WIRTSCHAFTSKAMMER ÖSTERREICH

The Austrian Federal Economic Chamber (AFCO), Wiedner Hauptstraße 63, 1045 Vienna, Austria, is registered with the number 10405322962-08 in the Transparency Register of the European Parliament and the European Commission.

Remarks on

the new BETTER REGULATION PACKAGE 2015 and the REFIT – SCOREBOARD 2015 (Regulatory Fitness and Performance Programme)

15 July 2015

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Preface

On 19 May 2015 the European Commission published an ambitious and comprehensive Better Regulation package.
The documents contain new guidelines for better regulation throughout the whole policy cycle, various documents setting out the rules for new consultation platforms (including a new REFIT-platform) and a new body in charge of scrutiny. Furthermore, the Commission proposed a new interinstitutional agreement on better law-making and relaunched the REFIT-Scoreboard.

The Austrian Federal Economic Chamber (AFCO) appreciates all efforts towards smart regulation at European level so as to create a business friendly regulatory environment. All European institutions and Member States have to work together in order for the initiatives on smart regulation to be successful. Overregulation is a stumbling block for growth and employment.

AFCO welcomes the approach of the new European Commission led by President Jean-Claude Juncker, to appoint a Vice President in charge of Better Regulation. The Austrian Federal Economic Chamber moreover appreciates that the rapid and thorough implementation of REFIT measures will be of top priority.

The business structure all over Europe and especially in Austria is dominated by SMEs. Therefore, we believe that it is necessary to increasingly focus on SMEs during the legislative process. “Think Small First” has to be the guiding principle and should be applied to all draft proposals. We very much welcome that the Commission included a compulsory SME-Test in the Impact Assessment via the new tool-box (# 19).

In situations where regulation at European level is needed, it should be analysed case by case which legal instrument (directive or regulation) is more suitable. Differing implementing measures in the different Member States should be avoided.

We appreciate the European Commission’s intention to concentrate on REFIT (AFCO prefers “thoroughness“ to “speed“) especially in areas with a significant European added value in accordance with the principle of subsidiarity. The European institutions should take the principle of subsidiarity better into account and concentrate on measures with a significant evidence of European Added Value.

In addition to measures already adopted in REFIT, it will be necessary to quickly provide efficient solutions for problems that businesses encounter in practice due to EU-legislation. REFIT measures must therefore be extended by further legislative acts (see part 3 of this position paper).

The Austrian Federal Economic Chamber identified potential improvements in EU-legislation. The present position paper consists of three parts:

1. Part 1: Comments on the new Better Regulation package
2. Part 2: Comments on and assessments of the Commission Staff Working Document concerning REFIT (Scoreboard)
3. Part 3: Important legislation with need for action which is not yet covered by REFIT

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Part 1: Comments on the new Better Regulation package

1. Regulatory Scrutiny Board

The Commission introduced a new body for scrutiny. The former Impact Assessment Board will be replaced by the Regulatory Scrutiny Board in charge of scrutinising the draft Impact Assessments and - widening the scope of this body - of ex-post evaluations and fitness checks. Members will now operate full-time, will include a chair, three internal members from the Commission as well as three external members with a specific academic expertise, selected via a selection procedure.
This is the first time that the Commission opens the doors to external members. It is a big step into the right direction to getting an independent body checking thoroughly both draft Impact assessments and evaluations. Experience from the past shows that the quality of impact assessments differed considerably. The additional quality control may remedy these shortcomings. Whether a body consisting of seven independent officials can achieve this goal, remains to be seen.

2. REFIT – Platform

The REFIT stakeholder platform will involve 20 high level experts from businesses and civil society stakeholders as well as one representative of each of the 28 member states. This body will replace the former High Level Group on Administrative Burdens and the Impact Assessment High Level Advisory Group. We hope that this body will be established very soon as it will be a direct channel of communication with the First Vice President concerning the topics that are mentioned in this paper in Part 3 ("Important legislation with need for action which is not yet covered by REFIT"). A balanced composition of stakeholders working in this group will be essential for the efforts that have to be done.

3. Lighten the load – have your say

This new platform constitutes an open channel for providing views on aspects of EU legislation that is burdensome or needs improvement. Everybody is requested to report burdensome pieces of legislation. The web-portal „Lighten the Load-have your say", which gives everybody the chance to comment on existing legislation, is a good opportunity to check public perception of EU legislation.

4. Transparent consultation on draft delegated acts as well as implementing acts

Often technical rules resulting from EU directives or regulations are very important for daily business practice. Both delegated acts (art. 290 TFEU) and implementing acts (art. 291 TFEU) can have significant impacts on enterprises, in particular SMEs. Therefore the Austrian Federal Economic Chamber appreciates that the European Commission will involve

member states and stakeholders, in particular business associations, in the preparation of delegated acts. We also welcome public consultations on draft implementing acts.

In this regard, the intended special section of "Your voice in Europe" with public consultations on draft delegated acts and implementing acts should be available as soon as possible, just as the promised list of such acts that are in the pipeline. Furthermore, a particular register for delegated acts - similar to the comitology register - would be useful.

The Austrian Federal Economic Chamber welcomes that Impact Assessments are required for a delegated act with expected significant economic, environmental or social impacts. However, we point out that in the case of significant impacts the Commission also has to check whether the planned measure is an essential amendment to or change of the basic legal act. In that case the delegated act would be the wrong instrument, the basic legal act should be changed instead.

