



Department
for Business
Innovation & Skills

DIRECTIVE 2015/1535/EU

Decision Tree to determine
whether a measure requires
notification

MARCH 2016

Withdrawn

This publication was withdrawn on 1 January 2021.

Contents

1. Introduction	3
2. To be aware before you use the decision tree	3
3. Using the decision tree	4
3a. How the tree is structured	4
3b. Using the decision tree	5
4. If your measure is notifiable	5
5. Detailed Guidance	6
Detailed Guidance Notes – relating to the corresponding questions posed in table A - Rules about products	6
Detailed Guidance Notes – relating to the corresponding questions posed in table B - Rules about Information Society	9
Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify	13
Detailed Guidance Notes – relating to the corresponding questions posed in table D - Standstill periods. A standstill period of at least 3 months will apply unless you fall within the following exceptions	21
Annex A: Guidelines* on the definition and notification of ‘fiscal measure or financial measures’ for the purposes of Directive 2015/1535/EU	25
1. Introduction	25
2. Definition of ‘fiscal or financial measure’ for the purposes of Directive 2015/1535/EU	25
3. Distinction between de jure technical regulations and de facto technical regulations and the classification of a measure as a ‘fiscal or financial measure’	27
4. Examples of ‘fiscal or financial measures’ in the framework of Directive 2015/1535/EU ..	27
5. Classification and notification of ‘fiscal or financial measures’ according to Directive 2015/1535/EU	28
Annex B: Cases where regulations were not notified under Directive 2015/1535/EU	30

1. Introduction

Decision Tree to help determine whether a draft regulation or standard – the ‘measure’ – is notifiable under Directive 2015/1535/EU

Directive 2015/1535/EU imposes an obligation upon each Member State to inform the Commission, and every other Member State, of technical regulations and technical standards in draft, before they are adopted in national law. In general, once notified, the measure enters a 3 month standstill period, during which the measure cannot be laid or come into force, enabling other Member States and the Commission to raise concerns about whether the proposed measure is a potential barrier to trade.

The procedure laid down by the Directive is consultative: information is disseminated on the proposed new measure to advise and stimulate dialogue, thus enabling Member States and the Commission to identify and prevent barriers to trade.

For more detailed information on this Directive and the process of notification please see: [Guidance for Officials](#)

You are recommended also to read the Directive that can be found at: [Directive 2015/1535/EU](#)

2. To be aware before you use the decision tree

Before you use the decision tree here are some key points to note on the requirements of the Directive:

- Subject to limited exceptions, the Directive requires notification in draft to the Commission of measures such as mandatory rules, guidance or any document which it is intended users should in practice follow (referred to as ‘technical regulations’) which apply in the UK or a major part of it and regulate:
 - industrially manufactured or agricultural products (including bans on products, rules about their composition, packaging or testing and rules that relate to their subsequent use, including minimum pricing), or
 - services provided on a commercial basis over the internet or through any similar medium (these are referred to as ‘information society services’).
- A measure is a ‘draft’ if the text is at a stage of preparation at which substantial amendments can be made (Article 1(1g)). Thus, for example, it is too late to make

a notification in relation to a statutory instrument if the Minister has already signed it.

- Subject to limited exceptions, after notification to the Commission, a standstill period of a minimum of 3 months (which can be extended in the event of objections from the Commission or another Member State) applies during which the draft measures may not be adopted. (NB any amendments of substance made to the draft after notification will require re-notification.)
- Adoption of a measure regulating goods or electronic services without following the procedure in the Directive renders the measure unenforceable. For this reason if in doubt it is safer to notify a measure in draft. (It also exposes the UK to the risk of infraction proceedings.)**
- The directive applies not only to Bills and statutory instruments but also to soft law such as guidance (an example of this is the guidance produced in relation to the Building Regulations which the UK has notified in draft). The test is whether the rule is in practice followed whether or not there is a strict legal requirement to do so (fiscal rules that mean that it is advantageous to manufacture products in a particular way would for example be caught). Agreements through which particular standards are adopted which are officially endorsed may also require notification in draft.
- Notification under 2015/1535/EU maybe necessary even where the rules implement a Directive.

3. Using the decision tree

3a. How the tree is structured

The tree – in section 5 below – comprises 5 sections:

- Table A: Product notifications;
- Table B: Information Society notifications;
- Table C: Exceptions to the requirements to notify; and
- Table D: Standstill period exceptions.

The fifth and final section comprises detailed guidance notes. The questions are labelled A1, A2 and so on, the detailed guidance notes are correspondingly labelled. Thus for question A1 – Do the draft rules relate to products? – There is a corresponding detailed guidance note A1 on what is a product.

3b. Using the decision tree

You need to apply the following tests – the questions – to draft rules such as draft statutory instruments or provisions to be included in a Bill as well as any guidance or similar document which in practice will be followed by those who use it. References in the test to ‘draft rules’ includes draft guidance etc.

