

Completing the Internal Market The Services Directive 2006/123/EC

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Completing the Internal Market

The Services Directive

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The Internal Market for Services (I)

Importance of services for the European economy

70% GDP, 68% employment, 96% new jobs

What the Internal Market should mean for service activities

Services should be able to move across national borders as easily as within a single national market:

- Freedom of establishment of nationals/companies of a Member State in the territory of another Member State
- Freedom to provide services within the Community across borders without the need for an establishment in the Member State where the service is provided

The Single Market for Services (II)

The reality today

Services = 20% of the intra-EC trade only

Reasons behind

- Services are much more prone to Internal Market barriers than goods
- Barriers arise from national, regional and local regulations as well as from the behaviour of the administration
- Barriers arise, to a large extent, because of lack of confidence between Member States and protectionist tendencies
- Barriers arise at every stage of the business process: establishment, use of input necessary for the provision of the service, promotion, distribution and sale, after-sale

Legislative Process

Initial proposal	13	January	2004
Committee of the Regions	30	September	2004
Economic and Social Committee	10	February	2005
First reading EP	16	February	2006
Amended proposal	04	April	2006
Adoption Common Position	24	July	2006
Second reading EP	15	November	2006
Final adoption	12	December	2006

European Council - March 05, December 05, March 06, June 2006 -
"welcomes the agreement reached in the Council on the Services Directive and calls for a swift conclusion of the legislative process"

Main Features of the Directive

- Objective: remove barriers to the establishment of service providers (Art. 43 ECT) and the cross border provision of services (Art. 49 ECT)
- Horizontal nature – large variety of services covered such as consultancy services, legal or fiscal advice, certification services, estate agents, engineering, construction, distribution, tourism, leisure sector, etc.
- ECJ case-law consolidation
- Framework Directive
- Builds upon and complements the existing “acquis”

Main Features of the Directive

- Administrative simplification Chapter II
- Freedom of establishment Chapter III
- Free movement of services Chapter IV
- Quality of services Chapter V
- Administrative cooperation Chapter VI
- “Convergence programme” Chapter VII

Main features of the Directive - Scope

- Initial exclusions: financial services, telecommunications, transport services.
- Further exclusions: healthcare services (including, but not limited to, the reimbursement of health care services), certain social services, audiovisual services, temporary work agencies, private security services, gambling services, services provided by notaries and bailiffs
- Plus the proposal does not affect labour law (removal of rules on the posting of workers)

Administrative simplification

- Points of single contact – service providers have to be able to complete all procedures and formalities relating to access to and exercise of a service activity through the PSCs. Organisational issues up to MS to decide
- Procedures by electronic means – MS have to make possible the completion of all formalities and procedures by electronic means, incl. for service providers from other MS

Freedom of Establishment – Authorisation Schemes

- Simplification of authorisation schemes
 - limitation (no authorisation schemes unless justified)
 - transparency (authorisation schemes shall be based on criteria precluding discretionary/arbitrary decisions from the competent authorities)
 - simplification (validity for the whole territory of the MS, unlimited duration, tacit approval)
- Authorisations : examples of case law on Article 43
 - ECJ, 20/2/2001, C-205/99, *Analir*
 - ECJ, 22/1/2002, C-390/99, *Canal Satellite*

Freedom of Establishment – Requirements to be eliminated (Art.14)

- discrimination, single establishment, economic needs test, intervention of competitors, local guarantee, etc.)
- Examples of case-law on Article 43 EC
 - Residence requirements : ECJ, 9/3/2000, C-355/98, *Commission v. Belgium* (private security services)
 - Prohibition on having establishments in other MS : ECJ, 20/5/1992, C-106/91, *Ramrath*
 - case by case application of economic test : ECJ, 4/6/2002, C-367/98, *Commission v. PT* (no economic justifications)
 - Involvement of competing operators : C-439/99 *Commission v. Italy - Trade fairs*
 - Obligation to conclude guarantees or insurance with established providers : ECJ, 1/12/1998, C-410/96, *Ambry*

Freedom of Establishment – Requirements to be evaluated (Art.15)

- quotas and territorial distance, legal forms or capital, tariffs, etc.
- Examples of case-law on Article 43 EC
 - Obligation to take a specific legal form : ECJ 6/11/2003, C-243/01, *Gambelli* and C-439/99, *trade Fairs*
 - Requirements on the shareholding of companies : ECJ, 30/9/2003, C-167/01, *Inspire Art*
 - Fixed tariffs : ECJ, 5/12/2006, C-202/04, *Cipolla*
 - Reserved activities: ECJ, 30/3/2006, CAF, C-451/03

Free Movement of Services

Freedom to Provide Services Clause- I

- Country of Origin Principle
 - Clear determination of the applicable law: rules of country of establishment
- Freedom to provide services clause
 - Clear prohibition for Member States to apply their legislation on services provided from other Member States unless non-discriminatory, proportionate and justified for one of the following reasons: public policy (*ordre public*), public security, public health, protection of the environment

Free Movement of Services

Freedom to Provide Services Clause- II

- Prohibited restrictions to free movement of services: examples of case-law based on Article 49 EC
 - Obligation to establish in the host State: case C-439/99 *Italian trade fairs*
 - Obligation to obtain an autorisation : case C-439/99 *Italian trade fairs*
 - Ban on setting up certain infrastructure in the host MS: ECJ, 30/11/1995, case C-55/94, *Gebhard*
 - Specific contractual arrangements preventing the activities of self-employed : ECJ 5/7/1997, case C-398/95, *Ergasias*
 - Obligation to possess a specific identity card : ECJ, 9/3/2000, case C-355/98, *Commission v. Belgium*
- Additional derogations (Art 17): professional qualifications, SGEI, IP, etc.

