EUROPEAN COMMISSION
DIRECTORATE-GENERAL FOR INTERNAL MARKET, INDUSTRY, ENTREPRENEURSHIP AND SMES
Single Market Policy, Regulation and Implementation
Regulatory Barriers

Minutes of the 134th meeting of the Committee on Technical Regulations

Brussels, 13 October 2020

1. Approval of the agenda of the 134th meeting of the Technical Regulations Committee

The Chairman, Head of Unit (HoU) B2 "*Prevention of Technical Barriers"* in the Commission (EC) Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (GROW), welcomed the Committee members/observers to the 134th meeting of the Technical Regulations Committee, which is the first virtual meeting. He also welcomed all Members who cannot usually attend the meeting which takes place in Brussels and who participate in this virtual edition.

The Chairman apologised for the absence of interpretation, because of the online formula. He reminded the participants that all powerpoint presentations have been communicated to the Committee members/observers in advance.

The Chairman reminded the participants of the technical instructions with respect to the meeting, to keep the camera switched off and the microphone muted except when taking the floor, in order to avoid loss in sound quality or disturbance, and the need to use the "raise your hand" feature to get the attention of the Chairman, and to lower the hand after speaking.

The Chairman presented two new members of the Unit: a colleague responsible for foodstuff and agricultural products, and a colleague managing the TRIS database.

The Chairman reminded the participants that the 133rd meeting was cancelled and that the minutes of the 132nd meeting have been approved by written procedure and sent to Committee members/observers on 30 June 2020 and were also published in CIRCABC.

The Chairman recalled that the draft agenda was sent to Committee members/observers on 18 September 2020, that no additional point had been requested by the Committee members/observers, and that the final agenda was sent on 8 October 2020. The agenda of the meeting was adopted as proposed.

2. The application of Directive (EU) 2015/1535 in 2019

GROW B2 presented the statistics concerning notifications made in 2019.

In 2019, a total of 694 draft technical regulations relating to products and information society services were notified to the Commission in the framework of the Directive

2015/1535 notification procedure. This is slightly less than during the 4 previous years when more than 700 notifications were registered each year.

Concerning the notifications per Member State, Poland had the highest number of notifications in 2019 (62 – most of them in the agricultural sector), followed by Austria (59), Germany (57), France (56) and Netherlands (49).

In terms of sectors, as during previous years, construction was the sector with the greatest number of notifications (167), followed by foodstuffs and agriculture (163), information society services (63), transport (57) goods and miscellaneous products (37), mechanics (35) and energy (34).

As regards the urgency procedure, it was requested for 39 notifications of which 3 were withdrawn. The urgency procedure was refused in 7 cases and accepted in 29 cases. As usual, the highest number of urgency request concerned notifications in the field of new psychoactive substances.

Concerning the reactions to notifications in 2019, the Commission services sent 76 requests for supplementary information. The Commission made comments on 155 notifications, issued 18 detailed opinions and 20 detailed opinions with comments on notifications. 2 notifications were blocked by the Commission for a period of 12 months due to current harmonisation work at Union level.

For their part, the Member States sent 41 requests for supplementary information, issued 64 comments and 30 detailed opinions in response to projects notified by the other Member States.

In 2019, more than 197,000 searches were made on the TRIS website, the number of displayed notifications was over 1.8 million. Regarding the number of interested parties who subscribed to the mailing list, their number reached 6,432 subscribers.

The Chairman updated the Committee members/observers on the study on non-notification, commissioned to screen the draft technical regulations not notified by Member States and to assess the application of non-applicability by national courts. The study covers 3 years (2017 to 2019). The Commission has received the first results concerning 2017. The results are currently under analysis. The Committee members/observers will be informed about the outcome of the study.

The Chairman announced some trends in 2020 linked to the COVID-19 crisis. Since the beginning of the COVID-19 crisis, 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. Beginning in March 2020, Member States started to enact intra-EU export restrictions for Personal Protective Equipment, 'PPE' (masks, safety goggles, visors, face shields, protective gowns and gloves), medicines and medical devices (including breathing machines/ventilators). In order to be timely informed about upcoming restrictions, the Commission services engaged in a systematic outreach and dialogue with

MS to remind them of the need to notify draft technical regulations related to COVID-19 via the SMTD by using the TRIS-database.

From March until 30 September 2020, Member States used the "urgency procedure" for COVID-19 related national legislation for more than 100 notifications. This represents three quarters of all urgent notifications in 2020 (in total 135 notifications). In comparison, the urgency procedure was used during the whole year of 2019 only 39 times.

The measures most commonly notified related to export restrictions for medicines (critical medicines/substances necessary for the treatment of COVID-patients or general export bans on all medicines) as well as export bans on protective equipment, medical devices and in vitro medical devices needed in hospitals. Export bans for disinfectants and alcohols needed for their production were also quite frequently notified. Other notified measures concerned requisitioning and/or the obligation to build up stocks of masks, medicines, medical equipment and devices, monitoring obligations, channelling of supply as well as restrictions in the distribution of medicines to individuals to avoid hoarding and price-fixing for masks, medicines and disinfectants.

The Chairman underlined that the well established network with the contact points proved also extremely useful to establish without delay direct contacts with competent national authorities.

