STUDY

Requested by the IMCO committee

European Parliament

Contribution to Growth

Free Movement of Services and Freedom of Establishment

Delivering Improved Rights to European Citizens and Businesses

Policy Department for Economic, Scientific and Quality of Life Policies
Directorate-General for Internal Policies
Author: Prof. Dr. Friedemann KAINER

PE 638.394 - May 2019

EN

Contribution to Growth

Free Movement of Services and Freedom of Establishment

Delivering Improved Rights to European Citizens and Businesses

Abstract

This study discusses European legal policy to ensure freedom to provide services and freedom of establishment since 2009, examines the market-opening effects of enacted acts and proposals, and identifies legislative challenges that the Union institutions should address in the coming legislative period. It also addresses the specific Brexit-related issues for the freedom to provide services.

This document was provided by Policy Department A, at the request of the European Parliament's Committee on Internal Market and Consumer Protection.

This document was requested by the European Parliament's Committee on the Internal Market and Consumer Protection.

AUTHORS
Prof. Dr. Friedemann KAINER, University of Mannheim

ADMINISTRATOR RESPONSIBLE
Mariusz MACIEJEWSKI

EDITORIAL ASSISTANT
Irene VERNACOTOLA

LINGUISTIC VERSIONS
Original: EN

ABOUT THE EDITOR
Policy departments provide in-house and external expertise to support EP committees and other parliamentary bodies in shaping legislation and exercising democratic scrutiny over EU internal policies.

To contact the Policy Department or to subscribe for updates, please write to:
Policy Department for Economic, Scientific and Quality of Life Policies
European Parliament
L-2929 - Luxembourg
Email: Poldep-Economy-Science@ep.europa.eu

Manuscript completed: May 2019
Date of publication: May 2019

This document is available on the internet at:
http://www.europarl.europa.eu/supporting-analyses

DISCLAIMER AND COPYRIGHT

For citation purposes, the study should be referenced as: KAINER, F., *Contribution to Growth: Free Movement of Services and Freedom of Establishment. Delivering Improved Rights to European Citizens and Businesses*, Study for the Committee on the Internal Market and Consumer Protection., Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2019.

CONTENTS

LIST OF ABBREVIATIONS

AEUV	Vertrag über die Arbeitsweise der Europäischen Union
BT-Drs.	Bundestagsdrucksache
CEAOB	Committee of European Auditing Oversight Bodies
CEN	European Committee for Standardization
CENELEC	European Committee for Electrotechnical Standardization
CJEU	**Court of Justice of the EU**
DStR	Deutsches Steuerrecht
EFF	European Franchise Federation
ELRev	European Law Review
EnzEuR	Enzyklopädie Europarecht
EPC	European Professional Card
ETSI	European Telecommunications Standards Institute
EU	European Union
EuR	Europarecht
EUV	Vertrag über die Europäische Union
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
GATS	General Agreement on Trade in Services
GDP	Gross Domestic Product
GewO	Gewerbeordnung
IMCO	Committee on the Internal Market and Consumer Protection
IMI	Internal Market Information System
MOSS	Mini One-Stop-Shop
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NZA	Neue Zeitschrift für Arbeitsrecht
OJ	Official journal of the European Communities
PSC	Points of Single Contact
SME	Small and medium-sized enterprises
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UK	United Kingdom
VAT	Value Added Tax
WTO	World Trade Organization

LIST OF TABLES

EXECUTIVE SUMMARY

The cross-border provision of services is in principle guaranteed within the framework of European internal market law: (1) As a cross-border offer of services from the country of origin or through a non-permanent establishment in the host state, by art. 56 TFEU (freedom to provide services); or (2) as a permanent establishment in the host state to offer services locally, by art. 49 TFEU (freedom of establishment). Both fundamental freedoms grant subjective rights and, as now interpreted by the Court of Justice of the EU (CJEU), oblige the host state to recognise professional qualifications or other requirements from the country of origin (principle of mutual recognition).

However, this principle applies only on the condition that the host Member State cannot justify stricter national standards. The Court has consistently held that restrictions to the freedom to provide services and to the freedom of establishment may be justified where they serve overriding reasons relating to the general interest, are suitable for securing the attainment of the objective which they pursue, and do not go beyond what is necessary in order to attain it.

In many cases of cross-border activity, the law of the host Member State requires an adjustment of the service provided or the economic activity of the established company. The necessary adjustments result in **additional costs for cross-border activities** of service providers or companies which distort competition and therefore are, in principle, contrary to the internal market and slow down economic growth. Finally, provisions which are non-discriminatory and have the sole effect of causing additional costs for the service in questions, in particular, information costs due to the diversity of the law itself, do not restrict market access and are not covered by the fundamental freedoms. However, such regulations can also have an inhibiting effect on economic growth.

Finally, different or double administrative procedures, unclear responsibilities and double supervision can reduce the attractiveness of cross-border services and establishments.

Legislative harmonisation can address the adjustment costs resulting from legislation which does not fall under the prohibitions of the freedom to provide services or the freedom of establishment. It can also be advantageous over the direct application of the fundamental freedoms as their development is slow and selective and comes with high costs of judicial enforcement. In principle, three regulative strategies are applied to enhance the effects of the fundamental freedoms: the establishment of common standards, the effectuation of the principle of mutual recognition, and the simplification of procedures.

Among the numerous directives passed in the area of responsibility of IMCO over the past decades, two stand out because of their major and general influence on the liberalisation of the services market: The **Services Directive** and the **Professional Qualifications Directive**.

The **Services Directive** is broad in scope and aims at enhancing the freedom to provide services through granting specific access rights, simplifying procedures and establishing cooperation on supervision. The mechanisms used in the Services Directive focus on making the principle of mutual recognition effective against rules that restrict market access for a service provider. The directive addresses adjustment costs by putting in place mechanisms such as the points of single contact where foreign service providers shall not only be able to access all relevant information about applicable requirements, including information on how they are interpreted and applied, and contact details of the competent authorities, but can also complete all procedures and formalities needed to exercise their service activities in the host Member State. The recently proposed **Services Enforcement Directive** aims at creating a notification requirement prior to the introduction of service-related authorisation schemes and requirements related to establishment procedures.

It would increase the notification obligations introduced by the Services Directive and implement extensive obligations to state reasons and justifications for every envisaged measure. It would address the problem that Member States often regulate access to their service markets without always considering the consequences under European law. The proposal could significantly reduce such barriers by raising awareness and giving guidance to the Member States. The proposed **E-Card for services** would simplify the procedure for cross-border services. This is an approach that should be pursued further. However, in this case, it should be clarified that the services e-card does establish the principle of mutual recognition only with limited scope and does not prevent the host Member State from requiring compliance with its own standards when justified.

The **Professional Qualifications Directive** constitutes a corner stone for the liberalisation of the services sector. By establishing rules on the recognition of professional experience, reducing adjustment costs by decreasing double regulation, and by establishing uniform supervision, the Professional Qualifications Directive was an important step into an integrated services market. The Directive uses a cross-sectoral approach, regulating a huge variety of different groups of professions including the liberal professions. This broad approach led to a complex and intricate scheme of rules making the Directive an instrument comprehensive on the one side, but rather less transparent on the other.

The newly adopted **Proportionality Test Directive** introduces a harmonised proportionality test to be used by all Member States before adopting or amending national regulations on professions. It aims at increasing the transparency for regulated professions and at ensuring a thorough analysis of their proportionality before adopting new rules. The directive to a broad extent consolidates the Court's case law and gives guidance to the Member States on how to conduct the proportionality test. Ultimately it can be expected that through harmonisation of the proportionality criteria and procedure, the adoption of unproportionate laws can be prevented. In that sense, the Directive can potentially have effects that are to some extent similar to directives that harmonise regulated professions.

Despite great achievements through secondary legislation in the past, there remain **practical and legal problems in the context of free services and establishment**: Ambiguities about the exemptions from notification and authorisation requirements pose obstacles to the cross-border provision of services. The authorities in the various Member States, for instance, do not agree on the period up to which it is still possible to speak of a temporary activity in the sense of the freedom of services. Despite uniform framework conditions, the requirements for tax registration, the registration and social security of employees or rules for health and safety vary. Many details must already be considered and researched during the preparation of a cross-border offer in order to avoid additional costs or even fines. This particularly affects the posting of employees. Service providers that work temporarily in other Member States are faced with many different notification and registration obligations. In many Member States there is still a lack of both the technical and administrative infrastructure as well as the legal framework to allow simple or even electronic procedures. Points of single contact often do not communicate in enough different languages.

Future legislative developments should focus on the importance of legal certainty and the reduction of administrative burdens as well as on further developing the principle of mutual recognition. Notification obligations can further increase cross-border mobility through "soft harmonisation". They can also increase transparency and legal certainty. In order to enhance their effectiveness in that regard as well as to minimise the burden on the Member States, such obligations should be consolidated in one legislative act and apply the same standards as far as possible. Future legislation should focus on reducing administrative interaction with the host Member State and shift recognition and registration procedures to the home Member State as an intermediary.

For this reason, the Proportionality Test Directive should be extended in scope and applied to all services, not only on professional qualification requirements. The legislative procedure for the services e-card and the Services Enforcement Directive should be completed. As their basic concept is convincing, consideration should also be given to broadening their scope in the medium term. The European Professional Card should be further developed and extended to other professions. Finally, to lower burdens, in particular for SMEs which do not have the capacity for substantial legal research on every jurisdiction they want to provide services to, a uniform platform should be developed that includes all the relevant legislation and guides through the complete process of offering cross-border services or establishing a business.

1. INTRODUCTION

The liberalisation of services markets differs in many respects from that of goods markets: Obstacles to cross-border trade in services often lie in mere differences between national regulations. Services cannot simply be controlled for compliance with product regulations like standardised products. Services are often considerably individualised to the customer. At the same time, the quality of services depends very much on the individual skills, training and professional experience of the service provider. Rules affecting cross-border trade in services therefore often do not apply to the product itself but to the service provider. As the rules and procedures in the Member States vary considerably, market access can take a significant amount of time and be very expensive. The same applies to cross-border establishments. Here, too, market access is regularly linked to the fulfilment of certain conditions and is subject to a specific procedure.

Effective liberalisation of the freedoms of establishments and of the cross-border trade in services, in particular access to regulated professions, requires common rules, such as standards for licences and diplomas, mutual recognition and to the setting of its conditions. Legislation aiming at enhancing cross-border trade in services and establishment should focus on eliminating unjustified or disproportionate obstacles. Persons and undertakings who are licensed to carry out a professional or economic activity in their country of origin should have access to other Member States within the EU as unconditionally as possible. Legislative policy should further aim at reducing adjustment and administrative costs by harmonising standards and strengthening administrative cooperation. It is essential to simplify the procedures for cross-border market access for service providers. Existing legislation, in particular the Services Directive and the Professional Qualifications Directive with their respective amendments, have paved the way to a more integrated trade in services by using this approach.

This study examines to what extent legal developments in the areas of freedom to provide services and freedom of establishment can contribute to economic growth in the European Union. It makes use of a variety of studies that have shown a link between facilitating cross-border trade in services and cross-border establishment on the one hand and economic growth on the other. If economic growth is therefore linked to the degree of economic freedom in services and establishments, this study can limit itself to analysing the effects of secondary legislation - here in the context of IMCO's competence - on services and establishments and identifying promising projects for the future.

This study therefore analyses the legal framework of the freedom to provide services and the freedom of establishment. Both fundamental freedoms form part of the European internal market and are aimed at ensuring that competition is as effective as possible. They are primarily guaranteed by the fundamental freedoms themselves (chapter 2), but in detail they are made more effective by secondary legislation (chapter 3). The aim of this study is to determine to what extent existing secondary legislation eliminates or reduces practical and legal problems in the context of free services and establishment, and if there is potential for further improvement that could be achieved through legislative measures. Particular attention will be paid to the remaining obstacles and costs of the relevant legislative framework and possible legislative initiatives will be proposed (chapter 4).

Finally, this study also addresses some aspects of Brexit for services and branches between the UK and the EU. This will be a major issue in the negotiation of a comprehensive trade agreement, which is linked to the specificities of services and has made liberalisation difficult in other agreements as well.

2. OBJECTIVES OF INTEGRATION IN THE FIELD OF FREEDOM TO PROVIDE SERVICES AND FREEDOM OF ESTABLISHMENT

2.1. The Protection of Barrier-Free Market Access through Fundamental Freedoms

KEY FINDINGS

The fundamental freedoms, initially understood as prohibitions of discrimination, have gradually been extended to prohibitions of market access-related restrictions. Insofar they establish the principle of mutual recognition. If the provision of services or the taking up of self-employment is legally permissible in the country of origin, this must be recognised, in principle, in the entire internal market.

However, the mutual recognition principle is subject to restrictions. If the host Member State can justify stricter national standards, it is entitled to apply these standards in spite of the freedoms. The Court has consistently held that restrictions to the freedom to provide services and to the freedom of establishment may be justified only where they serve overriding reasons relating to the general interest, are suitable for securing the attainment of the objective which they pursue, and do not go beyond what is necessary in order to attain it.

Ensuring the freedom to provide services and the freedom of establishment within the European Union is one of the central functions of the internal market concept under art. 26 TFEU.[1] The internal market is of paramount importance to the European Union. It creates the conditions for unimpeded and undistorted European competition, is thus the core of European economic governance system, and is at the same time the basis for an ever-deeper integration of the European Member States, also in the sense of a political and social rapprochement of the peoples united in the Union.[2] To this end, the internal market law creates the necessary conditions by safeguarding freedom rights for European citizens and guaranteeing their cross-border private autonomy for trade and mobility.[3]

The Treaty on the Functioning of the EU sets up separate rules on the right of establishment (Art. 49 TFEU) and the freedom to provide services (Art. 56 TFEU). Although there are many similarities between the two regimes, the Court of Justice[4] has clarified the differences between them, based on the assumption that if a service provider is legally established in one Member State, he should be able to provide services in another Member State, without – in principle – being subject to the same controls twice, taking into account the temporary and occasional nature of the service.

[1] *Terhechte*, in: Frankfurter Kommentar, Art. 49 AEUV para 1; *Müller-Graff*, EnzEuR, Vol. 1, § 1 paras 1 ff.; *Schröder*, in: Streinz EUV/AEUV, Art. 26 AEUV para 12.

[2] See *Kainer/Persch*, EuZW 2018, 932 ff.

[3] *Terhechte*, in: Frankfurter Kommentar, Art. 49 AEUV paras 1 f., 8, 10.

[4] See among others, CJEU, Judgement of 25.07.1992, Case C-76/90, Säger, ECLI:EU:C:1991:331: "Article 59 of the Treaty requires […] the abolition of any restriction, […] when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services. In particular, a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services".

Since the concept of establishment means that the operator offers its services on a stable and continuous basis from an established professional base in the Member State of destination[5] all services that are not offered on a stable and continuous basis from an established professional base in the Member State of destination constitute provision of services within the meaning of art. 56 TFEU

Consequently, the fact that an economic operator established in one Member State provides services in another Member State over an extended period is not in itself sufficient for that operator to be regarded as established in the latter Member State. The decisive criterion to distinguish the two freedoms is thus the existence of a stable and continuous participation in the economic life of the host Member State by the person concerned. Only, if such a stable and continuous participation exists, the conduct falls under the freedom of establishment (art. 49 TFEU).

In the case law of the European Court of Justice, both the freedom to provide services and the freedom of establishment have developed much more slowly than, for example, the free movement of goods. This was due to the increased sensitivity of many Member States to the liberalisation of their services markets: They may be associated with **increased immigration** and can also have considerable effects on the **autonomy of the Member States to regulate**.[6] An example may illustrate this: While the admission of foreign goods on the domestic market is primarily achieved through the application of the principle of mutual recognition and thus tends to interfere with the legal order of the Member States in a selective and invisible manner, liberalisation in the services sector and for branches is more complex and has a potential impact on domestic professional and industrial law. Such interventions have a considerable broad impact.[7]

2.1.1. Barriers to the Freedom to Provide Services and the Freedom of Establishment

The European Economic Community, founded in 1958, was initially based on the concept of creating a common market, particularly protecting against customs duties, quantitative restrictions and discrimination. Therefore, the fundamental freedoms were initially understood as prohibitions of discrimination[8] and only gradually extended to prohibitions of restriction. With the fundamental decision "Cassis de Dijon"[9], the European Court of Justice has developed the **principle of mutual recognition**. Applied to the freedom to provide services, this principle expresses the rule that, within the EU, a service provider may offer its services in the country of destination if they comply with the legal requirements of their country of origin.[10] Service providers thus have a **right under art. 56 TFEU to market access**, if they are legally established in a Member State and comply with this State's legal requirements. The modalities of the provision, however, are governed by the host Member State's laws which are only to be assessed under the freedom to provide services if they are liable to hinder specifically the access of services to the market of another Member State.[11]

Similarly, according to art. 49 TFEU, an undertaking should be allowed to transfer its entire business activities to another Member State and thus to establish itself if such activities were permitted in their country of origin.[12]

---

5 See among others, Judgement of 30.11.1995, Case C-55/94, Gebhard, ECLI:EU:C:1995:411, paras 25 and 28.

6 *Haltern/Stein*, in: Frankfurter Kommentar, Art. 56 AEUV paras 88 ff.

7 *Haltern/Stein*, in: Frankfurter Kommentar, Art. 56 AEUV paras 91 ff.

8 *Wollenschläger*, European Law Journal, Vol. 17, No. 1, January 2011, pp. 1, 7 ff.

9 CJEU, Judgement of 20.02.1979, Case C-120/78, Rewe, ECLI:EU:C:1979:42.

10 CJEU, Judgement of 11.12.2003, Case C-215/01, Schnitzer, ECLI:EU:C:2003:662; Judgement of 13.07.2004, Case C-429/02, Bacardi France, ECLI:EU:C:2004:432, para 31.

11 CJEU, Judgement of 10.5.1995, Case C-384/93, Alpine Investments, ECLI:EU:C:1995:126, paras 35 ff.; *Müller-Graff*, in: Streinz EUV/AEUV, Art. 56 AEUV para 96.

12 CJEU, Judgement of 30.09.2003, Case C-167/01, Inspire Art, ECLI:EU:C:2003:512.

The concept of the internal market is based on the objective of linking Member States' markets as far as possible by allowing economic operators to compete with each other independently of different legal systems.

2.1.2. Specific Market Access Rights: The Fundamental Freedoms

The guarantee of non-discriminatory and unhindered market access constitutes the core of the internal market law and is primarily achieved by enforcing the fundamental freedoms laid down in the treaties. The different kinds of obstacles to the market access are presented separately for the freedom to provide services and the freedom of establishment.

a. Market access barriers to the freedom to provide services

The barriers to market access faced by service providers and service receivers can have various causes and can be either discriminatory or non-discriminatory.

i. Discriminatory barriers

Direct discrimination on grounds of nationality (or: residence) can constitute a severe market access barrier for cross-border service providers. In line with settled case law of the Court of Justice, such discriminations are prohibited by the arts. 56, 49, 18 TFEU. However, regulations directly linked to nationality or residence (direct discrimination) have become rare. Examples of measures that the Court of Justice found to be directly discriminatory include: reservations on the part of nationals for certain professional activities,[13] licensing requirements[14] or residence requirements only for foreigners[15]; in some cases, tax regulations have also been qualified as direct discrimination by the European Court of Justice.[16]

Much more frequent are cases of indirect discrimination, in which a measure is not directly linked to nationality, but in fact affects foreigners more frequently. Proof of this can be provided either statistically[17] or by a value decision.[18] Examples include generally applicable residence requirements and domestic language skills.[19] Such conditions typically affect foreign companies more frequently, as foreign companies typically do not have their registered office or place of residence in the country of destination of the service. They constitute a barrier to market access because a service may not be offered on the market unless the requirement is met and are, in principle, prohibited by the fundamental freedom. The same applies to national degrees or qualifications: laws that require domestic licensures for the access to certain professions indirectly discriminate against graduates of foreign universities, who typically are foreigners.

---

[13] CJEU, Judgement of 24.05.2011, Case C-47/08, Commission/Belgium, ECLI:EU:C:2011:334, para 124 (notaries); Judgement of 21.06.1994, Case C-2/74, Reyners, ECLI:EU:C:1974:68, paras 24 ff. (lawyers); Judgement of 13.07.1993, Case C-42/92, Thijssen, ECLI:EU:C:1993:304, para 23 (tax counsel).

[14] CJEU, Judgement of 29.10.1977, Case C-71/76, Thieffry, ECLI:EU:C:1977:65; Judgement of 30.11.1995, Case C-55/94, Gebhard, ECLI:EU:C:1995:411, para 36; Judgement of 27.06.2013, Case C-575/11, Nasiopoulos, ECLI:EU:C:2013:430, para 19.

[15] CJEU, Judgement of 07.05.1998, Case C-350/96, Clean Car Autoservice, ECLI:EU:C:1998:205, paras 27 ff.

[16] CJEU, Judgement of 20.01.2011, Case C-155/09, Commission/Greece, ECLI:EU:C:2011:22, paras 67 ff.

[17] CJEU, Judgement of 11.03.2013, Joined Cases C-335/11 and C-337/11, HK Danmark, ECLI:EU:C:2013:222, paras 69 ff.

[18] CJEU, Judgement of 23.05.1996, Case C-237/94, O'Flynn, ECLI:EU:C:1996:206, para 18.

[19] For example CJEU, Judgement of 26.11.1975, Case C-39/75, Coenen, ECLI:EU:C:1975:162, paras 5 ff; Judgement of 03.12.1974, Case C-33/74, van Binsbergen, ECLI:EU:C:1974:131, paras 10, 12; Judgement of 29.04.1999, Case C-224/97, Ciola, ECLI:EU:C:1999:212, para 14; regarding Freedom of Movement for Workers: CJEU, Judgement of 29.05.2001, Case C-263/99, Commission/Italy, ECLI:EU:C:2001:293, para 20.

Due to multiple decisions of the European Court of Justice [20] as well as ambitious secondary legislation such discriminations have also been reduced substantially.

ii. Non-discriminatory barriers

The freedom to provide services also prohibits non-discriminatory restrictions on cross-border services. In the words of the European Court of Justice, the freedom to provide services covers "the abolition of any restriction even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where it lawfully provides similar services".[21] Therefore, reservations of requirements, general prohibitions of activities or monopolies of services in favour of the public sector (e.g. the gambling sector in some Member States) or in favour of a specific legal entity, the requirement to submit an original diploma, etc. all constitute non-discriminatory restrictions which have been subjected to an examination of justification by the European Court of Justice. The European Court of Justice rarely makes a clear distinction between indirect discrimination and non-discriminatory hindrances.[22] The legal consequence is the same: **both indirect discrimination and non-discriminatory restrictions can be justified on overriding grounds of general interest**.

According to the case law, non-discriminatory measures of an import state regulating service providers restrict the freedom to provide services if they lay down requirements relating to the legal form of the service provider, the financial resources of the service provider or the professional qualification of the service provider, if they require a service provider to have a permit, an approval, a needs assessment or to provide a security in order to provide the service,[23] if social security contributions cumulate, but serve the same purpose,[24] if they restrict the provision of a specific service to a specific occupational group,[25] if they prohibit or restrict the marketing of a service,[26] if they reserve the provision of a specific service to be provided by employees only,[27] if they foresee an obligation to contract with a specific company or insurer,[28] if they foresee or install monopoly service providers or exclusive rights,[29] if they require

---

[20] Cf. CJEU, Judgement of 28.4.1977, Case C-71/76, Thieffry, ECLI:EU:C:1977:65 – lawyer; Judgement of 19.1.2006, Case C-330/03, Colegio, ECLI:EU:C:2006:45– constructional engineer; Judgement of 10.12.2009, Case C-345/08, Pesla, ECLI:EU:C:2009:771– admission to the legal preparatory service.

[21] Settled case-law: CJEU Judgement of 05.07.1997, Case C-398/95, SETTG, ECLI:EU:C:1997:282, para 16; Judgement of 13.12.2007, Case C-250/06, United Pan-Europe, ECLI:EU:C:2007:783, para 29.

[22] CJEU, Judgement of 22.10.2009, Rs. C-438/08 (Kommission/Portugal); *Kainer*, in: Frankfurter Kommentar, Art. 49 AEUV para 59.

[23] CJEU, Judgement of 9.3.2000, Case C-355/98, Commission/Belgium, ECLI:EU:C:2000:113, para 35; Judgement of 22.6.2017, Case C-49/16, Unibet International, ECLI:EU:C:2017:491, para 34; Judgement of 7.2.2002, Commission/Italy, Case C-279/00, ECLI:EU:C:2002:89, paras 31 f.

[24] CJEU, Judgement of 3.2.1982, Case 62/81 and 63/81, Seco, ECLI:EU:C:1982:34, paras 9 ff.; Judgement of 28.3.1996, Case C-272/94, Guiot, ECLI:EU:C:1996:147, para 10; Judgement of 8.9.2005, joined Cases C-544/03 and C-545/03, Mobistar SA, ECLI:EU:C:2005:518, para 34.

[25] CJEU, Judgement of 25.7.1991, Case C-76/90, Säger, ECLI:EU:C:2005:518, paras 18 f.

[26] CJEU, Judgement of 18.3.1980, Case 52/79, Debauve, ECLI:EU:C:1980:83, para 12; Judgement of 24.3.1994, Schindler, Case C-275/92, ECLI:EU:C:1994:119, paras 43 f.

[27] CJEU, Judgement of 5.6.1997, Case C-398/95, SETTG, ECLI:EU:C:1997:282, paras 17 f.

[28] CJEU, Judgement of 22.5.2003, C-355/00, Freskot, ECLI:EU:C:2003:298, para 63 (mandatory insurance); see also: Judgement of 5.3.2009, C-350/07, Kattner Stahlbau, ECLI:EU:C:2009:127, paras 69 ff. (Compulsory membership of professional associations).