Go to table A if your rules relate to products or table B if your rules relate to electronic services.

Follow the questions in the tables and accompanying detailed guidance notes to see whether your draft rules/guidance are notifiable and whether you need to observe a standstill period.

4. If your measure is notifiable

If your draft measure is notifiable please read the [Guidance for Officials](#) and send the relevant [Form](#) and accompanying texts (see item 9. Guidance for Officials) to the BIS Central Contact Point: technicalregulations@bis.gsi.gov.uk.

Withdrown

5. Detailed Guidance

Detailed Guidance Notes – relating to the corresponding questions posed in table A - Rules about products		
No	Questions to determine whether a measure requires to be notified	Guidance notes
A1	<p>Do draft rules relate to any of the following products:</p> <p>A. Industrially manufactured products; or</p> <p>B. agricultural products (including fish)?</p>	<p>What is a product?</p> <p>If the answer is yes – go to question A2;</p> <p>If the answer is no go to question B1</p> <p>The Directive applies to rules (referred to as ‘technical regulations’) relating to ‘products’ (and electronic services described in the Directive as ‘Information Society services’). ‘Products’ are defined in Article 1(1) of the Directive as industrially manufactured products and agricultural products including fish products. The Commission view is that rules applying to products not in common use or with a negligible economic impact must be notified. See Annex B for Case Law</p>
A2	<p>Do the draft rules introduce or amend a prohibition or on the manufacture, importation, marketing or use of a product?</p>	<p>What is a prohibition?</p> <p>If the answer is yes your notification is notifiable unless an exception is applicable. Go to question C1 to determine whether exceptions apply.</p> <p>If the answer is no go to question A3.</p> <p>The definition of ‘technical regulation’ in Article 1(1f) includes provisions which prohibit the manufacture, importation, marketing or use of a product. See Annex B for Case Law</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table A - Rules about products		
A3	<p>Do the draft rules specify (or amend a specification relating to) the characteristic of a product such as the levels of quality, safety or performance or its dimensions or requirements as to:</p> <p>A. The name under which the product is sold;</p> <p>B. Terminology or symbols;</p> <p>C. Testing of the product (inc test methods);</p> <p>D. Packaging, marketing or labelling; or</p> <p>E. Conformity assessment procedures?</p>	<p>Technical specifications</p> <p>If the answer is yes your notification is notifiable unless an exception is applicable. Go to question C1 to determine whether exceptions apply.</p> <p>If the answer is no, go to question A4</p> <p>The definition of ‘technical regulation’ also covers ‘technical specifications’. A ‘technical specification’ includes a document which specifies the characteristics required of a product in Article 1(1c). See Annex B for Case Law</p>
A4	<p>Do the draft rules cover production methods and processes in relation to any of the following:</p> <p>A. agricultural products,</p> <p>B. products intended for</p>	<p>If yes, your provision is notifiable unless an exception is applicable - go to Section C to determine whether any of the exceptions apply.</p> <p>No – go to question A5.</p> <p>See second paragraph of definition of technical specification in Article 1(1c).</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table A - Rules about products		
	human and animal consumption, C. medicinal products, D. other products where the characteristics of the product are affected?	
A5	Do the draft rules impose or amend any requirements which apply after the product has been placed on the market and which might significantly influence: A. the composition of a product, B. the nature of product, C. the marketing of the product, (including in particular rules to protect consumers or the environment)?	<p>Requirements after a product is on the market ('other requirements')</p> <p>If yes, your provision is notifiable unless an exception is applicable - go to Section C to determine whether any of the exceptions apply.</p> <p>No – your draft rules are not notifiable.</p> <p>The definition of 'technical regulation' has been extended to cover what are described as 'other requirements' (see Article 1(1d)). These are requirements which affect the life cycle of the product after it has been placed on the market including for example:</p> <p>minimum pricing;</p> <p>conditions of use; recycling;</p> <p>reuse;</p> <p>disposal.</p> <p>See Annex B for Case Law</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table B - Rules about Information Society		
No	Questions to determine whether a measure requires to be notified	Guidance notes
B1	Do the draft rules relate to a service normally provided for remuneration?	<p>If yes, go to B2</p> <p>If no, your draft rules are not notifiable</p> <p>The Directive has been extended to cover what are referred to as ‘Information Society services’ (broadly speaking this covers services supplied over the internet or similar electronic medium). A service is something that is provided for remuneration. The remuneration need not be paid by the recipient of the service. For example a service funded by advertising will be covered.</p>
B2	Is this service provided by electronic means?	<p>Services not provided ‘by electronic means’</p> <p>If yes, go to B3</p> <p>If no, your draft rules are not notifiable</p> <p>Annex I of the Directive provides a non-exhaustive list of services that are not provided ‘by electronic means’. You should definitely answer ‘No’ to this question if the services fall within any of the following categories:</p> <p>Services having material content even though provided by electronic devices:</p> <p>automatic cash or ticket dispensing machines (banknotes, rail tickets etc.);</p> <p>access to roads/car parks where electronic devices at entrance/exit control access and/or ensure correct payment.</p> <p>Offline services: distribution of CD roms or</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table B - Rules about Information Society		
		<p>software on diskettes.</p> <p>Services which are not provided via electronic processing/inventory systems:</p> <p>voice telephony services;</p> <p>telex/telefax services;</p> <p>services provided via voice telephony or fax;</p> <p>telephone/telex consultations with doctors/lawyers;</p> <p>telephone/telex direct marketing.</p>
B3	Is this service provided at a distance without the parties being present?	<p>Services not provided at a distance</p> <p>If yes, go to B4</p> <p>If no, your draft rules are not notifiable</p> <p>Annex 1 of the Directive provides a non-exhaustive list of services that are not provided 'at a distance'. You should definitely answer 'No' to this question if the services fall within any of the following categories:</p> <p>Services where the provider and recipient are both physically present even where electronic devices are used such as:</p> <p>medical examinations using electronic equipment;</p> <p>consultation of an electronic catalogue by a customer in a shop;</p> <p>plane ticket reservations at a travel agency in the physical presence of the customer;</p> <p>electronic games in an arcade where the customer is physically present.</p>
B4	Is this service provided through	Services not supplied at the individual request of