Most importantly, the notifications of the draft technical regulations allowed the Commission to identify barriers to the free movement of goods, in particular concerning medicines and medical equipment most needed during the crisis, and address them in an efficient manner. For example, by engaging in discussions with the competent ministries in order to get further information, also on their intention to take new measures, which in some cases avoided new obstacles for the functioning of the internal market. The Commission services used the SMTD procedure to evoke potential needs for clarification at national level.

The Chairman concluded by stressing the importance of notifying COVID related measures, at draft stage, in order to allow the Commission and other Member States to react, so that barriers can be discussed before they are enacted. The notification of COVID measures also allows the Commission to elaborate a common European approach.

3. Digital health (including mHealth and Telehealth) services and products

Digital health, that includes telemedicine, tele-monitoring, mHealth etc., has been gaining momentum in the last years and even more since COVID-19 crisis.

The Commission (Directorate General SANTE, unit SANTE B3 responsible for Digital Health and European Reference Networks, in particular) is currently working on an initiative that is based on 3 main pillars: (1) Health Data (2) Digital Health and (3) AI in Health.

The first pillar on health data aims at the establishment of the European Health Data Space (EHDS); the EHDS will aid the governance, collection, cross-border, interoperability, use and re-use of health data and at the same time protect the privacy of these data in accordance with the GDPR; health data could be used for both primary purposes (directly aiding healthcare of a patient when for example moving from one healthcare provider to another) and secondary purposes (including research and development of AI algorithms in healthcare).

Regarding aspects in relation to digital health (second pillar), cross-border healthcare is governed by among other instruments the provisions in Directive 2011/24 on the application of patients' rights in cross-border healthcare. SANTE B3 is currently working on a study looking at new challenges/obstacles to free movement of digital health within the internal market and ways to address them.

As far as AI in health (third pillar) is concerned, AI is creating a promising potential to transform the healthcare sector and health; there are different challenges in this respect; SANTE/B3 looks in its study at the different challenge focusing on AI liability in health.

Since the COVID-19 pandemic the demand for these services has increased and this has also resulted in the adoption/proposal of national measures regulating such services. Since the beginning of 2020 Member States have notified to the Commission a number of legislative drafts dealing with telecare. Measures that could be applicable in this respect include the ones concerning the approval, authorisation and reimbursement of these services; interoperability between mHealth, telehealth and electronic health records/registries, and interoperability with other IT; privacy and liability rules in relation to eHealth services and products as well as professional qualifications for providing telehealth services. In this respect, the Commission reminded the participants that national measures regulating telecare should consider that digital health could be provided/received cross-border as well. Member States should pay attention, when legislating, at the crossborder aspects of the digital health services. National measures should not erect unjustifiable obstacles to free movement of digital health services and products.

In the coming months, SANTE B3 will have more results on its ongoing study and work on health data, digital health and AI. That would allow for closer collaboration between stakeholders and Member States on the evolution of these issues, addressing the challenges and ways forward.

4. Practical implementation issues

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

The Commission (Brexit Task Force) explained that the Withdrawal Agreement was in force since 1.2.2020. Until the end of 2020, there is a transition period during which the UK remains part of the EU internal market and customs union. This period will not be extended and as of the 1st of January 2021, different economic rules will apply for the

UK (Great Britain) and Northern Ireland. Based on the Protocol of the Withdrawal Agreement on Ireland and Northern Ireland ("the Protocol"), the trade between the EU and Northern Ireland will continue on the same terms as the trade between EU Member States. Conversely, the trade between the EU and the UK (Great Britain) will be based on different terms, based most probably on the principles of a free trade agreement. The EU and the UK (Great Britain) will be distinct markets and separate legal orders with no free movement principles such as the mutual recognition or equivalence for/harmonisation of product rules.

Under the Protocol, all the rules that have an impact on the free movement of goods including product requirements or Union Customs Code will be applicable in Northern Ireland to avoid the necessity for checks on trade between the northern and the southern part of the island. Most importantly, the Protocol contains Annex 2, which lists all the provisions of the EU law that will apply to and in the UK in respect of Northern Ireland. These provisions will produce the same legal effect in Northern Ireland as within the EU. The Single Market Transparency Directive is also included in this annex, but only in respect of goods, the Information Society services remain outside of its scope.

The Protocol also concerns the application of the mutual recognition principle, which will not apply in the same way in respect of Northern Ireland as it applies between the EU Member States. In the non-harmonised area, the principle of mutual recognition will only bind Northern Ireland in respect of goods lawfully marketed in the EU Member States, but the Member States will not have to accept goods lawfully placed on the market in Northern Ireland. If a product comes from Northern Ireland in the non-harmonised area and is made available in a EU Member State, it will have to comply with the rules of the Member State where the product is made available. On the contrary, if the product is placed on the market in an EU Member State, Northern Ireland will be bound by the provisions of Articles 34 and 36 of the Treaty and will have to apply the mutual recognition principle to those goods.

The Commission representative concluded by noting that in order to allow the UK to fulfil all its obligations in respect of Northern Ireland as required by the Protocol, the UK will keep a certain level of access to several EU databases, information systems or networks including the TRIS database, but only in duly justified cases. Northern Ireland will be required to comply with the SMTD provisions concerning the notification obligation in respect to all technical regulations. For this purpose, access to TRIS will be maintained.