[29] CJEU, Judgement of 18.6.1991, Case C-260/89, ERT, ECLI:EU:C:1991:254, para 12 (television monopolies); Judgement of 27.2.2014, Case C-351/12, OSA, ECLI:EU:C:2014:110, paras 69 ff. – OSA (Society for the collective management of copyrights); Judgement of 23.2.2016, Case C-179/14, Commission/Hungary, ECLI:EU:C:2016:108, paras 164 ff. (Monopoly in favour of public institutions); In its previous case-law, the CJEU has not questioned monopolies of services: CJEU, Judgement of 28.6.1983, Case 271/81, Amélioration de l'élevage, ECLI:EU:C:1983:175, para 9; Judgement of 30.4.1974 Case 155/73, Sacchi, ECLI:EU:C:1974:40, paras 6–8; and has in some judgments evaded the direct decision of the question: CJEU, Judgement of 23.4.1991, Case C-41/90, Höfner, ECLI:EU:C:1991:161, paras 37 ff. (no intergovernmental reference); Judgement of 19.3.1991, Case C-202/88, Commission/France, ECLI:EU:C:1991:120, paras 40 ff. (Application of Art. 34 TFEU to exclusive rights in service provision).

presence or residence or the establishment of a branch office,[30] if they restrict bringing personnel,[31] if they impede the use of brought along personnel, e.g. the requirement of work permits or minimum wages,[32] if they restrict the use of the import state's infrastructure,[33] if they are tailored towards a permanent provision of services and thus do not fit to a temporary provision of services, e.g. entry in the craftsmen's register.[34]

If a restrictive measure does not affect market access, however, discrimination must be established for the measure to fall under the prohibition of the freedom to provide services. This applies especially to restrictions that merely regulate the social environment of a cross-border economic activity.

b. Market access barriers to the freedom of establishment

Similar principles apply to the freedom of establishment. Directly discriminatory measures affecting cross-border establishment are prohibited in principle. The freedom of establishment further prohibits regulations which are indirectly discriminatory, or which directly affect market access without being discriminatory.[35]

i. Discriminatory and Non-Discriminatory Restrictions to Market Access

The general market access restrictions imposed on self-employed persons or companies wishing to establish themselves are similar to those imposed on the freedom to provide services. Direct and indirect discrimination and simple restrictions are prohibited. In the case of non-discriminatory measures, it should be borne in mind that measures that apply without distinction do not constitute a restriction solely by virtue of the fact that other Member States apply less strict rules to providers of similar services established in their territory.[36] In the case of non-discriminatory measures, the European Court of Justice examines whether the Member State measure is in fact linked to market access or merely regulates the exercise of entrepreneurial activity.[37] Non-discriminatory rules fall only within the scope of the freedom of establishment and need to be justified if they affect access to the market for undertakings from other Member States.[38]

On this basis, the European Court of Justice has assessed, for example, prohibitions on secondary establishment (no authorisation for an existing establishment or authorisation in another Member

---

30 CJEU, Judgement of 3.12.1974, Case 33/74, van Binsbergen, ECLI:EU:C:1974:131, paras 10–12; Judgement of 29.9.2011 Case C-387/10, Commission/Austria, ECLI:EU:C:2011:625 paras 21 f.; Judgement of 6.2.2014, Case C-509/12, Navileme and Nautizende, ECLI:EU:C:2014:54, para 20.

31 CJEU, Judgement of 27.3.1990, Case C-113/89, Rush Portuguesa, ECLI:EU:C:1990:142, para 12; Judgement of 21.10.2004, C-445/03, Commission/Luxembourg, ECLI:EU:C:2004:655, para 24.

32 CJEU, Judgement of 27.3.1990, Case C-113/89, Rush Portuguesa, ECLI:EU:C:1990:142, para 12; Judgement of 17.11.2015, Case C-115/14, RegioPost, ECLI:EU:C:2015:760, para 69; Judgement of 9.3.2000, Case C-355/98, Commission/Belgium ECLI:EU:C:2000:113.

33 CJEU, Judgement of 7.3.2002, Case C-145/99, Commission/Italy, ECLI:EU:C:2002:142, paras 22 f.; Judgement of 21.3.2002, Case C-298/99, Commission/Italy, ECLI:EU:C:2002:194, para 56.

34 CJEU, Judgement of 25.7.1991, Case C-76/90, Säger, ECLI:EU:C:2005:518, para 13; Judgement of 9.3.2000, Case C-358/98, Commission/Italy, ECLI:EU:C:2000:114, para 14; Judgement of 8.6.2000, Case C-264/99, Commission/Italy, ECLI:EU:C:2000:311, para 12.

35 CJEU, Judgement of 30.11.1995, Case C-55/94, Gebhard, ECLI:EU:C:1995:411, para 37; Judgement of 31.3.1993, Case C-19/92, Kraus, ECLI:EU:C:1993:125, para 32.

36 CJEU, Judgement of 7.3.2013, Case C-577/11, DKV Belgium, ECLI:EU:C:2013:146, para 32.

37 *Kainer*, in: Frankfurter Kommentar, Art 49 AEUV paras 61 f.; CJEU, Judgement of 28.4.2009, Case C-518/06, Commission v. Italy, ECLI:EU:C:2009:270, para 63; Judgement of 7.3.2013, Case C-577/11, DKV Belgium, ECLI:EU:C:2013:146, para 33.

38 CJEU, Judgement of 28.4.2009, Case C-518/06, Commission v. Italy, ECLI:EU:C:2009:270, para 64; Judgement of 7.3.2013, Case C-577/11, DKV Belgium, ECLI:EU:C:2013:146, para 33.

State)[39], residence requirements[40] or qualification requirements[41] as a violation of the freedom of establishment. An obligation to take out insurance is also inadmissible if this obligation exists irrespective of the fact that insurance has already been taken out in another Member State which also covers risks in the country of establishment.[42] The freedom of establishment also forbids a gambling monopoly that prohibits foreign companies wishing to establish a gambling business from taking up an activity without distinction,[43] as does a provision that prohibits a non-biologist from holding a stake of more than 25% in a biomedical analysis company.[44] The similarity of these national regulations lies in the fact that the taking up of an activity and thus the establishment are linked to the fulfilment of the respective conditions.

As such, these barriers to the market access must be overcome by rights to access in order to establish the effectiveness of internal market-wide competition.[45]

On the other hand, freedom of establishment is not affected by rules which concern only the exercise of the activity and do not impede market access, in particular taking up of the economic activity. The reason has already been mentioned above: Conversely, **anyone wishing to benefit from the location conditions of a host Member State must also accept any restrictive regulations to the extent that these have only internal effect.**

This is a difference from the freedom to provide services. What can restrict cross-border services in the sense of art. 56 TFEU and is therefore only permissible subject to justification may not affect the market access of the freedom of establishment. The example of minimum wages illustrates the difference. While minimum wages for service providers undoubtedly constitute a restriction on the freedom to provide services,[46] as a purely internal measure they do not – in principle – affect the freedom of establishment.

ii. The cross-border mobility of companies

The cross-border mobility of companies is a special problem in the context of the freedom of establishment. Moving the statutory seat or head office within the country from one place to another usually constitutes a mere administrative procedure and can be carried out without major difficulties. The same applies to the establishment of a branch. Carried-out cross-border, however, companies often face major obstacles, created by either the legislation of the state of origin, or of the host destination, or both.

Cross-border mobility of companies is worth protecting for two reasons: firstly, it is precisely the objective of the freedom of establishment that companies transfer their registered office to a legal and economic system that provides them with better production conditions.

---

39 For auditors: CJEU, Judgement of 20.5.1992, Case C-106/91, Ramrath, ECLI:EU:C:1992:230, paras 20 ff.: for doctors: CJEU, Judgement of 30.4.1986, Case 96/85, Commission/France, ECLI:EU:C:1986:189, para 12; for opticians: CJEU, Judgement of 21.4.2005, Case C-140/03, Commission/Greece, ECLI:EU:C:2005:242, para 28.

40 CJEU, Judgement of 29.10.1998, Case C-114/97 Commission/Spain, ECLI:EU:C:1998:519, para 44; Judgement of 9.3.2000, Case C-355/98, Commission/Belgium, ECLI:EU:C:2000:113, para 31; Judgement of 30.3.2006, Case C-451/03, Servizi Ausiliari Dottori Commercialisti, ECLI:EU:C:2006:208, para 34; see also: *Forsthoff*, in: Grabitz/Hilf/Nettesheim, Das Recht der EU, March 2011, Art. 49 AEUV, para 84.

41 CJEU, Judgement of 29.10.1977, Case C-71/76, Thieffry, ECLI:EU:C:1977:65, para 27; Judgement of 13.11.2003, Case C-313/01, Morgenbesser, ECLI:EU:C:2003:612, para 5; Judgement of 15.12.1983, Case C-5/83, Rienks, ECLI:EU:C:1983:382, paras 9 f.

42 CJEU, Judgement of 15.2.1996, Case C-53/95, Inasti/Kemmler, ECLI:EU:C:1996:58, para 12.

43 CJEU, Judgement of 6.3.2007, joined Cases C-338/04, C-359/04 and C-360/04, Placanica, ECLI:EU:C:2007:133, para 42; Judgement of 6.11.2003, Case C-243/01, Gambelli i.a., ECLI:EU:C:2003:597, paras 44 ff.; Judgement of 28.1.2016, Case C-375/14, Rosanna Laezza, ECLI:EU:C:2016:60, paras 22 f.

44 CJEU, Judgement of 16.12.2010, Case C-89/09, Commission/France, ECLI:EU:C:2010:772, paras 44 f.

45 *Kainer*, in: Frankfurter Kommentar, Art 49 AEUV para 62; *Müller-Graff*, in: Streinz EUV/AEUV, Art. 49 AEUV paras 62 ff.

46 CJEU, Judgement of 18.9.2014, Case C-549/13, Bundesdruckerei, ECLI:EU:C:2014:2235, paras 24 ff.

Secondly, as the European Court of Justice confirmed, the freedom of establishment also pursues that companies can use the company law provisions of another Member State by setting up a subsidiary in that State, which in turn establishes a branch in the country of origin; in this way, the legal form of a private limited company (Ltd.) was made frequently usable all over the EU.[47]

However, the cross-border transfer of the registered office or the establishment of a branch within the EU often encounters difficulties. The first question that arises is which law should apply to a company that has relocated its registered office: The law of the host country or the law of the country of origin? If a Member State applies its own law to a "confiscated" company, this usually leads to a negation of the legal personality of the company because it has not carried out the incorporation procedure in the host country.[48] It is also possible for a Member State to prohibit the withdrawal of a company incorporated under its national company law by linking the withdrawal of the company (transfer of the registered office or transfer of the registered office) to the dissolution of the company as a legal consequence.

Finally, there are numerous administrative problems, such as an obligation to provide documents that do not exist in the other state (*Cartesio*),[49] an obligation to liquidate the company (*Polbud*[50]) in advance, etc., which hinder the cross-border mobility of companies. The European Court of Justice has decided a number of cases in this respect, including cross-border mergers and changes of legal form. The Court has very largely protected the right of companies to transfer their registered offices across borders to other Member States. Legal gaps remain in the freedom to leave the market.[51] There is also ambiguity as to the applicable law, and as to what measures Member States may take to prevent abuses.[52]

Some of these problems have been addressed by the Company Law package.[53]

c. Principle of Mutual Recognition and Justification of Barriers

Considerations so far show that the provision of services and the establishment of companies are both protected by the prohibition of discriminations and restrictions of market access. The mutual recognition principle applies to cross-border services and establishments for these types of obstacles. If the provision of services or the taking up of self-employment is legally permissible in the country of origin, this must also apply, in principle, to the entire internal market.[54] For example, based on the freedom to provide services, a national qualification obtained in the Member State of origin must be recognised by the host Member State, as must any professional experience.

However, this principle applies only on the condition that the host State cannot justify stricter national standards. The Court has consistently held that restrictions to the freedom to provide services and to the freedom of establishment may be justified where they serve overriding reasons relating to the general interest, are suitable for securing the attainment of the objective which they pursue and do not go beyond what is necessary in order to attain it.[55]

---

47 CJEU, Judgement of 9.3.1999, Case C-212/97, Centros, ECLI:EU:C:1999:126; Judgement of 5.11.2002, Case C-208/00, Überseering, ECLI:EU:C:2002:632; Judgement of 16.12.2008, Case C-210/06, Cartesio, ECLI:EU:C:2008:723.

48 CJEU, Judgement of 5.11.2002, Case C-208/00, Überseeing, ECLI:EU:C:2002:632; Judgement of 30.9.2003, Case C-167/01, Inspire Art, ECLI:EU:C:2003:512.

49 CJEU, Judgement of 16.12.2008, Case C-210/06, Cartesio, ECLI:EU:C:2008:723.

50 CJEU, Judgement of 25.10.2017, Case C-106/16, Polbud, ECLI:EU:C:2017:804.

51 *Kainer/Herzog*, EuR 2018, 405 ff.; *Forsthoff*, in: Grabitz/Hilf/Nettesheim, Das Recht der EU, Art. 49 AEUV paras 116 f.

52 *Stelmaszczyk*, EuZW 2017, 890, 892 ff.

53 See https://ec.europa.eu/info/publications/company-law-package_en.

54 *Kainer*, NZA 2016, 394, 395; *Mestmäcker/Schweitzer*, Europäisches Wettbewerbsrecht, § 2 para 59.

55 See e.g. CJEU, Judgement of 13.12.2007, Case C-250/06, United Pan-Europe, ECLI:EU:C:2007:783, para 39, with further evidence of case law.

In its case-law, the European Court of Justice is generous with regards to the overriding interests of the general public, but very intensively examines the suitability and necessity of the national measure to pursue the respective objective. Applied to the requirement of a national professional qualification, this means that a host Member State's obligation to recognise a qualification of another Member State is subject to the condition that it is equivalent to the host Member State's standards, provided these standards are not disproportionate.[56] The host Member State has to carefully examine the equivalence of the professional qualification.[57]

In this sense one can speak of a restricted or conditional principle.[58] **Mutual recognition is therefore not a reliable principle**. Consequently, further legislative steps are needed to fully develop the freedom to provide services and the freedom of establishment.

[56] If, after careful examination, a Member State comes to the conclusion that the required qualifications have been proven by a foreign diploma, no further proof may be demanded, CJEU, Judgement of 15.10.1987, Case 222/86 Heylens, ECLI:EU:C:1987:442, para 13; in principle, however, admission requirements are permitted: CJEU, Judgement of 7.5.11991, Case C-340/89, Vlassopoulou, ECLI:EU:C:1991:193, para 9.

[57] *Müller-Graff*, in: Streinz EUV/AEUV, 2. edn 2012, Art. 56 AEUV para 113.

[58] See *Weatherill*, E.L.Rev. 2018, 224, 225.

2.1.3. (Limited) Effects of the Fundamental Freedoms to Ensure Growth in the Services Sector

KEY FINDINGS

In many cases, the law of the host Member State requires an adjustment of the service provided or the economic activity of the established company. The necessary adjustments result in additional costs for cross-border activities of service providers or companies which distort competition and therefore are, in principle, contrary to the internal market.

Provisions which are non-discriminatory and have the sole effect of causing additional costs for the service in question, in particular, information costs due to the diversity of the law itself, do not restrict market access and are not covered by the fundamental freedoms. It appears that the fundamental freedoms are powerful subjective rights but have limited effectiveness in removing barriers to Internal Market-wide services markets.

A cross-border service or a cross-border establishment may be completely restricted by prohibitions such as qualification requirements.

However, in many cases, economic activity is permitted in principle, but the law of the host Member State requires an adjustment of the service or economic activity of the established company. Such rules do not cover the "if" of the activity but its "how". The necessary adjustments result in additional costs for cross-border activities of service providers or companies which distort competition and therefore are, in principle, contrary to the internal market.[59]

And, finally, complicated and different Member State procedures can hamper or make less attractive access to services markets.

When determining whether a measure falls within the scope of the fundamental freedoms, one must differentiate between the two freedoms as well as different areas of protection.

a. Cost-Increasing National Provisions and the Freedom to Provide Services

i. Legal Assessment under Art. 56 TFEU

As has been established above, the freedom to provide services requires the elimination of all discrimination on grounds of nationality as well as the abolition of any non-discriminatory restriction which is liable to prohibit or further impede the activities of a provider of services established in another Member State where he lawfully provides similar services.[60]

It is not easy to distinguish between barriers to market access on the one hand and regulations that regulate the way in which services are provided on the other. The European Court of Justice ruled that the freedom to provide services does not apply to provisions which, although impeding the free movement of services, have the *sole* effect of causing additional costs for the service in question; in so far as the Member State's rules apply equally to domestic and foreign undertakings.[61] In particular, the diversity of the law itself does not restrict market access. If the costs of adjustment to the host country's regulation due to such legislative differences are so high that it reduces the ability of entering

[59] *Müller-Graff*, in: Streinz EUV/AEUV, 2. edn 2012, Art. 49 AEUV para 62.

[60] CJEU, Judgement of 8.9.2005, joined Cases C-544/03 and C-545/03, Mobistar SA, ECLI:EU:C:2005:518, para 29.

[61] CJEU, Judgement of 8.9.2005, joined Cases C-544/03 and C-545/03, Mobistar SA, ECLI:EU:C:2005:518, para 31.

undertakings to compete effectively with undertakings traditionally established in the host Member State, this can lead to a restriction of the freedom to provide service.[62]

However, the Court ruled that national measures regulating the exercise of the service can constitute barriers that needed to be justified if they eliminated or reduced competitive advantages from the Member State of origin.[63] For example, in the *Cipolla* ruling,[64] the European Court of Justice regarded Italian price regulations for lawyers as a violation of the freedom to provide services; the same applied to minimum wages in another case.[65] The reason for this is that such price regulations directly affect the competitiveness of the service provider and therefore prove to be market access-related measures.

ii. Economic Assessment

Market adjustment costs may lead to misallocations and to an overall weakening of competition in the internal market. Companies may lose competitive cost advantages through the obligation to adapt to the law of the host Member State and may therefore either completely refrain from opening up a cross-border market or may not be able to exploit the cost advantages of their country of origin. This could lead to companies considering a much more complex and potentially economically inefficient domestic service instead of a cross-border service.[66]

b. Cost-Increasing National Provisions and the Freedom of Establishment

Market access-related barriers to freedom of establishment also always need to be justified. This applies to qualification requirements (diplomas, professional experience, etc.) and requirement assessments. Here too, it remains the case that rules for the exercise of professions which have only internal effect generally do not violate Art. 49 TFEU. Although such cost-increasing national regulations may make the exercise of the freedom of establishment less attractive, as non-discriminatory measures they only constitute a violation of fundamental freedoms in exceptional cases – namely when they restrict market access.[67] As already explained, this is the reason why, for example, minimum wage regulations or price provisions, which may violate the freedom to provide services, do – in principle – not violate the freedom of establishment.[68] Cost-increasing provisions such as a price regulation, can however, constitute a market access barrier and thus a restriction of the freedom of establishment, if they force a change in business strategy, as a result of which the relocation of economic activity per se would no longer be profitable.[69]

---

62 See, *Haltern/Stein*, in: Frankfurter Kommentar, Art. 56 AEUV para 100, with reference to CJEU, Judgement of 28.4.2009 Case C-518/06, Commission/Italy, ECLI:EU:C:2009:270, paras 69 f.

63 Similar *Haltern/Stein*, in: Frankfurter Kommentar, Art. 56 AEUV para 101.

64 CJEU, Judgement of 5.12.2006, joined Cases C-94/04 and C-202/04, Cipolla, ECLI: EU:C:2006:758.

65 CJEU, Judgement of 15.3.2001, Case C-165/98, Mazzoleni, ECLI:EU:C:2001:162; Judgement of 12.2.2015, Case C-396/13, Sähköalojen ammattiliitto, ECLI:EU:C:2015:86; Judgement of 3.4.2008, Case C-346/06, Rüffert, ECLI:EU:C:2008:189.

66 *Donges/Eekhoff/Franz/Fuest/Möschel/Neumann,* Kronberger Kreis-Studien Nr. 44, p. 10; *Agraa*, European Union – Economics and Policies, 9th edition 2011, p. 107.

67 It is in line with the concept of the comparative cost advantage that companies relocate to where they produce under optimal conditions. This concept would be undermined if it was possible to produce in the host Member State without having to comply with its rules and regulations. Furthermore, it would be incompatible with the principle of continued regulatory sovereignty for the law to be observed in one's own Member State if every restrictive standard was examined in Luxembourg, see *Schütze*, E.L.Rev. 2016, 826, 827 ff.

68 *Kainer,* in: Frankfurter Kommentar, Art. 49 AEUV Fn. 283; CJEU, Judgement of 29.3.2011, Case C-565/08, Commission/Italy, ECLI:EU:C:2011:188.

69 *Kainer* in: Frankfurter Kommentar, Art. 49 AEUV Fn. 281 and 282; CJEU, Judgement of 7.3.2013, Case C-577/11, DKV Belgium, ECLI:EU:C:2013:146, paras 34 ff.; Judgement of 5.12.2006, joined Cases C-94/04 and 202/04, Cipolla, ECLI:EU:C:2006:758.

c. Addressing Adjustment Costs with Legislative Harmonisation

Legislative harmonisation, particularly in the form of directives and regulations, can address the adjustment costs resulting from legislation which does not fall under the prohibitions of the freedom to provide services or the freedom of establishment. Chapter 3 analyses the relevant legislation passed during the last two legislatures.

d. Double Regulation and Double Supervision

Especially to the free movement of services, being submitted to two different regulations constitutes another form of barrier. If both the country of origin and the host country each independently require qualifications, certifications or, for example, social security contributions with the same regulatory purpose[70] to take up an activity, this leads to additional costs for cross-border service providers, restricting competitiveness and therefore possibly conflicting with the free movement of services.[71] The same applies to being subject to double supervision. Regulatory procedures are cost-intensive as such, irrespective of the associated regulation, and can thus interfere with the level playing field if a cross-border company has to compete with domestic companies due to such higher costs.[72] These barriers can be addressed, for example, by legislative harmonisation. Double supervision and the resulting costs can be countered by mutual recognition of supervisory measures.

e. Procedure and Institutions

The absence of common, Europeanised or coordinated procedures, and the absence of administrative cooperation do not restrict, as such, the fundamental freedoms. Only by coordinating administrative procedures can market access for the international movement of services or service providers be achieved or simplified. This needs legislative action.

---

[70] CJEU, Judgement of 3.2.1982, Case 62/81 and 63/81, Seco, ECLI:EU:C:1982:34, paras 9 ff.; Judgement of 28.3.1996, Case C-272/94, Guiot, ECLI:EU:C:1996:147, para 10; Judgement of 8.9.2005, joined Cases C-544/03 and C-545/03, Mobistar SA, ECLI:EU:C:2005:518, para 34.

[71] *Haltern/Stein* in: Frankfurter Kommentar, Art. 56 AEUV paras 117 ff., *Holoubek* in: Schwarze, Art. 56, 57 para 90; *Randelzhofer/Forsthoff* in: Grabitz/Hilf/Nettesheim, Das Recht der EU, Art. 56, 57 AEUV paras 136 ff.

[72] Cf. on the necessity of supervision in the host country *Enchelmaier*, E.L.Rev. 2011, 615, 644 ff.

2.2. Legal Bases and Harmonisation Requirements

KEY FINDINGS

Legislative harmonisation – the codifying of common standards – often proves advantageous compared to leaving the economic integration to the case law of the European Court of Justice. Moreover, legislative harmonisation can also address such measures which do not fall within the scope of the fundamental freedoms but nevertheless affect the internal market by increasing adjustment costs or submitting service providers or companies to double regulation or double supervision.

Therefore, legislative harmonisation, particularly in the form of directives and regulations, can address the adjustment costs resulting from legislation which does not fall under the prohibitions of the freedom to provide services or the freedom of establishment. In principle three regulative strategies are applied to enhance the effects of the fundamental freedoms: the establishment of common standards, the effectuation of the principle of mutual recognition, and the simplification of procedures.

The legal bases for the adaption of regulations and directives concerning the freedom to provide services are arts. 53(1) and (as a reference for the freedom to provide services) 62 TFEU. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons (art. 53(1) TFEU).

2.2.1. The Necessity of Harmonisation

In terms of integration policy, the above-mentioned barriers to market access can be removed in two ways: By application of the fundamental freedoms on a case-by-case basis, or by legislative harmonisation through the adaption of regulations and directives.

The service providers and companies concerned can rely on the effect of the fundamental freedoms and their enforcement by the courts, in particular by the European Court of Justice (**negative integration**). In many cases this leads to the removal of discriminations and non-discriminatory barriers. However, this method has two disadvantages: First, it is slow and selective and therefore not very efficient. It may well be rational for companies to refrain from cross-border economic activities if the costs of judicial enforcement and the expected duration of the proceedings, together with the uncertainty of success, outweigh the potential benefits. The second weakness lies in the Member States' possibility to justify their national standards if they are appropriate and necessary to pursue overriding interests. Although the European Court of Justice strictly scrutinises proportionality, Member States' measures can often be justified and are therefore applicable in many cases, even if they restrict the freedoms of service providers and companies wishing to establish themselves. Finally, as shown in detail above, fundamental freedoms can only cover cost-increasing regulatory differences between Member States to a very limited extent.

Legislative harmonisation – the codifying of common standards (**positive integration**) – may therefore often prove advantageous over leaving the economic integration to the case law of the European Court of Justice.

Moreover, legislative harmonisation can also address such measures which do not fall within the scope of the fundamental freedoms but nevertheless affect the internal market by increasing adjustment costs or submitting service providers or companies to double regulation or double supervision.

2.2.2. Legal Bases for the Legislative Harmonisation concerning the Freedom to Provide Services and the Freedom of Establishment

The legal bases for the adaption of directives concerning the freedom to provide services are arts. 53(1) and (as a reference for the freedom to provide services) 62 TFEU. In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons (art. 53(1) TFEU).

Directives based on art. 53(1) TFEU must facilitate the taking up and pursuit of an independent activity. This is to be understood as the creation of competition that is as undistorted as possible. Therefore, the principles of interpretation of art. 114 TFEU are transferable.[73] Facilitation means the elimination or gradual dismantling of obstacles to cross-border access to independent economic activities or to noticeable distortions of competition in the internal market.[74] Potential distortions of competition or general economic considerations are not sufficient (as with art. 114 TFEU).[75] Specific obstacles are required in the sense of a restriction of the freedom of establishment or the freedom to provide services, which affect the functioning of the internal market itself.[76] There is no obligation to eliminate the differences; a step-by-step liberalisation is sufficient; there is scope for discretion in this respect.[77]

The subject-matter covered by art. 53(1) TFEU are directives on the mutual recognition of professional qualifications and on the coordination of rules governing access to the profession and the exercise of the profession for natural as well as legal persons.

2.2.3. Methods of Harmonisation

An analysis of the EU legislation of the past decades shows that in principle three regulative strategies are applied to enhance the effects of the fundamental freedoms: the establishment of common standards, the effectuation of the principle of mutual recognition, and the simplification of procedures. Common standards can be established in different ways: full harmonisation, minimum harmonisation, and the setting of voluntary standards.

a. Full Harmonisation (Setting of Standards)

One way is to completely harmonise standards all over the EU. Full harmonisation constitutes the most radical form of legislative harmonisation, taking away legislative freedom from the Member States, and is therefore a means which is used rather cautiously.[78] At least the burden of justification is greater here because the harmonisation degree must be assessed on the basis of the principle of proportionality (art. 5(1) TEU).[79]

---

73 CJEU, Judgement of 5.10.2000, Case C-376/98, Deutschland/Parlament und Rat, ECLI:EU:C:2000:544, paras 84, 87.

74 CJEU, Judgement of 5.10.2010, Case C-376/98, Tobacco advertising I, ECLI: EU: C:2000:544, paras 84, 87, 95.

75 CJEU, Judgement of 12.12.206, Case C-380/03, Tobacco advertising II, ECLI: EU: C:2006:772, para 37.

76 CJEU, Judgement of 12.12.206, Case C-380/03, Tobacco advertising II, ECLI: EU: C:2006:772.

77 CJEU, Judgement of 18.4.1991, Case C-63/89, Assurances du Credit, ECLI: EU: C:1991:152, para 11; Judgement of 13.5.1997, Case 233/94, ECLI:EU:C:1997:231, para 43.