Free Movement of Services

Rights of Recipients

- No restrictions on use of foreign operators
- No discrimination by national authorities or private operators on grounds of nationality or place of residence of the customer
 - Examples of case-law based on Article 49 EC: ECJ, 16/1/2003, C-388/01 – *access to Italian museums*
- Assistance for recipients of services (by authorities)
- Right of information (by providers)

Quality of Services

- Information on providers and their services
- Professional insurance (health, safety, financial, environmental risks)
- Commercial communications for professions ("ban on bans" and quality assurance; preference for fair information)
- Multidisciplinary activities (no exclusivity or incompatibility except for deontology and certification; guarantee of independence – information requirement)
- Dispute settlement

Administrative Cooperation (I)

Logic behind:

- complementary to freedom to provide services clause
- allocation of tasks between MS
- main principle that the MS of establishment ensures compliance with its requirements in case of a temporary movement of its service provider to another MS (except in cases of derogations of art 16 and 17)
- does not mean that the MS of establishment needs to carry out factual checks and controls in another MS, done at their request by other MS competent authorities

Administrative Cooperation (II)

Different aspects:

- ad hoc contact points
- information on the operators' good repute
- cooperation in cases of
 - physical movement of the operator
 - individual derogations

Convergence Programme - Dynamic Character

- Screening and notification process linked to authorisations, establishment requirements, multidisciplinary activities
- Screening and notification process linked to the freedom to provide services
- Commission guidance in view of Member States' implementation
- Policy on quality of services - Codes of conduct at Community level

Screening under art 39.1

Art 9.2 - Authorisations (I)

- Art.9.2 obliges Member States to identify existing authorisation schemes
- MS need to screen all authorisation schemes at all levels (national, regional, local)
- Wide notion of authorisation scheme (*Article 4 (6) of the Directive "any procedure under which a provider or a recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity, or the exercise thereof".*)

Screening under art 39.1

Art 9.2 - Authorisations (II)

- Authorisation schemes constitute by their very nature a restriction to the freedom of establishment, as consistently recognized by the case law of the Court of Justice.
- As a result of the screening, a number of schemes should be removed
- Those retained must be non-discriminatory, justified by an overriding reason of public interest and proportional.

Screening under art 39.1

Art 9.2 – Authorisations (III)

- Particular attention to be paid to the requirement of proportionality
- A legitimate public interest can often be effectively safeguarded by a less restrictive measure than an authorisation scheme.
- Member States will have to consider alternative measures such as *a posteriori* controls, or a simple declaration by the provider, and explain why these are not regarded as sufficient to safeguard the public interest in question.

Screening under art 39.1

Art 15.5 – Establishment Requirements

- Article 15.5 obligation to specify in the report under art 39.1 requirements that MS intend to maintain together with reasons why they consider that those comply with the conditions of non-discrimination, necessity (justification by an ORPI), and proportionality.
- Report has to cover also requirements, which have been abolished or made less stringent.

Screening under art 39.1

Art 25.3 – Multidisciplinary Activities

- Art 25.3 specifies, that in the report referred to in art 39.1 MS have to indicate, which providers are subject to requirements obliging them to exercise a given specific activity exclusively or restricting the exercise jointly or in partnership of different activities.
- MS are required to include in the report the content of those requirements, in addition to reasons for which they consider them to be justified.

Screening linked to the freedom to provide services (I)

Article 39.5 obliges MS three years after the entry into force of the directive to present a report to the Commission on national requirements, whose application could fall under the 3rd subpara of art 16.1, and the first sentence of art 16.3

Screening linked to the freedom to provide services (II)

- Art 16.1 prohibits MS to make access to or exercise of a service activity subject to requirements, which are not in compliance with the principles of non-discrimination, necessity (public policy, public security, public health or the protection of the environment) and proportionality.
- Para 2 of article 16 gives an indicative list of most incumbent prohibited requirements that cannot be imposed on a service provider or a service recipient

Screening linked to the freedom to provide services (III)

- Article 16 does not prevent MS from imposing their national requirements to service provision where the requirements are justified for four reasons of public interest: public policy, public security, public health and environment. This also applies to para 2 list of requirements
- **No other overriding reason of public interest can be evoked than the four**

Notification process

- MS will have to notify new requirements relating to establishment and freedom to provide services together with their reasons (art 15.7 and art 39.5)
- Does not prevent MS from adopting the requirements
- Sent to other MS for comments
- COM will examine the compatibility of new requirements on establishment with Community law and give orientations on the implementation of art.16

Going forward

- The Directive was published on the 27th of December 2006. As from the day after publication the three years implementation period starts to run
- Because of the complexity of the exercise: the process needs to start now
- A common approach is required: the need for Member States to coordinate and cooperate, the role of the European Commission