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His Excellency
Member of the European Commission
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Dear Commissioner,

I write to you with regard to the proposed inclusion of the “notary” profession in the European Commission’s indicator measuring the intensity of regulation on certain professions.

Germany fully supports the further deepening and development of the internal market in the area of professional services. Within the service sector, it is the regulated professions in particular that fulfil essential societal functions and make a significant contribution to economic growth. I therefore very much welcome the European Commission’s initiative to update the indicator measuring the intensity of regulation on certain professions – the “Restrictiveness Indicator” introduced in 2016. An instrument that enables us to measure and compare the intensity of regulation on professions and the resulting impact on the functioning of the internal market is an important component in ensuring the sustainable development of the internal market.

However, I wish to make it clear that we have serious concerns regarding the move by the Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) to include the “notary” profession in the Indicator. Due to the special functions performed by “Latin notaries” (notaries in civil-law countries), this form of notary profession is not comparable with the notary professions in common-law countries, nor is there any comparability with the other professions listed in the Indicator. The planned inclusion of notaries will therefore undermine the European Commission’s goal of producing a methodologically sound instrument for deriving valid and comparable results.

In countries whose jurisdictions provide for a system of Latin notaries, as it is the case for Germany, notaries carry out precautionary legal checks with regard to transactions and other legal acts (verifying identity, legal capacity and legality) and draft authentic instruments with

binding effect. They hold a public office and as such perform administrative-judicial functions within the system of preventive administration of justice. In particular, the precautionary checks carried out during procedures to request and effect entries in the public registers (such as the commercial register and the land register) ensure that such entries are correct and reflect the substantive legal situation. This gatekeeping function is the basis for the public registers enjoying the presumption of accuracy and public faith. Not only does this provide transactions with legal certainty, it also helps the economy by reducing transaction costs. This is because expensive *ex post* legal opinions – which must be obtained in common-law countries in the event of subsequent legal disputes – are no longer necessary. By contrast, the activities of notaries in common-law countries (“notaries public”) are often limited to confirming the authenticity of documents, witnessing the taking of oaths and such like. These activities do not have an administrative-judicial function within the framework of a state-authorised system of preventive administration of justice.

Until now, the EU legislation regulating professional services has taken account of these particularities. For example, notaries are excluded from the scope of both the Professional Qualifications Directive (2005/36/EC) and the Services Directive (2006/123/EC). The European Court of Justice stated in its judgement of 9 March 2017 (C-342/15 – “Piringer”, paragraph 60), that the fact that notarial activities pursue objectives in the public interest constitutes an overriding reason in the public interest capable of justifying restrictions of Article 49 TFEU.

Latin notaries do not offer their services on the market and they are not part of the free market. The profession’s “isolation” from the market means that no conclusions about its regulation can be drawn with regard to the functioning of the internal market. Any comparisons made with the group of notaries as a whole throughout the EU-Member States and any comparisons made with the other professions listed in the Restrictiveness Indicator are therefore methodologically unsound, because the differences between the reference groups are too great. The inclusion of the “notary” profession would thus lead to invalid results and would prevent the instrument from delivering the comparability and measurability sought by the European Commission.

I therefore kindly ask you to ensure that the “notary” profession is not included in the Restrictiveness Indicator for professions.

In conclusion, I would like to say that Germany will participate in the examination of the documents distributed by DG GROW containing data on the “notary” profession despite our opposition to its listing. This should not in any way be interpreted as signalling our agreement with the approach. We simply wish to ensure that no incorrect data are made available for further processing.

Yours sincerely,

(sgd.) Christine Lambrecht