



EUROPEAN COMMISSION

Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs
Single Market Enforcement
Notification of Regulatory Barriers

Message 317

Communication from the Commission - TRIS/(2023) 00106

Directive (EU) 2015/1535

Notification: 2022/0683/F

Detailed opinion from the Commission regarding a rule on services (article 6, paragraph 2, third indent, of Directive (EU) 2015/1535). This detailed opinion extends the standstill period until 14-02-2023.

Comunicado detallado - Podrobné vyjádření - Udførlig udtalelse - Ausführlichen Stellungnahme - Üksikasjalik arvamus - Εμπεριστατωμένη γνώμη - Detailed opinion - Avis circonstancié - Parere circostanziato - Detalizēts atzinums - Detali nuomonė - Részletes vélemény - Opinioni dettaljata - Uitvoerig gemotiveerde mening - Opinia szczegółowa - Parecer circunstanciado - Podrobný úsudok - Podrobno mnenje - Yksityiskohtainen lausunto - Detaljerat yttrande - Подробно становище - Aviz detaliat - Aviz detaliat.

Abre el plazo de statu quo - Zahájení doby pozastavení prací - Fristen for proceduren indledes - Beginn der Verfahrensfrist - Ooteaja avamine - Εναρξη της προθεσμίας διαδικασίας - Opening of the standstill period - Ouvrir le délai de statu quo - E aperto il termine di procedura - Bezdarbības perioda sākums - Atidėjimo periodo pradžia - A halasztási időszak megnyitása - Ftuħ tal-perijodu ta' waqfien - Begin van de termijn voor de procedure - Otwarcie okresu odroczenia - Abre o prazo de procedimento - Otvorenie pozastavenej periódy - Uvedba obdobja mirovanja - Menettelyn määräämisaika alkaa - Inleder förfarandets frist - Откриване на периода на прекъсване - Deschiderea perioadei de stagnare - Deschiderea perioadei de stagnare.

Die Kommission hat diese ausführliche Stellungnahme am 16-01-2023 empfangen.

The Commission received this detailed opinion on the 16-01-2023.

La Commission a reçu cet avis circonstancié le 16-01-2023.

(MSG: 202300106.EN)

1. MSG 317 IND 2022 0683 F EN 16-01-2023 16-01-2023 COM 6.2(3) 16-01-2023

2. Commission

3. DG GROW/E/3 - N105 04/63

4. 2022/0683/F - SERV

5. article 6, paragraph 2, third indent, of Directive (EU) 2015/1535

6. Within the framework of the notification procedure laid down by Directive (EU) 2015/1535, the French authorities notified to the Commission on 13 October 2022 the draft "Decree on the minimum tariff for a book delivery service" (the "notified decree"). It implements Article 1(1) of Law No 2021-1901 of 30 December 2021 aimed at strengthening both the "book economy" and equity/trust among its actors. Such Law No 2021-1901 of 30 December 2021, the purpose of which is to amend the provisions of Law No. 81-766 of 10 August 1981 on the price of books ("Law on price of books"), had previously been notified to the Commission on 17 June 2021 when it was considered as a draft, and registered under the reference 2021/351/F.

Pursuant to Article 5(2) of the same Directive, on 20 September 2021 the Commission issued comments on the previously notified Law No 2021-1901, in the light of the Treaty on the functioning of the European Union and Directive 2000/31/EC (hereafter the "e-Commerce Directive"). More specifically, the Commission considered that the previously notified law would:



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1) risk amounting to a restriction of the freedom to provide information society services from other Member States than France, enshrined in Article 56 TFEU and Article 3(2) of the e-Commerce Directive;

2) fail to meet the requirements set out in Article 3(4) of the e-Commerce Directive.

Following such comments, the Commission has not received any further information from the French authorities on how those comments had been taken into account.

In their notification message accompanying the present notification, the French authorities point out that this notified decree is aimed at implementing Article 1(I)(2) of Law No 2021-1901 of 30 December 2021 aimed at strengthening the book economy and strengthening equity and trust among its actors. In particular, the notified draft sets out a delivery service minimum rate of EUR 3 for any order of less than EUR 35 of book purchases and quasi-free shipping for orders above this threshold. This minimum rate applies to the delivery of any new books purchased in France, unless orders are collected from a book retailer.