5. Special concerns of SMEs: Binding implementation of the SME Test in the context of Impact Assessments – no general exception for micro-companies

The SME-test is now a part of the Impact Assessment and should illustrate the effects of new legislation especially for small and medium-sized enterprises.
The outcome of a properly performed SME-test could also be a reason why SMEs are exempted from new legislation. Every single new legislative act shall take small and medium-sized enterprises ("Think Small First"-principle) into account as SMEs are the backbone of European economy.
However a general exemption of SMEs from the scope of EU-legislation is contrary to the "Think Small First"-principle of the Small Business Act. Hence, legislation must be designed in a way that it can be implemented by all enterprises.
A general exemption of SMEs could harm the Single Market as it was the case with the accounting directive. As a consequence, legal uncertainty and 28 different national rules would have an even greater negative economic impact.
Therefore, AFCO appreciates the effort of the Commission to manage necessary simplifications within the existing legal framework, especially for SMEs.

6. Gold Plating

"Gold Plating" means adding stronger rules at national level when transposing EU-directives into national law. Very often stricter rules are implemented at national level as originally intended in the European legislative act. It these cases it is mostly argued that stronger consumer rights are needed. However, if there are stricter rules put into place at national level, the European legislator cannot be blamed and this will lead to a higher fragmentation of the internal market. This is why "Gold Plating" should be avoided by all means when EU-legislation is transposed.

The proposal for a new IIA Better Regulation suggests that Member States – when transposing EU-law into national law – have to communicate additional elements or procedures they decide to add at national, regional or local level. And before adopting such additional rules or procedures, they should assess their impact in particular as regards the administrative burden on businesses.
We appreciate this proposal very much, it will help to achieve more transparency in law-making at all levels.

7. Impact Assessment

With an Impact Assessment it is possible to analyse the impact of new regulation in advance and to reveal changes and potential burden for individual sectors. Thus, Impact Assessments must be implemented consequently and the results have to be taken into consideration within the legislative process. Impact Assessments allow a detailed assessment of potential negative impacts. The meaningful selection of the areas of application is important.

The new guidelines say that major initiatives have to be accompanied by a new Inception Impact Assessment and require a political validation from the lead Commissioner, Vice-President and First Vice President. We appreciate this new approach and are very interested in facing the first Inception Impact Assessments with the possibility to send comments to the Commission before the consultation process starts.

Point 3.3. of the Agenda for Better Regulation for Better Results provides for an additional impact assessment by the Co-legislator if substantial amendments are presented. Although this might slow down the legislative process it can help to take stakeholders considerations into account. Again, any criteria on how to determine "substantial amendments" are missing. Moreover, the question of the right timing remains open: shall this take place between parliamentary committee and plenary? Or before/after the trilogue-negotiations, but before the definite adoption? In general this idea seems to be based on a good intention but it comes with a multitude of practical problems.

Better regulation can only be successful if it is implemented on all government levels. It must therefore either be mandatory for the European Parliament and the Council to carry out their own impact assessments or the two institutions should be obliged to take the impact assessment of the Commission into account. This should be clearly stated in the new Interinstitutional Agreement. Whether each of the three institutions should carry out an individual impact assessment on one and the same legislative proposal is rather questionable in the light of efficiency considerations.

8. Stakeholder consultation

An early and comprehensive involvement of all important business representatives as well as transparent procedures for well-arranged consultation processes will raise the acceptance of new legislative acts and will subsequently also facilitate their implementation.

Thus, it is important to ensure the consultation of representative national and European trade associations. Considering the opinion of the respective stakeholders in accordance with their representativity and acknowledging the important role that the representative trade associations play as "managers of change" because of their proximity to the affected businesses and their enormous expertise is the basis for good law-making. Also the EESC as a representative body of the organized civil society could play an important role there.

However, we see a certain risk that public consultations become purely a matter of duty which allows the Commission to pick and choose those answers that suit best whereas others are neglected.

If the opinion of a single person gets the same weight as the opinion of a representative organisation, there is a risk that policy formulation follows the quantitative majority. We stress the need to motivate the criteria on which decisions are based. We think that the evaluation reports that have to be produced every 3 to 5 years should first and foremost reflect the positions of the stakeholders and not of the general public. This ensures, especially in the social field, that only those people have their say who are experts in that matter.

The present communication must not be used as a pretext to put social partner consultations or social partner agreements under an ex-ante or ex-post control of public consultations. The social dialogue is a specific procedure as provided for in the treaty. It must therefore be respected.

The participation in the surveys requires obtaining expert opinions that are often hard to receive due to language barriers. For instance, in the area of secondary construction, consultations require information in the mother tongue. An internal translation and preparation of the most important information in German requires preparation time that is often not available due to the time limits for responses.

The complexity of European evaluations is frequently too high and the questions are not specific enough. In order to receive concrete input, in particular from SMEs with limited capacities, the posed questions have to be reformulated in a simpler way and at the same time be more precise. This is even more essential when it comes to consultations on directives, since directives are implemented differently in each Member State, which, for instance, has an effect in the field of waste policy. In this case, falsifications of results can occur, if the questions are formulated too generally, because those subject to the

provisions are familiar with the legislation of the Member States and not with EU directives.

