European Commission

THE SERVICES DIRECTIVE

1. Legal Session 1

These slides accompany the explanation of the acquis to Albania and North Macedonia and can only be used for that purpose. Their content is subject to further development of the acquis and interpretation by the Court of Justice of the European Union

11/12/2018

Internal Market and Services

a) Right/Freedom of Establishment and Freedom to Provide Services

Right/Freedom of Establishment (Art 49 TFEU)

The definition of establishment:

- *the actual pursuit of an economic activity (ie normally for remuneration),*
- *which is self-employed (ie not in the context of employment),*
- *of a stable and continuous/indefinite nature,*
- *of a cross-border character (actual or potential link to at least 2 MS)*

Right/Freedom of Establishment (Art 49 TFEU)

Content and holders

- right to take up and pursue activities as self-employed persons
*held by EU citizens (extended to certain TCNs **in a MS only**)*

- right to set up (including by acquiring control) and manage companies (undertakings/companies/firms)

held by EU companies and EU citizens

Restrictions (any measure rendering establishment more difficult/less attractive) only admissible if

Non-discriminatory (exception Article 52 TFEU)

Justified as **necessary and proportionate** in pursuing overriding reasons of general interest (not economic interests)

EU citizen (Art 20 TFEU)

Every natural person
holding the nationality of a Member State

EU companies (Art 54 TFEU)

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- **Formed** in accordance with legislation of a MS

(registered seat/registered office therein)

freedom includes right to choose MS of formation/

*MS law governing company (*C-212/97 Centros; C-167/01 Inspire Art*)*

And

- **Management** (central administration/real seat)

or Principal establishment in a MS

(same MS of formation/registered seat or not – C-212/97 Centros)

(if MS of governing law is a real seat MS, central administration must remain there to keep that MS law applicable – C-210/06 Cartesio)

Special case – societas europeae (Regulation EC 2157/2001)

But only

In so far as pursuing economic activities

(irrespective of legal form /bylaws)

Internal Market and Services

Right/Freedom of Establishment (Art 49 TFEU)

Principal establishment (vs Secondary establishment)

Centre of economic activities

vs other physical locations of stable economic activity

Primary establishment (vs Secondary establishment)

Place of first establishment vs

subsequent (secondary) establishments

these may take the structure/form of:

- *office (of a citizen or a company)*
- *agency (independent staff authorised to act on a permanent basis for the principal – a citizen or a company)*
- *branches (registered representation of a company)*
- *subsidiary (separate legal entity/company controlled by a company)*

Freedom to provide (temporary cross-border) services (Art 56 TFEU)

The definition of 'service' (Art 57 TFEU):

- *an economic activity (ie normally for remuneration)*
- *which is self-employed (ie not in the context of employment),*
- *of a cross-border nature*

  provider moves to another (host) MS

  (including by posting workers, even TCNs)

  recipient moves to MS of establishment of provider

  service moves across IM borders

  (services at a distance, notably e-commerce)
- *in so far as not governed by other fundamental freedoms*

Freedom to provide (temporary cross-border) services (Art 56 TFEU)

Content and holders

- right to provide services temporarily

held by EU citizens and EU companies ***previously established in a MS***
(possible extension to TCNs established in EU – not currently in place)

- right to receive services

held primarily by EU citizens and EU companies

(*extended to certain TCNs by secondary EU legislation)*

Restrictions (any measure rendering provision of services more difficult/less attractive) only admissible if

Non-discriminatory (exception Article 52 TFEU)

Justified as **necessary and proportionate** in pursuing overriding reasons of general interest (not economic interests)

Exception: Article 51 TFEU

Right/Freedom of establishment and freedom to provide (temporary cross-border) services do not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the ***exercise of official authority****.*