The examination of the relevant provisions of the notified draft has prompted the Commission to issue the following detailed opinion and comments.

1. Detailed opinion

Assessment in the light of the e-Commerce Directive

Article 3(1) and (2) of the e-Commerce Directive

According to the notification message the notified decree will have the same material scope of application as Law No 2021-1901, which it implements.

As concluded in the assessment of notification 2021/351/F, the minimum delivery rate imposed by the decree will apply to any seller of books in and to France, regardless of the sellers' place of establishment. In practice, this means that sellers of books, both online and offline, established in other Member States than France will also be covered by the decree, in so far as they fall within the scope of the Law on price of books. Consequently, the notified decree would also apply to providers of information society services, services as defined in Article 1(b) of Directive (EU) 2015/1535, consisting of the sales of books by electronic means, including those established in other Member States but offering their services in France.

Insofar as the notified measure applies to the selling of books online, the activity which constitutes an information society service, as defined in Article 1(b) of Directive (EU) 2015/1535, Article 3 of the e-Commerce Directive sets out in secondary EU law the freedom to provide services cross-border as enshrined in Article 56 TFEU. Article 3 of the e-Commerce Directive is based on the principle that information society services must be regulated at the source of the activity and are, as a rule, subject to the law of the Member State in which the service provider is established (see recital 22 of the e-Commerce Directive). Under Article 3(1), Member States are required to ensure that information society services providers established in their territory comply with the applicable provisions of their respective national laws applicable to information society service providers or information society services ("the coordinated field"). Article 3(2) adds that Member States may not restrict, for reasons falling within the coordinated field, the freedom to provide such services from another Member State.

The notified draft falls within the coordinated field of the e-Commerce Directive as defined in its Article 2(h), as it entails a requirement regarding the pursuit of the activity of an information society service. The notified draft does not concern any of the fields listed in the Annex to the e-Commerce Directive, which are exempted from the scope of the country of origin principle pursuant to its Article 3(3).

A minimum delivery fee of 3 euros to be added to the average price of books sold in France is expected to result in a



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significant augmentation of the final price that retailers, including those constituting providers of information society services, will be able to offer to potential consumers. As described in the Commission's comments to notification 2021/351/F, the possibility to provide an attractive offer, including price comparison of the final product (i.e., including any delivery fees) is essential for accessing the market for the sale of books of other Member States. In addition, as regards the online sale of books, French distance sellers are more likely to have the infrastructure in place to offer viable alternatives to delivery by post (e.g., delivery in retail outlets or through physical outlets). Therefore, the Commission is of the view that the minimum shipping rate established in the notified decree would, in combination with Law No 2021-1901, appear to more heavily affect online retailers that do not have any presence in France and could entail a de facto discrimination in their regard.

Consequently, and taking also into account the assessment of notification 2021/351/F, the Commission is of the view that the obligations imposed by the notified draft entail a restriction of the freedom to provide information society services from other Member States than France prohibited under Article 3(2) of the e-Commerce Directive.

Article 3(4) of the e-Commerce Directive

Article 3(4)(a)(i) of the e-Commerce Directive lists exhaustively the reasons allowing a derogation from the principles set out in Article 3(1) and (2). Article 3(4)(a) also requires that any derogation has to be targeted ("taken against a given information society service"), in view of the prejudice – or the serious and grave risk of prejudice – of the service to the objective invoked to justify the restrictive measures. In addition, in accordance with points (ii) and (iii) of that provision, the measures must be proportionate to those objectives.

In their notification, the French authorities indicate that the objective of the notified measure is 'to maintain a dense and diverse network of book retailers, ensuring the widest public access to the diversity and quality of the publishing offer and, in so doing, to the creative work itself' and [...] 'to prevent a commercial practice of charging quasi-free delivery costs systematically, regardless of the economic balance of the transaction or activity'. According to them, '[t]his practice undermines the diversity of forms of the book trade, between online sales sites and between the latter and physical shops, all of which compete in the same market' [...] and 'is also not unfair insofar as it favours operators of a considerable size who are active in sectors that go beyond the book sector'.

