Minutes of the 135th meeting of the Technical Regulations Standing Committee (SG code: X01900)

Brussels, 20 April 2021

1. Approval of the agenda of the 135th meeting of the Technical Regulations Committee

The Chairman, Head of Unit E.3 "*Notification of Regulatory Barriers"* in the Commission (EC) Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (GROW), welcomed the Committee members/observers to the 135th meeting of the Technical Regulations Committee.

He informed the Committee members/observers about the reorganisation of DG GROW and about the new unit E.3 "*Notification of regulatory barriers*". The Chairman presented the new members of the Unit.

The Chairman reminded the participants that the minutes of the 134th meeting have been approved by written procedure and sent to Committee members/observers on 16 February 2021 and were also published in CIRCABC.

The Chairman recalled that the draft agenda was sent to Committee members/observers on 25 February 2021, that two additional points have been requested by Sweden, and that the final agenda was sent on 29 March 2021. The agenda of the meeting was adopted as proposed.

2. Nature of the meeting

The meeting was not public.

3. Points discussed

3.1. The application of Directive (EU) 2015/1535 in 2020

GROW E.3 presented the statistics concerning notifications made in 2020.

In 2020, a total of 895 draft technical regulations relating to products and information society services were notified to the Commission in the framework of the notification procedure laid down by Directive (EU) 2015/1535. This is almost 1/3 more than in 2019, when 694 draft texts were notified, and also much more than during the previous years, where the peak was registered in 2015 with 776 notifications. Concerning the notifications per Member State, France had the highest number of notifications in 2020 with 141 texts, out of which almost half concerned COVID-measures, followed by Germany (84), Denmark (72), Sweden (69) and the Netherlands (63). The fewest notifications, as regards the Member States, were registered from Cyprus and Portugal (1

notification each). As regards the EFTA-EEA countries, Norway ranked in the middle of the whole table (17 notifications).

In terms of sectors, as during previous years, construction was the sector with the highest percentage of notifications (18%), followed by foodstuffs and agriculture (16 %), Health and medical equipment (10%), transport (9%), Pharmaceuticals and cosmetics (7%), Information Society Services (7%), Goods and miscellaneous products registered (6%), Environment also (6%), Chemicals (5%), Domestic and leisure equipment again (5%), Energy, Minerals and wood (4%), Telecom (3%) and Mechanics (2%).

As regards the urgency procedure, it was requested for 189 notifications, of which 14 were withdrawn and 2 not considered (they did not concern any product or information society services related measures). The urgency procedure was accepted in 164 cases (COVID related notifications were, in principle, considered as fulfilling the urgency criteria of Art. 6(7) of the SMTD, "serious and unforeseeable circumstances") and refused in 23 cases (approx. 10% of all the urgency requests).

As already mentioned during the last Committee-meeting of October 2020, the SMTD has played a central role in facing the restrictions to the free movement of goods and information society services erected by the Member States since the beginning of the COVID-pandemic. Between March and December 2020, the Member States used the "urgency procedure" for COVID-19 related national legislation for more than 150 notifications. This represents three quarters of all urgent notifications in 2020 (in total almost 200 notifications). In comparison, the urgency procedure was used only 39 times during the whole year of 2019.

The measures most commonly notified with the urgency request related to medicines (critical medicines/substances necessary for the treatment of COVID-patients), protective equipment, masks, medical devices and in vitro medical devices, disinfectants and alcohols needed for their production. More recently, the notified measures concerned also the distribution of goods and services as well as the organisation of testing and the vaccination campaign.

Concerning the reactions to notifications in 2020, the Commission made comments on 134 notifications, issued 40 detailed opinions and did not block any notification. For their part, the Member States issued 142 comments and 53 detailed opinions in response to projects notified by other Member States.

In 2020, more than 1.9 million searches were made on the TRIS website, the number of notification displays was almost 1.3 million. Regarding the number of interested parties who subscribed to the mailing list, their number reached 6,467 subscribers.

3.2. Practical implementation issues

3.2.1. Withdrawal of the United Kingdom from the EU and Northern Ireland Protocol – consequences for the application of Directive (EU) 2015/1535

GROW E.3 reminded the TRIS practicalities with regard to notifications from Northern Ireland. The draft technical regulations from the UK will be identified with the code XI. Member States can send a request for supplementary information (message 787), comments (message 781) and detailed opinions (message 785) on UK notifications. In case of detailed opinion, Member States react to the reply of the UK to their detailed opinion with message 7.

The UK has limited access to the restricted TRIS: they access only reactions concerning the UK notifications.

