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of the Regions

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Economic Policy

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The EU's notification procedure under the Services Directive – implications for local and regional authorities in the light of the January 2018 ECJ ruling



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Acronyms

CoR	Committee of the Regions
EC	European Commission
ECJ	European Court of Justice
EU	European Union
GDP	Gross Domestic Product
IMCO	(Committee on the) Internal Market and Consumer Protection
IMI	Internal Market Information System
LAU	Local Administrative Unit
LRA	Local and Regional Authorities
MS	Member State
SWD	Staff Working Document
TEU	Treaty on European Union

Summary

The study supports the political work of the European Committee of the Regions (CoR) regarding the Services Directive. It identifies the key issues and challenges facing authorities associated with the European Court of Justice's (ECJ) 'Visser judgement' (2018) and the proposed Notification Directive¹. Analysis and research have enabled conclusions and recommendations on dealing with related risks.

Overview and analysis of the 'Visser judgment'

Services Directive background

The European Parliament and the Council's adoption of the Services Directive 2006/123/EC removes legal and administrative barriers to cross-border service provision in the EU, and aims to establish an integrated Internal Services Market (the largest sector in the European economy at 46% of EU GDP).

Under the Services Directive, any new requirements affecting service activities must be notified to the Commission. The Directive's implementation handbook (EC, 2007) notes these may be 'at central level as well as legislation at regional level and, in some cases, also at local level'. The formulation 'in some cases also at local level' suggests the Commission didn't foresee the thousands of local level notifications each year triggered by the Directive, and this huge scope has been latterly called a major challenge impacting its cost-effectiveness.

Local authorities and spatial planning under the Services Directive

Recital 9 of the Services Directive, exempts from notification regulations which service providers may encounter 'in the course of carrying out their economic activity', explicitly naming road traffic rules, town/city planning, plus building regulations. Local authorities perform spatial planning in democratically legitimised participation processes, and initially lawmakers in many Member States concluded the Directive was not applicable to local land use plans in light of Recital 9. This reasoning was however later rejected by the 'Visser judgment' in 2018, calling into question local authorities' role here.

Spatial planning and the retail sector

During implementation of the Services Directive some Member States needed to remove certain of their retail space planning requirements to ensure compatibility

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0821>

with EU law – such as economic need tests, or the involvement of competing operators in decisions. The Commission’s Staff Working Document (SWD) on the Single Market Performance Report 2019 presents a ‘retail restrictiveness indicator’ to highlight the intensity of such regulations in Member States. Cities in particular can face very specific and fast-moving challenges, such as the example of Amsterdam cited in this study, where tourism-related shop concentration has necessitated concentrating retail into certain areas, to maintain retail diversity and prevent commercial monocultures, thus improving quality of life in the city centre.

Economic/retail stakeholders tend to emphasise the importance of future-proofing and flexibility to businesses. A comprehensive study on spatial planning (ESPON COMPASS, 2018) even concluded that, ‘the diversity of conditions for territorial development in Europe means there can be no ‘one-size-fits-all’ solution’. The same study also notes the importance for EU institutions and sectoral policies to ‘address their ‘spatial blindness’’. A 2008 UN Study on Spatial Planning also emphasises that: ‘Local plans are especially important because they involve and affect the end-user.’ (UN 2008, pg. viii)

Changed perspectives after the ‘Visser judgement’

In contrast to then-prevailing opinions mentioned above, the ECJ’s ‘Visser Judgement’ in January 2018 concluded that land use zoning and planning regulations (laying down restrictions for certain types of retail in a dedicated geographical zone) qualify as a requirement under Articles 14 and 15 of the Services Directive. The exemptions specified in Recital 9 were not found applicable (thus making notification a requirement) as they are ‘addressed only to persons who are contemplating the development of those activities in those geographical zones, and not to individuals acting in their private capacity’.

However, the ECJ also accepted maintain the viability of a city centre as an overriding reason justifying territorial restrictions in the public interest.

Background, particular importance and status of the proposed Notification Directive

A 2016 special report by the European Court of Auditors concluded the Commission as only partly effective in ensuring implementation of the Services Directive. Shortcomings cited include limited possibilities to prevent disproportionate national regulation, inefficient decision powers, lack of thorough proportionality assessments, limited scope of requirements covered by the current notification obligation and unclear legal consequences when the notification obligation is not respected by Member States. Furthermore, five Member States

were found to have not notified any regulatory measures (2009-2015) and ten more notified at most just ten regulations in the same period. Discussions with Member States identified a lack of both awareness of the obligation, and standardised practices.

In 2017, the Commission announced the launch of a ‘**services package**’, containing four initiatives to boost the services sector and ensure better application with:

- A new European services e-card to simplify administrative formalities;
- Proportionality assessment of national rules;
- Proposed improved notification of draft national laws on services;
- Guidance for national services reforms.

For improved notification, the proposed Notification Directive was presented in 2017. The most important changes are obligations for Member States as well as procedural amendments, including access to notified draft measures for third parties and external stakeholders. A trilogue on the proposed Notification Directive started on 20 February 2018, with France and Germany arguing that the power given to the Commission to block national rules breaches subsidiarity and proportionality principles. Austria, Italy and Portugal also made contributions, though no substantial agreement has yet been found.

Application of the Services Directive on local self-government in general

The ‘Visser judgement’s’ broader implications shed light on **notification obligations for various aspects of communal organisation and life administered by local authorities**. A paper assisting German municipalities (written with Commission input in Autumn of 2019) presents examples of local/regional provisions requiring notification, showing the far-reaching scope and detailed legal knowledge required for implementation of the Directive. Included are provisions relating to statues in public markets and cemeteries, advertising in the ‘old town’, sale of goods at the open-air swimming-pools, horse-drawn (tourist) vehicles, and much else. Despite its apparent scope, only four countries (DE, CZ, NL, SE) notified more than 100 regulations between 2010 and 2015.

Unforeseeable new developments have seen ‘**platform economy**’ businesses such as Airbnb, Uber, and e-scooter sharing services thrive across Europe since, operating via intermediary platforms including webpages and/or apps. Under the European legal framework, the ‘platform economy’ is part of the services sector, further increasing uncertainty on application of the Directive to such services, to keep in line with European legislation and uphold quality of life.

A key challenge for the housing markets in urban areas is the impact of short-term rental platforms (such as Airbnb) on the housing market. While an ECJ ruling on a case in Paris concluded that Airbnb is an information society service provider and benefits from the freedom to provide services as defined in the E-Commerce Directive, ten European cities expressed their concerns in an open letter in 2019, asking to put the growth of short-term rental platforms on the agenda of the next European Commission. The European Association of Real Estate Professions also called on regulators to ensure local regulations remain possible. It's assumed though, that stakeholder concerns in smaller municipalities seeking tourist trade will differ from larger metropolises.

Conclusion: Implications of the 'Visser judgement' and the proposed EC Notification Directive for regional and local levels

The 'Visser judgement' has stimulated awareness about the scope of the Services Directive, plus discussion on its practicability for local and regional spatial planning. It also intensified discussion about options for excluding specific matters in the proposed Notification Directive. The proposed Notification Directive would see local level authorities required to notify and prove compliance with the Services Directive before passing laws/regulations/acts. It would also enable the Commission to declare and reject non-compliant laws/regulations/acts.

Diversity of local self-government responsibilities and spatial planning systems

Based on case study analyses in Austria, Germany, Latvia, the Netherlands and Spain, this study provides an overview of the diverse general responsibilities and spatial planning systems throughout the EU. All Member States agreed to the European Charter of Local Self-Government (1985), guaranteeing the political, administrative and financial autonomy of the EU's 95,000 municipalities, or 'LAU's ('local administrative units'). This study explores the wide range of responsibilities held by LAUs, in addition to how such municipalities are differently administered. While spatial planning is broadly uniformly defined throughout the EU, decision-making hierarchies vary widely between Member States, as do the differing legally binding effects of spatial planning instruments.

Challenges and concerns at regional and local levels related to the Services Directive, the proposed Notification Directive and the ‘Visser judgement’

An interview process with various stakeholders revealed local and regional authorities’ concerns regarding the unworkable increased workload and obligations both the Services Directive and the proposed Notification Directive would burden these levels of government and their administrations with. Not only smaller stakeholders, but also the mayors of Amsterdam, Barcelona, Berlin, Budapest, Madrid and Riga joined forces to bring their concerns to EU-level attention. Some local stakeholders also express concerns that unnecessary administrative pressures could contribute to local-level resentment towards the EU.

High degree of legal uncertainty

The interviews show the complexities of assessing Services Directive applicability as beyond the means of many local authorities. Many local administrators (even legal experts in larger cities), reportedly regularly approach higher authorities for clarity – and even legal experts cannot always agree on applicability. Such cases have to be decided by the ECJ, leading to case law uncertainty rather than a clear regulatory framework. Expert estimates suggest that a substantial number of small municipalities would thus either notify all or avoid issuing spatial plans or other municipal rules restricting service providers such as retailers.

Administrative burden due to a high number of relevant planning regulations

According to an impact assessment explored in this study (SWD (2016) 434 final), the estimated 145,000 annual retail-regulating notifications of local spatial plans would result in roughly 3 million man hours and nearly EUR 100 million in administrative costs at local level. In turn, the need for external legal advice could add up to another EUR 725 million in costs to be covered by local authorities. Implementation would also flood both the Commission and Member State authorities across all levels with notifications.

Local spatial planning as an instrument to pursue public interest

Local and regional stakeholders argue that the vast majority of (local) spatial planning regulations will fall in line with the Services Directive anyway, if it were applicable, as most such regulations will be working towards the public interest. Specific examples in light of the ‘Visser judgement’ throw doubt on the necessity

for such a wealth of notifications, and business representatives fundamentally doubt its added value. It's doubted that the Commission could duly and timely assess specific local issues, and argued that it's only possible with detailed local knowledge of a municipality to assess proportionality. As a consequence of the high number of notifications, the situation could emerge in which the Commission would not be able to give feedback on all notifications – leaving many local authorities presumably unable to receive valuable feedback about their implementation. In short, local stakeholders assume that the additional administrative burden and costs will not enhance knowledge or spatial planning and will turn out to be 'useless' regarding the public interest.

Serious delay to spatial planning processes

Stakeholders state that the proposed Notification Directive conflicts with the aims and efforts of streamlining procedures to adopt planning amendments faster. The proposed Notification Directive explicitly foresees a minimum three-month review period. This would not only affect local authorities but also citizens and especially economic actors requiring defined local regulations in order to invest. As such, longer planning processes could create a hindrance to the single market. Above this concern, local spatial planning already follows democratically legitimised decision-making processes, and stakeholders point out that interference by the Commission in such processes would be very difficult to explain to citizens. This, along with the lack of benefits, high necessary administrative efforts and procedural delays, could encourage activist groups campaigning against the EU.

Very low EU Single Market relevance of most local level regulations

For national stakeholders, notification should concentrate on rules worth assessing and notifying: those that can considerably affect competition and the economy. Stakeholders doubt that the added value from notifying local regulations (as e.g. spatial plans but also rules on the use of public space or on public order issues) equals the additional effort needed. The study also cites a recent study on EU proportionality, which recommends “national or subnational governing bodies should take the lead” in cases where added value from the EU can't be guaranteed. (Naess-Schmidt, Bjarke Jensen, 2018)

Questioned consideration of the proportionality and subsidiarity principles by the proposed Notification Directive

From a local authority perspective, consideration of proportionality principles is questioned because of the high additional effort needed for notification of local regulations although very low EU Single Market relevance is expected.

In addition, the rights of the Commission as foreseen in the proposed Notification Directive clearly put the principle of subsidiarity and the rights of municipalities to manage their own affairs in danger. Particularly incendiary is the Directive's proposed new powers enabling the Commission to request a Member State repeal an adopted measure at local level. Supported by the European Charter of Local Self-Government, local autonomy is considered extremely important. Local spatial planning is a core area of local self-government and has to be handled with great care to prevent civil society from EU fatigue, frustration and increasing opposition to measures implemented by the EU.

Conclusions and recommendations

The study underlines the importance of finding an appropriate solution regarding the proposed Notification Directive for both the European Commission and local/regional stakeholders. The challenges faced, stem from the combined impact of the Services Directive (2006) and the proposed Notification Directive (2017). The clarification of applying the Services Directive to local spatial planning highlighted by the 'Visser judgement' (2018) has highlighted the urgency of this issue. Following awareness being raised by the 'Visser judgement', local stakeholders have vocally raised concerns about the administrative – and political – burdens this framework formulated by the Commission could create.

Suggestions for changes in the proposed Notification Directive linked to specific challenges for local and regional authorities

This study reached the following conclusions and recommendations, taking into account both the perspective of the Commission ('establishing an integrated Internal Market in Services' by removing barriers) and local stakeholders (added value disappearing as additional administrative burdens/delays take hold; not complying with the 'principle of subsidiarity'):

(1) Suggestion to deal with the broad scope of the Services Directive

The underlying concept of 'service' is defined in a broad manner. To reduce the number of notifications at regional/local level, the Commission's attention could **focus on the most important fields of action**, where local and regional authorities are important implementation partners for the Services Directive.

In this framework, defining the 'most important fields of action' would be vital. This would require:

- (1) EU-wide 'information gathering phase' to analyse provisions to be considered;

- (2) Setting up ‘mutual discussion’ between the Commission, Member States and local/regional authorities to agree on an explicit list of ‘most important fields of action’;
- (3) Specifying these ‘most important fields of action’ at local/regional level;
- (4) Implementing the list e.g. by adopting a delegated act;
- (5) Evaluating the approach in the framework of article 11 (Report and review) of the proposed Notification Directive;
- (6) Revising the delegated act if necessary.

(2) Suggestion to deal with the challenge of the consultation and ‘stand-still’ period

The requested minimum ‘3 months stand-still’ before a regulation may be enacted is a major change proposed by the Notification Directive. While it supports effective and coherent notification, such a ‘stand-still period’ would be highly worrying for local and regional authorities, limiting their ability to act and react quickly. The rapid development of the platform economy underlines the importance of this ability.

To avoid delaying measures, local and regional authorities should thus be **exempted from a ‘stand-still period’** during consultation, i.e. from the obligation to wait for feedback from the Commission. **Measures would have to be notified when they are enacted at latest.** The Commission shall still examine notified requirements within 3 months and (if necessary) request a measure be withdrawn.

(3) Suggestion to deal with the challenge of more detailed justifications for notified rules and decisions

To facilitate assessment of notifications, the Notification Directive outlines more detailed requirements to clarify and justify the public interest objective and necessity of a requirement under the Services Directive and an analysis of the proportionality (with evidence). This increased demand for information though, goes beyond the resources and means of many local/regional authorities.

Thus, local and regional authorities should be required to provide **less information** – in particular regarding content and depth of the proportionality analysis. This should be partially offset through supporting tools to increase quality of reporting. For instance, clear guiding questions could outline the most important aspects and help reduce burden.

(4) Suggestion to deal with the ‘specific case’ of local spatial planning and the Services Directive

The increased requirements for notification (more detailed analysis of the measure being non-discriminatory, justified by an overriding public interest and proportionate, accompanied by evidence) would have a heightened impact on local spatial planning, due to the specific characteristics involved, plus the increased number of notifications resultant from constant amendments. The latter would lead to hundreds of thousands of annual notifications as amendments occur and is predicted to lead to a procedural standstill.

A proposal offered by the Council Presidency in 2018 noted that local spatial plans must act within national and/or sub-national legal frameworks, and are thus implementing acts of **already notified primary laws**, i.e. they **should be in line with the Services Directive**. In line with this proposal therefore, the suggestion is:

- notification of primary law on spatial planning (if containing relevant regulations);
- but, exemption of local level spatial planning documents (with an accompanying self-assessment process instead);
- with mandatory reporting about ongoing implementation at local level (based on a self-assessment process) to be provided by the Member State.

Concluding Remarks

The suggestions for improvement in the report aim to add important aspects for an improved ‘new Notification Directive’ by enabling the Commission to balance the need for details about how implementation enhances the internal market on one hand, with a feasible administrative burden (especially at the lowest administrative levels) on the other.

These suggestions are based on desk research, interviews and case studies. Further discussions between the Commission and Member States as well as representatives of regional and local authorities will be required in order to grasp the diversity of local and regional authority responsibilities and the differences between local matters being regulated.

A carefully balanced solution focusing on the most relevant notifications at regional and local level would be in line with the Sibiu Declaration (May 2019), where Europe’s leaders claimed that ‘We will deliver where it matters most. Europe will continue to be big on big matters. We will continue to listen to the concerns and hopes of all Europeans, bringing the Union closer to our citizens, and we will act accordingly, with ambition and determination.’

1. The aim of the study

The future enhancement of the European Single Market is being discussed intensively by the Commission, Member States and institutions. As highlighted in the latest Staff Working Document (SWD) on the Single Market Performance Report 2019 (17.12.2019, SWD(2019) 444 final), ‘it is important to ensure that the Single Market performs at its best’ but ‘there is significant scope for improvement in the compliance with and application of Single Market legislation’.

The SWD further states that the European Semester is the right framework to foster enhancement reforms by considering Single Market performance and structural reforms under the European Semester together. Structural reforms will contribute by ‘removing market imperfections due to inappropriate national regulations and anticompetitive behaviour and improving the business environment’.

European, national and lower level administrative stakeholders support the Single Market, but it is not evident how implementation shortcomings should be enhanced at local and regional level, especially for local and regional level spatial planning.

The far-reaching potential consequences of current legislation for the local level was highlighted by the European Court of Justice (ECJ) judgment in *Visser Vastgoed Beleggingen BV vs. Raad van de gemeente Appingendam* (‘Visser judgement’, 2018²) that examined land use and zoning. The ruling decided that local land use plans regulating retail may fall under the Services Directive. This has introduced major uncertainties for local and regional authorities concerning notifications related to the Services Directive 2006/123. Following the ‘Visser judgement’, discussion among local and regional experts determined that implementation of the Services Directive at local and regional level – if the proposed Notification Directive is introduced – might considerably restrict (or at least delay and complicate) the ability of local and regional authorities to regulate matters falling within their responsibility.

These concerns go beyond the effects on enacting land use plans. They could impact also other local and regional authority activities.

² January 2018 ECJ judgement concerning notification obligations under the Services Directive for urban land use plans relating to retail services (C-31/16, *Visser Vastgoed Beleggingen BV vs. Raad van de gemeente Appingendam*).

There is general agreement from many Member States and most regional and local authorities³ that zoning and land use plans should be exempted from the obligation to notify. However, beyond the matter of spatial planning, the debate has gained momentum concerning other local and regional government tasks and their relevance to the Services Directive.

This study supports the political work of the European Committee of the Regions (CoR) in this ongoing discussion. It identifies key issues and challenges for regional and local authorities associated with and triggered by the ECJ judgment and the proposed Notification Directive. Analysis and research have enabled conclusions and recommendations on dealing with these challenges and how to overcome related risks.

³ As highlighted in the Letter of the cities of Amsterdam, Barcelona, Berlin, Budapest, Madrid and Riga to Mr. Gutierrez Prieto, European Parliament, Rapporteur on the Notification Directive and Ms. Schramböck, EU Council Austrian Presidency, Minister for Digital and Economic Affairs in January 2019. The same view was also expressed in interviews with local and regional stakeholders at the CoR stakeholder meeting in Brussels, 28 January 2020.

2. Overview and analysis of the ‘Visser judgment’

2.1 Services Directive background

In 2006 the European Parliament and the Council adopted the Services Directive 2006/123/EC on services in the internal market. Its aim is to ease the freedom to establish and to provide services across borders within the EU by removing legal and administrative barriers.

The underlying objective of establishing an integrated Internal Market in Services, which is the largest sector in the European economy, affects the considerable potential for economic growth and job creation. In short, the Services Directive was implemented to benefit⁴:

- Businesses, by making it easier to establish and provide cross-border services with simplified procedures.
- Customers, by giving stronger rights when receiving services, higher quality services as well as enhanced information and transparency concerning providers.

The Services Directive addresses a broad range of services. Its implementation has clarified that a dynamic process is needed to bring out the full benefits:

- (1) During implementation of the Directive, Member States were required to take concrete legislative measures and put in place practical measures such as single points of contact for service providers, electronic procedures and administrative cooperation. Member States had to assess their legislation in relation to authorisation schemes and procedures as well as requirements which service providers might face in the respective country. As a general rule, *‘Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect’* the principles of non-discrimination, necessity (justified by overriding public interest⁵) and proportionality (Services Directive 2006/123, Art.16(1)). At the end of this process, Member States had to report on their decisions regarding maintained, refined, replaced and abolished requirements.

⁴ Source: Official Website of the European Union, https://ec.europa.eu/growth/single-market/services/services-directive_en

⁵ The concept of an overriding reason relating to the public interest (as in Article 4(8)) refers to legitimate non-economic grounds pursued by a Member State, including public policy, public health, public security, protection of the environment, protection of consumers and social policy objectives. (Source: EC(2007): Handbook on implementation of the Services Directive (pg 32)).

(2) Since the Directive's entry into force, any new legislation introducing requirements affecting service activities has to be notified to the Commission (Services Directive 2006/123, Articles 15 (7) and Articles 39 (5)).

The Handbook on implementation of the Services Directive (EC, 2007) emphasises that *'requirements that need to be reviewed may be found in legislation at central level as well as legislation at regional level and, in some cases, also at local level'* (pg. 57). So, the formulation 'in some cases also at local level' suggests that the EC did not expect to receive thousands of local level notifications each year.

As stated by Pelkmans (2019)⁶, implementation of the Services Directive is a major challenge due to its huge scope, its foundation on principles, disciplines and procedures instead of harmonisation (beyond eliminating prohibited restrictions relating to Art. 14, 15 and 16). Moreover, many decision-makers and other players are involved. These stakeholders differ in almost every Member State and include national, regional and local governments, professional bodies, regulators and supervisors. This process could become a titanic undertaking, impacting cost-effectiveness.