78 *Schröder*, in: Streinz EUV/AEUV, Art. 114 AEUV para 46.

79 *Schröder*, in: Streinz EUV/AEUV, Art. 114 AEUV para 64.

Full harmonisation is particularly useful to set uniform standards. While uniform standards for goods have long been widespread in the EU, they have only recently gained importance in European legislation for services.[80] At present, uniform standards in the service sector have only been implemented sectorally, especially for financial services.

b. Minimum Harmonisation

The establishment of minimum standards through legislation is more common. Minimum standards oblige the Member States to guarantee a specified minimum standard for, e.g. the provision of a specific service. **Minimum standards pave the way for automatic recognition, where services can circulate freely whenever they conform to the rules of the provider's Member State of establishment**. It also allows for the introduction of mutual recognition schemes and the elimination of double regulation and double supervision. By this, costs for cross-border services should decrease and the cross-border provision of services should become easier and more attractive. At the same time, Member States keep their legislative autonomy to establish stricter standards for overriding reasons related to the public interest provided that they are proportionate.

c. Voluntary Standards

Another means of harmonising standards is the setting of voluntary standards by European Standards Organisation such as CEN, CENELEC or ETSI following a request from the European Commission. Those harmonised voluntary standards can be used by economic operators to demonstrate the compliance with relevant EU legislation. It thus has to be distinguished from the other methods of harmonisations as it does not harmonise the Member States' laws but presupposes existing EU rules.

d. Safeguarding the Mutual Recognition Principle

It may not always be possible to set common standards for political or practical reasons. This can be seen, for example, in the Professional Qualifications Directive. While it harmonises the minimum training requirements for certain professions, given the number of possible regulated professions (more than 6.000 in the Union), the remaining professions are subject to a general recognition regime, based on the mutual recognition principle.

Although such rules ultimately codify the case law of the European Court of Justice, they can contribute to clarity both for the legislative bodies of the Member State in the legislative process and later in the administration of recognition. At the same time, codification is a suitable means of providing the service provider with clear information on the conditions for recognition of his qualifications. Moreover, the reversal of the burden of proof in refusing recognition can further support the service provider in individual cases.

e. Administrative Cooperation and Procedures to Secure Market Access

Mechanisms that aim at giving effect to the principle of mutual recognition usually lay down procedures, but also exceptions, for mutual recognition schemes, supervision schemes and administrative cooperation amongst the authorities of the Member States.

Legal provisions aiming at the simplification of procedures oblige Member States to simplify their regulation and/or establish EU-level procedures.

[80] See *Delimatsis*, E.L. Rev. 2016, 513, 523 ff.

They often include provisions on the exchange of information amongst the authorities of the Member States and aim at making access to relevant information easier for the service providers.

It will become apparent that this way of harmonising is of great importance for cross-border services.

3. ACHIEVEMENTS IN THE FIELD OF FREE MOVEMENT OF SERVICES AND FREEDOM OF ESTABLISHMENT: AN ANALYSIS OF THE EU LEGISLATION FROM 2009 TO 2018

The following analysis takes a closer look at the legislative actions taken during the 7th and 8th legislature to identify their benefits for the freedom to provide services and the freedom of establishment. The subsequent chapter (4.) will point out future potential for legislative developments.

Numerous directives on the provision of services in the area of responsibility of IMCO have been enacted over the past decades.[81] Two of them stand out because of the major influence they had and continue to have on the liberalisation of the services market: The **Services Directive** (Directive 2006/123/EC[82]) and the **Professional Qualifications Directive** (Directive 2005/36/EC[83]). For the purposes of this study, a particular emphasis will be put on the assessment of these two directives and their amendments, as well as proposed amendments, during the 7th and 8th legislature.

The following assessment therefore analyses in depth the legal mechanisms implemented by the Services Directive and the Professional Qualifications Directive before turning to their amendments and proposed amendments. This is followed by a more general assessment of other services directives enacted during the 7th and 8th legislature. The legal acts are reviewed to assess whether they facilitate market access, in particular by implementing the principle of mutual recognition or by reducing the administrative hurdles to cross-border economic activity through procedural regulations, etc.

[81] For an extensive list of services directives enacted during the 7th and 8th legislature see Annex.

[82] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, pp. 36–68.

[83] 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, pp. 22–142.

Table 1: Significant Measures to Facilitate Cross-Border Services and Establishment[84]

	Treaty provisions: art. 49 TFEU on freedom of establishment and art. 56 TFEU on freedom to provide service					
I - General provisions	II - Sectoral provisions					III - Free movement of professionals
	Credit and retail financial services	Insurance services	Payment services	Transport	Others	
Services Directive (2006)	Markets in Financial Instruments Directive (2014, amended 2016)	Insurance Distribution Directive (recast) (2016)	Payment Services Directive (2009	Cross-Border Parcel Delivery Service Regulation (2018)	Cross-Border Portability of Online Content Services Regulation (2017)	Proportionality test Directive (2018)
Services Enforcement Proposal (2016)	Mortgage Credit Directive (2014)	Solvency II (2009)	SEPA Regulation (2009)	Single European Railway Area Directive (2001, recast 2013)	Package Travel Directive (2015)	Recognition of Professional Qualifications Directive (2005, amended 2013)
Services E-Card Proposal (2016)	Banking Directive (2013)	Omnibus II Directive (2009)	E-Money Directive (2009)	Reservation System Regulation (2009)	Directive on enforcement of Directive 96/71/EC (posting of workers) (2014)	
	Banking Regulation (2013)	Insurance Mediation Directive (2002)	Payment Services Directive (2007)	Road Haulage Regulation (2009)	Patients' Rights in Cross-border Healthcare Directive (2011)	
	Consumer Credit Directive (2008)	Financial Conglomeration Directive (2002)	Funds Transfers Regulation (2006)	Coach and Bus Services Regulation (2009)	Proposal amending Directive 96/71/EC (posting of workers) (2016)	
	Distance Marketing of Consumer Financial Services Directive (2002)	Insurance Accounts Directive IMD II (recast) (2012)	Proposal Payment Services Directive II (2013) Proposal Revision Funds Transfers Regulation (2013) Proposal Payment Accounts Directive (2013)	Air Service Regulation (2008) Single European Sky Regulation (2004)		
				Interoperability Directive (2008)		
				Interoperability Directive (2008)		
	Proposal for a Package on Retail Investments and Insurance Products Key Information Document (1998)	Proposal for a Directive modernising VAT for insurance and financial services (2006)	Proposal Multilateral Interchange Fees (2013)	Inland Navigation Regulation (1996)		
	Proposal amending Directive 2009/65/EC cross-border distribution of collective investment funds (2018)			Maritime Cabotage Directive (1992) Non-resident carriers Regulation (1991)		
				Maritime Transport Regulation		

[84] Dark blue: Legal acts with active participation of IMCO; light blue: other legal acts; for a full list of regulations, directives and proposals see Annex.

3.1. Legislative Developments of the Services Directive (2006/123/EC)

3.1.1. Legal Assessment of the Services Directive 2006/123/EC

KEY FINDINGS

The Services Directive is broad in scope and aims at enhancing the freedom to provide services through granting specific access rights, simplifying procedures and establishing a system of cooperation in supervision.

The mechanisms used in the Services Directive focus on making the principle of mutual recognition (more) effective against rules restricting market access for a service provider. The rules granting access rights oblige host Member States, in general, to accept services provided by undertakings established in another Member State, allowing for the imposition of national requirements only if they are non-discriminatory, necessary, and proportionate. The rules concerning the simplification of procedures require host Member States to accept any document from the Member State of the establishment which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied. The supervision system is based on the general rule that it is the Member State of establishment's responsibility of ensuring that the providers established in their territory comply with the national requirements, and that the host Member State is only competent to conduct checks and inspections in specific cases. It is therefore also based on the principle of recognition in the way that the host Member State shall accept the Member State of establishment's supervision to be equivalent to its own supervision.

The directive addresses adjustment costs by putting in place mechanisms such as the points of single contact where foreign service providers shall not only be able to access all relevant information about applicable requirements, including information on how they are interpreted and applied, as well as contact details of the competent authorities, but can also complete all procedures and formalities needed to exercise his service activities in the host Member State.

The Services Directive sets out the first step towards a barrier-free trade in services. It gives broad access rights, fosters the principle of mutual recognition and reduces administrative barriers.

The Services Directive was established to eliminate barriers to the development of service activities between Member States in order to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress (recital No. 1).[85] It is based on the presumption that, at the time of its enactment, numerous barriers within the internal market prevent providers, particularly small and medium sized enterprises, from extending their operations beyond national borders and from taking full advantage of the internal market which weakens the worldwide competitiveness of EU providers (recital No. 2).[86]

[85] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, Recital (1); Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market, Brussels, 17 July 2006, 10003/06, Recital (1); Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM(2004) 2 final – 2004/0001 (COD)), INT/228 - CESE 137/2005 - 2004/0001 (COD) EN/o, Pt. 2.2.; Commission staff working paper, Extended impact assessment of proposal for a directive on services in the internal market, Brussels, 13.1.2004 SEC(2004) 21, p. 12 and pp. 32 ff.

[86] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, Recital No. 2; Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market, Brussels, 17 July 2006, 10003/06, Recital No. 2; Commission staff working paper,

The elimination of the restrictions shall make EU service providers more competitive, increase transparency and information for consumers and give them wider choice and better services at lower prices (recital No. 3).[87] A report from the Commission concluded that in 2002 there was still a wide variety of barriers affecting a vast range of service activities across all stages of the providers' activities and having a number of common features including the fact that they often arise from administrative burdens, the legal uncertainty associated with cross-border activity and the lack of mutual trust between Member States.[88] The directive aimed at establishing a general legal framework which benefits a wide variety of services while taking into account the distinctive features of each type of activity or profession and its system of regulation. It was based on a dynamic and selective approach consisting in the removal of barriers and the launching of a process of evaluation, consultation and complementary harmonisation of specific issues (recital No. 7).[89]

a. Scope of the Directive

The directive uses a cross-sectional approach and covers all services providers in principle. However, arts. 1 and 2 exclude several areas from its scope: the directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor with the privatisation of public entities providing services (art. 1(2)), it does not deal with the abolition of monopolies providing services (art. 1(3)) nor with aids granted by Member States which are covered by Community rules on competition (art. 1(3)), does not affect measures to protect or promote cultural or linguistic diversity or media pluralism (art. 1(4)), nor criminal law (art. 1(5)), nor labour law, nor social security legislation (art. 1(6)), nor the exercise of fundamental rights (art. 1(7)). Excluded are furthermore non-economic services of general interest (art. 2(2) lit. a), financial services (art.2(2) lit. b), electronic communications services and networks (art. 2(2) lit. c), services in the field of transport (art. 2(2) lit. d), services of temporary work agencies (art. 2(2) lit. e), healthcare services (art. 2(2) lit. f), audio-visual services and radio broadcasting (art. 2(2) lit. g), gambling activities (art. 2(2) lit. h), activities which are connected with the exercise of official authority (art. 2(2) lit. i), social services relating to social housing, childcare and support of families and persons in need which are provided by the State (art.2(2) lit. j), private security services (art. 2(2) lit. k), services provided by notaries and bailiffs (art. 2(2) lit. l), and finally the field of taxation (art. 2(3)).

b. Legal Provisions Enhancing the Freedoms to Provide Services and of Establishment

Within the directive, three different types of provisions aim at enhancing the freedom to provide services and of establishment of service providers: specific access rights, procedural provisions, and provisions concerning supervision.

i. Legislative rights to access markets

Extended impact assessment of proposal for a directive on services in the internal market, Brussels, 13.1.2004 SEC(2004) 21, p. 12, pp. 17 ff., pp. 34 ff.

87 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, Recital No. 3; Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market, Brussels, 17 July 2006, 10003/06, Recital No. 3; Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM(2004) 2 final – 2004/0001 (COD)), INT/228 - CESE 137/2005 - 2004/0001 (COD) EN/o, Pt. 2.1. ff.; Commission staff working paper, Extended impact assessment of proposal for a directive on services in the internal market, Brussels, 13.1.2004 SEC(2004) 21, p. 35.

88 European Commission, Report to the Council and the European Parliament, The State of the Internal Market for Services, COM (2002) 441, p. 14 ff.

89 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006, Recital (7); Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market, Brussels, 17 July 2006, 10003/06, Recital No. 7.

Access rights for cross-border services can be found in arts. 16(1), 19 and 23(2). Art. 16 is the first provision in Chapter IV *Free Movement of Services*, Section 1 *Freedom to provide services and related derogations*. It substantiates the access right guaranteed by the freedom to provide services in art. 56 TFEU. Art. 16(1) reinforces the freedom to provide services by stating that every Member State shall respect the right of providers to provide services in any Member State other than that in which they are established, and that the Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the principles of non-discrimination, necessity, and proportionality. The latter substantiates the justification of restrictions on the freedom to provide services. The Services Directive therefore does not deprive the Member States of the competence to adopt rules to pursue the mandatory interests of the general public. However, the directive subjects regulation by the Member States to specific requirements.[90]

Art. 16(2) lists in further detail the requirements that Member States shall refrain from imposing. Member States shall not impair the freedom to provide services in the case of a provider established in another Member State by imposing (a) an obligation on the provider to have an establishment in their territory, (b) an obligation on the provider to obtain an authorisation, except where provided for in this directive or other instruments of Community law, (c) a ban on the provider setting up a certain form or type of infrastructure in their territory, (d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed, (e) an obligation on the provider to possess an identity document issued by its authorities specific to the exercise of a service activity, (f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided, and (g) restrictions referred to in art. 19 of the directive (restrictions on the recipients of services).

Art. 16(3) reinforces that requirements about the provision of a service activity can be justified for reasons of public policy, public security, public health or the protection of the environment if they are in accordance with the principles of non-discrimination, necessity and proportionality according to paragraph 1.

Art. 17 contains further exceptions to the scope of the access right specified in art. 16(1), most of which are covered by other directives already: excluded are, inter alia, postal services, the electricity and gas sectors, water distribution, and the treatment of waste. Art. 18 additionally allows for case-by-case derogations for measures relating to the safety of services in exceptional circumstances.

Art. 19, found in Section 2 *Rights of recipients of services*, guarantees access rights to services for the recipients, addressing the passive freedom to provide services. According to this provision, Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular (a) an obligation to obtain authorisation from or to make a declaration to their authorities, and (b) discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State, or by reason of the location of the place at which the service is provided.

A third group of access rights is given by art. 23(2) which deals with professional liability insurance and guarantees. According to art. 23(2), Member States may not require of a provider who established himself in their territory a professional liability insurance or guarantee where he is already covered by a guarantee which is equivalent in another Member State in which the provider is already established.

[90] See art. 9(1) and art. 16(3) of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ L 376, 27.12.2006.

Access rights for the cross-border establishment of service providers can be found in arts. 9-15. The basic rule is set in art. 9(1). Accordingly, Member States shall respect the right of service providers to establish themselves in other Member States. This guarantees non-discriminatory and unlimited market access, which may only be restricted by proportionate (suitable and necessary) access conditions. Art. 14 contains a number of case groups taken from the case law of the European Court of Justice. Finally, art. 15 obliges Member States to evaluate their legal systems in respect of certain obstacles to freedom of establishment (referred to in paragraph 2), ensuring that existing rules do not contain discriminatory or disproportionate restrictions (art. 15(3)).

ii. Procedures

Arts. 5 to 8 regulate the simplification of procedures. They can be found in Chapter II *Administrative simplification*. Member States shall examine the procedures and formalities applicable to access to a service activity and to the exercise thereof and shall simplify them where they are not sufficiently simple (art.5(1)). Moreover, the Commission is competent to introduce harmonised forms at Community level in accordance with a procedure laid down in art. 40(2) which shall be equivalent to certificates, attestations and any other documents required of a provider (art. (2)).

In a case where a Member State requires a service provider to supply a document etc., art. 5(3) reinforces the principle of mutual recognition requiring Member States to accept any document from another Member State which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied. Art. 5(4) states exceptions to the latter obligation for specific service areas such as public works contracts, or the practice of the lawyer profession.

Art. 6 obliges the Member States to establish ***points of single contact*** where it is possible for providers to complete all procedures and formalities needed for access to his service activities as well as any applications for authorisation needed to exercise his service activities.

Art. 7(1) requires Member States moreover to ensure that relevant information is easily accessible to providers and recipients through points of single contact. This includes information about the applicable requirements, contact details of the competent authorities, the means of, and conditions for, accessing public registers and databases, and the means of redress, the contact details of the associations or organisations from which providers or recipients may obtain practical assistance. Member States must also ensure that providers and recipients can receive information on the way in which the requirements applicable are generally interpreted and applied (art. 7(2) and (6)), that information and assistance are provided in a clear and unambiguous manner (art. 7(3)), and that the points of single contact and the competent authorities respond as quickly as possible (art. 7(4)). Information shall also be available in other EU languages (art. 7(5)).

All procedures and formalities relating to access to a service activity and to the exercise thereof shall be made easy to complete from a distance and by electronic means (art. 8(1)). The Commission shall adopt detailed rules, facilitating the interoperability of information systems und use of procedures by electronic means between Member States, taking into account common standards developed at EU level (art. 8(3)).

For the freedom of establishment, the procedural regime of art. 13 must furthermore be observed. The Member States are obliged to observe the principles of clarity and the rule of law when designing their administrative procedures. They must publish deadlines and comply with them: According to art. 13(3), the approval procedures must ensure that applications are answered without delay and in any case within a pre-defined period. The time limit begins to run when the documents have been submitted in full and may be extended by the competent authority once for a limited period if this is justified by the complexity of the matter.

Art. 13(4) states that an authorisation shall be deemed to have been granted if the application is not granted within the time limit fixed in advance or extended. Derogations are allowed only where justified by an overriding reason relating to the public interest, including the legitimate interest of third parties.

iii. Coordination of Supervision

Arts. 30 to 36 establish a coordination of supervision. They form part of Chapter VI (Administrative Cooperation). Art. 30 regulates the supervision by the Member State of establishment, and art. 31 concerns the supervision by the host Member State. The directive establishes a system where, in principle, the Member State of establishment must ensure compliance with its requirements (art. 30(1)).

In cases where the host Member State imposes national requirements pursuant to art. 16 or 17, it is the host Member State's responsibility to supervise the activity of the provider in its territory with respect to these requirements (art. 31(1)). Where a provider moves temporarily to another Member State to provide a service without being established there, the host Member State shall participate in the supervision at the request of the Member State of establishment (art. 31(2)(3)). The host Member State can only conduct checks, inspections and investigations on the spot on its own initiative if they are not discriminatory, are not motivated by the fact that the provider is established in another Member State and are proportionate.

Art. 32 introduces an alert mechanism for cases where a Member State becomes aware of serious specific acts or circumstances relating to a service activity that could cause serious damage to the health or safety of persons or to the environment. In such a case, that Member State shall inform the Member State of establishment and other Member States concerned and the Commission immediately (art. 32(1)). The Commission shall promote and take part in the operation of a European network of Member States' authorities (art. 32(2)) and shall adopt detailed rules concerning the management of said network (art. 32(3)).

The Services Directive also establishes a notification procedure for new or changed authorisation schemes or requirements for establishments falling under the directive. Its purpose is to make sure that such measures or changes are non-discriminatory, proportionate and justified by overriding reasons of public interest.[91] However, the notification procedure covers only a small part of the Services Directive: Member States must notify to the Commission new or changed authorisation schemes or requirements falling under the Directive.[92] The purpose of the notification obligation is to ensure that newly introduced national measures or changes of existing national measures are non-discriminatory, proportionate and justified by overriding reasons of public interest.[93] The notification procedure covers only a small part of the Services Directive: Art. 15(7), which concerns the freedom of establishment for service providers, foresees an obligation to notify the Commission of new requirements falling under art. 15(6). The only other notification obligation concerns the rules on mutual assistance in the event of case-by-case derogations (art. 35(3)).

---

91 *Müller-Graff*, in: Streinz, EUV/AEUV, Art. 53 AEUV paras 27.

92 *Stenger*, in: Landmann/Rohmer, Gewerbeordnung, § 6a GewO Entscheidungsfrist, Genehmigungsfiktion, paras 6, 7; *Pielow*, in: Landmann/Rohmer, Gewerbeordnung, Einleitung EU paras 87-97.

93 European Commission (fn. 103), p. 2.

c. Assessment of the Services Directive

i. Mutual Recognition as Core of the Freedom to Provide Services

The mechanisms used in the Service Directive focus on making the principle of mutual recognition effective against rules restricting market access for a service provider. This principle constitutes the very core of the rules governing the liberalisation of services.[94] The principle is implemented by establishing specific access rights and, partly, by the simplification of procedures. The rules granting access rights (arts. 16, 19, 23) oblige host Member States, in general, to accept services provided by service providers established in another Member State, allowing for the imposition of national requirements only if they are non-discriminatory, necessary, and proportionate. The rules concerning the simplification of procedures require host Member States to accept any document from the Member State of establishment which serves an equivalent purpose or from which it is clear that the requirement in question has been satisfied (art. 5(3)).

ii. Overcoming barriers to cross-border provision of services

Different regulation and requirements, difficulties with finding relevant information on it, language barriers, and the resulting adjustment costs are the major obstacles faced by service providers and recipients who plan to provide or receive services in or from another Member State. If information is easily accessible for service providers and service recipients, and if cross-border services are easily carried out due to simple procedures, providers and recipients are more likely to look for services in other Member States.

The Services Directive addresses all of the obstacles mentioned in one or another way. Particularly noteworthy are the points of single contact (arts. 6 to 8) where foreign service providers shall not only be able to access – in different EU languages – all relevant information about applicable requirements including information on how they are interpreted and applied, contact details of the competent authorities, but can also complete all procedures and formalities needed to exercise his service activities in the host Member State.

iii. Reducing Adjustment Costs

Many of the provisions analysed are suitable to reduce adjustment costs for service providers and/or recipients who provide or receive cross-border services. Especially the provisions aiming at improved access to information, amongst them in particular the establishment of points of single contact, help reducing adjustment costs. Obligating the Member States to simplify their regulation and procedures is also suitable to decrease costs for cross-border services, as well as the establishment of a supervision scheme that aims at reducing double supervision by distributing the obligation to supervise between the host and the home Member State.

iv. Mutual recognition of supervision

The supervision system set up in the Services Directive for cross-border provision of services is based on mutual recognition. It establishes a work-sharing system for supervision between the home and the host Member State. The responsibility for supervision and monitoring lies in principle with the home Member State. A host Member States' competence to supervise and monitor is limited. The respective rules of the directive are, therefore, also based on the principle of recognition in the way that the host Member State shall accept the Member State of establishment's supervision to be equivalent to its own

---

[94] *Van den Gronden/De Waele*, ECL Review 2010, 397, 400 ff.; *Davies*, ELRev 2007, 232 ff.; "materialised, at least in part": *Delimatsis*, ELRev 2016, 513, 526.

supervision. In general, they may conduct checks and inspections only to supervise compliance with their own regulation passed under the conditions of art. 16, or when requested by the service provider's home Member State. Other checks and inspections may only be conducted if they are non-discriminatory and proportionate. Any abuse of the freedom and other risks are addressed by an alert system.

v. Overall Assessment

In summary, most of the substantive provisions of the Services Directive are a codification of the case law of the European Court of Justice.[95] To some extent, they also develop it further. This applies in particular to the requirements of arts. 9, 10 and 12 of the Services Directive and, with restrictions, also to art. 11 thereof. But even if the Directive only codifies the case law of the CJEU, this is sensible. In the regulations, the case law, which is often difficult to comprehend, becomes visible with positive effects on legal certainty in individual cases; it sets ex ante standards for the application of the law, because the text goes beyond general principles through virtually exemplary regulations.[96]

Other provisions, such as the very detailed requirements for the authorisation procedure, in particular the requirement of a period to be determined in advance (art. 13(3)) and the fiction of authorisation pursuant to art. 13(4), are provisions which do not result from the caselaw of the European Court of Justice and which in this respect can be regarded as innovations of the EU legislator.[97]

However, the Services Directive has not fully met the expectations placed in it from the outset. The numerous compromises which had to be made during the legislative process led to a patchwork of scopes and regulations, with the result that the legislative "revolution" sought by the Commission's first proposal was missed.[98]

Nevertheless, the Services Directive was the first important step towards barrier-free movement of services. It has managed to produce a deregulatory shift compared to the existing law on services.[99] The Commission estimates that the Services Directive added 0.9 per cent to the GDP of the EU over ten years, with a potential of generating an additional 1.7 per cent.[100] Its rules ensure broad access rights, foster the principle of mutual recognition and reduce administrative barriers.[101] Furthermore, the principle of supervision of cross-border service providers in the country of origin is important in order to avoid costly double supervision. The Services Directive does not set common standards, but its call for common standards (art, 26(5)) points towards a further integration of the European service markets.[102]

---

95 This is true, in particular, for the rules on establishment, see *Davies*, ELRev 2007, 232, 234.

96 See, *Hatzpopoulos*, Regulating Services, p. 259.

97 *Krajewski*, NVwZ 2009, 929, 935.

98 *Obwexer/Ianc*, EnzEuR, Vol. 4, § 7 para 101.

99 *De Witte*, EUI Working Papers Law 2007/20, p. 11.

100 *Monteagudo/Rutkowski/Lorenzani*, Economic Papers 456, 2012, p.2; European Commission, Update of the study on the economic impact of the Services Directive, 2015.

101 Monteagudo/Rutkowski/Lorenzani, p. 2.

102 See *Delimatsis*, E.L. Rev. 2016, 513, 526.

3.1.2. The Services Enforcement Directive Proposal

KEY FINDINGS

The proposed Services Enforcement Directive aims at creating a notification requirement prior to the introduction of service-related authorisation schemes and requirements related to establishment procedures. The notification shall be followed by a structured dialogue between the Commission and the Member State concerned, which may be joined by the other Member States. As a result, the Commission shall adopt a decision which may continue or to some extent halt the legislative procedure in the Member States.

The proposal would bring about major changes: It would greatly increase the notification obligations established by the Services Directive and implement extensive obligations to state reasons and justifications for every envisaged measure. It would address the problem that Member States often regulate access to their service markets without always considering the consequences under European law. This may not result in new barriers in individual cases or be well founded on overriding general interests; in other cases, however, new unjustified barriers may be created. The proposal could significantly reduce or prevent such barriers by raising awareness and giving guidance to the Member States.