9. Non-legislative instruments and self-regulation in the advertising industry

This provides especially in the advertising industry for self-regulatory measures as a perfect complement to the acquis of EU Community law. Therefore, the Commission will consider both regulatory and appropriate self-regulatory measures when considering policy solutions.
This dual policy mix should also improve the implementation of European law and its enforcement in the Member States.
Professional self-regulation is the right answer in the very complex framework of media and advertising law in order to give appropriate and timely responses to questions in view of the rapid development in technical and digital changes of marketing measures.
Advertising self-regulation creates fair competition and brings an added value to entrepreneurs, consumers and society as such.

Part 2: Comments on and assessment of the REFIT Scoreboard

The comments follow the order of topics in the REFIT Scoreboard (Commission Staff Working Document REFIT: State of Play and Outlook).

1. REACH (p. 6-8 and 16)

Most of the measures foreseen on REACH (pages 6 to 8) are highly welcome. Comments seem to be appropriate on the following:

- **The roadmap published by ECHA** for the registration deadline in 2018 is highly welcome. Many SMEs are affected by this deadline which will be a substantial challenge for them.
- **On Authorisation:** Simplified procedures, streamlining the process and a focus on recycling materials in a balanced and harmonised way are highly supported by AFCO. The authorisation has proven to be a non-proportional regulatory action for some relevant cases.
- **Taking into account socio-economic elements** before substances are considered for authorisation according to Title VII is highly welcome as well. Regulatory action needs to respect the fundamental principle of proportionality. This can only be assessed, if socio-economic aspects are taken into consideration. Furthermore, objectives of the REACH regulation are also to strengthen the competitiveness and innovation power of EU economy. Also to please these objectives, socio-economic aspects must be considered before taking regulatory action.
- **To increase synergies between REACH and other legislation** related to chemicals is highly welcome as well. Neither chemical nor other legislation are a desert-island. Therefore interaction of different pieces of legislation needs to be improved significantly and synergies have to be exploited.
- **Public consultations launched by ECHA** include summary cover sheets with key information about the restriction proposal – another action which we highly welcome. But we highly recommend that this approach is also extended to other public consultations under REACH and CLP. Restrictions are the minor part of regulatory action taken. More consultations are related to authorisation and harmonised classification. Also for these the same approach (summary cover sheets) should be included. We suggest the following: All dossiers published for consultations are usually available only in English. One could claim that also such dossiers must be available in all official languages and that a deadline starts only when all translations are published on the official webpage. However, it is self-speaking that such an approach would not be feasible in practice. Nevertheless, we suggest as a compromise, that would very much improve the situation of SMEs the following:
    - Every consultation dossier should be accompanied by a short fact sheet (max. 2-3 pages).
    - The fact sheet should include (in order of relevance):

        - a) Uses (described in an understandable way, no codes)
        - b) Sectors of use (described in an understandable way, no codes)
        - c) an (qualitative) estimation to which extend uses and sectors are covered & potentially relevant uses and sectors which are missing in the dossier
        - d) the RMO (risk management option) proposed
        - e) Chemical identifiers
    - The fact sheet could be made available as an online database with a filter option for parameters like use or sector, including an e-mail notification for specific filter-options.

2. Common consolidated corporate tax base –CCCTB (p. 28)

The European Commission initiated the CCCTB to facilitate cross border trade for SMEs. But most SMEs do not operate in form of a corporation but in form of a sole trader. And therefore they do not profit from the CCCTB. The whole advantage of this system is the consolidation. The aims of a common corporate tax base without consolidation can be reached in other ways. The central point is the consolidation of this project.

3. EU standard VAT declaration (p. 29)

The idea to have one VAT declaration for all businesses in the EU is welcomed. The proposal foresees 5 compulsory boxes and maximum 26 additional boxes for each member state. In fact this means 28 different VAT declarations. This is not a simplification compared to the status quo.

4. Modernising VAT for cross-border B2C E-Commerce (p. 30)

The project to extend the single electronic registration and payment system to all business to consumer supplies is welcomed.

5. Harmonised Indices of Consumer Prices (HICP) (p.36)

The proposal aims to take the load off the statistic authorities using scanner data especially in the food sector instead of collecting data by the authorities themselves. In Austria we have a system that combines both methods (interviews, collection of data and scanner data). This is burdensome for the companies as not all companies in the retail sale sector use scanners.
For this proposal the Commission did not carry out an Impact Assessment. We do not know, why the Commission believes, that all retailers use scanner cash desks. Where is the right idea about how things ought to be, called “Think small first”? Or does the Commission think about using scanners only in the case that there are scanners? This would be an acceptable position.

6. Survey on industrial production - PRODCOM (p. 40)

Usually the matter of complaint of companies is not the coverage of the PRODCOM-list, but two other facts. First obstacle is the possibility to match goods with items to report and secondly the variability of the reporting system.
An electronic system with preferably little changes of the items in the PRODCOM-list would help companies to fulfil their reporting duties efficiently.

7. Recording Equipment in Road Transport (p. 43-45 and 47-48)

Despite the revision of Regulation (EEC) No 3821/85 on recording equipment in road transport and the partial adaptation of Regulation (EC) No 561/2006 on driving time and rest periods through the adoption of Regulation (EU) No 165/2014 there is still a need to simplify and harmonise EU social rules because they do not correspond to the practical needs of everyday business. Thus, the current legal regime has to be reviewed and ultimately revised.