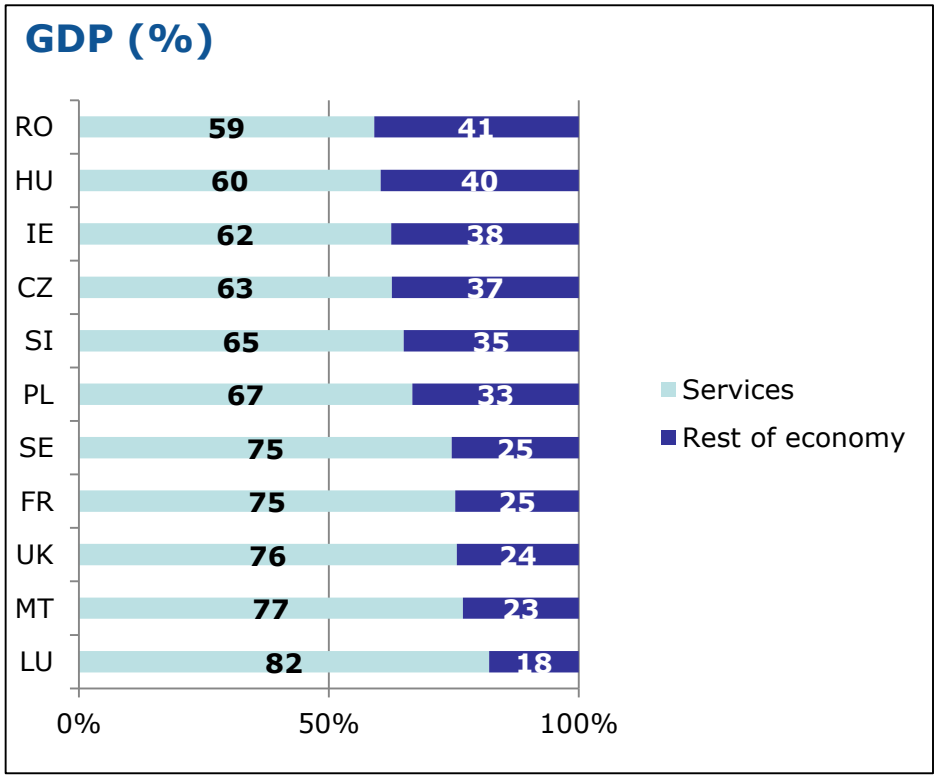
The restriction should be *directly and specifically* connected with the exercise of official authority

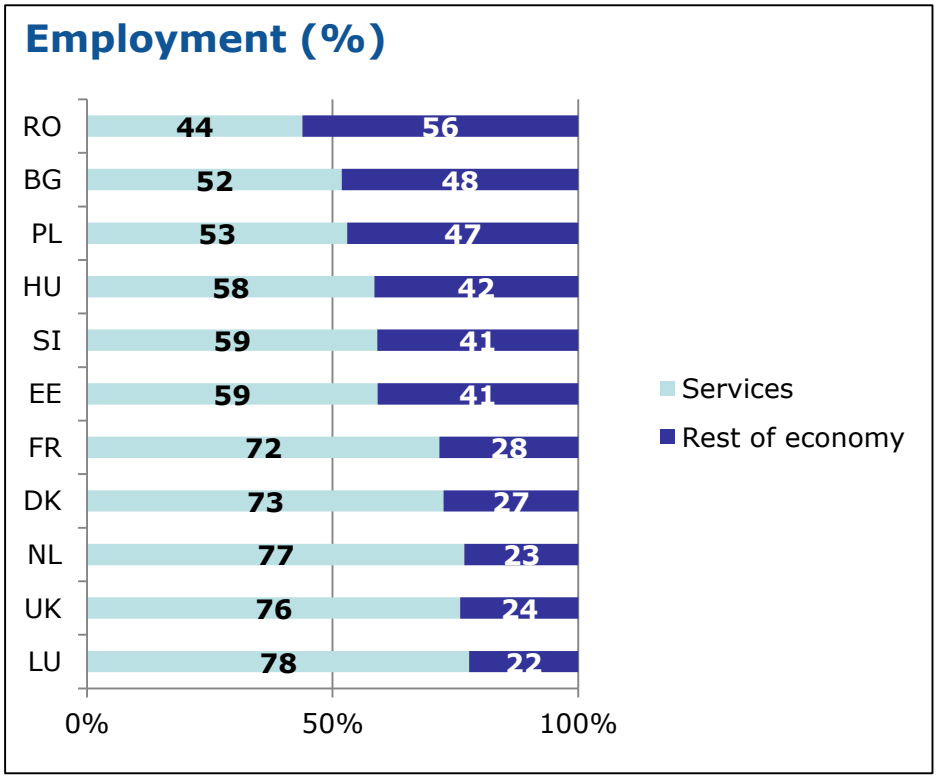
Typical example – sovereignty services (*services régaliens*), strictly interpreted

