



COMMISSION OF THE EUROPEAN COMMUNITIES

Internal Market and Services DG

HANDBOOK ON IMPLEMENTATION OF THE SERVICES DIRECTIVE

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Introduction

The objective of the Services Directive¹ is to make progress towards a genuine Internal Market in Services so that, in the largest sector of the European economy, both businesses and consumers can take full advantage of the opportunities it presents. By supporting the development of a truly integrated Internal Market in Services, the Directive will help realise the considerable potential in terms of economic growth and job creation of the services sector in Europe. For this reason, the Services Directive is a central element of the renewed Lisbon Strategy for growth and jobs². Moreover, by providing for administrative simplification, it also supports the better regulation agenda³.

The Services Directive is a big step forward in ensuring that both service providers and recipients benefit more easily from the fundamental freedoms guaranteed in Articles 43 and 49 of the Treaty establishing the European Community – the freedom of establishment and the freedom to provide services across borders. In order to achieve this, the provisions of the Directive aim to simplify administrative procedures, remove obstacles for services activities as well as enhance both mutual trust between Member States and the confidence of providers and consumers in the Internal Market.

The Directive applies to a wide range of service activities. Its provisions are, to a large extent, based upon the case law of the European Court of Justice relating to the freedom of establishment and the free movement of services and it complements existing Community instruments, which remain fully applicable.

Besides requiring Member States⁴ to take concrete legislative measures, the Directive asks them to put in place a variety of practical measures such as points of single contact for service providers, electronic procedures and administrative cooperation. It also introduces innovative tools, such as the review of national legislation and the process of mutual evaluation. If implemented properly, these different instruments will continue to further the development of the Internal Market for Services well beyond the Directive's implementation deadline. It is indeed clear that the Services Directive will not just require a one-off act of implementation but will also trigger a dynamic process, the benefits of which will unfold over the years.

It is also important to highlight that the Directive will enhance the rights of recipients of services, in particular consumers, and provide for concrete measures to develop a policy on quality of services across Europe.

To achieve its objectives, full and timely transposition of the Services Directive is essential. For this reason, the European Council concluded at its summit in March 2007 that *“the recently adopted Services Directive is a key tool for unlocking the full potential of the*

¹ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, OJ L376 of 27.12.2006, p. 36.

² Commission Communication “Working together for growth and jobs – A new start for the Lisbon Strategy” COM (2005) 24 of 02.02.2005.

³ Commission Communication “A strategic review of Better Regulation in the European Union” COM (2006) 689 of 14.11.2006.

⁴ The Agreement on the European Economic Area (EEA Agreement) extends the Internal Market to three EFTA States: Iceland, Liechtenstein and Norway. The assistance provided for in this handbook is also intended for these States.

European services sector. High priority should be placed on the complete, coherent and timely transposition of its provisions in a consistent manner". Full and timely transposition of the Directive will also help Member States to modernise their national administrations as well as their regulatory frameworks. The Directive was adopted on 12 December 2006 and will have to be implemented by Member States three years after its publication, i.e. by 28 December 2009, at the latest.

The implementation of the Services Directive constitutes a significant challenge for Member States and requires prompt and serious efforts. Considering its large scope and the wide range of issues it addresses, the novelty of the approach and the numerous measures to be put in place, it is clear that close cooperation and partnership between the Commission and the Member States will be particularly important in this case. Thus, and in line with its general policy on better application of Community law, the Commission has offered its assistance and has undertaken to cooperate closely with the Member States throughout the implementation process. This should contribute to the correct and coherent implementation and application of the Directive by all Member States and ensure a level playing field for service providers and recipients. It should be particularly helpful in identifying and addressing problems at an early stage.

The present "handbook on implementation" endeavours to give Member States technical assistance in the implementation process and is one of a series of concrete accompanying measures with which the Commission wants to assist Member States. It is also part of the response to the request the Commission received from the Council, at its meeting of 29 and 30 May 2006, to provide assistance to Member States on implementation of this Directive⁵. This handbook is neither exhaustive nor legally binding and does not prescribe one single way of implementation. It rather tries to describe appropriate ways of implementation and draws attention to important issues in the implementation process. It is based on preliminary discussions with Member States and seeks to reply to questions already raised by them or which can be easily anticipated. More questions will arise as the process of implementation advances and, if need be, this handbook will be supplemented at a later stage.

5 Statements in Council Document No 11296/06 of 14.07.2006
(<http://register.consilium.europa.eu/pdf/en/06/st11/st11296-ad01.en06.pdf>)

1. GENERAL QUESTIONS

1.1. The Directive's relationship to the EC Treaty

Like any piece of secondary legislation, the Services Directive needs to be seen in the context of primary law, i.e. the Treaty establishing the European Community (EC Treaty) and notably the Internal Market freedoms. The Directive must be interpreted and implemented in this context.

It should also be clear that matters excluded from the scope of the Services Directive remain fully subject to the EC Treaty. Services excluded remain, of course, covered by the freedom of establishment and the freedom to provide services. National legislation regulating these service activities must be in conformity with Article 43 and 49 of the EC Treaty and the principles that the European Court of Justice (ECJ) has developed on the basis of the application of these articles have to be respected. It is for Member States themselves to ensure that their legislation is in conformity with the EC Treaty as interpreted by the ECJ. The Commission will continue to exercise its role as guardian of the EC Treaty and assist Member States in this task.

1.2. Method of implementation

The implementation of the Services Directive will require Member States to take a combination of legislative and non-legislative, i.e. organisational or practical, measures. The Directive is a horizontal instrument which covers a broad range of different services and which is likely to affect a significant number of national laws and regulations. For this reason, and as far as implementing legislation is concerned, Member States will need to consider a mix of specific and horizontal legislative measures, which are likely to include the amendment of existing laws, as well as the adoption of new specific legislation and of a horizontal "framework" implementation law.

1.2.1. Implementing legislation

On the basis of the case law of the ECJ, it is clear that "*in order to ensure that directives are fully applied in fact as well as in law, Member States must provide a precise legal framework in the field in question*" which allows "*individuals to know their rights and rely on them before the national courts*"⁶. This means that Member States will have to provide for national provisions of a binding nature so that service providers and recipients can rely on the rights granted to them by the Services Directive.

Certain of these articles could be implemented by amendments to existing legislation, for example those in the area of authorisation schemes could in some Member States be implemented by amending national legislation dealing with administrative procedures. In

⁶ See amongst others: Judgment of 18 January 2001, *Commission v Italy*, Case C-162/99; Judgment of 15 June 1995, *Commission v Luxembourg*, Case C-220/94; Judgment of 30 May 1991, *Commission v Germany*, Case C-361/88.

other cases, notably in relation to articles setting out general principles such as Article 16 or 20, a new horizontal framework law should be considered⁷.

Legislation of a horizontal nature at the adequate level could be particularly needed as a safeguard against provisions in specific areas which might have escaped scrutiny as well as to ensure that service activities which may develop and be regulated at national level in the future will also be covered. However, it is clear that if Member States choose to implement the Directive, or certain articles of the Directive, by horizontal legislation, they will need to ensure that such horizontal legislation takes precedence over specific legislation.

Member States may also need to adapt existing specific legislation containing requirements which the Directive explicitly requires to be modified or abolished. This concerns, for instance, Articles 9, 14 and 15 regarding specific requirements restricting the freedom of establishment. Further examples are Articles 24 and 25 on commercial communications by the regulated professions and multidisciplinary activities.

Particular attention needs to be paid to legislation which contains specific rules for service providers established in other Member States. In so far as such rules are incompatible with the Directive, and are not based on other Community instruments, they need to be abolished by amending the legislation concerned. Member States need, for example, to verify whether in their legislation they have registration requirements for providers established in other Member States and wanting to provide services in their territory; if such requirements are neither provided for in another Community instrument nor justified under Articles 16 or 17 they have to be removed.

In order to be able to assess that implementation is complete, Member States are advised to resort to implementation tables indicating how the different provisions of the Directive have been implemented.

1.2.2. Non-legislative implementing measures

Some provisions of the Directive require implementation by putting in place appropriate administrative arrangements and procedures. This is, for instance, the case of the setting-up of points of single contact and electronic procedures. This also concerns the organisation of the identification and assessment of legislation that Member States will have to undertake prior to deciding whether legislation needs to be amended or abolished (for instance to check whether their authorisation schemes are justified or to screen their legislation and identify relevant requirements).

Furthermore, there are provisions in the Directive obliging Member States to encourage actions by private parties (for example service providers, professional associations or consumer associations) such as Article 26 on quality of services or Article 37 on codes of conduct at Community level. The implementation of these obligations will require Member States to take practical steps, such as providing assistance to operators or their associations, rather than legislation.

⁷ An example in which such an approach was successfully followed for the same reasons is the implementation of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1.

Finally, the entire chapter on “Administrative Cooperation” requires putting in place the practical arrangements necessary for the competent authorities in Member States to effectively cooperate with each other.

All these are obligations where Member States have to deliver a practical result (for example, ensure that points of single contact are available by the implementation deadline) or to take a particular action (for example, verify whether authorisation schemes comply with the conditions set out in the Directive).

1.2.3. *Follow-up measures*

The Services Directive also requires Member States to take measures beyond the December 2009 implementation deadline. This is notably the case in connection with the review of legislation and mutual assessment process set out in Article 39 of the Directive. For instance, on the basis of Article 39(5) Member States have an ongoing obligation to notify changes in requirements applicable to the cross-border provision of services (a similar obligation exists as regards certain establishment related requirements on the basis of Article 15(7)). Member States also have, on the basis of Article 39(2), an obligation to participate in the mutual evaluation process which will follow the review and reporting of legislation. Finally, it is equally clear that the development of a policy on quality of services, as foreseen in the Chapter V of the Directive, will evolve over the years.

2. THE SCOPE OF APPLICATION OF THE DIRECTIVE

2.1. Services covered

2.1.1. *The concept of “service”*

As a basic rule, the Services Directive applies to all services which are not explicitly excluded from it.

To start with, it is important to understand the concept of “service” and the scope of activities it covers. The concept of “service” is, in line with the EC Treaty and the related case law of the ECJ, defined in a broad manner⁸. It encompasses any self-employed economic activity which is normally provided for remuneration, as referred to in Article 50 of the EC Treaty.

Thus, within the meaning of the EC Treaty and the Services Directive, in order to constitute a “service” an activity has to be a self-employed activity, i.e. it has to be supplied by a provider (which could be a natural or a legal person) outside the ties of a contract of employment⁹. Moreover, the activity must normally be provided for remuneration; in other words, it must be of an economic nature. This has to be assessed on a case-by-case basis for each activity. The mere fact that an activity is provided by the State, by a State body or by a non-profit organisation does not mean that it does not constitute a service within the meaning of the EC Treaty and the Services Directive¹⁰. Rather, according to ECJ case law, “*the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service*”

⁸ See Article 4(1).

⁹ Judgment of 12 December 1974, *Walrave*, Case 36/74.

¹⁰ Judgment of 11 April 2000, *Delière*, Joined Cases C-51/96 and C-191/97.

*in question, which means that there must be an economic counterpart*¹¹. Whether the remuneration is provided for by the recipient of the service or by a third party is not relevant¹². However, it should be noted that the ECJ has – in the context of education services provided under the national education system – ruled that a teaching or enrolment fee, which pupils or their parents must sometimes pay under the national education scheme in order to make a certain contribution to the operating expenses of the system, does not as such constitute remuneration if the system is still essentially funded by the public purse¹³.

Consequently, Member States will have to ensure that the rules of the Services Directive apply to a wide variety of activities, whether provided to business or to consumers. Without being exhaustive, the following can be mentioned as examples of services covered by the Directive: the activities of most of the regulated professions¹⁴ (such as legal and fiscal advisers, architects, engineers, accountants, surveyors), craftsmen, business-related services (such as office maintenance, management consultancy, the organisation of events, recovery of debts, advertising and recruitment services), distributive trades (including retail and wholesale of goods and services), services in the field of tourism (such as services of travel agencies), leisure services (such as services provided by sports centres and amusement parks), construction services, services in the area of installation and maintenance of equipment, information services (such as web portals, news agency activities, publishing, computer programming activities), accommodation and food services (such as hotels, restaurants, catering services), services in the area of training and education, rental (including car rental) and leasing services, real estate services, certification and testing services, household support services (such as cleaning services, private nannies or gardening services), etc.

In the context of framework legislation implementing the Directive, it would be advisable for Member States to follow the same approach i.e. to define the scope of such framework legislation as applying to all service activities other than those explicitly excluded.

2.1.2. The services excluded from the scope of application of the Directive

The Services Directive explicitly excludes a number of services from its scope. These exclusions are optional in the sense that Member States may, if they so wish, apply some of the general principles and arrangements provided in the Services Directive, such as the “points of single contact”, to some or all of the excluded services. In any event, it is clear that national rules and regulations relating to excluded services have to comply with other rules of Community law, in particular with the freedom of establishment and the freedom to provide services as guaranteed in Articles 43 and 49 of the EC Treaty.

¹¹ Judgment of 26 April 1988, *Bond van Adverteerders*, Case 352/85; Judgment of 27 September 1988, *Humbel*, Case 263/86.

¹² Judgment of 26 April 1988, *Bond van Adverteerders*, Case 352/85; Judgment of 13 May 2003, *Müller Fauré*, Case C-385/99; Judgment of 12 July 2001, *Smits and Peerbooms*, Case C-157/99.

¹³ Judgment of 7 December 1993, *Wirth*, Case C-109/92.

¹⁴ In this context, it should be clear that existing Community instruments such as, for regulated professions, Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005, p. 22) continue to apply. See Section 4 of this handbook.

Concerning the scope of these exclusions, the following explanations can be given:

- **Non-economic services of general interest**

The exclusion in Article 2(2)(a) is closely linked to the concept of “service” explained above. The terms “non-economic services” refer to services which are not performed for an economic counterpart. These activities do not constitute a service within the meaning of Article 50 of the Treaty and are thus, in any case, not covered by the Services Directive. As a result, non-economic services of general interest, such as services which are not provided against remuneration in the field of national primary and secondary education, are not covered by the Services Directive. In contrast, services of general economic interest, such as those in the electricity and the gas sector, are services performed for economic consideration and thus, in principle, fall within the scope of application of the Services Directive¹⁵. Whether a service which a Member State considers to be of general interest is of an economic or a non-economic nature has to be determined in the light of the case law of the ECJ referred to above¹⁶. In any case, it will not be possible for Member States to consider all services in a specific field, for example all education services, as non-economic services of general interest.

- **Financial services**

The exclusion in Article 2(2)(b) covers all financial services, including banking services, credit services, securities and investment funds and insurance and pension services. This includes the services listed in Annex I to Directive 2006/48/EC of the European Parliament and the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions¹⁷, such as consumer credit, mortgage credit services, financial leasing and the issuing and administering of means of payment. Services which do not constitute a financial service, such as operational leasing services consisting in the hiring-out of goods, are not covered by this exclusion and Member States will have to ensure that they are covered by implementing measures.

- **Electronic communication services and networks**

The exclusion in Article 2(2)(c) concerns electronic communication services and networks, and associated facilities and services as defined in Article 2 of Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive)¹⁸. Such services and networks include, for example, voice telephony and electronic mail conveyance services. However, these services are only excluded with respect to matters covered by the five directives included in the so-called “telecoms package”¹⁹. As regards

¹⁵ Although the application of specific provision of existing Directives regulating these services will take priority in case of conflict with one of the provisions of the Services Directive. See Section 4 of this handbook.

¹⁶ See Section 2.1.1 of this handbook.

¹⁷ OJ L 177, 30.6.2006, p. 1.

¹⁸ OJ L 108, 24.4.2002, p. 33.

¹⁹ Directive 2002/19/EC of the European Parliament and of the Council of 7 March 2002 on access to, and interconnection of, electronic communications networks and associated facilities (Access Directive) (OJ L 108, 24.4.2002, p. 7); Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services (Authorisation Directive) (OJ L 108, 24.4.2002, p. 21); Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) (OJ L 108, 24.4.2002, p. 33); Directive 2002/22/EC of the

matters which are not covered by these five Directives, such as “points of single contact” or electronic procedures, the Services Directive applies. Member States thus need to ensure that these services benefit from the relevant provisions of the Services Directive. This can be done either by amending the specific legislation in the telecommunications sector or by addressing the matter in the horizontal framework legislation implementing the Directive.

- **Services in the field of transport**

The exclusion in Article 2(2)(d) covers the transport services falling within Title V of the EC Treaty. Thus, it covers air transport, maritime and inland waterways transport, including port services, as well as road and rail transport, including in particular urban transport, taxis and ambulances²⁰. The exclusion of transport services does not cover services which are not transport services as such like driving schools services, removal services, car rental services, funeral services or aerial photography services. It does not cover either commercial activities in ports or airports such as shops and restaurants. These service activities thus benefit from the provisions of the Services Directive and have to be covered by implementing measures.

- **Services of temporary work agencies**

The exclusion in Article 2(2)(e) covers the service of hiring out workers provided by temporary work agencies. Services other than services of hiring-out of workers which are sometimes furnished by the same service provider, such as placement or recruitment services, are not covered by the exclusion and thus have to be covered by implementing measures.

- **Healthcare**

The exclusion of healthcare in Article 2(2)(f) covers “*healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided*”²¹. This means that services which are not provided to a patient but to the health professional himself or to a hospital such as accounting services, cleaning services, secretarial and administration services, the provision and maintenance of medical equipment as well as the services of medical research centres, are not covered by this exclusion. Moreover, the exclusion does not cover activities which are not designed to maintain, assess or restore patients’ state of health. For example, activities which are designed to enhance wellness or to provide relaxation, such as sports or fitness clubs, are covered by the Services Directive and will have to be covered by implementing measures. Furthermore, the exclusion of health services only covers activities which are reserved to a regulated health profession in the Member State where the service is provided. Services which can be provided without specific professional qualification being required have thus to be covered by implementing measures. Finally, it should be clear that the exclusion of health services concerns services relating to human

European Parliament and of the Council of 7 March 2002 on universal service and users’ rights relating to electronic communications networks and services (Universal Service Directive) (OJ L 108, 24.4.2002, p. 51); and Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on Privacy and Electronic Communications) (OJ L 201, 31.7.2002, p. 37, as amended by Directive 2006/24/EC (OJ L 105, 13.4.2006, p. 54)).

²⁰

See Recital 21.

²¹

See Recital 22.

health and should not be understood as covering the services of veterinaries and therefore these services should be covered by implementing measures.

- **Audiovisual and radio broadcasting services**

The exclusion in Article 2(2)(g) covers audiovisual services, i.e. services the principal purpose of which is the provision of moving images with or without sound, including television and showing of films in cinemas, irrespective of the way they are produced, distributed or transmitted. It also covers radio broadcasting services. Other services linked to audiovisual services or to radio broadcasting, such as advertising services or the sale of drinks and food within cinemas are not excluded and have to be covered by implementing measures.

- **Gambling activities**

The exclusion in Article 2(2)(h) covers any service which involves wagering a stake with pecuniary value in games of chance, including in particular, numeric games such as lotteries, scratch cards, gambling services offered in casinos or licensed premises, betting services, bingo services and gambling services operated by and for the benefit of charities or non-profit-making organisations. In contrast, games of skill, gaming machines that do not give prizes or that give prizes only in the form of free games and promotional games whose exclusive purpose is to encourage the sale of goods or services are not covered by the exclusion and thus benefit from the Services Directive. Furthermore, other services provided in casinos, for example the sale of food and drinks, are also not covered by the exclusion and have to be covered by implementing measures.

- **Activities which are connected with the exercise of official authority**

The exclusion in Article 2(2)(i) reflects Article 45 of the EC Treaty according to which activities which are connected with the exercise of official authority are not covered by the provisions relating to the freedom of establishment and the freedom to provide services. This exclusion, in line with the case law of the ECJ, only covers specific activities and does not encompass entire professions²². Whether or not specific activities are directly or specifically connected with the exercise of official authority cannot be unilaterally determined by a Member State but has to be assessed on the basis of general criteria established by the ECJ. Thus, the mere fact that a Member State considers an activity to be an exercise of official authority or that an activity is provided by the State, a State body or a body to which public tasks have been assigned, does not mean that this activity is covered by Article 45 of the EC Treaty. When confronted with cases where they need to assess if a service activity is under Article 45 of the EC Treaty and therefore excluded from the Services Directive, Member States should keep in mind the narrow scope of application that the ECJ has given to this article²³.

²² Judgment of 9 March 2000, *Commission v Belgium*, Case C-355/98; see also Judgment of 29 October 1998, *Commission v Spain*, Case C-114/97, Judgment of 13 July 1993, *Thijssen*, Case C-42/92, and Judgment of 21 June 1974, *Reyners*, Case 2/74.

²³ The ECJ has ruled that Article 45 does not cover activities which are merely auxiliary and preparatory in relation to the exercise of the official authority (Judgment of 13 July 1993, *Thijssen*, Case 42/92) or activities having a merely technical nature, such as those concerning the design, programming and operation of data-processing systems (Judgment of 5 December 1989, *Commission v Italy*, Case 3/88). Moreover, there are a number of service activities which the ECJ has already deemed to be outside the scope of Article 45 of the EC, such as the activities of “avocat” (Judgment of 21 June 1974, *Reyners*, Case 2/74), of security undertakings (Judgment of 31 May 2001, *Commission v Italy*, Case C-283/99;

- **Social services relating to social housing, childcare and support of families and persons permanently or temporarily in need**

The social services in Article 2(2)(j) are excluded to the extent that they are provided by the State itself, by providers which are mandated by the State and are thus under an obligation to provide such services, or by charities recognised as such by the State. The notion of “charities recognised as such by the State” includes churches and church organisations which serve charitable and benevolent purposes. On the basis of the wording of this exclusion, and the explanations given in Recital 27, it is clear that such services are not excluded if they are provided by other types of providers, for example private operators acting without a mandate from the State. For instance childcare which is provided by private nannies or other childcare services (such as summer camps) provided by private operators are not excluded from the scope of application of the Services Directive. Similarly, social services relating to the support of families and persons who are permanently or temporarily in a state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalised, such as services concerning care for elderly people or services to the unemployed, are excluded from the scope of application of the Services Directive only to the extent that they are provided by any of the providers mentioned above (i.e. the State itself, providers mandated by the State or charities recognised as such by the State). Thus, for instance, private household support services are services not excluded from the Services Directive and have to be covered by the implementing measures.

- **Private security services**

The exclusion in Article 2(2)(k) covers services such as surveillance of property and premises, protection of persons (bodyguards), security patrols or supervision of buildings as well as the depositing, safekeeping, transport and distribution of cash and valuables. Services which are not “security services” as such, for instance the sale, delivery, installation and maintenance of technical security devices, are not covered by the exclusion. Thus, they have to be covered by measures implementing the Directive.