From a business point of view, the rules lack practicability in a formal way:
EU social legislation is characterised by numerous, partly overlapping rules of different legal quality, which make it difficult for companies to keep track:

- Regulation (EC) No 561/2006 sets up rules on driving times, breaks and rest periods for drivers engaged in the carriage of goods and passengers by road.
- Regulation (EU) No 165/2014 determines which vehicles have to be equipped with tachographs and how they have to be used.
- Directive 2006/22/EC sets up rules for checking systems of compliance with the above mentioned regulations.
- In addition to Regulation (EC) No 561/2006, Directive 2002/15/EC lays down rules regarding maximum weekly working times, rest periods, breaks and night work and implements essential definitions such as working time or periods of availability.
- Moreover the European Commission addressed various decisions and recommendations to Member States, of which some either have not been transposed into national law at all or have been interpreted in a different manner.
- There is a wide range of interpretations regarding various passages in EU social legislation.

Those framework conditions make it nearly impossible for transport companies to manage their daily routines effectively.

Moreover, the provisions in question also lack practicability as regards content:
EU social rules are primarily designed to prevent overtired drivers from driving and thus increase road safety. The corresponding legal provisions prescribing extensive documentation and strict compliance have reached dimensions that make it almost impossible to conduct transport operations in an economically feasible way. Furthermore, it is necessary to develop social rules especially designed for the bus and coach sector to

account for the flexibility that is needed and for the different economic circumstances in goods and passenger transport.

The current regime differentiates:

- Daily and weekly driving time
- Breaks:
  - in Art 4 d of Regulation 561/2006 (including complicated and inflexible rules on splitting the break)
  - in Art 5 of Directive 2002/15
  - in Art 34 of Regulation 165/2014 (without any definition, what is exactly meant by it)
- Daily and weekly rest periods (including complicated rules on extension/reduction and complicated separate rules for buses, like the 12 day rule)
- Other work (including a complicated reference to Directive 2002/15)
- Periods of availability (also including a complicated reference to Directive 2002/15)

This lack of practicability in form and content is aggravated by

- the coexistence of digital and analog tachographs
- non-binding recommendations and decisions of the European Commission
- diverging control and enforcement practices in Member States.

Thus, compliance with the social rules is getting more and more difficult for drivers and companies whereas controls regarding the compliance with the rules have become increasingly stringent.

This leads to

- excessive burdens for companies and drivers
- overburdened national authorities and control officers in Member States
- rapidly increasing legal uncertainty for companies and drivers.

Concluding, the following measures are of utmost importance:

- The EU has to decide on obligatory, harmonised rules on working conditions for mobile workers which have to be applied in a uniform way in all Member States.
- The legal framework has to be transparent, clear and comprehensible in order to prevent different interpretation by Member States.
- Key provisions have to be governed primarily by EU law. The leeway for Member States to introduce deviating national rules shall be reduced to a minimum.
- EU wide harmonised rules on tolerances for minor infringements have to be introduced.This could include cases where the driver exceeds the maximum driving time or reduces the minimum rest period or break only by a few minutes.

The implementation of those measures would lead to growing acceptance and more compliance with EU social rules.

8. Market access rules in road freight transport (p. 45 and p. 51)

The planned simplification and clarification of existing legislation shall not lead to a further liberalisation of EU cabotage rules. We strongly support the idea that cabotage shall not be liberalised as long as social and economic framework conditions differ throughout the EU. Currently, the main problem is the lack of efficient enforcement of existing rules. The quality and frequency of controls has to be improved.

9. Training, Qualification, Licensing in Road Transport (p. 51)

To boost the attractiveness and practicability of initial qualification and periodic training of drivers Directive 2003/59/EC has to be modified:

- The mobility and transport sector already faces the challenge to find and recruit new drivers. Therefore the access to the profession should not be unduly made difficult. The initial qualification - besides its positive training effects – also acts as a hurdle to job entry in the sector. Therefore we propose that the trainee driver may first take up the profession without qualification or basic training (on sole basis of driving licence) for one year and then the initial qualification may be completed within this first year. This would encourage more people to engage in the driver's profession and facilitate their access to the profession.
- Cross border problems also constitute a major concern in the field of driver training. Drivers that are employed in Austria and have their permanent residence in another Member State often face the problem that Austrian continuous training certificates are not recognised in other Member States. A general recognition requirement for continuous training certificates by other EU Member States has to be laid down in the Directive.

10. Employment and social affairs (p.67)

As expressed in previous opinions as well as during the social partner consultation we do not see the need to find a common definition of „information and consultation". It is much more urgent to amend the working time directive which is provided for in 2016.

The part on the "Enforcement-directive to the posting of workers directive", which was adopted in 2014, clearly states that the amendments by the European Parliament will increase administrative burden for enterprises. However, any eventual measures should only be taken after the enforcement directive has entered into force (June 2016)

11. Natura 2000 (p. 74)

AFCO shares the view of the Commission to define these two directives (FFH and Birds Directive) as a priority. We consider nature protection policy as relevant for Europe as a business location which has to be balanced with nature protection needs and should ideally complement each other in synergy.

AFCO welcomes a fusion of both directives: we think that the union of both directives should be part of the revision to ensure consistent and modern nature protection in the EU. Substantial elements of their construction should be adapted, e.g.

- the designation of protected areas has to meet next to nature conservation criteria also economic and social requirements
- the protection of certain species outside representative habitats should be eliminated
- the Annexes of the Birds and Habitats Directives should be made more flexible and adaptable by the Member States when protected species increase massively and disturb the ecological and economic balance
- introducing a solid right of request for affected landowners to redeem a designated protected area, if the protective purpose foreseen in the directives has not been maintained.

