being disclosed to the PL authorities. It concerned obstacles to free provision of services. In fact, only engineers who were members of the Polish professional body could be designated as responsible for construction works in Poland. To become a member of this body, foreign engineers had to be approved in a complex exam only available in Polish. The language barrier made it impossible for the PT engineers to become members. To be able to carry out its activities, the PT Company engaged young Polish engineers to be officially designated as responsible for its public works in Poland but in fact each work had a senior Portuguese engineer behind, acting as team leader. Unfortunately, SOLVIT failed to resolve this case. The company referred in the end that it was absolutely out of the question to go any further with this issue. The most important for them was to maintain a good relationship with the PL authorities and to continue to expand their business activities in Poland" (Portuguese SOLVIT centre)

Source: Copenhagen Economics interview with the Portuguese SOLVIT centre

Interviewing SOLVIT centres confirmed that if businesses, especially big ones, face an enforcement problem in the EU, they try to solve it themselves instead of going through SOLVIT as they will have in house legal expert team, which is focused and specialised.

That is the case for the Danish LEGO Group. The LEGO Group is the largest European manufacturer of toys and it often encounters barriers regarding the language choice for labelling when marketing and selling its products in other member states. The LEGO Group most often chooses to resolve such conflicts through dialogue with the retailer and relevant authorities in the destination country. If this approach fails, the LEGO Group may choose to ask the advice of the EU Commission on the matter. Hence, the LEGO Group rarely involves a dispute resolution forum like SOLVIT. Being a large player, the LEGO Group has the resources available to handle the matters itself. And, being in close contact with the Commission when working on guidance documents etc., it is easier to ask

the relevant DG for advice if dialogue with customers and national authorities turns out to be cumbersome.³⁸

Because of these aforementioned factors, SOLVIT has mainly gained exposure to citizens' cases rather than those of businesses. This missing track record of success with businesses' cases may also be a reason why few such cases appear in SOLVIT.

4.2 Directive 98/34

Under Directive 98/34/EC³⁹ (revised twice since, and formerly known as 83/189), the European Commission receives compulsory notifications from the Member States of all national draft laws containing technical regulations (on goods and, a minor part, information services). The notified national draft laws are verified so as to enable the Commission as well as the Member States to detect potential (new) technical barriers or other (new) regulatory barriers to intra-EU cross-border trade. Subsequently, the Commission requests the relevant Member States to amend the draft in such a way as to *prevent* such (potential) barriers.

The Directive 98/34/EC mechanism is remarkable for at least two reasons. First, Member States temporarily renounce their sovereign right and freedom to legislate as they want and when they want. A notification automatically postpones the conclusion of domestic pre-legislative procedures for three months, i.e. the draft cannot be adopted before the end of this standstill period.⁴⁰ Second, notification is not only compulsory but the CJEU has explicitly ruled that non-notification renders the national law adopted subsequently 'unenforceable'. Such a ruling provides strong incentives to notify, thereby raising credibility of the Directive even further.

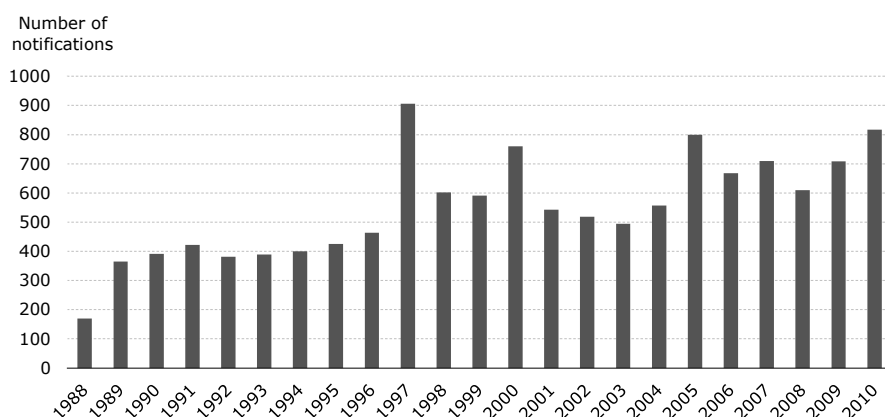
Number of notifications under 98/34

How critical the 98/34 mechanism is for the protection of the internal goods market can be read from Figure 18 showing the notifications over the period 1988-2010. In the period of the EU-12 (1988-1994) annual notifications hovered between 300 and 400 and many of these prompted observations from the Commission and/or Member States, suspecting potential barriers. During the period of the EU-15 (1995-2003), notifications start rising to (sometimes far) beyond 500 a year. A further structural increase can be observed after the first and second Eastern enlargement (2004-2010), approaching an annual average of around 700 a year. In short, for already one and a half decade the notifications number were more than 500, with a recent trend of 700 a year.

³⁸ Based on CE interview June 2012 and company website.