2.2 Local authorities and spatial planning under the Services Directive

Local spatial planning is key to forward-looking decision making at local level. Specified by primary planning law and depending on national or regional spatial planning systems (see annex A.4), local and regional authorities must define spatial development strategies and goals in order to safeguard sustainable local development. These strategies and plans have to balance the needs of citizens with the interests of government, social and economic stakeholders. Local and regional authorities specify and implement their strategic decisions using spatial planning tools, elaborating development strategies and preparing legally binding spatial plans (land use plans and zoning regulations) in democratically legitimised participation processes.

Since 2006, when the Services Directive came into force, there have been uncertainties and discrepancies related to interpretation of applying the Services Directive especially to local spatial planning.

⁶ Pelkmans, Jacques (2019): Contribution to Growth: The Single Market for Services, Delivering economic benefit for citizens and businesses. Study, Requested by the IMCO Committee.

Although applicability of the Services Directive at all levels has been highlighted above, Recital 9 exempts legislative acts which *'do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity.'* (Services Directive 2006/123, Recital 9). According to this paragraph, notification explicitly does not apply to *'road traffic rules, rules concerning the development of use of land, town and country planning and building standards in cases of not specifically addressing or affecting services providers.'*⁷

This specification for legislative matters where the Services Directive does not apply if they are formulated in a general way, has led to the conclusion of non-applicability for local land use plans in many Member States. The reasoning is broadly in line with the example of Germany below. This reasoning was later rejected by the 'Visser judgment'.

German authorities, for instance, commissioned a legal expert opinion⁸ on application of the Services Directive to local urban planning. The study focused on *'whether the review and assessment of national legislation required by the Directive include German rules concerning the development or use of land codified in the Federal Building Code (Baugesetzbuch) and the Land Use Decree (Baunutzungsverordnung).'* (Otto, 2008, pg.5). The report concluded that, according to Recital 9, *'rules which do not specifically affect service activity are not affected by the Services Directive. The European Parliament and the Council are in order to the principle of conferred competences not legitimated to coordinate rules without specifically affecting service activity.'* (Otto, 2008, pg.6)

Furthermore, the report elaborated that *'German rules concerning the use and development of land codified in the Federal Building Code (Baugesetzbuch) and the Land Use Decree (Baunutzungsverordnung) are rules regulating the use of land. They have to be respected by everybody using land and ground. Referring to this system of German planning law there is no difference between the owner of land, the investor renting the property or the customer or visitor entering a shop or a mall in respecting the rules for the development or use of land. Therefore, the actual effect of the requirements of the Federal Building Code (Baugesetzbuch) and the Land Use Decree (Baunutzungsverordnung) is the same*

⁷ COM 2007 Handbook specifies Recital 9: *'In fact, the actual effect of the requirements in question needs to be assessed to determine whether they are of a general nature or not. Thus, when implementing the Services Directive, Member States need to take into account the fact that legislation labelled as 'town planning' or 'building standards' may contain requirements which specifically regulate service activities and are thus covered by the Services Directive'* (pg. 14). Nevertheless, according to statements of experts and documents, legal interpretation of Recital 9 in many Member States concluded that the specific matter of local spatial planning does not have to be notified as it primarily regulates land use.

⁸ Otto, Christian-W., (2008): Anwendung der Richtlinie 2006/123/EG über Dienstleistungen im Binnenmarkt im Bereich des Städtebaurechts, Gutachterliche Stellungnahme, *original quotes from the summary in English.*

for the providers and recipients of services.' (Otto, 2008, pg6) Based on this interpretation of the Services Directive, the study concluded that these laws are not covered by the Services Directive in general and thus are outside the scope of the Services Directive.

In the course of formulating this expert opinion, a review contacted other European ministries. The review found that a number of Member States interpreted Recital 9 and applicability of the Services Directive on local development plans in a similar way. Notably, ministries in Denmark, the United Kingdom, Ireland, Luxemburg and the Netherlands came to the same conclusion in 2008.

In Germany, this general assessment was deemed fully valid until the 'Visser-judgement' in 2018. Before this Court decision, the Federal Government of Germany together with its Federal States and German communal associations interpreted Recital 9 in a way that the Services Directive does not apply to building regulations and specifically to land use and zoning plans⁹.

A similar conclusion about Recital 9 was also drawn by Austrian lawmakers, as underlined in a letter from a state governor in Austria which states that Recital 9 formed a reasonable basis for assuming non-applicability of the Services Directive to local land use and zoning plans.¹⁰

Legal experts in the Netherlands assumed these regulations to be outside the scope of the Services Directive. Here, territorial restrictions regulating the location of various types of retail services are very common. In line with the general assumption, the Dutch Council of State (as the Netherlands administrative high court) stated that the Services Directive did not apply to retail in goods, nor to zoning and planning decisions¹¹ until the 'Visser judgement'. Nevertheless, deviating from these opinions, in interviews conducted for this study, other Dutch experts underlined that spatial planning was never outside the Services Directive, as certain retail activities fall within the scope of the Directive. In addition to this general assessment of applicability, they felt the pragmatic approach regarding spatial planning not requiring notification under the Services Directive was initially agreed by the European Commission. However, after the 'Visser judgement', the notification procedure came into question.

⁹ Bauministerkonferenz Deutschland (2019): Hinweise der Fachkommission Städtebau zu Auswirkungen des 'Visser' Urteils des EuGH, insbes. zur Anwendbarkeit der EU-Dienstleistungsrichtlinie auf Bebauungspläne (März 2019) <https://www.bauministerkonferenz.de/Dokumente/42322684.pdf>

¹⁰ Letter from the State Governor of Upper Austria, Thomas Stelzer, to the Austrian Minister for Digital and Economic Affairs (29. Mai 2018).

¹¹ Source: CMS website (30/01/2018), <https://cms.law/en/nld/publication/cjeu-judgment-on-european-services-directive-brings-profound-changes-to-dutch-approach-to-retail-zoning>

2.3 Spatial planning and the retail sector

Member States widely impose territorial restrictions with spatial planning to regulate the establishment of retail space. This is to follow general public policy objectives such as environmental protection, consumer protection and town and country planning.

In many Member States, retail is subject to national, regional and/or local regulations. During implementation of the Services Directive some Member States needed to ensure that their rules were compatible with EU law. Certain requirements were removed due to their incompatibility, such as economic need tests and involving competing operators in the decisions of competent authorities¹².

Nevertheless, many requirements in land use plans and zoning regulations are based on the current planning practice and experience of local and regional authorities which are compatible with non-discrimination, proportionality and legal certainty and are justified by public policy objectives¹³.

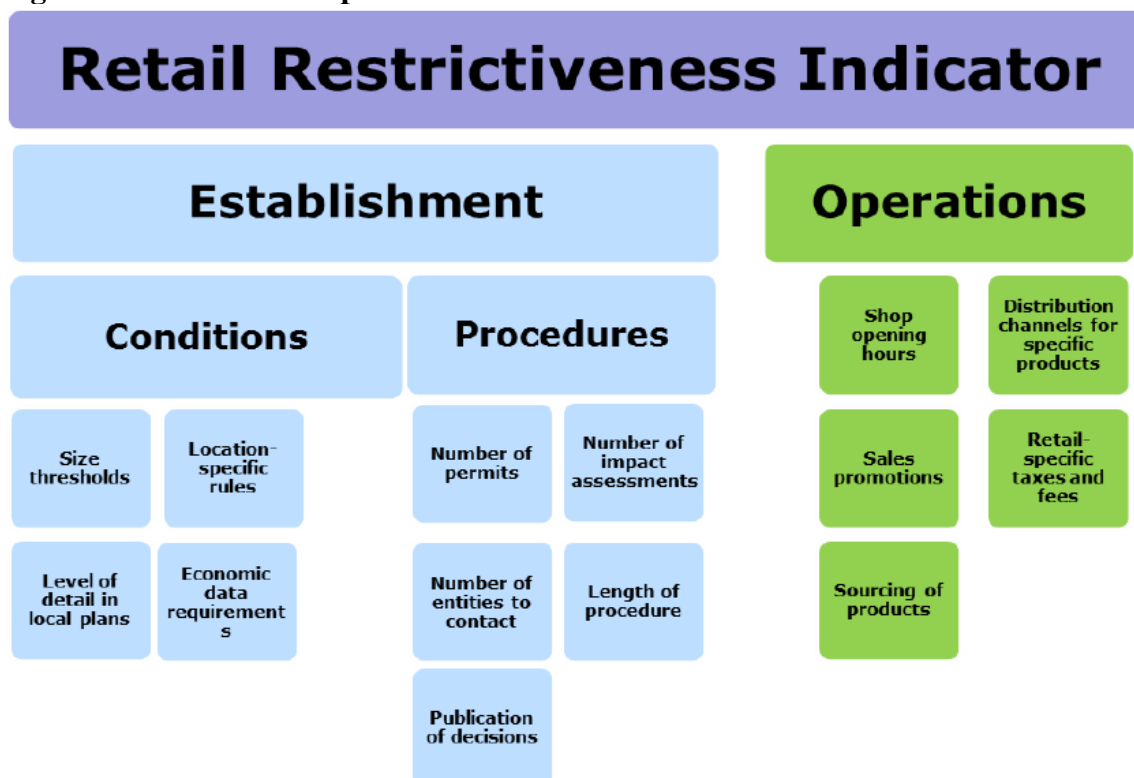
The Commission Staff Working Document related to Communication on ‘A European retail sector fit for the 21st century’¹⁴ presents a ‘retail restrictiveness indicator’ which subdivides regulations according to the issue. Information about regulations is combined into a composite indicator to highlight the intensity of regulation concerning retail in Member States. The following figure shows an overview of regulations considered in this calculation.

¹² Article 14 of the Services Directive on prohibited requirements refers to economic need tests and involvement of competitors. More concrete, in (5) it lays down that Member States are not allowed to make service activities subject to *‘the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, an assessment of the potential or current economic effects of the activity or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority; this prohibition shall not concern planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest.’* Furthermore, in abs.6 it determines prohibition of *‘the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority; this prohibition shall not concern the consultation of organisations, such as chambers of commerce or social partners, on matters other than individual applications for authorisation, or a consultation of the public at large.’*

¹³ Assessment of implementation measures in EU countries, country reports 2011 (https://ec.europa.eu/growth/single-market/services/services-directive/implementation/evaluation_en)

¹⁴ SWD(2018) 236 final, Commission Staff Working Document, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European retail sector fit for the 21st century.

Figure 1: Constituent parts of the ‘retail restrictiveness indicator’



Source: SWD (2018) 236 final.

National, regional and local regulations on the retail sector may include restrictions on establishing or operating retail points as well as the services involved.

For local and regional development, regulations for establishing retail sites consider:

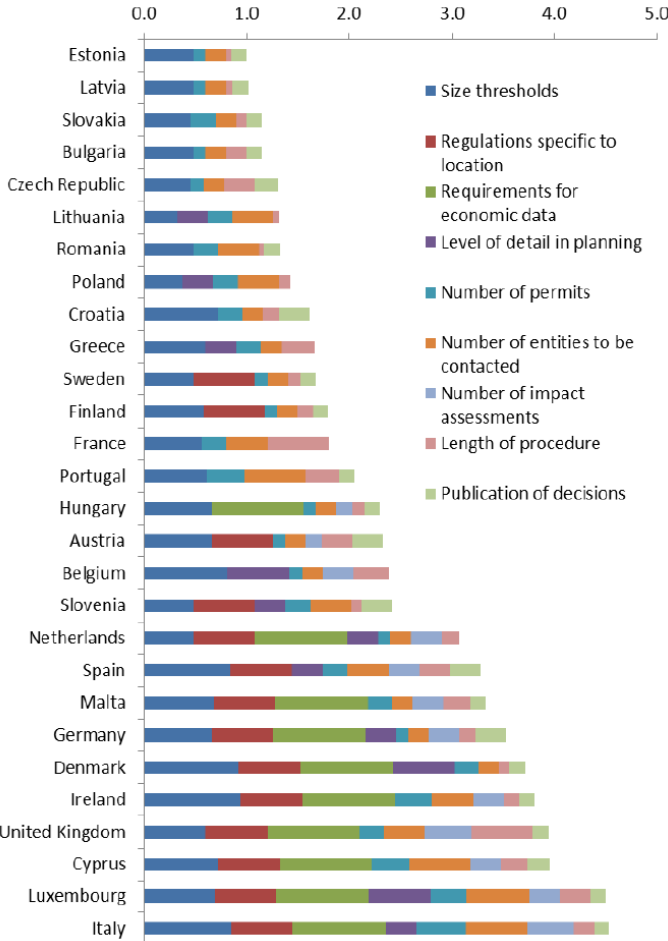
- Size (thresholds) due to the greater impact of large shops on the local environment and traffic;
- Spatial plan details, with a more detailed definition of zones dedicated to commercial activities¹⁵;
- Location-specific rules, including restricting establishment in town peripheries to keep city centres vibrant and avoid vacancies. This is a major concern in many Member States (a legitimate public interest which the Commission shares);
- Economic data for territorial planning requirements.¹⁶

¹⁵ Local spatial plans may refer to commercial use in general, to retail use, or distinguish between food and non-food retail, small and large shops, specify the type of products that can be sold or introduce further requirements.

¹⁶ Whereas ‘economic needs tests’ are prohibited as a requirement to establish new sites, territorial planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest, such as protecting the environment, including the urban environment, or the safety of road traffic are allowed.

Some cities face very specific, often fast developing challenges in the retail sector. As an example, Amsterdam has to cope with tourism related shop concentration. Here, concentrating retail activities into designated areas is necessary to maintain retail diversity and thus quality of life in the city centre. According to spatial analyses¹⁷ undertaken for the municipality, retail diversity decreased significantly up to 2017. Retail services catering to tourists and day-visitors increased relative to non-tourist services. In particular, bicycle rentals, ticket retailers, souvenir shops and various gastronomical/food providers specialising in tourists increased considerably. Such retail monocultures are negatively impacting the quality of life for residents including restricted local shopping opportunities. To limit the negative impacts of tourist retail activities on residents, the municipality opted to spatially constrain them. Thus, the city had to restrict retail services in order to maintain life quality for its citizens.

Figure 2: ‘Retail restrictiveness indicator’ for establishing retail services



Source: COM (2018) 219 final (A European retail sector fit for the 21st century), Annex¹⁸.

¹⁷ Gemeente Amsterdam (2017). ‘Sturen op een divers winkelgebied’, 28 February 2017

¹⁸ COM (2018) 219 final, Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European retail sector fit for the 21st century {SWD(2018) 236 final} – {SWD(2018) 237 final}.

The chart above presents regulations on retail establishment (including at regional and local levels) in Member States. The chart shows differences regarding the type of regulations. Size thresholds are set in all European countries, though regulations specific to locations and requirements for economic data seem to be less applied in Eastern European countries. Detailed planning is required in various Member States across the EU.

Economic stakeholders and representatives from retail service branches tend to doubt the need for setting restrictions to varying degrees and *'emphasise that regulatory frameworks should be future-proof and flexible to allow businesses to swiftly adapt to a changing reality'*. (COM (2018) 219 final (A European retail sector fit for the 21st century, pg. 4).

Nevertheless, local stakeholders argue that spatial planning objectives for retail as well as for other sectors are fundamental to sustainable local and regional development by improving life quality as well as climate protection and soil conservation.

Also from an economic stakeholder perspective this function brings added value, especially at the local level¹⁹: *'Spatial planning is largely a public sector function to influence the future spatial distribution of activities. It aims to create a more rational territorial organization of land uses and the linkages between them, to balance demands for development with the need to protect the environment, and to achieve social and economic objectives. Spatial planning comprises measures to coordinate and improve the spatial impacts of other sectoral policies so as to achieve a more even distribution of economic development within a given territory than would otherwise be created by market forces. Spatial planning is therefore an important lever for promoting sustainable development and improving the quality of life.'* (UN 2008, Marek Belka, Executive Secretary Economic Commission for Europe, pg. v).

In this context, considering local differences in every municipality is a specific requirement of spatial planning. A comprehensive study on territorial governance and spatial planning systems in Europe (ESPON COMPASS, 2018²⁰), notes that spatial planning has to consider local and regional situations to be able to steer tailor-made sustainable development: *'The diversity of conditions for territorial development in Europe means there can be no 'one-size-fits-all' solution to territorial governance and spatial planning. Nevertheless, there is a common concern for all countries and the EU institutions to advance the role of spatial*

¹⁹ United Nations (2008): Spatial Planning, Key Instrument for Development and Effective Governance with Special Reference to Countries in Transition, Economic Commission for Europe.

²⁰ ESPON COMPASS (2018): COMPASS – Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe, Applied Research 2016-2018, Final Report.

planning and territorial governance to meet their full potential in contributing to shared EU goals.'

Nevertheless, this specific task of spatial planning partly conflicts with sector stakeholders. Accordingly, the above study also stated that *'spatial strategy making at national and sub-national levels should concentrate resources on joining-up sectoral policies and actions where there is a particularly strong effect on EU goals, notably economic investment, environment, energy and transport. EU institutions and sectoral policies must address their 'spatial blindness' and work with existing planning tools and procedures more effectively.'*

On one hand spatial planning that restricts retail development provides certainty for service providers through clear land use regulations. On the other hand, spatial planning provides development options by setting the frame for developing infrastructure. *'Spatial planning has a regulatory and a development function. As a regulatory mechanism, government (at local, regional and/or national levels) has to give approval for a given activity; as a development mechanism, government has to elaborate upon development tools for providing services and infrastructure, for establishing directions for urban development, for preserving national resources, and for establishing incentives for investment, etc.'* (UN 2008, pg. vii).

The important role of territorial development issues together with sectoral development is highlighted by the call for the Territorial Agenda within Europe to be given a higher priority: *'[...] the EU must reinvigorate the Territorial Agenda with a substantial revision that aims to play in the same league as the New Urban Agenda and the UN Sustainable Development Goals. It will need a stronger connection to the potential of spatial planning and specific challenges of territorial development whilst embracing a wide range of sectoral interests.'* (ESPON COMPASS, 2018, pg.4).

In this context, multi-level-governance and cross-sectoral local spatial planning, balancing the needs of various stakeholders (including civil society and economic actors) are particularly important: *'Local-level spatial planning takes into account policies elaborated at both the national and regional levels. Local plans are especially important because they involve and affect the end-user. Local governments should prepare regulatory planning instruments, establish priorities for action, facilitate the preparation of local spatial plans, coordinate planning with neighbourhood authorities, engage with the community using participatory planning techniques, take proactive measures to encourage development, and monitor the implementation of policies and proposals, e.g. by enforcing adherence to specific planning legislation.'* (UN 2008, pg. viii).

2.4 Changed perspectives after the ‘Visser judgement’

In contrast to the prevailing opinion in many Member States, in January 2018, the ECJ ruled that retail in goods qualifies as a service under the Services Directive. This followed a request by the Dutch Council of State (Raad von State) for a preliminary ruling on how the Services Directive applies to retail zoning or planning decisions (‘Visser judgement’, case C-31/16, ECJ, 30 January 2018)²¹. The ECJ concluded that land use zoning and planning regulations, laying down restrictions for certain types of retail in a dedicated geographical zone, qualify as a requirement under Articles 14 and 15 of the Services Directive.

The ECJ stated that the exemption specified in Recital 9 cannot be applied because the rules in question (in zoning plans) are *‘addressed only to persons who are contemplating the development of those activities in those geographical zones, and not to individuals acting in their private capacity’* (ECJ, 30 January 2018, paragraph 124).

According to the ‘Visser judgement’, requirements in local zoning plans have to be compatible with the conditions of non-discrimination, necessity and proportionality laid down in Article 15(3) Services Directive and have to be assessed and notified with regard to Articles 15 (7) and 39 (5) of that Directive. (ECJ, 30 January 2018, paragraphs 126 and 132).

In this context, the ‘Visser judgement’ does not primarily question the respective zoning plan aim. On the question of necessity, paragraph 134 confirms that *‘it is apparent from the order for reference that the aim of the prohibition at issue in the main proceedings is to maintain the viability of the city centre of the municipality of Appingedam and to avoid there being vacant premises in the city, in the interests of good town and county planning.’* It continues in paragraph 135 that *‘such an objective of protecting the urban environment is capable of constituting an overriding reason relating to the public interest that may justify a territorial restriction such as that at issue in the main proceedings.’*

So, the ECJ decided that – in accordance with present EU law – the Services Directive may be applicable to rules concerning the development of land. Consequently, town and country planning has to be notified in these cases. However, the ECJ also accepted sustainable local and regional planning as overriding reasons justifying territorial restrictions in the public interest²².

²¹ The decision refers to the zoning plan of Appingedam municipality, where an area (Woonplein) has been designated as exclusively for retailing bulky goods.

²² As presented in the assessments of implementation measures in Member States (2011), the conclusion of public interest was already drawn for most urban and regional planning affecting retail after implementing the Services Directive (https://ec.europa.eu/growth/single-market/services/services-directive/implementation/evaluation_en).

2.5 Background, particular importance and status of the proposed Notification Directive

The 2009 deadline for implementing the Services Directive was followed by a mutual evaluation process with Member States, performance checks and peer reviews in 2010-2013. In 2015/2016 an evaluation by the Commission on Services Directive notification practices revealed limited effectiveness of the procedure. The European Court of Auditors concluded that the Commission was only partly effective in ensuring implementation of the Directive²³. According to the evaluation, shortcomings included limited possibilities to prevent disproportionate regulation, the limited requirements covered by the notification obligation, and the absence of consequences for non-notification.

The evaluation found that not all Member States fulfil the notification obligation. It highlighted that five Member States did not notify any regulatory measure (2009-2015) and ten more notified at most ten regulations in this period. Discussions with Member States identified a lack of awareness of the obligation and the absence of standard practices.