AFCO supports fair participation and involvement of the affected parties (landowners, authorized users) when designating protection areas: this is a big problem in practice since the participation happens after the nomination of the respective area for Natura 2000 instead of before that.

12. Possible revision of the Environmental Liability Directive (ELD) (p. 75)

No un-reflected extension of scope: A possible extension of the scope of ELD would lead to additional burden especially, for SMEs, with a very questionable benefit. Before extending the scope, an evaluation of the existing provisions has to be made.

Severity thresholds important for SMEs: The severity thresholds are necessary especially for SMEs. Furthermore, the competent authorities would suffer of the high number of cases to be expected, where the ELD provisions would have to apply. There is absolutely no justification to handle light damages under the ELD regime. This would impose a huge bureaucratic burden, especially on SMEs.

Optional provisions such as permit defense & state-of-the-art defense to be maintained: The permit defense and the state-of-the-art defense are very helpful to comply with the ELD. They are fundamental to a system of environmental liability, which promotes prevention by emphasizing the need to show compliance with existing permits and should not be questioned.

A fund to cover ELD liabilities as well as financial security to be avoided: A fund to cover the risks is strictly opposed. This would undermine both the polluter-pays principle as well as the precautionary principle. If there was a fund to cover the risks, the operator would not be as motivated to stick to the highest security levels. Why should operators, who have implemented and maintain high security standards, pay twice? Furthermore, no mandatory financial security should be implemented. This would lead to high costs for SMEs, which,

under realistic presumptions, will hardly be up to any ELD case. It should remain in the competence of the MS to choose a practicable system on covering possible future damages!

13. Flourinated greenhouse gases (p. 81)

The exemption for 100t is helpful for SMEs and should stay as it is.

14. Package Travel Directive (p. 98)

The Commission states in its communication "Better results through Better Regulation" (page 2), that it is important "that every single measure in the EU's overall regulatory framework is tailor-made, that means modern, effective, proportionate, practical and as simple as possible ". "Legislation should provide legal certainty and avoid any unnecessary burden". The Commission carries out further that when drawing up initiatives, the principle 'Think Small First' will count even more (p.6).

The Austrian Federal Economic Chamber has to state that these confessions quoted above were apparently ignored with regard to the new Package Travel Directive.
The new directive will lead to a broad and vague definition of 'package travel' and therefore be the basis for excessive bureaucracy and extreme legal uncertainty for SMEs in the tourism sector. It just does not reflect the principle of "Think Small First". The enormous practical problems - particularly for SMEs – are illustrated by the following examples and aspects:

- Even if a **package is not combined** or offered as a package **by the hotel** and the services are combined and put together by the traveller, it still leads to a **package travel** in the sense of the PTD (for example such a package “develops” due to the special wishes of the costumer when he books the room on the website of the hotel and chooses also a massage and the rental of a bicycle).

- Even if a **booking does not constitute a package at the outset**, it could end up being a package travel in the sense of the PTD **if the traveller subsequently** (after the booking of the accommodation but before the arrival at the hotel) **books other services** (e.g. a massage).

- The **threshold for applicability of 25%** of the total price for other tourist services (Recital 17) is far too low and would **be exceeded in almost all cases** where certain travel services are combined. For example if you think of a 2 days weekend-stay in a Wellness-hotel (cost for the room 160 Euro and a massage 60 Euro, total price = 220 Euro, the 60 Euro-massage exceeds the 25% threshold of 55 Euro). As a result, **a hotel** would be considered as **a tour operator** and would be **subject to an excessive regime** (enormous range of information duties, strict liability, insolvency protection etc.) tailored for big “real” tour operators. This is not appropriate and does not correspond to the expectations of consumers either.

- Furthermore we would like to draw your attention to the following **very important change in comparison to the EP's position in the first reading: Even if this (low) 25% threshold** for other tourist services **is not exceeded** the hotel **will never get the legal certainty** that the combined **offer is exempted** from the provisions of the PTD. This is due to the fact that the final compromise contains a "small" **change but with tremendous impact** in comparison to the **EP's position in Amendment 36:** In Art 3 (2) last paragraph the word **"or"** has been changed to an **"and"**. This means that **the exception**, that other tourist services do not lead to a package, if they do not account for a significant proportion (25%) **is only applicable**, **if the two other criterions** (the tourist service is not advertised as and does not otherwise represent an essential feature of the combination) are **fulfilled as well**. Basically this means that the exception regarding the 25% threshold will never be applicable because an additional service will always be advertised as well.

- Since June 2014 providers of tourist services (with the exception of carriage of passengers) - have to comply with the provisions of the Consumer Rights Directive (CRD). If the new PTD enters into force **service providers like hotels** would **be obliged to switch between** the information requirements of the **CRD and the PTD** (and within the PTD possibly between the requirements for packages and assisted travel arrangement - ATA) depending on the circumstances of the specific case. If for example one customer only wants to book accommodation in a hotel as a single tourist service the employee in charge at the hotel has to provide this customer with information according to the CRD (e.g. on the fact that a right of withdrawal does not exist). Another costumer does not only want to have accommodation but also wishes to book a beauty treatment or asks the hotel to provide him with a ticket for the Bregenz Festival. In this case the PTD (package or may be an ATA) with different and very sophisticated information requirements would be applicable. It would be **enormously burdensome** for traders like a hotel to **assess in each case which legal regime is applicable.**

15. Migration and home affairs (p.106)

For us, the „Researchers and students directive" which is currently under revision as well as the proposed fitness check for the directives concerning legal migration (blue-card directive, long term residents directive and single permit directive) are of particular importance.