IMCO's proposed changes to the Commission's initial proposal have found the right balance between effectuating the fundamental freedoms and other EU law principles such as the division of competences, the division of powers, the principle of subsidiarity and the principle of proportionality. In particular, the amendments where only in a case of serious restrictions, the Commission can issue a binding decision, and that it is the Commission that has the burden of proof for the illegality of the contested measure, could dispel concerns.

Regarding the shortcomings of the Services Directive, it is not surprising that the Commission soon started to further develop the legal framework. As part of the Services Package in 2017, the Commission proposed, inter alia, the Services Enforcement Directive.[103]

a. Aims of the proposal

The proposal[104] aims at creating a **notification requirement** prior to the introduction of service-related authorisation schemes and requirements related to establishment procedures. The notification is followed by a structured dialogue between the Commission and the Member State concerned, which may be joined by other Member States. As a result, the Commission adopts a decision which may continue or to some extent halt the legislative procedure in the Member States.

The initiative builds on an existing notification procedure in the Services Directive. However, the new procedures should be much more effective. The Services Directive established a notification procedure with a limited scope.[105] According to the Commission's assessments, the notification procedure established in the Services Directive did not proof efficient in safeguarding that newly introduced

[103] European Commission, Proposal for a Directive of the European Parliament of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, COM(2016) 821 final, 2016/0398 (COD).

[104] European Commission (fn. 103), p. 2.

[105] *Stenger*, in: Landmann/Rohmer, Gewerbeordnung, § 6a GewO Entscheidungsfrist, Genehmigungsfiktion paras 6, 7; *Pielow*, in: Landmann/Rohmer, Gewerbeordnung, Einleitung EU paras 87-97.

national measures or changes to existing national measures related to the provision of services comply with the conditions of the Directive.[106] The Services Enforcement Directive aims at closing this gap by increasing the efficiency of the notification procedure as well as the quality and the content of the notifications submitted.[107]

The Services Enforcement Directive therefore wants to introduce a notification procedure for requirements affecting the freedom to provide services as referred to in art. 16 of the Services Directive (art. 4 lit. c Services Enforcement Directive), for requirements to subscribe to a professional liability insurance, guarantee or similar arrangements as referred to in art. 23 Services Directive (art. 4 lit. d Services Enforcement Directive), and for requirements to exercise a given specific activity exclusively or which restricts the exercise jointly or in partnership of different activities as referred to in art. 25 Services Directive (art. 4 lit. e Services Enforcement Directive).

b. The Notification Procedure

The procedure of the notification is regulated in art. 3 of the Services Enforcement Directive. Member States shall be obliged to notify to the Commission, at least three months prior to their adoption (art. 3(3)), any draft measure that introduces new requirements or authorisation schemes as referred to in art. 4 as well as any draft measure that modifies such existing requirements or authorisation schemes (art. 3(1)). Information demonstrating the compliance of the notified measure shall be provided (art. 3(5)-(8)). Member States shall notify again if they make any significant modifications of the draft measures (art. 3(2)). A breach of these obligations shall constitute a substantial procedural defect of a serious nature (art. 3(4)). Within two weeks following the adoption of the notified measure, its adoption shall be communicated (art. 3(9)). For the purpose of the notification procedure, the IMI system shall be used (art. 3(10)).

Arts. 5 to 9 lay down the procedure that follows the notification. Upon the notification, the Commission shall inform the Member State of the completeness of the notification, and a consultation of maximum three months shall take place among the notifying Member State, other Member States and the Commission (art. 5). The Commission may alert the notifying Member State of its concerns about the compatibility of the draft measure with the Services Directive before the closure of the consultation period (art. 6(1)). Upon this alert, the notifying Member State shall not adopt the draft measure for a period of three months after the closure of the consultation period (art. 6(2)). Where the Commission issued an alert, it may, within a period of three months after the closure of the consultation period, adopt a decision finding the draft measure to be incompatible with the Services Directive and requiring the Member State to refrain from adopting it or to repeal it (art. 7). The Commission shall publish the notifications and the related adopted measures on a dedicated public website (art. 8). Member States shall designate a competent authority responsible for the operation of the notification procedure (art. 9).

c. Proposed Changes by IMCO

IMCO has proposed a number of substantive amendments in the legislative process, responding to criticisms expressed mainly by some Member States.

A first part of the proposed amendments concerns the **notification requirement itself**. Initially, the triggering of notification obligations was limited to substantial changes to existing requirements and authorisation schemes (Amendment 17).

[106] European Commission (fn. 103), p. 3.
[107] European Commission (fn.103), p. 3.

The same applies to amendments to already notified proposals (Amendment 19). An exception to the notification obligation has been proposed for urgent legislative projects (Amendment 22). The content of the notification, which must be accompanied by a substantiated justification for proportionality and non-discrimination, is also somewhat clearer (Amendment 24 f.). On the other hand, an objective extension of the notification to professional rules on commercial communications as referred to in art. 24(2) of Directive 2006/123/EC has also been proposed (Amendment 26).

The other proposed amendments concern the **consultation procedure**. First, the procedure is tightened up in terms of time (Amendments 27 f., 32) and its content is expressly limited to infringements of the Services Directive (Amendment 29). Further amendments serve clarity (e.g. Amendment 31) or simplification (e.g. Amendment 30). In the event that the Commission considers the national measure to be incompatible with the Services Directive, it must now provide detailed reasons for this finding (Amendment 33). Also new is the obligation of the Member State concerned to give reasons for compatibility with the Services Directive within one month of receipt of the Commission's notification and to explicitly allow the adoption of the notified measure after three months (Amendment 35).

The most significant amendment proposed (Amendment 36) concerns the **legal nature of the Commission's conclusion**. Whereas the Commission's draft version of art. 7 solely provided the Commission with the instrument of a decision, the amendment proposed by IMCO is intended to differentiate. Only in the case of alleged infringements of art. 15(2) of the Services Directive a decision is admissible. This concerns a catalogue of rather serious restrictions on the freedom of establishment, which do not relate to the actual authorisation, but rather attach other conditions to the taking up or exercise of the service. All other infringements, in particular all infringements of cross-border services within the meaning of art. 56 TFEU, can only be asserted by way of a non-binding recommendation.

Amendments 25 and 26 also brought some major changes: It is now for the Commission to bring a matter before the European Court of Justice pursuant to art. 258 TFEU and not the Member State that has to defend itself against the Commission's decision.

Other relevant proposals concern publication (newly proposed feedback procedure for stake holders, Amendment 37) and the designation of an authority responsible for this Directive (explicitly no impact on national competences, Amendment 38).

d. Critique

The Services Enforcement Directive would bring about major changes: It would greatly increase the notification obligations, expanding their scope to arts. 9(1), 16(1) and (3), 23 and 25 of the Services Directive, and implementing extensive obligations to state reasons and justifications for every envisaged measure. The Directive would establish a formal dialogue involving all Member States and the Commission. Breaches of the notification obligation shall constitute a substantial procedural defect of a serious nature. The Commission shall be competent to adopt binding decisions on the compatibility of the Member States' measures. **Critics argue that the Services Enforcement Directive contradicts the division of competences, the division of powers, the principle of subsidiarity and the principle of proportionality**. It is argued that the Directive unlawfully confers the notification scheme established for state aid under arts. 107 ff. TFEU to the fundamental freedoms, therefore disregarding the division of competences between the EU and the Member States. Contrary to the EU laws on state aid, where the treaty confers on the EU the exclusive competence (art. 3(1) lit. c), the EU and the Member States share the competence for the internal market (art. 4(2) lit. a). Arts. 107 ff. TFEU regulate a system where state aid is forbidden in general and can only be granted for a reason listed in art. 107 TFEU, and the treaty itself requires the Member States to notify to the Commission any plans

to grant or alter aid (art. 108(3) TFEU). In this area of law, the Member States thus transferred their sovereign rights to the EU in an extensive manner, a fact that does not apply to the law of the internal market, particularly the fundamental freedoms.[108] Critics argue moreover that granting the Commission the competence to decide on the compatibility of national rules with provisions of the Services Directive and to adopt binding decisions on this matter is in breach with the division of powers within the European Union ("institutional equilibrium")[109], as it is for the European Court of Justice to decide over the interpretation of EU law.[110] The interpretation of EU lies, in principle, within the sole competence of the European Court of Justice. This follows from art. 19 TEU, according to which the court *"shall ensure that in the interpretation and application of the Treaties the law is observed"* and art. 13 TEU (*"each institution shall act within the limits of the powers conferred on it in the Treaties")*.

Questions also arise concerning the potential achievements of the Services Enforcement Directive. The extensive notification obligations concerning envisaged national provisions, in combination with extensive obligations to state reasons and justifications, may deter national legislators from enacting new laws or from changing existing provisions and are even suitable to paralyse the national legislators. This may not only prevent new restrictive laws, but also the implementation of more modern and less restrictive provisions. For example, it is argued that the notification obligation of Directive 98/34/EC might have substantially slowed down the implementation of e-governance in Germany and that the Services Enforcement Directive bears the same danger.[111]

e. Assessment

The aim of the proposal is to examine, as a preventive measure, the introduction or amendment of national legislative proposals with a potentially negative impact on the exercise of the freedom to provide services and freedom of establishment. The Commission would be responsible in this respect. The project addresses the problem that Member States often regulate access to their service markets without always considering the consequences under European law. This may not create new barriers in individual cases or be well founded on overriding general interests in some case; in other cases, however, unjustified barriers may arise. The Directive addresses this problem in two ways. Firstly, the notification obligation imposes on Member States the need to examine a measure involving the freedom to provide services. Art. 3(2-5) imposes on them a duty to state reasons. In addition, the Commission is entrusted with a monitoring function and can draw attention to internal market problems in a structured dialogue.

Before going into the details of the criticisms from the Member States, it should be noted that the substance of the control mechanism was already included in the original 2006 Services Directive. Pursuant to Art. 15 (7) of Directive 2006/123/EC, the Member States were required to notify changes relevant to the establishment of service providers and, upon a Commission decision, to refrain from continuing with their draft legislation. The regulatory approach of the Services Enforcement Directive is, therefore, more ambitious and far-reaching in detail, but not fundamentally new. No criticism has been levelled at Art. 15 (7) of Directive 2006/123/EC so that the concerns expressed against the Services Enforcement Directive could possibly also (partly) be supported by political motivation. On the other hand, this does not exempt them from a careful legal analysis.

---

[108] *Stork*, EuZW 2017, 562, 564.

[109] CJEU, Judgement of 06.05.2008, C-133/03, European Parliament/Council, ECLI:EU:C:2008:257, para 57; Judgement of 22.05.1990, C-70/88, Tschernobyl, ECLI:EU:C:1991:373, para 22.

[110] See also *Stork*, EuZW 2017, 562, 564.

[111] *Stork*, EuZW 2017, 562, 565.

If one assumes that the problems presupposed by the Commission in its explanatory memorandum to the proposed directive actually exist as a result of Member State measures contrary to the Services Directive, then the measure proves to be **suitable** within the meaning of art. 5(4) TEU (within the framework of the principle of proportionality).

On the other hand, the question of **necessity** in the original draft is not undoubted. It is clear that the Commission's decision in the legislative hierarchy of Union law takes precedence over a national parliamentary law.[112] This regulatory approach thus proves to be more effective than a notification procedure without a prohibition of implementation as provided for in the Services Directive (art. 15 VII).[113] However, the instrument chosen in the Enforcement Directive raises a **problem of democracy**. A European authority such as the Commission can curtail the democratic rights of a national parliament. The principle of democracy is a guiding principle in the European Union (art. 2 TEU). It would restrict the democratic rights of elected parliaments if the Commission could block its legislative proposals. On the one hand, it must be taken into account that the Member States do not have a sovereign right to violate a directive. Directives bind the Member States directly (cf. art. 288(3) TFEU) and, as supranational law per se, prohibit national measures which violate them. On the other hand, however, the Enforcement Directive shifts the balance: as a directly applicable instrument, the decision takes precedence over the national law; the latter is no longer applicable (priority of application of Union law[114]). On the other hand, the Directive is in principle not directly applicable; law contrary to the Directive remains effective within the country. What has the effect of making the Services Directive more effective indirectly changes its legal effects. The interaction between the legal instruments (Services Directive, Enforcement Directive and Commission Decision) gives the Services Directive to a certain extent the character of a regulation. Contrary to criticism expressed partly,[115] this does not raise competence problems. It is true that the legislation based on art. 53, 62 TFEU is limited to directives. The direct effect, however, finds a sufficient basis in art. 114 TFEU.

The considerations can be summarised as follows: the chosen regulatory approach in art. 7 Enforcement Directive interferes with the democratic rights of the parliaments of the Member States. On the other hand, the principle of democracy as an expression of the sovereignty of a Member State's parliament is not guaranteed without reservations. For example, Commission decisions can bind the parliaments of the Member States within the framework of state aid law.[116] In art. 108 TFEU, this is based on the idea that state aid can disrupt the functioning of the internal market in a particularly intensive way. However, prohibition decisions by the Commission are limited to *significant* aids.[117] This shows that the shift in the balance towards directly effective decision-making powers of the Commission requires at least some relevance.

In this respect, IMCO has set the right emphasis with Amendment 36. Since violations of art. 15(2) of the Services Directive are more serious than other violations and, at the same time, the groups of cases mentioned therein tend not to be justified in the case law of the European Court of Justice, the

---

112 *Wölker*, EuR 2007, 32, 39.

113 Art. 15 para 7 Services Directive explicitly states that "Such notification shall not prevent Member States from adopting the provisions in question." Whereas under the Services Enforcement Directive proposal upon alert of the Commission's concerns "the notifying Member State shall not adopt the draft measure for a period of three months after the closure of the consultation period." (art. 6 para 2).

114 CJEU, Judgement of 15.07.1964, C-6/64, Costa/E.N.E.L., ECLI:EU:C:1964:66, p. 1269 ff.; *Ruffert*, in: Calliess/Ruffert, EUV/AEUV, Art. 4 EUV paras 16 ff.

115 *Stork*, EuZW 2017, 562, 564.

116 *Kühling/Rüchardt*, in: Streinz, EUV/AEUV, Art. 108 AEUV para 69.

117 Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid; the regulation concerns aid granted to undertakings outside approved aid schemes and not exceeding a total amount of EUR 200 000 over three fiscal years.

required relevance exists. This indicates that at least in the version of the IMCO Reports there is no violation of the principle of democracy and therefore no doubt about the necessity.

Notably, IMCO Amendments 25 and 26 raised concerns that the directive would violate the institutional balance of the EU. Art 6(2a) makes clear that an alert by the Commission does not prevent the Member State from the adoption of laws, regulations or administrative provisions. Amendment 26 shifts the burden to bring legal action towards the Commission: The Commission has to bring a matter before the European Court of Justice pursuant to art. 258 TFEU and only then the legal, regulatory or administrative measures concerned will be "suspended" rather than that the Member State is directly required to repeal it as it was the case in the original proposal. This ensures that the Commission has the burden of proof for the illegality of the contested measure[118] and that it is for the European Court of Justice to have the final say over the compatibility of national measures with EU law. The Commission's new power to "suspend" the application of Member States' measures does not seem to face the same concerns regarding the institutional balance within the EU. This system also does not appear to conflict with art. 278 TFEU, which provides that actions brought before the European Court of Justice may not have suspensory effect. It is not the action before the European Court of Justice but the Commission's decision that has suspensory effect - a scenario that is not without precedent in EU law.[119]

[118] CJEU, Judgement of 09.07.2015, C-87/14, Commission/Ireland, ECLI:EU:C:2015:449, para 22; Judgement of 22.11.2012, C-600/10, Commission/Germany, ECLI:EU:C:2012:737, para 13.

[119] E.g. in art. 1(V), 2(III) of the Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts; *Seidel/Mertens*, in: Dauses/Ludwigs, Handbuch des EU-Wirtschaftsrechts, H. IV. para 40.

3.1.3. Services E-Card Directive Proposal

KEY FINDINGS

The services e-card aimed to reduce the administrative complexity faced by the service providers and to ensure, at the same time, that the Member States could still apply justified regulation. The idea was to offer a voluntary electronic EU-level procedure to service providers to complete formalities when expanding abroad.

The rationale behind the proposed introduction of a services e-card is convincing. By simplifying the procedure from the company's perspective, centralising information, collecting it once and using it for subsequent declarations, e.g. for professional qualifications or for employment services, companies save time and money. In principle, the services e-card facilitates market access. The approach should thus be pursued further.

The rules on the services e-card should not, however, prevent the host Member State from requiring compliance with its own standards in the absence of coordinated standards. It should thus be clarified that the services e-card does establish a principle of mutual recognition only with limited scope.

A future proposal should

1. examine whether the scope of application of the services e-card could be extended;
2. reduce administrative duplication and integrate the regulations into the Services Directive as far as possible;
3. make it clear that the host Member State may adopt proportionate rules for the pursuit of overriding interests.
4. examine to what extent a fictional authorisation regime for admission to services can be generalised, while ensuring that the regulatory interests of the host Member State are not unduly affected.

As part of the Services Package released in 2017, the Commission also proposed a Regulation introducing a European services e-card and related administrative facilities[120] and a complementing Directive on the legal and operational framework of the European services e-card.[121] The Internal Market Committee rejected the proposal in March 2018.[122]

a. Aims of the Proposed Regulation

The initiative was based on the Commission's research showing that, especially for several business services and the construction sector, service providers still face complex administrative obstacles when expanding abroad.[123]

[120] European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a European services e-card and related administrative facilities, COM(2016) 824 final, 2016/0403 (COD).

[121] European Commission, Proposal for a Directive of the European Parliament and of the Council on the legal and operational framework of the European services e-card introduced by Regulation [ESC Regulation], COM(2016) 823 final, 2016/0402 (COD).

[122] See e.g. European Parliament, Internal Market MEPs reject Commission's 'services e-card' proposals, press release, 21.03.2018, http://www.europarl.europa.eu/news/en/press-room/20180319IPR00020/internal-market-meps-reject-commission-s-services-e-card-proposals.

[123] European Commission (fn. 103), pp. 2-3.

The Commission found that service providers have difficulties to obtain information on the requirements and the procedures necessary for offering their services in other Member States. As a result, they often struggle to understand which rules apply to them and how they can fulfil necessary requirements. Moreover, the administrative formalities often are complicated and costly.[124]

The services e-card aimed to reduce the administrative complexity faced by the service providers and to ensure, at the same time, that Member States could still apply justified regulation.[125] The idea was to offer a voluntary electronic EU-level procedure to service providers to complete formalities when expanding abroad.[126] The Commission hoped to save the service providers up to 50 per cent of costs, as the latter would be informed about the applicable requirements, could fill-in the forms in their own language, and would save time and money for certifying or authenticating documents.[127]

b. Scope of the Proposal

The scope of the legislative proposal is limited to certain services specified in the Annex to the Directive (art. 2). Specifically, these are mainly construction and business services. In coordination with the Services Directive, the areas excluded there (art. 2(2) and (3) Services Directive) are not covered by the provisions of the service card neither. These include health services, tax services and audio-visual services. Therefore, the overall scope of the service card would have been rather limited.

c. Access Rights and Restrictions

Service providers could have requested a services e-card that would have served as proof that they were established in the territory of their home Member State and were entitled, in that territory, to provide the service activities covered by that card (art. 4 Services E-Card Directive). The host Member State would not have been allowed to impose any prior authorisation or notification scheme or an establishment requirement to a services e-card holder (art. 5). Other controls are also not permitted. In this way, the service card would have provided market access for the service providers covered.

However, the draft Directive also provides for exceptions to this rule. First of all, certain types of controls do not fall within the scope at all. According to art. 2(2-1) in connection with art. 1(2)-(7) of the Services Directive excludes controls relating to criminal, labour or social security matters[128] which therefore continue to be admissible despite a service card.

In addition, according to art. 5(4) and (5), requirements in connection with selection procedures within the framework of a public contract or competition remain unaffected. The same applies to authorisation schemes, notification schemes or requirements concerning conditions specifically related to the site where the service is provided or to the site where the provider is established. For services for which the European professional card has been introduced, the e-card scheme is not applicable (art. 9).

---

[124] European Commission (fn. 103), p. 3. More about rejectment grounds: http://www.europarl.europa.eu/news/en/press-room/20180319IPR00020/internal-market-meps-reject-commission-s-services-e-card-proposals; Deutscher Bundestag, Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Energie (9. Ausschuss), 18/11442, 08.03.2017, http://dip21.bundestag.de/dip21/btd/18/114/1811442.pdf.

[125] European Commission (fn. 103), p. 3.

[126] European Commission (fn. 103), p. 3.

[127] European Commission (fn. 103), p. 3.

[128] See European Commission, IP/17/23.

d. Procedures

The procedure for granting a service card is comparatively complex and set out in the Regulation on the European Service Card and in parts also in the Directive. The procedure would have been the following:

Any service provider can apply for a European services e-card through an electronic platform connected to IMI using a multilingual standard form. The content of the form includes the identification of the provider, the service activity envisaged, information pertaining to establishment of the provider in the home Member State, requirements with regard to the service in the home Member State and information on the good repute of the provider and information on insurances (art. 4(1) Directive). Supporting documents can directly be uploaded by the application into the electronic platform (art. 4(2) Directive).

The basic idea is to simplify the procedure for the applicant as much as possible. To this end, the application is submitted electronically via IMI and forwarded to a Member State coordinating authority together with the information and supporting documents collected. The coordination authority must check within one week whether the information is complete and correct and, if necessary, request information or corrections. The simplification is enhanced by the fact that data are only collected once (art. 14); where data are available, the authority of the host country must rely on the information collected in the country of origin. The host Member State can also, in principle, not ask for certified copies or translations of the documents provided (art. 5 Regulation). The application process would then have differed for service providers planning to provide a service temporarily cross-border, and service providers wanting to provide services through an establishment in another Member State (arts., 12, 13). In both cases, the home Member State is the addressee of the application. It shall within one week examine the application, verify the completeness and accuracy and request supplementing if necessary (art. 11). In the first case, the services e-card is issued by the home Member State. The authorities have two weeks to do this. During this time, the host country is contacted. A host Member State can request further information and can only object the issuance of a services e-card where art. 16 of the Services Directive allows them to do so for overriding reasons of public interest. If the host country does not react, the deadline is extended by another two weeks. If no objection is raised by the host Member State or no decision is taken by the coordinating authority of the home Member State, the service card shall be deemed to have been issued as requested (art. 12(3)). In the case where a service is to be provided through an **establishment** in another Member State, the service provider has to request the services e-card for establishment with his home Member State's authorities. The latter checks if the provider was established on its territory in line with its applicable rules. In a second step, the authorities initiate a process with the relevant host Member States authorities to verify if the requesting service provider meets the justified requirements of the latter. The services e-card is then issued by the host Member State (art. 13). The Directive (art. 13(6)) also provides here for the fiction of approval of the application for the service card, with the consequence that in this case there is a right to market access without a substantive examination.

e. Assessment and Critique

The rationale behind the proposed introduction of a service card is convincing. By simplifying the procedure from the company's perspective, centralising information, collecting it once and using it for subsequent declarations, e.g. for professional qualifications or for employment services, companies save time and money. In principle, the service card thus facilitates market access.

On the other hand, the proposal has received strong criticism from the Member States and has been rejected by IMCO. Criticism has also been expressed from the academia.

The legislative technique itself is not without doubt. It is true that the division into a directive and a regulation is prescribed by law because of the different legal basis for facilitating market access for services and branches (arts. 53, 62 TFEU) and the approximation of law for the functioning of the internal market (art. 110 TFEU).[129] Nonetheless, this results in a regulation that is difficult to understand and systematically not free of defects. For this reason alone, the initiative loses some of the benefits associated with it.

The initiative was criticised for putting too much emphasis on the principle of mutual recognition at the risk of abuse and social dumping.[130] In particular, the Member States rejected the fiction that would have occurred if the authorities had failed to act. Although this approach is (in a nutshell[131]) also provided for in principle in the Services Directive (art. 13(4)), it does not have as severe consequences in general due to the lack of rigid deadlines in the directive.

Critics also argued that the services e-card was neither suitable to decrease administrative complexity nor costs. The point was raised that the freedom to provide services would have been served better if the Commission had focused on making the implementation of the Services Directive more effective, especially with regards to the points of single contact.[132] Finally, Member States and industry accused the proposal of being incompatible with the principle of proportionality (art. 5(4) TEU). Here it is argued that the establishment of additional authorities could lead to duplicate and even more complex structures and was therefore not necessary.[133] Finally, it should be added that several Member States have lodged subsidiarity complaints.

A final evaluation must distinguish between the present proposal of the European Commission on the one hand and the regulatory approach it pursues on the other.

The objections raised against the services e-card are partly justified with regard to the concrete form it takes. Neither do the complex administrative structures satisfy with possible double structures, nor is it convincing to create a legal framework outside the Services Directive. Moreover, the limited scope of the proposal is problematic. A negative list approach that, in principle, covers all professions and only exempts professions where the Member States see specific need for controls (such as health professions) would have been more desirable. Further, the issuance of services e-cards, European professional cards and similar documents (such as the A1 document for social security) should be subjected to a common set of rules and regulations as well as a uniform platform to avoid fragmentation and reduce administrative costs.

However, the basic approach of the project should be pursued further. It is essential to remove the administrative barriers to cross-border admission to services markets. The principle of mutual recognition is very appropriate for this purpose. **The rules on the services e-card should not, howeber, prevent the host Member State from requiring compliance with its own standards in the absence of coordinated standards.** This is a general principle of internal market law and is applied in the same way in the Services Directive and the Professional Qualifications Directive; it corresponds to the rulings of the European Court of Justice, which always makes the right to market access subject

[129] See *Wurster*, EuZW 2017, 332, 336 f.

[130] See e.g. European Parliament, Internal Market MEPs reject Commission's 'services e-card' proposals, press release, 21.03.2018, http://www.europarl.europa.eu/news/en/press-room/20180319IPR00020/internal-market-meps-reject-commission-s-services-e-card-proposals.

[131] Art. 13 of the Services Directive does not provide for strict deadlines but leaves it to the Member States to determine them.

[132] See e.g. European Parliament, Internal Market MEPs reject Commission's 'services e-card' proposals, press release, 21.03.2018, http://www.europarl.europa.eu/news/en/press-room/20180319IPR00020/internal-market-meps-reject-commission-s-services-e-card-proposals.

[133] See German Parliament (Bundestag), BT-Drs. 18/11442, S. 8. ZDH, Stellungnahme zum Dienstleistungspaket, February 2017, p. 14.

to the proportionate regulations of the host Member State (overriding general interest). This corresponds also with the obligation to protect national identity (art. 4(2) TEU) and the overriding objective of creating a social market economy (art. 3(3) TEU). It should thus be clarified that the services e-card does establish a principle of mutual recognition only with limited scope: as it is already laid down in art. 4 of the proposal, the host Member State should not check again whether the professional is established in the territory of his home Member State and is in this territory entitled to provide the service activities covered by the e-card. The principle of mutual recognition should also apply to the documents that have to submitted to avoid double administrative burdens. It should be clarified that it does not apply to social and labour standards.