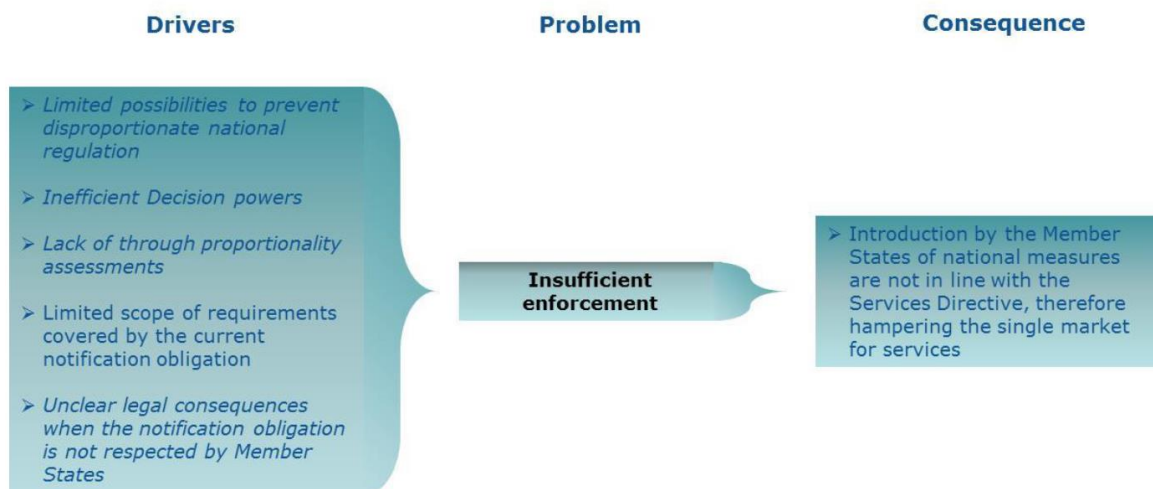
For the Commission, such insufficient implementation of the Services Directive is especially disadvantageous due the extremely large economic potential of the service sector covered by the Services Directive, accounting for 46% of EU GDP. According to estimates of the added value of Services Directive implementation and national reforms to 2014, EU GDP increased by 0.9%, and another 1.7% growth would be possible with more ambitious implementation.

As a next step, an impact assessment (SWD (2016) 434 final) examined drivers of the shortcomings, compared opinions on how to deal with these and how to better ensure implementation of the Directive.

In Austria the experts concluded that most of the Länder planning law acts foresee that shopping centres shall be established only in specially designated planning areas. These provisions have been reviewed by the Constitutional Court, which assessed them in the light of the right to freedom of commercial activities. The Constitutional Court abolished those provisions that had an economic objective while preserving those aimed at protecting the public interest and the planning principle of a non-conflicting usage of land. Protection of the environment includes the urban environment and town and country planning and thus the relevant provisions could be considered to be in conformity with the Directive. (pg.6), Source: Milieu (2011): Services Directive, Assessment of Implementation Measures in Member States, National Report for Austria, Contract No MARKT/2011/035/E1/ST/OP with the European Commission, DG Internal Market and Services, National Report Part Two, Analysis of national requirements in specific service sectors.

²³ European Court of Auditors (2016): Has the Commission ensured effective implementation of the Services Directive? Special Report 2016/05.

Figure 3: ‘Problem tree’ according to the impact assessment



Source: SWD (2016) 434 final, Commission Staff Working Document, Impact Assessment.

At the beginning of 2017, the European Commission published a press release related to the launch the ‘services package’²⁴. This contained four initiatives to boost the services sector that *‘will benefit consumers, jobseekers and businesses, and will generate economic growth across Europe.’* The proposed initiatives aim at facilitating navigation through administrative formalities for service providers and at identifying burdensome or outdated requirements on professionals in Member States. The Commission highlighted though, that the services package shall not amend existing EU services rules but rather ensure better application.

The services package comprises:

- A proposal for a new European services e-card introducing a simplified electronic procedure for completing administrative formalities when intending to provide services abroad.
- A proposal on proportionality assessment of national rules on professional services ensuring a comprehensive and transparent proportionality test prior to setting national rules.
- A proposal on improved notification of draft national laws on services.
- Guidance for national reforms regulating professions to open up services markets (for architects, engineers, lawyers, accountants, patent agents, real estate agents and tourist guides).

For improved notification of draft national laws and services, comparing options in the SWD impact assessment (SWD (2016) 434 final) laid the basis for the

²⁴ European Commission, Press release ‘A services economy that works for Europeans’, Brussels, 10 January 2017.

proposed Notification Directive presented in 2017²⁵. The most important changes are obligations for Member States as well as procedural amendments.²⁶

Changes concerning notification obligations in the proposed Notification Directive are:

- Notify measures via the Internal Market Information System (IMI) at least three months before final adoption.
- More measures to be notified by adding authorisation schemes, professional liability insurance, guarantees or similar arrangements, and multi-disciplinary restrictions.
- Requirement to provide information sufficient to assess compliance (in particular on proportionality).

Procedural amendments in the proposed Notification Directive:

- A three-month consultation period after notification shall allow a dialogue (Commission and Member States have two months to comment, and the notifying party has a month to respond).
- With persistent substantive concerns over compliance the Commission may issue an alert implying that the measure cannot be adopted for another three months.
- After the alert the Commission may adopt a decision on non-compliance which requests the Member State not to adopt the measure in question.
- The Decision to bring a measure in line with the Services Directive is binding on the Member State and may only be challenged in the EU Court.
- Access to notified draft measures, accompanying information and the final adopted measures for third parties and external stakeholders.

Since the Commission presented the proposed Notification Directive substantial discussion took place between the Council, the Parliament and the European Commission.

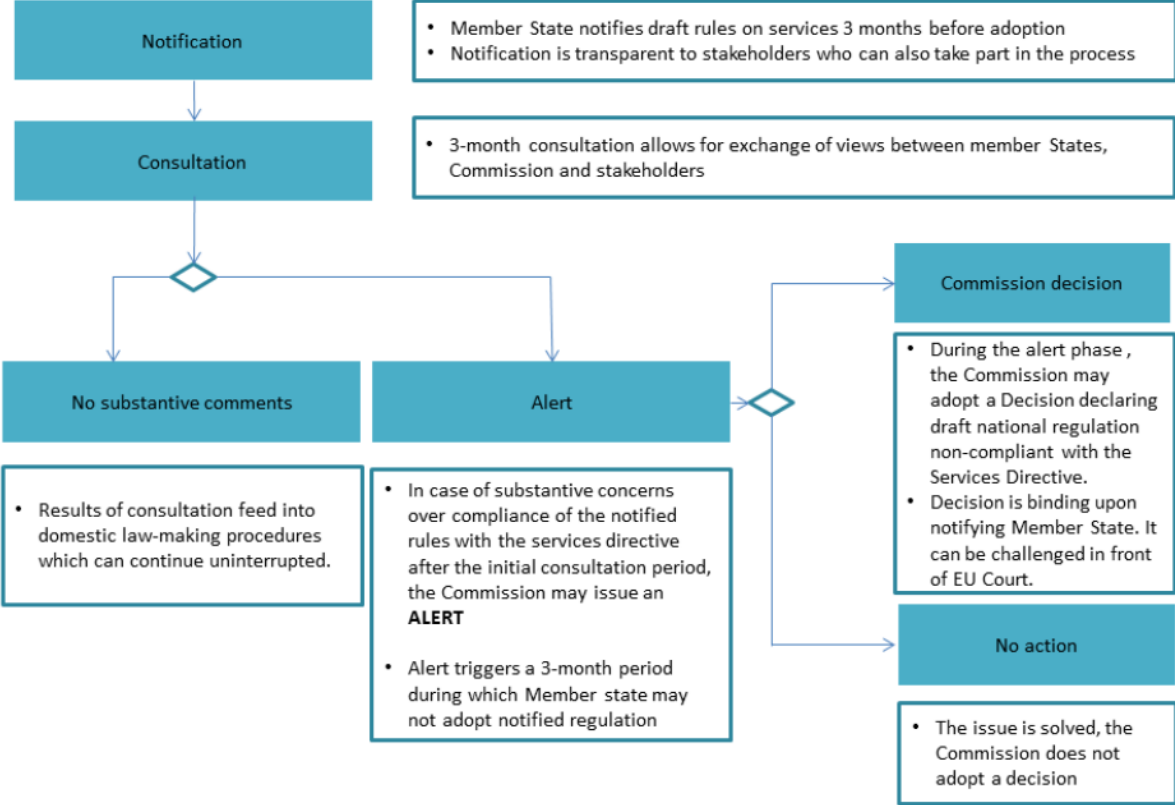
In its response, the Council aimed at balancing the need to improve the existing notification procedure with the need to respect the principles of proportionality and subsidiarity, particularly the prerogatives of national parliaments and

²⁵ COM(2016) 821 final, Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, 2017.

²⁶ See also: EPRS – European Parliamentary Research Service, Briefing EU Legislation in Progress (Author: Marcin Szczepański), 2017.

administrative authorities. Also, the IMCO Committee of the EU Parliament proposed several amendments.

Figure 4: New notification procedure according to the proposed Notification Directive, 2017



Source: European Commission, Fact Sheet A services economy that works for Europeans. 2017 https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_11).

The trilogue on the proposed Notification Directive started on 20 February 2018. Reasoned opinions were issued by France and Germany arguing that the power given to the Commission to block national rules breaches subsidiarity and proportionality principles. Austria, Italy and Portugal also made contributions. Different perspectives of the partners in the discussion means no substantial agreement has been found so far.

To now, the proposal is pending with the IMCO Committee for the new legislature. As coordinators decided to request resumption of work on the basis of the negotiating mandate (18 July 2019), Parliament will resume working on the file in the current term²⁷.

²⁷ See also: European Parliament, Legislative Train 12.2019, 4B Deeper and fairer internal market with a strengthened industrial base/services including transport/up to € 338 bn (<http://www.europarl.europa.eu/legislative-train/api/stages/report/10-2019/theme/deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file/services-notification-procedure>)

2.6 Application of the Services Directive on local self-government in general

The ‘Visser judgement’ covers spatial planning specifically. Nevertheless, beyond that, it has also shed light on the obligation for notifying numerous **other aspects of communal organisation and life** specified by local authorities. These are part of self-governance to ensure a well-functioning community life and to define common rules for the use of public assets (public order). Many of these acts and regulations also affect service providers. In contrast to regulations on services of general interest which are exempted from notification obligations, such local and regional regulations are within the scope of the Services Directive including notification needs.

Further tasks of local self-government (potentially) linked to the Services Directive

A paper assisting German municipalities illustrates the significant and widespread effects of the present legal background. The paper was written by German authorities and discussed with the EU Commission in the autumn of 2019 in two meetings. Based on German law and the Services Directive it presents examples of local and regional provisions (passed by German municipalities and regions) which must be notified, as well as provisions which do not need notifying.

To demonstrate the level of detail deemed relevant the paper presents typical provisions to be notified (from existing regulations):

- Provisions in cemetery statutes which include authorisation or notification for commercial activities at cemeteries or lay down requirements for providing services at cemeteries;
- Provisions for public market statutes that set conditions for selecting retailers or their opening times or product assortment;
- Provisions imposing obligations on service providers using public spaces, such as requirements for sales booths in streets, prohibiting commercial advertising in the old city as well as bans on ambulant trade or commercial activities in public leisure spaces;
- Provisions imposing obligations on service providers when using local facilities such as prohibiting the sale of goods at the local open-air swimming-pool, fees for the commercial use of local facilities;
- Provisions imposing obligations on service providers when carrying out a service (e.g. cleaning private sewage plants, burials, horse-drawn (tourist) vehicles in cities);
- Requirements for commercial use of a town coat of arms.

This list of local authority tasks and activities for sustainably organising municipalities as well as a friendly and beneficial neighbourhood and city life (public order) clearly shows the far-reaching scope of the Services Directive.

These cases highlight how detailed legal knowledge is necessary to decide whether the Directive is to be applied to an act or a regulation. Moreover, the list shows that a huge number of notifications is possibly required. Only four countries had a substantial number of municipalities notifying such regulations between 2010 and 2015 (SWD (2016)434final²⁸). These were Germany with 620 notifications on either funeral services or cleaning services notified by municipalities in 2011, Sweden with 136 notifications, the Czech Republic with 127 notifications of local authorities on prohibiting door-to-door sales of goods and services in 2015 and the Netherlands where notifications related to ‘General Municipal Ordinance’ or ‘Building Ordinance’ were uploaded to the IMI.

New developments – the platform economy offers chances and challenges for cities and municipalities

Recently, new platform-based business-models (platform economy) have developed rapidly. These include delivery and transportation, short-term rental accommodation and other services. Usually, these services use intermediary platforms including webpages and/or apps to connect individual consumers and providers. There are many such innovative companies of which the most well-known include Airbnb (short-term renting) and Uber (transportation).

In 2016, the Commission issued ‘A European agenda for the collaborative economy’. In this document the Commission highlights that collaborative economy business models can bring significant benefits. The Commission also perceived the challenge ‘to ensure fair working conditions and adequate and sustainable consumer and social protection’ (COM (2016) 356 final²⁹).

In addition to the Commission and Member States, especially the local level has to cope with these developments through tailor-made measures. Under the European legal framework, the platform economy is part of the digital economy and the services sector. This complicates matters as it has different implications for forcing companies to comply with local regulations. As emerged only a few

²⁸ EC, 2017: SWD(2016) 434 final, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.

²⁹ COM (2016) 356 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European agenda for the collaborative economy, Brussels, 2 June 2016.

years ago, such developments were not foreseen when the respective Directives were elaborated and agreed. Thus, recent developments greatly increased uncertainty on which Directive has to be applied and how to act in line with European legislation³⁰.

In this complex framework, cities have faced severe difficulties and setbacks in recent years when striving to sustain a high level of living quality.

Short-term rental platforms

Cities are highly challenged by the impacts of short-term rental platforms on the housing market and the quality of life. The speed of development has increased dramatically in recent years. In Vienna for instance, only 1,300 offers were available in October 2014 increasing to 5,300 one year later and 8,600 in August 2017³¹. In 2019 Vienna had almost 11,000 on offer³².

Originally, short term rentals offered by Airbnb and other platforms were based on the following idea:

A service of private households sharing their living place with others and the promise that ‘The community is powered by hosts, who provide their guests with the unique opportunity to travel like a local’ (<https://www.airbnb.co.uk/host/homes>). However, this idea of private home sharing turned into short-term rentals, often with hardly any contact to the hosts and sometimes provided by professional companies. This results in housing shortages by taking accommodation off the rental market and pushing up housing prices.

The proportion of entire flats or houses with high availability offered by short-term rental platforms is used as a proxy for opportunities which are most likely to interfere with urban housing markets. They are assumed to be solely apartments for tourists.

³⁰ ECJ rulings have highlighted that services of the platform economy are diverse and have to be assessed separately, e.g.: AirBnB has been qualified as an ‘information society service’ (C-390/18), concluding that according to the E-Commerce Directive (2000/31/EC) the country of origin principle has to be applied, whereas Uber qualified as a transport service and accordingly local national law is the relevant legal basis.

³¹ Seidl, R. et.al (2017): AirBnb in Wien, eine Analyse. <https://wherebnb.in/wien/>, 2017.

³² Der Standard, 31. März 2019, <https://www.derstandard.at/story/2000100452207/airbnb-in-oesterreich-was-sich-aendert-was-bleibt>.

Figure 5: Share of entire house or apartments for rent and high availability of offers

City	Total listings	Entire house/apartment for rent	High availability
London	49,348	51.2%	58.8%
Berlin	20,576	50.0%	38.2%
Barcelona	18,531	46.6%	63.9%
Paris	61,152	86.9%	34.4%
Rome	25,275	60.1%	91.4%
Athens	5,127	83.2%	91.6%
Venice	6,027	74.9%	87.1%
Amsterdam	18,861	79.5%	28.1%
Brussels	6,192	64.6%	57.8%
Copenhagen	20,545	80.7%	37.6%
Dublin	6,729	47.0%	49.9%
Edinburgh	9,638	56.8%	57.4%
Madrid	16,313	63.4%	64.7%
Málaga	4,853	76.3%	85.3%
Mallorca	14,858	87.5%	94.4%
Manchester	868	41.3%	83.8%
Trentino	1,847	77.3%	92.0%
Vienna	7,893	67.3%	67.0%

Data taken from the InsideAirBnB website in April 2018.

Source: Corporate Europe Observatory, May 2018, UnFairbnb, How online rental platforms use the EU to defeat cities' affordable housing measures.

It is estimated that in Paris about 20,000 flats were taken off the housing market (Baum, 2019).³³ and 2,000 in Vienna (Seidl, 2017). In Berlin restrictions for short-time renting seem to have returned about 8,000 apartments to the long-term rental market (Corporate Europe Observatory, 2018).

Accordingly, cities see themselves as defenders of *'the right to the city that citizens have'* (Sergi Mari, Manager of Tourism for Barcelona City Council³⁴). Thus, large European cities have been eager to regulate the fast-growing service of short-term rental platforms to counteract flats being available only for tourists, ensuring affordable housing market for citizens.

³³ Baum, J. (2019): Analytische Übersicht zu Strategien und Maßnahmen zur effektiven Herstellung von Wettbewerbsneutralität in der Digitalwirtschaft. Im Auftrag des Verbands der Öffentlichen Wirtschaft und Gemeinwirtschaft Österreichs, Jänner 2019.

³⁴ Housing Solutions Platform (2019): ASP Debate The Sharing Economy and Housing Affordability, January 2019 Meeting Report.

To limit short-term rentals and to uphold characteristics of the local housing market, different approaches have been implemented in European cities, such as:³⁵

- limitations on the number of days a home may be rented (e.g. in France or Germany),
- requiring property owners to seek prior planning permission (Dublin),
- a ban on new tourism accommodation in the city centre, differentiating different neighbourhoods (Barcelona), or
- employing a team to work on illegal short-term renting (Amsterdam).

After the ECJ preliminary ruling on a case in Paris, concluding that Airbnb is an information society service provider and benefits from the freedom to provide services as defined in the E-Commerce Directive, ten European cities³⁶ expressed their concerns in an open letter in 2019. They stated *‘European cities believe that homes should be used first and foremost for living in’*³⁷ which requires new ways of regulating. In this context, they asked to put the growth of short-term rental platforms on the agenda of the next European Commission. Supporting this request, the European Association of Real Estate Professions calls on European regulators to ensure that local regulations must remain possible and to pay close attention to increasing difficulties caused by the growth in short-term lettings through platforms.³⁸

However, the perspectives of stakeholders in large cities and metropolises may differ considerably from representatives of small cities and municipalities. Such local authorities may have little demand for short-term rental and may welcome new ways to attract tourists.

E-scooter sharing

The sharp increase in e-scooter sharing, especially in large cities may be another challenge induced by the platform economy for local self-government and its links to the Services Directive. Various providers have flooded a number of cities in the past two years, causing problems for traffic security and public order which required urgent short-term measures by the cities.

³⁵ Source: <https://www.housing-solutions-platform.org/single-post/2018/12/17/The-sharing-economy-and-housing-affordability-what-impact-what-solutions>

³⁶ Amsterdam, Barcelona, Berlin, Bordeaux, Brussels, Krakow, Munich, Paris, Valencia and Vienna

³⁷ <https://www.euronews.com/2019/06/21/rental-platforms-like-airbnb-do-not-cooperate-with-authorities-claims-letter-from-european>

³⁸ European Association of Real Estate Professions (2019): Airbnb and the real estate sector, CEPI calls on the new European Commission to examine impact sharing platforms such as Airbnb on the housing market, Brussels 7 November 2019

As an example, in Vienna, the first e-scooter sharing started at the end of November 2018. Only one year later, 10 service providers were accredited by the city, offering nearly 9,000 e-scooters mainly in inner-city districts. Problems included parking on sidewalks and significantly more scooters in the city. Accordingly, citizen complaints increased. Vienna enacted a new regulation³⁹ limiting the number of vehicles in delimited zones, regulating parking, setting rules for service providers covering illegally parked vehicles, automatic speed limits in certain zones and restricted areas, etc. (ORF.at, 2019).

So, even though Vienna welcomes innovative, slow(er), less space consuming and less polluting transportation modes, the city Council is also responsible for upholding traffic safety and public order for all its citizens. The new regulations are ‘immediate measures’ and a complete reorganisation for this sector is planned for 2021 to introduce quality criteria and regulations for such transport in the city.

2.7 Conclusion: Implications of the ‘Visser judgement’ and the proposed EC Notification Directive for regional and local levels

In addition to the wide scope of the **Services Directive** and its general applicability at national, regional and local administrative levels the ‘Visser judgement’ affirmed the Directive’s applicability at local level. It also shed light on interpretation of Recital 9 for urban planning and the level of detail to be considered for notifications. This obligation has not been implemented in many Member States which interpreted Recital 9 as excluding urban planning (especially at local level) from notification obligations.

The ‘**Visser judgement**’ explicitly clarified that all municipalities and regions setting requirements on retail falling under the scope of Art. 15 (2) and Art. 16 have to notify their local or regional spatial plans in line with the Services Directive. This may include legally binding spatial planning tools at various levels such as primary spatial planning law, regional development plans, local land use plans or zoning regulations, depending on the individual regulations. There are similar regulations in most European countries, cities, towns and villages. These are being amended regularly and sometimes several times a year, especially local spatial plans. Throughout Europe this means that huge numbers of notification requests would have to be elaborated and consulted by the Commission solely for spatial planning (for more detailed information, please see chapter 4: Challenges at regional and local level).

³⁹ ORF.at (2019): Strengere Regeln für Leih-E-Scooter, 19 December 2019, <https://wien.orf.at/stories/3026837/>

Beyond local tasks specified by the ‘Visser judgement’ on spatial planning, the discussion steered by this judgement has also increased awareness of the obligation to notify various local regulations and acts which are specified by local authorities in the framework of self-governance. These restrictions (also) for service providers most often strive to promote well-functioning community life and define common public order rules, rather than restricting service providers.

The **proposed Notification Directive** has intensified discussions as it explicitly allows intervention by the Commission and other Member States before the law is adopted. Important aspects of the proposed Notification Directive are that laws, legal regulations or acts passed by local and regional level authorities:

- need comprehensive evidence to show compliance with the Services Directive (non-discrimination, necessity and proportionality of the requirement);
- must be notified before the law or act comes into force;
- enables the Commission to declare non-compliance after alerting the authority which then did not amend the regulation sufficiently. So the Commission may request the Member State not to adopt such laws and acts.