- defence
- policing
- diplomacy
- justice

b) the Services Directive

Services are a major part of all EU economies





Context, Origin, Policy Developments

Free movement of goods and free movement of services

The Lisbon European Council 2000 and the Internal Market Strategy 2003

The first proposal of March 2004 and the Polish plumber

The Enforcement of the Services Directive in 2018: General Considerations

Objectives

European Commission

Go beyond direct application of Arts. 49 and 56 TFEU

- **Build on and consolidate CJEU case law (negative integration)**
- **Prohibit discrimination in all instances** (≠ Article 52 TFEU)
- **Prohibit certain (other) requirements** – C-593/13 Rina
- **Extend freedom of establishment to domestic situations**

  – C-360/15 and 31/16 Visser
- **Limit list of admissible overriding reasons of general interest for temporary cross-border services to**

  Public policy

  Public security

  Public health

  Protection of the environment
- **Introduce and foster positive harmonisation for quality of services**
- **Introduce practical administrative tools (PSC, Assist Recip, IMI)**

Limited subject matter and scope (Arts 1, 2 SD)

The Services Directive does not pertain to:

- **Abolition of monopolies and privatisations (see Article 106 TFEU)**
- **Restrictions from labour law (inc. health and safety at work)**
- **Restrictions from social security law of MS**
- **Restrictions in the field of taxation**

Special case of restrictions in the field of criminal law – Art 1(5) SD

- **Private international law – Art 3(2) SD**

- **Rules not specifically regulating or affecting service activities (rules with incidental impact on services) – recital 9 SD**

Limited subject matter and scope (Arts 1, 2 SD)

The Services Directive covers all service sectors except:

- **Financial services, temporary work agency services, human healthcare services, audiovisual services/radio broadcasting, gambling, private security services**
- **Services in the field of transport – C- 168/14 (however C-340-341/14)**
- **Social services provided by recognised charities,**
- **Notary and bailiff services provided by official appointees**

+ regarding free provision of services as per Art 16 SD

- **Services of general economic interest - Art 17(1) SD (see Art 14 TFEU)**
- **Judicial recovery of debts – Art 17(5) SD**

Services Directive

Horizontal "framework" Directive:

covers all service activities unless they are explicitly excluded: e.g.

- *commerce (retail/wholesale),*
- *construction and crafts,*
- *business- related services (consultancy, advertising etc.),*
- *most regulated professional services,*
- *tourism, etc.*

Recommended transposition method: paramount law

European Commission

Positive conflicts with other EU law (Art 3 SD)

The Services Directive does not apply to specific aspects of access or exercise of service activities (through establishment or free provision of services) ***in so far as specifically governed*** *by other EU (secondary) legislation, notably*

- **Declaration/recognition of professional qualifications**

of regulated professionals (as governed by Directive 2005/36/EC)

- **Public procurement procedures** (as governed by Directives 2009/81/EC, 2014/23,24,25/EC)
- **E-commerce** (as governed by Directive 2000/31/EC)
- **Posting of workers** (as governed by Directives 96/71/EC and 2014/67/EU)
- **EU social security law** (Regulation EC 883/2004 and implementing legislation)
- **Entry and residence formalities** (Directive 2004/38/EC, Schengen acquis, Regulation EU 2018/1806, …)
- **Protection of personal data** (Regulation EU 2016/679)
- **Intelectual property rights acquis + as per International law**
- **Waste legislation** (e.g. shipments – Regulation EEC 259/93, …)

Positive conflicts with other EU law (Art 3 SD)

The Services Directive does not apply to specific aspects of access or exercise of certain service activities (through establishment or free provision of services) ***in so far as specifically governed*** *by other EU (secondary) legislation, notably*