3.3. New proposal for a regulation on sustainable batteries

GROW I.3, responsible for Green and Circular Economy within DG GROW, presented the new proposal for the batteries regulation that follows from the evaluation of the Batteries Directive 2006/66/EC and the ecodesign study launched by the Strategic Action Plan on Batteries. Batteries are one of the key enablers for sustainable development, green mobility, clean energy and climate neutrality. In order for the EU's product policies to contribute to these objectives, it needs to be ensured that batteries marketed and sold in the Union are sourced and manufactured in a sustainable manner. It therefore addresses the entire life cycle of batteries.

The proposal concerns sustainability, safety, labelling and information requirements for the placing on the Union market of batteries as well as due diligence requirements for economic operators, and requirements for the end-of-life treatment of waste batteries. Sustainability requirements include design requirements such as on performance and durability, but also requirements that are new to EU product legislation, such as on the life cycle carbon footprint and on recycled content. Certain requirements apply only to specific categories of batteries, e.g. for reasons of proportionality, or if already addressed by other legislation (safety).

The proposal aims to harmonise the rules on batteries across the EU, both for placing batteries on the EU market and at their end of life, and is therefore based on Article 114 of Treaty on the Functioning of the EU. The proposal, presented on 12 December 2020, is now under discussion in the Council and the European Parliament, which may conclude in 2022.

3.4. Swedish National Board of Trade report on country-of-origin labelling for food products

The National Board of Trade Sweden presented the report "Made in EU – how country of origin labelling affects the Internal Market". The report analyses national requirements on mandatory country of origin labelling (COOL) among EU Member States. The report compares the notification procedures under Directive (EU) 2015/1535 and Regulation (EU) 1169/2011. The analysis in the report shows that the notification procedures do not offer the same guarantees with regard to review and transparency, which in turn can affect trade on the Internal Market.
The report can be downloaded via the following link:
https://www.kommerskollegium.se/publikationer/rapporter/2020/made-in-eu-how-country-of-origin-labelling-affects-the-internal-market/

3.5. Swedish non paper "Maintain and reinforce the functioning of free movement of goods"

During the pandemic, the importance and need for the Single Market Transparency Directive to avoid negative consequences for the free movement of goods became very clear. Sweden presented its non paper as a way forward for a fully functioning single market also in times of crisis and also be seen as part of an ongoing discussion regarding a better enforcement agenda.

It contains suggestions on how to strengthen the notification procedure for goods (without a revision of Directive (EU) 2015/1535):

- Launch an evaluation on experiences from different stakeholders in relation to the free movement of goods and the Single Market Transparency Directive.
- Introduce a working group within the framework of SMET to focus on strengthening the single market even in times of crisis.
- Improve the 'will for notification'. A partnership approach between the Commission and the Member States is crucial for a well-functioning single market and a better enforcement agenda. It should also be highlighted that technical rules are correspondingly not applicable in national courts if they have not been notified, if they should have been.
- Notifications must be fairly detailed and motivated. It is essential that each notification includes a motivation as to the necessity of the technical rule and its effects on the free movement of goods. The principle of proportionality, a clear motivation, an impact assessment and a clause on mutual recognition should be considered in each notification.
- Need for more transparency. The procedure can be improved by increased transparency concerning the status of each notification. This can be done through technical improvements in the TRIS database.
- A process-oriented approach in the Technical Regulations Committee. There is a need to promote and encourage a more general and process-oriented approach/discussion in the committee regarding the notification procedure for goods (e.g. exploring trends in notifications and relevant issues related to the procedures).

Finland took the floor to support the Swedish suggestions.

3.6. Recent CJEU cases

DG GROW E.3 explained the latest CJEU judgements and pending cases concerning the interpretation of the SMTD provisions:

- **Judgment of the Court of 3 December 2020 in Case C-62/19 *Star Taxi App*.**

The judgment was delivered in a preliminary ruling, presented in the committee meeting of 1 April 2019, referred by a regional court from Bucharest relating to a decision of the City of Bucharest of 2017.

In essence, the decision amended the definitions of "dispatching" and "computer application" to include within the scope of the existing regime applicable to taxi dispatchers the intermediation services provided by means of online applications ensuring interaction between professional taxi drivers and their clients. The underlying procedure in Romania was initiated by Star Taxi, a company operating an online software/application (an online platform) ensuring interaction between professional taxi drivers and taxi users. Star Taxi App was fined 4,500 Romanian lei (approximately € 929) for having infringed the rules laid down by the City of Bucharest. It contested the fines before the national court, invoking, inter alia, the lack of prior notification of the provisions adopted by Bucharest under Directive (EU) 2015/1535 (as well as the breach of the Services Directive). The Regional Court of Bucharest sent four preliminary questions to the CJEU related to the e-Commerce Directive, the Services Directive and

the SMTD. With respect to the SMTD, the question was whether the decision of the Bucharest municipality was subject to prior notification to the Commission.