Detailed Guidance Notes – relating to the corresponding questions posed in table B - Rules about Information Society		
	<p>the transmission of data at the request of a person?</p>	<p>a recipient of services</p> <p>If yes, go to B5</p> <p>If no, your draft rules are not notifiable</p> <p>Annex I of the Directive provides a non-exhaustive list of services that are not provided 'at the individual request of a recipient of services'. You should definitely answer 'No' to this question if the services fall within any of the following categories:</p> <p>Services provided by transmitting data without individual demand for simultaneous reception by an unlimited number of individual receivers (point to multipoint transmission):</p> <p>television broadcasting services (including near-video on-demand services), covered by point (a) of Article 1 of Directive 89/552/EEC (now repealed and replaced by Directive 2010/13/EU);</p> <p>radio broadcasting services;</p> <p>(televised) teletext.</p>
B5	<p>Is the specific aim or object of the draft rules to regulate information society services (i.e. electronic services) in an explicit or targeted way?</p>	<p>If yes, go to B6</p> <p>If no, your draft rules are not notifiable</p> <p>The Directive provides that a rule is to be considered as being specifically aimed at Information Society services where having regard to its statement of reasons and its operative part, the specific aim and objective of all or some of its individual provisions is to regulate Information Society services in an explicit and targeted manner. A rule is not to be considered to be specifically aimed at Information Society services if it affects such services only in an implicit or incidental manner. Rules of general application which incidentally affect information society services will not require to be notified (Article 1(1.e)). Thus a law on the protection of minors will not require</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table B - Rules about Information Society		
		notification unless it contains specific provisions relating to the internet. Similarly rules relating to the level of lawyers' fees will not require notification except where there is specific provision to services provided over the internet.
B6	Do the draft rules prohibit (or amend a prohibition relating to) the provision or use of a service, or establishment as a service provider?	<p>If yes, go to B7</p> <p>If no, your draft rules are not notifiable</p> <p>The definition of 'technical regulation' in Article 1(1f) includes measures which prohibit the provision or use of a service or establishment of a person as a service provider.</p>
B7	<p>Do the draft rules impose (or amend) requirements on the take up and pursuit of a service provided electronically in particular provisions concerning:</p> <p>A. the service provider</p> <p>B. the services</p> <p>C. the recipient of the services</p>	<p>If yes, your provision is notifiable unless an exception is applicable – See section C to determine whether exceptions apply</p> <p>If no, your draft rules are not notifiable</p> <p>The definition of 'rule on services' is to be found in Article 1(1e). Examples of the kinds of thing that may be covered are rules on domain names and electronic signatures and rules relating to advertising on the internet</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify		
No	Questions to determine whether a measure requires to be notified	Guidance notes
C1	Will the draft rules repeal a technical regulation in its entirety?	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C2</p> <p>The Commission has indicated that the total repeal of a technical regulation does not need to be notified. However measures that liberalise or derogate from existing rules which are not whole scale repeals need to be notified. See Annex B for Case Law</p>
C2	Are the draft rules limited to a pure re-enactment of existing rules which were notified under 2015/1535/EU (without adding new or additional rules)?	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C3</p> <p>See Annex B for Case Law</p>
C3	Are the draft rules limited to conferring a power to make rules?	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C4</p> <p>A provision that merely confers on the Minister a power to make subordinate legislation such as Regulations will not be notifiable provided that it does not itself contain any substantive provisions that amount to a technical regulation. However provisions made under the power must be notified in draft if they are technical regulations and where applicable the appropriate standstill period must be observed.</p> <p>See Annex B for Case Law “A rule is classified as a</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify		
		<p>technical regulation for the purposes of Directive 83/189 if it has legal effects of its own. If, under domestic law, the rule merely serves as a basis for enabling administrative regulations containing rules binding on interested parties to be adopted, so that by itself it has no legal effect for individuals, the rule does not constitute a technical regulation within the meaning of the directive.</p>
C4	<p>Are the draft rules being adopted for the purposes of a binding Community obligation in respect of which there is no choice as to methods of implementation?</p>	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C5</p> <p>There is an exception that provides that the notification and standstill requirements do not apply to things done to:</p> <p>“comply with binding Community Acts which result in the adoption of technical specifications or rules on services.” (Article 7(1))</p> <p>The Commission view on this is that where Member States have ‘room to manoeuvre’ national measures need to be notified. See Annex B for Case Law</p>
C5	<p>Do the draft rules fulfil obligations arising out of international agreements which result in the adoption of common technical specifications or rules on services in the Community?</p>	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C6</p> <p>This exception is contained in Article 7(1). This exception cannot be invoked unless all the Member States are party to the agreement. Additionally the provisions of the international agreement must be measures leaving Member States no margin for manoeuvre in implementation however narrow. See Annex B for Case Law</p>
C6	<p>Do the draft rules make use of safeguard</p>	<p>If yes, the draft rules do not need to be notified</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify		
	<p>clauses provided for in binding Community acts?</p>	<p>If no, go to C7</p> <p>This exception is to be found in Article 7(1) of the Directive.</p> <p>What is a safeguard clause?</p> <p>A safeguard clause will usually be indicated in the Article heading. An example is to be found in Article 3 of Directive 2001/18/EC of the European Parliament and of the Council of 12th March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EC. This Article is headed “Safeguard Clause” and it permits the banning of GMOs where new evidence appears which demonstrates a risk to human health or the environment notwithstanding that the procedures in that Directive have been followed.</p>
C7	<p>Do the draft rules apply Article 12(1) of Directive 2001/95/EC (which relates to the Community rapid information system in the event of serious risk to the health and safety of consumers)?</p>	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C8</p> <p>This exception refers to any situation where Member States apply Article 8(1) of Directive 92/59 on general product safety. This has been replaced by Article 12(1) of Directive 2001/95/EC. This lays down a Community rapid information system (RAPEX) in the event of a serious risk to the health and safety of consumers. The Directive provides a procedure for taking measures to deal with health and safety issues relating to specific products.</p>
C8	<p>Do the draft rules restrict themselves to implementing a judgment of the ECJ?</p>	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C9</p> <p>This exception is to be found in Article 7(1).</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify		
C9	<p>Do the draft rules restrict themselves to amending a technical regulation in accordance with a Commission request with a view to removing an obstacle to trade or, in the case of rules on services, to the free movement of services or the freedom of establishment of service operators?</p>	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C10</p> <p>This exception is to be found in Article 7(1). See Annex B for Case Law</p>
C10	<p>Are the draft rules concerned with a measure considered necessary by the UK under the Treaty for the protection of persons, in particular workers, when products are used, provided that such measures do not affect the products?</p>	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C11</p> <p>This exemption is contained in Article 1(1g) final paragraph. Thus a rule reserving use of certain dangerous equipment for specified skilled workers does not need to be notified. The exception means that a measure requiring compulsory use of protection equipment for certain activities does not require notification provided the measures do not specify the characteristics of the protection equipment that must be used.</p>
C11	<p>Do the draft rules relate to radio broadcasting</p>	<p>If yes, the draft rules do not need to be notified</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify		
	services?	<p>If no, go to C12</p> <p>This exception is to be found in Article 1(1b).</p>
C12	Do the draft rules relate to television broadcasting services covered by point (a) of Article 1 of Directive 89/552/EEC?	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C13</p> <p>This exception is to be found in Article 1(1b). A service comes within the concept of ‘television broadcasting’ referred to in Article 1(a) of Directive 89/552 (now repealed and replaced by Directive 2010/13/EU) if it consists of the provision of programmes to the general public by electronic communications networks (which includes networks used for television broadcasting) for simultaneous viewing on the basis of a programme schedule. See Annex B : Cases where regulations were not notified under Directive 2015/1535/EU Case Law</p>
C13	Do the draft rules relate to matters which are covered by Community legislation in the field of telecommunications services, as defined by Directive 90/387/EEC?	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C14</p> <p>Commission guidance indicates that this exception only covers matters that are actually harmonised by Community law. There was some debate as to whether internet service providers fall within the scope of this exception. However there are no harmonised rules on these. The Commission give as an example of a law that requires notification a law on the liability of internet access suppliers, on the basis that it would be a rule that specifically concerns an Information Society service.</p> <p>Article 2(3) of Directive 90/387/EEC (as amended) defines telecommunications services as services whose provision consists wholly or partly in the transmission and routing of signals on a telecommunications network, with the exception of radio broadcasting and television. Even though Directive 90/387/EEC has been repealed by Directive</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify

		<p>2002/21/EC, the Commission guidance states that the definition of ‘telecommunications services’ in Directive 90/387/EEC should be retained for the purposes of 2015/1535/EU Directive 2015/1535/EU, although that is not set out expressly in the relevant legislation. Therefore, it is worth noting that Directive 2002/21/EC establishes a harmonised framework for the regulation of, amongst other things, electronic communications services (services normally provided for remuneration which consist wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services but excluding services providing content transmitted using electronic communications networks and services). Such services do not include Information Society services, as defined in Article 1 of Directive 2015/1535/EU, which do not consist wholly or mainly in the conveyance of signals on electronic communications networks (see articles 1 and 2(c), and recital 10, of Directive 2002/21/EC).</p> <p>The Commission guidance (which pre-dates Directive 2002/21/EC) states:</p> <p>“Future national drafts relating to telecommunications matters already harmonised at Community level - i.e. including national measures other than those covered by the general exemption in Article 7 – will not fall within the scope of the Directive and will not therefore be subject to the obligation to notify...</p> <p>As a result of this specific exemption, not only the measures referred to in Article 7 of Directive 2015/1535/EU but also all other national regulations relating to questions governed by the Telecommunications Services Directives (e.g. laws amending, clarifying, or repealing the scope of a law transposing a Directive) are not subject to the obligation of prior notification in Directive 2015/1535/EU (given that, for the most part, they will have to be notified under these Directives....</p> <p>Similarly, a future national law, subsequent to the law</p>
--	--	---