- **Telecom services** (as governed by Directives 2002/19,20,21,22,58/EC) – Art 2(2)(c) SD
- **Lawyer services** (as governed by Directives 77/249/EEC and 98/5/EC)
- **Statutory auditor services** (as governed by Directive 2006/43/EC)
- **Energy-efficiency related services** (as governed by Directives 2009/28/EC, 2010/31/EU and 2012/27/EU)
- **F-gas equipment related services** (as governed by Regulation EU 517/2014) **and other environment-related services** (e.g. Dir 2009/31/EC, waste services acquis)
- **Travel agency services** (as governed by Directive EU 2015/2302)
- **Certification services** (as governed by Regulation EC 765/2008)
- **Trust services** (as governed by Regulation EU 910/2014)
- **Import/export and distribution services** (legislation primarily on goods)
- **SGEI under liberalisation Directives (postal, electricity, gas)**

European Commission

Important Definitions (Art 4 SD)

- **Provider –** no TCNs with right of establishment

&

- **Establishment** – no letter box companies
- **Requirement** – access and exercise/provider or recipient
- **Authorisation scheme** – access and exercise/provider or recipient
- **Competent authority -** also private law bodies

+

- Listing of examples of overriding reasons of general interest admitted by the CJEU – Article 4(8) SD

No economic reasons

Structure of the Services Directive

General provisions: Scope and definitions

Administrative simplification + Points of Single Contact

Freedom of establishment

Freedom to provide/receive services

Quality of services

Administrative cooperation: IMI

Reporting obligations

To be continued – see separate set of slides regarding retail

European Commission

THE SERVICES DIRECTIVE

2. Legal Session 2

Antonio de Sousa Maia
DG GROW E1

11/12/2018

Internal Market and Services

European Commission

Transposition and implementation of the Services Directive

the initial tasks for candidate countries + the ongoing tasks of all MS

Internal Market and Services

As a candidate country

European Commission

- **(Horizontal) transposition**
(bringing SD rules and principles into national law)
preferably through a paramount law in order to ensure that all ordinary legislation, notably sector-specific legislation on services, is subject to the transposition act, including *lex posterior*

- **Sector-specific transposition/ legislative implementation (aligning sector-specific rules with SD rules and principles)**
pursuant to a screening of existing legislation specifically regulating or specifically affecting service activities governed by the SD to detect non-conformities

- **Preparation of administrative practice in line with SD**
(training of personnel, raising awareness etc)
+
- ***Implementation of SD tools in practice (PSC, IMI, Assistance for Recipients)***
introduction of administrative capabilities (appointment/creation of responsible bodies, making of technical means available, training of personnel, raising awareness etc)

Internal Market and Services

As a MS

European Commission

- Ensure continued compliance with the SD (and the paramount law transposing the SD) in drafting subsequent legislation specifically regulating or specifically affecting service activities governed by the SD

- ***Notify draft/new legislation to the Commission***
as per Arts 15(7) and 39(5) 2nd subparagraph SD

- **Ensure continued compliance of administrative practice with the SD (and the paramount law transposing the SD)**

+

- Keep the PSC updated (information + e-procedures) and the assistance services running smoothly

- Make use of IMI as the main administrative cooperation tool

Negative integration

changing rules and administrative practice of MS (specifically regulating or specifically affecting service activities)
to prevent breaching
SD general rules and principles
(mostly outlining what is not allowed)

Administrative simplification

Administrative simplification (Art. 5 SD):

MS need to assess the complexity, length, cost, clarity, accessibility and delay of the procedures and formalities for access and exercise of service activities

and simplify them, notably by:

- **Reducing the number of competent authorities** interacting with the service provider/recipient ('coordinating authorities')
- **Reducing the number of administrative steps**, both between authorities (domestically and cross-border) and those taken by the service provider/recipient – once-only principle (see Art 14 of the SDG Regulation EU 2018/1724)
- **Reducing the time-limits of the remaining administrative steps**
- **Relying on 'responsible declarations'** rather than evidence issued by authorities

(COM harmonised forms not yet introduced – Art 5(2) SD)

Administrative simplification

Obligations regarding (kept) document requirements (Art. 5(3) SD):

Format of documents:

- no requirement to produce a document in a specific format or issued by a particular authority allowed **– MS obliged to accept any document, regardless of format, provided the content is relevant and sufficient as evidence**

Administrative simplification

Obligations regarding (kept) document requirements (Art. 5(3) SD):

Form of documents:

- MS should accept documents in simple copy form

- **Original documents (also certified/authenticated documents)**
- **Certified copies**