Regarding more specifically the procedure laid down by the SMTD, GROW B2 explained that according to the Protocol on Northern Ireland, UK shall notify draft technical regulations applicable in NI within the goods scope of the SMTD under certain modalities.

UK has requested access to the restricted TRIS database for the needs of sending notifications and receiving reactions to those notifications, but has excluded explicitly the possibility to react to notifications made by EU Member States. A partial access to restricted TRIS will therefore be granted to allow the necessary actions from the UK side, and also by the Commission and the EU Member States. Similar arrangements have been

made for the implementation of the specific SMTD related obligations in the EEA countries, Switzerland and Turkey.

In a nutshell, restricted TRIS will be used as follows:

- UK will be able to notify draft technical regulations related to goods applicable in NI (including those applicable in the entire UK territory and therefore also in NI).
- EU27 MS and COM will be able to issue comments and detailed opinions in relation to those notified drafts via restricted TRIS. In addition, COM will have the power to issue blocking decisions. UK will be able to access all those reactions in restricted TRIS.
- Within the frame of those limited activities, UK authorities will be able to exchange in the restricted environment with the Commission and the EU Member States (e.g. requests for supplementary information, follow up to detailed opinions, etc).
- UK will not have access in restricted TRIS to the exchanges among EU Member States (including the formal reactions) concerning EU notifications. This includes past UK notifications made before 31st December 2020. Neither will UK have access to the notification files from EEA countries, Switzerland and Turkey.

UK has identified the body in charge of the operation of the notification procedure for the needs of NI. Staff in that body will be authorised on a personal basis to have access to the restricted TRIS database to make the necessary operations. As from 1st January 2021, the current UK entity will not be operational in the restricted TRIS database and the access rights of the authorised staff will be revoked. From that moment, a new entity UK/NI will be created and new access rights will be provided to the officers identified by UK authorities.

4.2. Confidential notifications

GROW B2 recalled, as reported during the 132nd meeting of the SMTD Committee, that the Commission services intend to monitor carefully the use of confidential notifications under Article 5(4) of the Directive. Indeed, the ultimate objective of the SMTD is to prevent barriers to the free movement of goods and to the provision of information society services, namely by guaranteeing a high level of transparency in the Single Market. Therefore, when implementing the SMTD, Member States have to interpret exceptions to the transparency principle in a restrictive manner.

As already explained previously, the confidentiality has to be explicitly justified with grounded arguments, in the light of the proportionality principle. A clear distinction should be made between (i) cases in which the need for confidentiality is inherent to the substance of the draft legislation (e.g. fight against terrorism) and (ii) other cases in which economic grounds are evoked to justify the confidentiality, including the copyright protection.

Any general economic ground put forward by the notifying Member State substantiating the need of confidentiality will be rejected by default. Even when the confidentiality is justified and proportionate, some information needs still to be made publicly available in TRIS, such as at least (i) the reference number of the given notification and the date on which it was done; (ii) the title and the summary of the draft measure; (iii) the reason why

only a summary is made available (e.g. copyright) and information about where the relevant document in its entirety can be obtained from (if appropriate, against payment); and (iv) the date when the standstill period elapses.

In order to allow for swift implementation of these principles, when making confidential notifications pursuant to Article 5(4) of the Directive, national contact points are kindly invited to always tick the confidentiality box and to fill in the following points of the form:

- Point 5 – Title of the notified draft
- Point 6 – Products and/or services concerned
- Point 8 – Summary of the draft measure
- Point 9 – Reason why only a summary is made available
- Point 13 – Information about where the relevant document in its entirety can be obtained from

GROW B2 underlined that the points mentioned above always appear in public TRIS, as well as the reference number of the given notification, the date of the notification and the end of the standstill period. As a general rule and like for the other regular notifications, the notification message appearing in restricted TRIS is always mirrored in public TRIS.

Additionally, public TRIS also discloses the other points of the form, if filled in, such as the originating department and the department responsible for the notification and any other particular indication provided when notifying (e.g. urgency, fiscal measure, impact assessment, basic text). The text of the draft measure as such is compulsory to make the notification effective, but remains visible (and accessible) only in the ambit of restricted TRIS.

The Chairman concluded by recalling the transparency principle underlying the notifications under the SMTD. He also recalled that the abuse in the use of confidential notifications could be brought to the CJEU, as well as to the Ombudsman, as was already the case in 2018.

4.3. Incorporation of Directive (EU) 2015/1535 into the EEA Agreement

GROW B2 informed the Committee Members that on 2 July 2020, the Decision of the EEA Joint Committee of 29 March 2019 incorporating Directive (EU) 2015/1535 into the EEA Agreement was published in the OJEU. This Decision is a technical consequence of the adoption of Directive 2015/1535 codifying Directive 98/34. Thus, formally speaking, the EEA acquis becomes in line with EU latest adaptations.

In practice, nothing changes. Indeed, EEA countries (Iceland, Liechtenstein and Norway) via the EFTA Surveillance Authority notify draft technical regulations under the same conditions as EU Member States. The Commission, on behalf of the EU, can issue comments, and only comments, regarding those notifications. Also EEA countries can issue comments via the EFTA Surveillance Authority, and only comments, regarding EU notifications. All the other procedural steps (e.g. standstill periods, possibility for requesting complementary information, communication of adopted acts) are identical as

for EU notifications. TRIS is already adapted accordingly so all the steps are taken via that platform.