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify		
		<p>which transposed Directive 97/13/EC [which laid down the conditions and procedures applicable to general authorisations and individual licences in the field of telecommunications services, etc] and laying down specific conditions for granting licences to supply electronic mail telecommunications services, will not, as a result of this exemption, be subject to the obligation of prior notification.”</p>
C14	<p>Do the draft rules relate to matters which are covered by Community legislation in the field of financial services?</p>	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C15</p> <p>Annex II of the Directive sets out a non-exhaustive list of matters covered by Community legislation in the field of financial services. Answer ‘yes’ to this question if the rules cover any of the following:</p> <ul style="list-style-type: none"> investment services insurance and reinsurance operations banking services operations relating to pension funds services related to dealing in futures and options. <p>In particular this exception includes:</p> <ul style="list-style-type: none"> investment services referred to in the Annex to Directive 2004/39/EC; services of Collective investment undertakings services covered by the activities subject to mutual recognition referred to in the Annex I to Directive 2013/36/EU of the European Parliament and of the Council operations covered by the insurance and reinsurance activities referred to in Directive 2009/138/EC of the

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify		
		<p>European Parliament and of the Council</p> <p>Note, the Directives listed in the four bullet points above are due to be repealed and replaced by Directive 2009/138/EC with effect from 1 January 2014. However, there is a proposal to delay that repeal and replacement until 1 January 2016 but it has not been adopted as of October 2013.</p> <p>The exception for financial services is to be found in the Article 1(1e). The Commission's Vade Mecum to Directive 98/48 EC states (page 26) that this exception covers not only anything falling within the Article 7 general exception relating to the implementation of Community law but also all measures supplementing or subsequent to the implementing instrument.</p>
C15	<p>Do the draft rules apply to rules enacted by or for regulated markets within the meaning of Directive 93/22/EEC or by or for other markets or bodies carrying out clearing or settlement functions for those markets?</p>	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C16</p> <p>Article 1(1e) contains this exemption which relates to stock markets and markets on which financial instruments are traded etc. Note that Directive 93/22/EEC has been repealed and replaced by Directive 2004/39/EC.</p> <p>The Commission's Vade Mecum to Directive 98/48 (page 27) gives the following examples of things that are not notifiable:</p> <ul style="list-style-type: none"> a draft regulation on computerised stock exchange dealing and settlement; a draft decree concerning the clearing system for electronic trades made on the stock exchange; a draft regulation relating to the procedures for the supply and conclusion of electronic transactions concerning securities traded on financial markets other than stock exchanges.