  Can only be required if justified as necessary and proportionate in pursuing overriding reason of general interest

  In principle MS should accept

- documents certified/authenticated as per rules of MS of original issue

- certified copies made in any MS, according to local rules

- MS may require non-certified translations

- **Certified translations**

  Can only be required if justified as necessary and proportionate in pursuing overriding reason of general interest

In principle MS should accept certified translations made in any MS, according to local rules

Freedom of establishment

Authorisation schemes

Art. 9 – Authorisation schemes themselves should be:

- Non-discriminatory
- Necessary in pursuing an overriding reason relating to the public interest
- Proportionate (in particular if compared to
  - ex-post inspection
  - declarations in advance/prior notifications/registrations pro forma)

Good practice: to replace authorisations in more sensitive sectors by 'responsible declarations'

Authorisation schemes

Obligations regarding authorisation schemes that are kept:

General rules for

Conditions for the granting of the authorisation

Art. 10(1)(2)

- Not arbitrary (≠ administrative discretionary powers)
- Not discriminatory

- **Justified** as necessary and proportionate under overriding reasons of general interest

(however Arts 14,15, 23, 24, 25 SD prevail)

- Clear/ unambiguous/ objective/ made public in advance/ transparent /accessible

Authorisation schemes

Obligations regarding authorisation schemes that are kept:

Even if authorisation scheme is itself deemed justified (Art 9)

Even if conditions for the granting of the authorisation comply with Articles 10(1)(2), 14, 15, 24, 25

***Mutual recognition principle** (equivalence assessment)*

Art 10(3) - dictates that there can be no

- *Authorisations duplicating in essence a previous control*
- *Conditions duplicating in essence requirements*

*previously complied with **in another MS or in the same MS***

Good practice:

refer to principle (also) in sector-specific legislation

- Special provision for insurance/financial guarantee requirements Art 23

Validity of authorisations

Art. 10(4) – **territorial validity**

General principle of national validity

One authorisation should allow for

- **provision of services in the entire territory of the MS**
- **setting up of secondary establishments, including subsidiaries – see Art 11(3)(a)**

irrespective of regional/local level of admin. decision (see Art 10(7))

Exceptions should be justified as necessary and proportionate under admissible overriding reasons of general interest – most commonly controls requiring inspection of site

Validity of authorisations

Art. 11 – **validity in time**

General principle of unlimited validity in time

OK - Automatic renewal or Periodic supervisions to check continued fulfillment of conditions or Maximum period to commence activity

See also Art 11(3)(b) – obligation to report non-compliance by change of situation

Exception – Mandatory limited validity in time (not to foreclose market) in case of limited number of authorisations due to:

- **Quantitative restrictions - Art 15(2)(a)**
- **Scarcity of available resources or technical capacity – Art 12**

in which case an impartial, transparent and public selection procedure applies - itself an authorisation scheme – Art 12

Authorisation schemes – procedural rules (art 13)

- Procedures themselves clear, made public in advance, objective, simple, accessible (see also Art. 5) impartial (see also Art 14(6))

+

- Decision time-limit reasonable, fixed and made public in advance (extendable once – reasoned and notified before original period expires)
- Charges reasonable and proportionate to cost
- Authorisation to be granted as soon as compliance with conditions is verified

(Art 10(5)) and rejection to be notified as soon as non-compliance is verified

- General principle of tacit approval – exceptions to be justified as necessary and proportionate under admissible overriding reasons of general interest
- All decisions (except granting of authorisation) to be fully reasoned and open to challenge in appeal Shall be clear, public in advance, and shall guarantee objectivity and impartiality (Art 10(6))
- Acknowledgement of receipt of application informing on decision period, means of redress and (eventual) tacit approval + quick warning of incomplete applications informing of impact on decision period

Good practice: introduce these rules in the General Administrative Procedural Code

Prohibited requirements to be removed – Art 14

- Discriminatory requirements (Art 14(1))

  - based directly on nationality (of a particular MS)
  - based directly on residence (in a particular MS)
  - based indirectly on such nationality or residence (criteria linked *de iure* or *de facto* to nationality or residence)