However, none of the objectives mentioned by the French authorities are among the ones exhaustively listed in Article 3(4) of the e-Commerce Directive that could justify a derogation from the country of origin principle. Furthermore, such objectives may be accepted only if they serve as means that are suitable and necessary to achieve an imperative requirement in the public interest.

In this regard, and as was also the case in the previous notification 2021/351/F, the French authorities have failed to provide any assessment that would support the adequacy and proportionality of this measure to attain the alleged objectives. This assessment is essential to justify any derogation from the general principle set out in Article 3 of the e-Commerce Directive. In the absence of such assessment, the Commission cannot assess how this minimum shipping rate could lead to the preservation of a "rich and diversified cultural offer", i.e., the specific policy objective of the Law on price of books that introduced the fixed book price system that the notified measure is purported to support, assuming that such objective could be accepted under Article 3(4)(a)(i) of the e-Commerce Directive.

In addition, pursuant to Article 3(4)(b), certain procedural requirements must be met for a Member State to derogate from the home state control principle. Specifically, before taking the restrictive measures in question, the "host" Member State (in this case France) should request the "home" Member State of the service provider(s) concerned to take measures to address the identified public policy problem. If that Member State fails to take (adequate) measures, it must, together with the Commission, subsequently be notified of the measure that the "host" Member State intends to take. To the Commission's knowledge and on the basis of the information provided in the context of this notification, the French authorities have not fulfilled these procedural requirements mandated by Article 3(4)(b).

In view of all of the above, the Commission is of the view that the adoption of the notified decree, in combination with



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Law No 2021-1901, will result in an undue restriction to the free provision of information society services in the French territory in violation of Article 3 of the e-Commerce Directive.

Assessment in the light of Articles 34-36 TFEU

Additionally, the notified measure (the imposition of a minimum tariff of EUR 3 for the delivery of any order of books of less than EUR 35, unless they are collected from a book retailer) must be assessed in the light of Articles 34 to 36 TFEU.

Restriction

According to settled case-law, all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, trade within the EU should be considered as measures having an effect equivalent to quantitative restrictions and are, on that basis, prohibited by Article 34 TFEU (see, inter alia, Case 8/74, Dassonville, paragraph 5).

In so far as the notified measures do not concern the characteristics of the goods concerned, namely books, but the arrangements under which they may be sold, they must be regarded as rules concerning selling arrangements (joined cases C-267/91 and C-268/91, Keck and Mithouard, paragraph 15). However, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not as such as to hinder directly or indirectly, actually or potentially, trade between Member States, within the meaning of the Dassonville judgment, if those provisions meet two cumulative conditions: they apply to all relevant traders operating within the national territory and they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States (Keck and Mithouard, paragraph 16).

In the present case, the Commission questions the fulfilment of the second condition, given that books published in France are much more likely than books published in other Member States to be available in brick-and-mortar book retailers settled in French territory. Books published in other Member States in languages other than French would be particularly affected. In addition, it should be noted that sellers established in other Member States are always distance sellers, so the notified measure is more of an obstacle to them than to those established in France (see case C-148/15, Deutsche Parkinson Vereinigung, paragraph 23).

Therefore, the notified measures would constitute, in the Commission's view, a measure having equivalent effect to a quantitative restriction on imports of goods under Article 34 TFEU.

Justification

A measure which constitutes a measure having equivalent effect can only be justified on one of the grounds listed in Article 36 TFEU or by an overriding requirement in the public interest.

As regards the objective of maintaining a dense and diverse network of book retailers, the Commission would like to recall that objectives of a pure economic nature cannot justify restrictions to the fundamental freedoms of the Treaty (case C-398/95, Ypourgos Ergasias; case C-164/99, Portugaia Construções). In that vein, the protection of certain types of economic operators over other types or the limitation of the economic incentive for consumers cannot, by themselves, constitute an overriding requirement of general interest.