The proposal should therefore:

1. examine whether the scope of application of the service card could be extended;
2. reduce administrative duplication and integrate the regulations into the Services Directive as far as possible;
3. make it clear that the host Member State may adopt proportionate rules for the pursuit of overriding interests;
4. examine to what extent a fictional authorisation regime for admission to services can be generalised, while ensuring that the regulatory interests of the host Member State are not unduly affected.

3.2. Professional Qualifications

3.2.1. The Professional Qualifications Directive (2005/36/EC)

KEY FINDINGS

The Professional Qualifications Directive constitutes a cornerstone for the liberalisation of the services sector. The ability for professionals who acquired their qualifications in one Member State to pursue their profession in another Member State is essential for an integrated services market. By establishing rules on the recognition of professional experience, by reducing adjustment costs by decreasing double regulation, and by establishing uniform supervision, the Professional Qualifications Directive was an important step in the right direction. By establishing rules of automatic recognition and facilitating the recognition of professional experience and training it expands market access rights and reduces administrative burdens.

For temporary services, the principle of mutual recognition is implemented to a wide extent: the host Member State must recognise the Member State of origin's rules of access to a regulated profession and, in principle, respect its decision to grant a professional such access. As for the freedom of services, the directive gives effect to the principle of mutual recognition for the freedom of establishment.

The system of automatic recognition guarantees that access to the market of the host Member State is not restricted by different regulatory requirements and the need to obtain different qualifications to access the regulated profession in the host Member State.

The directive entails significant harmonisation that distinctly reduces adjustment costs for professionals. For several regulated professions, it harmonises the training requirements and thus ensures not only an access right through automatic recognition but also facilitates the integration in the host Member State's market. In principle, customers and employers can assume that a professional from another Member State has, overall, the same qualification as his competitors from the host Member State.

The directive uses a cross-sectoral approach, regulating a huge variety of different groups of professions including the liberal professions. This broad approach led to a complex and intricate scheme of rules which makes the directive a complicated instrument to apply.

Both, the free movement of persons and the freedom to provide services require that EU citizens shall have the right to pursue a profession, self-employed or employed, in a Member State other than their home Member State. Art. 53(1) TFEU therefore requires that directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications shall be issued.[134]

The Professional Qualifications Directive, which simplified and consolidated a number of previous legislative acts[135], was issued in 2005.

[134] *Kainer*, in: Frankfurter Kommentar, Art. 53 AEUV para 2.

[135] Directive 2005/36 stems from the Commission pursues Member States over internal market failures, EU Focus 2008, 242, 25-27, 25

More about Directive: Modernising the Professional Qualifications Directive, EU Focus 2012, 292, 22-23, 22; Professional services and EU law, P.N. 2013, 29(3), 144-171, 144; Implementing Professional Qualifications Directive 2005/36/EC, available on: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/485408/BIS-15-655-PQD-guidance-for-competent-authorities.pdf

This directive aims to ensure that persons who acquired their professional qualifications in one Member State have access to the same profession and can pursue it in another Member State with the same rights as nationals.[136] It also aims at supporting professionals from a Member State in which a profession is not regulated who want to establish in a Member State where the profession is regulated. At the same time, Member States can subject professionals with any non-discriminatory regulation, provided that it is objectively justified and proportionate.[137] For this purpose, the Directive establishes rules according to which a Member State shall recognise professional qualifications obtained in one or more other Member States which allow the holder of the said qualifications to pursue the same profession there (art. 1).

In the Single Market Act from 2011[138], the recognition of professional qualifications was considered as one of the key aspects to facilitate the mobility of workers and the modernisation of the legislative framework has since then been one of the top priorities of the EU.

The Professional Qualifications Directive was amended by numerous legal acts over the past two legislatures, with more amendments in the planning. The following assessment will first give an analysis of the Directive as issued in 2005 (a) before its most influential amendments will be discussed (b). Finally, current initiatives will be analysed (c).

a. Scope of the Directive

The Directive is not sector specific but, in general, applies to all regulated professions on either a self-employed or employed basis (art. 2(1)). A regulated profession is a professional activity which requires the possession of specific professional qualifications in order to access or pursue it (art. 3(1) lit. a). This includes the liberal professions (art. 2(1)). Professions practised by members of an association or organisation listed in Annex I shall be treated as regulated professions (art. 3(2)). The directive distinguishes between the temporary and the permanent provisions of service and applies to employed and self-employed persons alike (art. 2(1)).

b. Legal Provisions Enhancing the Freedom of Services and the Freedom of Establishment

i. Access Rights

In Title I *General Provisions*, art. 4 states the effects of the recognition of professional qualifications. The recognition by the host Member State grants the professional concerned access in that Member State to the same profession as that for which he is qualified in his home Member State and to pursue it in the host Member State under the same conditions as nationals of the host Member State (art. 4(1)). The profession which the professional wishes to pursue in the host Member State shall be considered the same as the one for which he is qualified in his home Member State if the activities covered are comparable (art. 4(2)). Formal qualifications issued by a third country recognised by a Member State have to be recognised by other Member States provided that the holder has three years professional experience in the profession concerned on the territory of the Member States that recognised his qualification (art. 3(3)).

---

[136] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications, recital 3, OJ L 255, 30.9.2005, pp. 22–142.

[137] Directive (fn. 136), pp. 22–142.

[138] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions, Single Market Act Twelve levers to boost growth and strengthen confidence "Working together to create new growth", COM/2011/0206 final.

The directive grants access rights to the temporary provision as well as to the permanent provision of services under a different regime.

Under the directive, for persons who wish to pursue their (regulated) profession in another Member State on a **temporary basis**, there is no need to undergo any formal recognition procedure. The temporary and occasional nature of the provision of services shall be assessed case by case, in particular in relation to its duration, its frequency, its regularity and its continuity (art. 5(2)).

In Title II *Free Provision of Services,* the principle of the free provision of services (art. 5) and certain obligatory exemptions that apply to foreign service providers (art. 6) are established. Member States shall not restrict the free provision of services in another Member State if the service provider is legally established in a Member State for the purpose of pursuing the same profession there (art. 5(1) lit. a) and, where the service provider moves, if he has pursued that profession the Member State of establishment for at least two years during the 10 years preceding the provision of services or provide evidence that he has followed "regulated education and training" when the profession is not regulated in that Member State. The service provider is, however, subject to the professional rules of the host Member State which are directly linked to professional qualifications, such as the use of titles, professional malpractice and disciplinary provisions (art. 5(3)).

The Professional Qualifications Directive also contains access rights that specifically aim at reducing adjustment costs. In that sense, art. 6 requires the host Member State to exempt service providers established in another Member State from authorisation by, registration with or membership of a professional organisation or body (art. 6 lit. a) and from registration with a public social security body for the purpose of settling accounts with an insurer relating to activities pursued for the benefit of insured persons (art. 6 lit. b). However, to facilitate disciplinary provisions (art. 5(3), the Member States may provide for automatic temporary registration with or pro forma membership of professional organisations (art. 6 lit a).

Further, Member States may require service providers to inform the competent authorities in the host Member States and to provide them with certain information in advance when they first move (art. 7(1) and (2)). The information to be provided can include: proof of the nationality of the service provider, an attestation certifying that the holder is legally established in a Member State for the purpose of pursuing the activities concerned and that he is not prohibited from practising, evidence of professional qualifications, proof that the service provider has pursued the activity concerned for at least two years during the previous ten years and evidence of no criminal records (only for professions in the security sector). The Member States may also check the professional qualifications of the service provider prior to the first provision of services where they might have public health or safety implications (art. 7(4)).

Title III of the Directive concerns the freedom of establishment in another Member State on a self-employed or employed basis. The access rights thereunder can be separated into three different groups, granting market access under differing conditions depending on the level of harmonisation. There is automatic recognition (arts. 21 ss.), recognition of professional experience (arts. 16 to 20), and a general system for the recognition of evidence of training (arts. 10 to 15).

Chapter III of title III regulates in arts. 21 ss. the 'automatic recognition' of professional qualifications based on the coordination of minimum training conditions for doctors, nurses, dental practitioners, veterinary surgeons, pharmacists, and architects. Midwives also benefit from automatic recognition (art. 21(3)). The education for these professions had already been harmonised by the directives listed in the directive's Annex V. The chapter is separated into several sections. The first section lays down general provisions, the following sections concern rules for the professions concerned respectively.

In section 1, art. 21 establishes the principle of automatic recognition. According to this principle, each Member State shall recognise evidence of formal qualifications for the professions concerned which satisfy the minimum training conditions established for the different professions respectively in arts. 24 to 46 without further checking. For pharmacists, the automatic recognition does not apply for the setting up of new pharmacies (art. 21(4)).

The minimum training conditions cover the conditions for the admission to the training, its minimum duration and minimum contents of the training and in the case of midwives and pharmacists also a list of certain activities the professional has to be able to pursue (art. 42(2), art. 45(2)). The directive does not regulate continuing professional development (art. 22).

The evidence of formal qualifications that shall be recognised are listed in Annex V. Member States shall give such evidence the same effect on its territory as the evidence of formal qualifications which it itself issues.

Title III Chapter II regulates the recognition of professional experience for professions that do not fall under chapter III but are listed in Annex IV. This mainly concerns trade, industrial and craft activities. These professions are subject to various differing regulations in the different Member States. The Directive therefore does not foresee a minimum harmonisation but rather the recognition of professional experience.[139] According to art. 16, if the access to or pursuit of an activity listed in Annex IV is contingent upon possession of knowledge and aptitudes in a Member State, that Member State shall recognise previous pursuit of the activity in another Member State as sufficient proof of such knowledge and aptitudes under the conditions of arts. 17 and 18. Annex IV lists groups of activities covered by other Directives, separated into three lists. For list I of Annex IV, art. 17 regulates the requirements for the recognition in detail, giving specific time frames for the previous pursuit of the activity under different conditions. For example, the activity in question must have been previously pursued for six consecutive years on a self-employed basis or as a manager of an undertaking (art. 17(1) lit. a), or for three consecutive years on a self-employed basis, if the beneficiary can prove that he has pursued the activity in question on an employed basis for at least five years (art. 17(1) lit. d). For list II of Annex IV, it is art. 18 that regulates the respective conditions for the recognition of previous activities. If professionals do not fulfil the requirements under Chapter II, they can nevertheless apply for recognition under the general system.

Chapter I of Title III establishes a general system for the recognition of evidence of training for all professions which are not covered by chapters II and III (art. 10(1)). For these professions, art. 13(1) contains the relevant principles. It states that where access to or pursuit of a regulated profession in a host Member State is contingent upon possession of specific professional qualifications, the competent authority of that Member State shall permit access to and pursuit of that profession, under the same conditions as apply to its nationals, to applicants possessing the attestation of competence or evidence of formal qualifications required by another Member State in order to gain access to and pursue that profession on its territory. Thus, unlike under the automatic recognition, each decision is taken on a case by case basis. For this purpose, art. 11 groups five different levels of qualification: general primary or secondary education (art. 11 lit. a), completion of a secondary course (art. 11 lit. b), diplomas for training at post-secondary level of at least one year or – in the case of a regulated profession – a training with a special structure (art. 11 lit. c), diplomas for training at post-secondary level of at least three and no more than four years' duration at a university or establishment of higher

[139] *Kluth/Rieger*, EuZW 2005, 486, 488.

education (art. 11 lit. d), and diplomas for post-secondary courses of at least four years' duration at a university or establishment of higher education (art. 11 lit. e).

However, Member States can require the applicant to complete an adaption period of up to three years or to take an aptitude test under the conditions laid down in art. 14 (different training period, training covers substantially different matters). Between 2007 and 2010, 73 per cent of the decisions under the general systems were recognition decisions without compensation measures, 15 per cent with aptitude test or adaption period, and 12 per cent were negative decisions.[140]

ii. Rules for the Provision of Services

Even though the Directive primarily focuses on provisions that aim at ensuring market access, many rules have effects on post market access behaviour also, and a few rules specifically concern the provision of services on the market of the host Member State. Particularly the principle of national treatment, which is laid down in art. 4(1), has effects on the service-providing activity. From this principle it follows that, once a service provider entered another Member State's market, he is obliged to follow the rules and regulations of the host Member State.[141] Art. 4(1) states clearly that the professional has the right to pursue his profession in the host Member State *under the same conditions as its nationals*. Other rules on market behaviour include the use of academic titles (art. 54) and language skills (art. 53).

For the temporary provision of services, art. 9 describes certain information the Member States may require the service provider to furnish the recipient of the service with, in cases, where the service is provided under the professional title of the Member State of origin or under the formal qualification of the service provider. These include for example, the professional title or formal qualification or professional associations in which the service provider is registered. Further rules on market behaviour are included in Title IV and cover: the knowledge of languages necessary for practicing the profession in the host Member State and the use of academic titles. It should be noticed that those rules are designed as "rules for pursuing the profession" meaning that they are not requirements for the recognition of the qualification as such.

iii. Administrative Cooperation

The directive also establishes a system of cooperation between the competent authorities of the Member States. In particular, the authorities of the host Member States may ask those of the Member State of establishment to provide relevant information on the legality of the service provider's establishment and his good conduct and the absence of any disciplinary or criminal sanctions of a professional nature (art. 8(1)). Information exchange is further required for complaints by a recipient of a service (art. 8(2)). Title V includes more detailed rules on the administrative cooperation and responsibility for the implementation. Thereunder, the Member States shall each designate a coordinator to promote the uniform application of the directive and to collect relevant information (art. 56(4)).

Art. 15 introduces the concept of common platforms that shall serve to facilitate the recognition on basis of the general system (chapter I) by waving compensation measures. The idea behind a common platform is that it would compensate the widest range of possible differences in training requirements

[140] European Commission, DG Internal Market and Services, Evaluation of the Professional Qualifications Directive, July 2011, p. 20.

[141] *Kluth/Rieger*, EuZW 2005, 486, 488; Professional services and EU law, P.N. 2013, 29(3), 144-171; Commission reports on professional qualifications Directive, EU Focus 2010, 278, 29-30

of Member States and allow a professional who satisfies its criteria to be waved additional compensatory measures in any Member State.

Administrative cooperation was further increased by the group of coordinators that was set up in March 2007.[142] It consists of the coordinators designated by the Member States in accordance with art. 56 (4) of the directive. The group aims at helping to foster the cooperation between national authorities and the Commission, monitor policies related to qualifications for regulated professions and exchange experiences and good practices in the recognition of qualifications.

Recital 33 foresees "the establishment of a network of contact points with the task of providing the citizens of the Member States with information and assistance". Albeit this is not legally binding under the directive, all Member States have set up such contact points.[143]

c. Assessment of the Professional Qualifications Directive

The Professional Qualifications Directive constitutes a corner stone for the liberalisation of the services sector. The ability for professionals who acquired their qualifications in one Member State to pursue their profession in another Member State is essential for an integrated services market.[144] By establishing rules on the recognition of professional experience, reducing adjustment costs by decreasing double regulation, and by establishing a uniform supervision, the Professional Qualifications Directive was an important step into the right direction.

i. Effectuating the Principle of Mutual Recognition

For temporary services, the principle of mutual recognition is implemented to a wide extent: the host Member State must recognise the Member State of origin's rules of access to a regulated profession and, in principle, respect its decision to grant a professional such access. Only for regulated professions with public health or safety implications that are not subject to automatic recognition, the host Member State may check the professional qualifications of the service provider (art. 7(4)). Where the profession is not regulated in the Member State of origin, the principle of mutual recognition is established insofar as access has to be granted on the basis of prior professional experience (two years) in the Member State of origin. One problem related to this issue is that the accumulation of professional experience in more than one Member State is not recognised.[145] Notably, the principle of mutual recognition also applies to recognition decisions of the Member State of origin regarding third country qualifications (albeit with the additional requirement of 3 years of professional experience in that Member State). Not covered by the directive are situations where the service provider is not fully qualified in the State of origin but still has to complete e.g. a supervised practice. Therefore, in such situations, art. 56 of the Treaty is directly applicable.[146]

As for the freedom of services, **the directive gives effect to the principle of mutual recognition or the freedom of establishment.** The system of automatic recognition guarantees that access to the market of the host Member State is not restricted by different regulatory requirements and the need to obtain different qualifications to access the regulated profession in the host Member State.

---

[142] Commission Decision 2007/172/EC of 19 March 2007 setting up the group of coordinators for the recognition of professional qualifications.

[143] European Commission (fn. 140), p. 82.

[144] Incompleteness of European Single market on standardisation and on the licensing of professions implies significant efficiency losses and costs for the EU economy and for EU society as a whole, *European Parliamentary Research Service*, Mapping the Cost of Non-Europe, 2014-19, 4th ed. 2017, p. 26.

[145] European Commission (fn. 140), p. 64.

[146] CJEU, Judgement of 13.11.2003, Case C-313/03, Morgenbesser, ECLI:EU:C:2003:612.

The system is, however, based solely on diploma and does – contrary to what is required for the temporary provision of services – not ask whether a professional is allowed to practice in the Member State of origin. For the setting up of new pharmacies the directive deviates from the automatic recognition. As Member States are bound by the principle of mutual recognition and the profession is harmonised, there seems to be little reason to uphold that provision: It is unlikely that a Member State while assessing the qualification obtained in the State of origin can reasonably come to the conclusion that this qualification (based on harmonised training) is not equivalent.

The principle of automatic recognition further is confronted with the partial access to regulated professions. Member States may vary in how broad or narrow they define regulated professions. The directive originally did not include partial access rights. A professional who obtained his qualification in a State where this profession is narrowly defined was not able to benefit from the system of recognition in a State where the profession is defined broadly. In such situations, the professional could only rely directly on the treaty.[147]

ii. Reducing Adjustment Costs

Regarding the freedom of establishment, the directive entails significant harmonisation that significantly reduce adjustment costs for professionals. For a number of regulated professions, it harmonises the training requirements and thus ensures not only an access right through automatic recognition but also facilitates the integration in the host Member State's market. In principle, customers and employers can assume that a professional from another Member State has, on the whole, the same qualification as his competitors from the host Member State. Only with regard to continuing professional development, this is not the case as this increasingly important field is not harmonised.

The directive does not harmonise, which documents (and in which language) are to be sent to the competent authorities as proof of professional experience and qualifications. This can lead to delayed recognition decisions. The competent authorities further have a wide discretion when examining if training in another Member State covers "substantially different matters" than in the host Member State for the purpose of art. 14 (compensation measures).

Regarding the freedom to provide services the directive does not entail significant harmonisation. The service provider, in principle, is subject to the rules of the host Member State. The directive does not specify when the provision of services is of temporary and occasional nature as required by art. 5(2), thus leaving room for deviating rules between the Member States that can constitute an obstacle to the freedom to provide services.

Similar problems arise with the declaration requirement the Member States may impose according to art. 7. Without a uniform procedure and fully harmonised rules for the declaration, it is difficult for service providers to know in advance which information and documents they need to provide in which Member State. Different requirements impose a burden particularly on those persons who wish to provide services in more than one host Member State.[148]

Another lack of harmonisation concerns the prior check of qualifications that the Member States may conduct under art. 7(4) for professions with health and safety implications for which there is no automatic recognition. It is left to the Member States to decide which professions fall thereunder and in some Member States this is even done on a case by case basis by the competent authorities rather

[147] CJEU, Judgement of 19.1.2006, Case C-330/03, Colegio de Ingenieros de Caminos, ECLI:EU:C:2006:45, para 31.

[148] E.g. tourist guides, see: European Commission (fn. 140), p. 67.

than by law.[149] This brings legal uncertainty and high information costs for temporary service providers. As it is also not harmonised for which professions pro forma registration in professional bodies is required, similar problems can arise here. However, this seems to be a lower burden as pro forma registration normally is a simple, fast and cost-free procedure. There is also a lack of harmonisation for language requirements. As language skills are not an access requirement, this leaves the competent authorities with some difficulties as to when and how to evaluate language skills.[150] Albeit troubling the authorities, these difficulties normally do not impose burdens on the service providers as they are not required to prove their language skills prior to the recognition and most Member States leave it to the employer to check the sufficiency of language skills.[151]

iii. Uniform Supervision and Cooperation

Regarding **administrative cooperation**, the exchange of information is a useful tool to facilitate the recognition of qualifications. It is used for example by authorities to find out the exact scope of a qualification or profession in another Member State.[152] This also simplifies the procedure for the professionals. Regarding **uniform supervision**, the concept of common platforms has not been used, as the conditions to set one up were considered to be difficult to be met.[153]

iv. Overall Assessment

The directive uses a **cross-sectoral approach**, regulating a huge variety of different groups of professions including the liberal professions. This broad approach led to a **complex and intricate scheme of rules** spreading over 65 articles and seven annexes.[154] This made the directive an instrument that was difficult to apply. In order to make the directive easier to use and more effective, more transparency and information was necessary.[155]

3.2.2. Directive 2013/55/EU Amendments to the Professional Qualifications Directive – European Professional Card

The first major amendment to the Professional Qualifications Directive was issued in 2013. Directive 2013/55/EU aimed at modernising the Professional Qualifications Directive, making the recognition of professional qualifications more efficient and transparent.[156] To this end, the directive introduced the European Professional Card (EPC), a transparency and mutual evaluation exercise between the Member States, and a common training framework.

The European Professional Card is intended to **simplify the procedure** of the recognition process and create cost and operational efficiencies for the benefit of professionals and competent authorities.[157] It is regulated in the newly inserted art. 4a to 4f. According to art. 4a(1), **Member States shall issue holders of a professional qualification with a European Professional Card upon their request and**

---

149 European Commission (fn. 140), p. 68.

150 European Commission (fn. 140), p. 71.

151 European Commission (fn. 140), p. 71.

152 European Commission (fn. 140), p. 75.

153 European Commission (fn. 140), p. 40.

154 *Kluth/Rieger*, EuZW 2005, 486, 490.

155 *Kluth/Rieger*, EuZW 2005, 486, 490. European Commission, Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC), available on: http://ec.europa.eu/docsroom/documents/15384/attachments/1/translations/en/renditions/pdf

156 Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 354, 28.12.2013, pp. 132–170, Recital No. 4.

157 Directive (fn. 156) Recital No 4.

on condition that the Commission has adopted the relevant implementing acts provided for in paragraph 7.

At present, the European professional card can only be used for the following professions: Nurse for general care, pharmacist, physiotherapist, mountain guide, real estate agent. For temporary services, the European Professional Card replaces the declaration pursuant to art. 7 (art. 4a(4)). Professionals can apply for a Professional Card through an online tool and the competent authority of the home Member State shall verify whether the applicant is legally established in the home Member State and whether all the necessary documents which have been issued in the home Member State are valid and authentic (art. 4b). It shall issue the Professional Card within three weeks and transmit it to the competent authorities of each host Member State concerned; the host Member State may not require any further declaration under art. 7 for the following 18 months (art. 4c(1)). For the temporary provision of services in another Member State, the professional thus only has to deal with his Member State of origin, which reduces administrative burdens for the professional and is another step towards the realisation of the **principle of mutual recognition**. This does not apply to the same extent to regulated professions that have public health or safety implications and are subject to checks under art. 7(4). Although it is still for the home Member State to verify the authenticity and validity of the documents and to forward it to the host Member State (art. 4d(1)), it is for the host Member State to decide whether to issue a European Professional Card or to subject the holder of a professional qualification to compensation measures (art. 4d(3)). With regard to the freedom of establishment, the EPC is mainly an instrument that facilitates the application for recognition of qualifications. It allows the professional to submit its application to the home Member State which verifies the authenticity and validity of the supporting documents (art. 4d (1)) and submits them to the host Member State. It is for the host Member States to issue the EPC. If it does not do so within the deadline (in principle 1 month, art. 4d(2)), the EPC shall be deemed to be issued and sent automatically to the applicant (art. 4d (5)).

Directive 2013/55/EU also added some **additional rules on the language requirement** set out in art. 53. According to the new paragraphs 2-4, controls may only be carried out after the recognition of a qualification or the issuance of an EPC, and for professions other than those with patient safety implications controls may only be imposed where there is a serious and concrete doubt about the sufficiency of the professional's language knowledge in respect of the professional activities he intends to pursue. Any language controls shall be proportionate to the activity to be pursued (art. 43(4)). This further simplifies the procedure of recognition.

Furthermore, the directive introduces **rules on transparency** in art. 59. Member States shall submit to the Commission a list of existing regulated professions, specifying the activities covered by each profession, and a list of regulated education and training and notify any changes to the Commission which shall set up and maintain a publicly available database of regulated professions.[158] Further, they shall notify a list of professions for which a prior check of qualification is necessary under art. 7(4) and provide a justification for the inclusion of each profession on that list. Further, Member States shall examine whether national rules restricting the access to a profession or its pursuit to the holders of a specific qualification fulfil the following requirements (art. 59(3)): (1) they are neither directly nor indirectly discriminatory on the basis of nationality or residence; (2) they are justified by overriding reasons of general interest; (3) they are suitable for securing the attainment of the objective pursued and must not go beyond what is necessary to attain that objective. By 18 January 2016, Member States shall provide the Commission with information on the requirements they intend to maintain and the reasons why they consider them to comply with art. 59(3).

[158] The database is now available under: http://ec.europa.eu/growth/tools-databases/regprof/.

From then they shall provide information on subsequently introduced requirements. Member States by 18 January 2016, and every two years thereafter, shall also submit a report to the Commission about the requirements which have been removed or made less stringent (art. 59(6)) and the Commission shall forward these to the other Member States to submit their observations and consult interested parties and then provide a summary report (art. 59(7-9).

The **mutual evaluation exercise** requires the Member States to notify which professions they regulate, for which reasons, and discuss amongst themselves their findings. The purpose of this exercise is to contribute to more transparency in the professional services market.[159] Therefore, the Directive introduces various notification obligations, amongst them art. 21a that lays down a notification procedure that obliges the Member States to notify the Commission and other Member States of the laws, regulations and administrative provisions which they adopt regarding the issuing of evidence of formal qualifications. Assessments by the Commission showed, however, that the conduction of the mutual evaluation presented a challenge to many Member States, with most of the assessments lacking proper reasoning.[160]

Art. 49a introduces **common training frameworks**, which means a common set of minimum knowledge, skills and competences necessary for the pursuit of a specific profession (art. 49a (1)). It shall not replace national training programmes unless a Member State decides otherwise. The Commission shall be empowered to adopt acts to establish common training frameworks for given professions (art. 49a(4)). Art. 49c introduces common training tests, which means a standardised aptitude test available across participating Member States and reserved to holders of a particular professional qualification (art. 49b(1)). Passing such a test shall entitle the holder to pursue the profession in any host Member State under the same conditions as the holders of professional qualifications acquired in that Member State. The Commission is also competent for issuing corresponding acts for this new measure (art. 49b(4)).