Detailed Guidance Notes – relating to the corresponding questions posed in table C - Exceptions to the requirements to Notify		
C16	Do the draft rules relate to geographical indications and designations of origin for agricultural products and foodstuffs within regulation 2081/92/EEC?	<p>If yes, the draft rules do not need to be notified</p> <p>If no, go to C17</p> <p>Regulation 2001/92/EEC expressly dis-applies the Directive in relation to rules relating to geographical indications and designations of origin for agricultural products and foodstuffs.</p>
C17	Do the draft rules relate to technical specifications or other requirements or rules on services linked to national social security systems?	<p>If yes, the draft rules do not need to be notified</p> <p>If no, the draft rules do not fall within any of the exceptions to the Directive and are notifiable.</p> <p>Article 1(1f) contains this exemption.</p>

Detailed Guidance Notes – relating to the corresponding questions posed in table D - Standstill periods. A standstill period of at least 3 months will apply unless you fall within the following exceptions		
No	Questions to determine whether a measure requires to be notified	Guidance notes
D1	Do the draft rules contain a manufacturing prohibition which	Yes – You need not observe the standstill period (but you must still notify the rules to the Commission)

<p>Detailed Guidance Notes – relating to the corresponding questions posed in table D - Standstill periods. A standstill period of at least 3 months will apply unless you fall within the following exceptions</p>		
	<p>does not impede the free movement of products?</p>	<p>No – go to D2</p> <p>Prohibitions on manufacturing not impeding free movement of products.</p> <p>This exception is to be found in Article 7(2).</p>
D2	<p>Are the draft rules:</p> <p>to be imposed by an authority on a list drawn up by the Commission under Article 1(1f) and to be linked to fiscal or financial measures which affect the consumption of products or services by encouraging compliance with the draft rules?</p>	<p>No, go to D3</p> <p>Fiscal measures</p> <p>This exception is to be found in Article 7(4). Draft Commission guidance on fiscal measures can be found at Annex A but should be used with caution as it is only draft guidance which is subject to change.</p>
D3	<p>Do the rules need to be adopted because there are:</p> <p>urgent reasons arising out of serious and unforeseeable circumstances relating to:</p> <p>the protection of public health or</p>	<p>Cases of urgency - products</p> <p>If yes, you need not observe the standstill period (but you must still notify the rules to the Commission).</p> <p>No – go to D4.</p> <p>This exception is to be found in Article 6(7) of the Directive.</p> <p>This exception is construed narrowly. A Member State cannot rely on urgency of its own making e.g. a failure to implement a Directive on time.</p>

<p>Detailed Guidance Notes – relating to the corresponding questions posed in table D - Standstill periods. A standstill period of at least 3 months will apply unless you fall within the following exceptions</p>		
	<p>safety</p> <p>the protection of animals</p> <p>the preservation of plants</p> <p>and the rules need to be prepared and enacted in a short space of time with no consultation being possible.</p>	
D4	<p>Cases of urgency - services</p> <p>Are the draft rules to be adopted because:</p> <p>A. there are urgent reasons arising out of serious and unforeseeable circumstances relating to public policy reasons (especially the protection of minors) (or any reason mentioned in the previous question) and</p> <p>B. the rules need</p>	<p>If yes, you need not observe the standstill period (but you must still notify the rules to the Commission.)</p> <p>No – go to D5.</p> <p>Cases of urgency - services</p> <p>This exception is to be found in Article 6(7) of the Directive.</p>

<p>Detailed Guidance Notes – relating to the corresponding questions posed in table D - Standstill periods. A standstill period of at least 3 months will apply unless you fall within the following exceptions</p>		
	<p>to be prepared and enacted in a short space of time with no consultation being possible?</p>	
D5	<p>Do the draft rules need to be adopted immediately for urgent reasons occasioned by serious circumstances relating to the protection of the security and the integrity of the financial system, notably the protection of depositors, investors and insured persons?</p>	<p>Cases of urgency – financial markets</p> <p>If yes, you need not observe the standstill period (but you must still notify the rules to the Commission.)</p> <p>No – Your rules do not fall within any exception and must observe the standstill period.</p> <p>This exception is to be found in Article 6(7) of the Directive.</p>

Annex A: Guidelines* on the definition and notification of ‘fiscal measure or financial measures’ for the purposes of Directive 2015/1535/EU

* These guidelines are solely the view of the Directorate General Enterprise and Industry of the European Commission. The Directive 2015/1535/EU is subject to the interpretation of the European Court of Justice.

1. Introduction

Pursuant to Directive 2015/1535/EU, amended by Directive 2015/1535/EU, hereinafter designated 'Directive 2015/1535/EU, the Member States are obliged to notify the Commission of draft national technical regulations relating to any products, as well as those specifically concerning Information Society services¹.

On the day of receipt by the Commission of the draft technical regulation communicated by a Member State, as well as of all documents required for the justification of this draft, the so-called standstill period begins, i.e. the period of three months during which the Member State concerned is obliged not to adopt the draft in question².

According to Directive 2015/1535/EU, technical regulations can be compulsory de jure or de facto. Among de facto compulsory technical regulations there is the category of 'fiscal or financial measures' to which specific notification rules apply.

The aim of the present document is to clarify the notion of a 'fiscal or financial measure' for the purposes of Directive 2015/1535/EU and to recall the notification rules applying to 'fiscal or financial measures'.