The French authorities also invoke as policy objective of the notified measures 'ensuring the widest public access to the diversity and quality of the publishing offer and, in so doing, to the creative work itself'. Objectives of cultural interest are explicitly recognised by Article 167 TFEU. In this context, the Court of Justice has recognised the protection of books as cultural objects as an overriding requirement in the public interest capable of justifying measures restricting the free movement of goods (see case C-531/07, LIBRO, paragraph 34). However, the French authorities would still have to substantiate that those measures are appropriate for achieving the objective fixed and do not go beyond what is necessary to achieve it. In the present case, the French authorities have not provided such reasoning in order to justify a



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derogation from Article 34 TFEU.

Furthermore, the French authorities have not yet provided an assessment of less restrictive alternative measures that could have been considered to achieve the stated cultural policy objective. In this regard, several stakeholder contributions received in the context of the present notification point to the possibility of various alternative measures (e.g., targeted or differentiated application based on the availability of titles or categories or formats of books through the different sale channels, reduced postal rates for bookshops or support to the digitisation of bookshops).

For the reasons stated above, the Commission delivers a detailed opinion provided for in Article 6(2) of Directive (EU) 2015/1535 to the effect that it considers the notified draft could be in breach of the above-mentioned provisions of the e-Commerce Directive and Articles 34-36 of the Treaty on the Functioning of the European Union, were it to be adopted without giving due consideration to the above remarks.

The Commission would remind the French authorities that under the terms of article 6(2) of the above-mentioned Directive (EU) 2015/1535, the delivery of a detailed opinion obliges the Member State which has drawn up the draft technical regulation concerned to postpone its adoption for four months from the date of its notification.

This deadline therefore comes to an end on 14 February 2023.

The Commission further draws the attention of the French authorities to the fact that under this provision the Member State which is the addressee of a detailed opinion is obliged to inform the Commission of the action which it intends to take as a result of the opinion.

The Commission furthermore invites the French authorities to communicate to it on adoption the definitive text of the draft technical regulation concerned, in accordance with Article 5(3) of Directive (EU) 2015/1535.

Should the French Government not comply with the obligations foreseen in Directive (EU) 2015/1535 or should the text of the draft technical regulation under consideration be adopted without account being taken of the above-mentioned objections or be otherwise in breach of European Union law, the Commission may commence proceedings pursuant to Article 258 TFEU.

2. Comments

Assessment under the Postal services Directive

According to article 12 of Directive 97/67/EC (as amended by Directives 2002/39/EC and 2008/6/EC) (hereafter the "Postal services Directive"), Member States shall take steps to ensure that the tariffs for each of the services forming part of the universal service are, amongst others, affordable and cost-oriented.

The Commission notes that, while sellers of books are not addressees of Article 12 of the Postal services Directive, which exclusively applies to universal services provided by universal service providers, it would, however, be relevant to understand how the rate of EUR 3 for delivery of items with a value of less than EUR 35 has been established in relation to underlying delivery costs.

In particular, one should bear in mind that the large majority of at least bigger online book sellers would avail themselves of bulk mail tariffs outside the universal service that are lower than universal service tariffs. Smaller online booksellers may only be able to use universal service tariffs, and the tariffs they charge may still be higher than the minimum tariff imposed. As a result, while the notified measure would reduce the difference between the tariffs charged by bigger and smaller online sellers, because bigger sellers cannot charge less than EUR 3, the tariffs of smaller operators may still be higher and not competitive compared to those of the bigger operators. As a consequence, online consumers may still prefer to purchase from the biggest sellers, and not from the smaller operators that the notified measure intends to favour.



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For the reasons stated above, the Commission invites the French authorities to take the above comments into account.

The Commission services are open to a close cooperation and discussion with the French authorities on possible solutions to the identified issues in full respect with EU law.

Thierry Breton
Member of the Commission
European Commission

Contact point Directive (EU) 2015/1535
Fax: +32 229 98043
email: grow-dir2015-1535-central@ec.europa.eu