³⁹ Under this directive Member States are obliged to notify to the Commission their draft technical regulations related to all products and to information society services, mainly in the non-harmonised areas. The draft texts and their translations are made available to Member States and the public. Thus, economic operators get acquainted with the rules proposed by the countries in which they market their products. The Commission and the other Member States can react in specific forms if the draft appears incompatible with EU law or if its quality could be improved.

⁴⁰ Depending on a situation, however, such standstill period may be prolonged and take four or six months. In case of a blockage (i.e. when the Commission announces that the proposal concerns a matter which is covered by a proposal for a directive, regulation or decision) it may reach twelve months. If the Council adopts a common position, the national legislative procedure is blocked for 18 months.

Figure 18 Total number of notifications (1988-2010)

Note: The notifications for 2011 are under periods of commenting or 'detailed opinions' longer than 3 months; hence the data cannot be final until much later into year 2012.

2004: enlargement from EU-15 to EU-25; 2007: enlargement from EU-25 to EU-27.

Source: For data between 1988-1998 is from Pelkmans, Vos & di Mauro, 2000, p. 274, based on Commission reports and for data between 1999-2010 is from Pelkmans, 2007; SEC(2009) 1704 of 21 Dec. 2009 and SEC(2011) 1509 of 7 Dec. 2011.

Effectiveness of 98/34 Directive

The effectiveness of 98/34 in protecting the internal goods market can be appreciated once one 'zooms in' on the actual working of the Commission. No less than some 12.500 notifications have been dealt with since 1988. One might assume that, once the mechanism is well-known inside the national administration (between ministries – which requires coordination done in practice by national enquiry points), the mere existence of the mechanism should already exercise some disciplinary effect. Thus, one should expect the potential barriers detected in 98/34 procedures to be a good deal less (in terms of draft laws) than 12.500. Even so, thousands of potential barriers have been prevented in these 23 years for which Figure 18 show data. The effectiveness of 98/34 can be seen in three possible ways:

The first one is through the very existence of the mechanism for more than 25 years now, which is bound to have induced some degree of discipline and effort to ensure EU legal compatibility in ministries in all EU Member States.

Second is via the working of the 98/34 notification procedure which has gradually engendered a greater 'Europeanization' of domestic law-making by the permanent machinery to comment on drafts of other EU countries, and to identify instances of potential and likely 'barriers' springing from draft laws which have no mutual recognition clauses or comprise other (too) restrictive ways to pursue health, safety or environmental objectives.

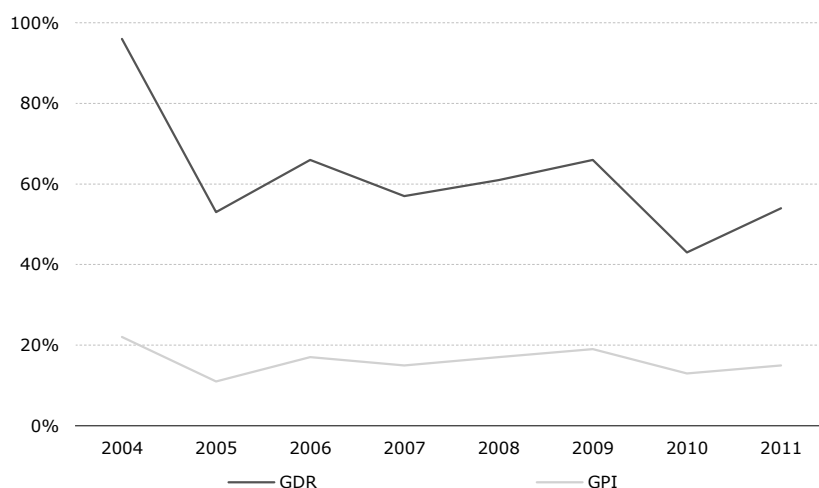
The above two beneficial effects of 98/34 cannot be empirically verified in any meaningful fashion, although that does not mean that such impacts are not real.

The third is through effect that can be verified empirically with the help of proxy measures. We refer to barriers which were actually prevented via the comments and especially the detailed opinions. In the following we assume, for the sake of simplicity, that a detailed opinion is assumed to be 'a barrier prevented' which is in actual practice very often the case. More generally, also comments may point to issues or a potential for later problems or overly complicated or heavy bureaucracy, etc., but comments may just as well provide advice or comparisons with solutions found elsewhere. By zooming in on comments and in particular, on detailed opinions, it is possible to calculate the 'proven prevention' in the annual functioning of the 98/34 procedure.

The above empirical perspective can be provided with the help of two indicators. The first one is the "Gross Detection Rate" (=GDR), showing the reported activities of the procedure in detecting issues, problems and/or likely barriers. The GDR is the ratio of the sum of the comments and detailed opinions of one year, divided by the total number of notifications. The second one is "Gross Prevention Indicator" (= GPI) which focuses on prevention, that is, the share in percentages of all detailed opinions in all notifications in one year. However, the GPI is "gross" because, although it is relatively easy to calculate from TRIS data, it cannot be fully precise in identifying how many new barriers have been prevented per year (assuming that one draft law is equivalent to one barrier). The reason is that more than one Member State can have detailed opinion on the same notified draft law and/or that a Member State as well as the Commission may file a detailed opinion on the same draft law. The GPI is the share (in %) of the notifications which have attracted one or more detailed opinions.