  Of

- **Providers themselves (EU nationals self-employed and EU companies)**

Also of

- **Staff of providers + Shareholders/members of management/supervisory bodies of EU companies**

Including **reciprocity conditions** – Art 14(4) – exception for energy

different treatment of TCNs or residents in 3rd countries is not covered by this prohibition – it does not mean the restriction is necessary or proportionate if it impacts holders of freedom of establishment

Prohibited requirements to be removed – Art 14

- Prohibition of establishment/ authorisation/registration in more than one MS (14(2))

- Restrictions in choosing principal or secondary establishment in a MS (Art 14(3))

- Restrictions in freely choosing the form of secondary (successive) establishment (**including branches and subsidiaries**) – Art 14(3)

  All derivations of right/freedom of secondary establishment (≠15(2)(e))

- Economic needs tests (Art 14(5))

derivation of inadmissibility of economic reasons not justifying restrictions

Prohibited requirements to be removed – Art 14

- Direct or indirect (e.g. consultative bodies) involvement of competing operators in authorisations and other case-specific decisions (e.g. ex post inspections) (Art 14(6))

derivation of impartiality of control schemes

Exception of associations of professionals appointed a regulatory/supervisory role

- Take out insurance/subscribe to financial guarantee provided by (financial services) provider established in the MS in question (Art 14(7))

(also derivation of free provision of services of financial service providers)

Does not preclude participation in collective compensation funds

- ***linked to mutual recognition of insurance/financial guarantee requirements Art 23***

- Prior activity or prior authorisation/registration (for a given period) in the MS in question (Art 14(8))

Particularly restrictive requirements to be removed or notified – Art 15

- Quantitative/territorial restrictions (Art 15(2)(a))

Limitation of number of service providers allowed to establish according to direct quantitive criteria or territorial restrictions with quantum impact

- Legal form restrictions (Art 15(2)(b)) – **see also Art 14(1)(3)**

- Shareholding restrictions (Art 15(2)(c)) – **see also Art 14(1)(3)**

- (other) Requirements reserving access to the service activity to certain providers (presenting themselves certain characteristics), excluding all others (Art 15(2)(d)) – **see also Art 14(1)(3)**

Particularly restrictive requirements to be removed or notified – Art 15

- ban on more than 1 establishment in a MS (Art 15(2)(e))

- quantitative staff requirements (minimum number) (Art 15(2)(f))

- Tariff requirements (art 15(2)(g)
  fixed
  minimum
  maximum

- Mandatory joint service provision (art 15(2)(h)) **– see also Art 25**

Upon notification, COM may ask MS not to adopt/abolish req.s

Notification (in IMI) of requirements is not required
if notified as draft national law through TRIS,
meant primarily for requirements regardign free movement of goods and requirements specifically meant for e-services
(Directive 2015/1535)

Other requirements under specific regime

- Insurance cover/Financial guarantee requirements – Art 23

express possibility (positive harmonisation) of introducing requirement to pursue

- health and safety of the recipient/3rd person
- financial security of the recipient

Mutual recognition principle – Art 23(2) – see also 27(3)

- Total ban on advertising – prohibited – to be removed – Art 24(1)

(other) rules on advertising by regulated professionals must be non-discriminatory and justified as necessary and proportionate under overriding reason of general interest – Art 24(2)

Other requirements under specific regime

- Multidisciplinary restrictions – Art 25

Obligation (positive harmonisation) of introducing rules to

- erradicate conflicts of interest
- ensure independence, impartiality
- ensure compatibility of professional ethics and conduct (notably professional secrecy)

Regarding

regulated professions

services of cerification/acreeditation/technical monitoring/test/trial

if restrictions or ban on multidisciplinary restrictions are introduced, they need to be justified as necessary and proportionate in

- ***erradicating conflicts of interest***
- ***ensuring independence, impartiality***
- ***ensuring compatibility of professional ethics and conduct (notably professional secrecy)***

Positive integration

introducing new rules based on the SD specifically regulating or specifically affecting service activities

Quality of Services

Art 22 - Providers are obliged to provide information to recipients

- **on themselves** (particulars of provider, registration/ authorisation)
- **on their services** (general conditions of service, clauses on applicable law/jurisdiction, after-sales guarantee, main features of service, insurance/guarantees, price – see also Directive 98/6/EC)
- **on dispute resolution mechanisms** – Art 27

  also obligation to act towards satisfactory solution of dispute

Art 26 – MS and COM encourage voluntary quality standards and voluntary certifications for services