Contact points should take into account the possibilities deriving the EEA Agreement. From the Commission side, we encourage EEA countries and EU Members States to make the most of this instrument to prevent barriers to the free movement of goods and information society services in this enlarged single market.

4.4. Obligation to renotify

DG GROW B2 representative recalled the obligation under Article 5(1) of the SMTD to re-notify a draft text in the event it is amended after the notification and before its adoption. The obligation arises when the MS makes changes which are considered substantial, i.e. significant changes. Significant changes are those that alter the scope of the measure, shorten the timetable for implementation, add specifications or requirements or make specifications or requirements more restrictive. In the case of re-notification the standstill period starts as from the date of the second modification.

DG GROW B2 representative recalled the case-law of the CJEU, particularly Ince (C-336/14), where the CJEU clarified that "[t]hat obligation relates only to the situation […] in which significant changes are made, during the national legislative procedure, to a draft technical regulation after that draft has been notified to the EC". The legal consequences of non-notification of substantial changes, i.e. the unenforceability of the technical regulation vis-à-vis third parties, were also recalled, as well as the relevant case-law.

DG GROW B2 representative also pointed out that there is no need to re-notify in the case of minor amendments and recalled the CJEU case Sandström (C-433/05): "the failure to inform the EC of a non-significant amendment to a technical regulation, prior to its adoption, does not affect the applicability of that regulation but a sufficiently stable text has to be notified".

No new notification is required when amendments take account of a detailed opinion or comments from the EC, as the exemption under Article 7 of the SMTD applies. However, the Commission services have noticed that in some recent cases MS introduced some amendments in the notified draft concerning matters not addressed in a COM DO. In such cases, if those changes constitute a substantial modification of the draft, the national authorities shall consider whether to re-notify the relevant parts in line with Article 5§1, third paragraph.

Ireland asked for guidance on minor amendments. The EC representative highlighted that this is a case-by-case assessment and recommended that a sufficiently stable text is notified because this facilitates the assessment of the draft and for reasons of legal certainty.

4.5. Administrative capacity

GROW B2 explained that the European Semester exercise provides a framework for the coordination of economic policies across the European Union. It allows EU countries to discuss their economic and budget plans and monitor progress at specific times throughout the year. In practice, the European semester is a key instrument to monitor the economic situation of Member States and to identify any deficiencies.

Following an exchange of views with the relevant national authorities, the Commission prepares dedicated country reports. With that basis, EU countries prepare national reform programs. The situations which are particularly worrying for the EU economy are identified and country specific recommendations are proposed by the Commission. Those country specific recommendations provide policy guidance tailored to each EU country on how to boost jobs and growth, while maintaining sound public finances. The country specific recommendations prepared by the Commission are endorsed subsequently by the Head of States and Governments at the European Council.

Early in 2020, the Commission published country reports in the context of the European Semester exercise. Concerning the notifications of draft technical regulations under Directive 2015/1535, in its reports, the Commission acknowledged a low level of notifications in 12 EU countries (in comparison with the average number of yearly notifications). Moreover, concerns related to administrative capacity or coordination were identified for 5 additional countries.

During the last summer, GROW B2 took contact with the national authorities with responsibility for the implementation of the SMTD in the countries identified in the country reports and with others with direct experiences in the past. In the communication, GROW B2 drew the attention of the national authorities to the support that the Commission (and more specifically DG REFORM) could offer to enhance administrative capacity concerns, ranging from workshops and trainings to study visits, studies to be carried out by external experts, awareness-raising brochures, IT trainings, updates of guidelines etc. The contact details of the coordinators was also shared with the national authorities for this facility in each country. GROW B2 also offered to support the national contact points when preparing the application.

Unfortunately, only few contact points have showed interest in presenting projects for Commission support. At this stage, deadlines for the 2020 call are advanced. However, GROW B2 took the opportunity to insist on the need to consider the importance of the administrative capacity and to act in order to ensure a high level of follow up.

This aspect of administrative capacity is particularly important in the context of the upcoming National Recovery and Reform Plans that are currently being prepared. GROW B2 invited the national contact points to convey the message to their superiors so effective action is taken to ensure the application of single market rules, and in particular those related to the notifications under the SMTD.

Sweden took the floor to ask the plans of the Commission with respect to the update of the Guide to the procedure, which has not been updated since 2005. The Chairman indicated that the updated Guide to the procedure is ready, but is still with the Legal Service. Due to the COVID crisis, the Legal Service has been overcharged in recent months and has not yet given its feedback on the updated Guide.

Sweden questioned about the nature of the standstill period within the context of the urgency procedure. In reply, the Chairman underlined that in the context of the urgency procedure, provided for by Article 6(7), the SMTD does not provide for any standstill for the adoption of technical regulations notified with the urgency request. Once the urgency request is accepted, the Member State can adopt, without delay. Nevertheless, a working arrangement of 10 days has been agreed with the Member States. If the number of refusals of the urgency requests is considered, Member States are asked not to adopt their draft, in the interests of legal certainty, before the Commission approves the use of the procedure.

Sweden also indicated its interest in the outcome of the study on the non-notified technical regulations.