The **amendments include the principle of partial access to a profession** and thus solves the problem of professions that are defined differently in the Member States. Now, an economic activity can be carried out as part of a profession (art. 4f).

Moreover, the amendments set up an alert mechanism for professions with patient safety implications and professions involved in the education of minors (art. 56a). Under this mechanism, there is an obligation for competent authorities of a Member State to inform competent authorities of other Member States about a professional who has been prohibited from exercising his professional activity or who made use of falsified documents. This implements – at least in general – the principle of mutual recognition for negative decisions.

The amendment also aimed at *facilitating the access to information*. Building on the points of single contacts which were created under the Services Directive, these take over the previous task of national contact points (art. 57) and provide information to professionals. Member States also shall designate assistance centres to provide citizens (and assistance centres of other Member States) with assistance and information (art. 57b).

[159] Directive (fn. 156), Recital No. 35.

[160] European Commission, Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions, COM(2016) 822 final/2, 2016/0404 (COD), p. 3.

Another step toward the simplification of recognition was the establishment of the **Internal Market Information System** (IMI)[161] and its incorporation in the Professional Qualification Directive by Directive 2013/55/EU. The IMI is an IT-based network linking up national, regional and local authorities. It is used e.g. for the procession of the European Professional Card (arts. 4a (5), 4b, 4e), for the notification procedure (art. 21a(3) and the alert mechanism (art. 56a(3)).

[161] Regulation 1024/2012(EU) of the European parliament and the Council of 25 October 2012 on administrative cooperation through the Internal Market Information System and repealing Commission Decision 2008/49/EC ("the IMI Regulation").

3.2.3. The Proportionality Test Directive

KEY FINDINGS

The Proportionality Test Directive introduces a harmonised proportionality test to be used by all Member States before adopting or amending national regulations on professions. It aims at increasing the transparency for regulated professions and at ensuring a thorough analysis of their proportionality before adopting new rules.

The directive does not impose strict substantial requirements on the regulations of professions but rather gives guidance to the Member States on how to undertake the proportionality assessment.

Member States in the past often had difficulties conducting proportionality assessments. Some differences between the regulatory environment in different Member States are not due to a different application of the margin of appreciation but rather to uneven scrutiny. These variations are neither justified by national identity nor by overriding social market goals. The Proportionality Test Directive to a broad extent consolidates the Court of Justice's case law and gives guidance to the Member States on how to conduct the proportionality test.

Ultimately, it can be expected that through harmonisation of the proportionality criteria and procedure, the adoption of unproportionate laws can be prevented. In that sense, the Proportionality Test Directive can potentially have effects that are to some extent similar to directives that harmonise regulated professions. If unjustified rules on professional qualifications are prevented, this will lead to an approximation of legal conditions for regulated professions. This reduces barriers to trade that stem from differences in the legal orders and clears the way for a more progressive application of the principle of mutual recognition in the future.

In 2017, the Commission successfully proposed a Directive on a proportionality test before adoption of new regulation of professions (Proportionality Test Directive) as part of its Services Package.[162] The proposal has been accepted and entered into force in July 2018.[163] It builds on existing provisions of the Recognition of Professional Qualifications Directive.

The Proportionality Test Directive aims at ensuring a coherent EU legal framework for assessing the proportionality of envisaged national provisions on the regulation of professions (Recital No. 11). It lays down rules on **a common framework for conducting proportionality assessments** before introducing new national provisions restricting access to or pursuit of regulated professions or amending existing ones (art. 1). The Directive is based on the findings that the mutual evaluation exercise introduced by Directive 2013/55/EU did not establish effective means of ensuring that newly introduced national measures are based on sound and objective assessments carried out in an open and transparent manner (Recital No. 5).

The Proportionality Test Directive introduces a harmonised proportionality test to be used by all Member States before adopting or amending national regulations on professions. It aims at increasing the transparency for regulated professions and at ensuring a thorough analysis of their proportionality before adopting new rules while guaranteeing a high level of consumer protection (Recital No. 7).

[162] European Commission (fn. 160).

[163] Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions ("Proportionality Test Directive"); discussed in detail by: *Schäfer*, EuZW 2018, 789.

a. Scope of the Directive

The Directive applies to national legislative, regulatory or administrative requirements restricting access to a regulated profession or its pursuit falling within the scope of the Professional Qualifications Directive (art. 2(1)). Where separate EU acts established specific arrangements for a regulated profession, the provisions of the Directive shall not apply (art. 2(2)).

b. Obligatory Proportionality Test

Art. 4(1) obligates the Member States to undertake an assessment of the proportionality in accordance with the rules laid down in the Directive of any new provisions, or any amendment of existing provisions, restricting access to or pursuit of regulated professions. **The extent of the assessment shall be proportionate to the nature, the content and the impact of the provision** (art. 4(2)). Any provisions shall be accompanied by a detailed statement making it possible to appraise compliance with the principle of proportionality (art. 4(3)), including qualitative and quantitative evidence (art. 4(4)). Art. 4(6) furthermore introduces an obligation to monitor the proportionality of existing provisions restricting access to or pursuit of regulated professions on a regular basis. Art. 4(5) obliges the Member States to ensure that the assessments of proportionality are carried out in an objective and independent manner.

Art. 5 states that Member States, when regulating the access to, or the pursuit of, regulated professions, shall ensure that those provisions are neither directly nor indirectly discriminatory on the basis of nationality or residence.

Art. 6 regulates the possibility to justify restrictive provisions on grounds of public interest reasons, with art. 6(2) non-exhaustively listing several overriding reasons in the public interest accepted by the European Court of Justice in the past, and art. 6(3) reinforcing that grounds of a purely economic nature having essentially protectionist aims or effects or purely administrative reasons are not eligible to justify restrictions.

Art. 7 lays down the criteria for the proportionality test in the narrower sense, obliging the Member States to assess the necessity and suitability of the measure for securing the attainment of the objective pursued (art. 7(1)). To this end, art. 7(2)-(5) provide in detail the relevant criteria to be considered by the competent authorities.

According to art. 8, Member State shall inform stakeholders and involve them in the process of passing or amending legislation for regulated professions. Art. 9 requires Member States to ensure that there exist effective remedies. Art. 10 contains provisions on the exchange of information between Member States. Art. 11 contains rules on transparency. The reasons for considering provisions as justified shall be recorded in the database of regulated professions that was established by regulation 2013/55/EU. The transposition period ends 30 July 2020.

c. Discussion

This short and compact directive consists of 15 articles only. Its sole purpose is the introduction of an obligatory proportionality test which is to be applied by every Member State for any new provision as well as any amendments of existing provisions restricting access to or pursuit of regulated professions. It applies to legislative, regulative and administrative provisions likewise. However, the proportionality test was already included in the Professional Qualification Directive (as amended in 2013).

Member States even had to carry out a screening of all the legislation already in place that regulates professions.

Nonetheless, various parties[164] voiced criticism over the Proportionality Test Directive. The French Assemblée Nationale, the Austrian Bundesrat as well as the German Bundestag and Bundesrat have even raised subsidiarity complaints.[165] Concerns are expressed mainly with regard to the threat to quality standards and the impairment of national room for manoeuvre as well as to compliance with the distribution of competences, the principle of proportionality and the subsidiarity principle.

The critics emphasise that rules governing access to and pursuit of a profession regularly serve legitimate general interest objectives such as quality assurance and thus also the protection of recipients of services and consumers.[166] The many test criteria laid down by the directive would narrow the decision-making freedom of national legislators in autonomous areas of competence too much. This would conflict with the case law of the European Court of Justice who had always recognised that each Member State can determine which professions it regulates and at what level regulation takes place. Furthermore, the extensive notification and reasoning obligations are criticised as they would create a high pressure on the Member States to justify their regulations. The additional bureaucratic work would be considerable.[167]

Regarding the question of competence, it is stated that the regulation of professions in the absence of harmonised EU rules remains the responsibility of the Member States. Moreover, the EU has only support and coordination competences in the field of professional education and training; harmonisation is explicitly excluded (art. 166(IV) TFEU).[168] Overall, the question is also raised as to whether the directive is necessary at all and whether it is compatible with the subsidiarity principle. The obligation to carry out a proportionality test already arises from art. 59(3) of the Professional Qualifications Directive, which also mentions specific proportionality criteria developed in the case law of the European Court of Justice.[169] In the light of this criticism, it is proposed that Member States which still have difficulties in applying the principle of proportionality should be given guidance by the Commission on the application of EU law and, where appropriate, recommendations.[170]

The criticism does not appear to be justified. Compared to the previous legal situation, the Proportionality Test Directive mainly specifies the requirements in more detail. Art. 1 explicitly states that it does not affect the Member States' margin of discretion on how to regulate a profession within the limits of the principles of non-discrimination and proportionality. It does not impose strict substantial requirements on the regulation of professions that go beyond those established by the Court of Justice but rather gives guidance to the Member States on how to undertake the proportionality assessment.

---

164 *Stöbener de Mora*, EuZW 2017, 287, who even questions the proportionality of the directive. BT-Drs. 18/11442, pp. 6 ff.; Austrian Federal Council 20/SB-BR/2017 (available: http://www.ipex.eu/IPEXL-WEB/scrutiny/COD20160404/atbun.do).

165 BT-Drs. 18/11442 of 9.3.2017; BR-Drs. 45/17 of 10.3.2017; French Assemblée Nationale of 21.2.2017; Austrian Federal Council of 15.3.2017 (each available: http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20160822.do).

166 *Stöbener de Mora*, EuZW 2017, 287, 290.

167 Statement of the German Confederation of Skilled Crafts of Feb. 2017 (available: https://www.zdh.de/themen/organisation-und-recht/stellungnahmen/stellungnahmen-zur-binnenmarktstrategie/?L=0); Statement of the Federal association of Liberal Professions of 21.2.2017 (available: http://www.freie-berufe.de/fileadmin/bfb/5_Themen/8_Europa/Binnenmarktstrategie/2017-02-21_BFB-Stellungnahme_zur_Verh%C3%A4ltnism%C3%A4%C3%9Figkeitspr%C3%BCfung.pdf).

168 *Stöbener de Mora*, EuZW 2017, 287, 290; Statement of the German Chamber of Industry and Commerce of Apr. 2017 (available: http://www.dihk.de/themenfelder/recht-steuern/eu-internationales-recht/recht-der-europaeischen-union/dihk-positionen-zu-eu-gesetzesvorhaben).

169 Statement of the German Confederation of Skilled Crafts of Feb. 2017.

170 Statement of the Federal association of Liberal Professions of 21.2.2017.

This applies all the more since the directive does not include the Commission's original proposal to base the reasons for considering that a provision is justified, wherever possible, on quantitative evidence.[171]

The Proportionality Test Directive does not necessarily require Member States to produce a specific study or a specific form of evidence (Recital No. 13). By making the extent of the assessment proportionate to the nature, the content and the impact of a provision (art. 4(2), it avoids overreaching administrative burdens for the Member States. Also, the catalogue of test criteria to determine proportionality was shortened in the course of the negotiations.[172] Against this background, it must be admitted that the Directive has some regulatory and normative gaps, not least in regards of incompleteness in defining of terms.[173]

On the other hand, there are opinions which recognise some future potential of the directive. According to them, the directive "with its new rules on assessment of new measures and monitoring (art. 4) and Exchange of information between Member States (art. 10) and Transparency (art. 11) could serve as an engine for the regulatory law[174]".

As the directive is not yet implemented by the Member States, the full impact cannot be duly estimated.[175] The general approach, however, seems convincing. Member States in the past often had difficulties conducting proportionality assessments[176] and some differences between the regulatory environment in different Member States are not due to different application of the margin of appreciation but rather to uneven scrutiny. Such differences are not justified by national identity (art. 4(2)) TEU) nor by overriding social market goals (art. 3(3) TEU). Fragmented rules and requirements for regulated professions in the Member States already pose significant burdens on the freedom of services and establishment. To eliminate those that are not justified as thoroughly as possible is desirable. The directive to a broad extent consolidates the European Court of Justice's case law and gives guidance to the Member States on how to conduct the proportionality test. **Ultimately it can be expected that through harmonisation of the proportionality criteria and procedure, the adoption of unproportionate laws can be prevented**. In that sense, the directive can potentially have effects that are to some extent similar to directives that harmonise regulated professions. When unjustified professional qualifications are prevented, this will lead to an approximation of legal conditions for regulated professions. This reduces barriers to trade that stem from differences in the legal orders and clears the way for a more progressively implemented principle of mutual recognition in the future.

As the extent of the Member States proportionality assessment will depend on the content and the impact of a provision, it is not to be expected that regulatory costs rise to a level where there is a concern of a regulatory chill. Moreover, it should be considered to extend the application of the Proportionality Test Directive to other regulations that restrict market access. In particular, a similar system could have been included to the regulatory area of the Services Directive, e.g, by amending the Services Enforcement Directive.

---

171 European Commission (fn. 160), art. 4(3); it should be noted, however, that such requirement can possibly follow from the requirement established by the Court that the Member State must produce "specific evidence substantiating its arguments", see CJEU, Judgement of 7.7.2005, C-14703, Commission v. Austria, ECLI:EU:C:2005:427, para 63.

172 *Schick*, DStR 2018, 1454, 1456.

173 *Schäfer*, EuZW 2018, 789, 791.

174 *Schäfer*, EuZW 2018, 789, 795.

175 *Schick*, DStR 2018, 1454, 1455.

176 CJEU, Judgement of 11.12.2003, C-322/01, DocMorris, ECLI:EU:C:2003:664.

3.3. Legal assessment of other directives passed in the 7th and 8th legislature

During the 7th and 8th legislature, a number of other directives has been enacted in the field of cross-border services.[177] Due to the limited volume of this study, it is not possible to analyse each of these directives in depth. The following paragraphs exemplify the mechanisms used by pointing out characteristic rules implemented by these directives. In general, most of the directives share the basic patterns that were found in the Services Directive and the Professional Qualifications Directive. With different focuses, they aim at effectuating the principle of mutual recognition, reducing adjustment costs and/or create uniform supervision.

The directives effectuating the principle of mutual recognition establish rules aiming to overcome barriers to the cross-border provision of services. These rules are generally based on the principle of mutual recognition. In particular, the directives usually implement specific access rights and rules on mutual recognition.

Many provisions in the service directives issued over the past two legislatures aim at reducing costs for cross-border services. While some directives use techniques like the ones used by the Services Directive, such as simplifying procedures and improving access to information, some directives additionally provide for standardised forms and standardised information available in all EU languages. These means are meant to decrease adaption costs for the provision and reception of cross-border services.

The establishment of a system of **uniform supervision** is another mechanism that can be found in many of the directives.

3.3.1. Directive 2015/2302/EU on Package Travel

Directive 2015/2302/EU on package travel and linked travel arrangements requires Member States to **recognise** as meeting the requirements of their national measures any insolvency protection an organiser provides under such measures of the Member State of his establishment (art. 18(1)).

The directive contains rules on pre-contractual information. It specifies in its annex I standard information and forms which shall be provided to a traveller (art. 5(1)). The directive also harmonises rules regarding pre-contractual information, compulsory content of package travel contracts, price changes, termination rights and travellers' rights. These rules aim at **reducing costs** for cross-border provision of services.

Member States shall designate central contact points to facilitate the **administrative cooperation and supervision** of organisers operating in different Member States, art. 18(2). They shall notify the contact details of those contact points to all other Member States and the Commission.

3.3.2. Directive 2014/23/EU on the Award of Concession Contracts

Directive 2014/23/EU on the award of concession contracts states in its art. 64(7) that economic operators from other Member States shall not be obliged to undergo such registration or certification in order to participate in a public contract, and that the contracting authorities shall recognise equivalent certificates from bodies established in other Member States. They shall also accept other equivalent means of proof.

[177] See Annex, list of regulations and directives (2009-2018).

According to art. 26(1) economic operators that, under the law of the Member State in which they are established, are entitled to provide the relevant service, shall not be rejected solely on the ground that, under the law of the Member State in which the contract is awarded, they would be required to be either natural or legal persons.

The Directive further establishes rules on the procedures for procurement to ensure that service providers from other Member States can participate in a tender or in an application more easily. For example, concession notices and concession award notices shall not be published at national level before publication by the Publications Office of the EU and shall not contain information other than that contained in the notices dispatched to the Publications Office of the EU (art. 33(4), similar art. 52(1)). Contracting authorities from different Member States may act jointly in the award of public contract (art. 39(1)). A Member State shall not prohibit its contracting authorities from using centralised purchasing activities offered by central purchasing bodies located in another Member State (art. 39(2)).

When it comes to procurement law, Directive 2014/23/EU introduces many rules that aim at reducing adjustment costs and the simplification of procedures for service providers. Notices shall be published in full in one or more of the official languages of the institutions of the Union as chosen by the contracting authority or contracting entity. That language version or those language versions shall constitute the sole authentic text or texts. A summary of the important elements of each notice shall be published in the other official languages of the institutions of the Union (art. 33(3)). Where contracting authorities intend to purchase works, supplies or services with specific environmental, social or other characteristics, the requirement of a specific label as means of proof that the works, services or supplies correspond to the required characteristics is only possible under specific conditions (art. 43(1)). They must be linked to the subject-matter of the contract, be appropriate, based on objectively verifiable and non-discriminatory criteria, established in an open and transparent procedure, accessible to all interested parties, and set by a third party over which the economic operator applying for the label cannot exercise a decisive influence. Annex V sets out information for notices which has to be included in the format of standard forms (art. 51(3)).

3.3.3. Directive 2014/56/EU on Statutory Audits of Annual Accounts and Consolidated Accounts

Directive 2014/56/EU on statutory audits of annual accounts and consolidated accounts establishes specific access rights for audit firms. An audit firm which is approved in a Member State is entitled to perform statutory audits in another Member State provided that the key audit partner who carries out the statutory audit on behalf of the audit firm complies with point (a) of art. 3(4) in the host Member State (art. 3a).

The directive introduces auditing standards by requiring Member States to require statutory auditors and audit firms to carry out statutory audits in compliance with international auditing standards adopted by the Commission (art. 26(1)). This harmonisation **reduces adjustment costs**.

For **supervision** purposes, the directive makes use of the Committee of European Auditing Oversight Bodies (CEAOB). In its chapter on investigations and sanctions (chapter VII), it obliges the Member States' competent authorities to provide the CEAOB annually with aggregated information regarding all administrative measures and all sanctions imposed which the CEAOB shall publish in an annual report (art. 30f(1)). The competent authorities of Member States and the relevant European Supervisory Authorities shall cooperate with each other whenever necessary; the competent authorities in a Member State shall render assistance to competent authorities in other Member States and to the relevant European Supervisory Authorities (art. 36(1)).

3.3.4. Directive 2014/67/EU Concerning the Posting of Workers

Directive 2014/67/EU concerning the posting of workers in the framework of the provision of services requires Member States to take the appropriate measures to ensure that the information on the terms and conditions of employment which are to be applied and complied with by service providers is made generally available free of charge in a clear, transparent, comprehensive and easily accessible way at a distance and by electronic means (art. 5(1)).

The directive contains rules on uniform **supervision**: it establishes a common framework for better and more uniform implementation, application and enforcement in practice of Directive 96/71/EC. Therefore, it establishes a system of **mutual assistance** between the Member States. The Directive contains rules on administrative cooperation (arts. 6 to 8), monitoring (arts. 9 and 10), and cross-border enforcement (arts. 11 to 19). The measures introduced shall not create administrative burdens or limitations on service providers.[178] As a general principle, Member States shall work in close cooperation and provide each other with mutual assistance without undue delay in order to facilitate the implementation, application and enforcement in practice of this directive and of Directive 96/71/EC (art. 6(1)). The cooperation shall in particular consist in replying to reasoned requests for information from competent authorities and in carrying out checks, inspections and investigations with respect to the situations of posting, including the investigation of any non-compliance or abuse of applicable rules on the posting of workers (art. 6(2)). During the period of posting of a worker to another Member State, the inspection of terms and conditions of employment to be complied with is the responsibility of the authorities of the host Member State in cooperation, where necessary, with those of the Member State of establishment (art. 7(1)). The Member State of establishment shall continue to monitor, control and take the necessary supervisory or enforcement measures with respect to workers posted to another Member State (art. 7(2)). The Member State of establishment shall assist the host Member State to ensure compliance, however that responsibility shall not in any way reduce the possibilities of the Member State to which the posting takes place to monitor, control or take any necessary supervisory or enforcement measures in accordance with the directive (art. 7(3)). The **principles of mutual assistance** and **mutual recognition** shall apply to the cross-border enforcement of financial administrative penalties and/or fines imposed on a service provider established in a Member State, for failure to comply with the applicable rules on posting of workers in another Member State (art. 13(1)).

3.3.5. Directive (EU) 2015/1535 on a Procedure for the Provision of Information in the Field of Technical Regulations and of Rules on Information Society Services

Directive (EU) 2015/1535 on a procedure for the provision of information in the field of technical regulations and of rules on Information Society services requires Member States to inform the Commission about draft technical regulations that and halt the adoption of the regulations for three months from the date of notification, arts 5f. During this period, the Commission and other Member States have the opportunity to make comments on the regulation. This system follows a similar approach of "**soft harmonisation**" as the already mentioned Services Enforcement Directive and the Proportionality Test Directive. Unlike these legislative acts, however, the Directive (EU) 2015/1535 does not impose substantive requirements nor give the Commission the power to further suspend the adoption and application of the regulation.

[178] 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, Recital (4) f.

The directive also establishes a **supervision** mechanism through a Standing Committee consisting of representatives appointed by the Member States (art. 2) that shall examine questions concerning Information Society services. In particular, the Committee shall identify areas where harmonisation appears necessary.

4. FUTURE POTENTIAL OF FREE MOVEMENT OF SERVICES AND FREEDOM OF ESTABLISHMENT

4.1. Current Practical and Legal Problems in the Context of Free Services and Establishment

KEY FINDINGS

Ambiguity about the exemptions from notification and authorisation requirements poses an obstacle to the cross-border provision of services. The authorities in the various Member States, for instance, do not agree on the period up to which it is still possible to speak of a 'temporary activity'.

Practical problems persist with services that require the posting of workers. Despite uniform framework conditions, the requirements for tax registration, the registration and social security of employees or rules for health and safety vary. Many details must be considered and researched during the preparation of an offer in order to avoid additional costs or even fines. This makes the posting of employees difficult.

Another obstacle are different VAT procedures. There are ambiguities regarding the registration of turnover tax, procedures are time-consuming, and the enforcement of refunds is often bureaucratically complex or can only be achieved with legal assistance.

Service providers that work temporarily in the other Member States are faced with many different notification and registration obligations. In many Member States, there is still a lack of both the technical and administrative infrastructure as well as the legal framework to allow simple or even electronic procedures. Points of single contact often do not communicate in enough different languages.

Professionals and companies who plan to expand abroad are faced with numerous practical and legal challenges. Bureaucratic burdens and uncertainties about foreign regulations continue to hamper the access to foreign markets.[179]

The liberalisation of services markets differs in many respects from that of goods markets. **First, obstacles to cross-border trade in services often lie in mere differences between national regulations**[180] - such as different standards in the field of consumer protection or environmental protection; adaptation to different standards is particularly cost-intensive for companies.

National rules can therefore close market access for services and establishments. This can be the intended consequence of a Member State's regulation. Such openly protectionist rules are per se contrary to Internal Market law.[181]

In most cases, however, the protectionist effect of a measure is not the intention but purely the consequence of a regulation. Member States often pursue legitimate regulatory purposes. The aim here is to differentiate permissible from inadmissible restrictions on the freedom to provide services

[179] See e.g. European Commission, Proposal for a Regulation of the European Parliament and of the Council introducing a European services e-card and related administrative facilities, COM(2016) 824 final, 2016/0403 (COD), pp. 2-3.

[180] *Delimatsis*, International Trade in Services and Domestic Regulations: Necessity, Transparency, and Regulatory Diversity, 2007, Sp. 70; an overview of barriers to cross-border trade in services provide *Hoekman/Braga*, Protection in Trade in Services – a Survey, The World Bank Policy Research Working Paper No. 1747, 1997, pSp. 5 ff.

[181] *Dietz/Streinz*, EuR 2015, 50, 58.

and the freedom of establishment, with the principle of proportionality at its core.[182] For this reason, the European Court of Justice examines very closely whether a measure taken by a Member State is appropriate and necessary in relation to the objective pursued.[183]

Secondly, such rules often do not apply to the service itself but to the service provider.[184] Since services - in contrast to goods - are mostly of a non-physical or completely individual nature and thus tend to elude controls, quality assurance starts with the qualifications of the persons providing the service. For example, the provision of legal services (under the professional title of the host Member State[185]) is generally reserved for professionals with a domestic qualification.[186] Such requirements of national legal systems are difficult or impossible for foreign service providers to meet, whereas national standards in relation to goods are a mere cost factor for cross-border traders. Effective liberalisation of cross-border trade in services, in particular access to regulated professions, is either based on common rules, such as harmonised rules on licences and diplomas, or on mutual recognition.

Thirdly, accessing other Member States' service markets often includes to overcome barriers stemming from administrative and procedural problems.[187] To provide services in other Member States, it is often required to obtain certifications and permits which can be time-consuming, expensive and bring legal uncertainty. Furthermore, mutual recognition is often not respected by reason of poor enforcement of EU legislation, especially directives.[188] Even when there exist harmonised rules for services, such as common qualification standards, administrative and procedural rules may differ in the Member States.

These considerations show the importance of the recognition of professional qualifications for the free movement of services and persons.

A recent study of the Association of German Chambers of Commerce and Industry reveals problems faced especially by small and medium-sized enterprises (SME).[189] The study deals with concrete obstacles in the internal market for services and concludes that overall the number of obstacles has increased in recent years. The main reasons for this are increasing bureaucratic burdens and legal uncertainty due to an opaque flood of information. This means extensive research for companies, which is time-consuming and costly. In detail, the study has identified the following obstacles.

4.1.1. Authorisation and Notification Requirements

The first obstacle is **ambiguity about the exemptions from notification and authorisation requirements**. For example, certain notification and authorisation obligations do not apply to a temporary self-employed activity of an entrepreneur. In principle, this exemption is beneficial for the free movement of services.

However, the authorities in the various Member States do not agree on the period up to which it is still possible to speak of a temporary activity.

---

182 *Müller-Graff*, in: Streinz EUV/AEUV, Art. 56 AEUV para. 109 ff.; *Dietz/Streinz*, EuR 2015, 50, 72.