- **Services provided by notaries and bailiffs, who are appointed by an official act of government**

These services are excluded by Article 2(2)(l) from the scope of application of the Directive irrespective of whether or not they can be considered to be connected with the exercise of official authority as set out in Article 45 of the EC Treaty. The exclusion covers the services provided by notaries and bailiffs who are appointed by an official act of government. It includes, for instance, authentication services of notaries and seizure of property by bailiffs.

Judgment of 9 March 2000, *Commission v Belgium*, Case C-355/98; Judgment of 26 January 2006, *Commission v Spain*, Case C-514/03), activities of approved commissioners in insurance undertakings (Judgment of 13 July 1993, *Thijssen*, Case C-42/92), activities of design, programming and operation of data-processing systems (Judgment of 5 December 1989, *Commission v Italy*, Case 3/88), activities carried out in the framework of contracts which relate to the premises, supplies, installations, maintenance, operation and transmission of data necessary for the conduct of a lottery (Judgment of 26 April 1994, *Commission v Italy*, Case C-272/91).

2.1.3. *The field of taxation*

As stated in Article 2(3), the Services Directive does not apply to the field of taxation. This includes substantive tax law as well as administrative requirements necessary for the enforcement of tax laws, such as the allocation of VAT numbers. Member States might, of course, decide to apply certain aspects of the Services Directive also to tax matters, for instance to provide VAT numbers through the “points of single contact” and by electronic means.

2.1.4. *The relationship with the free movement of goods*

As stated in Recital 76, the Services Directive does not concern activities which come under Articles 28 to 30 of the EC Treaty relating to the free movement of goods. Thus, the Services Directive does not apply to requirements which have to be assessed under the EC Treaty provisions on the free movement of goods and which do not affect the access to or the exercise of a service activity, such as requirements concerning the labelling of products, construction material or the use of pesticides. It should be clear, however, that requirements restricting the use of equipment which is necessary for the provision of a service affect the exercise of a service activity and are thus covered by the Services Directive²⁴.

When implementing the Directive, Member States need to bear in mind that whereas the manufacturing of goods is not a service activity²⁵, there are many activities ancillary to them (for example retail, installation and maintenance, after-sale services) that do constitute a service activity and should therefore be covered by the implementing measures.

2.2. Providers covered

The Services Directive applies to services which are provided by a natural person who is a national of a Member State or by a legal person within the meaning of Article 48 of the EC Treaty²⁶ and established in a Member State. As clarified in Recital 38, the concept of “legal person” encompasses all entities constituted under, or governed by, the law of a Member State²⁷, irrespective of whether under national law they are considered to have legal personality. All these entities have to be covered by the implementation of the Directive. By contrast, services provided by natural persons who are not nationals of a Member State or by entities which are established outside the Community or are not incorporated in accordance with the laws of a Member State are not covered by the Directive.

²⁴ See Section 7.1.3.4 of this handbook.

²⁵ Judgment of 7 May 1985, *Commission v France*, Case 18/84; Judgment of 11 July 1985, *Cinéthèque*, Joined Cases 60-61/84.

²⁶ See Recital 36. Article 48 of the EC Treaty refers to companies or other legal persons constituted in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community.

²⁷ Including, for example, the limited liability company under British law or the “offene Handelsgesellschaft” (oHG) constituted under German law.

2.3. Requirements covered

2.3.1. *The concept of requirement*

The Services Directive applies to those requirements, which affect the access to, or the exercise of, a service activity. As stated in Article 4(7), the concept of requirement covers any obligation, prohibition, condition or any other limitation imposed on service providers (or recipients of services), such as an obligation to obtain an authorisation or to make a declaration to competent authorities. The concept covers any such obligation, prohibition, condition or limitation whether they are provided for in law, regulation or administrative provision and whether they are provided for at national, regional or local level. In addition and in line with the case law of the ECJ²⁸, the Services Directive also applies to any such provision imposed by rules of professional bodies, collective rules of professional associations or other professional organisations which are adopted by these bodies in the exercise of their legal autonomy.

2.3.2. *General requirements not affecting access to or exercise of a service activity*

As explained in Recital 9, the Services Directive does not apply to those requirements which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity. This means that, for example, road traffic rules, rules concerning the development or use of land, town and country planning as well as building standards will generally not be affected by the Services Directive. However, it is clear that the mere fact that rules are labelled in a specific way, for example as town planning rules, or that requirements are formulated in a general way, i.e. are not specifically addressed to service providers, is not sufficient to determine that they are outside of the scope of the Services Directive. In fact, the actual effect of the requirements in question needs to be assessed to determine whether they are of a general nature or not. Thus, when implementing the Directive, Member States need to take account of the fact that legislation labelled as “town planning” or “building standards” may contain requirements which specifically regulate service activities and are thus covered by the Services Directive. For instance, rules on the maximum surface of certain commercial establishments, even when contained in general urban planning laws, would come under the Services Directive and, as a result, will be covered by the obligations in the establishment chapter of the Directive.

2.3.3. *Requirements governing access to public funds*

As explained in Recital 10, the Services Directive does not concern requirements the fulfilment of which is a condition to have access to public funds, for example in relation to quality standards or in relation to specific contractual conditions for certain services of general economic interest. Such requirements will not be affected by implementation of the Services Directive. In particular, the Services Directive does not oblige Member States to grant service providers established in other Member States the right to receive the same

²⁸ According to the ECJ case law, the abolition of State barriers should not be neutralised by obstacles resulting from rules established by associations or organisations in the exercise of their legal autonomy. See Judgment of 12 December 1974, *Walrave*, Case 36/74, paragraphs 17, 23 and 24; Judgment of 14 July 1976, *Donà*, Case 13/76, paragraphs 17 and 18; Judgment of 15 December 1995, *Bosman*, Case C-415/93, paragraphs 83 and 84; Judgment of 19 February 2002, *Wouters*, C-309/99, paragraph 120.

funding as service providers established within their own territory. However, it is clear that such requirements governing access to public funds for service providers as well as all other aids granted by Member States (or through State resources) have to comply with other Community rules, including competition rules, in particular Article 87 of the EC Treaty.

3. THE RELATIONSHIP BETWEEN THE DIRECTIVE AND SPECIFIC AREAS OF LAW OR POLICY

3.1. Criminal law

As explained in Recital 12, the Services Directive aims to create a legal framework to ensure the freedom of establishment and the free movement of services between Member States but does not harmonise or prejudice and – as stated in Article 1(5) – does not affect Member States' criminal law rules. It is clear, for instance, that if a service provider from another Member State commits a criminal offence, such as libel or fraud, on the occasion of his service provision, this is outside the scope of the Services Directive.

However, it is also clear that criminal law rules cannot be used to restrict the fundamental freedoms guaranteed by Community law²⁹ and that Member States may not circumvent or prevent the application of the provisions of the Services Directive by making use of criminal law. This means, for example, that a Member State which – according to Article 9 of the Services Directive – cannot maintain an authorisation scheme because it is discriminatory or disproportionate, cannot circumvent this by imposing a criminal sanction in case of non-compliance with this authorisation scheme. In the same way, if a Member State cannot apply certain national requirements to incoming services because they do not comply with the criteria set out in Article 16 that Member State cannot circumvent this by imposing a criminal sanction for non-compliance with such requirements. Thus, when examining national requirements applicable to service providers Member States may also have to review certain provisions of their criminal law whose application could result in a circumvention of the obligations in the Directive.

3.2. Labour law and social security legislation

Article 1(6) states that the Services Directive does not affect labour law or the social security legislation of the Member States. The Directive neither contains any rules belonging to the area of labour law or social security, nor does it oblige Member States to modify their labour legislation or their social security legislation. Since there is no common Community law notion of labour law, Article 1(6) explains what is meant by labour law: any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers. This covers all those rules which deal with the individual employment conditions of workers and the relationship between the worker and his employer. It includes regulations on wages, working time, annual leave, and all the legislation that concerns contractual obligations between the employer and his employees. Article 1(6) furthermore states that the application of national

²⁹ See, for example, Judgment of 19 January 1999, *Calfa*, Case C-348/96; Judgment of 6 March 2007, *Placanica*, Joined Cases C-338/04, C-359/04 and C-360/04.

legislation must respect Community law. This means that, as regards posted workers, the receiving Member State is bound by the Posting of Workers Directive³⁰.

3.3. Fundamental rights

Article 1(7) states that the Directive has no impact on fundamental rights as recognised by Member States and by Community law, without further specifying this concept. Its second sentence refers to the right to negotiate, conclude and enforce collective agreements in accordance with national laws and practices which must respect Community law. Article 1(7) does not take any position as to whether negotiation, conclusion and enforcement of collective agreements are fundamental rights. In the context of this article, Recital 15 is of particular importance. It spells out the basic principle that there is no inherent conflict between the exercise of fundamental rights and the fundamental freedoms of the EC Treaty, and that neither prevails over the other³¹.

3.4. Private international law

As stated in Article 3(2), the Services Directive does not concern rules of private international law. Private international law rules, including the Rome Convention (and future Rome I and Rome II regulations)³² determine which private law rules are applicable, in particular to contractual and non-contractual obligations, in cases of litigation between providers and recipients of services or other providers. In its Article 17(15), the Services Directive provides for a specific derogation from the freedom to provide services clause, and thus ensures that rules of private international law will not be affected by the implementation of the Services Directive.

This is true for all rules of private international law, including those, as in Article 5 of the Rome Convention, which provide that in specific cases involving consumers the law of the state of the habitual residence of the consumer applies. It should, however, be noted that private international law rules only determine which private law rules apply to a contractual or extra-contractual relation, including one between a service provider and a consumer. They do not, for instance, determine which rules of public law apply. Whether or not the rules of the Member State of habitual residence of the consumer, other than private law rules, can be applied to a specific service provider is not determined by private international law but is governed by the Services Directive, in particular Article 16.

³⁰ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

³¹ Following the line of reasoning of the ECJ in its Judgments of 12 June 2003, *Schmidberger*, Case C-112/00, and of 9 December 1995, *Commission v France (Strawberries)*, Case C-265/95, the exercise of fundamental rights can and must be reconciled with the exercise of the fundamental freedoms of the EC Treaty.

³² Rome Convention on the law applicable to contractual obligations, OJ C 27, 26.01.1998, p. 34, which is currently being modernised and transformed into a Community instrument, see Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations ("*Rome I*"), COM/2005/0650 final. Regulation on the law applicable to non-contractual obligations ("*Rome II*") (Commission Proposal, COM/2006/0083 final) as adopted by the European Parliament on 10 July 2007.

Finally, the Services Directive does not concern the jurisdiction of courts. These questions are regulated by the existing Community Regulation concerning jurisdiction and the recognition and enforcement of judgments in civil and commercial matters³³.

4. THE RELATIONSHIP BETWEEN THE DIRECTIVE AND OTHER PROVISIONS OF COMMUNITY LAW

As a basic rule, the Services Directive applies in addition to existing Community law. Possible conflicts between the Services Directive and other instruments of secondary Community law have generally been explicitly addressed in the Directive, in particular by means of derogations from specific provisions³⁴. Nevertheless, Article 3 provides a rule for any residual and exceptional cases in which a conflict between a provision of the Services Directive and a provision of another instrument of secondary Community law could arise.

Article 3 states that, in case of conflict between a provision of the Services Directive and a provision of another instrument of secondary Community law, the provision of the latter takes precedence. This means that in such cases the provision of the other Community instrument prevails and the provision of the Services Directive will not be applied. It should be noted that this concerns only the specific conflicting provision and not the remaining provisions of the Services Directive which will still apply.

The question of whether or not a conflict exists between a provision of the Services Directive and a provision of another Community instrument has to be assessed carefully in each specific case. The mere fact that rules relating to specific aspects of a particular service have been established in another Community instrument (including those mentioned in Article 3) is not sufficient to conclude that a conflict exists with a provision of the Services Directive. In order to set aside a provision of the Services Directive, it has to be demonstrated that there is a contradiction between specific rules of both instruments. This assessment has to be based on a thorough interpretation of the provisions at issue in compliance with their legal basis and with the fundamental freedoms enshrined in Articles 43 and 49 of the EC Treaty.

5. ADMINISTRATIVE SIMPLIFICATION

Chapter II of the Services Directive (Articles 5 to 8) sets out an ambitious programme of administrative simplification and modernisation. It requires Member States to simplify administrative procedures, to set up “points of single contact” as single interlocutors for service providers, to provide for the possibility to complete procedures at a distance and by electronic means and to make information on national requirements and procedures easily accessible for service providers and service recipients.

Articles 5 to 8 apply to all procedures and formalities necessary for access to and exercise of a service activity, for all services covered by the scope of application of the Directive, whether imposed at central, regional or local level. They do not draw any distinction between domestic and foreign providers. Therefore, they apply in the same way to service providers established

³³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

³⁴ See, for instance, Article 5(3), Article 9(3) or Article 15(2)(d).

in another Member State, and to service providers established (or wishing to establish) in the territory of their own Member State.

Moreover, these articles apply to all procedures regardless of whether the service provider needs to comply with them to establish in a Member State or to provide services across borders (to the extent that procedures and formalities can be applied to providers established in other Member States and providing their services across borders)³⁵.

Administrative simplification as envisaged in the Services Directive will contribute to enhancing the competitiveness of the European economy³⁶. Member States may therefore want to consider the possibility of applying some or all of the provisions of Chapter II, in particular the points of single contact and electronic procedures, to services and matters not covered by the Services Directive.

5.1. Simplification of procedures and formalities applicable to service providers

According to Article 5(1), Member States have to examine all procedures and formalities applicable to access to a service activity and to the exercise thereof and must, if these procedures are not sufficiently simple, simplify them. This requires Member States to undertake a real effort of administrative simplification. When undertaking this exercise, Member States should examine and assess the procedures and formalities from the provider's perspective while keeping in mind that simplification of procedures will in turn reduce the administrative burden for the administration itself. Member States could take into consideration simplified administrative procedures used in other Member States and exchange best practice. The Commission will use its best endeavours to facilitate this.

The concept of procedures and formalities is a broad one and includes any administrative step which businesses are required to take, such as submission of documents, filing a declaration or registration with a competent authority. It covers not only procedures and formalities which are a pre-condition for the exercise of the service activity but also those imposed at a later stage, in the course of the exercise of the activity, or even upon its completion (for example an obligation to report on a yearly basis the details of transactions carried out).

In practical terms, Member States will have to assess whether their administrative requirements are indeed necessary or whether some procedures or parts of these procedures can be abolished or replaced by alternatives which are less burdensome for service providers. Member States will also have to assess the number of different administrative procedures a service provider has to deal with, their possible duplication, their cost, clarity and accessibility, as well as the delay and practical difficulties that these procedures imply for the providers concerned³⁷.

³⁵ In that respect, it has to be borne in mind that, on the basis of Article 16, Member States can impose their requirements on incoming service providers only in limited cases. See Section 7.1.3 of this handbook.

³⁶ In line with the renewed Lisbon Strategy and "Better Regulation" initiatives, see Commission Communication "Working together for growth and jobs – A new start for the Lisbon Strategy" COM (2005) 24 of 02.02.2005 and Commission Communication "A strategic review of Better Regulation in the European Union" COM (2006) 689 of 14.11.2006.

³⁷ See Recital 45.

Member States will furthermore have to assess whether all evidence and documents asked are necessary and whether it is necessary to demand that all evidence has to be produced by the service provider himself or whether certain information might be already available from other sources (for example other competent authorities). For example, rules by which a service provider is required to produce a full dossier, without any possibility of obtaining a waiver for some documents/evidence already in the administration's possession, are normally unnecessary and, if so, should be abolished. Likewise, procedures which require separate filings for different requirements could be simplified so as to permit single filings.

Member States will also have to assess whether it is justified to require that certain evidence is produced in a specific form, for example in its original form, as a certified copy or with a certified translation, or whether it would be sufficient to provide a non-certified copy or a non-certified translation. In any event and according to Article 5(3), Member States may only require documents to be produced in their original form, as a certified copy or to be accompanied by a certified translation if this is justified by an overriding reason relating to the public interest or if it is provided for by another Community instrument. It must be pointed out that the mere doubt as to the authenticity of a given document, or its exact content, can be addressed by appropriate contacts between competent authorities (in particular with the authority which has issued the document), notably through administrative cooperation. This should not be particularly burdensome since the Internal Market Information system (IMI)³⁸ will allow for documents to be easily uploaded and checked at a distance.

Moreover, pursuant to Article 5(3), Member States have to accept documents from other Member States which serve an equivalent purpose or from which it is clear that the requirement in question has been satisfied. This implies an effort on the part of national administrations to assess the substance, rather than just the form, of documents issued by other Member States. For example, Member States may not require production of a certificate of nationality, or of residence, where other official identification documents (for example a passport or an identity card) already prove these details.

Article 5(3) does not apply, however, to a number of documents referred to in the following Community instruments: the Professional Qualifications Directive³⁹, the Public Procurement Directive⁴⁰, the Lawyer Establishment Directive⁴¹ and the First and Eleventh Company Law Directives⁴².

³⁸ See Section 9.2.2 of this handbook.

³⁹ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005, p. 22.

⁴⁰ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

⁴¹ Directive 98/5/EC of the European Parliament and of the Council of 16 February 1998 to facilitate practice of the profession of lawyer on a permanent basis in a Member State other than that in which the qualification was obtained, OJ L 77, 14.3.1998, p. 36.

⁴² First Council Directive 68/151/EEC of 9 March 1968 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community, OJ L 65, 14.3.1968, p. 8; Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State; OJ L 395, 30.12.1989, p. 36.

According to Article 5(2), the Commission may use the Comitology procedure referred to in Article 40(2) to introduce harmonised forms to serve as “*equivalent to certificates, attestations and any other document required of a provider*”. Harmonised forms may be introduced for specific certificates or similar documents, when divergences between national documents designed to serve similar purposes make it difficult for competent authorities to ascertain the content or the meaning of the certificate, and service providers, as a result, are faced with a multiplicity of different forms. For instance, proof of establishment in a Member State can be drawn from a number of different legal documents, which range from a certificate of incorporation issued by a public authority to an attestation of membership with a chamber of commerce or trade, depending on the Member State. If practical experience were to show that service providers continue to face a multitude of different forms (despite the assistance offered by the administrative cooperation to be established under the Directive), a harmonised form could prove to be an effective solution. This is, however, a decision that may only be taken at a later stage, on the basis of the experience gained with application of the Services Directive.

5.2. Points of Single Contact

On the basis of Article 6, Member States are obliged to ensure that service providers can complete all procedures and formalities needed for access to and exercise of their service activities through “points of single contact”. This is one of the obligations of result in the Services Directive. Member States will have to take a number of decisions as to the manner of organising their “points of single contact” and will have to ensure that the “points of single contact” are set up and functioning at the latest by the end of the implementation period.

The “points of single contact” are meant to be the single institutional interlocutors from the perspective of the service provider, so that he does not need to contact several competent authorities or bodies to collect all relevant information and to complete all necessary steps relating to his service activities. Member States need to make the “points of single contact” available for all service providers whether established in their territory or in the territory of another Member State. Of course, the obligation only applies to services sectors covered by the Directive but Member States may consider extending the activities of the “points of single contact” to all or some of the sectors excluded from the Directive. The same logic applies as regards certain matters excluded from the Directive. For example, Member States could consider the possibility of including certain tax-related requirements, such as the allocation of VAT numbers, in the “points of single contact”.

The objective of setting up one-stop shops for businesses has been pursued by Member States for several years and the obligation contained in the Services Directive is therefore in line with, and complementary to, the aims of other Community initiatives, in particular the commitment taken by the European Council to put in place one-stop shops for start-ups by the end of 2007⁴³. However, the legal obligation contained in the Services Directive is broader and comprises all kinds of businesses (not only start-ups), service recipients (for information purposes) and all types of procedures (not only start-up procedures). On the other hand, it is

⁴³ The objective of setting-up, by the end of 2007, one-stop contact points for entrepreneurs was included in the “*integrated guidelines for growth and jobs 2005-2008*” (guideline No 15), adopted by the Council in June 2005; Council Recommendation of 12 July 2005 on the broad guidelines for the economic policies of the Member States and the Community (2005/601/EC).

clear that other functions fulfilled by one-stop shops for start-ups⁴⁴, such as coaching, training, financial advice and business-plan guidance, go further than the obligations laid down by the Services Directive. Implementation of the one-stop shop target set by the European Council will contribute to the implementation of the “points of single contact”. In any event, it is clear that Member States do not have to provide for two separate networks and that they can build on existing initiatives to fulfil the legal obligation contained in the Services Directive.

5.2.1. The setting-up of the “points of single contact”

Each Member State is free to decide how to organise the “points of single contact” in its territory but needs to ensure that they are available for all service providers that benefit from the Directive to complete all procedures and formalities relating to services and matters falling within the scope of application of the Directive.

The concept of “points of single contact” does not mean that Member States have to set up one single centralised body in their territory. Member States may decide to have several “points of single contact” within their territory. The “point of single contact” must however be “single” from the individual provider’s perspective (i.e. the service provider should be able to complete all procedures by using only one such point of contact).

Member States may choose to have different “points of single contact” for different sectors, such as “points of single contact” for regulated professions and “points of single contact” for commercial activities such as retail, etc. However, it is important that possible gaps in coverage be avoided. Therefore, if Member States choose to set up “points of single contact” according to specific sectors, they will need (additional) “points of single contact” which are competent for all services that may not be covered by the sector specific “points of single contact”. In any case, if a Member State decides to set up different “points of single contact”, differences in coverage should be easily identifiable to the service provider. This is likely to require a central webpage which would enable service providers to easily identify and contact the relevant “points of single contact” in a given Member State. Also, if different “points of single contact” exist, a “point of single contact” which has been contacted by a service provider, but which is not competent for this service provider’s activities, should assist the service provider to find the “point of single contact” competent in his case.

Setting up different “points of single contact” for foreign and national service providers might result in discrimination. Discrimination might also arise if Member States set up different “points of single contact” for establishment-related questions and questions related to the provision of cross-border services. These differences therefore should be avoided.

Member States may decide that “points of single contact” only fulfil a coordinating role, so that final decisions remain with the existing competent authorities. Member States deciding to do so would have to organise the communication between the “points of single contact” and the competent authorities so as to ensure their rapidity and reliability. Member States may nevertheless decide to allocate certain decisional powers to the “points of single contact”. For instance, Member States could consider that the “points of single contact” are directly responsible for the registration of business or for the granting of authorisations of a simple

⁴⁴ See Commission Staff Working Document: Assessing Business Start-up Procedures in the context of the renewed Lisbon strategy for growth and jobs (SEC(2007) 129).

nature. In any case, the Directive makes clear that the “points of single contact” do not prejudice the allocation of competences among competent authorities⁴⁵.

Also, Member States are free to decide to whom they want to attribute the task of “points of single contact”: to competent authorities at national, regional or local level, to professional chambers, to other professional organisations or even to private operators. In any event, the rules for public procurement have to be respected if applicable, in particular the provisions on public service contracts⁴⁶. If Member States decide to have “points of single contact” run by private operators, Member States should put in place the appropriate mechanisms to ensure that they fulfil their task in accordance with the requirements laid down by the Directive.