In its Opinion delivered on 10 September 2020, presented on the 134th meeting, the Advocate General concluded that a service consisting in putting taxi passengers directly in touch, via an electronic application, with taxi drivers constitutes an Information Society service where that service is not inherently linked to the taxi transport service so that it does not form an integral part of the taxi transport service, but the Decision of the Bucharest Municipal Council does not constitute a "rule on information society service" within the meaning of Directive (EU) 2015/1535, because the challenged provisions of the City of Bucharest apply only in Bucharest and cannot be considered as "compulsory [...] in a Member State or a major part thereof", and that the City of Bucharest has not been included by Romania among the authorities required to notify draft technical regulations.

In its judgment of 3 December 2020, the Court confirms the Commission's position and the Opinion of the Advocate-General that a service consisting in connecting via an electronic application, for remuneration, taxi passengers with taxi drivers, where the provider of that service does not set the price of the journey (or guarantee that it will be collected from those persons, who pay it directly to the taxi driver) nor does it control the quality of the vehicles and their drivers, constitutes an information society service. This aspect is essential for determining which EU rules apply in the present case (i.e., the e-Commerce Directive or the Services Directive). The judgment confirmed that the question whether the provider of an online application offers merely an information society service or its service is part and parcel also of the underlying service (in this case of transport by taxi) must be assessed on a case-by-case basis and taking into account whether the provider of the app exercises a decisive influence over the underlying service.

For the case of Star Taxi, the Court considered that the service provided by Star Taxi consists in an add-on to a pre-existing service, which is not essential for the provision of the underlying service (i.e., transport by taxi service). The Court noted that through the online intermediation service Star Taxi does not create the offer (as it was the case in the *UberPop* case) inasmuch as it does not select the taxi drivers, fix the fares or receives remuneration for the rides or exercise control over the quality of the vehicles and the drivers. Accordingly, the intermediation service provided by Star Taxi cannot be considered as an integral part of the underlying transport (by taxi) service.

Concerning the SMTD, the Court considered that a national legislation on services cannot be considered as specifically aimed at regulating information society services (criteria to fall within the scope of the Single Market Transparency Directive), if it makes no mention of the information society and applies to all kinds of 'dispatching' service without distinction, whether provided by telephone or by IT application.
Finally, the Court also confirmed that, to be qualified as a "technical regulation", a national measure should not only be considered as rules on information society services, but also be binding de jure or de facto, in particular, for the provision of the service concerned or its use, in a Member State or a significant part of it.

- **Judgment of the Court of 22 October 2020 in Case C-275/19 *Sportingbet and Internet Opportunity Entertainment***

The judgment was delivered in a preliminary ruling, presented in the Committee meeting of October 2019, submitted by the Supremo Tribunal de Justiça (Portugal), in proceedings between Portugal's lottery and retail sports-betting monopoly (Santa Casa da Misericórdia de Lisboa), on the one hand, and Internet Opportunity Entertainment Ltd

and Sportingbet, proposing online games of chance and betting. The case relates to Portuguese legislation of 1989 and of 2003 on the monopoly on gambling and betting (and then on online gambling and betting) granted to Santa Casa, a non-profit legal entity which carries on activities of public interest. Sportingbet and Internet Opportunity Entertainment have proposed online games of chance and betting and have organised an advertising campaign with 2 sport clubs. An action has been brought against Sportingbet, IOE and the 2 clubs unlawful activities. In their defence, they invoke that the Portuguese Decree-Law of 2 December 1989 (the Gaming Law) and Decree-Law of 8 November 2003 are not applicable because have not been notified to the Commission.

The questions were whether provisions of Decree-Law of 2 December 1989 laying down the regulatory provisions governing all types and forms of operating games of chance and of Decree-Law of 8 November 2003 adapting the legal framework governing lotteries, lotto games and sports betting in order to take account of technical developments enabling games to be offered by electronic means, in particular the internet, be considered as technical regulations in the meaning of Directive 98/34/EC, and declared unenforceable in so far as they were not notified to the Commission prior their adoption.

In its judgment of 22 October 2020, the Court assessed separately the Decree-Law of 2 December 1989 and the Decree-Law of 2003.

First, concerning the Decree-Law of 2 December 1989, it was assessed in the light of Council Directive 83/189/EEC. In the initial version of the SMTD, the concept of 'technical regulations was limited to the one of "technical specifications", defined as "a specification contained in a document which lays down the characteristics required of a product such as levels of quality, performance, safety or dimensions, including the requirements applicable to the product as regards terminology, symbols, testing and test methods, packaging, marking or labelling". The Court concluded that national legislation, such as the Portuguese Decree-Law of 1989, which provides that the right to operate games of chance is reserved to the State and may be exercised only by undertakings that are established as public limited companies, to which the Member State concerned awards the corresponding concession, and which lays down the conditions and the zones for exercising that activity does not amount to a 'technical regulation' within the meaning of the 1983 version of the Directive.