183 See, for example, CJEU, Judgement of 30.11.1995, C-55/94, Gebhard, ECLI:EU:C:1995:411.
CJEU, Judgement of 20.02.1979, Case C-120/78, Rewe, ECLI:EU:C:1979:42

184 *Sampson/Snape*, Identifying the Issues in Trade in Services, The World Economy 1985, Sp. 171.

185 Lawyers with a qualification of a other Member State may practise under the title of the home state.

186 See Communication from the Commission to the European Parliament, COM(2016) 820, Spp. 17 ff.

187 See European Commission, The State of the Internal Market for Services, COM(2002) 441 final, p. 17 f., 45 f.

188 See European Parliament Research Services, Mapping Cost of Non-EU, p. 28.

189 Association of German Chambers of Commerce and Industry, *Obstacles in the EU Internal Market for Services 2016* from 10 October 2016, AHK/IHK-Umfrage *Hindernisse im EU-Dienstleistungsbinnenmarkt 2016*, 10. October 2016.

Additionally, it can be observed that many authorities, when interpreting the constituent element of the exemptions, not only focus on the temporal component, but also on other aspects, such as the scope and focus of the activity. These non-transparent practices lead to considerable uncertainty on the part of the companies.

4.1.2. Posting of workers

The second obstacle concerns the **posting of workers** abroad in the EU. The study concludes that companies employing staff in the EU need to be become more aware of the working conditions and minimum labour standards in each country. Despite uniform framework conditions, the requirements for tax registration, the registration and social security of employees or rules for health and safety vary. Many details must already be considered and researched during the preparation of the offer in order to avoid additional costs or even fines. In the construction sector, another obstacle is that national certificates cannot be transferred automatically, e.g. the forklift license.

4.1.3. VAT procedures

The third obstacle could be identified in the area of **VAT law**. On the one hand, there are ambiguities regarding the registration of turnover tax. The procedures are generally time-consuming and are often only worthwhile with regular work. On the other hand, although Member States have agreed on input tax refunds, the relevant Directive is interpreted differently. The enforcement of refunds is therefore often bureaucratically complex or can only be achieved with legal assistance and is therefore associated with high litigation costs.

4.1.4. Administrative Requirements for Cross-border Provision of Services

A fourth obstacle concerns the **general administrative requirements for the provision of services**. Service providers who work temporarily in other Member States are faced with many different notification and registration obligations.[190] It can currently be observed that more and more EU countries are introducing electronic reporting procedures. Although the electronic communication with the authorities introduced is well-intentioned, in practice it often does not work smoothly and in some cases even excludes foreign companies altogether. The same applies to the points of single contact (PSCs), which were introduced as legally binding measures under the Services Directive. The points of single contact are eGovernment portals that enable service providers to obtain the information they need and to carry out administrative procedures online. **However, in many Member States there is still a lack of both the technical and administrative infrastructure as well as the legal framework to allow simple or even electronic procedures.** In addition, the single points of contact among companies are hardly known or rarely used, which is due to the fact that many single points of contact only communicate in their national language or, sometimes, in English. In general, the electronic procedures call up more and more data and require significantly more effort, particularly in terms of employee secondment. Entrepreneurs are confronted with an often impenetrable thicket of notification, registration and approval requirements. Despite uniform framework conditions, the requirements for registration, social security for employees and rules for health and safety protection vary. As a consequence, this means extensive research for companies. Particularly in the case of shorter assignments, the expense often does not commensurate with the benefits of the assignment.

[190] See EUROCHAMBRES, EU Internal Market Barriers and Solutions: The Business Perspective, September 2015, http://www.eurochambres.eu/content/default.asp?PageID=1&DocID=7095; *Wurster*, EuZW 2017, 332, 333.

4.1.5. Road Freight Transport Documents

The fith and last obstacle mentioned in the study regards **documents for road freight transport**. Despite largely uniform documents for road freight transport, special rules are repeatedly introduced by individual Member States, such as reporting obligations (most recent example in connection with the introduction of minimum wages in France). The same applies to the documents issued in the Member States in connection with Regulation (EC) No 1071/20091 and Regulation (EC) No 1072/20092. The proofs of professional qualification have different durations, contents, etc. - despite specifications in the EU regulations. This results in delays in transport procedures or when applying for licenses.

4.2. Areas for Legislative Development

KEY FINDINGS

Notification obligations for the Member States when introducing or further restricting market access schemes can further increase cross-border mobility through "soft harmonisation". They can also increase transparency and legal certainty. To enhance their effectiveness in that regard as well as to minimise the burden on the Member States, such obligations should be consolidated in one legislative act and apply the same standards as far as possible.

To lower burdens, in particular for SMEs which do not have the capacity for substantial legal research on every jurisdiction they want to provide services to, a uniform platform should be developed that informs about all relevant legislation and guides through the complete process. The European Professional Card should be further developed and extended to other professions.

Future legislation should focus on reducing administrative interaction with the host Member State and shift recognition and registration procedures to the home Member State as an intermediary. For this reason, the Proportionality Test Directive should be extended in scope and the Services Enforcement Directive should be adapted and (in medium-term) extended in scope.

Further, indeterminate legal terms should be clarified to avoid diverging interpretation and legal uncertainty.

The legislative actions taken over the past decades address many of the challenges faced by professionals and companies who want to access other Member States' markets. The Commission estimates that the Services Directive added 0.9 per cent to the GFP of the EU over ten years, with a potential of generating an additional 1.7 per cent.[191] According to the Commission, the Services Directive provides a balanced legal framework to reduce hurdles to make it easier for service providers to pursue new business opportunities, while guaranteeing quality services for consumers.[192]

However, despite the progress made in legislation in recent decades, there are practical and legal challenges that continue to hamper the willingness of service providers to expand abroad.[193] In particular, it is bureaucratic hurdles and uncertainty about the applicable foreign rules that discourage SMEs from engaging in cross-border activities.

[191] *Monteagudo/Rutkowski/Lorenzani*, Economic Papers 456, 2012, p.2; European Commission, Update of the study on the economic impact of the Services Directive, 2015.

[192] *Monteagudo/Rutkowski/Lorenzani*, Economic Papers 456, 2012, p.2.

[193] See Joint survey by the German Chambers of Industry and Commerce and the German Foreign Chambers on *Obstacles in the EU Internal Market for Services 2016* from 10 October 2016, AHK/IHK-Umfrage *Hindernisse im EU-Dienstleistungsbinnenmarkt 2016*, 10. October 2016.

4.2.1. Areas for cross-sectoral developments

a. General Remarks

With the **point of single contact,** the EU has created a fundamentally valuable support - but so far to a large extent only in theory: Many Member States still lack both the technical and official infrastructure as well as the legal framework conditions that make simple or even electronic processing possible. Many uniform contact persons only communicate in their national language and, if necessary, in English. This facility is also hardly known to the companies. It would be particularly important for entrepreneurs that information on national procedures and rules be made available in several languages - at least in English. There is a need for improvements to be made here so that the single point of contact can develop its full effect.

Unfortunately, the new forms of electronic communication with the authorities of the Member States have not yet brought about any significant improvement. In addition to technical problems such as a high susceptibility to failure, it is particularly inconsistent standards, time-consuming procedures or a design that completely excludes foreign companies from use that generate costs and act as a deterrent. Each Member State has its own registration system with different requirements. Some systems are only available in the national language.[194]

Another practical problem faced in particular by SMEs concerns the **posting of workers**. As working conditions and minimum labour standards in the EU are not substantially harmonised, posting employers abroad involve a lot of administrative preparation as the employer needs to be aware of the host Member State's standards. This also includes requirements for tax registration and rules on health and safety. With regard to social security, substantial steps have already been taken to facilitate the posting of workers. The social security cooperation regulation[195] lays down the principle that a person shall be only subject to the social security legislation of one Member State (art. 11). Most importantly, a posted worker continues to be subject (only) to the social security legislation of his home Member State for up to 24 months (art. 12), while still being able to receive the benefits by the institution of the place of residence (art. 17). Any reimbursement is carried out by the institutions between the Member State (art. 35) and thus does not impose administrative burdens on the professional. In practice, the professional can apply for an A1 form which is issued by the country to whose legislation he is subject and can be used to confirm in the host Member State that social security contributions are paid in another Member State. Similar forms exist to facilitate the use of social security services in the host Member State.[196] This system shifts the administrative burdens from the professional and employer to the Member State institutions which are better equipped to deal with it and should thus be extended were possible. However, where the enforcement of rules requires the ability to conduct physical controls, this is the case for e.g. fire safety rules or health security rules, such a mechanism is not feasible. In such cases, the Member State of origin or an EU-wide one stop system should, however, provide information and forward applications to the host Member State to avoid difficulties the professional or employer may encounter when dealing with foreign institutions.

A similar system as the one for social security could be introduced with regard to **VAT procedures for the temporary provision of services**. If professionals were only subject to the VAT procedures and rates of their home Member State, this would decrease administrative burdens substantially.

---

[194] *Duke/et. al.*, A European Single Point of Contact, 2013, p. 142.

[195] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

[196] A list of the relevant forms can be found under https://europa.eu/youreurope/citizens/work/social-security-forms/index_en.htm.

As the standard and reduced VAT rates in the EU are harmonised (minimum 15 % standard rate and 5 % reduced rate)[197], it would also not face any competition concerns. The VAT e-commerce package[198] that will introduce a threshold of EUR 10000 under which intra-EU cross border supplies of telecommunications, broadcasting and electronic services remain subject to the VAT rules of the Member State of the supplier is already a good approach. However, to exceed that threshold it seems to be necessary to link it with an intra-Member State VAT reimbursement system similar to the one for social security. Another way to facilitate cross-border services would be the extension of the Mini One-Stop-Shop (MOSS Scheme). It allows to cross-border supply telecommunication services, television and radio broadcasting services and electronically supplied services without the need to register in each Member State of supply. The undertakings can submit their VAT returns through the online service MOSS without having to register with all the Member States where they supply to. This could potentially be extended to non-digital services.

Another problem can be overserved where the EU legislation make use of **indeterminate legal terms** which often leads to different interpretations by the Member States and thus to legal uncertainty and high research costs for professionals. One example is the question of when the cross-border provision of a service is temporary. This plays a role for the application of the recognition of professional qualifications directive, as for temporary services there is no formal registration procedure required. It appears difficult to further define this by secondary law as the Court has decided that "*no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services*."[199] Nonetheless, legal certainty could be brought by introducing a minimum period up to which a cross-border service is always considered temporary while allowing for longer periods to be still considered temporary.

Notification obligations such as laid down in the Services Enforcement Directive and to a lesser extent also in the Professional Qualifications Directive could further increase cross-border mobility through "soft harmonisation" – meaning that they would work towards the abolishment of non-justified restrictions of cross-border services and establishment in a more systematic manner. They can also increase transparency and legal certainty. **To increase their effectiveness in that regard as well as to minimise the burden on the Member States, such obligations should be consolidated in one legislative act and apply the same standards as far as possible.**

It should be noted that there are already various mechanisms in place that facilitate cross-border services and freedom of establishment. However, **the legislation in place is widely fragmented, not applied uniformly and not easily understandable.** To lower burdens, in particular for SMEs which do not have the capacity for substantial legal research on every jurisdiction they want to provide services to, a uniform platform should be developed that includes all the relevant legislation and guides through the complete process. Under the current regime, providing services abroad requires the understanding of numerous regulations and going through different application and registration procedures in every host Member State. Future legislation should focus on reducing administrative interaction with the host Member State and shift recognition and registration procedures to the home Member State as an intermediary.

---

[197] Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, art. 96 ff.

[198] See https://ec.europa.eu/taxation_customs/business/vat/digital-single-market-modernising-vat-cross-border-ecommerce_en.

[199] CJEU, Judgement of 29.04.20004, Case C-171/02, Commission/Portugal, ECLI:EU:C:2004:270, para 26; Judgement of 11.12.2003, Case C-215/01, Schnitzer, ECLI:EU:C:2003:662, para 31.

b. Further Development of the Services Directive

The Services Directive represents an essentially conservative approach in so far as it has codified the case law of the European Court of Justice. Nevertheless, this codification already contributes to an improvement in the practical enforceability of the freedom to provide services and the freedom of establishment, because both companies and Member States, including the courts, can more easily recognise the rights deriving from the fundamental freedoms. This greater legal clarity also leads to an improvement in the enforcement and involvement of rights.

The idea of the services e-card could be further pursued to reduce the administrative complexity faced by the service providers. The idea of a voluntary electronic EU-level procedure to service providers to complete formalities when expanding abroad from an internal market perspective is appealing. As discussed above, any future approach should however, ensure that host Member States can nonetheless require compliance with its own standards in the absence of coordinated standards. A future legislative act should have a wide scope of application and be integrated in the Services Directive as far as possible to simplify the legal system that governs cross-border services.

c. Further Development of the Professional Qualifications Directive

As seen, the Professional Qualifications Directive regulates a huge variety of different groups of professions including the liberal professions in a cross-sectoral approach. Its complex and intricate scheme of rules spreading over 65 articles and seven annexes makes the Directive an instrument difficult to apply. Future legislative developments should simplify the directive and make it more transparent. In terms of content, the main aim should be to improve access to information for businesses.

The **European Professional Card** seems to be a good approach that should be further developed and expanded to other professions. One of its biggest advantages is that it can be accessed online through the Commission's website in different languages.

d. Extension of the Scope of the Proportionality Test Directive

The approach of the Proportionality Test Directive could possibly be further pursued and the requirement to conduct a proportionality test extended beyond regulated professions to all national legislative, regulatory or administrative requirements restricting access to services markets. Similar guidance on how to undertake proportionality assessments may help the Member States also in other areas to avoid the adoption of unproportionate laws.

An extension of this approach will have similar effects as the harmonisation of laws as differences between national legal systems that stem from unjustified restrictions of the freedom to provide services will be reduced. A broad proportionality test requirement might thus not only further develop the principle of mutual recognition and facilitate cross-border trade in services but might also substitute for harmonisation.

e. Adoption and Extension of the Scope of the Services Enforcement Directive

Similarly, the Services Enforcement Directive should be adopted and possibly extended in scope, in particular to rules that govern access to regulated professions. A broad notification obligation would further reduce unjustified barriers to cross-border services. As it goes hand in hand with the Proportionality Test Directive, the two legislative acts could be consolidated in one directive applying to all services. The balanced approach that IMCO has proposed in its amendments to the Services Enforcement Directive seems promising for future legislative acts in that regard.

4.2.2. Areas for sectoral developments

Besides these cross-sectoral approaches, future legislation should also focus on specific sectors and how their integration in the Single Market can be improved. Examples of such sectoral approaches are the Commission's current work on financial services and the Parliament's resolution on franchising services. Such sectoral approaches, however, should always be in line with the cross-sectoral concepts described above.

a. Financial Services

One sector that because of his particularities deserves special attention is the sector of financial services, with a particular focus on consumer protection. A recent Eurobarometer Study showed that 92% of respondents have never purchased a financial product outside their home country.[200] Financial services differ in many aspects from other services: Customers often only infrequently purchase financial services; such services are often complex, opaque and their risks are difficult to assess.[201] These particularities pose challenges to cross-border financial services as the described problems increase when purchasing financial services abroad or from new market entrants from other Member States. The Commission in its Consumer Financial Services Action Plan[202] identified three methods to further integrate financial services markets: (a) Increase trust and empower consumers when buying services at home or from other Member States; (b) Reduce legal and regulatory obstacles affecting businesses when providing financial services abroad; and (c) Support the development of an innovative digital world which can overcome some of the existing barriers of the Single Market. This approach should be supported and further pursued. It should be noted that an integrated financial services market can also help to remove borders for other cross-border economic activities. Being able to easily access bank accounts, have similar insurances and credit options as in the home State will further reduce burdens for cross-border economic activities. To achieve these goals, common creditworthiness assessment standards and principles and cross-border exchange of data between credit registers will eventually be needed.

b. Franchising services

Another sector that deserves special attention is the franchising sector. The European Parliament in 2017 passed a resolution[203] to further develop the franchising sector. In the EU, franchising accounts for 1.89 % of GDP, compared to 5.95 % in the USA and 10.83 % in Australia.[204] As franchising is a business model which supports new business and small-business ownership, it has the potential to further integrate the retail sector in the Single Market.[205] However, existing legislation covering franchising varies widely between Member States which creates barriers for cross-border franchising. This concerns in particular unfair contract terms and unfair trading practices. Although such practices can be subject to European Competition Law, uneven application in the Member States can lead to distortion of competition and barriers to trade, weakening economic growth.

---

200 Special Eurobarometer 446, July 2016: http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/SPECIAL/surveyKy/2108.

201 European Parliament, Study on Consumer Protection Aspects of Financial Services, 2014, IP/A/IMCO/ST/2013-07.

202 Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, Consumer Financial Services Action Plan: Better Products, More Choice, COM/2017/0139 final.

203 European Parliament resolution of 12 September 2017 on the functioning of franchising in the retail sector (2016/2244(INI)).

204 European Parliament, Study on Legal perspective of the regulatory framework and challenges for franchising in the EU, 2016, IP/A/IMCO/2016-08.

205 Ibid, p. 36.

The Parliament has asked the Commission to open a public consultation and to make an analysis of the existing self-regulatory instruments[206] as well of legislative practices of Member States in the field of franchising in the retail sector. An EU legislative act based on the expected findings of the Commission could bring a homogenous approach to the regulation of franchising.

4.3. Challenges for the Free Movement of Services and Establishment between EU and UK after Brexit

KEY FINDINGS

The future trade relations between the United Kingdom and the European Union after Brexit are everything but clear. This applies particularly to trade in services.

If the withdrawal agreement enters into force, the Union's internal market law and in particular the directives on the freedom to provide services and the freedom of establishment discussed above will (probably) continue to apply until 31 December 2020 as part of a transitional period. From 1st January 2021, the UK would no longer be subject to Union law. Until then, trade relations are to be regulated by a comprehensive trade agreement in accordance with the withdrawal agreement.

A fall back on the WTO rules on trade and services, besides specific legal problems, would deeply affect the integrated markets for services. The WTO system does neither contain rules on positive harmonisation nor on mutual recognition and the scope of the obligations under the GATS is very limited.

The key challenge will ultimately be to restructure the trade relationship between the UK and the EU. Internal Market law will then be replaced by an international trade treaty, which must agree on two opposing objectives: to ensure the widest possible continuation of the trade relationship with the UK economy, which is closely interwoven with the EU, and at the same time to enable the UK to pursue its own independent regulation and trade policy.

A future trade agreement should pay particular attention to market access rights for service providers and specifically to the recognition of professional qualifications and market authorisation rights in the country of origin. In this context, it would be appropriate to link market access rights to common regulatory standards.

The UK's withdrawal from the European Union poses particular challenges. With its withdrawal, the country is pursuing the goal of regaining full sovereignty over legislation and, in particular, migration. Trade between the UK and the European Union is intended by the London Government to be governed by a comprehensive trade agreement. What is striking here is that - as the Chequers proposal shows - the British side is striving for as unhindered a trade in goods as possible ('frictionless trade') but has only made very general proposals within the framework of services.

4.3.1. The Legal Framework of Brexit

For the legal consequences of Brexit, it is crucial whether the withdrawal agreement agreed between the two sides will be ratified.

If the withdrawal agreement enters into force, the Union's internal market law and in particular the directives on the freedom to provide services and the freedom of establishment discussed above will

[206] Such as the European Code of Ethics for Franchising, developed by the European Franchise Federation (EFF).

(probably) continue to apply until 31 December 2020 as part of a transitional period.[207] From 1st January 2021 the UK would no longer be subject to Union law. Until then, trade relations are to be regulated by a comprehensive trade agreement in accordance with the withdrawal agreement. If this does not succeed either, the transitional period can be extended;[208] if this does not happen, the 'backstop' solution will become effective.[209] However, it does not contain any substantial provisions for trade in services or freedom of establishment - with the exception of Northern Ireland. In this case, the economic relations between the two parts would insofar derive from WTO law. For services, this primarily means that the GATS rules apply, and cross-border service providers can no longer assert directly applicable rights.[210]

If the withdrawal agreement does not win a majority in the House of Commons, Union law will cease to apply on 30 March 2019. The further legal consequences then also result from the WTO framework.

4.3.2. The WTO Rules on Services and Establishment

The GATS provides a relatively broad framework agreement for the liberalisation of cross-border trade in services, but does not impose a mandatory level of liberalisation. Rather, specific obligations (equal treatment of nationals, market access) arise only from the so-called schedules, which are optional for the WTO member states in their sectoral extension and warranty range (so-called positive list). Thus, in principle, the access of service providers or persons to permanent establishment is free. However, the mutual recognition of professional qualifications by the WTO member states is provided for by WTO law only to a very limited extent as it requires agreements of mutual recognition. GATS rather serves as a platform to conclude such agreements.

The United Kingdom would remain a GATS Member State after leaving the EU.[211] However, there are still some unresolved difficulties: The EU has joined the GATS as a mixed agreement, but the specific GATS obligations (Schedules) have been declared by the EU and not by the Member States and apply only within the EU territory. Therefore, the UK may have to submit new commitments, but the details are controversial.

Moreover, the WTO system contains neither rules on positive harmonisation nor on mutual recognition. The system of the positive list, which considerably limits the scope of application and is unilaterally and non-bindingly defined by each Member State, is not very transparent and hardly legally secure. Moreover, there is a lack of direct applicability of the agreement and of effective legal control. There is only a dispute settlement mechanism between Member States without the possibility for individuals to assert their rights. More decisive for the recognition of professional qualifications is therefore the existing legal situation in the United Kingdom and the EU.

Overall, the GATS is probably the worst possible solution from an internal market perspective.

---

[207] Art. 126 Withdrawal Agreement.

[208] Art. 132 Withdrawal Agreement.

[209] Art. 2 f. Protocol on Northern Ireland/Ireland, Withdrawal Agreement.

[210] See, in more detail, *Kainer*, The consequences of Brexit on services and establishment, p. 14.

[211] Both the EU and the United Kingdom are members of GATS. Basically, the United Kingdom will continue to be subject to GATS, s. *Lehmann/Zetzsche*, European Business Law Review 2016, p. 999, 1003. For a more detailed analysis of WTO membership after Brexit, s. *Bartels*, The UK's status in the WTO after Brexit, p. 3 ff., https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747.

4.3.3. The Provisions of the Withdrawal Agreement on the Recognition of Professional Qualifications

For the professional qualification of persons (British in the EU and EU citizens in the UK) who are already established at the end of the transitional period, the withdrawal agreement contains provisions which apply after the transitional period. Established persons can continue to rely on recognised qualifications until the end of the transition period (presumably at the end of 2020). Applications for recognition submitted by this date will largely be dealt with under the Union recognition rules. After this date, recognition for persons already established will only be granted on the basis of an equivalence test. This does not apply to service providers and persons established later. They are subject to national law.

4.3.4. Challenges for the Legal Policy on Services and Establishment after the Brexit

The key challenge will ultimately be to restructure the trade relationship between the UK and the EU. Internal Market law will then be replaced by an international trade treaty, which must agree on two opposing objectives: to ensure the widest possible continuation of the trade relationship between the UK economy, which is closely interwoven with the EU, and at the same time to enable the UK to pursue its own independent regulation and trade policy. Against the backdrop of the above-mentioned importance of trade in services, the greatest possible integration and freedom should be agreed for service providers and - to the extent compatible with migration control - also for establishments.

This meets inherent complications. Free trade agreements worldwide distinguish between the liberalisation of goods and services. While goods have been liberalised to a large extent in the case of the latest generation of trade agreements, this has only been possible to a very limited extent in the case of services. In part, this has to do with the fact that the provision of services can be linked to the access of persons to the territory of the receiving country; the interest in migration control completely opposes the introduction of the free movement of persons in commercial contracts. Furthermore, there is the difficulty of controlling the quality of services. Therefore, the necessary quality control in the interest of consumers and the general public is conventionally achieved primarily through qualification requirements of the service provider and access controls. However, since the relevant regulations differ from country to country and precisely these differences lead to obstacles to the free movement of services, regulations such as an equal treatment requirement for nationals are not sufficient in themselves.

A future trade agreement should therefore pay particular attention to market access rights for service providers and in particular the recognition of professional qualifications and market authorisation rights in the country of origin.

In this context, it would be appropriate to link market access rights to common regulatory standards. For example, the coordination provisions of the Professional Qualifications Directive could be incorporated into the trade agreement to be created. From the EU's point of view, the status of the acquis communautaire can serve as the basis for negotiations in this respect.

5. CONCLUSIONS

The liberalisation of cross-border trade in services requires common rules, such as standards for licences and diplomas, mutual recognition and their conditions. Legislation aiming at eliminating barriers to cross-border trade and establishment should focus on further effectuating the principle of mutual recognition and reducing administrative costs. Member States often require adjustments of the services provided to the rules of their territory. As long as such requirements are non-discriminatory and proportionate, they may be justified and, therefore, are not prohibited under EU law. Legislative harmonisation can address the adjustment costs resulting from such national legislation.

In principle, three regulative strategies are applied to enhance the effects of the fundamental freedoms: the establishment of common standards, the effectuation of the principle of mutual recognition, and the simplification of procedures. Legislative harmonisation proves advantageous over leaving the economic integration to the case law of the European Court of Justice. It can address measures which do not fall within the scope of the fundamental freedoms but nevertheless affect the internal market by increasing adjustment costs or submitting service providers or companies to double regulation or double supervision.

Previous legislation has paved a way to a more integrated services market in the EU by applying the abovementioned strategies. In particular, the Services Directive and the Directive on the Recognition of Professional Qualifications proved important steps to facilitate cross-border services and establishment. Both directives aim at facilitating market access, mutual recognition and reducing adjustment costs, leading considerably to more economic growth in the EU.

Amongst recent legislative proposals, the Services Enforcement Directive and the Proportionality Test Directive deserve special consideration. The Services Enforcement Directive aims at further developing the already existing notification obligations prior to the introduction of service-related authorisation schemes and requirements related to the establishment procedures. By implementing extensive obligations on the Member States to state reasons and justifications for every envisaged message, the Directive could significantly reduce unjustified barriers to trade in services. IMCO's proposed changes to the Commission's initial proposal have found the right balance between effectuating the fundamental freedoms and other EU law principles such as the division of competences, the division of powers, the principle of subsidiarity and the principle of proportionality.

The Proportionality Test Directive similarly addresses the Member States' legislative process by introducing a harmonised proportionality test to be used by all Member States before adopting or amending national regulations on professions. It aims at increasing the transparency for regulated professions and at ensuring a thorough analysis of their proportionality before adopting new rules. Ultimately it can be expected that through harmonisation of the proportionality criteria and procedure, the adoption of unproportionate laws can be prevented. When unjustified rules on professional qualifications are prevented, this will lead to an approximation of legal conditions for regulated professions. This reduces barriers to trade that stem from differences in the legal orders and clears the way for a more progressive principle of mutual recognition in the future.