Moreover, Member States may also choose to set up “points of single contact” on an electronic basis only, thus not putting in place a specific physical infrastructure where service providers can actually go to. In this case, particular emphasis needs to be placed on the clear structure of information and procedures provided on webpages or in similar electronic tools, which must give comprehensible guidance as regards all procedures and formalities relating to access to and exercise of service activities. Service providers should be able to easily identify all procedures and formalities relevant to their particular requests and get a consistent overview of their ongoing applications or requests through these electronic-only “points of single contact”. Accordingly, it would not be sufficient if Member States provide a mere list or compilation of web links on a central webpage. Also, if “points of single contact” are set up on an electronic basis only, it will be necessary to establish a helpline which service providers can contact in case of difficulties. Member States should nevertheless consider the possibility to support the electronic functioning of the “points of single contact” by means of a certain physical infrastructure, in particular if this facilitates their use by service providers not necessarily familiar with the use of electronic means.

Finally, Member States are free to choose how to finance the “points of single contact”. As stated in Recital 49, “points of single contact” may charge users for the services they render. However, the fees charged must be proportionate to the effective cost of the procedures dealt with. In any case, charges should not be so high as to discourage service providers from making use of the “points of single contact”. Furthermore, Member States may also entrust “points of single contact” with the collection of other administrative fees, such as fees of supervisory bodies.

The Commission will use its best endeavours to facilitate the exchange of best practice concerning the organisation and financing of “points of single contact” between Member States.

5.2.2. The completion of procedures and formalities through the “points of single contact”

As mentioned above, “points of single contact” have to be available for completion of the procedures and formalities which service providers have to comply with in a Member State to have access to or exercise a service activity (whether via an establishment or across borders from another Member State, to the extent that procedures and formalities are applicable in the

⁴⁵ See Article 6(2).

⁴⁶ See in particular Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114.

case of cross-border services). This includes authorisations as well as declarations, notifications, the allocation of a company registration number and other procedures and formalities. It should be clear that subsequent appeal procedures, whether of a judicial or administrative nature, such as lodging of complaints or actions for annulment of a decision, do not have to be dealt with by “points of single contact”.

To complete all procedures through “points of single contact”, service providers need to be able to obtain all pertinent information, forms and documents relevant to the procedures, to submit documents and applications and to receive the decisions and other replies relating to their application through them.

Some of the procedures to be completed via the “points of single contact” may be complex, such as certain procedures for the establishment of large commercial retailers, and/or involve a number of different authorisations. However, as mentioned above, “points of single contact” may have a coordinating role only, with the decisional power remaining with the specific competent - authorities. In any case, it remains very important that “points of single contact” give providers a clear overview of all steps they need to take and supply them with procedural assistance and feedback on ongoing procedures.

Of course, it is not an obligation for service providers to resort to the “points of single contact”. They remain free to use or not to use this possibility and they are also free to contact any competent authority directly and submit/receive documents, authorisations and the like directly. In cases where the procedures and formalities undertaken via the “point of single contact” involve time periods (for instance because there is a deadline for the submission of a document, or because a competent authority has to take a decision as regards a request for an authorisation within a given time limit), the moment of reception by the “point of single contact” of all the required documents should be the point in time relevant for calculating such time period.

Once a request has been made, the “points of single contact” have to respond as quickly as possible and inform the applicant without delay if a request is faulty or unfounded.

Finally, it is worth noting that the “points of single contact” provided for in the Services Directive and the “contact point” envisaged in Article 57 of the Directive on the Recognition of Professional Qualifications⁴⁷ pursue different objectives. Whereas according to Article 57 of the latter Directive, one single contact point is to be set up in each Member State which will make available information concerning recognition of professional qualifications and assistance to citizens wishing to have their professional qualifications recognised in another Member State, the “points of single contact” referred to in the Services Directive will make it possible for citizens and businesses to actually complete through it all procedures and formalities relating to access to and exercise of service activities, including those related to the recognition of professional qualifications.

⁴⁷ Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, OJ L 255, 30.9.2005, p. 22, Article 57.

5.3. Information and assistance through the “points of single contact”

5.3.1. The information to be provided

Article 7(1) contains a list of essential information which Member States must make easily accessible through the “points of single contact” to service providers and service recipients. This information needs to be accessible at a distance and by electronic means. “Points of single contact” need to reply as quickly as possible to any request for information and shall, in case the request is unclear or incomplete, inform the applicant accordingly without delay.

Information to be provided includes the requirements service providers have to comply with when they want to provide services in a Member State. It also covers the means of, and conditions for, accessing public registers and databases on providers and services, such as business registers, databases on regulated professions or public databases on services statistics. Information to be provided also comprises the contact details of the competent authorities, including those responsible for supervising the exercise of the service activities, as well as the contact details of the associations or organisations from which providers or recipients may obtain practical assistance or additional information. Information on the means of redress which are generally available in the event of dispute should also be available.

To implement this obligation Member States will have to organise a certain amount of information. Existing databases or online information tools (such as websites of ministries or regional authorities) should facilitate the task, but Member States will still have to make an important effort to organise the information in a clear manner (for instance by sector of activity and differentiating between the requirements that need to be fulfilled by those wanting to establish and by those just wanting to provide services across borders) and to make sure that it is provided in simple, straightforward language and presented in a coherent, understandable and structured way. A simple reference to, or reproduction of, the relevant legal texts will clearly not be sufficient. Member States will also have to review and update the information regularly.

The Directive does not deal with questions of liability arising from the actions or omissions of the “points of single contact”, such as liability for incorrect or misleading information. This will be determined by national law⁴⁸.

5.3.2. The assistance to be provided

In addition to the information on the requirements which service providers have to comply with, competent authorities should provide, at the request of service providers or recipients, assistance on the way these requirements are usually applied or interpreted. Such assistance may, for instance, be given by way of easily understandable guides which could explain the general application of certain terms and conditions and the different procedural steps to be taken. As clarified in Article 7(6), this obligation of assistance is an obligation to provide general information and does not require the competent authority to provide legal advice in individual cases.

This additional information also has to be provided in a clear and unambiguous manner and be easily accessible at a distance and by electronic means, such as via the Internet or by

⁴⁸ See Recital 51.

e-mail. As explained in Article 7(4), competent authorities need to reply as quickly as possible to any request for information or assistance and have to, in case the request is unclear or incomplete, inform the applicant accordingly without delay.

5.3.3. *Encouraging the use of other languages*

In order to improve the functioning of the Internal Market and to facilitate cross-border establishment and provision of services, it is important – and in the interest of Member States, providers and recipients of services – that information through the “points of single contact” is not only made available in the Member State’s own language(s) but also in other Community languages⁴⁹. As established in Article 7(5), this needs, to be encouraged. For instance, Member States could consider making information available in the languages of neighbouring Member States or in languages most commonly used by business in the EU.

5.4. Electronic procedures

The setting-up of fully functioning and interoperable electronic procedures by the end of the implementation period is a key element for attaining the goal of administrative simplification of the Services Directive. Electronic procedures are an essential tool to make administrative procedures considerably less burdensome for service providers and for public authorities alike. The possibility to complete administrative procedures at a distance will be particularly important for service providers from other Member States. Moreover, electronic procedures will also contribute to the modernisation of public administrations by rendering them more efficient. Following an initial investment, the use of electronic procedures should prove to be money- and time-saving for administrations.

The setting up of electronic procedures that can be used across borders has been part of Member States’ and the Community e-Government objectives for some time now⁵⁰. In the Services Directive, Member States have now entered into a legal commitment to have “e-Government” services in place by a set date. By the end of 2009, service providers should be able to complete electronically and at a distance all procedures and formalities necessary to provide a given service.

5.4.1. *The scope of the obligation to provide for electronic procedures*

Article 8 establishes an obligation for Member States to “*ensure that all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, through the relevant point of single contact and with the relevant competent authorities*”.

⁴⁹ This does not interfere, as indicated in Article 7(5) with Member States’ legislation on the use of languages.

⁵⁰ At political level, the 2005 Manchester Ministerial Declaration on e-Government recognised that “*the effective use of ICT should have a positive impact on the four Internal Market freedoms of movement included in the EC Treaty (persons, goods, capital and services)...*” and set the target of 2010 for widely available, trusted access to public services across the EU through mutually recognised electronic identifications (“*By 2010 European citizens and businesses shall be able to benefit from secure means of electronic identification that maximise user convenience while respecting data protection regulations. Such means shall be made available under the responsibility of the Member States but recognised across the EU*”).

In order to ensure that electronic procedures are easily accessible for providers, they should in principle be available via publicly accessible communication networks such as the Internet. Such an understanding is also in line with the use of the term “electronic means” in other Internal Market instruments⁵¹.

Article 8 covers procedures and formalities required for establishment as well as any procedure and formality which might be necessary in the case of cross-border provision of services. Electronic procedures have to be available not only for service providers resident or established in the Member State of the administration but also for service providers resident or established in other Member States. This means that service providers should be able to complete procedures and formalities by electronic means across borders⁵².

Procedures and formalities which service providers need to be able to complete by electronic means, in principle, encompass all procedures and formalities relating to access to a service activity and to the exercise thereof. Electronic means have to be available for the whole administrative process, from the service provider’s initial application/submission of documents to the final reply, if required, from the relevant competent authority. Nevertheless, Article 8(2) provides for three logical exceptions from the obligation to provide for electronic means: (i) the inspection of premises on which the service is provided; (ii) the inspection of the equipment used by the provider; and (iii) the physical examination of the capability or the personal integrity of the provider or his responsible staff.

On the basis of Article 8, electronic procedures should be available for transactions both through the “points of single contact”⁵³, and also for direct transactions with competent authorities. In practical terms this means first that electronic procedures have to be available for all administrative procedures which service providers will have to be able to carry out through the points of single contact. Second, service providers should have a possibility to communicate directly with a relevant authority if they so choose, for example in cases where only one competent authority is involved and it may be easier to deal directly with the authority.

Establishing electronic procedures for the completion of all necessary procedures and formalities does not, of course, mean that Member States cannot maintain or provide for other means to complete procedures and formalities⁵⁴. On the contrary, different means to complete

⁵¹ The term “electronic means” was defined, for example, in Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ L 217, 5.8.1998, p. 18 (known as the “Transparency Directive”). Directive 2000/31/EC (Directive on Electronic Commerce, OJ L 178, 17.7.2000, p. 1) followed the same definition. The term has also been used in the new public procurement directives – Directives 2004/18/EC (OJ L 134, 30.04.2004, p. 114) and 2004/17/EC (OJ L 134, 30.04.2004, p. 1). Directive 98/48/EC defines “electronic means” as meaning that “the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means”. The same Directive explicitly indicates in its Annex V that services transmitted over voice telephony and telefax are not considered to be services provided by electronic means. In the context of public procurement it is considered, for example, that the network used for e-procurement must be open and everybody must be able to connect to it, and that these generally available means cover internet and e-mail.

⁵² See Recital 52.

⁵³ See Article 6.

⁵⁴ See Recital 52.

administrative procedures and formalities should possibly co-exist. However, in any case, electronic procedures must be available as a choice for service providers.

Finally, in line with the e-Government objectives, it would make sense to establish electronic procedures not only for the services covered by the Services Directive, but also for other services as far as the benefits of electronic procedures established under the Services Directive could also be used more widely in the framework of e-Government services to businesses.

5.4.2. *The implementation of electronic procedures*

In a number of Member States, some e-Government services for businesses have already been put in place or are underway. Also, several initiatives aimed at interoperable e-Government services have been launched and are ongoing both at national and Community level, in particular in the framework of the i2010 strategy⁵⁵.

The implementation of the obligation undertaken in Article 8 by the end of 2009 will be a considerable challenge for Member States, which should increase their already ongoing efforts to work towards interoperable e-Government services for businesses. Member States are encouraged to build upon the existing initiatives. Indeed, the obligation in the Services Directive should be seen as a chance to boost current efforts and to help Member States to focus and deliver the objectives they have set themselves as part of their e-Government work.

One of the core issues to be tackled in order to put in place functioning electronic procedures across the EU is interoperability⁵⁶. Given the fact that at a national level different requirements and legal, organisational, semantic and technical arrangements are in place with regard to existing or planned electronic procedures, several issues may arise, be they political, legal or technical (linked to identification, authentication, electronic document exchange/recognition, etc.), which would require a certain level of coordination and cooperation between Member States. This, however, does not mean that Member States are expected to harmonise their e-Government solutions or to use one model only. Member States are free to choose their models, while bearing in mind that electronic procedures have to be available both to their own nationals/residents and to service providers from other Member States, who should in principle be able to use their national means to deal with public authorities in other Member States. This would be in line with the objective of cross-border interoperable e-Government services, the idea of administrative simplification and the facilitation of cross-border service provision. If access to e-Government services in another Member State requires service providers to use the (identification/authentication) means of that other Member State new complications and burdens for services providers may arise. Indeed, if service providers need to obtain national means of all Member States where they wish to provide their services, this may result in delays and costs which in principle should be avoided (moreover, in some Member States they may even be required to obtain several

⁵⁵ Communication from the Commission of 1 June 2005 to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – “i2010 – A European Information Society for growth and employment”, COM(2005) 229 final.

⁵⁶ *The EIF-European Interoperability Framework* (Version 1.0) defines interoperability as “the ability of information and communication technology (ICT) systems and of business processes they support to exchange data and to enable the sharing of information and knowledge” (p. 5), see <http://ec.europa.eu/idabc/en/document/2319/5644>.

means, a separate one for each application, which further complicates the situation). When considering how to tackle this issue Member States need to avoid creating additional burdens or adopting solutions that may slow down the introduction of interoperable e-Government services across borders in the long run.

In order to work towards interoperable solutions, the Commission will play an active role and assist Member States in the task of setting up electronic procedures. In particular, the Commission will encourage the exploitation of synergies between the existing e-Government initiatives under the i2010 strategy and the objective of achieving electronic procedures across the EU by the end of 2009.

The key issues linked to cross-border interoperability of different e-Government services (like authentication/identification or e-documents) are already being discussed, and possible solutions are being considered, in the e-Government framework. It is not clear yet whether and in what respect there will be a need to resort to the Comitology procedure referred to in Article 8(3). The aim should be not to replicate the work done in other fora, but to use Comitology only if value added can be achieved by this. In order to decide whether a Committee should be used, and what role it could have, it is necessary to further analyse the issue of interoperability to see whether and to what extent the existing initiatives are not sufficient to solve the issues.

6. FREEDOM OF ESTABLISHMENT

The provisions of Chapter III (Articles 9 to 15) apply only to cases of establishment, not to cases of cross-border service provision, which are dealt with in Chapter IV.

They apply to all cases where a business seeks to establish in a Member State, irrespective of whether a provider intends to start a new business or whether an existing business seeks to open a new establishment, for example a subsidiary or a branch. It covers both the situation where a service provider seeks to establish in another Member State and the situation where a provider seeks to establish in his own Member State.

The provisions of Chapter III apply to all requirements relating to the establishment of a service provider, whether imposed at national, regional or local level. They also apply to rules enacted by professional bodies and other professional associations or organisations within the meaning of Article 4(7) which in the exercise of their legal autonomy regulate in a collective manner access to a service activity or the exercise thereof⁵⁷.

6.1. Authorisation schemes and procedures

Authorisation schemes are one of the most common formalities applied to service providers in Member States and constitute a restriction to the freedom of establishment, as consistently recognised by the case law of the ECJ⁵⁸. For this reason, the Services Directive provides that

⁵⁷ See the definition of “requirement” in Article 4(7) and the definition of “competent authority” in Article 4(9). For ECJ case law on this issue see, for example, the Judgment of 15 December 1995, *Bosman*, Case C-415/93, and case law cited therein.

⁵⁸ Judgment of 22 January 2002, *Canal Satélite*, Case C-390/99.

Member States have to review their existing authorisation schemes and make them compliant with Articles 9 to 13 of the Directive.

Articles 9 to 13 apply to all authorisation schemes relating to access to or exercise of a service activity. However, as stated in Article 9(3), these articles do not apply to those aspects of authorisation schemes which are governed, directly or indirectly, by other Community instruments⁵⁹. Community instruments indirectly governing some aspects of authorisation schemes should be understood as those Community acts which, while not providing themselves for authorisation schemes, nevertheless explicitly make reference to the possibility for Member States to impose an authorisation scheme. Community instruments which do not contain any such explicit reference cannot be considered as governing indirectly such schemes.

As regards those aspects of authorisation schemes which are not governed by other Community instruments, the relevant provisions of the Services Directive are applicable. For example, the Directive on Waste⁶⁰ explicitly requires Member States to subject certain activities relating to waste water to authorisation regimes and therefore those authorisation schemes will not be subject to evaluation pursuant to Article 9. However, since the Directive on Waste does not deal with specific aspects, such as the conditions for granting the authorisation, its duration or the applicable procedure, Articles 10 to 13 will be applicable to those aspects. Thus, Member States will have to ensure that such authorisation schemes (and their procedures) comply with the rules provided for in these articles.

Articles 9 to 13 establish a number of general principles for the review and adaptation of authorisation schemes. In order to avoid gaps in implementation and to ensure that these principles are complied with at all levels, Member States should consider embodying these principles in their horizontal framework legislation implementing the Directive or, if existing, in general legislation dealing with authorisation schemes such as codes of administrative procedures.

6.1.1. The identification and evaluation of authorisation schemes

The term “authorisation scheme” encompasses any procedure under which a provider or a recipient is in effect required to obtain from a competent authority a formal decision, or an implied decision, concerning access to a service activity, or the exercise thereof⁶¹.

When Member States review their legislation to identify their existing authorisation schemes, the key element to look for is whether the legislation in question requires a decision from a competent authority, be it explicit or implicit, before the service provider can lawfully exercise the activity. The notion of authorisation scheme includes, for example, procedures by which a service provider needs to make a declaration to a competent authority and can only exercise the activity upon expiry of a certain time period if the competent authority has not reacted. It also includes cases in which declarations have to be made by the service provider,

⁵⁹ For instance, Articles 9 to 13 will not apply, for regulated professions, to those aspects of authorisations which are governed by Directive 2005/36/EC.

⁶⁰ Council Directive 75/442/EEC of 15 July 1975 on waste, OJ L 194, 25.7.1975, p. 47, as codified in Directive 2006/12/EC of the European Parliament and of the Council of 5 April 2006 on waste, OJ L 114, 27.4.2006, p. 9.

⁶¹ See the definition of “authorisation scheme” in Article 4(6).

which then have to be acknowledged by the competent authority, insofar as this acknowledgement is necessary in order to commence the activity in question or for the latter to be lawful.

In accordance with the case law of the ECJ⁶² and Article 9(1) of the Services Directive, authorisation schemes may be maintained only if they are non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.

Thus, for each identified authorisation scheme a Member State will, first of all, have to verify whether the scheme is non-discriminatory, i.e. whether it does not provide, directly or indirectly, for different treatment of domestic providers and of providers from other Member States. Secondly, the Member State will have to assess whether the authorisation scheme pursues a public interest objective (one of the so-called overriding reasons relating to the public interest⁶³) and whether the authorisation scheme is indeed suitable for securing the attainment of that objective. Finally, the Member State will have to assess whether the objective pursued cannot be achieved by other less restrictive means.

Member States should keep in mind that, in many situations, authorisation schemes can be simply abolished or replaced by less restrictive means, such as monitoring of the activities of the service provider by the competent authorities or simple declarations (which do not constitute an authorisation scheme) to be made by the service provider. In such cases, the maintenance of prior authorisation schemes would not be proportionate.

Article 9 not only requires Member States to evaluate their authorisation schemes and to abolish or modify those schemes which are not justified, but also to report to the Commission the reasons why they consider that the remaining ones are compatible with the criteria of non-discrimination, are justified by an overriding reason relating to the public interest and are proportionate.

6.1.2. The conditions for granting an authorisation

Whereas Article 9 requires Member States to assess the need to maintain an authorisation scheme as such, Article 10 contains specific obligations as to the conditions for the granting of an authorisation. These criteria, derived from ECJ case law, ensure on the one hand that authorisation schemes become less burdensome for service providers and, on the other hand, make them more predictable and guarantee transparency. The objective, as Article 10(1) states, is to make sure that service providers can be confident that decisions are not taken in an arbitrary manner.

Article 10(2) requires that the conditions for granting authorisations comply with a number of criteria. First of all, the conditions themselves have to be non-discriminatory, justified by an overriding reason relating to the public interest and must not go beyond what is necessary. Member States will have to make sure that the conditions for granting an authorisation – such as insurance requirements, requirements concerning proof of solvency or requirements related to the staff of the service provider – comply with the criteria of non-discrimination, necessity and proportionality.

⁶² Judgment of 20 February 2001, *Analir*, C-205/99.

⁶³ See the definition of “overriding reason relating to the public interest” in Article 4(8).

Article 10(2) also requires that the conditions for granting authorisations be clear and unambiguous, objective, transparent and accessible, and made public in advance. Clarity refers to the need to make criteria easily understandable to everybody by avoiding ambiguous language. Objective criteria should not leave a margin of appreciation to the competent authority in a way that would allow for arbitrary decisions. This is necessary to ensure that all operators are treated fairly and impartially, and applications are assessed on their own merits. Transparency, accessibility and publicity guarantee that the authorisation scheme is comprehensible for all potential applicants and that the different steps in the procedure are known in advance.

The criteria established in Article 10(2) should apply to authorisation schemes governing access to and exercise of service activities at all levels. In order to avoid gaps in implementation, Member States should consider incorporating them as part of the general principles in their horizontal framework legislation implementing the Directive or in general legislation dealing with administrative proceedings.

6.1.3. The non-duplication of requirements and controls

Service providers established in a Member State will often have obtained an authorisation in this Member State and had already proven that they comply with a number of obligations and conditions. In line with the case law of the ECJ⁶⁴, Article 10(3) states that the conditions for granting an authorisation for a new establishment may not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose to those to which the provider was already subject in the same or another Member State. This means that the competent authority, when applying its national requirements, has to take into account the equivalent or essentially comparable requirements which have already been complied with by the service provider⁶⁵. In order to ensure effective compliance with Article 10(3), Member States should lay down a clear obligation on the part of the competent authorities to take account of equivalent requirements already complied with in other Member States⁶⁶. This could be done as part of the horizontal framework legislation implementing the Directive. Alternatively, it could be included in national legislation dealing with administrative proceedings.

6.1.4. The duration of authorisations

Having a limited duration for authorisations hinders the exercise of service activities, since it may prevent the service provider from developing a long term strategy, including as regards investments, and generally speaking, introduce an element of uncertainty for businesses. Once a service provider has proven that he complies with the requirements for the service provision, there is generally no need to limit authorisations in time. Thus, Article 11 provides that the authorisation is to be generally granted for an unlimited period.

⁶⁴ Judgment of 22 January 2002, *Canal Satélite*, Case C-390/99, paragraph 36.

⁶⁵ See Recital 61.

