



MUTUAL EVALUATION FORESEEN BY THE SERVICES DIRECTIVE - STAKEHOLDERS' CONSULTATION

INTRODUCTION AND OBJECTIVE OF THE CONSULTATION

The current consultation is undertaken by the Commission in the context of the "mutual evaluation process" foreseen by the Services Directive¹. Its objective is to obtain feedback from consumers, businesses and any other interested party as to their assessment of national measures implementing the Services Directive as well as other existing national provisions applicable in the area of services. Your attention is drawn, however, to the fact that not all national implementing measures or existing national provisions are the object of this consultation. Only certain types of measures relating to requirements imposed either on the establishment of service providers or on the cross border provision of their services (the same ones covered by the "mutual evaluation process") are concerned.

You are invited to read this consultation paper, to provide answers to the attached questionnaire and to send it to MARKT-SERVICES-CONSULTATION@ec.europa.eu by the 13th of September 2010, at the latest.

BACKGROUND OF THE CONSULTATION

The Services Directive was adopted at the end of 2006 with the main objective of removing unjustified and disproportionate barriers to the development and better functioning of an internal market for services. Member States had to transpose it in national law by the 28th of December 2009.

The Services Directive has the potential to foster growth and job creation in the largest, most dynamic and innovative pillar of the EU economy, the services sector. This becomes even more vital in the context of the current economic crisis. According to conservative estimates, the potential economic benefits of the Services Directive could range between 60-140 billion euro, representing a growth potential of 0.6-1.5% of GDP². But these gains can only be reaped if the Directive is implemented fully in all EU countries.

During the three year implementation period of the Directive, all Member States were required to engage in a thorough analysis of their laws and regulations applicable to a broad range of service activities to ensure their compatibility with the provisions of the Services Directive. This review implied an assessment of the rationale and proportionality of existing rules and, when necessary, their modification or abolition.

Since the beginning of 2010, Member States have engaged, together with the European Commission, in a process of mutually evaluating a number of the reviewed national measures.

¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market published in the OJ L 376 of 27.12.2006.

² Source: "Expected economic benefits of the European Services Directive", Netherlands Bureau for Economic Policy Analysis (CPB), November 2007.

This innovative working method is known as the “mutual evaluation process” and it is foreseen by the Directive itself, which also provides, in the same context, for a consultation of stakeholders. By the end of 2010, the Commission will report on the results of the mutual evaluation process, including the present consultation, to the Council and the European Parliament.

I. NATIONAL MEASURES WHICH FORM THE OBJECT OF THE CONSULTATION

The "mutual evaluation process" and this consultation concern national measures³ which impose certain types of requirements either on the establishment of service providers or on the cross border provision of their services. These requirements are covered by a number of provisions of the Services Directive which are explained in some detail below. The national measures at hand are laws, regulations or professional rules that companies and individuals have to comply with when they want to establish their business in an EU Member State or when providing cross-border services into another EU country.

SERVICE ACTIVITIES COVERED BY THE SERVICES DIRECTIVE AND BY THIS CONSULTATION

The Directive covers a wide range of service activities provided both by individuals and companies, for example:

- distributive trades (including retail and wholesale of goods and services);
- construction services;
- craft services;
- most professional services (e.g. services of legal and tax advisers, architects, engineers, accountants, surveyors, veterinarians);
- business-related services (e.g. office maintenance, management consultancy, organisation of events, advertising, recruitment services, patent agents);
- tourism (e.g. travel agencies, tourist guides);
- equipment installation and maintenance services;
- information services (e.g. web portals, publishing, computer programming activities);
- accommodation and food services (e.g. hotels, restaurants, catering services);
- training and educational services (e.g. private universities, language or driving schools);
- rental and leasing services (including car rental);
- real estate services.

Please be aware that several service sectors such as financial services, transport services or health services are excluded from the scope of the Services Directive⁴. National measures concerning these services do not form the object of this consultation.

³ National measures can be legal, regulatory or administrative provisions as well as rules of professional associations or organisations adopted in the exercise of their legal autonomy.

⁴ For more details on the scope of the Services Directive, please consult chapter two of the Handbook on the implementation of the Services Directive, available in all 23 official languages on http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm.

REQUIREMENTS APPLICABLE TO THE ESTABLISHMENT OF SERVICE PROVIDERS

1. National measures imposing an authorisation on service providers

Authorisations⁵ are one of the most common formalities imposed to service providers in Member States and constitute restrictions to the freedom of establishment. Article 9 of the Services Directive requires Member States to assess authorisation schemes in order to determine if they are compatible with the Directive.

An authorisation scheme is compatible with the Services Directive if it is:

- non-discriminatory (it does not, directly or indirectly, provide for or result in different treatment of domestic providers and of providers from other Member States),
- justified by at least one of the so-called “overriding reasons relating to the public interest” as defined by the Court of Justice of the European Union⁶ (policy objectives such as consumer protection, protection of the environment, public health, etc), and
- proportionate, i.e. the authorisation scheme is suitable for securing attainment of the objective pursued and this cannot be achieved by less restrictive means than imposing an authorisation (for instance, by means of a simple declaration).