In Figure 19 this empirical perspective has been brought together for the last few years. It can be shown that after many years of having the Directive 98/34/EC and supporting CJEU case-law the trend is that still around half of the notified draft laws lead to an issuance of either comments or detailed opinions or both (2004 was the first enlargement year and is an outlier). When it comes to identified (likely) barriers in national draft laws, the scores are much lower. Nonetheless, the GPI hovers around 15 per cent or so which is far from trivial. These are good proxies of actually prevented barriers to intra-EU goods trade using Directive 98/34/EC.

Figure 19 Detection and effective prevention of barriers in 98/34



Note: GDR = Gross Detection Rate; GPI = Gross Prevention Indicator

Source: CEPS calculation based on TRIS database

There are two issues worth noting in relation to Directive 98/34/EC. First, a national technical rule which has been notified under the Directive could still create barriers to the free movement of goods since it has to be implemented by the national administration. Any misunderstanding or flawed interpretation by the competent authority might result in the rule being wrongly applied. Second, the technical rule might not reflect the latest technological developments and product innovation. Thus, a rule that, during the notification procedure under the Directive, showed no risk of creating trade barriers, can still throw up a barrier for a product which has been lawfully placed elsewhere in the internal market. In that event the Regulation should be applied on a case-by-case basis.

An example on the second issue has come from the company VOLA, which we have presented earlier. The point in this context is that innovations may be denied access: An innovation of VOLA is a safety cover around the fixture point where the tap connects with the piping. This is hidden in the wall of e.g. the bathroom. The safety cover makes sure that in the case of a leak around the fixture point, the water does not drip inside the wall but is led from back through the pipes eventually ending up in the drain. Nevertheless, the Swedish regulation BBR6:625, dictates that the fixture point between tap and pipe cannot be placed inside a wall, due to the risk of a water leak going undetected resulting in water inside the wall. But as the risk of leakage inside the wall is non-existent with VOLA solution, it should be allowed access to the Swedish market.

Chapter 5

Policy options

In this study we have argued for the increased need for attention on improving implementation and real life application of EU legislation in Member States. As focus shifts from issues in the area of transposition to issues in the areas of implementation and application, so must the instruments and fora to ensure enforcement.

This suggests a widening of instruments and fora from formal infringement procedures (which are important as ultimate remedies indispensable for credibility) to a broader spectrum, including different pre-infringement routes, preventive initiatives and efforts to reduce transaction and information costs for business and Member States.

Member States have every interest in a well-functioning Single Market and so have their businesses and consumers. The notion of 'a partnership' between the Commission and the Member States naturally fits the roles of both in the EU system and can stimulate effective problem solving in a variety of ways. Member States should embrace more firmly their ownership of the EU acquis, and in particular, the Single market: the positive experiences in SOLVIT and EU Pilot are good examples.

Furthermore, the joint 'ownership' of the difficult implementation of the Services Directive (2006/123), the IMI system of day-to-day inter-Member-States administrative cooperation and the cooperation of all Member States in the 98/34 committee preventing new technical barriers from arising in the Single Market are good examples that preventive and cooperative approaches can be of great help in preventing enforcement issues. The EU should extend this form of cooperation wherever meaningful.

More specifically, SOLVIT has proven its worth as a resolution mechanism with easy access, fairly high success rate while costing relatively little. However, the resources provided by Member States are unequal and often too few. This ought to be improved. Furthermore, SOLVIT has no competence over other national agencies. This will limit its ability to solve cases and especially make sure that similar cases do not arise later on. Finally, uniting the individual Member State competences on SOLVIT, TRIS, IMI etc. into a single competence center could create more critical mass, provide the Commission with a more complete picture of the situation in each Member States and provide easier access for business.

Furthermore, the rather few and stable business cases in SOLVIT would indicate a potential for more business. SOLVIT centres should consider to increase the quality of their service towards business by e.g. make a 'SOLVIT-business' dealing solely with disputes originating from business. Moreover, as every government agency must prioritise its scarce resources, SOLVIT could direct focus towards the areas of greatest economic importance for the Single Market which are also facing the most problems. This would increase SOLVIT's contribution to EU growth through enforcement.

A successful enforcement strategy should focus on cooperation and transparency but it must be supported by the right incentives and accountability between the Commission, Member States and national agencies and complainant. For example, Member States and national agencies must have incentive to staff properly, detect and solve cases; and complainants must have right incentive to report wrong application. But maybe even more importantly, national agencies acting under EU legislation should have incentive not just to 'properly apply' the legislation, but to 'fully exploit' it.

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Appendix A

See separate appendix report