⁶⁶ Article 10(3) specifies that the provider and the “liaison points” established in the Chapter on administrative cooperation including the “liaison points” of the Member State of (first) establishment, have a duty to assist the competent authority in order to ascertain which requirements are equivalent or essentially comparable to those applicable in its territory. In some cases, indeed, competent authorities will be able to more easily ascertain equivalence by resorting to the administrative cooperation system set up by the Directive and liaising directly with their counterparts in other Member States.

Article 11 allows exceptions to this general rule of unlimited duration for authorisations, *inter alia* when the limitation in time can be justified by an overriding reason relating to the public interest or when the number of available authorisations is limited by an overriding reason relating to the public interest.

When implementing the Services Directive, Member States will have to establish the general principle of unlimited duration of authorisations and the possible exceptions to it. This does not prevent Member States from revoking authorisations if the conditions are no longer complied with, as expressly provided for by Article 11(4).

When considering the need to maintain a time limit for authorisations, because of the need to protect a general-interest objective (for example in order to protect recipients of services by ensuring that providers comply with the obligation to follow certain courses periodically), Member States should first carefully consider whether ongoing supervision of the service provider, coupled with the possibility to revoke authorisations, is not sufficient to attain the objective pursued (in the example above, a less restrictive alternative is to require the providers to submit proof of the courses attended).

By contrast, in cases where the number of available authorisations is limited, a limitation of authorisations in time may in many cases be necessary in order to ensure that all service providers have access to the market on an equal basis. In any event, in cases in which the number of authorisations is limited because of the scarcity of natural resources or technical capacity, Member States are, on the basis of Article 12, obliged to grant authorisations for a limited time period only.

6.1.5. *The territorial scope*

Authorisations which are not granted for the whole territory of a Member State but for a specific part only are likely to hinder the exercise of service activities and to constitute an additional burden on service providers. In most cases, there is no need to limit the territorial scope of the authorisation if a service provider has been granted an authorisation and is thus allowed to exercise his activity in the Member State. That is why Article 10(4) provides that authorisations shall generally enable the provider to have access to the service activity or to the exercise of that activity throughout the national territory, including by means of setting up agencies, subsidiaries, branches or offices.

However, Member States may limit the territorial scope of authorisations in cases in which individual authorisations for each establishment or a limitation of the authorisation to a certain part of the territory are justified by an overriding reason relating to the public interest, are proportionate and non-discriminatory. Individual authorisations for each establishment will normally be justified in cases where the authorisation is linked to a physical infrastructure (for example a shop) because an individual assessment of each installation in question may be necessary.

If, in a Member State, the granting of an authorisation for a given activity is within the remit of regional or local authorities, the Directive does not require Member States to change this. However, the mere fact that the competence to grant authorisations lies with local or regional authorities is not in itself a valid reason justifying a territorial limitation of the validity of the authorisations.

Rather, once an authorisation has been granted by the competent regional or local authority (for example of the place where the provider sets up his establishment), the authorisation will, in principle, have to be recognised by all other authorities of the Member State. Thus, subject to justified exceptions, an authorised provider may not be required to obtain another authorisation by a different authority if he wishes to exercise his activity throughout the whole territory. For example, an operator providing debt recovery services which has been authorised to exercise his activity by one competent local authority may not be subject, in principle, to additional authorisation schemes by other local authorities in the same Member State⁶⁷.

Again, Member States should consider adopting this principle (and likewise the ones below, i.e. the requirements relating to the limitation of the number of authorisations, the obligation to state reasons and the right of appeal as well as the requirements for authorisation procedures) in their horizontal framework legislation implementing the Directive. Alternatively, it could be included in national legislation dealing with administrative proceedings.

6.1.6. *Limitations to the number of authorisations*

Limitations on the number of available authorisations are only permissible if they are motivated by the scarcity of available natural resources or technical capacity or if they are justified by an overriding reason relating to the public interest.

On the basis of Article 12, where the number of available authorisations is limited because of the scarcity of natural resources or technical capacity, there has to be a specific selection procedure in order to ensure impartiality and transparency and conditions of open competition⁶⁸. Impartiality specifically requires a judgment on the merits of each application, and bars the competent authorities from conferring any advantage, even *de facto*, to any of them. For instance, Member States will have to ensure that adequate rules to prevent conflicts of interest are in place. The requirement of transparency relates, above all, to the obligation to give adequate publicity to the selection procedure. In particular, the administration will have to publish all relevant information on the procedure, including the subject-matter of the authorisation scheme, the reasons why the number of authorisations is limited, any applicable deadline, and the criteria which will be employed in order to select the successful candidates.

Article 12 also indicates that these authorisations may only be granted for a limited period of time and may not be renewed automatically. The period for which authorisations are granted shall be appropriate, i.e. should be such as to enable the provider to recoup the cost of investment and to generate a fair return on the investment made⁶⁹.

6.1.7. *The obligation to state reasons and the right of appeal*

According to Article 10(6), any decision taken by the competent authorities, except for the decision to grant the authorisation sought by the applicant, must be fully reasoned. This means that the administration must disclose all reasons, in fact and in law, which led the

⁶⁷ Judgement of 18 July 2007, *Commission v Italy*, Case C-134/05, paragraph 61.

⁶⁸ See Recital 62.

⁶⁹ See Recital 62.

competent authority to take the decision in question. Merely tautological or standard phrases do not satisfy the requirements of this provision.

Closely related to this obligation is the obligation, also provided for in Article 10(6), that all decisions should be open to challenge before the courts or other instances of appeal. Fully reasoned decisions are necessary in order to guarantee effective judicial review.

6.1.8. The authorisation procedures

Service providers can be faced with lengthy and non-transparent authorisation procedures which may leave room for arbitrary and discriminatory decisions. In order to remedy this situation, Article 13 requires that procedures are based on objective, transparent rules to safeguard that the applications will be dealt with in an impartial way. When implementing the Services Directive, Member States will have to ensure that procedures are neither dissuasive, nor unduly complicate or delay the provision of the service. Moreover, procedural rules should be easily available and easily understandable.

Applications for authorisation must be acknowledged and processed as quickly as possible (Article 13(3) and (5)). If the application is incomplete, the applicant must be promptly notified of the need to supply additional documents or information. As soon as it is established that the conditions for granting an authorisation are met, the authorisations must be granted (Article 10(5)). When an application is rejected because it fails to comply with the required procedures or formalities, the applicant must be informed of the rejection as quickly as possible. Service providers might then quickly decide whether to take legal action.

In any event, authorisation procedures need to be carried out within reasonable periods of time. Such periods of time within which authorities will need to complete authorisation procedures will need to be fixed and made public in advance by Member States (Article 13(3)). Which period of time can be considered reasonable for a given type of authorisation procedure will depend on the complexity of the procedure and the issues involved, and it is clear that Member States might set different periods of time for different types of authorisation schemes.

In accordance with Article 13(4), Member States must provide that – in case an application has not received any response within the set time period – the authorisation will be deemed to have been granted to the provider. This mechanism of tacit authorisation has already been adopted by many Member States in their efforts to achieve administrative simplification for the benefit of businesses and citizens. The mechanism of tacit authorisation leaves in any case sufficient time for competent authorities to examine the application since the time period should be fixed in relation to the time necessary for examination of an application and the time period runs only from the time when all documentation has been submitted (Article 13(3)). Moreover, Member States can lay down that competent authorities may in exceptional cases, when this is justified by the complexity of the issue, extend the time period once for a limited time. Such an extension and its duration need to be duly motivated and notified to the applicant before the initial period has expired.

There are specific cases where Member States may – if this is justified by overriding reasons relating to the public interest – decide to provide for different arrangements than a mechanism of tacit authorisation. This might be the case, for instance, for activities with a potentially lasting impact on the environment. At any event, even when Member States opt for these

alternative arrangements, they must still guarantee fast procedures and have to ensure that the decisions are reasoned and open to challenge before the courts.

Finally, procedures must be easily accessible to applicants (see Articles 6 to 8). Any charges which applicants may incur need to be reasonable (i.e. they should not represent a significant economic barrier, account being taken of the nature of the activity and the investment usually associated with it) and proportionate to the cost of the authorisation procedures.

6.2. Prohibited establishment requirements

Article 14 establishes a list of requirements which Member States cannot impose for access to or exercise of a service activity. These requirements are discriminatory or are in other ways particularly restrictive and thus cannot be maintained. In many cases the ECJ has already found them to be incompatible with Article 43 of the EC Treaty.

In order to ensure proper implementation, Member States will have to examine their legislation, and remove requirements of the type listed in Article 14 in a systematic way and for all service activities covered by the Directive. Member States are also prevented from newly introducing such requirements in the future. In view of the very restrictive nature of the requirements listed in Article 14, and the fact that in many instances they have been found incompatible with the EC Treaty, Member States should consider removing them also in sectors not covered by the Services Directive.

6.2.1. Prohibition of requirements based directly or indirectly on nationality

Article 14(1) prohibits all discrimination based directly or indirectly on grounds of nationality or, as regards companies, the location of the registered office.

Direct discrimination concerns requirements based on nationality or, in the case of a company, the location of the registered office. Indirect discrimination concerns, in particular, those requirements based on residence or, in the case of companies, the place of their principal establishment⁷⁰. But differences of treatment based on other criteria may also amount to indirect discrimination on grounds of nationality if these criteria are, in practice, exclusively or mostly fulfilled by nationals or companies of the Member State imposing them. Such criteria may, for instance, relate to the place of the principal provision of the service activity, the law under which a company has been incorporated or the fact that a majority of the shares have to be directly or indirectly in public or State ownership⁷¹.

Article 14(1) explicitly mentions requirements which make access to or exercise of a service activity conditional upon the nationality or residence of the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies. For example, a rule whereby only companies owned by nationals can undertake a particular

⁷⁰ See Judgment of 27 June 1996, *Asscher*, Case C-107/94; Judgment of 25 July 1991, *Factortame I*, Case C-221/89 (where the ECJ ruled that “national legislation which lays down a distinction founded on residence is liable to act mainly to the detriment of nationals of other Member States, since non-residents are more frequently non-nationals”) and Judgment of 13 July 1993, *Commerzbank*, Case C-330/91.

⁷¹ See Judgment of 5 December 1989, *Commission v Italy*, Case 3/88.

service activity or a rule according to which managers need to reside in the national territory would be prohibited by Article 14(1)⁷².

Article 14(1) also prohibits rules which make the access to or the exercise of the service activity for foreign service providers more burdensome than for domestic players by imposing discriminatory requirements on the access to, or use of, property or equipment necessary for the provision of the service⁷³. This is the case, amongst others, with discriminatory requirements imposed on the operator for the acquisition or use of immovable property, equipment, tools, vehicles, etc. (for example, a rule according to which only nationals can apply for the allocation of lock-ups rented by a municipality and used by craftsmen for the exhibition and sale of craft products)⁷⁴. Indirect discrimination prohibited by Article 14(1) is also constituted by requirements which restrict the legal capacity or the rights of companies to bring legal proceedings, for instance, on the ground that they have been incorporated under the law of another Member State⁷⁵.

6.2.2. *Prohibition of requirements limiting the establishment of service providers to one Member State*

Article 14(2) requires Member States to remove all requirements prohibiting service providers from having an establishment in more than one Member State as well as requirements

⁷² Such requirements have already been ruled out by the ECJ in many cases. See Judgment of 21 June 1974, *Reyners*, Case 2/74; Judgment of 14 July 1988, *Commission v Greece*, Case 38/87 and Judgment of 7 March 2002, *Commission v Italy*, Case C-145/99 concerning laws making enrolment of lawyers at the bar conditional upon possession of the nationality of a specific State; Judgment of 29 October 1998, *Commission v Spain*, Case C-114/97 on a nationality requirement imposed on staff and residence requirements imposed on directors and managers of the same undertakings; Judgment of 9 March 2000, *Commission v Belgium*, Case C-355/98 relating to an obligation for managers and employees to reside in the national territory; Judgment of 7 March 1996, *Commission v France*, Case C-334/94; Judgment of 25 July 1991, *Factortame I*, Case C-221/89; and Judgment of 27 November 1997, *Commission v Greece*, Case C-62/96 concerning national legislations that only allowed the operation of activities in a Member State to companies partly or fully owned by nationals of a given State, and whose managers and members of the supervisory board were citizens of the same country.

⁷³ See Judgment of 14 January 1988, *Commission v Italy*, Case 63/86, concerning the access to immovable property, where the ECJ ruled, in paragraph 14, that freedom of establishment concerns not only “*the specific rules on the pursuit of occupational activities but also rules relating to the various general facilities which are of assistance in the pursuit of these activities. Amongst the examples are the right to purchase, exploit and transfer real and personal property and the right to obtain loans and in particular to have access to the various forms of credit*”.

⁷⁴ Such as the requirement analysed by the ECJ in the Judgment of 18 June 1985, *Steinhauser v City of Biarritz*, Case 197/84, concerning a provision that allowed only nationals to apply for the allocation of public property belonging to a municipality – rented lock-ups – used by craftsmen for the exhibition and sale of craft products. For an example of a discriminatory requirement imposed in relation to the registration of the equipment necessary for the provision of the services (such as machinery, vehicles, etc.), Judgment of 27 November 1997, *Commission v Greece*, Case C-62/96; Judgment of 7 March 1996, *Commission v France*, Case C-334/94, and Judgment of 25 July 1991, *Factortame I*, Case C-221/89. For an example relating to registration of aircraft used for aerial photography services, see Judgment of 8 June 1999, *Commission v Belgium*, Case C-203/98; see also Judgment of 14 January 1988, *Commission v Italy*, Case 63/86, and Judgment of 30 May 1987, *Commission v Greece*, Case 305/87. For a requirement according to which only associations having a minimum number of nationals of a given Member State could be conferred legal personality in that State, see Judgment of 29 June 1999, *Commission v Belgium*, Case C-172/98.

⁷⁵ See Judgment of 5 November 2002, *Überseering*, Case C-208/00.

prohibiting service providers from being entered in registers or enrolled with professional bodies or associations in more than one Member State.

Requirements of this type mean that service providers already established in one Member State may not additionally establish in the territory of another Member State, and they are clearly at odds with the freedom to set up and maintain an establishment in more than one Member State.

Member States will have to identify and abolish any rule existing in their legal system, including those laid down by professional bodies or associations, which prohibits a provider from registering with a professional association if already a member of a similar association in another Member State⁷⁶. Moreover, Member States will also have to abolish any requirement obliging service providers to give up their previous establishment in another Member State upon their establishment in such Member States' territory, something that could result from a requirement to cancel registration in a business register in another Member State⁷⁷.

6.2.3. *Prohibition of requirements limiting the choice of the service provider between principal and secondary establishment*

Under Article 14(3) Member States will have to remove requirements which restrict the choice of a provider already established in a Member State as to the type of establishment he wants to have in another Member State (for example a principal or secondary establishment or a specific type of secondary establishment, such as a branch or a subsidiary). Requirements restricting the choice of providers as to the type of establishment may be very burdensome for service providers and may – notably in the case of an obligation to have the principal establishment in the territory of a Member State – require the change of location of the business, thereby in fact negating the right of being established in a Member State through a secondary establishment⁷⁸.

In order to implement this provision Member States will have to abolish obligations imposed on providers to have the principal establishment in their territory, such as requirements which reserve access to or exercise of a given activity to legal persons which have their registered office in that Member State⁷⁹. They will also have to abolish requirements which limit the freedom to choose between different types of secondary establishment, such as obligations to establish a subsidiary (and not a branch or other form of secondary establishment) in order to

⁷⁶ For instance, in its Judgment of 12 July 1984, *Klopp*, Case 107/83, the ECJ struck down a national law prohibiting the registration with the bar association of lawyers already enrolled at a bar in another Member State. An analogous requirement concerning the activity of auditor was found to be at odds with Article 43 EC Treaty in the Judgment of 20 May 1992, *Ramrath*, Case C-106/91.

⁷⁷ See, for example, Judgment of 30 April 1986, *Commission v France*, Case 96/85, concerning a regime that obliged professionals (dentists in this specific case) to cancel their enrolment or registration in another State in order to be able to provide their activity in this Member State.

⁷⁸ Judgment of 18 January 2001, *Commission v Italy*, Case C-162/99, and Judgment of 9 March 1999, *Centros*, Case C-217/97.

⁷⁹ See Judgment of 6 June 1996, *Commission v Italy*, Case C-101/94. See also the cases on the registrations of vessels: Judgment of 27 November 1997, *Commission v Greece* C-62/96; Judgment of 7 March 1996, *Commission v France*, Case C-334/94 and Judgment of 25 July 1991, *Factortame I*, Case C-221/89.

take up a certain business in their territory or requirements which grant to a certain form of secondary establishment more favourable treatment than to others⁸⁰.

6.2.4. *Prohibition of conditions of reciprocity*

Article 14(4) prohibits any requirement on the basis of which a Member State would make access to or exercise of a service activity by service providers from another Member State subject to a condition of reciprocity (i.e. subject to the condition that the Member State of the service provider treats service providers from the other Member State in the same way). Reciprocity is generally not compatible with the idea of an Internal Market based on the principle of equal treatment of all Community operators. Thus, the ECJ has in many cases found reciprocity clauses to be contrary to the EC Treaty⁸¹.

In order to implement this provision, Member States will, for instance, have to abolish requirements according to which a service provider already established in another Member State can only enrol in professional registers in its territory if his Member State of first establishment also allows the registration of nationals from the Member State where the registration is being requested.

6.2.5. *Prohibition of economic tests*

Article 14(5) requires Member States to abolish requirements that may exist in their legislation laying down a case-by-case application of economic tests. In particular, Member States will have to verify whether their legislation makes the granting of certain authorisations subject to proof of the existence of an economic need or market demand, to an assessment of the potential or current economic effects of the activity, for instance on competitors, or to an assessment of the appropriateness of the activity in relation to economic planning objectives set by the competent authority. If provisions of this kind are in force, they will have to be eliminated. Article 14(5) clarifies that the prohibition set out in this provision does not concern territorial planning requirements which do not pursue economic aims but serve overriding reasons relating to the public interest, such as the protection of the environment, including the urban environment, or the safety of road traffic, etc.

Economic tests exist in some Member States, in particular in the commerce sector (for instance for the opening of supermarkets, shopping malls, etc.), and often require service providers to carry out costly and time-consuming economic studies whose outcome is generally uncertain⁸². Such tests are highly burdensome on service providers and may open the doors to particularly arbitrary results. They delay the establishment of service providers considerably, if they do not indeed fully hinder the establishment of newcomers. In practice, under such schemes, service providers are often required to submit data such as the expected

⁸⁰ See Judgment of 28 January 1986, *Commission v France*, Case 270/83; Judgment of 21 September 1999, *Saint Gobain*, Case C-307/97; Judgment of 12 April 1994, *Halliburton*, Case C-1/93.

⁸¹ As an example from the case law, see the Judgment of 13 February 2003, *Commission v Italy*, Case C-131/01, in the field of patent agents. In this case the Court deemed to be at odds with the freedom of establishment legislation that allowed agents non-resident in Italy to enrol in the Italian patent agents' register only if they were nationals of States that permitted Italian agents to enrol under the same conditions. See also Judgment of 6 June 1996, *Commission v Italy*, Case C-101/94, on dealing in transferable securities.

⁸² See Judgment of 15 June 2006, *Commission v France*, Case C-255/04, relating to services of placement of artists.

supply and demand, the economic impact of the new business on operators already present in the local market or the existing market share of the provider in a given territory, etc.

In this context, it should be noted that, on the basis of the case-law of the ECJ, reasons of an economic nature (for example protection of a certain category of economic operators, maintaining a certain market structure, etc.) cannot justify restrictions of the fundamental freedoms of the Internal Market, including the freedom of establishment⁸³.

6.2.6. *Prohibition of the involvement of competing operators in the decisions of competent authorities*

Article 14(6) requires Member States to remove requirements which may exist in their legal system providing for competing operators to be involved in the taking of individual decisions by the competent authorities. Indeed, involvement of competing operators in the decision-making concerning individual cases goes against the basic goal of ensuring objective and transparent procedures, and might potentially hinder new players from entering the market⁸⁴.

Member States will have to abolish, for instance, any rule which envisages the involvement of competing operators in decisions about individual applications for an authorisation. Provisions providing for the involvement of competitors in any other decisions relating to individual cases will also have to be removed. The prohibition set out in Article 14(6) includes cases in which competitors are part of a body, such as a chamber of commerce, that is consulted on individual applications for authorisations. Yet it is clear that Member States are not prevented from maintaining in place systems whereby the participation/consultation of potential competitors would be envisaged in matters other than individual cases. This could, for instance, be the case as regards consultations of business representatives that public authorities might want to carry out in the preparatory works concerning the drawing up of general rules relating to the planning of urban development or similar initiatives.

Moreover, it is also clear that, as explicitly stated in this provision, Article 14(6) does not prevent professional bodies and associations or other organisations from deciding about individual applications if these professional bodies are themselves acting as competent authorities, as is sometimes the case for the professional bodies of the regulated professions.

6.2.7. *Prohibition of obligations to obtain financial guarantees or insurances from operators established in the same Member State*

According to Article 14(7), Member States will have to abolish obligations in their legal order obliging providers wishing to establish in their territory to take out insurance with, or to provide a financial guarantee issued by, an operator established in their own territory. Requirements of the sort prohibited by Article 14(7) may easily lead to an unnecessary duplication of insurance cover by the service provider and, moreover, favour financial

⁸³ See, for example, Judgment of 4 June 2002, *Commission v Portugal*, Case C-367/98.

⁸⁴ Such an involvement of competing operators has already been found contrary to Article 43 of the EC Treaty by the ECJ. See Judgment of 15 January 2002, *Commission v Italy*, Case C-439/99, concerning the organisation of trade fairs. On that occasion the ECJ pointed out that competitors involved in the authorisation procedure might, for example, seek to delay important decisions as well as propose excessive restrictions or they might obtain information of relevance to competition.

institutions established in the same Member State. Such requirements are not justified and have already been held as being contrary to the EC Treaty by the ECJ⁸⁵.

It should be clear, though, that Article 14(7) does not prevent Member States from imposing insurance requirements as such. Provided that such an obligation is in accordance with Article 23 of the Services Directive and with other Community law, Member States remain free to impose insurance obligations on providers established in their territory.

Also, Article 14(7) does not prevent Member States from maintaining in force requirements relating to participation in a collective compensation fund, such as those that are often put in place by members of professional bodies or organisations. For example, an obligation imposed on lawyers to contribute to a fund established by a Bar Association in order to compensate damages and losses caused to clients by the malpractice of its members would not be affected by this provision.

6.2.8. Prohibition of obligations to have been previously registered or to have previously exercised the activity for a given period in the same Member State

Finally, Article 14(8) requires Member States to abolish requirements making establishment in their territory conditional on a previous registration or a previous exercise of activities of the provider in their territory. It is clear that requirements that allow only operators which have already carried out activities in a Member State for a certain number of years to provide certain categories of services will normally exclude access to the market for new service providers and have thus to be abrogated.