Despite the great achievements in the past, some challenges and areas for legislative development remain:

- Different notification and registration obligations for service providers and a lack of simplified or electronic procedures remain significant barriers to cross-border trade in services. Many Member States do not have the technical and administrative infrastructure and the legal

framework to allow simplified or electronic procedures and information can often not be easily accessed in enough different languages.

- Unjustified barriers through Member States' legislation that do not sufficiently take into account cross-border trade in services and establishment.
- Ambiguity in the relevant directives and regulations, e.g. the exemptions from notification and authorisation requirements for "temporary activities".
- The posting of workers remains difficult as, despite uniform framework conditions, the requirements for tax registration, the registration and social security of employees of rules for health and safety vary. This comes with significant research and litigation costs for employers.
- Different VAT procedures pose further costs on the cross-border provision of services. Different tax procedures are time-consuming and the enforcement of refunds complex.

  To address these difficulties and obstacles to cross-border trade in services, future legislation strategies should, in the long run, be developed to progressively harmonise standards for services in order to maximise the growth potential of the services sector.

REFERENCES

- *Bartels, L.*, The UK's status in the WTO after Brexit, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841747
- *Callies, C./Ruffert M.*, Kommentar EUV/AEUV, 5th edition 2016
- Commission pursues Member States over internal market failures, EU Focus 2008, 242, 25 ff.
- Commission reports on professional qualifications Directive, EU Focus 2010, 278 f.
- *Craig, P./de Búrca*, G., EU Law, 6th edition 2015
- *Donges, J./Eekhoff, J./Franz, W./Fuest, C./Möschel, W./Neumann, M.*, Den Subventionsabbau umfassend voranbringen, Kronberger Kreis-Studien Nr. 44/2006
- *Davies, G.*, The Services Directive: extending the country of origin principle, and reforming public administration, E.L. Rev. 2007, 32(2), 232 ff.
- *Dauses, M./Ludwigs, M.*, Handbuch des EU- Wirtschaftsrechts, 45th edition 2018
- *de Witte, B.*, Setting the Scene: How did Services get to Bolkestein and why, EUI Working Papers Law 2007/20
- *Delimatsis, P.*, International Trade in Services and Domestic Regulations - Necessity, Transparency, and Regulatory Diversity, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1471563
- *id.*, Standardisation in services - European ambitions and sectoral realities, E.L.Rev. 2016, 41(4), 513 ff.
- *Duke, C./et. al.*, A European Single Point of Contact, 2013
- *El-Agraa, A.*, The European Union: Economics and Policies, 9th edition 2011
  Enchelmaier, S., Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006-11), E.L.Rev. 2011, 615 ff.
- *Grabitz, E./Hilf, M./Nettesheim, M.*, Das Recht der Europäischen Union: EUV/AEUV, 68th edition
- *Eurochambres*, EU Internal Market Barriers and Solutions: The Business Perspective, September 2015, http://www.eurochambres.eu/content/default.asp?PageID=1&DocID=7095
- European Commission, Evaluation of the Professional Qualifications Directive (Directive 2005/36/EC), available on: http://ec.europa.eu/docsroom/documents/15384/attachments/1/translations/en/renditions/pdf
- *European Parliamentary Research Service*, Mapping the Cost of Non-Europe, 2014-19, 4th ed. 2017
- *Hatje, A./Müller-Graff, P.*, Enzyklopädie Europarecht Gesamtausgabe, 2016
- *Hatzpopoulos, V.*, Regulating Services in the European Union, 2012
- *Hoekman, B./Primo Braga, C.*, Protection in Trade in Services – a Survey, http://documents.worldbank.org/curated/en/629571468781750702/pdf/multi-page.pdf
- *Kainer, F.* Mindestlohnregelungen im Lichte der europäischen Grundfreiheiten, NZA 2016, 395 ff.
- *id.*, The Consequences of Brexit on Services and Establishment: Different Scenarios for Exit and Future Cooperation, In-depth analysis for the IMCO Committee, 2017, http://www.europarl.europa.eu/RegData/etudes/IDAN/2017/602035/IPOL_IDA(2017)602035_EN.pdf
- *id./Persch, J.*, Das Prinzip der Einheit des Binnenmarktes: Keine Rosinen für Drittstaaten, EuZW 2018, 932 ff.
- UK Government, Implementing Professional Qualifications Directive 2005/36/EC, available on: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/485408/BIS-15-655-PQD-guidance-for-competent-authorities.pdf
- *Kluth W./Rieger, F.*, Die neue EU-Berufsanerkennungsrichtlinie - Regelungsgehalt und Auswirkungen für Berufsangehörige und Berufsorganisationen, EuZW 2005, 486 ff.

- *Krajewski, M.,* Anforderungen der Dienstleistungsrichtlinie an Genehmigungsregelungen und ihre Umsetzung im deutschen Recht, NVwZ 2009, 929 ff.
- *v. Landmann, R./Rohmer, G.*, Gewerbeordnung und ergänzende Vorschriften: GewO, 78th edition 2018
- *Lehmann, M./Zetzsche, D.*, Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK, European Business Law Review 2016, 999 ff.
- *Mestmäcker, E./Schweitzer, H.,* Europäisches Wettbewerbsrecht, 3rd edition 2014
- Modernising the Professional Qualifications Directive, EU Focus 2012, 292
- *Monteagudo, J./Rutkowski, A./Lorenzani, D.*, The economic impact of the Services Directive: A first assessment following implementation, Economic Papers 456, 2012, http://ec.europa.eu/economy_finance/publications/economic_paper/2012/pdf/ecp_456_en.pdf
- *Pechstein, M./Nowak, C./Häde, U.*, Frankfurter Kommentar zu EUV, GRC und AEUV Bd. II, 1st edition 2017
- Professional services and EU law, P.N. 2013, 29(3), 144 ff.
- *Sampson, G./Snape, R.*, Identifying the Issues in Trade in Services, The World Economy 1985, 171 ff.
- *Schick, M.*, Zwischenbilanz zum Dienstleistungspaket der Europäischen Kommission, DStR 2018, 1454 ff.
- *Schwarze, J.*, EU-Kommentar, 3rd edition 2012
- *Schäfer, A.*, Berufsrecht 2020 – Mit der Verhältnismäßigkeitsrichtlinie auf dem Weg zu einem modernen Regulierungsrecht, EuZW 2018, 789 ff.
- *Schütze, R.*, Of types and tests: towards a unitary doctrinal framework for article 34 TFEU?, E.L. Rev. 2016, 41(6), 826 ff.
- *Stork, S.,* Richtlinienentwurf zur Festlegung eines Notifizierungsverfahrens für dienstleistungsbezogene Genehmigungsregelungen und Anforderungen, EuZW 2017, 562 ff.
- *Stelmaszczyk,* Grenzüberschreitender Formwechsel durch isolierte Verlegung des Satzungssitzes, EuZW 2017, 890 ff.
- *Streinz, R.*, Beck'sche Kurzkommentare Band 57 EUV/AEUV, 3rd edition 2018
- *Wollenschläger, F.*, A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration, European Law Journal, Vol. 17, No. 1, January 2011
- *Stöbener de Mora, P.,* Eine unverhältnismäßige Verhältnismäßigkeitsprüfung, EuZW 2017, 287 ff.
- *Van den Gronden, J./De Waele, H.*, All's well that bends well? The constitutional dimension to the Services Directive, E.C.L. Review 2010, 6(3), 397
- *Weatherill, S.*, The principle of mutual recognition: it doesn't work because it doesn't exist, E.L. Rev. 2018, 43(2), 224-233, 225
- *Wölker, U.,* Die Normenhierarchie im Unionsrecht in der Praxis, EuR 2007, 32
- *Wurster, B.*, Die Elektronische Europäische Dienstleistungskarte: Mehrwert für Dienstleistungserbringer, EuZW 2017, 332 ff.

ANNEX: LIST OF LEGISLATIVE ACTS (SERVICES AND ESTABLISHMENT)

Regulations

- Council Regulation (EEC) No 4055/86 of 22 December 1986 applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries
- Council Regulation (EEC) No 3572/90 of 4 December 1990 amending, as a result of German unification, certain Directives, Decisions and Regulations relating to transport by road, rail and inland waterway
- Council Regulation (EEC) No 3573/90 of 4 December 1990 amending, as a result of German unification, regulation (EEC) No 4055/86 applying the principle of freedom to provide services to maritime transport between member states and between member states and third countries
- Council Regulation (EEC) No 2155/91 of 20 June 1991 laying down particular provisions for the application of arts. 37, 39 and 40 of the Agreement between the European Economic Community and the Swiss Confederation on direct insurance other than life assurance
- Council Regulation (EEC) No 3577/92 of 7 December 1992 applying the principle of freedom to provide services to maritime transport within Member States (maritime cabotage)
- Council Regulation (EC) No 1356/96 of 8 July 1996 on common rules applicable to the transport of goods or passengers by inland waterway between Member States with a view to establishing freedom to provide such transport services
- Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE)
- Regulation (EC) No 2195/2002 of the European Parliament and of the Council of 5 November 2002 on the Common Procurement Vocabulary (CPV)
- Regulation (EC) No 808/2004 of the European Parliament and of the Council of 21 April 2004 concerning Community statistics on the information society
- Council Regulation (EC) No 352/2006 of 27 February 2006 repealing Regulation (EEC) No 1461/93 concerning access to public contracts for tenderers from the United States of America
- Regulation (EC) No 1060/2009 of the European Parliament and of the Council of 16 September 2009 on credit rating agencies
- Regulation (EC) No 1006/2009 of the European Parliament and of the Council of 16 September 2009 amending Regulation (EC) No 808/2004 concerning Community statistics on the information society
- Regulation (EC) No 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001
- Regulation (EC) No 1071/2009 of the European Parliament and of the Council of 21 October 2009 establishing common rules concerning the conditions to be complied with to pursue the occupation of road transport operator and repealing Council Directive 96/26/EC
- Regulation (EU) No 1094/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Insurance and Occupational Pensions Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/79/EC
- Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC

- Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC
- Regulation (EU) No 513/2011 of the European Parliament and of the Council of 11 May 2011 amending Regulation (EC) No 1060/2009 on credit rating agencies
- Regulation (EU) No 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009
- Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories
- Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies
- Regulation (EU) No 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012
- Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions
- Regulation (EU) No 1022/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EU) No 1093/2010 establishing a European Supervisory Authority (European Banking Authority) as regards the conferral of specific tasks on the European Central Bank pursuant to Council Regulation (EU) No 1024/2013
- Regulation (EU) No 248/2014 of the European Parliament and of the Council of 26 February 2014 amending Regulation (EU) No 260/2012 as regards the migration to Union-wide credit transfers and direct debits
- Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC
- Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012
- Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010
- Regulation (EU) No 1286/2014 of the European Parliament and of the Council of 26 November 2014 on key information documents for packaged retail and insurance-based investment products (PRIIPs)
- Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions
- Regulation (EU) 2015/2365 of the European Parliament and of the Council of 25 November 2015 on transparency of securities financing transactions and of reuse and amending Regulation (EU) No 648/2012
- Regulation (EU) 2016/1014 of the European Parliament and of the Council of 8 June 2016 amending Regulation (EU) No 575/2013 as regards exemptions for commodity dealers
- Regulation (EU) 2016/1011 of the European Parliament and of the Council of 8 June 2016 on indices used as benchmarks in financial instruments and financial contracts or to measure the

performance of investment funds and amending Directives 2008/48/EC and 2014/17/EU and Regulation (EU) No 596/2014

- Regulation (EU) 2016/1033 of the European Parliament and of the Council of 23 June 2016 amending Regulation (EU) No 600/2014 on markets in financial instruments, Regulation (EU) No 596/2014 on market abuse and Regulation (EU) No 909/2014 on improving securities settlement in the European Union and on central securities depositories
- Regulation (EU) 2016/1191 of the European Parliament and of the Council of 6 July 2016 on promoting the free movement of citizens by simplifying the requirements for presenting certain public documents in the European Union and amending Regulation (EU) No 1024/2012
- Regulation (EU) 2016/2340 of the European Parliament and of the Council of 14 December 2016 amending Regulation (EU) No 1286/2014 on key information documents for packaged retail and insurance-based investment products as regards the date of its application
- Regulation (EU) 2017/1129 of the European Parliament and of the Council of 14 June 2017 on the prospectus to be published when securities are offered to the public or admitted to trading on a regulated market, and repealing Directive 2003/71/EC.
- Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.
- Regulation (EU) 2017/1131 of the European Parliament and of the Council of 14 June 2017 on money market funds (.)
- Regulation (EU) 2017/2402 of the European Parliament and of the Council of 12 December 2017 laying down a general framework for securitisation and creating a specific framework for simple, transparent and standardised securitisation, and amending Directives 2009/65/EC, 2009/138/EC and 2011/61/EU and Regulations (EC) No 1060/2009 and (EU) No 648/2012
- Regulation (EU) 2017/2401 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) No 575/2013 on prudential requirements for credit institutions and investment firms
- Regulation (EU) 2017/2395 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) No 575/2013 as regards transitional arrangements for mitigating the impact of the introduction of IFRS 9 on own funds and for the large exposures treatment of certain public sector exposures denominated in the domestic currency of any Member State
- Regulation (EU) 2018/644 of the European Parliament and of the Council of 18 April 2018 on cross-border parcel delivery services

Directives

- Council Directive 63/474/EEC of 30 July 1963 liberalising transfers in respect of invisible transactions not connected with the movement of goods, services, capital or persons
- Council Directive 64/225/EEC of 25 February 1964 on the abolition of restrictions on freedom of establishment and freedom to provide services in respect of reinsurance and retrocession
- Council Directive 72/430/EEC of 19 December 1972 amending Council Directive 72/166/EEC of 24 April 1972 on the approximation of the laws of the Member States relating to insurance against civil liability in respect of the use of motor vehicles and to the enforcement of the obligation to insure against such liability
- 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

- Council Directive 73/240/EEC of 24 July 1973 abolishing restrictions on freedom of establishment in the business of direct insurance other than life assurance
- Council Directive 74/556/EEC of 4 June 1974 laying down detailed provisions concerning transitional measures relating to activities, trade in and distribution of toxic products and activities entailing the professional use of such products including activities of intermediaries
- Council Directive 74/557/EEC of 4 June 1974 on the attainment of freedom of establishment and freedom to provide services in respect of activities of self- employed persons and of intermediaries engaging in the trade and distribution of toxic products
- Council Directive 77/249/EEC of 22 March 1977 to facilitate the effective exercise by lawyers of freedom to provide services
- Council Directive 80/767/EEC of 22 July 1980 adapting and supplementing in respect of certain contracting authorities Directive 77/62/EEC coordinating procedures for the award of public supply contracts
- Council Directive 86/635/EEC of 8 December 1986 on the annual accounts and consolidated accounts of banks and other financial institutions
- Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents
- Council Directive 87/540/EEC of 9 November 1987 on access to the occupation of carrier of goods by waterway in national and international transport and on the mutual recognition of diplomas, certificates and other evidence of formal qualifications for this occupation
- Council Directive 88/295/EEC of 22 March 1988 amending Directive 77/62/EEC relating to the coordination of procedures on the award of public supply contracts and repealing certain provisions of Directive 80/767/EEC
- Council Directive 89/117/EEC of 13 February 1989 on the obligations of branches established in a Member State of credit institutions and financial institutions having their head offices outside that Member State regarding the publication of annual accounting documents
- Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts
- Council Directive 91/371/EEC of 20 June 1991 on the implementation of the Agreement between the European Economic Community and the Swiss Confederation concerning direct insurance other than life assurance
- Council Directive 91/672/EEC of 16 December 1991 on the reciprocal recognition of national boatmasters' certificates for the carriage of goods and passengers by inland waterway
- Council Directive 91/674/EEC of 19 December 1991 on the annual accounts and consolidated accounts of insurance undertakings
- Council Directive 91/675/EEC of 19 December 1991 setting up an insurance committee
- Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors
- Directive 94/19/EC of the European Parliament and of the Council of 30 May 1994 on deposit-guarantee schemes
- Directive 94/22/EC of the European Parliament and of the Council of 30 May 1994 on the conditions for granting and using authorizations for the prospection, exploration and production of hydrocarbons
- European Parliament and Council Directive 95/26/EC of 29 June 1995 amending Directives 77/780/EEC and 89/646/EEC in the field of credit institutions, Directives 73/239/EEC and 92/49/EEC

in the field of non- life insurance, Directives 79/267/EEC and 92/96/EEC in the field of life assurance, Directive 93/22/EEC in the field of investment firms and Directive 85/611/EEC in the field of undertakings for collective investment in transferable securities (Ucits), with a view to reinforcing prudential supervision

- Council Directive 96/50/EC of 23 July 1996 on the harmonisation of the conditions for obtaining national boatmasters' certificates for the carriage of goods and passengers by inland waterway in the Community
- 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
- Directive 97/9/EC of the European Parliament and of the Council of 3 March 1997 on investor-compensation schemes
- Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of service
- 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
- Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems
- Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access
- Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions
- Directive 2001/34/EC of the European Parliament and of the Council of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities
- Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European company with regard to the involvement of employees
- Directive 2002/13/EC of the European Parliament and of the Council of 5 March 2002 amending Council Directive 73/239/EEC as regards the solvency margin requirements for non-life insurance undertakings
- Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services
- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC
- Directive 2002/87/EC of the European Parliament and of the Council of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate and amending Council Directives 73/239/EEC, 79/267/EEC, 92/49/EEC, 92/96/EEC, 93/6/EEC and 93/22/EEC, and Directives 98/78/EC and 2000/12/EC of the European Parliament and of the Council
- Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings

- Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC
- Directive 2004/109/EC of the European Parliament and of the Council of 15 December 2004 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC
- Directive 2005/1/EC of the European Parliament and of the Council of 9 March 2005 amending Council Directives 73/239/EEC, 85/611/EEC, 91/675/EEC, 92/49/EEC and 93/6/EEC and Directives 94/19/EC, 98/78/EC, 2000/12/EC, 2001/34/EC, 2002/83/EC and 2002/87/EC in order to establish a new organisational structure for financial services committees
- Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications
- Commission Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive
- Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market
- Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market
- Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions
- Directive 2007/24/EC of the European Parliament and of the Council of 23 May 2007 repealing Council Directive 71/304/EEC concerning the abolition of restrictions on freedom to provide services in respect of public works contracts and on the award of public works contracts to contractors acting through agencies or branches
- Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts
- Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services
- Directive 2008/11/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading, as regards the implementing powers conferred on the Commission
- Directive 2008/21/EC of the European Parliament and of the Council of 11 March 2008 amending Council Directive 91/675/EEC setting up a European insurance and occupational pensions committee, as regards the implementing powers conferred on the Commission
- Directive 2008/22/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, as regards the implementing powers conferred on the Commission
- Directive 2008/25/EC of the European Parliament and of the Council of 11 March 2008 amending Directive 2002/87/EC on the supplementary supervision of credit institutions, insurance

undertakings and investment firms in a financial conglomerate, as regards the implementing powers conferred on the Commission

- Directive 2008/106/EC of the European Parliament and of the Council of 19 November 2008 on the minimum level of training of seafarers (recast)
- Directive 2009/14/EC of the European Parliament and of the Council of 11 March 2009 amending Directive 94/19/EC on deposit-guarantee schemes as regards the coverage level and the payout delay
- Directive 2009/44/EC of the European Parliament and of the Council of 6 May 2009 amending Directive 98/26/EC on settlement finality in payment and securities settlement systems and Directive 2002/47/EC on financial collateral arrangements as regards linked systems and credit claims
- Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)
- Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC
- Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 relating to insurance against civil liability in respect of the use of motor vehicles, and the enforcement of the obligation to insure against such liability
- Directive 2009/110/EC of the European Parliament and of the Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/EC
- Directive 2009/111/EC of the European Parliament and of the Council of 16 September 2009 amending Directives 2006/48/EC, 2006/49/EC and 2007/64/EC as regards banks affiliated to central institutions, certain own funds items, large exposures, supervisory arrangements, and crisis management
- Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II)
- Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive)
- Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organisational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company
- Commission Directive 2010/42/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards certain provisions concerning fund mergers, master-feeder structures and notification procedure
- Directive 2010/73/EU of the European Parliament and of the Council of 24 November 2010 amending Directives 2003/71/EC on the prospectus to be published when securities are offered to the public or admitted to trading and 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market

- Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010
- Directive 2011/89/EU of the European Parliament and of the Council of 16 November 2011 amending Directives 98/78/EC, 2002/87/EC, 2006/48/EC and 2009/138/EC as regards the supplementary supervision of financial entities in a financial conglomerate
- Directive 2012/23/EU of the European Parliament and of the Council of 12 September 2012 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives
- Directive 2013/14/EU of the European Parliament and of the Council of 21 May 2013 amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision, Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) and Directive 2011/61/EU on Alternative Investment Funds Managers in respect of over-reliance on credit ratings
- Council Directive 2013/16/EU of 13 May 2013 adapting certain directives in the field of public procurement, by reason of the accession of the Republic of Croatia
- Council Directive 2013/23/EU of 13 May 2013 adapting certain directives in the field of financial services, by reason of the accession of the Republic of Croatia
- Council Directive 2013/25/EU of 13 May 2013 adapting certain directives in the field of right of establishment and freedom to provide services, by reason of the accession of the Republic of Croatia
- Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC
- Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC
- Directive 2013/55/EU of the European Parliament and of the Council of 20 November 2013 amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation')
- Directive 2013/58/EU of the European Parliament and of the Council of 11 December 2013 amending Directive 2009/138/EC (Solvency II) as regards the date for its transposition and the date of its application, and the date of repeal of certain Directives (Solvency I)
- Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010
- Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts
- Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC

- Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC
- Directive 2014/49/EU of the European Parliament and of the Council of 16 April 2014 on deposit guarantee schemes
- Directive 2014/51/EU of the European Parliament and of the Council of 16 April 2014 amending Directives 2003/71/EC and 2009/138/EC and Regulations (EC) No 1060/2009, (EU) No 1094/2010 and (EU) No 1095/2010 in respect of the powers of the European Supervisory Authority (European Insurance and Occupational Pensions Authority) and the European Supervisory Authority (European Securities and Markets Authority)
- Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive)
- Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU
- Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions
- Directive 2014/92/EU of the European Parliament and of the Council of 23 July 2014 on the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features
- Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC
- Directive (EU) 2016/97 of the European Parliament and of the Council of 20 January 2016 on insurance distribution (recast)
- Directive (EU) 2016/1034 of the European Parliament and of the Council of 23 June 2016 amending Directive 2014/65/EU on markets in financial instruments
- Directive (EU) 2018/411 of the European Parliament and of the Council of 14 March 2018 amending Directive (EU) 2016/97 as regards the date of application of Member States' transposition measures
- Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services
- Directive (EU) 2018/958 of the European Parliament and of the Council of 28 June 2018 on a proportionality test before adoption of new regulation of professions

Proposals[212]

- Proposal for a Directive of the European Parliament and of the Council amending Directive 2009/65/EC of the European Parliament and of the Council and Directive 2011/61/EU of the European Parliament and of the Council with regard to cross-border distribution of collective investment funds, 52018PC0092, 2018-03-12
- Proposal for a Directive of the European Parliament and of the Council on the enforcement of the Directive 2006/123/EC on services in the internal market, laying down a notification procedure for authorisation schemes and requirements related to services, and amending Directive 2006/123/EC

[212] Published in 2009-2018.

and Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System, 52016PC0821, 2017-01-10

- Proposal for a Directive of the European Parliament and of the Council on a proportionality test before adoption of new regulation of professions, 52016PC0822, 2017-01-10
- Proposal for a Regulation of the European Parliament and of the Council introducing a European services e-card and related administrative facilities, 52016PC0824, 2017-01-10
- Proposal for a Directive of the European Parliament and of the Council on the legal and operational framework of the European services e-card introduced by Regulation [ESC Regulation], 52016PC0823, 2017-01-10
- Proposal for a Directive of the European Parliament and of the Council amending Directive 2013/36/EU as regards exempted entities, financial holding companies, mixed financial holding companies, remuneration, supervisory measures and powers and capital conservation measures, 52016PC0854, 2016-11-23
- Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No 575/2013 as regards the leverage ratio, the net stable funding ratio, requirements for own funds and eligible liabilities, counterparty credit risk, market risk, exposures to central counterparties, exposures to collective investment undertakings, large exposures, reporting and disclosure requirements and amending Regulation (EU) No 648/2012, 52016PC0850, 2016-11-23
- Proposal for a Directive of the European Parliament and of the Council amending 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, 52016PC0128, 2016-03-08
- Proposal for a Directive of the European Parliament and of the Council on insurance mediation (recast), 52012PC0360, 2012-07-03
- Proposal for a Directive of the European Parliament and of the Council on payment services in the internal market and amending Directives 2002/65/EC, 2013/36/EU and 2009/110/EC and repealing Directive 2007/64/EC, 52013PC0547, 2013-07-24
- Proposal for a Directive of the European Parliament and of the Council On the comparability of fees related to payment accounts, payment account switching and access to payment accounts with basic features, 52013PC0266, 2013-05-08
- Proposal for a Regulation of the European Parliament and of the Council on promoting the free movement of citizens and businesses by simplifying the acceptance of certain public documents in the European Union and amending Regulation (EU) No 1024/2012, 52013PC0228, 2013-04-24
- Proposal for a COUNCIL REGULATION conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions, 52012PC0511, 2012-09-12
- Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, 52011PC0895, 2011-12-20
- Proposal for a Directive of the European Parliament and of the Council on public procurement, 52011PC0896, 2011-12-20
- Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, 52011PC0897, 2011-12-20
- Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/36/EC on the recognition of professional qualifications and Regulation on administrative cooperation through the Internal Market Information System, 52011PC0883, 2011-12-19
- Proposal for a Regulation of the European Parliament and of the Council on markets in financial instruments and amending Regulation [EMIR] on OTC derivatives, central counterparties and trade repositories, 52011PC0652, 2011-10-20

- Proposal for a Directive of the European Parliament and of the Council on markets in financial instruments repealing Directive 2004/39/EC of the European Parliament and of the Council (Recast), 52011PC0656, 2011-10-20
- Proposal for a Directive of the European Parliament and of the Council on Deposit Guarantee Schemes [recast], 52010PC0368, 2010-07-12
- Proposal for a Directive of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (Codified version), 52009PC0185, 2009-04-21

This study discusses European legal policy to ensure freedom to provide services and freedom of establishment since 2009, examines the market-opening effects of enacted acts and proposals, and identifies legislative challenges that the Union institutions should address in the coming legislative period. It also addresses the specific Brexit-related issues for the freedom to provide services.
This document was provided by Policy Department A, at the request of the European Parliament's Committee on Internal Market and Consumer Protection.

PE 638.394
IP/A/IMCO/2017-14

Print ISBN 978-92-846-4811-5 | doi: 10.2861/63082 | QA-02-19-304-EN-C
PDF ISBN 978-92-846-4812-2 | doi: 10.2861/467192 | QA-02-19-304-EN-N