Denmark took the floor to express the need to modernise the notification interfaces in order to provide a single place instead of the different interfaces linked to the different notification requirements under the SMTD, the Services Directive, the Professional Qualifications Directive, etc... In reply, the Chairman informed the Committee members that the Commission has been working on the possibility of a single interface. The one-stop-shop option is a first step of the Commission's intention to facilitate the task of the Member State, and of the Commission services, and to reduce the administrative burden for the national administrations. In this context, GROW B2 will convey the message of the Danish authorities. The Chairman however also underlined that the use of a single interface would not always be possible, given that the different EU acts require different notification procedures, in terms of nature of the (draft act/final act), standstill period, deadline for the Commission to react, publicity of the procedure, etc...

The Netherlands took the floor, first for indicating their support for a single interface for all notifications under the different EU acts.

The Netherlands asked for receiving any written guidance, in the framework of the Guide to the procedure, concerning the translation of the notified draft or of the relevant parts of it, in case of amendments to a very long text. In its reply, the Chairman indicated that the Guide for the procedure has been finalised, but ad hoc guidelines could clarify the question.

5. Recent CJEU cases

DG GROW B2 explained the latest CJEU judgements and pending cases concerning the interpretation of the SMTD provisions.

5.1. Case C-727/17 *Eco-Wind Construction*

GROW B2 presented the judgment of the Court of justice in this preliminary request, submitted by the Polish Regional Administrative Court, with respect of a provision of Polish law of 2016 imposing, for the construction of any wind farm, a distance equal to or greater than ten times the height of the wind farm ("10h rule").

The Court has been consulted on the interpretation of several EU provisions, among others the SMTD, with the following question: Should this "10h rule" be considered as technical regulation to be notified, prior to the adoption of the law, under the SMTD, under penalty of inapplicability pronounced by the national judge?

The Court delivered its judgment on 28 May 2020. Regarding the SMTD, the Court concluded that the requirement that the installation of a wind turbine is subject to compliance with the condition of a minimum distance from buildings with a residential function does not constitute a technical regulation to be notified under Article 5 of the SMTD, except if that requirement leads to a *de facto* prohibition of the marketing of wind generators, leaving room only for a purely marginal use of wind generators. In this last case (purely marginal use), the provision could be qualified as "a law, regulation or administrative provisions of Member States prohibiting the manufacture, importation, marketing or use of a product" within the meaning of Article 1(1), point (f) of the Directive. The ultimate qualification is left for the national judge who should assess whether the marketing of the wind turbine generators has become marginal.

With respect of the category of "technical specification", the Court ruled that legislation which lays down a mandatory minimum distance requirement that must be complied with for the installation of wind turbines does not refer to a product, in this case the wind generator, as such and, therefore, does not lay down one of the characteristics required of that product.

Concerning the category 'other requirements", the Court considered that the requirement that the installation of a wind turbine is subject to a minimum distance from buildings with a residential function has no direct connection with the composition, nature or marketing of a product such as a wind generator. In that regard, even if that requirement were to lead to a restriction of the locations suitable for the installation of wind turbines, and therefore that it had an effect on the marketing of wind generators, that effect would not be sufficiently direct for that requirement to fall within the category of 'other requirements'. The case is therefore distinguishable from legislation concerning the prohibition on issuing, renewing or amending authorisations for gaming activities outside casinos, which was capable of directly affecting the trade in those machines.

5.2. Case C-390/18 *Airbnb Ireland*

GROW B2 presented the judgment of the Court of Justice in Case C-390/18 - *Airbnb Ireland.* The judgment originates from a request for a preliminary ruling from the Tribunal de grande instance de Paris (France), lodged on 13 June 2018, in the framework of investigations against AIRBNB Ireland, for activities involving mediation and management of real property and business activities without a professional licence, in breach of the French 'Hoguet Law'.

The questions submitted to the Court were:

- whether the services provided in France by Airbnb Ireland via an electronic platform managed from Ireland benefit from the freedom to provide services established in Article 3 of Directive 2000/31?

- whether the restrictive rules relating to the exercise of the profession of real estate agent in France are enforceable against Airbnb Ireland?

In its judgement of 19 December 2019, the Court of justice, in line with the opinion of the Advocate General, concluded that an intermediation service which, by means of an electronic platform, is intended to connect, for remuneration, potential guests with hosts offering short-term accommodation services, must be classified as an 'information society service' within the meaning of Directive (EU) 2015/1535, to which refers the e-Commerce Directive (Directive 2000/31). Contrary to the Uberpop judgment from 2017 (case C-434/15), the Court considered that the intermediation service provided by Airbnb is dissociable and does not form an integral part of an overall accommodation service (in this case, the service should have been classified as part of the short-term rental service, rather than an information society service, which would imply different legal consequences).

From the perspective of the SMTD, the scope of this judgment is confined to the interpretation of Article 1(1)(b) which lays down the definition of an "information society service", since Airbnb did not invoke a breach of the notification obligation under Directive (EU) 2015/1355. The fact that the intermediation service provided by Airbnb should be considered as an information society service does not mean that the law would automatically fall within the scope of the SMTD. To be considered as notifiable, the national provision should constitute "a rule on information society service", in the meaning of Article 1(1)(e) of the Directive.