Examples of such requirements include, for instance, a regime under which only operators that had been established in a Member State for at least one year were allowed to register aircraft used for the provision of aerial photography services⁸⁶.

6.3. Requirements subject to evaluation

Requirements listed in Article 15 constitute severe obstacles to the freedom of establishment and can often be replaced by less restrictive means. As a result, the ECJ has in many cases ruled such requirements to be incompatible with the freedom of establishment. Still, in certain circumstances and in specific sectors such requirements might nevertheless be justified. For this reason, Article 15 does not provide for their outright prohibition but requires Member States to review their legislation, as well as, if applicable, rules provided for by professional and other professional associations or organisations within the meaning of Article 4(7), identify all requirements of the kind of those listed in Article 15(2) and evaluate them on the basis of the criteria of non-discrimination, necessity and proportionality as set out in Article 15(3).

Member States will have to assess, in relation to each of the requirements identified in their legislation, whether the requirement is non-discriminatory, justified by an overriding reason

⁸⁵ See for example Judgment of 1 December 1998, *Ambry*, Case C-410/96, a case concerning the establishment of tour operators in France. See also Judgment of 7 February 2002, *Commission v Italy*, Case C-279/00.

⁸⁶ Judgment of 8 July 1999, *Commission v Belgium*, Case C-203/98. For another example of an obligation to have been previously registered in a Member State, see also Judgment of 23 May 2000, *Commission v Italy*, Case C-58/99.

relating to the public interest and proportionate. As set out in Article 15(3), a requirement is non-discriminatory if it does not directly or indirectly discriminate on grounds of nationality (or in the case of companies on grounds of the location of the registered office). A requirement is justified by an overriding reason relating to the public interest and proportionate if it is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it. The concept of overriding reason relating to the public interest (as recalled in Article 4(8)) refers to legitimate non-economic grounds that are pursued by a Member State recognised as such in the case law of the ECJ and including, *inter alia*, public policy, public health, public security, the protection of the environment, the protection of consumers and social policy objectives. As seen above, economic reasons such as the protection of competitors do not, in line with ECJ case law, qualify as an overriding reason of public interest and therefore cannot justify a restrictive requirement. Member States will also need to evaluate in each case whether the objective pursued by the requirement in question cannot be achieved by less restrictive means.

Depending on the outcome of the evaluation, Member States will need to abolish requirements which do not comply with the conditions set out in Article 15(3), or replace them by less restrictive means compatible with the provisions of the Services Directive. Member States can maintain requirements which comply with the conditions set out in Article 15(3). At the end of this process, Member States will need to report on requirements which they have maintained as well as on requirements which have been abolished or made less stringent in the framework of the review and mutual evaluation procedure provided for in Article 39 of the Directive⁸⁷.

It is important to highlight that, on the basis of Article 15(6), as from the entry into force of the Directive (28 December 2006) any new legislation introducing requirements of the kind listed in Article 15(2) needs to comply with the criteria set out in Article 15(3). On the basis of Article 15(7), new requirements will have to be notified to the Commission⁸⁸.

6.3.1. *Quantitative or territorial restrictions*

Article 15(2)(a) requires Member States to evaluate requirements consisting of quantitative and 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. Quantitative restrictions also include requirements according to which the number of admitted operators is determined according to the population, for example, a requirement according to which no more than one newspaper shop or a driving school may be opened for a given number of people, for example 2000 inhabitants. As to territorial restrictions, these include requirements which limit the number of service providers according to a minimum geographical distance between providers, for example, at least 5 km between two petrol stations. Article 15(2)(a) does not cover limits imposed on input, output or emissions, for example regarding CO₂ emissions or gases.

Quantitative and territorial restrictions limit the overall number of service providers, thus hindering new operators from entering the market, and seriously restrict or even impede the freedom of establishment. When examining this type of requirement Member States should keep in mind that they can often be abolished or replaced with less restrictive measures. In

⁸⁷ See Section 10 of this handbook.

⁸⁸ See again Section 10 of this handbook.

this context it should also be recalled that economic aims, such as to ensure the economic basis of specific categories of providers, do not constitute overriding reasons of public interest and, therefore, cannot be invoked as a possible justification for quantitative or territorial restrictions.

6.3.2. *Obligation for the service provider to take a specific legal form*

Article 15(2)(b) concerns requirements existing in some Member States which oblige service providers to take a specific legal form if they want to provide certain services. It is clear that requirements to take a specific legal form are serious obstacles for the establishment of service providers from other Member States because such restrictions might oblige them to change their legal form or structure.

For example, Member States will have to identify and evaluate requirements whereby only economic operators taking the form of a legal person are allowed to take up certain activities in their territory, thus excluding natural persons from the market⁸⁹. Likewise, requirements which prevent service providers from offering their services in the form of a certain legal entity or in the form of partnerships, which are sometimes applied to certain professions, fall in this category and are also subject to the evaluation.

Other examples of cases covered by Article 15(2)(b) are requirements that allow the exercise of a specific activity only to companies with individual ownership or to companies owned exclusively by natural persons or, similarly, requirements which exclude certain categories of companies from the exercise of an activity, for example requirements that operators taking the form of a publicly quoted company may not provide certain services⁹⁰. Moreover, requirements that reserve certain activities to non-profit-making entities are also subject to the evaluation obligation laid down in this provision⁹¹.

Requirements relating to the legal form may in many cases be replaced by less restrictive means and will thus not be justified. For instance, the ECJ⁹² has stated that the requirement for economic operators to be constituted as legal persons in order to pursue certain activities could not be maintained in so far as the objective of protecting creditors could be attained by less restrictive measures, such as requiring operators to set up a guarantee or take out insurance. Also, the objective of preventing operators from being involved in criminal or fraudulent activities will generally not justify the exclusion of operators with a specific legal form from exercising specific activities⁹³. In the same vein, requirements reserving certain activities to non-profit-making bodies will, in a number of cases, not be justified⁹⁴.

⁸⁹ As examples from case law, see Judgment of 29 April 2004, *Commission v Portugal*, Case C-171/02, and Judgment of 26 January 2006, *Commission v Spain*, Case C-514/03.

⁹⁰ This was the case, for example, in the Judgment of 6 November 2003, *Gambelli*, Case C-243/01.

⁹¹ See for example, Judgment of 15 January 2002, *Commission v Italy (trade fairs)*, Case C-439/99 and Judgment of 17 June 1997, *Sodemare*, Case C-70/95.

⁹² See Judgment of 29 April 2004, *Commission v Portugal*, Case C-171/02.

⁹³ Judgment of 6 March 2007, *Placanica*, Joined Cases C-338/04, C-359/04 and C-360/04. The ECJ ruled that such “*blanket exclusion goes beyond what is necessary*” in order to achieve the objective of preventing operators from being involved in criminal or fraudulent activities and that a less restrictive way of monitoring the accounts and activities of the operators at issue could be, for example, the gathering of information on their representative or their main shareholders.

⁹⁴ For example, in its Judgment of 15 January 2002, *Commission v Italy (trade fairs)*, Case C-439/99, the ECJ pointed out that “*it is difficult to envisage reasons in the public interest that might justify such*

6.3.3. *Requirements relating to the shareholding of companies*

Article 15(2)(c) refers to requirements relating to the shareholding of companies. Such requirements include, for instance, obligations to hold a minimum amount of capital. They also encompass requirements to have a specific qualification in order to hold share capital. For example, as regards certain services provided by members of a regulated profession and carried out through a company, Member States sometimes require that the entire capital or a relevant part of it be directly owned by members of that profession.

In many cases Member States should be able to replace requirements to hold a minimum share capital by less restrictive arrangements. In particular, the ECJ has considered that such a requirement could not be justified by reasons relating to the protection of creditors, since less restrictive measures, for example obliging the provider to lodge a guarantee or to take up insurance, may be sufficient to attain the same objective⁹⁵. Moreover, in other cases, imposing on the operators certain transparency and information requirements might also be deemed sufficient to protect creditors.

In the same way, requirements to have a specific qualification in order to hold share capital may not be justified in some cases because the same objective can be achieved by less restrictive measures. Thus, in a case concerning the establishment of opticians, the ECJ found that imposing a given level of participation of opticians in the share capital was not proportionate for attainment of the objective of protecting public health⁹⁶. As the ECJ pointed out on this occasion, the high quality and professionalism of the service may often be ensured by measures that are less restrictive to the freedom of establishment, for example by requiring the physical presence of qualified, salaried or associate, professionals in each shop, by applying rules concerning civil liability for the action of others or national rules requiring professional liability insurance.

6.3.4. *Requirements reserving the provision of certain services to specific providers*

Article 15(2)(d) relates to rules that reserve the right to provide certain services to particular providers only. However, reserved activities linked to professional qualifications for regulated professions pursuant to Directive 2005/36/EC or provided for in other Community instruments are not covered by Article 15. For example, since requirements reserving the provision of legal advice, in certain Member States, are linked to a professional qualification they are not dealt with by Article 15(2)(d). Yet it is clear that such requirements in any case have to comply with other Community law, in particular Articles 43 and 49 of the EC Treaty.

6.3.5. *Bans on having more than one establishment in the territory of the same Member State*

Article 15(2)(e) requires Member States to evaluate requirements according to which service providers are prevented from having more than one establishment in the territory of the same

restrictions” (paragraph 32). Yet, it cannot be excluded that such requirements can be justified in certain cases, in particular in the social field, as shown by the Judgment of 17 June 1997, *Sodemare*, Case C-70/95.

⁹⁵ Judgment of 29 April 2004, *Commission v Portugal*, Case C-171/02, and Judgment of 26 January 2006, *Commission v Spain*, Case C-514/03. See also Judgment of 30 September 2003, *Inspire Art*, Case C-167/01.

⁹⁶ Judgment of 21 April 2005, *Commission v Greece*, Case C-140/03.

Member State. In this respect it is worth noting that this provision differs from the outright prohibition in Article 14(2) in so far as it only addresses restrictions on having more than one establishment within one Member State which do not affect the possibility for service providers to be established in other Member States.

In many cases, Member States should be able to identify less restrictive means, also suitable for the attainment of general interest objectives, than prohibitions on having more than one establishment in the. For instance, in many cases Member States will be able to ensure the objective of high quality of services by other less restrictive means, such as a requirement to have qualified staff providing the service.

In this context, the ECJ found that a national law that did not permit operators to open more than one driving school in a Member State was contrary to the freedom of establishment⁹⁷.

6.3.6. *Obligations to have a minimum number of employees*

Article 15(2)(f) refers to requirements fixing a minimum number of employees for service providers. Such a requirement might be very burdensome for certain operators, in particular for small and medium-sized undertakings, which might be forced to increase their staff in order to be able to provide their services. If they cannot afford this, such a requirement might in some cases even exclude them from the market.

When evaluating their legislation Member States should consider that, as shown by the case law of the ECJ, requirements to have a minimum number of employees will only be justified in a limited number of cases. For example, in a case concerning security services, the ECJ stated that the obligation to have a minimum number of employees was justified by considerations of security only when applied to the specific activity of transport of explosives (in view of the necessity to have a team of a specified number of people handling dangerous material) but not with regard to other more common activities in the field of security involving a lower risk for the public, like activities carried out by watchmen⁹⁸.

6.3.7. *Obligations to apply fixed minimum or maximum tariffs*

Article 15(2)(g) refers to fixed minimum and/or maximum tariffs imposed by legislation or professional rules for the provision of certain services. These tariffs are the prices with which operators must comply when offering their services in the market.

Fixed minimum or maximum tariffs constitute a serious obstacle to the Internal Market, since they deprive service providers of the possibility of competing on price or on quality, which is an essential tool of any economic activity, and may render the establishment in a Member State less attractive. Member States should normally find more appropriate means to protect the general interest objectives at stake, such as consumer protection.

For example, Member States will have to review and, as the case may be, abolish fixed minimum or maximum tariffs that are sometimes imposed on certain regulated professions, such as lawyers. In carrying out the review Member States will have, also in this case, to take ECJ case law into account. In a recent case concerning minimum tariffs for lawyers, the ECJ

⁹⁷ Order of 2 December 2005, *Seidl*, Case C-117/05.

⁹⁸ Judgment of 26 January 2006, *Commission v Spain*, Case C-514/03.

pointed out that these tariffs are not necessary in a number of cases since rules relating to organisation, qualifications, professional ethics, supervision and liability may suffice in themselves to attain the objectives of the protection of consumers and the proper administration of justice⁹⁹.

6.3.8. *Obligation on the provider to supply other specific services jointly with his service*

Article 15(2)(h) requires Member States to evaluate obligations which might exist in their legislation obliging the provider to supply other services jointly with his service. This in many cases may be disproportionate. For example, in some Member States, operators wishing to open a petrol station have to offer other types of service on the premises, such as the sale of car maintenance products, food and beverages, etc. Member States will have to consider whether a requirement of that type without any possibilities for exceptions will be proportionate in view of the fact that the same products may already be available in shops located near the petrol station.

7. FREE MOVEMENT OF SERVICES

7.1. The Freedom to Provide Services clause and related derogations

7.1.1. *The distinction between establishment and cross-border service provision*

In line with Articles 43 and 49 of the EC Treaty and the related ECJ case law, the Services Directive clearly distinguishes between the rules applicable to establishment and those applicable to cross-border service provision. While Articles 9 to 15 concern the establishment of service providers, Articles 16 to 21 deal with cross-border service provision, i.e. cases where the service provider is not established in the Member State in which he provides services. The distinction between establishment and cross-border service provision is thus fundamental in order to determine under which rules of the Directive a service provider falls.

Establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period¹⁰⁰. By contrast, according to the case law of the ECJ, the freedom to provide services is characterised by the absence of a stable and continuous participation in the economic life of the host Member State¹⁰¹. As the ECJ has consistently held, the distinction between establishment and provision of services needs to be made on a case-by-case basis, taking into account not only the duration but also the regularity, periodicity and continuity of the provision of services¹⁰². It follows from this, as concluded by the ECJ, that there can be no general time limits set in order to distinguish between establishment and service provision¹⁰³. Neither is the fact that the provider uses a certain infrastructure decisive, since a provider of services may use an infrastructure in the host

⁹⁹ Judgment of 5 December 2006, *Cipolla*, Joined Cases C-94/04 and C-202/04.

¹⁰⁰ Judgment of 25 July 1991, *Factortame*, Case C-221/89, paragraph 20. See also definition of “establishment” in Article 4(5).

¹⁰¹ Judgment of 13 February 2003, *Commission v Italy*, Case C-131/01, paragraph 23.

¹⁰² Judgment of 30 November 1995, *Gebhard*, Case C-55/94, paragraph 39; Judgment of 11 December 2003, *Schnitzer*, Case C-215/01, paragraph 28.

¹⁰³ Judgment of 11 December 2003, *Schnitzer*, Case C-215/01, paragraph 31.

Member State for the cross-border provision of services without being established there¹⁰⁴. In *Schnitzer* the ECJ explained that even an activity carried out over several years in another Member State can, depending on the circumstances of the case, be considered to be service provision within the meaning of Article 49 of the EC Treaty, as can recurrent service provisions over an extended period – such as consulting or counselling activities. Establishment requires integration into the economy in the Member State involving the acquisition of customers in that Member State from the basis of a stable professional domicile¹⁰⁵.

7.1.2. *Scope and effect of the Freedom to Provide Services clause*

Article 16 provides for the freedom to provide cross-border services without unjustified restrictions. It is one of the cornerstones of the Services Directive. It applies to all services falling within the scope of application of the Directive, with the exception of those services or matters listed in Article 17.

Article 16 requires Member States to abstain from imposing their own requirements on incoming service providers except where justified by the four reasons enumerated in Article 16(1) and (3)¹⁰⁶. This means that the requirements Member States can impose on in-coming service providers are limited. This applies to any form of requirement, regardless of the type or level of the legislation in question or the territorial limits within which a national rule applies. As a result, service providers will know that they will not be subject to the legislation of the receiving Member State except where its application is justified for the four reasons set out in Article 16(1) and 16(3) (or the legislation in question is covered by a derogation provided for in Article 17).

Contrary to other articles of the Directive, such as Article 14, Article 16 does not, in principle, require Member States to remove existing requirements but only obliges them to refrain from applying their own requirements to service providers established in other Member States. Article 16 does not prevent Member States from maintaining their requirements for their national operators. Changes to national rules may, however, be required to remove requirements which are specifically designed for service providers established in other Member States.

In order to avoid gaps in the implementing legislation it may be advisable to implement Article 16 in a horizontal instrument rather than through sector- or subject-specific measures. This would ensure legal certainty both for providers and recipients of services and for the relevant competent authorities.

7.1.3. *Requirements which can be imposed by Member States on cross-border services*

Article 16(1) prohibits Member States from making access to or exercise of a service activity subject to requirements which are not justified by one of the four reasons referred to in Article

¹⁰⁴ Judgment of 30 November 1995, *Gebhard*, Case C-55/94, paragraph 27; Judgment of 11 December 2003, *Schnitzer*, Case C-215/01, paragraph 28.

¹⁰⁵ Judgment of 11 December 2003, *Schnitzer*, Case C-215/01, paragraph 29.

¹⁰⁶ The freedom to provide services clause is based on the principle developed in the consistent case law of the ECJ regarding free movement of services, see Judgment of 3 December 1974, *van Binsbergen*, Case 33/74; see also for free movement of goods the Judgment of 20 February 1979, *Cassis de Dijon*, Case 120/78.

16(1) and (3). In addition, any such requirements have to comply with the principles of non-discrimination, necessity and proportionality.

7.1.3.1. The four reasons referred to in Article 16(1) and (3)

According to Article 16 application of national requirements can only be justified if necessary for the protection of public policy, public security, public health or the environment. This excludes Member States from invoking other public interest objectives¹⁰⁷.

It should be noted that the terms “public policy”, “public security” and “public health” are concepts of Community law which stem directly from Article 46 of the EC Treaty. These concepts have been consistently interpreted by the ECJ in a narrow sense, meaning that there must be a genuine and serious threat to a fundamental interest of society and it is for the Member State invoking these public interest objectives to demonstrate the risks involved¹⁰⁸. The ECJ has also clearly indicated that Member States cannot unilaterally determine their scope: “... *the concept of ‘public policy’ in the Community context, and where, in particular, it is used as a justification for derogating from a fundamental principle of Community law, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions*”¹⁰⁹.

It also results from the case law that the aim of protecting these public interest objectives does not allow Member States to exempt entire economic sectors or professions from the fundamental freedoms, and in particular the freedom to provide services¹¹⁰.

- Public policy: As mentioned above, the concept of public policy is a concept of Community law which requires the existence of a genuine and serious threat to a fundamental interest of society. It thus cannot be understood as corresponding to broad notions of public policy which might exist in the legal order of certain Member States and which might cover a whole range of different policy issues or even the entire legal or social order in a Member State. This is without prejudice to the fact that the ECJ has recognised that the values which are of a fundamental nature in a society can differ from Member State to Member State¹¹¹. The number of cases in which the ECJ has accepted the invocation of public policy is quite limited. For example, it was accepted in a case regarding personal behaviour involving drug abuse if such behaviour creates a real and sufficiently serious threat to a fundamental interest of society¹¹²; in a case in which a Member State regarded games simulating the killing of people as a violation of human dignity¹¹³; and in cases of risks for fundamental values of social order which can result

¹⁰⁷ Leaving aside the case-by-case derogation provided for in Article 18, see Section 7.1.5 of this handbook.

¹⁰⁸ As regards public policy see Judgment of 14 October 2004, *Omega*, Case C-36/02. As regards public policy and public security see Judgment of 14 March 2000, *Église de Scientologie*, Case C-54/99, paragraph 17. Concerning public security and public health see Judgment of 14 December 2006, *Commission v Austria*, Case C-257/05, paragraph 25.

¹⁰⁹ Judgment of 4 December 1974, *Van Duyn*, Case 41/74, paragraph 18 with regard to the free movement of workers; see also Judgment of 27 October 1977, *Bouchereau*, Case 30/77, paragraph 33.

¹¹⁰ Judgment of 9 March 2000, *Commission v Belgium*, Case C-355/98.

¹¹¹ Judgment of 14 October 2004, *Omega*, Case C-36/02.

¹¹² Judgment of 19 January 1999, *Calfa*, Case C-348/96: however, in the case at issue the ECJ did not find the measure in question – expulsion from the territory after a criminal conviction – justified.

¹¹³ Judgment of 14 October 2004, *Omega*, Case C-36/02.

from gambling¹¹⁴. On the other hand, the ECJ did not accept an invocation of public policy with regard to national legislation requiring a minimum capital for certain companies in order to protect creditors¹¹⁵, or a requirement that a manager of a company must be resident in the territory in which the company is established so that notices of fines can be served on him¹¹⁶. The ECJ has also rejected as “*obviously unfounded*” the argument that any security firm is capable of constituting a genuine and sufficiently serious threat to public policy and public security¹¹⁷. Furthermore, it has stated that the mere failure by a national of a Member State to complete the legal formalities concerning access, movement and residence of aliens cannot be regarded as constituting in itself a breach of public policy¹¹⁸.

- **Public security:** As in the case of public policy, public security is a concept of Community law which requires the existence of a genuine and serious threat to a fundamental interest of society. Examples of what the ECJ has recognised as public security objectives are: the aim of a Member State to ensure the availability of crude oil, because of “*the fundamental importance for a country’s existence, since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon [it]*”¹¹⁹, and the aim of a Member State to prevent major accidents in harbours¹²⁰. In a recent judgment where this concept was invoked, the ECJ confirmed that, while the prevention of serious bodily harm to persons constitutes a fundamental interest of society, Article 46 of the EC Treaty, as a derogation from a fundamental principle of the Treaty, has to be interpreted restrictively and can only be relied upon in the event of a genuine and sufficiently serious threat affecting one of the fundamental interests of society¹²¹.
- **Public health:** So far, the ECJ has not given a specific definition of what constitutes public health¹²². However, the relevant case law confirms that, like with the other reasons referred to in Article 46 of the EC Treaty, only in case of a genuine and sufficiently serious threat can the concept of public health be invoked¹²³. Public health has been referred to in cases where Member States claimed that the need “*of maintaining a balanced medical and*

¹¹⁴ Judgment of 21 September 1999, *Läära*, Case C-124/97.

¹¹⁵ Judgment of 9 March 1999, *Centros*, Case C-212/97, paragraphs 32 to 34.

¹¹⁶ Judgment of 7 May 1998, *Clean Car Services*, Case C-350/96, paragraphs 40 to 42 with regard to Article 39(3) of the EC Treaty.

¹¹⁷ Judgment of 9 March 2000, *Commission v Belgium*, Case C-355/98, paragraph 30.

¹¹⁸ Judgment of 10 December 1974, *Royer*, Case 48/75, paragraphs 38 and 39.

¹¹⁹ Judgment of 10 July 1984, *Campus Oil*, Case 72/83, paragraph 34.