The Decree-Law of 2003 was assessed in the light of Directive 98/34/EC, as amended by Directive 98/48/EC, in force in 2003. The Court ruled that a national legislation which provides that the exclusive right to operate certain games of chance awarded to a public entity for the entire national territory is to include such operations on the internet constitutes a 'technical regulation' within the meaning of the Directive, and in particular a rule on information society service. Concerning the interpretation of Directive 98/34/EC, as amended by Directive 98/48/EC (which scope is more or less identical to the current SMTD), the Court gives some guidance on the concept of rule on information society service. The Court recalls that provisions relating to the prohibition of offering games of chance on the internet, the exceptions to that prohibition, the restrictions placed on offering sporting bets on the internet and the prohibition of broadcasting advertisements for games of chance on the internet may be classified as 'rules on services', in so far as they concern an 'Information Society service'.

The Court also confirmed its case-law that the failure to communicate that regulation to the European Commission, in accordance with the directive, makes that legislation unenforceable against individuals.

- **Judgment of the Court of 17 December 2020 in joined Cases C-475/19 P and C-688/19 P *Germany v Commission***

In its judgment of 10 April 2019, the General Court of the EU dismissed the action, brought by Germany, asking to annul Commission Decisions on the maintenance with a restriction in the Official Journal of the European Union of the reference of harmonised standards EN 14342:2013 and EN 14904:2006 and Commission communications relates to these 2 standards. The General Court ruled that, while until the adoption of Regulation (EU) No 1025/2012 on European standardisation, Directive 98/34/EC regulated technical regulations and standards, Regulation (EU) No 1025/2012 replaced all provisions of Directive 98/34/EC related to the European harmonisation procedure, and that since the entering into force of Regulation (EU) No 1025/2012, the competency of the Committee of Directive 98/34 and, later, of the Committee of Directive (EU) 2015/1535 has been limited to the technical regulations.

On 20 June 2019, Germany brought an appeal against the judgment of the General Court. In its judgment of 17 December, the Court of Justice confirmed the ruling of the General Court and dismissed the appeals, ordering Germany to bear, in addition to its own costs, those incurred by the European Commission in relation to the present appeals and to the proceedings before the General Court of the European Union.

3.7. The new Drinking Water Directive

DG ENV C.2, responsible for Marine Environment & Water Industry, presented the revised Drinking Water Directive, which was definitely adopted on 16 December 2020.

Member States will have until 12 January 2023 to transpose it into their national legal system. In line with recommendations from the World Health Organization (WHO), the new directive updates the existing safety standards and establishes a 'watch-list' mechanism for substances and compounds of concern for drinking water. It also introduces the 'risk-based approach' (RBA) covering the entire supply chain. The RBA helps to focus on the most important issues for the protection of public health, in accordance with WHO guidelines for drinking water quality.

Another new provision places an obligation on Member States to take measures to improve or maintain access to safe drinking water for all, in particular to vulnerable and marginalized groups. The Directive also improves transparency for consumers on efficiency of water suppliers. Finally, it introduces new provisions on substances/materials in contact with drinking water. Several delegated acts, implementing acts and technical guidelines will be adopted by the Commission in the coming years to implement the various provisions of the directive (for example: to develop a methodology to measure micro-plastics, to develop analytical methods for PFAS, etc.).

3.8. IT matters

DG GROW E.3 updated the Committee members/observers about the IT issues, namely the progress on the development of the new TRIS system, which should be available beginning 2022, and the state of play of the migration of the system to the new IT platform, which will take place in May, hopefully without any technical problems.

Concerning the maintenance of the current version of TRIS, DG GROW B.3, responsible for the IT System Development within DG GROW, mentioned the new User Interface application introduced in November 2020, as well as the ongoing upgrade of the system with respect of the translation process, given the new contractor providing the translation since 1 March 2021.

3.9. Vademecum

The revised guidelines (updated essentially with the references to the provisions of Directive (EU) 2015/1535 and the recent case law) was translated into all official languages. It will be uploaded in the restricted TRIS, in the Library space, as well as in the public TRIS, to replace the old guidelines.

4. Next meeting

The following date has been identified to hold the next meeting of the group: **Thursday 26 October**, hopefully in physical format.

5. List of participants

Members of the group:

EU Member States:

Austria
Belgium
Bulgaria
Croatia
Czech Republic
Denmark
Estonia
Finland
France
Germany
Greece
Hungary
Ireland
Italia
Latvia
Lithuania
Luxembourg
The Netherlands
Poland
Portugal
Romania

Slovakia
Slovenia
Spain
Sweden

Other entities:

EFTA Secretariat

Observers:

Liechtenstein - Norway - Turkey

Commission services:

DG GROW units B.3, E.3 and I.3
DG ENV unit C.2