The researcher and students directive is important, as we strongly advocate that third country nationals who have concluded their studies in an EU member state should have the right to stay for 1 year in order to enter the labour market. During their studies they should be allowed to work for a minimum of 20 hours per week.

Part 3: Important legislation with need for action not covered by REFIT yet

1. Directive 2011/83/EU on consumer rights

Directive 2011/83/EU on consumer rights had to be implemented into national law by the Member States until 13.12.2013. However, the provisions are applied in practice **consistently throughout the European Union since 13.06.2014** to contracts between businesses and consumers.

The directive establishes **new provisions for distance contracts** (e.g. mail order companies, webshops, hotel bookings), but **especially also for contracts negotiated away from business premises** (in Austria called "Außergeschäftsraumverträge" – AGV).

Unfortunately, the directive is a **particularly negative example** that REFIT´s **aspiration, to establish a simple, clear and predictable legal framework, is not met.** Instead, it created **massive legal uncertainty, enormous bureaucracy and unnecessary and excessive regulatory burden for the affected companies** in many areas. Thus, there is urgent **need to evaluate and amend** the directive.

As an example, some especially problematic aspects are highlighted.

- **Contracts negotiated away from business premises:**

The provisions on contracts negotiated away from business premises do **not only apply if,** e.g. **a business is collecting unrequested orders by doorstep selling**, **but also if**, e.g. **a craftsman is called into a customer´s flat because of an order** (e.g. paintwork, electrical installations, manufacturing of a cupboard, hairdressing in a flat, etc.), and if the contract is concluded there.

Businesses – an overwhelming majority of them are SMEs or even single-person companies – are in such cases affected by **enormous information obligations** (see also distance contracts below), whereas the information must be given to the customer beforehand principally on paper. If there is no exception from the right of withdrawal (e.g. in the case of urgent repair and maintenance works; however, the consumer must be precontractually informed about the non-existence of the right of withdrawal by writing), the consumer has a **period of 14 days to withdraw from an off-premises contract**. If the **consumer wants a service to be provided during the withdrawal period, he must explicitly request that (principally on paper).** Because the **burden of proof that the information has been provided is always on the business**, it has no other option than **have the consumer sign enormous contract forms in duplicate**.

Given the case that, for example, a hairdresser is called into a flat or a care home for an aged client´s more extensive hairdressing, it can be estimated that the 50 Euro limit will be exceeded regularly. The example shows, how **bureaucratic and exaggerated the new standards are**. But also **regarding all other crafts** (e.g. electrical installation, sanitation and heating, paintwork), first experiences show that the new provisions are an **entire overextension and an unacceptable bureaucratic burden**. Notably, first reports from our members show, that also consumers are overcharged with the new provisions and react wary of getting forms filling pages that they have, for example, to sign before the work begins during the withdrawal period.

Besides the enormous bureaucratic effort, **mistakes concerning the information about the right of withdrawal are sanctioned with liberation of the consumer´s duty of payment** if he withdraws from the contract. So, he would get the service for free.

A **model withdrawal form** which businesses can use is contained in the directive´s annex, however, with many design tips, even for jurists it is challenging. Among other things, a craftsman without legal education must decide, whether it is a service contract or a sales contract, so that he can give the right information about the right of withdrawal. In the case of a service contract, the withdrawal period starts with conclusion of the contract, while in the case of a sales contract it starts with receipt of the goods. Therefore, he must give divergent information depending on the kind of the contract. If the craftsman assesses the contract wrongly, also the information on the right of withdrawal will be wrong. Thus, the withdrawal period is extended by 12 months. In case of a withdrawal, the consumer can call his money back or does not need to pay. This sanction is also critical with regard to the Fundamental Rights Charter.

Assessing whether it is a sales contract or a service contract is not easy. This is especially shown in the craftsman's trades, where many contracts are so called **mixed purpose contracts**, which contain both goods and services. This also shows in the guidance document published by the DG Justice on 13 June 2014 (see page 6f with numerous example cases), which, unfortunately, has been published quite late and was firstly only available in English. According to this document, the purchase of specific construction elements, such as windows, including their installation in the consumer's house would be a sales contract. The period of withdrawal would begin after receiving the last window (it must be mentioned that this is factually and economically inappropriate). However, must there be an explicit claim from the consumer before the installation of the windows? What about the construction of a partition to divide a room, where also a door is installed? Here, both the goods (bricks, doorframe and door) and services are part of the contract. There are good reasons that this is a service contract. Otherwise, the withdrawal period would begin with the delivery of the last construction material. However, would the assessment even be different if it would not be a brick wall but a standard drywall?

These questions only illustrate some examples of **legal issues**, which SMEs from the crafts sector have to cope with since 13 June 2014 in addition to the **enormous battle with red**

tape, in order to act in conformity with the law and especially to keep the claim for remuneration.

During the negotiations, AFCO has opposed the, especially for SMEs, excessive and bureaucratic provisions and has called for an exception for contracts, where the consumer himself has requested the business' visit. This exception was also supported in the Council by Austria; however, to our knowledge there was no support from other Member States (except for Germany).