Secondly, the Court examined the ground of the inapplicability of a law restricting the freedom to provide information society services provided by an operator from another Member State, which has not been notified in accordance with the **e-Commerce Directive** (Directive 2000/31). The Court considered, drawing on the reasoning of the CIA International judgment national, that measures restricting the freedom to provide an information society service become inapplicable against individuals, where those measures were not notified in accordance with the e-Commerce Directive. Individuals can ask the national judge not to apply such measures. (Concretely, this means that the national judge cannot apply the French Hoguet law against Airbnb.)

5.3. Case C-723/19 *Airbnb Ireland and Airbnb Payments UK*

GROW B2 presented this request for a preliminary ruling from the Italian Consiglio di Stato, in relation to the appeal brought by Airbnb Ireland and Airbnb Payments UK contesting the decision of the Italian Revenue Agency of 12 July 2017 implementing the tax scheme for short-term rental agreements laid down by Decree-Law No. 50 of 24 April 2017, as converted into law with amendments by Law No. 96 of 21 June 2017.

The referring court asks several questions, among others one related to the SMTD:

Do the provisions of Directive (EU) 2015/1535 preclude a national provision that, without prior notification of the European Commission, imposes on the operator of an online property rental platform the transmission to the Revenue Agency of data concerning agreements concluded on the platform and the levying of a withholding tax on payments made in relation to agreements concluded on the platform and subsequent payment to the Treasury?

By order of 30 June 2020, the Court rejected the preliminary request as manifestly inadmissible, without examination of the substance (concerning a non-alleged non notification/inapplicability) of the case. The Court estimated that the Italian Supreme

court had not presented the factual and regulatory framework in which the dispute in the main proceedings takes place, had not provided any information enabling the Court to determine whether the Italian regulation at stake specifically targets information society services, had not specified the reasons which led it to question the interpretation of several provisions of the EU law, as well as the link which it establishes between those provisions and the national law applicable to the dispute in the main proceedings.

The referring court can however submit a new request for a preliminary ruling including the information enabling the Court to give a useful answer to the question asked.

5.4. Case C-711/19 *Admiral Sportwetten and Others*

GROW B2 presented the judgment of this preliminary ruling lodged by the Austrian Supreme Administrative Court, in proceedings between Vienna City Administration, on the one hand, and the installer and the owner of the betting terminal and the proprietor of the premises used for operating the betting terminal, concerning the betting terminal duty fixed by the Vienna City Administration in respect of the appellants.

The questions asked by the Austrian Supreme Administrative Court were the following:

1. Is Article 1 of Directive (EU) 2015/1535 to be interpreted as meaning that the provisions of the Vienna Betting Terminal Duty Law of 2016 which provide for taxation of the operation of betting terminals are to be assessed as ‘technical regulations’ within the meaning of that provision?

2. Does the failure to notify the provisions under Directive (EU) 2015/1535 mean that a duty such as the betting terminal duty may not be levied?

In its judgment of 8 October 2020, the Court ruled that a national fiscal provision which establishes a tax on the operation of betting terminals does not constitute a “technical regulation” within the meaning of the SMTD.

To reach these conclusions, the Court first analysed whether the national provision falls within one of the four categories of technical regulations:

- First, to be qualified as "technical specification", a measure must necessarily refer to the product or its packaging as such and establish one of the characteristics required of a product. Since the national measure is limited to defining what is to be understood by 'betting terminal' for the purposes of determining the scope application of the disputed tax, namely, the operation of these terminals, without however determining the characteristics required of them and notwithstanding the fact that it describes them, the measure does not constitute a "technical specification".
- As regards the concept of 'other requirement', it relates to a requirement imposed with regard to a product and relating to its life cycle after placing on the market, such as its conditions of use, recycling, reuse or elimination when these conditions can significantly influence the composition or the nature of the product or its marketing. In the present case, the provisions are limited to determining the scope of the disputed tax, without any condition that could significantly influence the composition, use or the marketing of betting terminals.
- Thirdly, the classification as 'rules relating to services', presupposes, in particular, the existence of a service provided at a distance (definition of information society service). As the legislation at issue relates to a service not supplied at a distance, it does not fall within the category of 'rules relating to services'.

- As regards the fourth category ('laws, regulations and administrative provisions prohibiting the manufacture, import, marketing or use of a product or prohibiting to provide or use a service or to establish itself as a service provider '), the tax legislation does not contain any prohibition, so that it does not fall within this category of technical rules.

Then the Court found that the tax legislation does not include any de facto technical regulation, linked to the fiscal measure, so that the fiscal measure would de facto affect the consumption of products or services by encouraging compliance with these technical regulations. In this respect, the Court confirmed its previous case-law in case Berlington Hungary and others: “tax legislation which is not accompanied by any technical specification or any other requirement which it seeks to ensure compliance cannot be qualified as a “de facto technical regulations”.

On the second question (Does the failure to notify the provisions under Directive (EU) 2015/1535 mean that a duty such as the betting terminal duty may not be levied?), the Court considered that there was no need to answer it, since the legislation at stake does not fall within the notification obligation.

5.5. Case C-62/19 *Star Taxi App.*

GROW B2 presented the conclusions of the Advocate General in Case C-62/19 – Star Taxi App.