In the light of current law with the wide scope of the Services Directive and assuming that the proposed Notification Directive is implemented without further exemptions, there will be far-reaching consequences for local and regional authorities, including small municipalities and even villages.

In addition, there are new challenges from the rapid development of platform economy services which were not been foreseen when the Services Directive was set up. Although, undoubtedly innovative services increase the chance for economic growth, these developments may also endanger sustainable urban balances and life quality for citizens. Examples include short-term rentals affecting the local housing market or excessive E-scooter rental jeopardising traffic safety and the safe use of public space/pavements. The speed of these developments means that postponing local authority activities to enact ordinances or regulations could hamper their ability to deal with such challenges.

Most importantly, the ‘Visser judgement’ has stimulated awareness about the far reaching scope of the Services Directive as well as a general discussion on the practicability of Directive for spatial planning (especially at local level) and an intensified discussion about options for excluding specific matters through a new draft of the (still pending) proposed Notification Directive.

3. Diversity of local self-government responsibilities and spatial planning systems

Adding to discussions in the literature and by stakeholders and experts, the following conclusions are based on case study analyses in Austria, Germany, Latvia, the Netherlands and Spain. (For more information, please see annex A.4). This analysis underpins the wide scope of tasks and responsibilities of local governments in these EU countries and presents an overview on the diversity of spatial planning systems.

3.1 Wide range and diversity of local authority tasks and responsibilities

All Member States have agreed on the **European Charter of Local Self-Government** (1985), laying down the commitment to apply basic rules guaranteeing the political, administrative and financial independence of local authorities. The Charter specifies that:

- Local authorities shall, within the limits of the law, have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority. (Art. 4 (2));
- Public responsibilities shall generally be exercised, in preference, by those authorities which are closest to the citizen. Allocation of responsibility to another authority should weigh up the extent and nature of the task and requirements of efficiency and economy. (Art. 4 (3));
- Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law. (Art. 4 (4)).

In line with the Charter, local authorities have mandatory autonomous functions (prescribed by law) as well as voluntary functions performed as initiatives. In addition, local authorities undertake tasks transferred from central or regional governments as delegated functions on behalf of the higher government level.

Thus, local self-government is undoubtedly a task for all municipalities. However, their size and consequently their way of dealing with their tasks differs widely. The European Union (EU 27) has more than 95,000 municipalities ('local administrative units' – LAU). Of these, nearly 35,000 are in France, about 11,000 in Germany, more than 8,000 in Spain, and around 6,000 in Italy, the Czech Republic and Greece (Eurostat, 2018). Other countries like Denmark, Estonia and Lithuania have less than 100 LAUs. The average population of an LAU ranges between 59,000 inhabitants in Denmark to about 1,300 in Cyprus. The average population size of a European LAU is about 4.700 persons.

In addition to the size of municipalities, the size of a Member State is relevant for establishing the multi-level system nationally as well as how subsidiarity and proportionality principles are applied.

The five case studies show that primary law specifying the tasks and responsibilities of municipalities (local authorities) varies. In federal states (Austria, Germany) the responsibilities vary in the different provinces (Länder), whereas in Spain the tasks depend on the size of the municipality.

Local governments cover a **wide range of responsibilities**. Although there may be few mandatory functions, focusing on a few groups, local governments often assume many more tasks. They may cover general public services, public order and safety, economic affairs, local transport environmental protection, housing and spatial planning, public utilities, public health, recreation and culture, education, social services and welfare.

Figure 6: Tasks and responsibilities of local authorities (in case study Member States)

Tasks & Responsibilities	Austria	Germany	Latvia	The Netherlands	Spain*
General public services					
Registration (birth, land registry, marriage, death, etc)	x	x	x	x	x
Collecting statistical information	x	x	x	x	
Administration of elections	x	x			
Public order and safety					
Building inspection	x		x		
Civil protection	x	x	x	x	x
Fire safety	x	x		x	x
Disaster management		x	x		
Food & drink control					x
Economic affairs					
Economic development (facilitating economic activity, supporting local investment)		x	x	x	
Licensing for commercial activity			x	x	
Tourism		x		x	
Local transport					
Public transport	x	x	x	x	x
Local roads	x	x	x	x	x
Public infrastructure (bicycle and parking infrastructure)	x	x	x	x	
Environmental protection		x	x		x
Housing & Spatial Planning					
Local planning	x	x	x	x	x

Tasks & Responsibilities	Austria	Germany	Latvia	The Netherlands	Spain*
Social housing	x	x	x	x	x
Public utilities					
Water supply, sewage	x	x	x		x
Waste management	x	x	x	x	x
Public space	x	x	x	x	x
Energy supply		x	x		
Public Health	x	x	x	x	x
Recreation and culture	x			x	
Sports facilities	x	x	x	x	x
Cultural facilities (libraries, local museums, cultural events)	x	x	x	x	x
Cemeteries	x	x	x		x
Public parks	x	x	x	x	x
Education					
Pre-school	x	x	x	x	
Primary education		x	x	x	
Secondary education		x	x	x	
Organisation of continuing education for teaching staff			x		
Vocational education		x			
School building – maintenance	x			x	x
Social and welfare					
Personal social services	x	x	x	x	x
Child care		x	x	x	
Social benefits		x		x	
Employment				x	

* depending on population size | Source: ÖIR/Spatial Foresight, 2020.

Some categories are very similar in the Member States analysed. Most countries transfer some administrative tasks like registration, administration of elections and collecting statistical information to their most local level of government. Local transport, housing and spatial planning are other typical tasks for local governments. The same is true for public order and safety, basic public health, as well recreation and culture, although for German municipalities, cultural and sport facilities are a voluntary task. Public utilities are a typical local government task although energy supply is excluded in Austria and the Netherlands.

The wide scope of local authority tasks provides a glimpse of the variety of issues where municipalities must consider Services Directive applicability. Depending on the breadth of local regulations density, the Services Directive may have to be applied to many different local matters. Thus, following a thorough review by the authority, such acts and ordinances have to be notified according to the present legal framework (see further, chapter 4.6).

3.2 Differences between Member States regarding spatial planning governance

Spatial planning is ubiquitous in Europe though **detailed arrangements vary a lot**. Even the legal definition of spatial planning differs considerably. All Member States have a hierarchy of instruments involving multiple levels of government. (ESPON/COMPASS 2018).

The following simplified overview highlights differences in the levels of decision making related to spatial planning.

Figure 7: Number of levels of government relevant for spatial planning in 2016

2 Levels	3 Levels	4 Levels	5 Levels
DK; IS; LI; LT; LU; MT; SE; SI; UK- SCT/WAL/NIR	AT; BE; BG; CH; CY; CZ; EE; EL; ES; FI; FR; HR; HU; LV; NL; NO; PL; RO; SE; SK; UK-ENG	DE; IE; IT;	PT
No planning competences at national level: BE; ES; UK. The UK Government has competence for spatial planning for England.			

Source: ESPON/COMPASS, 2018.

In addition, the **types of spatial planning instruments** and their legally binding effects differ greatly. Member States combine visionary, strategic, framework and regulatory instruments at various governance levels. This means, spatial planning governance and legal frameworks differ greatly between and even within European countries.

Differences, highlighted by spatial planning organisation charts for the five case studies, concern the level of law-making and implementation especially for sectoral issues. Also, the characteristics of strategic planning and governance for horizontal and vertical coordination vary including tasks, powers and topical focus. There are various regional, sub-regional and intermediate level systems, with different planning responsibilities and decision-making powers.

Although there are large differences in responsibilities and organisational structures, spatial planning law in Member States shows a common understanding which *‘typically defines spatial planning as the process of organising the territory, land use or space, and managing competing interests so as to balance development with protection of land in the public interest.’* (ESPON/COMPASS 2018, pg. 14) Nevertheless, some countries define wider objectives or other substantive goals.

Despite the large differences in responsibilities and decision-making power at higher governance levels, there is a broad convergence for local spatial planning

tasks in general. Nearly all municipalities are responsible for local spatial planning, including local land use planning and zoning regulations. In line with the aims of the European Charter of Local Self-Government (Council of Europe, Treaty No.122), this is a core task for municipalities related to applying their right for local self-government.

Spatial planning systems throughout Europe show a diverse landscape of governance, especially for regulatory powers at regional and national levels. The diversity of these conditions is important when discussing solutions for balancing the aims of the European Single Market and the needs and resources of local and regional authorities (see chapter 5).

4. Challenges and concerns at regional and local levels related to the Services Directive, the proposed Notification Directive and the ‘Visser judgement’

This chapter reviews regional and local challenges based on interviews with national, regional and local stakeholders in seven Member States (Austria, Denmark, Germany, Latvia, the Netherlands, Spain and Sweden). Experts were asked to contribute to the study with their expertise in this field in guided interviews. In addition, a CoR stakeholder meeting in Brussels on 28 January 2020 enabled local and regional stakeholders to raise their concerns. Experts and stakeholders in this chapter were interviewees or at the stakeholder meeting.

As described above, the wide scope of the Services Directive puts a lot of additional workload on local and regional authorities who are responsible for acts and regulations which have to be notified to a varying extent. Assuming that the proposed Notification Directive is implemented without further exceptions, the implications will increase these far-reaching obligations for regional and local authorities down to small municipalities and even villages. There will be an even higher level of impact due to procedural delay and increased intervention opportunities for the Commission (as proposed in the current draft).

Differences in population size imply different administrative staff capacity and professional specialisation. Accordingly, small towns and municipalities find it considerably more difficult to cope with highly difficult and complex questions including applicability of the Services Directive to local law making.

These concerns have been expressed by many local and regional stakeholders towards their higher national administrative governance structures with the main impetus on informing the national level about local and regional stakeholder views and envisaged problems. Some capital cities have even joined forces to bring their concerns to a European level of attention. The mayors of Amsterdam, Barcelona, Berlin, Budapest, Madrid and Riga expressed their common position in a joint letter.⁴⁰

⁴⁰ The letter prepared in January 2019 was addressed to Mr. Gutiérrez Prieto, European Parliament, Rapporteur on the Notification Directive and Ms. Schramböck, EU Council Austrian Presidency, Minister for Digital and Economic Affairs.

4.1 High degree of legal uncertainty

It has become clear that the broad scope of the Services Directive and its obligations encounters a wealth of situations in terms of tasks of local and regional authorities as well as ways to deal with these tasks locally and regionally. This is especially true for local spatial planning and legally binding documents (including land-use plans and zoning regulations, laid down in acts and ordinances by local authorities) but also for many other responsibilities of local and regional authorities (as shown above).

The interviews highlighted that the wealth of circumstances mean discerning applicability of the Services Directive is highly difficult and complex and may only be answered correctly by European law experts. Experience in Member States shows that many local administrators, even legal experts in larger cities, regularly approach legal departments of provincial or national authorities to clarify these questions. Since subtleties count, this can also be difficult for these central legal departments. Furthermore, even legal experts cannot always agree on applicability of the Services Directive. These cases have to be decided by the ECJ, which means uncertainty based on case law rather than the certainty of a clear regulatory framework. Accordingly, interpretation of the Services Directive is very uncertain for local and regional stakeholders.

Experience has shown that local administrative staff find it very difficult to evaluate and judge if a new act or regulation has to be notified under the Services Directive, even if the person is trained in legal procedures. This leads to high administrative burden not only for local authorities but also for higher level legal departments supporting them. This doubles procedures and related work load as local officials often also need to coordinate with regional and national authorities about notifications to European bodies.

In addition, vast demand is expected for training local and regional civil servants to prepare and implement notifications. This expectation is based on the lack of know-how for notifications as well as the requirement to clearly justify a measure with robust empirical analysis of the legally binding local spatial plan, in line with the proportionality assessment in the proposed Notification Directive. In this context, the justification to be provided and what is feasible for municipalities remains in doubt.

Having said that, experts assume that large cities will increasingly contract legal experts. Smaller municipalities, may cope with this challenge of judging the

applicability of the Services Directive with two types of actions, especially for local spatial plans (if the obligation for notification remains):

- (1) High uncertainty of municipalities about notifying spatial plans may lead to notifying all such plans (regardless of their link to the Services Directive) in order to be 'safe'. Especially, but not limited to local spatial planning, this could amount to thousands of needless notifications even if only a small share of municipalities notify every change to a spatial plan.
- (2) Small municipalities may refrain from issuing specific regulations for service providers (e.g. restrictions for retail) and stick to very general requirements in their spatial plans. So, they would abandon their options to lay down more specific future local development planning requirements. This again would hamper tailor-made implementation of spatial planning principles and could have a negative impact on the life quality, sustainability and attractiveness of centres.

Concluding on implementation uncertainty and qualitative burden, research shows that local administrative staff in many, especially small and medium sized local authorities are not equipped to take such highly complex legal decisions. This poses additional administrative burden not only on local authorities, but also on higher administrative levels. In addition, expert estimates suggest that a substantial number of small municipalities would either notify all or avoid issuing spatial plans restricting service providers such as retail, even though the aims are in the public interest.

4.2 Administrative burden due to a high number of relevant planning regulations

Apart from the professional specialisation of administrative staff, notifying local spatial plans means that local authorities (plus regional and national authorities, responsible for spatial planning as well as supporting functions) and even more the Commission, would face a vast number of local spatial planning documents which must be notified.

In contrast to many other legal matters, spatial planning necessitates constant attention at local level. In addition to regular revisions of local spatial planning in most European countries (generally every 5-10 years), partial amendments of land use plans or zoning regulations (especially changes for specific locations affecting individual plots of different sizes) may be made several times a year by each local authority. The larger the city, the more partial amendments, but small

municipalities also normally have to issue changes of spatial plans several times a year.

Without implementation of the Services Directive regarding notification of spatial planning legislation (due to a common interpretation of Recital 9 until the ‘Visser judgement’), there are only estimates of the **number of notifications** to be expected.

Austrian and German experts expect that many local spatial plans may have to be notified. Overall, there are numerous changes of local spatial plans every year:

- As spatial planning in Austria is a provincial responsibility, amendments depend on the provinces’ primary spatial planning law and requirements. Nevertheless, Austrian Ministry of Economy experts estimated more than 100,000 amendments of local spatial plans per year in Austria. This is based on the following estimations of selected Austrian provinces:
 - In Lower Austria, up to 1,000 changes of local spatial plans are issued per year (about 500-600 land use plans and 300-400 local development plans)
 - In Tyrol, local spatial planning legislative amendments average 4,000 or more per year.
 - In Upper Austria, 440 municipalities issue on average 10 local spatial plan amendments annually, a total of some 4,400 cases.
- In Germany about 11,000 municipalities issue around 10 local spatial plan amendments per year.
- Differences in governance structures and the spatial planning system in Denmark means estimates here are lower. Nevertheless, Denmark (with around 100 municipalities), experts assumed about 200 legislative amendments of local spatial plans and additional 100 amendments at sub-local level per year.

Hence Germany and Austria change more than 200,000 documents related to local spatial planning per year. As described above, regulating retail is widely practiced in all Member States. Even if only 10% of local planning acts and regulations have to be notified (a very cautious estimate), this would result in about 20,000 notifications per year from Germany and Austria alone. Applying this estimate⁴¹ to all European municipalities would result in some 145,000 retail-regulating notifications each year.

⁴¹ Based on multiplying the number of municipalities in Europe by an average number of notifications. This average is based on estimated notifications and the number for municipalities in Germany and Austria (ca. 1.5 notifications per year).

This expectation was also expressed in a letter of concerned European cities, stating: *'The stream of draft-proposals from European cities, carefully developed by our mayors and deputy-mayors, that may need to be put forward for examination by the European Commission, will be enormous.'*⁴²

To emphasise the scale a comparison with IMI notifications might be useful. Between 2008-2018 some 200 to 650 notifications were added per year by all Member States. Within the entire ten-year period about 150,000 documents were notified via IMI⁴³.

In its impact assessment on the proposed Notification Directive, the Commission estimated the **work load and related costs** for future notifications in 2017⁴⁴. The SWD (2016) presented average time and cost estimates, according to a request for information from Member States about the hours spent per notification and the level of the civil servant occupied with the notifications⁴⁵. The average for each national notification was:

- Preparation (including coordination with the line Ministry): 10 man hours (determining whether a measure needs to be notified, writing the notification, consulting relevant authorities);
- Processing in IMI: 2 man hours;
- Processing comments received from the Commission or other Member State, including responses: 8 man hours (analysing comments and determining the authority responsible for replying, preparing comments, coordinating with other authorities, uploading in IMI);

So each notification is expected to require about 20 man hours on average (mainly from legal experts) for the notifying Member State alone.

⁴² Letter of the cities of Amsterdam, Barcelona, Berlin, Budapest, Madrid and Riga to Mr. Gutierrez Prieto, European Parliament, Rapporteur on the Notification Directive and Ms. Schramböck, EU Council Austrian Presidency, Minister for Digital and Economic Affairs in January 2019

⁴³ EC, Single Market Scoreboard, Internal Market Information, System (IMI), Reporting period: 01/2018 12/2018, https://ec.europa.eu/internal_market/scoreboard/docs/2019/performance_by_governance_tool/imi_en.pdf

⁴⁴ EC, 2017: SWD(2016) 434 final, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System

⁴⁵ see also: SWD (2016) 434 final, Annex 4: Estimation of costs for public authorities, 66f

Additional work load is to be expected for assessing notifications by other Member States:

- Commenting: 4 man hours (assessment by responsible authority, determining whether comments should be made, formulating and coordinating comments with relevant authorities, uploading in IMI).

As notifications generally have to be handled by trained lawyers, especially for local authorities of low population size estimates should add support from an external legal expert (as reasoned above).

This number depends on the notification procedure specifications and the information required. The proposed Notification Directive requires more details in terms of the proportionality assessment, so the average workload per case will be even higher⁴⁶.

It becomes clear that this obligation would cause a major quantitative burden as well as costs for Member States, especially for municipalities but also for higher administrative levels supporting the local and regional level. In addition, implementation would also flood the Commission and all other Member States with notifications to be processed.

According to the impact assessment (SWD(2016) 434 final), above estimated 145,000 retail-regulating notifications of local spatial plans each year would result in roughly 3 million man hours of administrative staff and nearly EUR 100 million administrative cost at local level. Considering the need for external legal advice, up to another EUR 725 million cost could have to be covered by local authorities to support notification obligations for regulations similar to that of the ‘Visser judgement’⁴⁷.

4.3 Local spatial planning as an instrument to persue public interest

The high administrative burden from an enormous number of notifications and stakeholders affected (as described above) should result in visible added value. However, the plausibility of such expectations is severely questioned by regional and local stakeholders. They argue that spatial planning regulations will be compatible with the Services Directives requirement in the vast majority of cases. This is grounded on legal objectives and purposes laid down in national planning

⁴⁶ see also: SWD(2016) 434 final, Annex 3 – Practical implications of the initiative for the affected parties: who is affected and how, p64f

⁴⁷ If about 5 000 euro for legal costs are considered per authorisation process for 145 000 notifications per year.

frameworks aiming at implementing public interest through planning instruments accompanied by a participatory process and legitimised democratically.

This argument is also strengthened by the ‘Visser judgement’ for retail regulation by spatial planning, confirming that the aim of maintaining the viability of the Appingedam central area (city centre) and avoiding vacancies clearly reflects good planning. After the ECJ judgement, the question of overriding reasons was proven by the national Dutch court and decided accordingly. From this general, but not concluding, statement, it seems most probable that many regulations in local spatial plans will be for an overriding reason relating to public interest.

As an example, the German technical commission on urban development (Fachkommission Städtebau) issued a handout⁴⁸ for municipalities after the ‘Visser judgement’. In this paper, the commission argues conclusively that municipalities should already be able to meet the requirements related to argumentation and documentation (when planning responsibly and in line with the German Federal Building Code – Baugesetzbuch). It further advises municipalities to explain urban planning reasons for each restriction specified in local plans. The paper concludes that, if the regulation of retail in spatial planning documents is justified in line with the requirements of German law, it can also be justified in line with the requirements of the Services Directive. In the Netherlands, a leaflet published by the association of municipalities, and seminars clarified the impact of the ‘Visser judgement’ on spatial planning.

These guidelines for municipalities reduced uncertainty. Municipalities still employ similar spatial planning tools to concentrate retail activities, but spatial plans have been adjusted to reflect the ‘Visser judgement’ by adding justifications.

According to background information from selected Member States, business representatives also fundamentally doubt the added value of notifying every local spatial plan regulating service providers. They argue that especially small and medium sized enterprises would not have the resources to follow these ongoing information processes at a very detailed level and separately for each municipality) in terms of content and spatial coverage⁴⁹.

Beyond justifying current local regulations and plans, local and regional stakeholders expressed their concerns and doubts that the Commission could assess the specific local and regional issues in due time and detail. They argue

⁴⁸ Bauministerkonferenz Deutschland (2019): Hinweise der Fachkommission Städtebau zu Auswirkungen des ‘Visser’ Urteils des EuGH, insbes. zur Anwendbarkeit der EU-Dienstleistungsrichtlinie auf Bebauungspläne (März 2019), <https://www.bauministerkonferenz.de/Dokumente/42322684.pdf>

⁴⁹ Source: CoR stakeholder meeting, Brussels, 28 January 2020.

that a serious examination of proportionality would only be possible with detailed local knowledge of a municipality and the applicable spatial planning instruments. As a consequence of the high number of notifications the situation could emerge in which the Commission would not be able to give feedback on all notifications. This would lead to an unsatisfying situation for many local and regional authorities who would not receive valuable feedback about their implementation.

Local and regional stakeholders assume that the additional administrative burden and costs will not enhance knowledge or spatial planning and will turn out to be 'useless' related to the initial aim of the Services Directive.

4.4 Serious delay to spatial planning processes

Another serious concern of local and regional stakeholders is the requested additional stand-still period for an ex-ante notification. The currently proposed Notification Directive foresees a minimum three-month review period. Such a requirement would cause considerable delay in adopting spatial planning documents (land use plans and zoning regulations).