2. Definition of ‘fiscal or financial measure’ for the purposes of Directive 2015/1535/EU

Article 1(1f) of Directive 2015/1535/EU provides the definition of a technical regulation. In this framework, a technical regulation is defined as “technical specifications and other requirements or rules on services, including the relevant administrative provisions, the observance of which is compulsory, de jure or de facto, in the case of marketing, provision of a service, establishment of a service operator or use in a Member State or a major part thereof, as well as laws, regulations or administrative provisions of Member States, except

¹ Article 5 (1) of Directive 2015/1535/EU

² Article 6 (1) of Directive 2015/1535/EU

those provided for in Article 7, prohibiting the manufacture, importation, marketing or use of a product or prohibiting the provision or use of a service, or establishment as a service provider”.

The same article provides several examples of de facto technical regulations including 'fiscal and financial measures'.

According to Article 1(1f), of Directive 2015/1535/EU, de facto technical regulations include, inter alia, “technical specifications or other requirements or rules on services which are linked to fiscal or financial measures affecting the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services”.

The same provision specifies that technical specifications or other requirements or rules on services linked to national social security systems are not included.

Therefore, in order to classify a draft technical regulation as a 'fiscal or financial measure' for the purposes of Directive 2015/1535/EU, **three cumulative conditions have to be fulfilled:**

- i. the draft measure has to contain technical specifications or other requirements or rules on services;
- ii. these technical specifications or other requirements or rules on services have to be linked to fiscal or financial measures, and
- iii. the fiscal or financial measures have to affect the consumption of products or services by encouraging compliance with such technical specifications or other requirements or rules on services.

It is important to underline that the simple fact that requirements are linked to taxation in general is not sufficient to classify a draft measure as a 'fiscal or financial measure' for the purposes of Directive 2015/1535/EU.

In fact, 'fiscal or financial measures' under Directive 2015/1535/EU do not cover the whole fiscal or financial legislation of the Member States. They concern only technical specifications, other requirements or rules on services **linked to fiscal or financial measures and which aim at changing the consumers' behaviour or that of services' recipients.**

Consequently, pure taxation measures which are limited, for instance, to increasing or to decreasing the tax rate, to the definition of the taxable base or to the recovery of the tax could not be classified as 'fiscal or financial measures' within the meaning of Directive 2015/1535/EU to the extent that they do not contain technical specifications or other requirements or rules on services and especially do not have the objective of encouraging compliance with technical specifications, other requirements or rules on services since they are mandatory as such.

3. Distinction between de jure technical regulations and de facto technical regulations and the classification of a measure as a 'fiscal or financial measure'

The distinction to be drawn in order to decide whether a measure is, for the purposes of Directive 2015/1535/EU, a 'fiscal or financial measure' depends on **the scope of the measure** at issue:

- the measure is a technical regulation, compulsory de jure, if compliance with the technical specifications or other requirements or rules on services which it contains is compulsory for the marketing or use of the products or services in question;
- the measure is a 'fiscal or financial measure', i.e. technical regulation compulsory de facto, if it is limited to fiscal or financial incentives to comply with the relevant technical specifications or other requirements or rules on services.

4. Examples of 'fiscal or financial measures' in the framework of Directive 2015/1535/EU

'Fiscal or financial measures' within the meaning of Directive 2015/1535/EU are essentially intended to influence the behaviour of consumers regarding a product or a service and this in the framework of a policy of protection of health, the environment, consumers etc.

'Fiscal or financial measures' aim at **encouraging the purchase** of products or services which comply with certain technical specifications by **providing financing facilities or tax reductions** (for example, subsidies for the purchase of equipment respecting specific technical requirements), or at **discouraging the purchase** of products or services (for example, the exclusion of subsidies for the use of materials with certain characteristics).

The following are examples of 'Fiscal or financial measures':

- a direct grant for financing or a reduction of vehicle tax for the acquisition of new electric vehicles;
- legislation establishing higher taxes for private individuals and firms that use vehicles with a relatively high fuel consumption, while those who acquire vehicles that consume less fuel will be rewarded;
- an exemption from road tax for passenger cars with a CO2 emission not exceeding a certain level;
- a subsidy for the operation of solar collectors and photovoltaic installations complying with certain technical requirements;
- a charging requirement applying to single use carrier bags made wholly or mainly from plastic, paper, plant-based material or natural starch;

- a subsidy for purchases of photovoltaic solar panels complying with certain technical requirements.

'Fiscal or financial measures' may also have an impact on the consumption of certain products or services by encouraging compliance with other requirements within the meaning of Directive 2015/1535/EU, for example:

- exemption of environmental tax for some products where a deposit system is put in place for their packaging;
- exemption of environmental tax for some products when a collection and recycling system is put in place.

'Fiscal or financial measures' may also encourage the acquisition of certain services with specific properties, as for example, services from operators established in some areas.