Member States had to examine each individual authorisation scheme on the basis of these three criteria and should have abolished or modified those authorisation schemes which are not compliant with them.

The objective of this stakeholders' consultation in respect of Article 9 is to get stakeholders' views as to whether authorisation schemes which have been maintained by the Member States comply with the principles set by the Directive or whether the respondents believe that certain authorisation schemes, still in place, should have been modified or abolished.

⁵ An 'authorisation scheme' means any procedure under which a provider or recipient is required to take steps to obtain from a competent authority a formal or implied decision, concerning access to a service activity or the exercise thereof. Authorisations can apply to all or to a plurality of service activities (e.g. a general trade licence applying to all commercial activities) or to an individualised service activity or group of activities, following a particular procedure and based on criteria which are particular to that service activity (e.g. an authorisation for opening particular types of shops, for providing career guidance services, for setting up a travel agency, or for providing driving lessons). For more details on authorisation schemes, please consult section 6.1. of the Handbook on the implementation of the Services Directive, available in all 23 official languages on http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm.

⁶ See the examples given in the definition of 'overriding reasons relating to the public interest' in Article 4 (8) of the Services Directive.

2. National measures imposing certain types of requirements on service providers

Article 15 of the Services Directive contains a list of eight types of requirements⁷ that are frequently found in national legislation and constitute obstacles to the freedom of establishment.

As in the case of authorisations, the Directive does not provide for their outright prohibition but requires Member States to review their regulatory framework (including the rules set by professional associations and organisations) with a view to identify these requirements and determine whether they are compatible with the Services Directive.

Compatibility of these requirements is determined by the same criteria as in the case of authorisations:

- non-discrimination,
- justification by an overriding reason relating to the public interest, and
- proportionality.

Member States should have examined each individual requirement on the basis of these three criteria and should have abolished or modified those requirements which are not compliant with them.

The objective of the stakeholders' consultation in respect of Article 15 is to get stakeholders' views as to whether the requirements of the kind listed in Article 15, which have been maintained by the Member States, comply with the principles set by the Directive or whether the respondents believe that certain requirements still in place should have been modified or abolished.

The requirements at stake are:⁸

Provisions containing quantitative or territorial restrictions

Quantitative restrictions are, for example, limitations imposed by Member States on the number of operators authorised to establish in their territory or in a specific area, or requirements according to which the number of admitted operators is determined according to the population. Territorial restrictions include requirements which limit the number of service providers according to a minimum geographical distance between them.

Provisions containing an obligation for the service provider to take a specific legal form

This category comprises, for example, requirements whereby service providers are obliged to operate as natural persons or under certain specific legal forms (such as partnerships).

⁷ 'Requirements' means any obligations, prohibitions, conditions, or limitations applied to service providers (see the definition in Article 4 (7) of the Services Directive). See below for a detailed description of these requirements.

⁸ For more explanations on each of these requirements, please refer to section 6.3. of the Handbook on the implementation of the Services Directive, available in all 23 official languages on http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm.

Provisions containing requirements relating to the shareholding of a company

Such requirements include obligations to hold a minimum amount of the capital or rules on the specific qualifications required in order to hold a share of the capital in a company providing certain services (for example in the case of services of certain regulated professions).

Provisions containing requirements reserving the provision of certain services to specific providers

This category refers to rules that reserve the right to provide certain services to particular providers only. Please be aware that requirements that reserve an activity to a particular regulated profession because of the required professional qualification are not covered by Article 15 of the Services Directive.

Provisions containing bans on having more than one establishment in the territory of the same Member State

This refers to provisions specifically limiting the possibility of providers to have more than one establishment (for instance by opening branches or offices) in the same Member State.

Provisions containing an obligation to have a minimum number of employees

This category refers to rules that impose on providers of certain services the obligation to have a pre-determined minimum number of employees.

Provisions containing obligations to apply fixed, minimum or maximum tariffs for providing a service

This refers to rules imposing the (minimum, maximum or fixed) prices which providers must comply with when providing their services.

Provisions containing requirements relating to the obligation on the service provider to supply other services jointly

This category covers rules requiring that service providers engaging in a certain activity also provide other specific services, sometimes even unrelated with their main business (e.g. an obligation for petrol stations to sell food and beverages).

3. National measures which limit the possibilities of providers to engage in multidisciplinary activities

These requirements can take different forms: either requiring service providers to engage in a given specific activity exclusively, or restricting the exercise of different activities jointly or in partnership. Article 25 of the Services Directive requires Member States to remove such requirements, with two exceptions:

- for regulated professions, in so far as it is justified in order to guarantee compliance with the rules governing professional ethics and conduct and if it is necessary to ensure their independence and impartiality;
- for providers of certification, accreditation, technical monitoring and testing services, in so far as it is justified in order to ensure their independence and impartiality.

Member States should have examined each individual requirement on the basis of these criteria and should have abolished or modified those requirements which are not compliant with them.