This is especially aggravating as the length of planning processes has been criticised for a long time. National and regional authorities (as lawmakers for spatial planning) have strived to shorten these as much as possible while still considering public participation and the mandatory democratic decision-making process.

In this context, stakeholders highlight the difficulty of procedural requirements, time limits and existing deadlines for spatial planning. Procedure timeframes would have to be lengthened to include notifications and lead to a longer planning process for each plan affected by the Services Directive.

In addition, local spatial planning follows democratically legitimised decision-making processes. In its function as representing local citizens, the Municipal Council must follow a clearly defined legal process where potential intervention by the Commission would be a significant interference. Either such interference would then have to be allowed before the Council decision is taken and thus would not be based on the democratically legitimised version. Or the notification would be based on the Council decision. A request for changes would then be in conflict with the legitimate decision and delay the planning process considerably. Such an interference by the Commission in democratically legitimised local planning processes would be very difficult to explain to citizens.

Local stakeholders, especially in smaller municipalities, fear that longer procedural phases could reduce their ability to attract companies looking for new locations. Companies might back out from negotiations if procedures take more time. Thus, longer planning processes might have a negative impact on local investment by service providers. Such waiting periods would be especially devastating for small municipalities as they often rely on few, sometimes singular chances to attract enterprises to invest in their territory.

Some concerns even relate to potential lawsuits or compensation claims where planning processes are questioned by the Commission which requests the Member State not to adopt the measure or the local plan. Conversely, municipalities may also need to prepare for legal claims (where measures are not notified) leading to longer decision processes and less efficient administrative procedures (even if not notifying is finally proven correct).

Moreover, local and regional stakeholders doubt the benefit of notifications from a (local) political perspective. The lack of benefits together with the high necessary administrative efforts and procedural delay again would encourage activist groups campaigning against the EU.

In conclusion, stakeholders state that the proposed Notification Directive conflicts with the aims and efforts of streamlining procedures to adopt planning amendments faster. This not only affects local and regional authorities but also citizens and especially economic actors requiring defined local regulations in order to invest. As such, longer planning processes could create a hindrance to the single market. Above this concern, the procedural consequences and citizen perception of such an intervention worry local and regional stakeholders.

4.5 Very low EU Single Market relevance of most local level regulations

Stakeholders doubt that the added value in terms of enhancing competition and increasing economic value by notifying such local regulations equals the additional effort needed.

For national stakeholders, notification should concentrate on laws and regulations worth assessing and notifying if considerable improvements are to be expected. This principle is very relevant for spatial planning, but also for other local tasks and responsibilities as shown in the German example. This should especially be taken into account with public order regulations such as the use of public space (below the limit for specifically economic regulations) or local acts specifying

common local agreements on public order issues (e.g. requirements for sales booths in street use statutes, prohibition of commercial advertising in old cities, bans on ambulant trade on beaches or public green spaces, etc.).

A recent study reviewed subsidiarity and the proportionality of EU-measures in relation to their economic added value. As a recommendation it states: *'Applying the principles of subsidiarity and proportionality, these questions in fact envision an EU that is orientated towards a common good perspective: in areas where the EU can provide a value added for citizens, it should indeed act and, this way, provide a common good. The common good can take various forms, e.g. specific regulation in the Single market or leadership in crisis situations. But any such EU-level action should be guided by the idea that member states and its citizens are provided with a clear-cut value added. Conversely, in areas where it may not be capable of providing such value added, national or subnational governing bodies should take the lead.'* (Naess-Schmidt, Bjarke Jensen⁵⁰, 2018, pg. 27)

4.6 Questioned consideration of the proportionality and subsidiarity principles of the proposed Notification Directive

The discussion on notifying local spatial planning regulations has gained momentum and opened another thread of debate on provisions in the proposed Notification Directive. National authorities and experts question the proportionality of the Commission to inherit more power to ensure implementation of the Services Directive at various levels. Consideration of proportionality principles is questioned because of the high additional effort needed for notification of local regulations although very low EU Single Market relevance is expected.

From a local and regional authority perspective, the rights of the Commission, foreseen in the proposed Notification Directive, clearly put the principle of subsidiarity and the rights of municipalities to manage their own affairs in danger. A considerable dispute has developed about the powers the given to the Commission by the proposed Notification Directive on the basis of Article 6(5). This would enable the Commission to request a Member State to repeal an adopted measure.

An infringement of the right to local self-government under Art.4 TEU and the principle of proportionality guaranteed by Art.5 (4) TEU, is being discussed

⁵⁰ Naess-Schmidt, S., Bjarke Jensen, J. (2018): Subsidiarity and Proportionality in the Single Market, An EU fit for inclusive growth, Bertelsmann Stiftung.

intensively by some Member States. In the context of the proposed Directive, local and regional actors are very concerned about infringement and the democratic aspect in general.

Supported by the European Charter of Local Self-Government, local autonomy and self-government are considered as extremely important. At the same time local autonomy is multi-faceted throughout Europe. The following paragraph underlines this statement:

'Local autonomy is definitely a multi-dimensional phenomenon, and it is far from easy to create an index which fully reflects the different elements from which the concept is composed. There are, furthermore, important variations between countries when it comes to the autonomy of their municipalities. These variations can only partly be explained by regional and historical factors and depend to some extent on political choices, power and interest. It would be interesting to know more about the factors which lead to high or low degrees of autonomy. Local autonomy is not only a phenomenon to be explained. It is also likely that local autonomy has an impact on other political processes, such as the participation of citizens at local elections, their trust in politicians and the performance of municipalities' (Ladner, Keuffer, Baldersheim, 2015, pg.7)⁵¹

Local spatial planning is a core area of local self-government and has to be handled with great care to prevent civil society from EU fatigue, frustration and increasing opposition to measures implemented by the EU.

⁵¹ Andreas Ladner, Nicolas Keuffer and Harald Baldersheim, November 2015, Self-rule Index for Local Authorities (Release 1.0), Final report, Tender No 2014CE16BAT031.

5. Conclusions and recommendations

5.1 Background to the study research question

The study findings show that the way the proposed Notification Directive is implemented will be important for the European Commission as well as for local and regional stakeholders. For the Commission it is important to find an appropriate solution for future implementation of the European Single Market at local and regional level. Local and regional stakeholders will have to cope with future administrative requirements depending on the solution.

Specific challenges for local and regional authorities, highlighted in the study, are linked to the combined impact of the Services Directive (2006), the proposed Notification Directive (2017) and clarification of applying the Services Directive to local spatial planning in certain cases, as highlighted by the ‘Visser judgement’ (2018).

Figure 8: Background of specific challenges for local and regional authorities



Source: OIR.

The actual and proposed legal framework from the viewpoint of the Commission

The **Services Directive**, adopted in 2006, aims to increase the freedom to establish and provide services across borders within the EU by removing legal and administrative barriers. The services sector accounts for 46% of EU GDP and the underlying objective of establishing an integrated Internal Market in Services is to support the sector’s considerable potential for economic growth and job creation.

Evaluations by the Commission and the European Court of Auditors between 2010 and 2016 revealed limited effectiveness of the notification procedure and ensuring adequate implementation of the Directive.⁵² Services Directive implementation was estimated to increase EU GDP by 0.9% up to 2014, with another 1.7% growth possible given more ambitious implementation.

Consequently, in 2017 the Commission proposed the Notification Directive aiming at improved notification of draft national laws and services, considering options in the SWD impact assessment (SWD (2016) 434 final)⁵³. The aims of the **proposed Notification Directive** are to:

- increase the efficiency of the notification procedure,
- improve the quality and content of notifications,
- cover additional requirements which application of the Services Directive has shown can be important barriers to the internal market for services,
- enhance compliance with the notification obligation.

From the Commission's viewpoint, as detailed in the proposed Notification Directive, COM(2016) 821 final, explanatory memorandum, the legislative instrument was meant to modernise *'the current notification procedure under the Services Directive in order to improve the enforcement of the existing provisions of that Directive, by establishing a more effective and efficient procedure preventing the adoption by Member States of authorisation schemes or certain requirements not complying with the Services Directive. The provisions of the present Directive do not amend the existing Services Directive beyond the required revision of its specific provisions on notification procedures.'*

In addition to this proposed directive, in January 2018 the European Court of Justice (ECJ) **'Visser judgment'** revealed that land use zoning and planning regulations that restrict retail in a geographical zone qualify as potentially notifiable regulations under the Services Directive. Consequently, similar legal regulations at local and regional level must be assessed and notified accordingly.

⁵² European Court of Auditors (2016): Has the Commission ensured effective implementation of the Services Directive? Special Report 2016/05.

⁵³ COM(2016) 821 final, Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, 2017.

The viewpoint of local and regional stakeholders

Although the **Services Directive** has not been changed in terms of intention and aims since 2006, the Notification Directive aims at improving its implementation. Discussions of the consequences of the ‘Visser judgement’ has increased awareness of the Services Directive notification obligation at local and regional level both, for spatial planning but also for other measures restricting services at local and regional level.

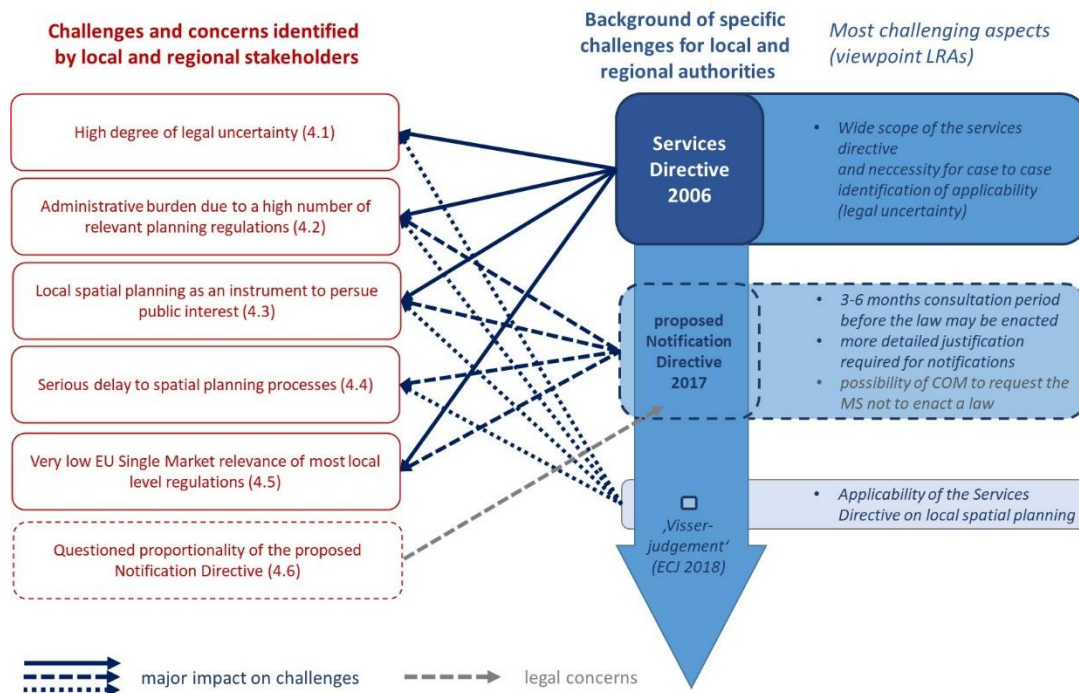
The following discussion on possible amendments to the proposed Notification Directive does not question the Single Market aims or the Services Directive objectives. National, regional and local stakeholders share these overall goals. However, especially in interpreting the ‘Visser judgment’ they have become aware of potential administrative consequences and burden when implementing the Services Directive according to the proposed Notification Directive.

The following conclusions and recommendations shed light on both perspectives –concerns and challenges for local and regional stakeholders as well as the viewpoint and intentions of the Commission. They contribute to the discussion by introducing alternative suggestions for notifications by local and regional authorities which could be incorporated in a potential ‘new Notification Directive’.

5.2 Major challenges of the current and proposed legal framework for local and regional stakeholders

Case studies and interviews show that local and regional authorities recognise various challenges under the existing Services Directive and its interpretation through the ‘Visser judgement’ and the proposed Notification Directive.

Figure 9: Most challenging aspects of the Services Directive, proposed Notification Directive and ‘Visser judgement’ for local and regional authorities



Note: The brackets (4.1 – 4.6) refer to chapters of the study that provide more detailed information on the challenge.
Source: OIR.

Analysing statements from local and regional stakeholders highlights the following challenges:

- (1) The broad scope of the Services Directive and the necessity to identify its applicability for regulating service providers leads to uncertainty and significant use of authority resources.
- (2) The consultation period of 3 months after notification (with an option to extend for another 3 months), would result in a ‘stand-still period’ before the law may be enacted by an authority (required by the proposed Notification Directive), causing serious delays in planning and decision-making processes.
- (3) More detailed justification of regulations related to service providers, as foreseen for every notification under the proposed Notification Directive, would lead to much higher administrative burden.
- (4) Applicability of the Services Directive on local spatial planning according to the ‘Visser judgement’ would require notifying thousands of local and regional acts each year (only related to spatial planning), resulting in major administrative burden and costs for local and regional authorities.

Member States and European institutions have also identified major challenges related to the proposed Notification Directive. Accordingly, several proposals to amend the Directive were offered in 2017, including by the EU Parliament/IMCO⁵⁴, the Council of the EU/European Presidency 2017⁵⁵ and the EU Economic and Social Committee⁵⁶).

The proposed amendments differ considerably in detail, but are similar in looking to ease the strict approach where the Commission can adopt a Decision about the incompatibility of a measure with Directive 2006/123/EC and require a Member State to refrain from adopting the measure. At least one proposal also highlights concerns and alternative proposals for the ‘stand-still period’, more detailed justification of notified measures and for (repeated) notification of implementing laws at lower levels if a law has been already notified at national level.

Local and regional authorities find implementation of the proposed Notification Directive challenging due to:

- their broad spectrum of responsibilities (at local level) including public order,
- limited staff and financial resources (especially for the 75% of EU municipalities with less than 5,000 inhabitants⁵⁷),
- many small acts and ordinances directly influencing the every-day lives of their citizens, with some being amended or replaced regularly,
- more direct relations with citizens who often follow implementation of local acts more attentively than at higher administrative levels, which might disrupt an ‘EU-friendly climate’ if local problems are perceived to be caused by the EU.

The discussion about local and regional implementation of the proposed Notification Directive is overshadowed by a general discussion about whether the Commission should be entitled to issue a binding decision to a Member State to

⁵⁴ European Parliament 2014-2019 (Plenary sitting): Report on the proposal for a directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (COM(2016)0821 – C8-0011/2017 – 2016/0398(COD)), Committee on the Internal Market and Consumer Protection, Rapporteur: Sergio Gutiérrez Prieto (8.12.2017).

⁵⁵ Council of the European Union, Interinstitutional File: 2016/0398 (COD), General approach.

⁵⁶ Official Journal of the European Union, C288/43: Opinion of the European Economic and Social Committee on: (a) ‘Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System’ (COM(2016) 821 final — 2016/0398 (COD)), [...], Rapporteur: Arno METZLER, 31.8.2017.

⁵⁷ No detailed data per LAU (local administrative unit) for Spain (average population size of LAU: 5,700), France (1,900), Cyprus (1,300) and Portugal (3,400), EUROSTAT, 2018.

not adopt a measure. Some Member States argue that the right for the Commission to decide on national regulation breaches subsidiarity and proportionality principles. No substantial agreement has been found so far. Local and regional stakeholders share the concerns of national stakeholders related to the proposed Notification Directive proportionality and coherence with the subsidiarity principle. However, as this discussion is mainly at Member State level this study does not further expand on the subsidiarity and proportionality aspects of the proposed Directive.

The proposal is currently pending with the IMCO Committee for new legislature. Coordinators requested resumption of work based on the negotiating mandate (18 July 2019), so Parliament will resume working on the file in the current term⁵⁸.

General needs for local and regional stakeholders

The case studies and interviews highlighted that local and regional stakeholders expect that improved implementation of the Services Directive as proposed by the draft Notification Directive needs to balance the responsibilities of local and regional stakeholders for their citizens and the overall aims of the European Single Market encouraging jobs and economic growth. At the moment, many stakeholders see a mismatch at the expense of the local and regional positions.

For local and regional stakeholders, **application of the Services Directive on local decision-making** must:

- include certainty and validity for local, regional and national authorities, with precise information on the legal matters to be notified, the rules to be applied and how Recital 9 (Services Directive) has to be interpreted in practice (e.g. by restricting the notification obligation to limited, clearly defined matters);
- **be appropriate, pragmatic and workable** to limit the administrative burden at local and regional level to a minimum;
- **consider the large share of very small municipalities** across Europe with scarce personnel resources and finances which have difficulties in performing complex legal tasks or entering into a dialogue with the Commission;

⁵⁸ See also: European Parliament, Legislative Train 12.2019, 4B Deeper and fairer internal market with a strengthened industrial base/services including transport/up to € 338 bn (<http://www.europarl.europa.eu/legislative-train/api/stages/report/10-2019/theme/deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file/services-notification-procedure>).

- avoid extending planning and decision-making processes and endangering local and regional development **with additional standstill periods**;
- **be useful and manageable for the Commission** by providing transparent and reliable information about implementation at regional and local levels;
- **focus on laws and regulations which provide noticeable added value** related to intra-European competition for services and increasing economic wealth in the EU (in the framework of the Services Directive);
- **avoid interfering in democratically legitimised decision processes** at local level without concrete added value, to avoid major irritations for European citizens and even more critical discussion on the role of the EU especially at local level;
- **be adaptable** to allow the Commission to change the focus of notification obligations to the most important issues at local and regional level.

Finally, **local situations in Europe are extremely diverse** in terms of legal frameworks for local and regional responsibilities including spatial planning, the size of municipalities and their resources (financial and expertise), etc. These differences need to be kept in mind when discussing the administrative burden for local and regional authorities implementing the Services Directive together with a future ‘new Notification Directive’.

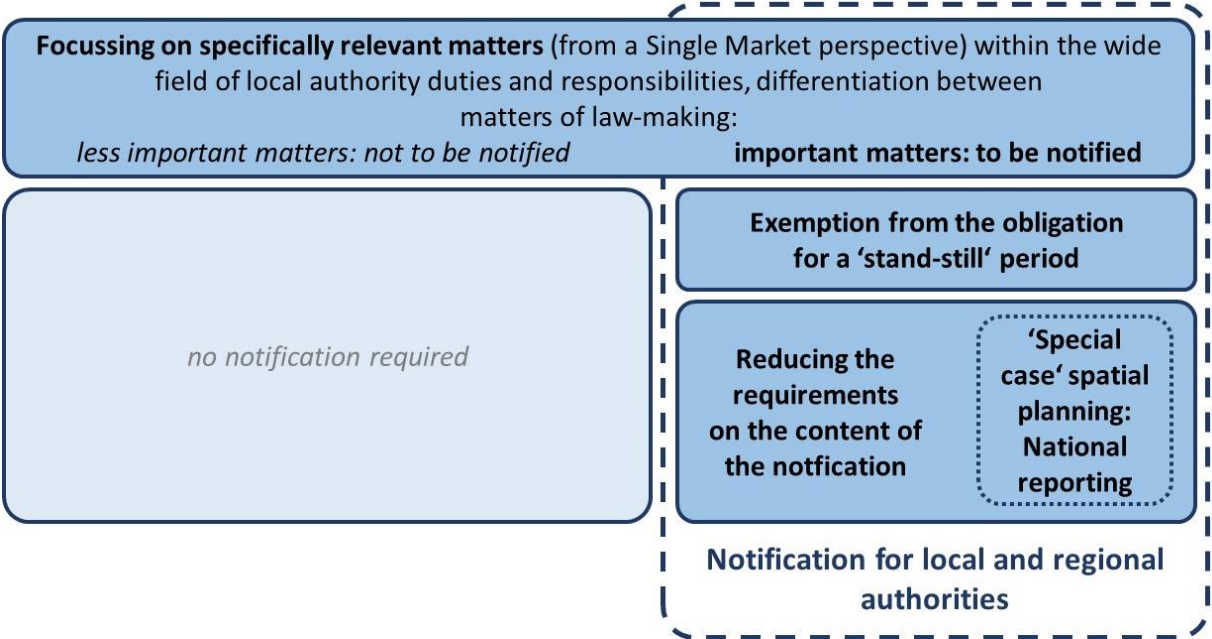
5.3 Suggestions for changes in the proposed Notification Directive linked to specific challenges for local and regional authorities

The following subchapters describe the research team’s suggestions to deal with challenges created by the actual and potential legal framework (Services Directive, proposed Notification Directive, ‘Visser judgement’).

The suggestions cover the requirements of the Commission as well as local and regional authorities. Suggestions include the initial intention and objectives of the Commission, specific challenges for local and regional authorities, probable consequences of changes in the proposed Notification Directive and also highlight advantages and disadvantages for both perspectives.

The following figure shows how these suggestions can match an overall approach to deal with challenges for local and regional stakeholders.

Figure 10: Suggestions for changes to the proposed Notification Directive concerning local and regional authority notifications



Source: OIR.

(1) Suggestion to deal with the broad scope of the Services Directive

Intention and objectives of the Commission

The Services Directive applies to a wide range of service activities⁵⁹. It strives to ease the freedom to establish and provide services across borders within the EU by removing legal and administrative barriers.

The underlying concept of ‘service’ is defined in a broad manner. As referred to in Article 50 of the EC Treaty, it encompasses any self-employed economic activity which is normally provided for remuneration. Furthermore, the obligation for notification (Art. 15) applies to any requirement which affects access to, or the exercise of, a service activity at national, regional or local levels.

The Commission explicitly intended implementation of the Services Directive at all national governance levels. The Handbook on implementation of the Services Directive (EC, 2007) emphasises that *‘requirements that need to be reviewed may be found in legislation at central level as well as legislation at regional level and, in some cases, also at local level’* (pg. 57).