¹²⁰ Judgment of 18 June 1998, *Corsica Ferries*, Case C-266/96.

¹²¹ Judgment of 14 December 2006, *Commission v Austria*, Case C-257/05, and case law mentioned therein.

¹²² However, in Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (OJ L 158, 30.4.2004, p. 77), the notion of public health, which is one of the reasons which can justify restrictions to free movement, is explained as follows: “*The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of the host Member State*”.

¹²³ See Judgment of 14 December 2006, *Commission v Austria*, Case C-257/05, paragraph 25.

hospital service open to all” and *“the survival of the population”*¹²⁴ justified certain restrictions.

- Protection of the environment: Member States have the possibility to ensure that service providers comply with their own national, regional or local rules which protect the environment. Taking into account specific characteristics of the place where the service is provided, Member States may prevent a service from impacting negatively on the environment at that particular place. Relevant rules might concern protection against noise pollution (maximum noise levels for the use of certain machines), rules on the use of hazardous substances with a view to preventing damage to the environment, rules on disposal of waste produced in the course of a service activity, etc. In all these cases it has to be carefully examined whether application of the host Member State’s requirements is necessary and proportionate. For example, a provider may already be subject to environmental auditing in his Member States of establishment with regard to the environmental soundness of his operation and working methods and requirements in the host Member State must not duplicate that.

7.1.3.2. Non-discrimination

National requirements which discriminate against service providers from other Member States even if they could relate to one of the four public interest objectives referred to in Article 16(1) cannot be applied under Article 16. For instance, authorisation schemes specifically put in place for service providers from other Member States will generally be discriminatory. The same holds true for other rules which are specifically designed to regulate the provision of services by service providers from other Member States and do not apply to national providers in the same way. Examples could be rules which prohibit providers from other Member States from having an infrastructure or require providers to possess an identity document which is not required from nationals.

7.1.3.3. Proportionality

Finally, even if a requirement is non-discriminatory and comes under one of the four overriding reasons of public interest referred to above, the ultimate test of whether the application of such a requirement is in compliance with Article 16(1) and (3) is the proportionality test, meaning that the application of the requirement must be appropriate to secure the attainment of the objective which it pursues and must not go beyond what is necessary in order to attain it¹²⁵.

A first step in this assessment is to establish whether the application of a national requirement is suitable to achieve the objective sought. The application of legislation which is not effective to protect one of the four public interest objectives referred to in Article 16(1) cannot be justified. Furthermore, the application of the requirement in question must be the least

¹²⁴ Judgment of 16 May 2006, *Watts*, Case C-372/04, paragraph 105. The ECJ referred generally to statements regarding “public health” in prior case law, but in the concrete case and with regard to authorisation for hospital treatments in other Member States the ECJ accepted a justification based on the need for planning security without specifically referring to “public health” as such.

¹²⁵ Judgment of 25 July 1991, *Säger*, Case C-76/90, paragraph 15; Judgment of 23 November 1999, *Arblade and Others*, Joined Cases C-369/96 and C-376/96, paragraph 35; Judgment of 3 October 2000, *Corsten*, Case C-58/98, paragraph 39; Judgment of 22 January 2002, *Canal Satélite*, Case C-390/99, paragraph 33.

restrictive means to achieve the objective. In particular it must be assessed whether the public interest objective is not already attained by requirements to which the provider is subject in the Member State of establishment. Even if this is not the case (because there are no, or only less protective, requirements in the legislation of the Member State in which the provider is established), the receiving Member State must assess whether there are other less restrictive means to achieve the objective sought (for instance, monitoring the activity while it is being carried out may be less restrictive than the requirement of prior authorisation and still sufficient to attain the objective). This assessment will often need to be made on a case-by-case basis.

7.1.3.4. The list of requirements in Article 16(2)

The lists of requirements in Article 16(2) contains examples of requirements which in principle cannot be imposed by a Member State in the case of services provided into its territory by a provider established in another Member State. It also refers to requirements which normally cannot be imposed on recipients of services.

The examples of requirements mentioned in paragraph 2 have, to a large extent, already been the subject of the case law of the ECJ and have been found to be incompatible with Article 49 of the EC Treaty. On this basis, there is a strong presumption that such requirements cannot be justified by one of the four public interest objectives referred to in Article 16(3) since they will normally be disproportionate.

- **The obligation to have an establishment in the territory where the service is provided**

Article 16(2)(a) concerns requirements which oblige service providers from other Member States to set up an establishment in the Member State into which they wish to provide cross-border services. As stated by the ECJ, such requirements negate the right to provide cross-border services enshrined in Article 49 of the EC Treaty, since they make cross-border service provision impossible by imposing an obligation on the provider to have a stable infrastructure in the receiving Member State¹²⁶.

- **The obligation to obtain an authorisation or a registration**

Article 16(2)(b) concerns requirements obliging service providers from other Member States to go through an administrative procedure in the form of an authorisation or a registration before they can actually commence providing their services. The ECJ has consistently held that such a type of prior control is only justifiable in exceptional cases if it is demonstrated that monitoring or *a posteriori* verification would be inefficient or come too late to prevent serious damage¹²⁷. Article 16(2)(b) does not concern authorisation or registration schemes which are provided for in other Community instruments, such as in Directive 2005/36/EC on the recognition of professional qualifications.

- **The ban on setting up an infrastructure**

¹²⁶ Judgment of 10 February 1982, *Transporoute*, Case 76/81; Judgment of 15 January 2002, *Commission v Italy*, Case C-439/99; Judgment of 7 February 2002, *Commission v Italy*, Case C-279/00.

¹²⁷ Judgment of 8 June 2000, *Commission v Italy*, Case C-264/99; Judgment of 22 January 2002, *Canal Satélite*, Case C-390/99; Judgment of 13 February 2003, *Commission v Italy*, Case C-131/01.

Article 16(2)(c) deals with bans the receiving Member State imposes on setting up an infrastructure such as offices or chambers, etc. that service providers from other Member States may need to use for providing their services. A service provider cannot be obliged to have an establishment but he should have the possibility to use some sort of infrastructure, such as an office or the like, for carrying out cross-border service activities, for instance in order to receive clients or to store equipment which he uses when providing his services, as has been recognised by the ECJ¹²⁸.

- **The application of specific contractual arrangements between the service provider and the recipient restricting the provision of the service by the self-employed**

Article 16(2)(d) concerns requirements which prescribe specific contractual arrangements for the provision of particular services and that affect the provider's relation with his client, in particular his capability to enter into contractual relationships under service contracts. This would be the case if a Member States would exclude by law the possibility of carrying out certain activities as a self-employed person, for instance by requiring that they are always carried out in the context of an employment relationship. This would, for instance, include cases in which services provided by a tourist guide would not be recognised as services under national legislation prescribing an employment relationship between tourist guides and travel agencies organising tourist programmes¹²⁹.

- **The obligation to possess a specific identity document**

Article 16(2)(e) concerns requirements which oblige service providers to be in possession of a specific identity document issued by the Member State where the service is provided. The effect of such requirements is that they do not allow a service to be provided before such a document has been obtained from the authorities in the host Member State. Thus, they result in delays and complications, which is the reason why the ECJ has held such requirements to be disproportionate¹³⁰.

- **Requirements affecting the use of equipment**

Article 16(2)(f) concerns requirements restricting the use of equipment. Such requirements may prevent service providers from other Member States from using their habitual equipment, even though it is technically well suited. Examples are obligations to use particular types or brands of technical machinery (for instance, the use of certain measuring instruments) or requirements which subject the use of certain equipment to authorisations or similar administrative procedures¹³¹. It has to be understood that the notion of equipment covers tools, machines, working gear, etc. used by the service provider during the provision of the service, such as cranes used by a construction company. It does not cover material provided by the service provider which is consumed or remains with the recipient of the service after the service is completed, such as construction material which remains as part of the building.

¹²⁸ It should be borne in mind that, as explained above, the fact that a provider uses such an infrastructure does not mean that he is established and that his activities could not be regarded as cross-border service provision anymore. See Judgment of 30 November 1995, *Gebhard*, Case C-55/94, and Judgment of 21 March 2002, *Commission v Italy*, Case C-298/99.

¹²⁹ Judgment of 5 June 1997, *Greek tourist guides*, Case C-398/95.

¹³⁰ Judgment of 9 March 2000, *Commission v Belgium*, Case-355/98.

¹³¹ Judgment of 22 January 2002, *Canal Satélite*, Case C-390/99; Judgment of 8 July 1999, *Commission v Belgium*, Case C-203/98, on Article 43 of the EC Treaty.

Furthermore, it should be noted that Article 16(2)(f) does not concern requirements which are necessary to protect health and safety at work and it does not prevent Member States from applying their specific requirements in that area, such as certain obligations regarding the use of dangerous machinery or safety equipment. This applies regardless of whether equipment is used by posted workers¹³² or by self-employed persons.

- **Restrictions on recipients**

Article 16(2)(g) refers to Article 19 of the Directive which concerns restrictions on recipients. Such restrictions also impact on service providers wishing to provide a service to customers in another Member State. These requirements, although not imposed directly on the provider but rather on his (possible) clients, deter potential recipients from resorting to service providers from other Member States or in certain cases even make it impossible for them to do so¹³³.

7.1.4. *The derogations in Article 17*

Article 17 contains a list of derogations from Article 16. In line with ECJ case law, derogations from a rule laid down in a directive with the intention of ensuring the effectiveness of the rights conferred by the EC Treaty, such as the freedom to provide services, have to be understood narrowly¹³⁴.

The fact that certain matters or services are covered by one of the derogations in Article 17 does not necessarily mean that the entire body of regulations of the Member State where the service is provided can be applied to them. These matters or services are in any case subject to Article 49 of the EC Treaty. As a result, the application of certain requirements in the Member State where the service is provided may not be justified.

- **Services of general economic interest**

Article 17(1) contains a derogation from Article 16 for services of general economic interest which are provided in another Member State. As explained in Recital 70, “[f]or the purposes of this Directive, and without prejudice to Article 16 of the Treaty, services may be considered to be services of general economic interest only if they are provided in application of a special task in the public interest entrusted to the provider by the Member State concerned. This assignment should be made by way of one or more acts, the form of which is determined by the Member State concerned, and should specify the precise nature of the special task”. Article 17(1) mentions explicitly what are known as network services, including those which are covered by Community legislation (postal services, certain gas and electricity related services). The reference to these services does not mean that all such services are automatically to be considered services of general economic interest. In any case, the assessment as to whether a given service is one of general economic interest is to be made in each specific case applying the principles explained in Recital 70.

- **Matters covered by Directive 96/71/EC on posting of workers**

Article 17(2) makes clear that the Posting of Workers Directive¹³⁵ is not affected by

¹³² In this case Article 17(2) already provides for a derogation from Article 16.

¹³³ For more details on Article 19 see Section 7.2.1 of this handbook.

¹³⁴ See Judgment of 18 May 1995, *Commission v Italy*, Case C-57/94.

¹³⁵ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, p. 1.

Article 16. Recitals 86 and 87 explain in detail what this derogation covers. Rules concerning maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, including overtime rates, the conditions of hiring out of workers, in particular the protection of workers hired out by temporary employment undertakings, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth and of children and young people, provisions on equality of treatment between men and women and other provisions on non-discrimination are covered by the Posting of Workers Directive and are thus not affected by Article 16.

- **Matters covered by Directive 95/46/EC on the processing of personal data**

The derogation in Article 17(3) covers the matters dealt with in the Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which lays down specific rules for the cross-border transfer of data.

- **Matters covered by Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services**

The derogation in Article 17(4) ensures that the above mentioned Directive continues to fully apply in so far as it contains more specific rules on the provision of cross-border services by lawyers. Therefore, under this derogation, Article 16 will apply for lawyers only to those matters not dealt with by the said Directive. In particular, according to Directive 77/249, judicial activities and representation of a client before public authorities should be pursued in a Member State under the obligations laid down for lawyers established in that State. As regards non-judicial activities, Article 16 complements Directive 77/249 as regards matters for which this Directive does not explicitly permit the application of the rules of the Member State in which the services are provided.

- **The activity of judicial recovery of debts**

The exclusion in Article 17(5) of activities of judicial recovery of debts covers activities consisting in the recovery of debts by way of having recourse to judicial proceedings. It does not cover debt recovery services which are carried out by service providers outside the context of judicial procedures.

- **Matters covered by Title II of Directive 2005/36/EC on the recognition of professional qualifications and national requirements reserving an activity to a regulated profession**

The derogation in Article 17(6) ensures the full application of Title II of the Professional Qualifications Directive in the case of cross-border service provision¹³⁶. According to this derogation, Article 16 will apply, for regulated professions, only to those matters not linked to professional qualifications such as commercial communications, multidisciplinary partnerships, tariffs, etc. This derogation also excludes from the application of Article 16 requirements reserving an activity to members of a certain regulated profession. For example, when legal advice is reserved to lawyers in one Member State the provision on the freedom to provide services will not apply. Thus, a

¹³⁶ Thus, it is clear that the provisions contained in Title II of the Professional Qualifications Directive will continue to fully apply. For example, the host Member State can require a prior declaration on an annual basis and the provider will be subject to those professional rules of a professional, statutory or administrative nature which are directly linked to professional qualifications.

person that can provide services of legal advice in his Member State of establishment but is not qualified as a lawyer will not be able to rely on Article 16 to provide services of legal advice in a Member State where such services are reserved to lawyers. The compatibility of such a reserve with Community law is not dealt with by the Services Directive, the Professional Qualifications Directive or the lawyers Directives, but has to be analysed in the light of the EC Treaty.

- **Matters covered by Regulation (EEC) No 1408/71 on the coordination of social security systems**

The derogation in Article 17(7) ensures that the rules in the regulation on the coordination of national social security systems are not affected by Article 16. These rules *inter alia* determine which national social security system covers persons temporarily working in another Member State either as a self-employed person or as an employee.

- **Matters covered by Directive 2004/38/EC as regards administrative formalities concerning the free movement of persons and their residence**

Directive 2004/38/EC concerns administrative formalities Member States may impose on EU citizens and certain third-country nationals who move from one Member State to another. On the basis of the derogation in Article 17(8) these rules are not affected in cases of a service provision involving the temporary movement of EU citizens or third-country nationals.

- **Visa or residence requirements for third-country nationals**

The derogation in Article 17(9) ensures that the rules on visa requirements which are part of the Schengen acquis are not affected by Article 16. Likewise, this derogation ensures that Article 16 does not affect Member States' possibilities to impose visa requirements on those third-country nationals who do not come under the Schengen acquis (in essence third-country nationals who move between a Schengen and a non-Schengen country or vice versa, and third-country nationals who move to another Member State for periods exceeding three months).

- **Matters covered by Regulation (EEC) No 259/93 as regards the shipment of waste**

The regulation on shipment of waste contains certain rules which provide for obligations to be complied with in the country of destination or of transit. The derogation in Article 17(10) ensures that this regulation will not be affected by Article 16.

- **Intellectual property rights**

The derogation in Article 17(11) for intellectual property rights covers the rights as such (existence of the right, scope and exceptions, duration, etc.). It does not concern, by contrast, services linked to the management of such rights, such as those provided by collecting societies or patent agents.

- **Acts requiring by law the involvement of a notary**

The derogation in Article 17(12) concerns requirements in national legislation stipulating the involvement of a notary for particular acts. This might be the case, for instance, for property transactions, establishment of company statutes or their registration, etc.

- **Matters covered by Directive 2006/43/EC on statutory audits**

The derogation in Article 17(13) covers the specific rules on statutory audit laid down in the relevant directive. It ensures that rules in that directive which apply to the provision of

statutory audit services by auditors from another Member State, such as the necessity for an auditor to be approved by the Member State requiring the statutory audit, are not affected by Article 16. Article 16 will only apply to auditors for matters not covered by Directive 2006/43/EC.

- **Registration of vehicles leased in another Member State**

This derogation in Article 17(14) takes account of the major differences between Member States as regards taxation of vehicles and the possible consequences of the registration of vehicles for the vehicle taxation system¹³⁷ and allows Member States to retain the possibility of requiring that vehicles which circulate habitually on their national roads be registered there. This derogation applies to long-term leases but not to short-term car rental activities.

- **Provisions regarding contractual and non-contractual obligations determined pursuant to the rules of private international law**

Article 17(15) deals with the relationship between Article 16 and the rules of private international law governing contractual and non-contractual obligations. Private international law rules will not be affected by Article 16. This means that the question of which national civil law is to be applied regarding non-contractual or contractual obligations will be determined by rules of private international law.

7.1.5. Case by case derogations pursuant to Article 18

Article 18 allows for derogations from Article 16 under specific conditions and in particular cases relating to the safety of services. Under the conditions set out in Article 18, a receiving Member State may exceptionally apply requirements to a particular incoming service provider. Recourse to this article can only be had in a concrete and specific situation and with regard to the provision of a specific service by a particular service provider. The article cannot be used in a general way to derogate from Article 16 for a given type of service or category of service provider.

Article 18 allows preventive or injunctive measures to ensure the safety of the service concerned. The service must present a danger which cannot be prevented by measures taken in accordance with the provisions on administrative cooperation, i.e. by the mutual assistance mechanism between the administrations of the Member States concerned. Measures must be proportionate and limited to what is necessary to protect against dangers created or about to be created by the service or the service provider. The measures must be more effective than measures taken by the Member State of establishment of the service provider. This requires that the Member State receiving the service undertakes an assessment in every case as to whether the measures it envisages provide a real added value over measures taken by the Member State of establishment of the service provider.

Procedurally, the Member State in which the service is provided may only take measures on its own after having requested assistance from the Member State where the service provider is established and after having complied with the steps set out in Article 35(2) to (6), including

¹³⁷ See Judgment of 21 March 2002, *Cura-Anlagen*, Case C-451/99.

the obligation to notify the Member State of establishment and the Commission of the intention to take the measures and the reasons for it¹³⁸.

Paragraph 3 clarifies that this procedure does not affect other Community instruments in which the freedom to provide services is guaranteed and case-by-case derogations are provided for. This is notably the case in the E-commerce Directive¹³⁹.

7.2. Obligations relating to the rights of recipients of services

In order to establish a genuine Internal Market in services, it is not only necessary to facilitate the freedom of operators to provide services but it is equally important to ensure that recipients of services can easily exercise their freedom to receive them. As stated in the case law of the ECJ, the freedom of recipients to receive services forms an integral part of the fundamental freedom enshrined in Article 49 of the EC Treaty¹⁴⁰.

Section 2 of Chapter IV of the Services Directive is devoted to strengthening the rights of recipients of services, in particular consumers. This section aims to remove obstacles for recipients wanting to make use of services supplied by service providers established in other Member States and to abolish discriminatory requirements based on the recipient's nationality or place of residence. The section also ensures that recipients of services have access to general information about the requirements that service providers from other Member States need to comply with, thus enabling recipients to make an informed choice when considering opting for the services of a provider established in another Member State.

Articles 19 to 21 apply to all recipients of services as defined in Article 4(3) of the Directive. Thus, all nationals of a Member State and any legal person as referred to in Article 48 of the EC Treaty and established in a Member State benefit from Articles 19 to 21. In addition, as stated in Article 4(3) as well as in Recital 36, the notion of "recipient" also covers any natural person who – although not a national of a Member State – already benefits from rights conferred upon him by Community acts. As a result, these persons also benefit from the rights provided for under Articles 19 to 21¹⁴¹.

7.2.1. Restrictions which cannot be imposed on recipients

Today, recipients of services, in particular consumers, are sometimes hindered from making use of services offered by a service provider from another Member State. Restrictions and even discriminations might occur in different situations when the service provider moves into

¹³⁸ See Section 9.4.2 of this handbook.

¹³⁹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1.

¹⁴⁰ See, for example, Judgment of 2 February 1989, *Cowan v Trésor Public*, Case 186/87; Judgment of 30 May 1991, *Commission v Netherlands*, Case C-68/89; Judgment of 9 August 1994, *Van der Elst*, Case C-43/93.

¹⁴¹ This is without prejudice to the decision taken by the UK, Ireland and Denmark in accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland respectively, and in accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community, not to take part in the adoption of Council Directive 2003/109 of 25 November 2003 concerning the status of third-country nationals who are long-term residents; OJ L 16, 23.1.2004, p. 44.

the territory of another Member State or when the service is provided at a distance, but also when a recipient moves to another Member State to receive services there.

Article 19 prevents Member States from imposing on recipients requirements which hinder the use of a service provided by operators established in another Member State. In particular, Article 19 prohibits requirements which discriminate on grounds of the place of establishment of the service provider, i.e. on the basis of whether the latter is established in the same Member State in which the recipient is resident or in another Member State, or which discriminate on the basis of the place at which the service is provided. To implement this provision, Member States will have to go through their legislation, verify if it contains any requirements prohibited by Article 19 and, if it does, abolish them.

On the basis of Article 19(a) Member States which impose obligations on service recipients to make a declaration or to obtain an authorisation when wishing to use services of providers established in another Member State will have to abolish them¹⁴². However, this does not concern authorisation schemes which are applied in all cases to the use of a service¹⁴³ and not just to the use of a service from another Member State.

Moreover, and pursuant to Article 19(b), Member States which provide financial assistance for the use of a specific service will have to remove existing discriminatory limits on such financial assistance that are based on the fact that the provider is established in another Member State or that the service is provided in another Member State. This means, for example, that the financing of language or training courses for employees granted on condition that the courses are provided in the national territory would not be compatible with Article 19 and should therefore be removed. It should be clear, however, that Article 19(b) only concerns financial assistance granted for the use of a specific service. Schemes not linked to the use of a specific service, such as financial assistance granted to students for their living, do not fall under Article 19¹⁴⁴.

7.2.2. *Principle of non-discrimination*

Recipients of services are sometimes confronted with discriminations based on their nationality or their place of residence, for instance in the form of higher tariffs for entering museums or parks. Article 20 establishes a general obligation of non-discrimination to be complied with by Member States and service providers.

7.2.2.1. Obligation of non-discrimination by Member States

Article 20(1) obliges Member States to ensure that recipients of services are not made subject to discriminatory requirements based on their nationality or their place of residence. As a consequence, any discrimination by the State or by regional or local authorities that is based on nationality or the place of residence of recipients, such as discriminatory tariffs or requirements solely imposed on nationals of other Member States (for instance, the obligation to supply specific documents for the use of a service) have to be abolished.

¹⁴² Authorisation requirements imposed on service providers (rather than on recipients) should normally no longer be imposed on service providers from other Member States on the basis of Article 16. Article 19 complements Article 16 from the recipient's end.

¹⁴³ See Recital 92.

¹⁴⁴ See Recital 93.

However, not every difference of treatment necessarily constitutes discrimination. As clarified in the case law of the ECJ, discrimination consists in the application of different rules to comparable situations or in the application of the same rule to different situations¹⁴⁵. Hence, even though differences of treatment based on the place of residence in general constitute discrimination, in exceptional cases such differences might not amount to discrimination if and in so far as they reflect relevant and objective differences in the situation of the recipients¹⁴⁶ (this may be the case, for example, with reduced tariffs for residents of a given town, for instance, for the use of a public swimming pool run by the local authority and financed by local taxes).

