

Services Directive II

Authorisation Requirement

The Services Directive applies where a service provider proposes to provide services cross border from his own Member State or seeks to establish a business in another Member State. Authorisation may only be required in the recipient state if it is non-discriminatory, justified by an overriding reason relating to public interest and the public interest cannot be protected in any other way. The Directive provides that they must go no further than absolutely necessary.

By December 2009, Member States must report to the European Commission in relation to authorisation schemes and demonstrate their compatibility with the requisite criteria. Authorisation refers to licences, permits or requirements which the provider of a service is required to obtain from a regulatory body in the host Member State in order to provide the service.

Requirements for granting authorisation cannot duplicate requirements and controls which are equivalent to or comparable with those to which the providers are already subject, in another Member State. Each State's regulatory body must take into account the equivalent requirements in other Member States.

In order to allow service providers to develop a long term strategy, an authorisation must be for an unlimited period unless it is automatically renewed subject to fulfilment of requirements. Limitations of time can only be justified by an overriding reason in relation to public interest.

The Services Directive provides that the authorisation procedures must be clear, must be made public in advance, be dealt with objectively and impartially, must not be complicated, must not be delayed and be easily accessible. Any charges made must

be reasonable and proportionate. Applications must be processed as quickly as possible and within a reasonable period.

Prohibited Conditions

The Services Directive sets out requirements which Member States cannot prescribe and are therefore prohibited. These include:

- requirements based on nationality or residence of the service provider, staff members or board members;
- prohibitions on having an establishment in more than one state;
- restrictions on freedom to have its permanent establishment in a particular Member State;
- the application of an economic test making authorisation subject to economic need or market demand;
- obligations to provide financial guarantee or take out insurance from a particular provider
- an obligation to pre-register for a given time before exercising an activity.

Necessity and Proportionality of Requirements

Member States are required to review their legal system in order to identify all requirements (including professional organisation rules). They must then assess them on the basis of whether they are in fact necessary and are in accordance with the above criteria of non-discrimination, public interest and proportionality. The following can only

be justified if they are objectively justified. It is likely that most of the below cannot be justified:

- quantitative or territorial restrictions e.g. limits on the number of similar businesses that can operate in a territory;
- obligation for the service provider to take a specific legal form;
- requirements in relation to shareholdings of companies e.g. requirements of minimum shareholdings or specific requirements;
- requirements reserving the provision of certain services to specific providers (requirements to have professional qualifications are not covered by this provision)
- limitations on having more than one establishment in the territory of the same Member State;
- obligations for a minimum number of employees;
- obligations to apply fixed or minimum tariffs;
- obligations to supply services jointly.

Provision of Services in Host State

The Directive requires Members to give effect to the right to provide service in a Member State other than the one in which they are established. Any conditions imposed on incoming service providers must be strictly justified. They must be non-discriminatory with regard to nationality of the Member State, in which a company is incorporated. They must be necessary for reasons of public policy, public security, public health and protection of the environment and they must be proportionate to obtain the objective concerned. The following types of obligations cannot be prescribed:-

- obligation to have an establishment in the territory where the service is provided;
- obligation to obtain an authorisation or registration from an authority where the service is to be provided;
- requirement to set up infrastructure in the host state;

- the application of specific contractual arrangements between the service provider and the recipient which prevent or restrict provision of services by the self-employed;
- obligation to possess specific identity document issued by the competent authority;
- requirements affecting the use of equipment e.g. requirements to use of specific brands;
- restriction on recipients which restrict useful services.

There are a number of service areas to which the above do not apply so that a Member State can impose additional requirements. These include:

- general economic services such as post, electricity, gas, water;
- services that are covered by existing Directives;
- protection of personal data, social security schemes, administrative formalities regarding the free movement of persons,
- shipment of waste;
- legal protection of intellectual property;
- statutory audit of accounts;
- judicial recovery of debts;
- visa requirements for third country nationals,
- actions involving notaries;
- registration of vehicles leased in other Member States; and
- obligations determined by private international law.

Recipients have rights to receive services from abroad. Member States are prohibited from placing restrictions on the use of a service provided by a provider established in another Member State. They must ensure residents obtain information in relation to access to and exercise of services, means of redress in case of dispute and contact details of the organisation which can help.

Obligations on Service Providers

There are number of provisions designed to encourage a high quality of services and to provide information and transparency in relation to service providers and services. They provide for binding obligations for service providers and encourage voluntary measures.

Member States must ensure service providers make certain information available to recipients without being asked for, including:-

- name, address, legal status and contact details of provider;
- whether it is registered in trade or other register;
- whether it is registered under an authorisation scheme,
- details of the relevant authority and point of single contact; and
- VAT number

In case of regulated professionals, the professional body's terms and conditions applicable to the provision of services must be provided including those related to jurisdiction, after-sales guarantee, prices pre-determined, the main features of the services and professional guarantee. The information must be reasonably accessible where the service is provided. It must be available electronically and must appear on any information documents that the provider uses to describe the services.

Member States must ensure that service providers make certain information available to recipients on request. This includes:

- prices or the method of determining price;
- any applicable professional rules and where access can be obtained;
- information on service providers, disciplinary activities and measures taken to avoid conflicts;
- details of any code of conduct to which a provider as subject;

- any information as to non-judicial means of dispute settlement to which the provider is subject as a member of a trade or professional association.

This information must be communicated in a clear and unambiguous manner in good time before conclusion of the contract of services.

Obligations on Member States

Member States must ensure that where the service providers pose a risk to the health and safety of third parties or to the financial security of the recipient, that they must take out professional liability insurance or provide a comparable guarantee. This cannot however be required where the provider is already covered by equivalent insurance or guarantee in the Member State in which they are established.

Member States must remove total prohibitions on commercial communications (e.g. promotional advertising) by regulated professionals. They may however ensure that commercial communications comply with relevant professional rules.

Member States must ensure the providers are not restricted from exercising different activities. Regulated professions which provide certification, accreditation, monitoring or testing services, may be subject to such requirements.

Member States are required to encourage providers to take action to ensure quality of services by way of certification, or assessment by independent bodies or drawing up quality charters or tables. Member States must also take measures to encourage professional bodies to co-operate to promote quality of service, encourage development of independent assessments and the development of European standards with the aim of facilitating compatibility between different Member States.

Member States must ensure:-

- contact details are supplied to which a recipient in any state can send a complaint or request for information;
- that the service provider responds to complaints in the shortest possible time;
- that the service provider demonstrates compliance with obligations in the directive; and
- that the service provider inform recipients of any code of conduct or membership of a trade association or professional body that provides a recourse of non-judicial means of dispute.

The provision also requires that where judicial decision requires lodging a financial guarantee Member States must recognise financial guarantees lodged with an institution established in other states.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.