An improvement of the companies´ situation on national level is not possible, because the Austrian legislation is largely oriented on the directive. The scopes provided in the directive (e.g. the exception for contracts negotiated away from business premises up to 50 Euro), have been implemented by the national lawmaker. Therefore, **an amendment of the directive is necessary**. In all cases where the consumer has requested the entrepreneur´s visit, no use shall be made of the complicated information and guidance system. In these cases, the initiative came from the consumer; therefore nobody is taken in surprise as in a doorstep selling situation.

- **Distance contracts and pre-contractual information requirements**

However, also the new provisions on distance contracts have brought severe burden to the affected companies. Here, the **excessive extension of pre-contractual information requirements** must be mentioned. EU legislation is following a questionable strategy of extending information requirements, without the existence of a scientific study on the effectivity of this model. Especially with the new Directive on consumer rights, this **is getting more and more absurd**. Information requirements, which moreover also exist in parallel in various directives, are regularly extended, as in the case of the Directive on consumer rights.

Every new information requirement means burden and legal uncertainty for the affected companies. Just as an example, the **pre-contractual information requirements on warranties** are pointed out. The obligation of traders, of providing pre-contractual information about the conditions of the manufacturer´s warranty means an **enormous effort** for traders with a wide range of products. It has also not been considered that the information requirements are also in effect for the traditional mail order business. Here, it makes no economic sense to print the complete warranty conditions. Maybe, the clause of Article 8(4) can be used; however, there is no legal certainty for the affected companies.

Particularly, it cannot be the task of the companies, to i**nform consumers increasingly extensive about the legal situation**. In the directive, the **information obligations on the right of withdrawal have been expanded substantially**. Moreover, an information obligation on the **legal guarantee has been introduced,** which causes confusion. Whereas the directive requests "a reminder of the existence of a legal guarantee of conformity for goods" (Article 6(4)(l)), the guidelines of the commission state that "the seller should

specify that, under EU law, he is liable for any lack of conformity that becomes apparent within a minimum of two years from delivery of the goods and that national laws may give the consumer additional rights" (p. 27).

Moreover, there is a **massive legal uncertainty** how the pre-contractual information requirements can be **accomplished correctly,** especially because the directive differentiates the run of the withdrawal periods. If goods are, for example, ordered in one order but are delivered separately, the period for all goods begins with receipt of the last good. However, if a separate delivery will happen, is not known to the entrepreneur in advance. Therefore, **generally, the model instructions on withdrawal cannot be used**. To cover all possibilities, various model instructions on withdrawal must be provided on the website. This seems bureaucratic.

Also the obligation that the **"trader shall make the consumer aware in a clear and prominent manner, and directly before the consumer places his order" of the main characteristics of a good or a service, is a regulatory overreach**. However, the directive regulates also the labelling of the button for the order of clothes or the booking of a hotel and the trader shall ensure, that the consumer "explicitly acknowledges that the order implies an obligation to pay". Therefore, all over Europe, millions of enterprises are forced to give their websites a new layout – without any Impact Assessment. This is another example how **easily new administrative burdens for companies are created** just because it is not possible to come to grips with rip-offs on the internet (supposed free offers of horoscopes, prognosis of lifespan or recipes) by effective enforcement of existing legislation in some Member States.

There is massive legal uncertainty regarding the **extent, to which the main characteristics of a good or a service must be outlined before placing the order**. The guideline in article 8(2) is quite vague and is causing problems with the interpretation. However, every entrepreneur will have an interest to present and describe his products in a way that the consumer can get an idea of it. If, according to article 8(2), the information must be provided in the same way as in article 6(1)(a), this "overview" would lead to an entire confusion, especially if several goods are ordered.

The provisions on the design of distance **contracts on digital content** are **completely confused, wrongheaded and bureaucratic**. Apparently, they have been attached to the directive at the last minute, thus without any profound discussion and coherent coordination. To go into detail would take us too far afield. However, it must be mentioned that the content of Article 16(m), about the loss of the right of withdrawal, combined with all the other provisions (information on the right of withdrawal, information on the content) **bears a high legal uncertainty and makes downloads bureaucratic**.

Obviously, the Commission is aware of the problem and tries to clarify some aspects in the guidelines (p. 64ff). However, it is questionable, whether the well-intentioned remark that

the use of the example consent and acknowledgement statement (p. 66) would also contain the information on the right of withdrawal and is in accordance with the directive.

The **legal uncertainty concerning contracts on digital content is problematic**, and questionable with regard to the Fundamental Rights Charter, because **infringements are sanctioned similar to those by contracts negotiated away from business premises**. Article 14(4)(b) entitles the consumer either not to pay for the content received or be reimbursed for the amounts paid.

Another example for a professional group especially affected by the directive are real estate agents. These are affected by both the provisions for distance contracts and for contracts negotiated away from business premises. If the real estate agent wants to protect his brokerage, he must overwhelm the consumer with enormous information materials before beginning his service. The consumer is facing a raft of information and must confirm the receipt before getting information on the realty.

The new provisions lead to a situation where either the whole procedure is clearly slowed down (awaiting the 14-days withdrawal period) or the consumer loses his right of withdrawal if he wants services and information immediately (in the case of complete fulfilment of the contract within the withdrawal period). The intention of the directive, consumer protection, is completely lost. Often, consumers are angry about the new provisions and refuse any further contact with the real estate agent. The companies report up to 50% less requests from prospects and many severances after the initial contact.