5 Classification and notification of 'fiscal or financial measures' according to Directive 2015/1535/EU

It is up to the Member State responsible for the notification to decide whether to declare a provision as a 'fiscal or financial measure'. Directive 2015/1535/EU does not empower the Commission to reclassify a measure or to open a standstill period for measures misclassified as a 'fiscal or financial measure'. Consequently, in the event of misclassification, it is up to the Member State responsible for the notification to correct the mistake. The Commission and the other Member States can only invite that Member State to do so and, if need be, initiate the procedure for failure to fulfil obligations under Articles 258 and 259 of the Treaty on the Functioning of the European Union (TFEU).

According to Article 7(4) of Directive 2015/1535/EU, the standstill period provided for in Article 6 of the Directive does not apply to draft technical regulations notified as 'fiscal or financial measures'.

The correct classification of a technical regulation as a 'fiscal or financial measure' is very important since according to the Court of Justice case-law "*Unilever*", the breach of the obligation to postpone the adoption of a draft technical rule, i.e. the failure to respect the standstill periods provided for in Article 6 of Directive 2015/1535/EU, constitutes a substantial procedural defect that renders the technical rule in question inapplicable.

The misclassification of a measure as a 'fiscal or financial measure' should be corrected by withdrawing the notification concerned and notifying the measure again with the application of the standstill period of three months.

Despite the fact that the standstill period does not apply to 'fiscal or financial measures', the Commission and the other Member States analyse the notified draft. According to Article 5(1), of Directive 2015/1535/EU, the fiscal or financial aspects of the 'fiscal or financial measures' are not subject to the assessment of the Commission services or other Member States. **The assessment of the measure is limited to the technical**

specifications, other requirements or rules on services that it contains and that could hinder intra-Union trade, the free provision of services or the freedom of establishment of services operators. In particular, the assessment under Directive 2015/1535/EU does not replace or prejudice the assessment which will be conducted by the Commission under State aid rules, if the fiscal or financial measure concerned constitutes State aid within the meaning of Article 107(1) TFEU.

According to Article 107 TFEU, "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition **by favouring certain undertakings or the production of certain goods** shall, in so far as it affects trade between Member States, be incompatible with the internal market

Even if it can be drawn from the Council minutes at the time of adoption of Directive 94/10/EC on the second substantial amendment of Directive 83/189/EEC providing for an information procedure in the field of standards and technical regulations that 'fiscal or financial measures' adopted in favour of specific undertakings or productions, which constitute State aid within the meaning of Article 107(1) TFEU, are not intended to be covered by Article 1(1f), of Directive 2015/1535/EU, this exclusion is not made explicit in the text of Directive 2015/1535/EU. Therefore, draft legislation which contains 'fiscal or financial measures' within the meaning of Directive 2015/1535/EU must be notified under this Directive, even if the measures concerned constitute State aid within the meaning of Article 107(1) TFEU, in which case they must also be notified to the Commission as required by Article 108(3) TFEU, before such measures are put into effect. **The notification of a 'fiscal or financial measure' under Directive 2015/1535/EU does not replace or render unnecessary the notification of that measure in accordance with the procedure provided by the Treaty rules applicable to State aid.**

According to the case-law of the Court of justice, the concept of State aid is wider than the concept of subsidy and includes not only positive benefits, but also interventions which in various forms mitigate the charges which normally burden the budget of an undertaking and which have identical effects to those of subsidies . Thus, tax advantages granted to certain undertakings or certain sectors may constitute State aid. The tax benefit can be granted in various forms: reduction of the tax base, reduction of the amount of the tax, recovery adjustment etc., and represents a loss of income for the budget of the State or a loss of tax revenue.

Annex B: Cases where regulations were not notified under Directive 2015/1535/EU

Departments must ensure that all those responsible for preparing and drafting national measures are aware of the Directive and its requirements to notify any new draft technical regulations. **This will help avoid the possibility of national courts being unable to apply i.e. enforce, the regulations or of enforcement authorities being prevented from taking action given that non-notified measures cannot be enforced against individuals.**

Rulings on failures to fulfil obligations can be found on the Commission's website: [Case Law](#)

Withdrawn

Withdrawn



© Crown copyright 2016

This publication is licensed under the terms of the Open Government Licence v3.0 except where otherwise stated. To view this licence, visit nationalarchives.gov.uk/doc/open-government-licence/version/3 or write to the Information Policy Team, The National Archives, Kew, London TW9 4DU, or email: psi@nationalarchives.gsi.gov.uk. Where we have identified any third party copyright information you will need to obtain permission from the copyright holders concerned.

This publication available from www.gov.uk/bis

Contact us if you have any enquiries about this publication, including requests for alternative formats, at:

Department for Business, Innovation and Skills
1 Victoria Street
London SW1H 0ET
Tel: 020 7215 5000

Email: enquiries@bis.gsi.gov.uk

BIS/16/151