Art 37 – MS and COM encourage codes of conduct

Other requirements of MS for establishment

(If no other secondary EU law applicable)

If not conditions in granting authorisation (Art 10)

TFEU applies in determining admissibility (notably Article 49 TFEU)

To be continued

European Commission

THE SERVICES DIRECTIVE

3. Legal Session 3

Antonio de Sousa Maia
DG GROW E1

11/12/2018

Internal Market and Services

Negative integration

changing rules and administrative practice of MS (specifically regulating or specifically affecting service activities)
to prevent breaching
SD general rules and principles
(mostly outlining what is not allowed)

Freedom to provide (temporary cross-border) services

- right to <u>provide</u> services

Requirements in general

General principle of disapplication

Requirements should not apply to temporary cross-border providers

(providers are already bound by compliance with home MS requirements for establishment there)

Requirements exceptionally imposed should be justified as necessary and proportionate under admissible overriding reasons of general interest:

Requirements of home MS (to exit) – Article 56 TFEU

Requirements of host MS – Article 16 SD – **only 4 admissible overriding reasons of general interest: public policy, public security, public health, protection of the environment**

Notification – Article 39(5)

Requirements in general

Good practice: in sector-specific legislation

- refer to disapplication of host MS requirements as the rule
  - list exceptionally applicable host MS requirements

Requirements of host MS on incoming provider may also be applied as case-by-case measures

- **Proportionate for safety of services**
- **In absence of EU rules**
- **In absence of sufficient home MS rules**

Art 18 **procedure in IMI (Art 35)**

European Commission

Prohibited requirements to be removed
in case of no movement of provider
Particularly restrictive requirements to be removed or notified in case of movement of provider
– Art 16(2)(3)

- Establishment requirement (*negation of free provision of services*)

- Authorisation/registration schemes - Requirements to obtain ID

- Ban on infrastructure in the MS in question

- Specific contractual arrangements banning service provision (e.g. only work under employment contract allowed)

- Requirements on use of equipment and materials

(**<u>prohibited</u>** restrictions for reception of services – Art 19)

Internal Market and Services

Notification – Article 39(5)

Art 17 - Article 16 does not apply to:

- Certain service sectors (covered by the rest of the SD):

  - **Services of general economic interest - Art 17(1)**
  - **Judicial recovery of debts – Art 17(5)**

- Certain requirements:

  - **TCNs moving between non-Schengen MS and between Schengen-non-Schengen MS or TCNs moving across MS for more than 90 days – Art 17(9)**
  - **Acts that must be performed by a notary - Art 17(12)**
    - see also Art 5
  - **Registration of vehicles leased in another MS – Art 17(14)**

- Matters covered by other EU legislation (as also per Art 3(1)) and international private law (see also Art 3(2))

To be continued

European Commission

THE SERVICES DIRECTIVE

4. Legal Session 4

Antonio de Sousa Maia
DG GROW E1

11/12/2018

Internal Market and Services

Negative integration

changing rules and administrative practice of MS (specifically regulating or specifically affecting service activities)
to avoid breaching SD general rules and principles (mostly outlining what is not allowed)

Freedom to provide (temporary cross-border) services

- right to <u>receive</u> services

Prohibited requirements

- Requirements imposed on a recipient restricting use of service supplied by provider established in another MS (who moved or not)

- Art 19

Notably:

- *authorisation/declaration requirements*

- *discrimination on granting financial assistance*

(by reason of place of establishment or provision of service)

Prohibited requirements

- **Discriminatory restrictions (of MS/regulatory body) to receive service based on nationality or residence of the recipient**

- Art 20(1)

Notably:

- *Tariffs*
- *Added formalities*
- *Outright prohibition*

However:

- different treatment of objectively different situations is not discrimination

discrimination does not take place where reservation of advantages, especially as regards tariffs, is based on legitimate and objectively justified criteria - Case C-388/01

Positive integration

introducing new rules based on the SD specifically regulating or specifically affecting service activities

Article 20(2) Services Directive

*Application of the non-discrimination obligation in inter-private horizontal relationships (service providers **including public bodies as service providers** – recipients)*

Prohibition of discrimination based on nationality or residence included in the general conditions made available to the public

Different conditions are not discriminatory if directly justified by objective criteria (examples listed in Recital 95)

Obligation of MS to ensure transposition and enforcement of this principle (see Annex SWD(2012)146)

Obligation of Member States to ensure assistance to recipients (including on non-discrimination), see Article 21 SD

Beyond the Services Directive

Non-discrimination principle in Art. 20(2) of "Services Directive", but unclear "objective criteria" that can justify difference in treatment and limited enforcement in Member States.