In order to avoid gaps in implementation, Member States may need to consider whether to include in their framework law implementing the Directive a general clause embodying the principles in Article 20(1). This may be particularly important to avoid discrimination via administrative practices at local level.

7.2.2.2. Obligation of non-discrimination in general conditions of service providers

Article 20(2) requires Member States to ensure that general conditions of access to a service which are made available to the public at large by a service provider do not contain discriminatory provisions based on nationality or the place of residence of recipients.

It is clear, however, that the Directive does not intend to prevent differences in treatment in general conditions based on objective business considerations. In this respect, paragraph 2 explicitly indicates that the prohibition of discrimination does not preclude the possibility for service providers to apply different conditions of access where these differences are justified by objective criteria. As clarified in Recital 95, objective circumstances which could justify differences in tariffs, prices or other conditions might be, for example, additional costs incurred because of the distance involved or the technical characteristics of the provision of the service, etc.

Again, in order to implement this provision Member States may need to include in their horizontal framework legislation implementing the Directive a general provision embodying Article 20(2). This is important to allow recipients to rely on the principle of non-discrimination vis-à-vis service providers.

7.2.3. *Obligation of assistance to recipients*

Today many recipients still hesitate to use services from abroad because they do not have and cannot easily obtain information about the rules, in particular as regards consumer protection, that service providers from other Member States have to comply with. This lack of information makes it difficult for recipients to compare offers and hence to choose their providers on the basis of all relevant information. Against this backdrop, the objective of Article 21 is to enhance the confidence of recipients of services by giving them the means to make informed choices and comparisons when engaging in cross-border transactions. This provision introduces the right of recipients to obtain, in their home Member State, general information and assistance on the legal requirements, in particular consumer protection rules, and on redress procedures applicable in other Member States.

¹⁴⁵ See Judgment of 29 April 1999, *Royal Bank of Scotland*, Case C-311/97.

¹⁴⁶ See Recital 94.

Article 21 complements Article 7 which requires Member States to make information concerning their own national legislation available to recipients¹⁴⁷.

7.2.3.1. Information to be made available

According to Article 21, information to be provided to recipients of services includes, notably, general information on requirements applicable to service providers in other Member States. This encompasses, in particular, information on requirements for authorisations as well as other rules relating to access to and exercise of service activities, in particular those relating to consumer protection. Unlike under Article 7, which requires Member States to make information concerning their own national legislation available to recipients, under Article 21 Member States will not need to provide detailed information, such as information on the steps that need to be taken by a service provider in order to obtain an authorisation. Member States are not required either to supply legal advice or other detailed information tailored to the situation of specific recipients¹⁴⁸.

In addition to general information on requirements, it is also necessary to provide general information on the means of redress available in the event of a dispute between a provider and a recipient, as well as the contact details of associations and organisations from which the recipient may obtain practical assistance.

Information needs to be provided in simple, unambiguous language and be presented in a coherent and structured manner. It would not be sufficient to simply refer recipients to legal texts. As in the case of Article 7, questions of liability, including liability for incorrect or misleading information, are not addressed.

Article 21 does not require information bodies to have at hand all the relevant information about other Member States' legislation that recipients of services could request from them or to have detailed knowledge on other Member States' legislation or to set up new databases. It is sufficient if Member States, if so requested by a recipient, gather the requested information, if necessary by contacting the relevant body of the Member State concerning which information is required. This cooperation between Member States should also contribute to the provision of up-to-date and quality information. The information needs to be provided within a reasonable period of time and by the Member State of residence of the recipient. It is not sufficient to merely refer the recipient to the relevant contact point in the other Member State. This should, of course, not preclude the possibility for recipients to directly contact the relevant body in the other Member State if they so wish.

In order to comply with the obligations under Article 21, effective cooperation between the competent bodies is necessary. In this respect, paragraph 3 establishes an obligation of mutual assistance and effective cooperation.

7.2.3.2. Bodies providing the information

On the basis of Article 21, Member States are free to designate the bodies they consider most appropriate for fulfilling the tasks set out in Article 21. As stated in paragraph 2, Member

¹⁴⁷ See Section 5.3 of this handbook.

¹⁴⁸ In case of disputes, personalised assistance may also be obtained through other mechanisms, such as the European Consumer Centres Network or Fin-Net.

States may, for instance, confer this responsibility on “points of single contact” which, in any case, already provide information on the national requirements. Member States may also choose any other body, including – for instance – Euro Info Centres, the contact points referred to the Professional Qualifications Directive, the European Consumer Centres Network or other consumer associations.

8. QUALITY OF SERVICES

Chapter V (Articles 22 to 27) of the Directive, together with Article 37 on codes of conduct at Community level, lays down a set of measures to foster the high quality of services and to enhance information and transparency relating to service providers and their services. The development of a policy on quality of services is vital for the proper functioning of the Internal Market and the competitiveness of the European services economy. Quality-enhancing measures will benefit recipients of services, especially consumers. In particular, enhanced information and transparency will enable consumers to make better informed choices, especially as regards services of providers established in other Member States. Increased transparency will also contribute to creating a level playing field between service providers from different Member States.

Chapter V sets out a number of binding obligations for service providers, on the one hand, and encourages certain voluntary measures on the other. Thus, implementation by Member States of this chapter of the Directive will require a combination of actions.

First, legislation will be needed to ensure service providers’ compliance with certain obligations, such as the requirement, contained in Articles 22 and 27, to make information available or the obligation to rapidly respond to complaints and to use best efforts to settle disputes as set out in Article 27. In the area of professional liability and guarantees, Member States may also consider imposing requirements on service providers established in their territory although this is, pursuant to Article 23, non mandatory for Member States.

Second, Member States will have to review and adapt, if necessary, their legislation in order to avoid duplication of insurance obligations (as required in Article 23(2)), in order to remove all total prohibitions on commercial communications by the regulated professions and restrictions regarding multidisciplinary activities (as required in Articles 24 and 25 respectively), or in order to recognise financial guarantees (as required in Article 27). When relevant, Member States will have to ensure that not only legislation but also the rules of professional bodies and other professional associations or organisations within the meaning of Article 4(7) are adapted. As regards restrictions on multidisciplinary activities, Member States will not only have to review and adapt their legislation but will also have to provide a report under the mutual evaluation process envisaged in the Directive¹⁴⁹.

Finally, Member States will have to take some active steps to encourage providers to put in place voluntary quality-enhancing measures. The Services Directive leaves it up to Member States to decide the concrete measures to take to encourage such efforts. Possible measures could include, for example, organising awareness campaigns, promotion of quality labels, codes of conduct and voluntary standards, establishing programmes including the provision of funding, the organisation of workshops and conferences, etc. Articles 26 and 37 already

¹⁴⁹ See Article 25(3).

indicate a number of actions that Member States can develop in cooperation with the Commission and, in most cases, together with representatives of service providers (professional bodies, chambers of commerce, etc.) and consumer associations. These provisions should become the basis for a long-term policy on quality of services to be developed at European level by Member States and the Commission.

8.1. Information on providers and their services

In many cases, recipients of services, in particular consumers, do not have basic information about providers and their services. Article 22 strengthens the possibility of recipients to obtain such information while avoiding excessive burdens for providers.

Article 22 distinguishes between some indispensable information, which should in any case be available to recipients, and other information which only needs to be provided upon the recipient's request. Information has to be clear and unambiguous, and needs to be provided before the conclusion of a contract, or where there is no written contract, before the provision of the service.

It is for service providers to decide by which means or support they want to provide the information. They remain free to choose the most appropriate and efficient means of communication, building upon the information they already provide as well as the means of information they already use. It is likely that the choice will depend very much on the nature of the service in question and the way it is normally provided. Many providers will make information to potential customers available via their websites, whereas others may choose to provide information by displaying it at the place where the service is provided or by including it in documents or leaflets.

It should be noted that the information requirements in Article 22 are complementary to information requirements laid down in other Community instruments, such as the E-commerce Directive¹⁵⁰, the Package Travel Directive¹⁵¹ and the Distance Selling Directive¹⁵². Also, Member States remain free to impose additional information requirements on providers established in their territory.

8.1.1. Information to be made available at the provider's own initiative

Information to be supplied comprises some basic information concerning the identity of the provider (such as name, legal status and form), contact details as well as registration details and VAT identification number where appropriate. Where the activity is subject to an authorisation scheme, the particulars of the competent authority having granted it or of the relevant point of single contact should be given. In the case of regulated professions, the professional title, the Member State where the title was granted and the name of the professional body or institution with which the provider is registered should also be provided.

Other information to be supplied relates to the main features and conditions of the service. This includes the general terms and conditions (if any), the existence of contractual clauses

¹⁵⁰ Directive 2000/31/EC on electronic commerce, OJ L 178, 17.7.2000, p. 1.

¹⁵¹ Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours, OJ L 158, 23.06.1990.

¹⁵² Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, OJ L 144, 4.6.1997, p. 19.

concerning the law applicable to the contract, the existence of a voluntary after-sales guarantee, the price of the service (where pre-determined) and information concerning insurances or guarantees.

8.1.2. Information to be made available at the recipient's request

Article 22 contains a list of information which only needs to be supplied if the recipient requests it. This includes the price of the specific service, where not pre-determined, or, if an exact price cannot be given, the method for calculating it. Other information which the recipient may request concerns multidisciplinary activities and partnerships of the provider, and measures taken to avoid conflicts of interest, as well as information on any relevant codes of conduct or available extra-judicial dispute-settlement schemes.

8.2. Professional liability insurance and guarantees

Article 23 aims to enhance consumer confidence in services from other Member States by encouraging insurance for all providers whose services may potentially pose a risk for the consumer.

8.2.1. Insurance or guarantee obligations for service providers presenting particular risks

Article 23 encourages Member States to require service providers established in their territory, and whose services present a direct and particular risk for the health or safety of the recipient or of a third person or to the recipient's financial security, to subscribe to a professional liability insurance or to provide for some other form of financial guarantee. Such insurance should be appropriate to the nature and extent of the risk, and cross-border coverage should only be required if and to the extent that the service provider actually provides cross-border services.

8.2.2. Non-duplication of insurance or guarantee requirements

Article 23(2) concerns service providers who are already established in a Member State and want to establish in another Member State. The Member State where a service provider wants to establish will have to take into account essentially equivalent or comparable insurance or guarantee requirements to which the provider may already be subject to in the Member State of first establishment, and may not require the provider to take out any additional insurance or guarantee if the existing insurance or guarantee already covers the territory of the Member State where the provider wants to establish. Whether an insurance or a guarantee is equivalent or essentially comparable has to be assessed by the competent authorities in the light of its purpose and the cover it provides in terms of insured risk, insured sum or ceiling for the guarantee as well as possible exclusions from the cover. Where the insurance coverage is not fully but only partially comparable, a supplementary arrangement may be required. Member States should consider specifying this by law whether in a horizontal law or in the relevant specific legislation.

In any case, Member States have to accept attestations of such insurance cover issued by credit institutions and insurers established in other Member States as sufficient evidence of compliance with the insurance obligation in their territory.

8.3. Commercial communications by the regulated professions

The notion of commercial communication, as defined in Article 4(12) of the Directive, covers any form of communication aiming to promote services or the image of a service provider. It thus covers advertising as well as other forms of commercial communication, such as business cards mentioning the title and speciality of the service provider¹⁵³.

Member States will have to remove unnecessary restrictions on commercial communications, while at the same time safeguarding the independence and integrity of the regulated professions. Article 24 applies to any such restriction, whether provided for in national legislation or in rules of professional bodies or other professional organisations. This means that Member States have to screen their legislation, adapt it when necessary and also take appropriate measures to ensure that relevant rules of professional bodies and organisations are adapted where necessary.

First, Member States will have to remove all total bans on commercial communications by the regulated professions, for instance, prohibitions on communicating information about the service provider or his activity in all means of communication.

This is the case if, for example, professional rules prohibit commercial communications in all forms of media (including press, television, radio, Internet, etc.) for a specific regulated profession. By contrast, rules on the content and conditions of advertising and other forms of commercial communication can be justified for deontological reasons in the case of specific regulated professions and specific types of commercial communications.

Second, Member States will have to ensure that commercial communications by the regulated professions comply with professional rules which, in conformity with Community law, aim in particular to guarantee the independence, dignity and integrity of the regulated profession as well as professional secrecy. For example, respect of the obligation of professional secrecy will normally prevent providers from mentioning their clients in commercial communications without their explicit consent.

Whereas the Services Directive explicitly acknowledges and may require certain limitations relating to the content of commercial communications, such rules have to be non-discriminatory, justified by an overriding reason relating to the public interest and also proportionate. For example, a national law prohibiting any comparative commercial communication by regulated professions can only be considered justified and proportionate in order to ensure the dignity and ethics of the profession if there are no other less restrictive means to ensure achievement of the same objective.

8.4. Multidisciplinary activities

Restrictions on multidisciplinary activities limit the range of available services and hamper the development of new business models. The objective of Article 25 is to remove requirements restricting the exercise of different activities jointly or in partnership where such restrictions are unjustified while at the same time ensuring that conflicts of interest and

¹⁵³ Articles 7(3), 52 and 54 of Directive 2005/36/EC contain rules applicable for the use of professional and of academic titles if a provider provides his services in another Member State than the one in which he acquired his professional qualifications.

incompatibilities are prevented and that the independence and impartiality required for certain service activities is secured¹⁵⁴.

Article 25 applies to any such requirement whether provided for in national legislation or in rules of professional bodies or other professional associations or organisations within the meaning of Article 4(7).

8.4.1. Removal of restrictions on multidisciplinary activities

Article 25 requires Member States to remove requirements obliging service providers to exercise a given specific activity exclusively as well as requirements restricting the exercise of different activities jointly or in partnership. However, Article 25 spells out conditions under which such restrictions can be maintained for regulated professions and for certification, accreditation, technical monitoring and testing services.

Restrictions on multidisciplinary activities aimed at ensuring the independence and impartiality of the regulated professions can be justified in so far as they are necessary to guarantee compliance with the rules governing professional ethics and conduct, which may vary according to the specific nature of each profession. For example, a Member State could consider a national law prohibiting multi-disciplinary partnerships between members of the Bar and accountants to be justified and proportionate because those regulated professions are not bound by a comparable rule of professional secrecy¹⁵⁵. Similarly, restrictions on multidisciplinary activities for providers of certification, accreditation, technical monitoring, and testing services can be maintained in so far as justified to ensure the independence and impartiality of those providers.

8.4.2. Prevention of conflicts of interest and ensuring independence and impartiality of services providers

In parallel to the removal of restrictions, it is important to prevent conflicts of interest and secure the independence and impartiality required for certain services activities.

As a consequence, Member States which allow multidisciplinary activities must ensure that conflicts of interest are prevented, that the independence and impartiality required for certain activities is ensured, and that the rules governing professional ethics and conduct for different activities are compatible with one another.

8.4.3. Review of legislation and content of the evaluation report

Member States will have to review their legislation to identify existing restrictions and to assess whether they are justified under Article 25. Member States will have to assess whether there are no less restrictive means to ensure, for example, the independence and impartiality of the providers or compliance with the rules governing professional ethics and conduct. Member States will, in particular, have to assess whether existing prohibitions of multidisciplinary partnerships between two regulated professions could not be replaced by less restrictive means – for example by ensuring the independent exercise of the two activities by specific rules of internal organisation and conduct. In this respect the process of mutual

¹⁵⁴ For lawyers, such a provision does not affect the application of Article 11(5) of Directive 98/5/EC.

¹⁵⁵ See Judgment of 19 February 2002, *Wouters*, C-309/99, paragraph 104.

evaluation will allow for an exchange of experience and the spread of best practice between Member States.

8.5. Policy on quality of services

Article 26 provides for a framework for voluntary quality-enhancing measures which will have to be encouraged by Member States in cooperation with the Commission.

There are different methods of fostering the quality of services and transparency for recipients. It is clear that the suitability and effectiveness of these methods will depend on the specific area and type of services. Article 26 refers in particular to certification or assessment of service providers' activities by independent or accredited bodies, development of quality charters or labels by professional bodies as well as to voluntary European standards. There are different means for Member States to encourage such measures, such as awareness campaigns, organisation of workshops and conferences, funding of programmes and projects, etc. The Commission will use its best efforts to support such measures and to spread best practice among Member States.

In order to make it easier for consumers to compare the different features of service activities in different Member States, Article 26(2) requires Member States to ensure that information on the significance and the criteria for the application of labels and quality marks can be easily accessed by providers and recipients. Member States can consider, for example, to create a website with information on labels or to require professional bodies or other associations to provide such information about the labels used by their members. Professional associations whose members use a common label should also make sure that they are used correctly and do not mislead recipients of services.

Finally, consumer associations and independent bodies dealing with assessment and testing of services should be encouraged to provide more comparative information about the quality of services available in different Member States. Again, this can be achieved by awareness campaigns, workshops and conferences, or the funding of programmes and projects by Member States with the support of the Commission.

8.6. Settlement of disputes

8.6.1. Improved handling of complaints by service providers

In order to improve the handling of complaints, which is important to enhance trust and confidence in cross-border services, Article 27 requires Member States to take measures to ensure that providers supply contact details, in particular an address, to which recipients can send a complaint or a request for information. Member States will also have to ensure that providers respond to complaints in the shortest possible time, use their best efforts to find a satisfactory solution and inform recipients of any possibility of recourse to a non-judicial means of dispute settlement. Member States should include such an obligation for service providers in their implementing legislation.

8.6.2. Financial guarantees in the event of judicial decisions

Pursuant to Article 27(3), if a financial guarantee is required to enforce a judicial decision, Member States are obliged to recognise equivalent guarantees lodged with financial institutions established in another Member State. This provision is intended to solve potential

problems related to compliance with judicial decisions. In another context the ECJ has already recognised that the requirement stipulated by a Member State for a guarantee to be established with a credit institution having its registered office or a branch office in its own territory constitutes discrimination against credit institutions established in other Member States, and is prohibited by Article 49 EC¹⁵⁶. The Services Directive specifies that such credit institutions and insurers must be authorised in a Member State in accordance with relevant Community law¹⁵⁷.

8.7. Codes of conduct

8.7.1. *Development of common rules at Community level*

The increase in cross-border activities and the development of a genuine Internal Market for services call for a greater convergence of professional rules at European level. It is therefore important that professional organisations reach agreement between themselves at European level on a common set of rules, specific to the respective profession or service sector, which will ensure an equal level of protection of recipients and a high quality of services throughout the EU.

European codes of conduct can, on the one hand, facilitate the free movement of service providers and, on the other, lead to recipients' enhanced trust and confidence in services offered by providers from other Member States. Codes of conduct are intended to set common minimum rules of conduct at Community level, according to the specificity of each profession or services sector. This does not exclude Member States or national professional associations from stipulating more detailed rules aimed at greater protection in their national law or national codes of conduct.

8.7.2. *Content of the codes of conduct*

With respect to the regulated professions, codes of conduct should establish a minimum set of rules concerning professional ethics and conduct aimed at ensuring, in particular, independence, impartiality and professional secrecy, as well as rules on commercial communications, and – where appropriate – insurance requirements. Such codes should contain the principles which are at the core of the exercise of regulated professions in Europe, such as professional independence, confidentiality, honesty, integrity and dignity.

Rules provided in the codes of conduct should normally apply both to the provision of services across-border as well as to the provision of services in the territory where the service provider is established, the aim being to establish a common set of rules at European level and not to draw a distinction between national and cross-border provision of services.

In order to ensure the quality of the codes of conduct, their acceptability by service providers and recipients and the respect of competition rules and Internal Market principles, the

¹⁵⁶ Judgment of 7 February 2002, *Commission v Italy*, C-279/00.

¹⁵⁷ First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance, OJ L 228, 16.8.1973, p. 3; Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, OJ L 345, 19.12.2002, p. 1; Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions (recast), OJ L 177, 30.6.2006, p. 1.

professional associations need to conform to principles of inclusiveness, transparency, efficiency and accountability. Furthermore, one of the challenges of such codes would also be their concrete implementation, in order to ensure that application of these minimum sets of rules can be enforced in practice.

9. ADMINISTRATIVE COOPERATION

9.1. The rationale of administrative cooperation

Administrative cooperation between Member States is essential to make the Internal Market in services work properly. As was highlighted in the report of the Commission on “The State of the Internal Market for Services”¹⁵⁸, lack of trust and confidence in the legal framework and in supervision in other Member States has resulted in a multiplication of rules and duplication of controls for cross-border activities, which is one of the main reasons why the Internal Market in services has not functioned well to this date. The rules on administrative cooperation in the Services Directive address these difficulties and establish the basis for efficient cooperation between Member States’ authorities. The cooperation between the competent authorities should ensure effective supervision of service providers, based on accurate and complete information, making it more difficult for rogue traders to avoid supervision or to circumvent applicable national rules. At the same time, administrative cooperation should help avoid multiplication of controls on service providers.

Implementing the obligations in the Directive concerning administrative cooperation will require putting in place the necessary legal and administrative arrangements. Member States will have to make sure that their competent authorities involved in the day-to-day administrative cooperation with the competent authorities of other Member States are legally bound by and effectively comply with the obligations of mutual assistance. They will also have to ensure that providers established in their territory supply their competent authorities with all information necessary for supervision of compliance with their national legislation in the event of a request from a competent authority. In some Member States this may require laying down these obligations by law.

9.2. Basic features

9.2.1. Mutual assistance

Articles 28 to 36 legally oblige Member States to give each other mutual assistance, in particular to reply to information requests and to carry out, if necessary, factual checks, inspections and investigations. This means that Member States will not be able to refuse to cooperate with each other. For example, they cannot refrain from carrying out checks or providing information relating to a service provider on the ground that risks or problems have occurred not in their territory but in the territory of another Member State.

The obligation to give mutual assistance is comprehensive and encompasses the obligation to take all possible measures necessary for effective cooperation, for example using all possible

¹⁵⁸ Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services presented under the first stage of the Internal Market Strategy for Services, COM(2002) 441 final.

means to find information if the information is not already available and indicating if difficulties appear.

In order to ensure that mutual assistance is undertaken within the shortest possible time period and in the most efficient way, administrative cooperation should normally take place directly between the competent authorities of the different Member States. Administrative cooperation with competent authorities from other Member States should indeed become standard administrative practice. “Liaison points” – which Member States will have to designate pursuant to Article 28(2) – should only intervene in exceptional circumstances when problems occur (Recital 107). They should consequently have coordinating or supervisory responsibilities in the Member State concerned.

9.2.2. *Technical support by the Internal Market Information System (IMI)*

In order to function properly, administrative cooperation needs to be supported by technical means which enable direct and fast communication between the competent authorities of different Member States. For this reason, the Commission has entered into the obligation to establish, in cooperation with the Member States, an electronic system for the exchange of information between Member States (Article 34(1) and Recital 112).