Nevertheless, the handbook’s formulation ‘in some cases also at local level’ suggests that the EC did not expect to receive many local level notifications each

⁵⁹ As a basic rule, the Services Directive applies to all services which are not explicitly excluded from it. (Handbook on implementation of the Services Directive, EC 2007, pg. 10).

year. This assumption is supported by the calculation estimates presented in the annex of the impact assessment (SWD (2016) 434 final) to assess administrative costs, which calculated with only 13 notifications per Member State per year on average. This presumably does not include many local and regional level notifications.

Specific challenges for LRAs

Due to its large scope and the wide range of issues it addresses, the Services Directive constitutes a significant challenge for Member States and especially for local and regional authorities. However, the broad scope of local tasks, as well as the diverse landscape of local authority acts and ordinances in individual Member States are a major challenge when interpreting the Services Directive's applicability and the need for notification.

An assessment by German authorities (including feedback from the EU Commission) illustrates the significant and widespread effects of the Services Directive legal background. German law covers many examples of local and regional provisions which must be notified. Many of those requirements are expected to have very little economic impact on the services sector and thus are of negligible importance for the European Single Market. Such regulations include provisions imposing obligations on service providers when using local facilities such as prohibiting the sale of goods at a local open-air swimming-pool, fees for the commercial use of local facilities, prohibiting commercial advertising in the old city, bans on ambulant trade or commercial activities in public leisure spaces, or requirements for commercial use of a town coat of arms.

This list of local authority tasks and activities set up in the German study, mainly focuses on the organisation of sustainable city life (public order) to which the Services Directive is applicable. It clearly shows the far-reaching scope of the Services Directive at local level. It also highlights that detailed legal knowledge is necessary to decide whether the Directive is applicable (or not) and that at least a part of these requirements is of little relevance to the Directive's general aims. Moreover, the German study shows that many notifications should be expected if Member States have to screen every local regulation.⁶⁰

⁶⁰ So far, only three countries notified a substantial number of local regulations between 2010 and 2015 (SWD (2016)434final). These were Germany with 620 notifications on funeral services or cleaning services notified by municipalities in 2011, the Czech Republic with 127 notifications of local authorities prohibiting door-to-door sales of goods and services in 2015 and the Netherlands where notifications related to 'General Municipal Ordinance' or 'Building Ordinance' were uploaded to the IMI.

The consequences would be:

- continued legal uncertainty for local and regional authorities related to what has to be notified;
- many notifications from local and regional authorities with very little relevance to the Directive's general aim of increasing GDP;
- large administrative burden and costs for local and regional authorities;
- difficulties for the Commission to assess the large number of notifications in time, possibly leading to many notifications without feedback.

Suggestion for improvement

To meet such challenges and to reduce the number of notifications at regional and local level, it **the Commission's attention could focus on the most important fields of action**, where local and regional authorities are important implementation partners for the Services Directive.

Such a focus would reduce the obligation for notification of local and regional acts and regulations which are economically relevant. In doing so, 'economically relevant matters' (from the viewpoint of the EU Single Market) would have to be clearly defined.

This approach would limit the administrative and financial burden for local and regional authorities as well as the Commission while still ensuring that the Commission can follow the functioning of the internal market at local and regional level in the most relevant sectors.

Definition of '**most important fields of action**' (economically relevant matters) is key. As there is no common European structure for local and regional regulations, specifying relevant regulations needs thorough analysis.

The list of important fields of action could be developed as follows:

- (1) Launching an initial EU-wide 'information gathering phase' to analyse the broad field of local and regional legal provisions to be considered;
- (2) Setting up 'mutual discussion' between the Commission, Member States and representatives of local and regional authorities to agree on an explicit list of 'most important fields of action';
- (3) Specifying these 'most important fields of action' at local and regional level for which notification is required (with restrictions for service providers);

- (4) Implementing the list e.g. by adopting a delegated act;
- (5) Evaluating the approach in the framework of article 11 (Report and review) of the proposed Notification Directive;
- (6) Revising the delegated act if necessary (revised list of the most important fields of action).

Step 1, the ‘information gathering phase’ serves as the basis for deciding on the most important local and regional responsibilities under the Services Directive. Elements contributing to this information gathering could be:

- an analysis of notifications of local and regional regulations from Member States since 2006;
- an analysis of Commission alerts during notification of local and regional regulations since 2006;
- a study on the Service Directives’ applicability to local and regional regulations in EU Member States and their relevance for the Single Market. This could include (estimated) scales of monetary values for affected service providers, overall EU added value and national court decisions related to claimed infringement of the Services Directive by local and regional regulations.

This information would enable definition of the ‘most important local and regional fields of action’ from the viewpoint of the Commission. The results of the ‘information gathering phase’ should be available to all Member States, including examples of regulations to be notified (explicitly differentiated by Member State). Together with the delegated act, a guidance for Member States (and especially for local and regional stakeholders) could be published to support implementation at local and regional level.

The suggested process of information gathering and mutual discussion would require a delay in enacting the ‘new Notification Directive’. Thus, either the ‘new Notification Directive’ would only be enacted after this process has finished, or a temporary solution is needed to provide certainty for local and regional authorities until the list of ‘most important fields of action’ is available.

Consequences– advantages/disadvantages for LRAs and the Commission

Advantages for LRAs	Advantages for the Commission
<ul style="list-style-type: none"> + less notifications at local and regional level, + certainty about the regulations to be notified with an explicit list of ‘most important fields of action’, + certainty and guidance for Member States and local and regional stakeholders reduces the need for additional legal experts. 	<ul style="list-style-type: none"> + less notifications at local and regional level to be evaluated, + local and regional authorities are aware of the regulations to be notified, which leads to less non-notifications for the ‘most important fields of action’, + Commission can concentrate on the most important regulations.
Disadvantages for LRAs	Disadvantages for the Commission
<ul style="list-style-type: none"> – some administrative burden remains (also for very small municipalities), – possibly uncertainty during the transition phase (based on the temporary solution until agreement on the explicit list of ‘most important fields of action’). 	<ul style="list-style-type: none"> – considerably more effort for information gathering, mutual discussion and adopting a delegated act, – potentially postponing enactment of the ‘new Notification Directive’ or requiring a temporary solution – steering effort (revision may be necessary).

(2) Suggestion to deal with the challenge of the consultation and ‘stand-still’ period

Intention and objectives of the Commission

The consultation period, including the requested minimum ‘3 months stand-still’ before a regulation may be enacted by the national authority, is a major change proposed by the Notification Directive. It supports a more effective and coherent notification procedure to prevent Member States from introducing discriminatory, unjustified and disproportionate authorisation schemes or requirements related to services covered by Services Directive. By avoiding the adoption of authorisation schemes or requirements the proposed Notification Directive shall contribute to more competitive and integrated services markets in Europe, benefitting service providers and consumers.

Specific challenges for LRAs

For local and regional stakeholders, the new requirement of a stand-still period of 3-6 months is highly worrying, as it **limits the ability of local and regional authorities to act and react quickly**.

Cities and municipalities are urged to enact short-term measures as well as to act and react quickly, especially when changing conditions and new developments make it necessary to uphold the quality of life for their citizens, public order and a prosperous and sustainable development within their territories.

The need for action has become especially evident with the rapid development of the platform economy (e.g. short-term rental platforms and mobility services). This development has shown that economic actors and frameworks can change very quickly. The rapid changes have produced considerable positive as well as negative effects on life quality and lifestyle in cities. This experience demonstrates the necessity to be flexible in terms of implementing regulations at local level.

Adhering to legally prescribed terms and deadlines in planning processes is especially important for **spatial planning**. Concerns expressed by local and regional stakeholders highlight the anticipated effect of the ‘stand-still’ period which extends planning processes considerably. In recent years, it has been a major aim of legislators in many Member States to shorten these processes to better serve the needs of citizens and entrepreneurs. Furthermore, they argue that a standstill of 3-6 months could severely endanger local and regional development with negative effects on businesses, because economic actors require concrete and certain regulations for investment decisions.

Finally, local authorities are closest to citizens. Delaying decision-making at local level ‘because of EU-control’ (due to consultation by the Commission) could be perceived negatively by citizens and easily used by activist groups or political parties working against the overall idea of a common European Union. As such, the ‘stand-still’ period could strengthen campaigning against the EU and harm the perception of EU added value for European citizens. This would not help an ‘EU-friendly climate’ within the population.

Suggestion for improvement

To avoid delaying measures, local and regional authorities should be exempted from a ‘stand-still’ period during consultation, i.e. from the obligation to wait for feedback from the Commission. Thus, relevant local and regional measures would have to be notified when they are enacted at latest.

As foreseen in the Services Directive, the Commission shall examine compatibility of notified requirements within 3 months and (if necessary) adopt a decision requesting the respective Member State to refrain from adopting the measure or to abolish it (Services Directive, article 15(7) para.2).

The suggestion to exempt local and regional measures from the ‘stand-still’ period also applies to spatial planning matters. However, in contrast to the other local and regional measures, there is a suggestion to deal with specific challenges related to notification of local and regional spatial planning regulations (see below, suggestion for regular national reports).

Consequences– advantages/disadvantages for LRAs and the Commission

Advantages for LRAs	Advantages for the Commission
+ no delay due to ‘stand-still’ period, + local and regional authorities can react quickly to developments within their territories.	+ notification obligation remains in effect, the Commission receives information on local and regional regulations related to the Services Directive (current practice), + less disturbance of ‘EU-friendly climate’ at local level.
Disadvantages for LRAs	Disadvantages for the Commission
– no disadvantages identified.	– Ex-ante prevention of disproportionate legislation is not possible at local and regional level.

(3) Suggestion to deal with the challenge of more detailed justifications for notified rules and decisions

Intention and objectives of the Commission

According to the Services Directive, Member States may maintain certain regulatory requirements restricting service providers only when they are non-discriminatory, justified by an overriding public interest and proportionate. This has to be described in the notification.

The impact assessment (SWD (2016) 434 final) revealed that, in practice, information in Member State notifications is often insufficient for proper assessment of the justification and proportionality of the measures. This shortfall has been explained by the lack of a clear obligation for Member States to provide a substantive assessment of the justification and proportionality as part of the notification.

Consequently, the proposed Notification Directive defines the quality of information required in the notification in more detail. It requests the information should be sufficient to assess compliance with Directive 2006/123/EC. Thus, the notification shall clarify the public interest objective, why the authorisation scheme or requirement is necessary and meets this objective and an analysis of the proportionality. The justification should be accompanied by evidence.

Specific challenges for LRAs

The increased demand for information is placing greater demands on local and regional authorities as they often do not have substantial personal and financial resources.

Notifications would cover a very broad scope of responsibilities. Accordingly, an increased quality of notifications, especially the evidence and an analysis of the proportionality of the measure would pose a major additional administrative burden on local and regional authorities. To meet these higher demands, many of those authorities would have to pay for consultation by an external legal support or would have to ask higher governance levels to increase their support.

Suggestion for improvement

To ease local and regional notifications, less information should be requested from local and regional authorities. This especially refers to the demand for evidence and analysis of the proportionality of the measure, which challenges many small municipalities due to their considerably smaller resources.

The reduced standard of reporting for smaller municipalities (maintaining the requirements laid down in the Services Directive) should be partially offset through supporting tools to increase the quality of local and regional authority reporting. For instance, guidance with clear guiding questions could outline the most important aspects and help reduce the burden of reporting notifications while increasing their quality. This could also be considered in the notification tools (e.g. IMI).

Consequently, for most local and regional authorities, lower quality notifications would massively reduce the considerably higher administrative burden to be expected with the proposed Notification Directive.

To enable the Commission to differentiate between the large number of small municipalities and a few large cities and metropolises, the lower requirements could also be combined with population size limits (e.g. large cities and metropolises could still have to meet the higher demands).

Consequences– advantages/disadvantages for LRAs and the Commission

Advantages for LRAs	Advantages for the Commission
+ no additional administrative burden from higher demand for quality, especially for evidence and analysis, + guidance for justifying measures due to overriding reasons.	+ more willingness to describe the proportionality adequately (due to less notifications required), + better quality due to guidance, + high quality descriptions for large cities and metropolises maintained, + clear, concise description for small local and regional authorities, with a clear structure, easy and quick to verify.
Disadvantages for LRAs	Disadvantages for the Commission
– no disadvantages identified.	– not all municipalities report with the same standards.

(4) Suggestion to deal with the ‘specific case’ of local and regional spatial planning and the Services Directive

Intention and objectives of the Commission

The intention and objectives of the Commission are the same as for the more detailed justification of notified regulations (3).

The specific characteristics of spatial local and regional planning regulations make it a particular challenge to notify every legal act. Even more so if the information must be evidenced empirically and enriched by detailed analyses.

Specific challenges for LRAs

Notifying local and regional spatial planning documents separately is widely anticipated to entail overwhelming administrative burden and costs. Due to the need for regular amendments of local spatial plans, there could be some 145,000 notifications of retail regulations per year, resulting in some EUR 825 million of costs annually for local authorities throughout the EU.

As the Commission is not expected to be able to check this number of notifications in time and will also have difficulties in evaluating the local situation and relevant details without local knowledge, a procedural standstill is expected.

Therefore, it is clearly a priority for local and regional authorities to inform the Commission about implementation of local spatial planning in line with the Services Directive without having to notify each planning decision.

Suggestion for improvement

Finding an adequate solution for this specific legal matter is clearly a priority for local and regional authorities as well as for Member States and European institutions. All stakeholders agree that notifying local spatial planning acts (as clarified in the ‘Visser judgment’) is neither practical nor even feasible in terms of achieving the Services Directive aims regarding local spatial planning⁶¹.

In line with the Commissions’ expressed need for information about implementation at local and regional level (especially for retail as a sector of major importance concerning the Services Directive), a proposal was already offered by the Council Presidency in 2018 (Presidency proposal on Urban and Spatial Planning, Brussels, 31 October 2018⁶²).

Depending on the Member State, primary planning laws and regulations including legal documents at national and/or sub-national levels set the legally binding framework for local and regional spatial planning. When this primary planning law is notified, the framework for local and regional spatial planning has already been justified regarding its proportionality related to the Services Directive aims. Local and regional authorities have to act within this framework. Thus, local and regional spatial plans must follow legal specifications and guidelines in national or sub-national primary planning laws which are notified (if relevant). Local and regional spatial plans are therefore implementing acts of already notified primary laws. They apply generally notified measures to a specific local authority and accordingly should be in line with the Services Directive.

The following suggestion addresses key elements of the spatial planning proposal presented by the Council Presidency⁶³ and details its potential implementation:

- notification of primary law on spatial planning (if containing relevant regulations);
- but, exemption of local and regional level spatial planning documents (with an accompanying self-assessment process instead);

⁶¹ The Commission, in the person of Elżbieta Bieńkowska (European Commissioner for Internal Market, Industry, Entrepreneurship and SMEs 2014-2019), has already signaled a general willingness to amend the current draft Notification Directive to not impose disproportionate administrative burden, especially regarding local spatial and urban plans. Source: Letter from Elżbieta Bieńkowska to Mr Sergio Gutiérrez Prieto and Mr Niculae Badalau, 4 April 2019, Brussels.

⁶² https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13733_2018_INIT&from=DE

⁶³ Presidency proposal on Urban and Spatial Planning, pg. 2

- with mandatory reporting about ongoing implementation at local and regional level (based on the self-assessment process) to be provided by the Member State.

Every relevant act at local and regional level should be subject to a self-assessment, filling in a template to evaluate the compliance of local and regional spatial planning documents with Services Directive requirements. The self-assessment template should be defined by guidelines built and shared among Member States and the Commission.

National summary reports

The mandatory reporting should be presented in a national summary report, to be submitted to the Commission. This mandatory report should include evidence about ongoing implementation at local and regional level (based on the self-assessments). As the proposed Notification Directive foresees European Commission reports on the results of applying the Directive every three years, reporting from Member States should be coordinated with these ('period of the report').

The definition of information required in the mandatory national report should be agreed with Member States and the Commission. The Commission shall have the right to assess the quality of the reports and to call for additional information.

National reports should present a structured description of local and regional implementation in the context of national/sub-national primary planning law. The reports could be based on:

- reasoning and justification for notification of the primary planning law;
- an accompanying self-assessment for local and regional spatial planning (based on guidelines agreed by Member States and the Commission) from local and regional authorities to be shared with national authorities;
- claims related to spatial planning in the context of the Services Directive before national courts (where relevant).

Contents of the national summary reports describing implementation of spatial planning measures at local and regional level for a specified period could include:

- information about the national/sub-national primary planning law (related to the Services Directive), including a general explanation of how measures are justified, proportional and non-discriminatory;

- a structured summary of implementation of regional and local regulations within the period (based on self-assessment, to be provided by local and regional authorities), including:
 - a description of restrictions laid down in local and regional spatial plans,
 - analyses, describing the use of existing restrictions (described in previous reports) and new local and regional restrictions (for the Member State),
 - for new restrictions: explanations of how these restrictions are justified, proportional and non-discriminatory,
 - for new restrictions: examples providing evidence and analysis of the proportionality of the measure (especially for new regulations in large cities).

These reports could provide a comprehensive picture of local and regional usage of primary planning laws and how uniformly or diversely these are handled in Member States. They would allow for a mutual exchange of the interpretation of national, regional and local legal provisions in relation to the Services Directive in line with the Commission's aim of active subsidiarity.

Requirements to be considered for exempting local and regional spatial plans

This suggestion to reduce massive administrative burden can only work with a clear definition of the legal planning regulations and governance levels which are exempted from the notification obligation, but are self-assessed and presented in the national summary report instead. This is especially important as spatial planning laws and governance structures differ widely across Member States. These differences have to be considered and the matters to be notified must be defined precisely for each Member State and agreed by the Commission and Member States with input from local and regional authorities.

This approach requires careful screening of national primary planning law and the options for lower level planning in relation to the Service Directive. This should identify the measures to be applied in each Member State. In any case, the justification for certain matters must be notified, creating a framework for local and regional spatial planning⁶⁴.

Differentiating between primary planning laws to be notified and local and regional planning acts to be presented in national reports could involve:

⁶⁴ Here, 'regional' should be understood as a wider local level, comprising several local authorities, whereas 'sub-national' authorities may be responsible for enacting primary planning law together with or instead of national authorities e.g. in federal states.

- Each Member State sending a proposal for the differentiation to the Commission which matches its planning system,
- The Commission evaluates the proposals and agrees or gives feedback in case of disagreement,
- A final agreement between the Commission and all Member States forms the basis of subsequent implementation.

Consequences– advantages/disadvantages for LRAs and the Commission

Advantages for LRAs	Advantages for the Commission
<ul style="list-style-type: none"> + no notification procedure at local and regional level, + less demanding, clearly structured self-assessment (instead of notification procedure), + much less administrative burden and costs, + no need for additional legal advice, + national report provides good information for comparing approaches within the Member State. 	<ul style="list-style-type: none"> + evaluation of spatial planning notifications only at national/sub-national level, + less need for insight into local and regional situations, + structured reports provide reliable integrated information about implementation in the Member State at all governance levels, + quality of justifications should increase if national reports are publicly available, + much more efficient than dealing with some 145,000 local planning acts annually.
Disadvantages for LRAs	Disadvantages for the Commission
<ul style="list-style-type: none"> – providing information for each planning act according to the self-assessment template, – provision of additional information for the national report (if requested by the national level). 	<ul style="list-style-type: none"> – ex-ante prevention of disproportionate legislation is not possible, – ex-post information only presented in a structured, detailed summary report with illustrative examples (not in detail for each act),

5.4 Concluding remarks

The Single Market objectives as well as the Services Directive aims are shared by the Commission as well as by national, regional and local stakeholders. However, in interpreting the ‘Visser judgment’ national, regional and local stakeholders became aware of potential consequences and additional administrative work and costs when implementing the Services Directive. Even more administrative burden is expected with the proposed Notification Directive.

The suggestions for improvement in this report aim at contributing to the discussion on implementation of the Services Directive through the proposed Notification Directive. They add important aspects for an improved ‘new Notification Directive’ by enabling the Commission to balance the need for information and details of implementation enhancing the internal market on one hand with a feasible administrative burden especially at the lowest administrative levels on the other hand.

These suggestions are based on desk research, interviews and case studies. Further discussions between the Commission and Member States as well as representatives of regional and local authorities will be required in order to grasp the diversity of local and regional authority responsibilities and the differences between local matters being regulated.

A carefully balanced solution focusing on the most relevant notifications at regional and local level is in line with the Sibiu Declaration (May 2019), where Europe’s leaders claimed that *‘We will deliver where it matters most. Europe will continue to be big on big matters. We will continue to listen to the concerns and hopes of all Europeans, bringing the Union closer to our citizens, and we will act accordingly, with ambition and determination.’*

Bibliography

Andreas Ladner, Nicolas Keuffer and Harald Baldersheim, (2015): Self-rule Index for Local Authorities (Release 1.0), Final report, Tender No 2014CE16BAT031.

Baum, J. (2019): Analytische Übersicht zu Strategien und Maßnahmen zur effektiven Herstellung von Wettbewerbsneutralität in der Digitalwirtschaft. Im Auftrag des Verbands der Öffentlichen Wirtschaft und Gemeinwirtschaft Österreichs, Jänner 2019.

Bauministerkonferenz Deutschland (2019): Hinweise der Fachkommission Städtebau zu Auswirkungen des ‘Vissser’ Urteils des EuGH, insbes. zur Anwendbarkeit der EU-Dienstleistungsrichtlinie auf Bebauungspläne (März 2019) <https://www.bauministerkonferenz.de/Dokumente/42322684.pdf>

Bauministerkonferenz Deutschland (2019): Hinweise der Fachkommission Städtebau zu Auswirkungen des ‘Vissser’ Urteils des EuGH, insbes. zur Anwendbarkeit der EU-Dienstleistungsrichtlinie auf Bebauungspläne (März 2019), <https://www.bauministerkonferenz.de/Dokumente/42322684.pdf>

Bjerkem, J.; Harbour, M. (2019): Making the Single Market work: Launching a 2022 masterplan for Europe, Discussion Paper, Sustainable Prosperity for Europe Programme, 28 August 2019.