As part of the urgently needed amendment of the Directive on consumer rights, we ask for an exception for the professional group of real estate agents. Not only contracts on real estates should be excluded, but also contracts on services by real estate agents.

2. EU Food Labelling Regulation (no. 1169/2011) for food business operators in the hospitality sector

As anticipated, compliance with the requirements of the Regulation has proven to be a significant additional administrative burden in the workplace for food businesses. This stands in a strong disproportion to the interest of consumers and guests to food labelling in general.

According to a survey of the German Hotel and Restaurant Association (DEHOGA) from April 2015 almost 70% of restaurant owners state that they have not received a single request by a guest for allergen information since the entry into force of the Regulation in December 2014. This finding is also consistent with our experience and we believe that throughout the European Union one will encounter similar results.

For this reason we think it is justified if the information obligation under the Food Information Regulation in the field of gastronomy is loosened. The severe obligation to

inform should be changed into an instruction to inform, starting from the principle of oral information upon request.

3. Biocidial Product Regulation (BPR) - (EU) No 528/2012

A particular provision of the biocides regulation No 528/2012 (article 95) will become relevant on 1. September 2015 and it could become a show-stopper for a large amount of SMEs. This new provision requests from all suppliers of active substances, who want to stay on the market after the mentioned date, to perform an extensive and costly dossier-submission.

It seems that not many companies – in particular SMEs – are aware of the deadline in September. In general awareness about the recent changes in the area of biocides legislation is very low in the SME sector. Due to intense communication efforts of SME associations it seems that it is not ignorance that causes this lack of information and activity, rather it is caused by the complexity of the biocides regulation and all other heavy pieces of chemical legislation (e.g. REACH and CLP), which are also relevant for a supplier of biocides. Because of that a fall-back option for all those companies, who fail to comply with their obligations on 1 September this year should be established. We suggest a tolerance period of 2 years, in which companies are not fined and can take the necessary action.

4. Clean Air Package

Currently (July 2015) two important pieces of legislation are being finalised or will be in the months and years to come:

- **MCP Directive (COM(2013) 919)** will constitute a substantial challenge on industrial companies using medium combustion plants from 1 to 50 MW which are being faced by ambitious emission limit values. Therefore any additional red tape is to be avoided, which unfortunately has been added into the directive during the final negotiations. Article 12 will establish a register which is additional to other registers with no visible added value on the environment and health side. These provisions are the first of this new directive to be revised.
- **NEC Directive (COM(2013) 920)** is not yet finalised. It is of utmost importance that the 2030 targets proposed by the Commission are being revised toward realistic and still ambitious targets of emission ceilings. Furthermore, flexibilities on
    - the setting of the targets which should by changeable based on changed scenarios
    - the fulfilment of the targets based on an extended version of the IIASA proposal enabling Member States to exchange emissions of pollutants against each other
    - the calculation of the target fulfilment through a flexible approach using alternatively fuels sold or fuels used for transport emissions.

5. Future Circular Economy Package (after EC withdrawal in 2015)

Within Europe, there are big gaps between the Member States when it comes to the implementation of existing waste standards. It is a fact, that ambitious EU waste targets have been established in EU legislation for decades. However, only a small number of Member States has implemented them adequately. The costs and the administrative burden of waste management lead to competitive disadvantages in these countries.

The implementation of the already existing EU waste legislation in all Member States should therefore be given priority before adopting new targets and obligations which again only a small number of Member States would implement properly. Otherwise the gap between Member States in the field of waste policy continues to become wider. Therefore, in the coming years, the focus should be placed on creating incentives for the implementation of the already existing law and on checking compliance without red tape.

An increase of waste targets on recycling and/or prevention should not be discussed before it is ensured that these targets are based on well-founded data, are technically and economically feasible in all Member States and are not widening the implementation gap between EU Member States.

6. Emissions Trading Directive (2003/87/EC)

For the Emissions Trading System, a radical simplification of bureaucratic procedures and increased transparency on the processes within the European Commission (e.g. regarding the assessment for the carbon leakage list) are necessary. The criteria to remain on the carbon leakage list must remain constant, also when compared to the current trading period. Also, financial burden for ETS businesses must be reduced.

Regarding the benchmarking system, these benchmarks must be technically and economically realistic and feasible. Our proposal: the average emissions of the 10 to 15 percent most efficient installations (best performers) should be counted for the benchmarking exercise, the top 5 percent should be treated as statistical outliers and thus be excluded from the calculations.

To decrease the administrative burden and increase planning security for participating companies, benchmarks and fall-backs should only be updated once at the beginning of the new trading period. This update should rely on data provided by the companies. If there have not been any significant technological changes in a certain sector, a simplified procedure to gather and submit data should be accepted by the Commission.

The Cross-Sectional Correction Factor (CSCF) must be scrapped. Not only is this necessary to create a fair and level playing field within Europe, doing away with the CSCF would also dramatically increase the planning and investment security for businesses. Currently, the CSCF punishes the best performers with a reduction of their free certificates by up to one fifth. Scrapping the CSCF would furthermore ease the carbon leakage problem. By making the allocation system more dynamic and fair, the

CSCF could become redundant without jeopardising the long-term climate objective (i.e. the overall EU greenhouse gas cap).

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