The objective of the stakeholders' consultation in respect of Article 25 is to get stakeholders' views as to whether the remaining prohibitions or limitations on multidisciplinary activities affect only the services of the regulated profession or certification/accreditation/technical monitoring/testing services and are necessary and proportionate to guarantee the independence and impartiality of these providers.

REQUIREMENTS APPLICABLE TO THE CROSS BORDER PROVISION OF SERVICES

National measures imposed on cross border service providers

Article 16 of the Services Directive allows Member States to impose their own requirements on service providers established in other Member States and providing services temporarily in their territory only if this can be justified by one of the following four reasons:

1. public policy,
2. public security,
3. public health,
4. protection of the environment.⁹

In addition, any such requirements have to comply with the principles of:

- non-discrimination and
- proportionality.

Article 16 (2) gives examples of requirements constituting a serious obstacle to the cross border provision of services. When existing in national legislation, these requirements should have been carefully assessed (and when needed modified or abolished in as far as their application to cross border services is concerned) as they often can be discriminatory or disproportionate. Please be aware that there may be other types of requirements not listed here which also fall under Article 16 and should have also been examined by Member States.

You should be aware of the fact that Article 17 of the directive lists certain matters (for instance matters concerning the recognition of professional qualifications such as annual declarations linked to such recognition) and services (for instance in the postal, electricity or gas sector) to which Article 16 does not apply.¹⁰ These matters and sectors should therefore not be considered when replying to the related questions of the consultation.

The objective of the stakeholders' consultation in respect of Article 16 is to get stakeholders' views as to whether the requirements that continue to be applied by Member States in the context of the cross border provision of services comply with the criteria of Article 16 and whether the respondents believe that certain of the requirements still applied to cross border service providers should have been modified or abolished.

⁹ These four reasons are concepts of EU law which have been interpreted by the Court of Justice of the European Union and they may differ from similar, broader notions used in national legislation. For more details, please consult section 7.1.3.1. of the Handbook on the implementation of the Services Directive.

¹⁰ For more details about these derogations, please consult section 7.1.4. of the Handbook on the implementation of the Services Directive, available in all 23 official languages on http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm.

The types of requirements that are particularly restrictive on the cross border provision of services and which Member States should have assessed and, when needed, disapplied vis-à-vis incoming service providers, include:¹¹

Provisions containing an obligation to have an establishment in the territory where the service is being provided

This type of requirement would oblige any provider wishing to engage in a given service activity in a Member State to become established in that particular Member State. Such a requirement makes it impossible for an economic operator from another Member State to provide services in the Member State imposing the requirement on a temporary basis.

Provisions containing an obligation to obtain an authorisation or a registration

This type of requirement covers situations when providers from other Member States need to complete an administrative procedure, in the form of authorisation or registration, before they can start providing their services in the Member State imposing the requirement.

Provisions containing an obligation to notify or send a declaration to the authorities of the Member State where the service is being provided

This type of requirement covers situations where providers from other Member States are obliged to make a declaration prior to or at the time of provision of services in the Member State imposing the requirement.

Provisions requiring specific contractual arrangements between the service provider and the recipient restricting the provision of the service by the self-employed

These are requirements which would exclude the possibility of carrying out certain service activities as a self-employed person, for instance requiring that they are always carried out in the context of an employment relationship.

Provisions affecting the use of equipment

These are requirements that impose or prohibit the use of certain types or brands of machinery or require that providers obtain in the host Member State a prior authorisation in respect of equipment used or have national inspections performed. However, this does not concern requirements which are necessary to protect health and safety at work.

¹¹ For more examples of requirements covered by Article 16 of the Services Directive, please consult section 7.1.3.4 of the Handbook on the implementation of the Services Directive, available in all 23 official languages on http://ec.europa.eu/internal_market/services/services-dir/documents_en.htm.

II. GENERAL OVERVIEW OF LEGISLATIVE CHANGES IN THE MEMBER STATES

Annexed to this paper you will find, for each Member State, examples of and references to national legislation relevant under the above-mentioned four articles of the Services Directive. This information is based on what Member States have reported to the Commission services. The Commission services did not verify this information as to its correctness and completeness.

The information is given for illustration purposes only and does not pretend to be exhaustive, so that you are invited to comment on any relevant national provisions covered by the scope of this consultation, even if it has not been mentioned as an example in the document dedicated to a specific Member State.

The Commission would like to stress that some Member States have not yet completed the implementation of the Directive and that legislative acts are still in the process of being adopted, in particular in specific service sectors. You may also want to comment on such draft legislation as far as relevant and you are aware of it. Please also note that the consultation does not relate only to legislation adopted for the implementation of the Directive but also to existing legal provisions which have not been modified during the implementation process. You are thus invited to reply to the questionnaire attached, by referring to those existing measures too.

The mutual evaluation process is still ongoing and its final results, including input received by means of this consultation, will be presented in a report from the Commission to the Council and the European Parliament, which should be adopted before the end of the year.

Information on the situation in each of the Member States:

http://ec.europa.eu/internal_market/consultations/2010/services_directive_en.htm.