IMI is intended as a horizontal tool to support the body of Internal Market legislation containing obligations of administrative cooperation¹⁵⁹. IMI, now being developed, will make the electronic exchange of information between competent authorities possible. It will enable competent authorities to easily find the relevant interlocutor in other Member States and to communicate with each other in a fast and efficient way. To overcome possible language barriers, IMI will provide for language support tools. Moreover, IMI will include additional mechanisms which will contribute to the proper functioning of administrative cooperation, such as the exchange of electronic files, documents, certificates, etc. It will also have functions which make it possible to involve other competent authorities in a request if necessary. In addition, it will include features to ensure timely replies, such as automatic e-mail alerts, setting and indicating target deadlines for responses, as well as problem-solving mechanisms in the event of disagreements between competent authorities (for instance if one competent authority does not provide the necessary information).

Putting IMI in place will require intensive efforts by the Commission and Member States throughout the implementation period. This is particularly so because the wide array of economic activities covered by the Services Directive means that a large number of competent authorities at national, regional and, in some Member States, local level will need to be registered in IMI and will need to use the system. The Commission and Member States will need to cooperate closely for the development of the IMI Services application, in particular the specific questions sets and technical functions. Member States, with the assistance of the Commission, should also provide training to the end-users of the system and ensure adequate knowledge of its practical functioning.

¹⁵⁹ IMI will also include a specific application for the administrative cooperation obligations under Directive 2005/36/EC of the European Parliament and the Council of 7 September 2005 on the recognition of professional qualifications (OJ L 255, 30.9.2005, p. 22).

9.3. Exchange of information

9.3.1. *The obligation to provide information on request*

In most cases, requests for mutual assistance will be requests to provide information. Such requests may be made in the context of the freedom of establishment: for example, if a Member State needs to know whether a service provider wanting to establish in its territory is already legally established in another Member State and whether documents attesting to, for instance, insurance are authentic. Many requests will also be made in the context of cross-border provision of services, for example, when the Member State into which services are provided needs to know whether a provider is entitled by law to provide certain services or whether, to the knowledge of the Member State of establishment, he is not exercising his activities in an unlawful manner.

9.3.1.1. The exchange of information on providers and their services

The information exchange with competent authorities in other Member States should generally be very fast and non-bureaucratic.

Requests for information will have to specify clearly what kind of information is required and be duly motivated, giving reasons why the information is necessary to ensure proper supervision (Article 28(3)). Once a competent authority has received a request for information, it will have to provide it within the shortest possible period of time and by electronic means (Article 28(6)). Since the requested competent authority is responsible for supervising the provider, it will normally have the requested information and will thus normally be able to transmit information very quickly to the requesting competent authority. In cases in which the competent authority does not itself have the requested information, for example because the provider is not registered or the information has never been collected before, it will have to use all possible means provided by its national law to obtain the required information as quickly as possible, including by asking other competent authorities, by contacting the service provider and, as the case may be, by carrying out checks and inspections. Once information has been obtained, it may only be used in respect of the matter for which it was requested (Article 28(3)).

There might be situations in which the requested information is not available and cannot be gathered or in which gathering will take some time. In such cases, the competent authorities should contact and inform the requesting authority in the other Member State as quickly as possible with a view to finding a solution (Article 28(5)). For example, if the provision of information is delayed because the information first has to be collected from a service provider, the requested competent authorities should inform the requesting competent authority in the other Member State as quickly as possible about the delay and indicate when it can expect to receive the requested information. In the same way, a requesting competent authority which has received only partial or unsuitable information, should reply as quickly as possible and explain why the information received is not sufficient and which kind of supplementary information is needed. Such consultation between competent authorities will generally make it possible to find a solution at their level. However, in cases in which difficulties cannot be solved at the level of competent authorities, the liaison points of the Member States concerned should be involved in order to find a solution. If necessary, the Commission needs to be informed on the basis of Article 28(8) and it may take appropriate

steps to ensure compliance with the mutual assistance obligations, including, by way of infringement procedures.

9.3.1.2. The exchange of information on the good repute of providers

In view of the sensitivity of information on the good repute, Article 33 provides for specific rules for the exchange of information concerning criminal sanctions and disciplinary and administrative measures which are directly relevant to the provider's competence or professional reliability as well as for decisions concerning insolvency or bankruptcy involving fraud. In particular, according to Article 33(3), the exchange of such data on the good repute needs to comply with rules on personal data protection and with rights guaranteed to persons found guilty or convicted in the Member States concerned. Moreover, on the basis of Article 33(2), information on criminal sanctions and disciplinary and administrative measures directly relevant to the provider's competence or professional reliability can only be communicated if a final decision has been taken, i.e. no possibilities for appeal exist or remain. Also, as mentioned above, such information may in any case only be used in respect of the matter for which it was requested (Article 28(3)).

9.3.2. *The obligation to carry out checks on request*

In some cases, requests for information will require carrying out checks, inspections or investigations. Such factual checks may be necessary in cases of cross-border service provision, for instance, if a Member State into which a service provider moves to provide a service without being established there, has doubts whether that service provider complies with the laws of his Member State of establishment.

Requests which require carrying out factual checks have to be limited to cases where this is necessary for supervision, must be clear and precise and give reasons for the request (Article 28(3)). It is up to the competent authority of the Member State that received such a request to decide on the appropriate means to carry out checks and inspections and to decide how to collect the requested information (Article 29(2) and Article 31(3)), for example, by carrying out an on-site inspection at the service providers' premises, by asking the provider or by any other means.

If a competent authority has difficulties in meeting a request from another Member State, for example because a service provider could not be identified or the relevant information could not be found, it must quickly inform the competent authority in the requesting Member State and try to find a mutually satisfactory solution (Article 28(5)). If necessary, the Commission should be informed in accordance with Article 28(8) and it may take appropriate steps.

9.4. Mutual assistance in case of cross-border service provision

9.4.1. *Division of supervisory tasks between Member States*

Articles 30 and 31 provide for a division of tasks between the different Member States involved. They reflect which Member State's requirements apply according to Articles 16 and 17. On the basis of Article 16, there will be cases in which the Member State where the service is provided is prevented from applying its own requirements to service providers from other Member States. In other cases, however, it can apply its requirements to service providers from other Member States (provided this is in compliance with Community law). Articles 30 and 31 reflect this and attribute the tasks of supervision between the Member State

of establishment and the Member State where the service is provided accordingly. On the basis of these articles, each Member State is in principle responsible for the supervision and enforcement of its own requirements. The other Member State has to cooperate in the effective supervision.

Thus, in relation to those rules of the Member State where the service is provided which can – in accordance with Articles 16 and 17 and with Community law – be applied to service providers from other Member States, Article 31(1) states that it is the Member State where the service is provided which is responsible for supervising the activity of the provider and which can take measures, for instance, to check and enforce compliance with rules necessary for environmental protection.

On the other hand, in relation to cases in which the Member State where the service is provided is – on the basis of Articles 16 and 17 – prevented from applying its own requirements to service providers from other Member States, the Member State of establishment of the service provider has to ensure compliance with its own national requirements (Article 30(1)) and has, for instance, to ensure that the service provider has the required authorisations. As mentioned above, the Member State of establishment cannot refrain from taking supervisory measures, for example on the ground that the service is provided (and possible damage caused) in another Member State. The Member State where the service is provided, in its turn, is obliged to provide assistance, where necessary, but may also carry out factual checks on its own initiative under the conditions set out in Article 31(4).

9.4.2. *Mutual assistance relating to case-by-case derogations*

By way of derogation from the freedom to provide services clause, and for specific cases only, Article 18¹⁶⁰ gives Member States the possibility to take measures – on the basis of their own legislation relating to the safety of services – in respect of individual service providers providing services across borders into their territory. Concerning case-by-case derogations, Article 35 provides for a specific procedure for administrative cooperation which furnishes procedural safeguards ensuring that the case-by-case derogation is only used if the substantive criteria laid down in Article 18 are fulfilled. In particular, Article 35 establishes that the Member State where the service is provided can only take measures if the Member State of establishment of the service provider has been contacted but has not taken sufficient measures. Provided that the requirements set out in Article 18 are fulfilled and the procedure laid down in Article 35 has been complied with, a Member State might invoke a case-by-case derogation, for instance, in a case in which an operator from another Member State providing maintenance and cleaning services for central heating systems in its territory does not carry out work properly and creates safety risks.

As the first step in the procedure, as mentioned above, a Member State which intends to take a measure pursuant to Article 18 has to ask the Member State of establishment of the service provider to take measures and provide information. The Member State of establishment will then need to check whether it is appropriate to take measures according to its legislation, and inform the requesting Member State within the shortest possible time of the measures taken or envisaged or, as the case may be, the reasons why it does not intend to take any measures. If – after consulting of the Member State of establishment – the Member State where the service is

¹⁶⁰ See Section 7.1.5 of this handbook.

provided still intends to take measures according to Article 18, it will, as a second step, have to inform the Commission and the Member State of establishment of its intention giving reasons why the measures by the Member State of establishment are inadequate and why the measures it intends to take fulfil the conditions laid down in Article 18. The Member State where the service is provided can take these notified measures after 15 days following notification unless the Commission has adopted a decision to the contrary.

In cases of urgency, i.e. if there is a substantiated risk of immediate and serious damage to the safety of persons or property, the Member State where the service is provided can take measures on the basis of its own safety-of-services-related legislation even though the specific procedure provided for in Articles 35(2) to (4) has not been completed (Article 35(5)). However, it is clear that such measures can only be taken if the criteria laid down in Article 18 are fulfilled, i.e. if the national provisions, in accordance with which the measure is taken, have not been subject to Community harmonisation in the field of safety of services, the measures provide for a higher level of protection of the recipient, the Member State of establishment has not taken sufficient measures and the measures are proportionate. Such measures have to be notified to the Commission and the Member State of establishment within the shortest possible time and giving reasons for the urgency.

9.5. Alert mechanism

To ensure effective supervision and, in particular, adequate protection of service recipients, it is important that Member States are quickly informed about service activities that can cause serious damages to the health or safety of persons or the environment. For this reason, Article 32 lays down a mechanism aiming to ensure that Member States inform all other Member States concerned and the Commission within the shortest possible time if they become aware of acts of a service provider or specific circumstances relating to a service activity which could cause serious damage to the health or safety of persons or to the environment. Such information will enable the competent authorities of other Member States to react quickly, to closely supervise the service provider in question and, as the case may be, to take necessary preventive action in compliance with the rules of the Services Directive, i.e. in particular Articles 16 to 18 and Articles 30 and 31.

10. REVIEW OF LEGISLATION AND MUTUAL EVALUATION PROCESS

10.1. Objectives and basic approach

As a result of the Services Directive, Member States will have to review their legislation in a number of areas. Article 39 requests Member States to report to the Commission on the results of their review and sets up a process of “mutual evaluation”, which will ensure transparency and peer review. This process will provide an important opportunity for Member States to modernise their legal and administrative frameworks.

The review and assessment of national legislation is required by the Directive in two different contexts and with two different objectives. On the one hand, there is an obligation to review authorisation schemes and certain establishment related requirements (Articles 9, 15 and 25). In this context, Member States need to assess their existing legislation in the light of the Directive and to amend or abolish unjustified or disproportionate authorisation schemes and other requirements in question. On the other hand, pursuant to Article 39(5), Member States have to review requirements that they apply to service providers which are established in

another Member State and provide services in their territory. This should be done in order to assess whether the application of such requirements is compatible with the conditions set out in Article 16. There are differences between the reporting of authorisation schemes and other establishment related requirements on the one hand (Article 39(1)) and the reporting linked to Article 16 on the other (Article 39(5)).

The reporting under Article 39(1) is in principle a one-off exercise (although complemented by a notification procedure in Article 15(7) concerning possible future legislation containing requirements of the kind listed in Article 15(2)), followed by a process of mutual evaluation involving the Commission, (the) other Member States, interested parties and the Committee referred to in Article 40(1) of the Directive. At the end of this process, and at all events one year after the implementation deadline at the latest, the Commission will “*present a summary report to the European Parliament and to the Council accompanied where appropriate by proposals for additional initiatives*”¹⁶¹.

The reporting under Article 39(5), by contrast, is an ongoing process because there is a continuous obligation for Member States to report any changes in the requirements, including new requirements, they apply to incoming services. This is meant to achieve transparency and legal certainty for service providers, in particular SMEs, wishing to provide cross-border services. The first report under Article 39(5) and subsequent updates will be communicated to (the) other Member States, and the Commission will produce on an annual basis “*analysis and orientations on the application of these provisions in the context of this Directive*”¹⁶².

The proper and coherent review of their regulatory framework will be a considerable challenge for Member States. The reason is the variety of services sectors covered by the Services Directive and the fact that requirements to be reviewed may be found not only in legislation specifically regulating such sectors but also in legislation of a horizontal nature (for example acts regulating commerce in general or rules on commercial communications).

It is clear that this process will require close co-operation between different parts of the national administrations both at the stage of identification of the relevant requirements and at the stage of assessment of their substance. Considering the scale of the exercise and the potential number of government departments and authorities involved, strong coordination at an appropriate level will be essential.

Member States are free to decide how to organise themselves internally. However, in order to ensure that all the relevant requirements are identified and coherently assessed, it would seem to be advisable for Member States to allocate to a particular body the task of coordinating and guiding the process. Moreover, to ensure coherence in the scope of the review and the assessments of identified provisions, it would appear advisable for Member States to consider internal guidelines together with standard forms for identification and assessment of the different types of authorisation schemes and requirements. In addition, and in order to assist Member States in reporting the results of their review and assessment of legislation, the Commission services will develop and propose to Member States a methodology and

¹⁶¹ See Article 39(4).

¹⁶² See Article 39(5).

structure for the national reports and will also put in place arrangements for online reporting¹⁶³.

10.2. The procedure provided for under Article 39(1) to (4)

10.2.1. Review and assessment of legislation

The first step Member States need to take is to review their legislation to identify the relevant requirements (all authorisation schemes covered by Article 9(1), all requirements of the kind covered by Article 15(2) as well as all restrictions on multidisciplinary activities covered by Article 25(1)) and to assess whether they comply with the relevant criteria in the Directive.

As explained in Recital 9, the Directive does not apply to requirements which do not specifically regulate or specifically affect service activities but have to be respected by providers in the course of their activity in the same way as by individuals acting in their private capacity. Member States should be careful, however, not to exclude too easily from the review requirements which, although contained in general law, nevertheless specifically affect service activities¹⁶⁴. Equally, Member States do not need to review legislation which clearly does not concern access to or exercise of a service activity, for instance legislation in the area of labelling or safety of products. Again, Member States should be careful as there might be provisions in such legislation that concern service activities (for instance rules on the equipment used by service providers).

Another aspect to be kept in mind is the meaning of the term “requirement” as defined in Article 4(7) of the Services Directive¹⁶⁵, which covers requirements established in law, regulations or administrative provisions. Also, the rules of professional bodies or collective rules of professional associations or other professional organisations which are adopted in the exercise of their legal autonomy constitute a requirement¹⁶⁶ and will need to be reviewed if they regulate or affect a service activity. This would be the case, for instance, if minimum or maximum tariffs for the provision of the services of a regulated profession are established and collectively applied by the professional body regulating such profession.

Requirements that need to be reviewed may be found in legislation at central level as well as legislation at regional level and, in some cases, also at local level.

Once Member States have identified the relevant requirements, they will have to assess in each case whether they are in conformity with the criteria set out in the respective articles of the Directive¹⁶⁷ and if necessary remove or replace them by less restrictive measures.

¹⁶³ See Sections 10.2.2 and 10.3 of this handbook.

¹⁶⁴ For further clarification on the scope of application of the Directive including the requirements covered, see Section 2 of this handbook.

¹⁶⁵ See Section 2.3.1 of this handbook.

¹⁶⁶ See Judgment of 12 December 1974, *Walrave*, Case 36/74, paragraphs 17, 23 and 24; Judgment of 14 July 1976, *Donà*, Case 13/76, paragraphs 17 and 18; Judgment of 15 December 1995, *Bosman*, Case C-415/93, paragraphs 83 and 84; Judgment of 19 February 2002, *Wouters*, C-309/99, paragraph 120.

¹⁶⁷ See Section 6.1 of this handbook on authorisations, Section 6.3 on requirements to be evaluated and Section 8.4 on restrictions concerning multidisciplinary activities.

10.2.2. Reports to be submitted

Member States need to report to the Commission on their review of national legislation by 28 December 2009 at the latest. Each Member State will have to specify the requirements it intends to maintain and justify this on the basis of the criteria set out in Article 9(1)¹⁶⁸, Article 15(3) and Article 25(1) respectively. In the case of Article 15, the requirements that have been abolished or made less stringent will also have to be reported.

The Commission will use its best efforts to find practical arrangements to assist Member States with their reporting obligation and to facilitate the subsequent transmission and use of the reports. This will include a structured manner of providing the information and an online tool to submit the reports. This would help to ensure that the reports are of an equivalent level and that the information provided by Member States is manageable (clearly structured and easily understandable) and comparable. A system of online reporting should also help to address translation problems and will contribute to the overall transparency of the reporting exercise.

10.2.3. The mutual evaluation process

The Commission will make available the reports to other Member States, which will have six months to submit their observations on them, and will consult interested parties and the Committee provided for in Article 40(1) of the Directive. On the basis of the reports and in the light of the observations made the Commission will draw up a summary report and submit it to the European Parliament and the Council.

10.2.4. The review and assessment of requirements listed in Article 15(2) and services of general economic interest

Services of general economic interest fall within the scope of application of the Services Directive to the extent that they are not covered by an explicit exclusion. Accordingly, Member States will have to review requirements applicable to services of general economic interest and assess their conformity with the criteria of non-discrimination, necessity and proportionality.

However, Article 15(4) specifies that the application of Article 15(1) to (3) must not obstruct the performance, in law or in fact, of the particular task assigned to services of general economic interest. This is also confirmed by Recital 72, which further clarifies that “requirements which are necessary for the fulfilment of such tasks should not be affected by this process while, at the same time, unjustified restrictions on the freedom of establishment should be addressed”. In practical terms this means that Member States have to review but may maintain those requirements in the field of services of general economic interest that are proportionate and necessary for the fulfilment of the specific task entrusted to the service

¹⁶⁸ Member States do not need to report on each of the conditions upon which the granting of an authorisation depends. Nevertheless, Member States need to make sure that these conditions comply with the criteria set out in Articles 10-13 and should use the review of authorisation schemes to ensure that the conditions for the granting of authorisations are in conformity with the Directive.

provider. This assessment has to be carried out in conformity with the case law of the ECJ relating to services of general economic interest¹⁶⁹.

10.2.5. Notifications of new requirements of the type listed in Article 15(2).

Article 15(6) requires Member States as from the entry into force of the Directive (28 December 2006) not to introduce new requirements of the kind covered by Article 15(2) unless these requirements are non-discriminatory, justified by an overriding reason relating to the public interest and proportionate¹⁷⁰. To enhance regulatory transparency and legal certainty for service providers, such requirements have to be notified to the Commission. If there is any doubt about their conformity it would seem advisable for Member States to notify such requirements before their formal adoption. Notification, in any event, does not prevent Member States from adopting the provisions in question. Furthermore, as clarified in Article 15(7), a requirement which is notified in accordance with Directive 98/34/EC¹⁷¹ does not need to be additionally notified under the Services Directive.

Once a new requirement has been notified, the Commission will inform the other Member States and will examine the compatibility of any such new requirement within three months after the notification. The Commission shall, where appropriate, adopt a decision requesting the Member State in question to refrain from adopting or to abolish the requirement.

10.3. The procedure provided for under Article 39(5)

The general approach to the review of and reporting on relevant requirements under Article 39(5) is in many aspects similar to the process under Article 39(1). It would therefore make sense for Member States to use in principle the same methodology. This means that, to identify the requirements which need to be reviewed, Member States will to a large extent be able to base themselves and draw on the work done for the review procedure provided for under Article 39(1), or vice versa.

Member States will have to assess whether the requirements they have identified as potentially applicable to service providers from other Member States comply with the criteria

¹⁶⁹ The ECJ has clarified in its case law on the application of Article 86(2) of the EC Treaty that to justify a measure adopted by a Member State in relation to a particular task of an operator of a service of general economic interest "it is not sufficient for the undertaking in question merely to have been entrusted by the public authorities with the operation of a service of general economic interest" (Judgment of 10 December 1991, *Port of Genova*, Case C-179/90, paragraph 26). It must be shown in addition that the application of the specific requirement is necessary to ensure the performance of the particular tasks assigned to that operator (for example the compliance with the principle of universality). See Judgement of 19 May 1993, *Corbeau*, Case C-320/91, paragraphs 14 and 16.

¹⁷⁰ Although Member States are not obliged to ensure implementation before the implementation period has expired, the ECJ has ruled that they must, during that period, refrain from adopting any measures liable to seriously compromise the result prescribed by the Directive (see Judgment of 18 December 1997, *Inter-environnement Wallonie*, Case C-129/96, paragraph 45). This is based on Article 10 of the EC Treaty by which Member States have the duty to facilitate the achievement of the Community tasks and abstain from any measure which could jeopardise the attainment of the objectives of the EC Treaty.

¹⁷¹ Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards, OJ L 204, 21.7.1998, p. 37. Further to the amendments introduced by Directive 98/48/EC of 20 July 1998 (known as the "Transparency Directive"; OJ L 217, 5.8.1998, p. 18), Directive 98/34/EC applies, in the field of services, to regulations and rules on information society services, i.e. to services provided at a distance by electronic means.

set out in the third subparagraph of Article 16(1) and in the first sentence of Article 16(3), i.e. that they are non-discriminatory, justified for reasons of public policy, public security, public health or the protection of the environment and do not go beyond what is necessary¹⁷².

If a requirement does not comply with the criteria set out in Article 16, Member States will have to ensure that it will not be applied to service providers from other Member States¹⁷³.

On the basis of this review and assessment of requirements, Member States will have to present a report to the Commission by 28 December 2009 at the latest, specifying those requirements whose application could fall under the third subparagraph of Article 16(1) and the first sentence of Article 16(3) and give reasons why their application to service providers established in other Member States could be appropriate and compatible with Article 16. For example, if a Member State considers that it needs to apply a national rule limiting noise levels for certain activities for reasons of environmental protection, this rule needs to be specified together with the reasons for its potential application. Following the first report, Member States will have to subsequently notify any changes in the relevant requirements, including new requirements, or in their application, again specifying the reasons why their application could be justified under Article 16.

As with the report under Article 39(1), in order to facilitate the reporting obligation and to structure information, the services of the Commission will develop and propose to Member States a methodology and structure of online reporting.

The Commission will submit Member States' reports, as well as any later notification of modified or new requirements, to the other Member States and will, on an annual basis, provide analysis and orientations on the application of these provisions in the context of the Directive in order to enhance transparency and legal certainty for service providers.

¹⁷² For more details on the criteria see Section 7.1.3 of this handbook.

¹⁷³ See Section 7.1.2 of this handbook.