This case is a request for a preliminary ruling referred by a regional court from Bucharest. It relates to provisions adopted by the City of Bucharest on 19 December 2017 on the organisation and operation of local public taxi services, creating an obligation for all taxis of authorised carriers to use dispatching services. This obligation enables customers to use the service by telephone request or by other means, including online applications. S.C. Star Taxi App SRL, a company established in Bucharest, operates a smartphone application which places users of taxi services directly in touch with taxi drivers. Star Taxi App was fined 4,500 Romanian lei (approximately € 929) for having infringed the rules laid down by the City of Bucharest. He contested the fines before the national court, invoking, inter alia, the lack of prior notification of the provisions under Directive (EU) 2015/1535 (as well as the breach of the Services Directive).

With respect to the interpretation of the SMTD, the questions to be replied by the Court are the following:

- Does a service consisting in putting taxi passengers directly in touch, via an electronic application, with taxi drivers constitute an ‘Information Society service’ within the meaning of the SMTD?

- Does the Decision of the City of Bucharest of 19 December 2017 on the organisation and operation of local public taxi services, creating an obligation for all taxis of authorised carriers to use dispatching services, enabling customers to use the service by telephone request or by other means, including online applications, constitute a technical regulation to be notified prior its adoption?

In its Opinion delivered on 10 September 2020, 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 2015/1535.

Concerning the first point (information society service versus transport service), the Advocate general justified its conclusions diverging from the UBER and the Asociación Profesional Elite Taxi by explaining that the situation seems to be different in the case of a service such as that provided by Star Taxi App and the case of UBER like services.

Concerning the question whether the provisions of the City of Bucharest constitute a technical regulation within the meaning of the SMTD, the Advocate General based his conclusions on twofold considerations.

First, 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", as required in the definition of technical regulations provided for in Article 1(1)point (f) of the SMTD, and that the City of Bucharest has not been included by Romania among the authorities required to notify draft technical regulations.

However, the Advocate general goes further, considering the decision of the City of Bucharest as merely an implementing measure of national Law No 38/2003 on transport by taxi and hire vehicle. Therefore, he proceeds with the analysis of the requirement to obtain authorisation in order to provide taxi services, laid down in Law No 38/2003, with respect of the concept of rules on information service.

To do so, the Advocate general recalls that Article 1(1)(e) of the SMTD excludes from the concept of 'rule on services' any rules which are not specifically aimed at Information Society services. He quotes the second paragraph of Article 1(1)(e) which provides that rules are specifically aimed at such services where their specific aim and object is to regulate such information society services in an explicit and targeted manner. On the other hand, rules which affect them only in an implicit or incidental manner are not considered to be specifically aimed at them.

Then he observes that national Law No 38/2003 on transport by taxi and hire vehicle does not contain any reference to Information Society services and its object is not to regulate those services in an explicit and targeted manner and it affects them only in an implicit manner. Therefore, Law No 38/2003 is not specifically aimed at Information Society services within the meaning of Article 1(1)(e) of the SMTD.

The Advocate general took the opportunity to revisit the Falbert and Others case, which stays as an exception to the case law. In that judgment, the Court held that a national rule which has the aim and object of extending an existing rule to cover Information Society services must be classified as a 'rule on services' within the meaning of the Directive. In this respect, the Advocate general recalls that rules on services within the meaning of the SMTD are rules which concern Information Society services specifically, and that national provisions that merely lay down the conditions governing the establishment or provisions of services by undertakings, such as provisions making the exercise of a business activity subject to prior authorisation, do not constitute technical regulations within the meaning of the SMTD, since that principle also applies to rules on services.

The date of the delivery of the judgement by the Court is still unknown.

5.6. Case C-514/19 *Union des industries de la protection des plantes*

Case C-514/19, Union des industries de la protection des plantes, originates from a request for a preliminary ruling from the French 'Conseil d'État' lodged on 8 July 2019.

The question referred concerns the applicability of one-stop-shop mechanism in relation to the procedure to invoke the safeguard clause under Regulation (EC) No 1107/2009 on plant protection products. Regulation (EC) No 1107/2009 on plant protection products harmonises the authorisation of active substances and plant protection products in the European Union. Nevertheless, according to the procedure under articles 69 and 71 Member States may take unilateral protective measures if they have previously raised concerns about an active substance with the Commission and the Commission does not adopt protective measures of its own.

In 2017 France sent a notification to the Commission in accordance with Directive 2015/1535, but did not expressly invoke the safeguard clause of the Plant Protection Regulation. The French 'Union des industries de la protection des plantes' claimed before the French Conseil d'État for the annulment of the measures at issue since France failed to comply with Articles 69 and 71 of the PPPR.

The French Conseil d'Etat asked to the CJEU whether a national measure designed to restrict the use of active substances that has been formally notified to the Commission on the basis of Article 5 of Directive 2015/1535 together, however, with a presentation of the information which leads the Member State to take the view that the substance is likely to constitute a serious risk to human or animal health or to the environment and that that risk can be adequately controlled, as the legislation currently stands, only by measures taken by the Member State, a presentation sufficiently clear for the Commission not to make the mistake of thinking that that notification has been made on the basis of Regulation No 1107/2009 on plant protection products, can be considered by the European Commission as having been submitted under the procedure laid down in Articles 69 and 71 of that regulation and adopt, as appropriate, additional measures of enquiry satisfying both the requirements of that legislation and the concerns expressed by that Member State.