CMS website (30/01/2018), <https://cms.law/en/nld/publication/cjeu-judgment-on-european-services-directive-brings-profound-changes-to-dutch-approach-to-retail-zoning>

COM (2016) 356 final: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European agenda for the collaborative economy, Brussels, 2.6.2016.

COM (2016) 821 final, Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, 2017.

COM (2018) 219 final, Annex to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European retail sector fit for the 21st century {SWD(2018) 236 final} – {SWD(2018) 237 final}

Committee of the Regions (2019): Minutes CoR-Meeting, 26 June 2019, 136th Plenary session of the European Committee of the Regions.

Council of the European Union (2018), Presidency proposal on Urban and Spatial Planning (Brussels, 31 October 2018), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_13733_2018_INIT&from=DE.

Council of Europe (1985), European Charter of Local Self-Government, Treaty No.122, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/122>

Council of the European Union, Interinstitutional File: 2016/0398 (COD), General approach.

Corporate Europe Observatory (2018), UnFairbnb, How online rental platforms use the EU to defeat cities' affordable housing measures.

Der Standard, (2019): 31. März 2019, Newspaper Article: 'Wo sich Wiens 11.000 Airbnbs befinden und was auf Vermieter zukommt', <https://www.derstandard.at/story/2000100452207/airbnb-in-oesterreich-was-sich-aendert-was-bleibt>

EC(2007): Handbook on implementation of the Services Directive.

EC, 2016: SWD(2016) 184 final, Commission Staff Working Document, European agenda for the collaborative economy – supporting analysis, SWD Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – A European agenda for the collaborative economy.

EC, 2017, European Commission, Fact Sheet A services economy that works for Europeans. 2017 (https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_11)

EC, 2017: SWD(2016) 434 final, COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the enforcement

of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System.

EC, 2019. Monitoring the application of European Union law, Annual Report, 2018.

EC, 2019: Europe in May 2019 Preparing for a more united, stronger and more democratic Union in an increasingly uncertain world, The European Commission's contribution to the informal EU27 leaders' meeting in Sibiu (Romania) on 9 May 2019, https://ec.europa.eu/commission/sites/beta-political/files/euco_sibiu_communication_en.pdf

EC, Single Market Scoreboard, https://ec.europa.eu/internal_market/scoreboard/governance_cycle/index_en.htm

EC, Single Market Scoreboard, Internal Market Information, System (IMI), Reporting period: 01/2018 12/2018, https://ec.europa.eu/internal_market/scoreboard/docs/2019/performance_by_governance_tool/imi_en.pdf

EPRS – European Parliamentary Research Service (2017), Briefing EU Legislation in Progress, (Author: Marcin Szczepański).

ESPON COMPASS (2018): COMPASS – Comparative Analysis of Territorial Governance and Spatial Planning Systems in Europe, Applied Research 2016-2018, Final Report.

EU, Official Website of the European Union, <https://ec.europa.eu/growth/single-market/services/services-directive>

European Association of Real Estate Professions (2019): Airbnb and the real estate sector, CEPI calls upon the new European Commission to examine the impact sharing platforms such as Airbnb are having on the housing market, Brussels 7 November 2019.

European Commission, Press release 'A services economy that works for Europeans', Brussels, 10 January 2017.

European Council; Press release; 9 May 2019; The Sibiu Declaration, <https://www.consilium.europa.eu/en/press/press-releases/2019/05/09/the-sibiu-declaration/>

European Court of Auditors (2016): Has the Commission ensured effective implementation of the Services Directive? Special Report 2016/05.

European Parliament, Legislative Train 12.2019, 4B DEEPER AND FAIRER INTERNAL MARKET WITH A STRENGTHENED INDUSTRIAL BASE/SERVICES INCLUDING TRANSPORT/UP TO €338BN (<http://www.europarl.europa.eu/legislative-train/api/stages/report/10-2019/theme/deeper-and-fairer-internal-market-with-a-strengthened-industrial-base-services-including-transport/file/services-notification-procedure>)

European Parliament 2014-2019 (Plenary sitting): Report on the proposal for a directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System (COM(2016)0821 – C8-0011/2017 – 2016/0398(COD)), Committee on the Internal Market and Consumer Protection, Rapporteur: Sergio Gutiérrez Prieto (8.12.2017).

Gemeente Amsterdam (2017). ‘Sturen op een divers winkelgebied’, 28 February 2017.

Housing Solutions Platform (2019): ASP Debate The Sharing Economy and Housing Affordability, January 2019 Meeting Report.

Housing Solutions Platform, 2018: <https://www.housing-solutions-platform.org/single-post/2018/12/17/The-sharing-economy-and-housing-affordability-what-impact-what-solutions>

<https://www.euronews.com/2019/06/21/rental-platforms-like-airbnb-do-not-cooperate-with-authorities-claims-letter-from-european>

Milieu (2011): Assessment of implementation measures in EU countries, country reports 2011 (https://ec.europa.eu/growth/single-market/services/services-directive/implementation/evaluation_en)

Naess-Schmidt, S., Bjarke Jensen, J. (2018): Subsidiarity and Proportionality in the Single Market, An EU fit for inclusive growth, Bertelsmann Stiftung.

OECD (2017) Land-use planning systems in the OECD – Country fact sheet, OECD Publishing, Paris. DOI: <https://www.oecd.org/regional/regional-policy/land-use-spain.pdf> (last accessed 23.01.2020)

OECDpublishing (2017), The Governance of Land Use in the Netherlands, The Case of Amsterdam, https://read.oecd-ilibrary.org/urban-rural-and-regional-development/the-governance-of-land-use-in-the-netherlands_9789264274648-en#page94

Official Journal of the European Union, C288/43: Opinion of the European Economic and Social Committee on: (a) ‘Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System’ (COM(2016) 821 final — 2016/0398 (COD)), [...], Rapporteur: Arno METZLER, 31.8.2017
ORF.at (2019): Strengere Regeln für Leih-E-Scooter, 19 December 2019, <https://wien.orf.at/stories/3026837/>

Otto, Christian-W., (2008): Anwendung der Richtlinie 2006/123/EG über Dienstleistungen im Binnenmarkt im Bereich des Städtebaurechts, Gutachterliche Stellungnahme.

Pelkmans, Jacques (2019): Contribution to Growth: The Single Market for Services, Delivering economic benefit for citizens and businesses. Study, Requested by the IMCO committee.

Seidl, R. et.al (2017): AirBnb in Wien, eine Analyse. <https://wherebnb.in/wien/>, 2017.

SWD(2018) 236 final, Commission Staff Working Document, Accompanying the document Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European retail sector fit for the 21st century.

United Nations (2008): Spatial Planning, Key Instrument for Development and Effective Governance with Special Reference to Countries in Transition, Economic Commission for Europe.

Annex

A.1 Presentation of main findings and recommendations

A.2 Interviewees and contributors

A.3 Letter from EU cities

A.4 Background information from case analyses – responsibilities related to local self-government and spatial planning systems

A.1 Presentation of main findings and recommendations

Delivered separately as an MS PowerPoint file.

A.2 Interviewees and contributors

The below listed experts has been willing to contribute to the study by dedicating time for an interview and/or providing further information:

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- Henning Ehrenstein, Deputy Head of Unit, European Commission DG GROW (Service Policy for Consumers)
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- Melanie Dobernigg-Lutz, Austrian Association of Towns and Cities
- Kevin Muik, Austrian Association of Towns and Cities
- Johannes Schmid, Austrian Association of Towns and Cities
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- Markus Seidl, Austrian Conference on Spatial Planning
- Martin Steinwendner, Amt der Oberösterreichischen Landesregierung, Direktion Verfassungsdienst, Oö. Landtagsdirektion
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- Christian Müller, Bundesministerium für Digitalisierung und Wirtschaftsstandort, Abteilung EU-Koordination und EU-Binnenmarkt, Wettbewerbspolitik und -recht (status: contacted)

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- Tiers Bakker, Municipal Council Member Amsterdam
- Chris Koedooder, Kenniscentrum Europa decentral
- Cheyen Bannenberg, Ministry of Economic Affairs and Climate Policy
- Robin Van Amsterdam, Ministry of Economic Affairs and Climate Policy
- Patrick Van den Berghe, Ministry of Economic Affairs and Climate Policy

Spain

- Alfredo Sánchez Gimeno, Director of the Representation Office of Madrid Autonomous Community in Brussels

Sweden

- Helena Linde, Swedish Association of Local Authorities and Regions (SALAR)

A.3 Letter from EU cities

The municipalities of Amsterdam, Barcelona, Berlin, Budapest, Madrid and Riga addressed the following letter to Mr. Gutierrez Prieto, European Parliament, Rapporteur on the Notification Directive and Ms. Schramböck, EU Council Austrian Presidency, Minister for Digital and Economic Affairs in January 2019

‘We would like to share with you with some urgency, and on behalf of a line-up of European Capital Cities, a majors concern on the current proposals for notifications regarding the ‘EU Services-Directive’.

We understand that the European Parliament and the Council are in the process of negotiating this proposal. We believe that the proposals, in combination with recent rulings by the European Court of Justice on the scope of the Services Directive, will have serious and very undesirable implications for the process of decision-making by all local authorities in Europe.

In the new proposals for notifications, all new regulatory draft-decisions that may affect the Internal Market for services, will need to be notified in advance. Including draft-proposals by our city councils. This is new. Also new is a standstill period that has to be observed in which the European Commission reviews the notified regulation.

We are worried about the regulatory burdens this will bring about for our cities. Especially since we see that the potential scope of the Services-Directive has been significantly widened by rulings of the EU Court, including: arrangements for local warehouses and shops, urban planning proposals, arrangements for services that are purely local.

For instance our cities have a major challenge to manage the growing daily stream of tourism to our historical city center. Of course, we are first and foremost a welcoming cities. But we have to find new arrangements to remain this welcoming city while at the same time ensure our city’s livability to its inhabitants. To keep the city livable and workable, we will look into different possibilities, such as maximizing groups for guided visits, limiting certain shops in certain districts that serve only tourists, limiting certain types of ‘fun-transports’ such as ‘beer-bicycles’.

When it comes to urban planning, which is a key responsibility for local authorities and crucial for maintaining the livability in our cities, we are often balancing different interests of different stakeholders. The number of urban planning–proposals throughout the year are manifold. In addition our city council, and our citizens, may wish consider to limit certain types of activity in

our city, such as the trade in certain life-animals (lobsters, crabs), or trade in certain animal-products (fur-products).

Other examples from our daily practice, that will face stand-still procedures under the scope of the new notifications-procedure: quality criteria that we may impose on our child-centers (for example a minimal number of guardians to ensure child-safety). Or specific criteria for (language) skills for employees to avoid accidents on construction-sites. Again, these are just some illustrations of the many local draft-decisions that will need to be pre-notified.

In short: The stream of draft-proposals from European cities, carefully developed by our mayors and deputy-mayors, that may need to be put forward for examination by the European Commission, will be enormous.

We know that the European project is met with cynicism by a growing number of citizens in Europe. And actually, quite often it is at local level where you will find in cities true defenders of Europe. There exists an enormous potential for a strong partnership between the EU institutions and Europe's flourishing cities. Cities have benefited enormously of European integration and the free movement of goods, services and people. They have been engines of growth, innovation, job creation and upward social mobility. We are ready to defend these values.

However: This proposal interferes with local democratic processes. It is not pragmatic and creates extra administrative burdens for all levels of government, including for the European Commission itself. Furthermore, it impairs our cities' ability to protect the quality of city life, the authentic character of historic urban centers, social cohesion and economic diversity.

We urge you to take our concerns into consideration, and consider alternative solutions to avoid the stand-still, when finalizing your decisions. Such an alternative may be to make the procedure to notify more easy through a smart ICT-based notification-device, possibly in combination of an annual report by Member States to the Commission.'

A.4 Background information from case analyses – responsibilities related to local self-government and spatial planning systems

This annex offers findings from the case studies on tasks and responsibilities of local governments and their spatial planning systems in five EU countries. The case studies cover Austria, Germany, Latvia, the Netherlands and Spain. The studies highlight the wide field of responsibilities for local communities and the diversity in spatial planning governance within the EU. It also reveals the important role municipalities play in local spatial planning.

A.4.1 Responsibilities and tasks of local self-government

In general, the selected Member States show two different forms of government. Austria and Germany are federal states, meaning that self-governing states form a union under a central federal government. In contrast, Latvia and The Netherlands are unitary states, where the central government is the one supreme authority which rules over other government tiers. Spain is officially a unitary state, but according to the judgement of the OECD a so-called quasi-federal state.

A.4.1.1 Government structures

In Germany and Austria, the federal republic is divided into federal states (Länder). The federation and the federal states have their own constitutions, in general their law is equally relevant.

In **Austria** the nine federal states are divided into administrative districts (Verwaltungsbezirke) responsible for administrative tasks. Municipalities (Gemeinden) are the smallest political and administrative unit. The federal authorities, the federal states and the municipalities are referred to as local or regional authorities, which are legal entities under public law. The municipalities have no legislative powers. However, they are entitled to issue general regulations (ordinances) and perform many of the federal state's administrative tasks. The federal constitution guarantees the municipalities 'official responsibility in its own sphere of competence' (Art. 18).

It is similar in the Federal Republic of **Germany**, which has 16 Länder. In general, the Länder exercise governmental powers and discharge governmental functions. As a rule Länder and local authorities are responsible for administration. The right of local authorities, the municipalities (Kommunen) to self-government is also

enshrined in the federal constitution (Basic Law, Art. 28). These municipalities are the basic level of governance.

Although various Länder constitutions define the powers and duties of local governments in different ways, their common feature is to provide constitutional guarantees for local autonomy. The basic principle in Land constitutions is that local authorities are responsible for all tasks not expressly assigned to other (federal or Land) authorities by the Basic Law or Länder legislation.

In both Germany and Austria, Länder are the most important players for spatial planning law. They hold all competences which are not explicitly assigned to the federation. Local governments, have a constitutional right of local autonomy, as long as the central and federal level are not affected.

The **Spanish system of government** is divided into three levels of territorial power – the State, Autonomous Communities, and Local Entities. The Spanish Constitution gives the status of a constitutional principle to the self-government of municipalities, provinces and islands, guaranteeing their right to participate in affairs affecting their interests. Individual municipalities or municipality associations should provide basic services depending on their population.

The relationships between the State and the Local Entities are regulated by the principles of self-government and cooperation. Two cooperation bodies are particularly important in shaping these relationships: One is the National Committee of Local Government, the permanent body for cooperation between the two levels of government in charge of reporting on State provisions or regulations affecting Local Entities and also in charge of issues pertaining to Local Treasuries. The other body is the Sector Conference for Local Government, which includes representatives of the State, Autonomous Communities and Local Entities in one forum to discuss local government policies.

Latvia has a single tier of local government through 119 local authorities (districts and cities). According to a territorial reform, the number of local authorities must be reduced to 40 in 2020. Between the central and local governments are five planning regions without a legal status. The Law on Local Governments defines their powers and responsibilities.

More complicated is the **Dutch government structure**. The unitary state has three tiers of government (national, provincial and local) and is driven by the underlying principle of co-government among the three levels⁶⁵. In other words, the Netherlands have a decentralised system incorporating numerous

⁶⁵ OECD (2017) The Governance of Land Use in the Netherlands. The Case of Amsterdam, OECD Publishing, p. 83, DOI:<https://dx.doi.org/10.1787/9789264274648-en>

collaborative arrangements. At the same time the central government has a lot of influence on the local level, limiting the autonomy of the lower two government tiers. The municipal law (gemeente wet) governs the structure and competences of the Dutch municipalities.

A.4.1.2 Tasks and responsibilities of local governments

There are three broad categories of tasks and responsibilities of the local governments (municipalities) in the analysed countries:

- mandatory autonomous functions prescribed by law,
- autonomous functions performed as voluntary initiatives,
- and delegated functions on behalf of the central government.

In the federal states (Austria, Germany) responsibilities vary in each of the Länder and in Spain the tasks depend on the municipality population. The table below summarises a typical range of responsibilities for local governments.

Figure A.1: Tasks and responsibilities of local level authorities (in case study Member States)

Tasks & Responsibilities	Austria	Germany	Latvia	The Netherlands	Spain*
General public services					
Registration (birth, land registry, marriage, death, etc)	x	x	x	x	x
Collecting statistical information	x	x	x	x	
Administration of elections	x	x			
Public order and safety					
Building inspection	x		x		
Civil protection	x	x	x	x	x
Fire safety	x	x		x	x
Disaster management		x	x		
Food & drink control					x
Economic affairs					
Economic development (facilitating economic activity, supporting local investment)		x	x	x	
Licencing for commercial activity			x	x	
Tourism		x		x	
Local transport					
Public transport	x	x	x	x	x
Local roads	x	x	x	x	x
Public infrastructure (bicycle and parking infrastructure)	x	x	x	x	
Environmental protection		x	x		x
Housing & Spatial Planning					
Local planning	x	x	x	x	x
Social housing	x	x	x	x	x
Public utilities					
Water supply, sewage	x	x	x		x
Waste management	x	x	x	x	x
Public space	x	x	x	x	x
Energy supply		x	x		

Tasks & Responsibilities	Austria	Germany	Latvia	The Netherlands	Spain*
Public Health	x	x	x	x	x
Recreation and culture	x			x	
Sports facilities	x	x	x	x	x
Cultural facilities (libraries, local museums, cultural events)	x	x	x	x	x
Cemeteries	x	x	x		x
Public parks	x	x	x	x	x
Education					
Pre-school	x	x	x	x	
Primary education		x	x	x	
Secondary education		x	x	x	
Organisation of continuing education for teaching staff			x		
Vocational education		x			
School building – maintenance	x			x	x
Social and welfare					
Personal social services	x	x	x	x	x
Child care		x	x	x	
Social benefits		x		x	
Employment				x	

* depending on population size | Source: ÖIR/Spatial Foresight, 2020.

Local governments cover a wide range of responsibilities. Although there may be few mandatory functions such as in Austria where most mandatory functions relate to public order and safety, local governments assume many more tasks.

There are many similarities between the Member States. Most countries transfer to their most local level of government administrative tasks like registration, administering elections and collecting statistical information. Local transport, housing and spatial planning is typically in the hands of local governments as are public order and safety, basic public health, recreation and culture. For some German municipalities, cultural and sport facilities are a voluntary task. Public utilities are a typical local government task although energy supply is excluded in Austria and the Netherlands.

Differences become apparent in economic affairs and education. In Germany, Latvia and the Netherlands local governments have a say in these. Austrian and Spanish local levels are mainly concerned with maintaining school buildings. Similarly, the situation differs with environmental protection, where German, Latvian and Spanish local authorities have tasks in contrast to Austria and the Netherlands. Also diverse are competence for of social welfare, but all local governments have at least some say for this.

A.4.2 Spatial planning systems

The different governance structures in the case studies give an idea of differences to be expected in spatial planning organisation and competences.

Austria

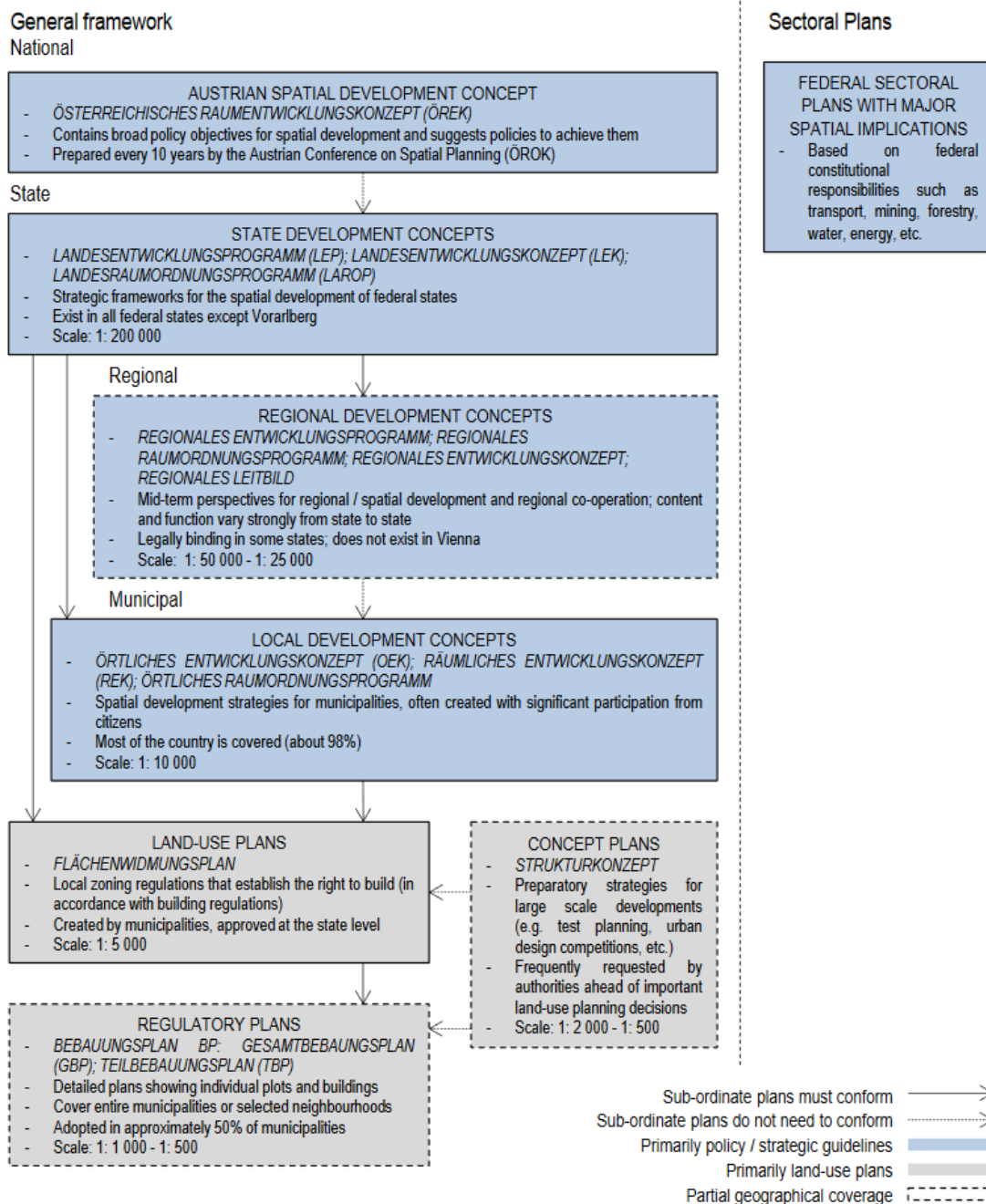
In Austria, spatial planning is a competence of the Länder. Consequently, Austria does not have a federal act on spatial planning, but nine legislations at Länder level.⁶⁶ The federal level is responsible for some sector planning competences such as water, forests, railway, federal roads, mining and energy, that influence the spatial structure of the country. The Länder also have sector planning powers with significant territorial impact, such as construction, nature conservation, housing subsidies and land transfer. Local spatial planning is the responsibility of municipalities.