European customers still facing discrimination when accessing goods and services based on their nationality or place of residence/establishment.

- Widespread cases of discrimination reported (car-rental and amusement parks cases in 2014-2016)

=> Action needed to tackle geo-blocking and other forms of discrimination (announced in DSM/SMS).

Geoblocking Regulation (Reg (EU) 302/2018)

27 February 2018: adoption by European Parliament and Council

2 March 2018: Publication in OJ http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.LI.2018.060.01.0001.01.ENG&toc=OJ:L:2018:060I:TOC

22 March 2018: Entry into force

3 December 2018: Date of application

Extensive Q&A document published on Internet

- Translation in official languages available at **https://ec.europa.eu/digital-single-market/en/news/geo-blocking-regulation-questions-and-answers**

Scope of the Regulation

Cross-border commercial relationships (no purely domestic)

Scope of Directive 2006/123/EC

- I.e. no audiovisual, financial, transport (where however sector-specific rules applies), etc…
- Both on-line and off-line
- Both B2C and B2B, but not purchases for resale

Copyright, taxation, international private law rules not affected

- But Regulation clarifies that mere compliance with the Regulation, on that ground alone, cannot be considered as directing activities in another Member State

*Addressing **specific situations** of discrimination where no objective justification is admissible (unconditional prohibition)*

- In these cases, case by case assessment of Article 20(2) SD does not apply

Directly applicable rights and obligations

- But enforcement is a Member State competence (Articles 7 and 8)

Access to online interfaces (Article 3)

- Blocking of access to websites or automated rerouting is forbidden
- Consumer's explicit consent to rerouting is required

European Commission

Access to goods or services- Article 4

3 situations where differences in treatment based on residence, nationality or establishment are banned:

- Sale of goods, such as electronics, clothes, sportswear, delivered to a location where the trader offers delivery or picked up therein

- Services received in a physical location in the country where the trader operates, such as car rentals or access to entertainment parks

- Electronically supplied services, such as cloud & hosting services, where the main feature <u>is not</u> the provision of access to and use of copyright protected works or other protected subject matter
  - Hence Article 4 does not apply to digital content services such as e-books, music, games. However Article 3 and 5 will continue to apply to these non-audiovisual content services

Non-discrimination for reasons related to payment-Article 5

Traders cannot discriminate payment means, within the range of means and brands accepted, in view of the residence, nationality or establishment of the customer or of the "nationality" of the payment mean (place of issuance, bank, etc…) in the following situations (cumulative):

Electronic transaction (e.g. no cash)
Authentication requirements are fulfilled
Currency accepted by the trader

Agreements on passive sales - Article 6

Directly applicable and unconditional prohibition of passive sale restrictions in vertical agreements, without need of assessment under competition law

It only applies to restrictions in direct contrast with the prohibitions of the Regulation (see Recital 34)

Clauses in vertical agreements where suppliers impose on traders/sellers to act in contrast with the Regulation are null and void.

All other restrictions (e.g. on active sales or not related to the prohibitions provided by the GBR) remain subject to competition law assessment.

Postponed application to agreements concluded before 2 March 2018 (competition law scrutiny remains unaffected)

European Commission

Check out:

the Guide on the implementation of the SD

https://publications.europa.eu/en/publication-detail/-/publication/a4987fe6-d74b-4f4f-8539-b80297d29715

the Jurisprudence guides on Articles 49 and 56 TFEU

http://ec.europa.eu/docsroom/documents/22543?locale=en

https://ec.europa.eu/docsroom/documents/16743?locale=en

Any further questions?

Contact: grow-E1@ec.europa.eu