In its judgement of 8 October 2020 the CJEU concluded that the Commission must treat a notification of a measure under Article 5 of Directive 2015/1535 in the same way as the official information referred to in the first sentence of Article 71(1) of Regulation 1107/2009, where:

(1) that communication contains a clear presentation of the evidence showing, first, that those active substances are likely to constitute a serious risk to human or animal health or to the environment and, second, that that risk cannot be controlled without the adoption, as a matter of urgency, of the measures taken by the Member State concerned; and

(2) where the Commission failed to ask that Member State whether that communication must be treated as the official provision of information under Regulation 1107/2009.

In conclusions, the Chairman drew attention to the practical consequences of the judgments to help the national authorities to better understand which provisions should be notified and which not.

Denmark took the floor, with respect to the Airbnb case, to ask for clarification, possibly in the revised Guide to the procedure, on the application of the 2 different notification procedures provided for by the SMTD and the e-Commerce Directive. In its reply, the Commission took note of the request. The message will be conveyed in the framework of the ongoing internal discussions on this question between the different Commission

services. The Guide to the procedure has been finalised, but ad hoc guidelines could be elaborated to clarify the issue.

6. IT matters

DG GROW Unit R.3 'Information Technologies' informed the Committee members/observers that the IT team of DG GROW is currently working on the development of the new TRIS system. The whole planning has not yet been finalised, but the new system is expected to be available within more or less one year.

In parallel, the IT team is also working on the current TRIS application (the one in use today), and in particular on a new User Interface in order to remove the Adobe Flash Player technology that is being blocked from all browsers. The new User Interface will be available by the end of November. The new User Interface will have the same screens, with the same layout, although with a new look and feel, but will be navigable smoothly since the screens have the same structure as the current ones. The change will make the system faster, since the technology used improves performance substantially.

The IT team is also ensuring the technical support to the national contact points and to GROW B2, when needed, on the current TRIS version.

7. Free movement of goods (latest developments)

The Deputy Head of Unit of DG GROW Unit B1 'Free movement of goods' presented the main elements introduced by Regulation 2019/515 on Mutual Recognition in the field of goods.

First, Regulation 2019/515 provides for a voluntary **mutual recognition declaration**, to facilitate the way economic operators would demonstrate that their products are lawfully marketed in another Member State.

Regulation 2019/515 also promotes the use of SOLVIT, the internal market non-judicial problem solving system, with the introduction of a new specific procedure according to which the SOLVIT centre can request the non-binding opinion of the Commission which assesses the compatibility of a specific administrative decision denying or restricting market access with Union law.

With the aim of contributing to the improvement of cooperation between Member States, Regulation 2019/515 requires the Member State of destination to notify the administrative decision denying a product market access not only to the Commission, but also to the other Member States. The same applies to an administrative decision temporarily suspending the marketing of the product during the assessment. Furthermore, a Member State of destination may submit a request for the release of information to the product contact points of the Member State in which the economic operator claims to have lawfully marketed his product and the approached Member State must provide the requested information within 15 working days. **Stronger administrative cooperation** will facilitate the application of the mutual recognition principle, in particular in sectors where its application is problematic.

Such cooperation between Member States will be carried out through the Information and Communication System for Market Surveillance (ICSMS).

Concerning ICSMS, Regulation 2019/515 established new **functionalities** of ICSMS for Mutual recognition, such as the notification, by national authorities, of administrative decisions and temporary suspension. ICSMS is used for the first time for non-harmonised goods. Product Contact Points and Product Contact Points for Construction will have an overview of the state of play. Transparency (competent authorities, PCPs, PCPCs will receive notifications) and efficiency (ICSMS facilitates the notification and the communication) are the main added values of ICSMS.

Regulation 2019/515 attributes **new tasks for Product Contact Points. They will be** integrated in the **Single Digital Gateway, in order to** offer more reliable and specific information on applicable national technical rules. Product Contact Points cover both harmonised and non-harmonised products. Product Contact Points are the main communication channel between economic operators and competent national authorities and have the obligation to cooperate and exchange information.

Administrative, technical and logistic support will be provided by the Commission.

Regulation 2019/515 also encourages Member States to notify their national technical rules with a **"Single Market Clause**" which aims at facilitating the application of the principle of mutual recognition clause.

With regard to future developments, the Commission has announced the **Mutual Recognition Alliance/Enhanced project.** As set out in the **Enforcement Action Plan of March 2020,** the Commission will help to better enforce the Single Market principles and the free movement of goods with a Guidance on the principle of Mutual Recognition and a Revised guidance on Articles 34 and 36 TFEU on the free movement of goods. Concerning the **implementation of the Market Surveillance Regulation** 2019/1020, a Guidance on Article 4 on the **responsible economic person will be issued** by the end of 2020. A **Revised Blue Guide** on the harmonised rules for products has been announced for mid-2021.

8. Miscellaneous

8.1. Next meeting

The following tentative dates have been identified to hold the next Committee meetings in 2021: **Tuesday 20 April and Thursday 14 October**. The final dates for the meetings will be confirmed with the invitation once the room booking is definite (around 6 weeks before the meeting dates).

9. List of participants

Representatives of Member States, EFTA and Turkey