The Austrian spatial planning system has three levels:

- the federal government is responsible for sector planning (sector plans);
- Länder take care of sector planning and state/regional spatial planning (state development concepts: mid-long term strategic documents; sectoral plans);
- municipalities are responsible for local spatial planning (local development concepts: main strategic plan with short- to long term objectives; land use plans which contain general zoning regulations and permitted types of land use; and regulatory plans which detail permitted developments).

⁶⁶ Although the Länder have structured their planning systems in a comparable way, there are some differences in the formal process, intercommunal planning or cooperation, practices related to retail developments, use of financial instruments to influence developments and the influence of Länder.

Figure A.2: Organisation of spatial and land use planning in Austria



Source: OECD (2017) Land-use planning systems in the OECD – Country fact sheet, OECD Publishing, Paris. DOI: <https://www.oecd.org/regional/regional-policy/land-use-Austria.pdf> (last accessed 23.01.2020).

The relationship between different planning levels is generally hierarchical. State development concepts are therefore binding for municipalities. Restrictions on local planning activities in state development concepts are however only permitted provided the scope of competence of municipalities is considered and the regional interests of a planning measure dominate. This is seen in state planning especially for central facilities, shopping centres, key infrastructure such as wind farms, industrial or commercial areas as well as settlement borders and large undeveloped zones.

In addition, all three levels cooperate in the Austrian Conference of Spatial Planning (ÖROK) to develop the Austrian spatial development concept and provide a non-binding strategic guideline for federal spatial development in the next decade. Some states also added a regional planning level between Länder and the municipalities which varies considerably in the Länder.

Germany

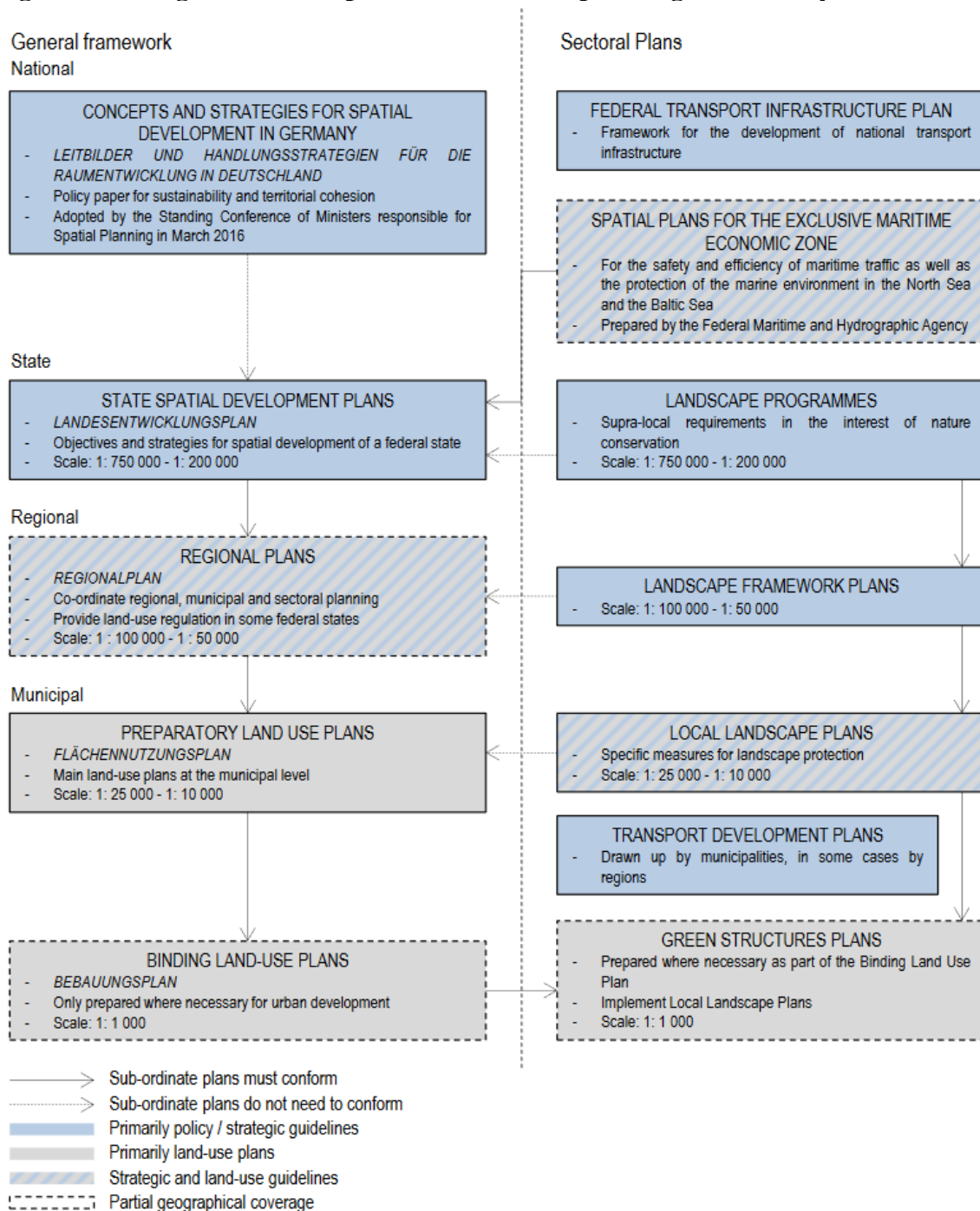
The federal structure in Germany leads to decentralised spatial planning powers, although the Federal Planning Act and the Federal Building Code provide the main framework. Federal spatial planning is limited to developing guiding principles and specifications for sectoral planning (with the exception of the spatial plan for the exclusive maritime economic zone, which is prepared by central government). An important governance element coordinating the federation and Länder, is the Conference of Ministers for Spatial Planning (MKRO) which also prepares nationwide policy documents.

Länder spatial planning incorporates the federal principles of spatial planning in a two-phase process: State spatial planning and regional planning:

- A state spatial development plan is an overall superordinate plan for the Länder and addresses spatial structure, central place structure, superordinate infrastructure and the distribution of potential settlement areas and open areas.
- Regional planning is concerned with subdivisions of a state and covers the detailed elaboration, sectoral integration, and implementation of state spatial planning goals. Their level of detail can vary considerably within the federation.

At the level of municipalities, local authorities regulate urban development and the structure of their territories through urban land use planning in the framework of local government planning autonomy. Final planning goals are developed in compliance with federal, state and regional spatial planning specifications.

Figure A.3: Organisation of spatial and land-use planning in Germany



Source: OECD (2017) Land-use planning systems in the OECD – Country fact sheet, OECD Publishing, Paris. DOI: <https://www.oecd.org/regional/regional-policy/land-use-germany.pdf> (last accessed 23.01.2020)

Local urban land use planning (Bauleitplanung) is carried out on two levels; the preparatory land use plan (Flächennutzungsplan) and the binding land use plan (Bebauungsplan).

The preparatory land use plan covers the entire municipal territory and outlines the intended urban development. This plan determines which developments are permitted at a certain location and provides the basis for binding land use plans.

The binding land use plan contains legally binding specifications controlling urban development, the use of land for building and other purposes with a plot-by-plot definition of land use. Binding land use plans are not mandatory and often only parts of a municipality are covered by it.

There are also a number of sectoral plans (e.g. transport, landscape) which impact spatial planning in the different levels.

Latvia

In Latvia the spatial planning system is defined by the Spatial Development Planning Law (2011). Latvia has three planning levels – national, regional and local but only two governance levels – national and local. The responsible national authority is the Ministry of Environmental Protection and Regional Development.

Figure A.4: Planning instruments and actors responsible for planning in Latvia

Level	Planning Instruments	Main responsible actor
NATIONAL	Sustainable Development Strategy of Latvia (Latvia2030) National Development Plan (NDP2020)	Ministry of Environmental Protection and Regional Development
REGIONAL	Planning regions' sustainable development strategies Planning regions' development programmes	Planning regions' development councils
LOCAL	Local government sustainable development strategies Local government development programmes Local government spatial plans Local plans Detailed plans Thematic plans Building permits	Municipalities

Source: VASAB (2018) Country Fiche on Terrestrial Spatial Planning – Latvia https://vasab.org/wp-content/uploads/2018/06/Latvia_Country_Fiche_Spatial_Planning_May2018.pdf (last accessed 23.01.2020)

At the national level the Latvia 2030 strategy and the National Development Plan 2014-2020 are the highest national strategic development planning documents with the status of legal acts. All subordinate spatial planning documents and policy guidelines should be consistent with their policy goals.

At the regional level development strategies and programmes are elaborated and approved by the regions. They are meant to guide regional and local spatial

development in the respective region. The decision-making body is the development council, with representatives of local governments.

Local governments develop and approve their development strategy, development programme, spatial plan (also called Territorial plan), local plans, detailed plans and thematic plans.

Figure A.5: Spatial planning system at local level in Latvia



Source: VASAB (2018) Country Fiche on Terrestrial Spatial Planning – Latvia https://vasab.org/wp-content/uploads/2018/06/Latvia_Country_Fiche_Spatial_Planning_May2018.pdf (last accessed 23.01.2020)

The sustainable development strategy includes a vision, strategic objectives, a spatial development perspective and development priorities for a municipality’s long-term development.

The development programme sets out medium-term priorities and measures to implement the long-term strategic goals specified in the local government development strategy. It contains the action and investment plan.

The spatial plan covers the whole municipality territory and establishes detailed requirements, sites and objects specified in higher level spatial plans. This planning document defines legally binding requirements for land use and building, including functional zoning, public infrastructure and regulations for land use and building, as well as other conditions for land use.

The local plan is developed by a municipality for part of a town, village or rural area to accomplish a planning task or to detail or amend a spatial plan.

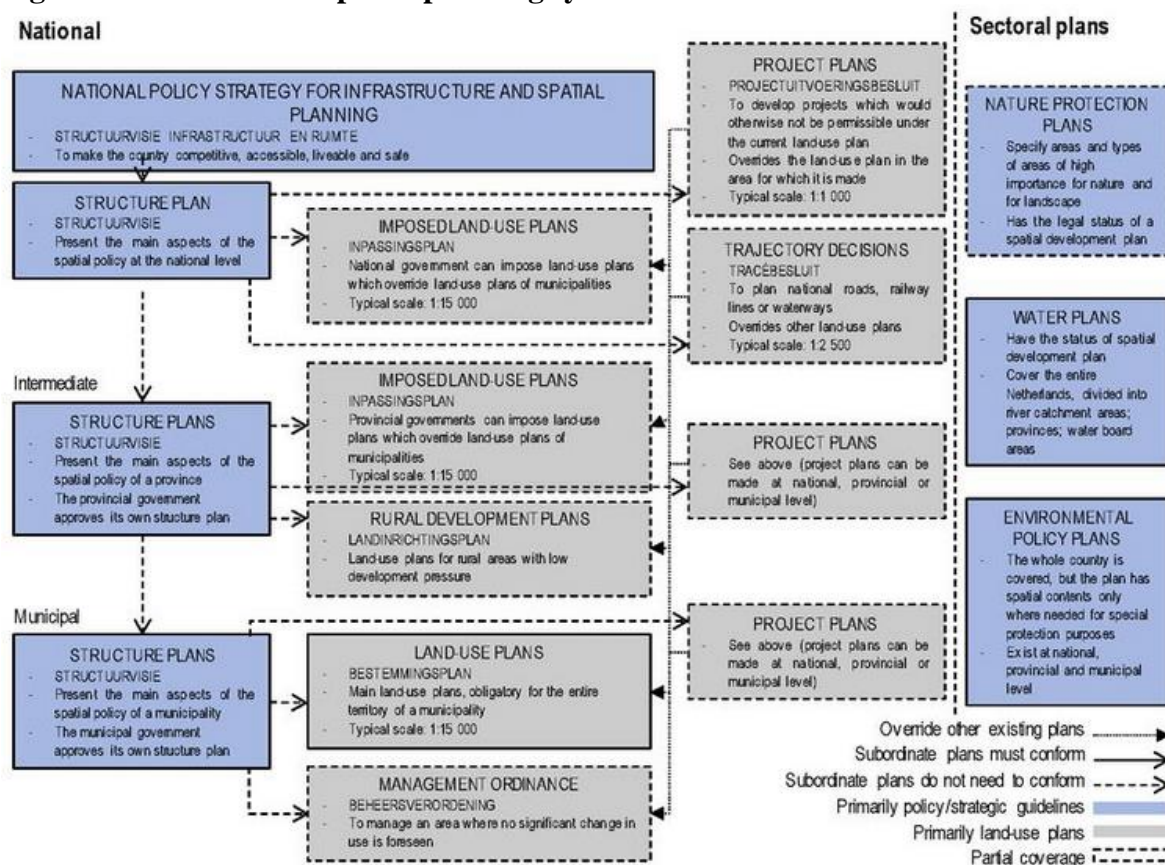
In addition, a thematic plan or detailed plan can be necessary to clarify specific aspects in the absence of information in higher-level plans.

Netherlands

In the Netherlands, spatial planning is decentralised. Actors at each level of governance (i.e. municipalities, provinces and central government) can design and implement spatial planning.

The central government prescribes a national strategy for infrastructure and spatial planning (*'structuurvisie infrastructuur en ruimte'*). The strategy is implemented through structure plans (*'structuurvisie'*) at provincial and local levels, with each level having distinct competencies. Each governance hierarchy can implement land use plans (*'bestemmingplans'*).

Figure A.6: The Dutch spatial planning system



Source: OECD (2017) The Governance of Land Use in the Netherlands – The Case of Amsterdam, Fig. 2.1. OECD Publishing, Paris. DOI: <https://dx.doi.org/10.1787/9789264274648-en> (last accessed 23.01.2020)

The Spatial Planning Act is a plan from each level of government, specifying the tools and instruments to implement this vision.

Vertical coordination between provinces and municipalities is ensured by provincial planning committees serving as discussion platforms. If there is no consensus, the national level or province may issue ordinances to streamline lower

level plans. Additionally, horizontal coordination is based on a legal requirement to coordinate spatial decisions at the respective planning level.

Beyond spatial plans for specific regions, there are sectoral plans for water management, environmental policy and zoning, or nature protection areas. In addition, general rules apply to specific land uses, irrespective of a spatial plan (e.g. building regulations, outdoor advertisements, environmental pollution) which apply across the whole country and can have a strong impact on how land may be used.

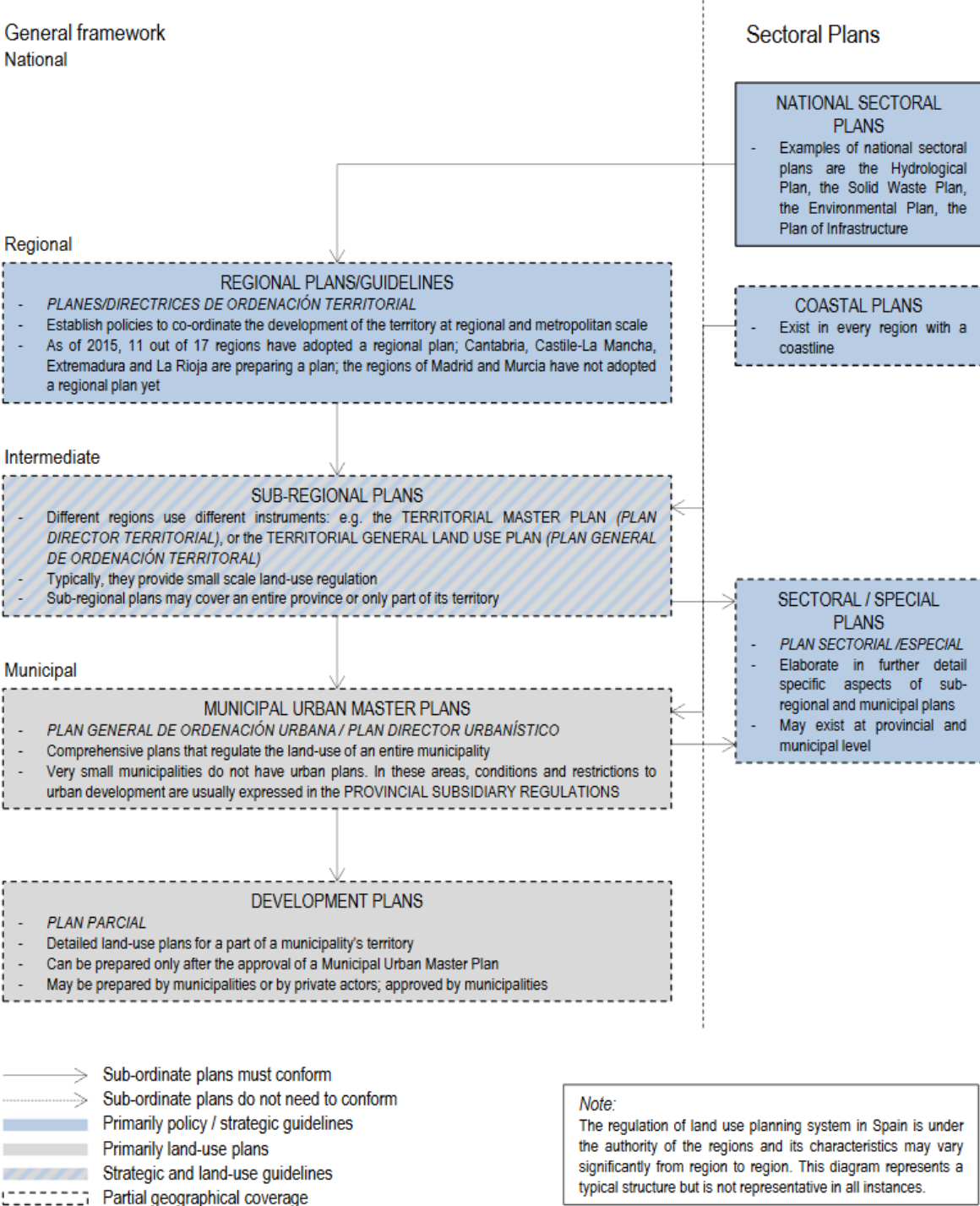
Municipalities interface with EU law and policy via the *kenniscentrum Europa decentraal*. This provides e.g. municipalities and provinces with information on EU laws and policies. As such, it is an important actor for municipalities facing uncertainty about implementation of new laws. Municipalities with smaller legal teams can especially benefit from this service.

Spain

The current system of land use planning was introduced in the Constitution of 1978, which assigned responsibility for spatial planning and urban development to the autonomous communities. Subsequently, autonomous communities established their own planning systems starting with Catalonia in 1983. Since then there have been various regional reforms, especially after 2000 as regions adapted to the new principles and objectives of the European Spatial Planning Perspective.

The division of powers regarding land use policy is specified in the constitution and other national legislation. The constitution assigns responsibility for spatial planning to the autonomous communities. However, the national government prepares framework legislation that guides regional laws. Furthermore, the national government has important powers related to spatial planning. It can impose environmental and related legislation that affects land development. It prepares a sectoral plan for national infrastructure, for example related to transport and energy. However, according to a decision of the constitutional court, it has no authority to prepare a general national spatial plan.

Figure A.7: Organisation of spatial and land-use planning in Spain



Source: OECD (2017) Land-use planning systems in the OECD – Country fact sheet, OECD Publishing, Paris. DOI: <https://www.oecd.org/regional/regional-policy/land-use-spain.pdf> (last accessed 23.01.2020)

Autonomous communities develop and complement the basic national framework legislation concerning land use by establishing their own legislative framework on land use planning. Within limits national, this allows them to establish their own comprehensive planning systems. This includes, for example, defining requirements of local master plans to delineate land as ‘suitable for urban development’, as ‘not suitable’ or as ‘protected according to its environmental,

natural cultural, etc. value' as well as the definition and content of planning instruments.

Most regions have a hierarchical system where the regional government is responsible for preparing a regional spatial plan binding on local governments. Depending on the region, regional governments are also responsible for issuing building permits for specific development projects, such as large scale or particularly sensitive projects.

Municipalities are the main actors in land-use planning. They prepare and enact local plans, which vary in detail between regions. In general, medium sized and small municipalities have a simplified version of the Master Plan, with very similar contents. Only very small municipalities have no land use plans but conditions and restrictions on urban development are usually set by Provincial Subsidiary Regulations. In most cases, municipalities are also responsible for assessing building permit applications.

Conclusion on the diversity of planning systems

As clearly shown by the planning systems in only five European Member States, spatial planning governance and legal frameworks differ greatly between and even within European countries.

Differences concern law-making as well as implementation, especially for sectoral issues. Also, strategic planning characteristics and governance of horizontal and vertical coordination vary in terms of coordination, tasks, powers and topical focus. Furthermore, there are various regional, sub-regional and intermediate systems, with different planning responsibilities and decision powers.

What is similar, is the common responsibility for land use planning and zoning at the local level. In line with the overall aims of the European Charter of Local Self-Government (Council of Europe, Treaty No.122), this is a core task of municipalities related to applying their right to local self-government.

EN

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