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## **WORKING DOCUMENT**

on ECA Special Report 5/2016 (2015 Discharge): Has the Commission ensured effective implementation of the Services Directive?

Committee on Budgetary Control

Rapporteur: Nedzhmi Ali

## **Introduction**

The Service Directive was adopted in 2006 with the aim of reducing legal and administrative barriers to both providers and recipients of services, in order to make it easier for businesses and consumers to provide or use services in the Single Market.

The Directive introduced an obligation for Member States (MS) to "ensure free access to and free exercise of a service activity within its territory" and "not make access to or exercise of services activity in their territory subject to compliance with any requirements that do not respect the principles of non-discrimination, necessity and proportionality".

A number of economic activities were exempted from the scope: non-economic services of general interest, financial services, electronic communications, temporary work agencies, healthcare, audio-visual services, gambling, activities connected with the exercise of official authority, social services, private security services, notaries and bailiffs and taxation. The Directive also does not affect MS' social security legislation.

Nevertheless the Services Directive addresses services activities covering around 46% of EU GDP. The deadline for transposition was set for 2009 but most MS did not transpose the Directive into national legislation on time.

Full implementation of the Directive should remove red tape and significantly facilitate the establishment of service providers both at home and abroad. It should facilitate the cross-border provision of services. To help achieve this objective, MS are required to set up "Points of Single Contact" (PSC), which should assist businesses by providing comprehensive information on the procedures necessary to offer and provide services, and by allowing them to complete required formalities online. The Directive also strengthens the right of service recipients by prohibiting discrimination on the basis of nationality or residency.

The Directive sets out the roles and responsibilities of the Commission and the MS. The latter are responsible for transposing the Directive into their legislation and a number of tasks regarding the follow-up of the transposition through mutual evaluation and for facilitating assistance to business by setting up Points of Single Contact (PSC). The Commission put up a dispute resolution mechanism - SOLVIT - to help EU citizens and businesses that have been denied the possibility to exercise their European Internal Market rights in another MS. They are a practical alternative to formal problem-solving mechanisms. DG GROWTH (Internal market, Industry, Entrepreneurship and SMEs) coordinates the Commission's policy on the European Single Market and seeks the removal of unjustified obstacles to trade. It should monitor how EU law is being implemented in practice, assist MS and initiate infringement procedures when necessary.

## **European Court of Auditors' (ECA) observations**

According to the Court, after the transposition period of the Directive to national legislations, by the end of 2009, barriers persisted, some of which were due to vague drafting of the Directive. The Court is of the opinion that the Commission has been reluctant to take infringement measures partly due to a lack of solidity in the legal base and partly due to the length of time necessary for such a legal procedure to enforce compliance (several years).

It is not yet possible to evaluate the extent to which the expected economic benefits of the

Directive have been realised because the Commission did not initiate any systematic effort to compile data on cross-border trade in services covered by the Directive before 2014.

#### Transposition and monitoring of implementation

The Commission published the "Handbook on the implementation of the Services Directive", which aimed to provide MS with technical assistance by describing appropriate approaches to implementation. The Commission also provided advice to MS through monitoring visits and responding to their queries. Although the Court considers that the handbook would have been of greater use if available in all languages soon after the Directive entered into force, it considers that the Commission took the necessary steps to monitor progress in transposition and reported on it.

The deadline for transposition was only met by eight MS<sup>1</sup>. Letters of formal notice were sent to the twenty MS for not notifying transposition and three cases - Germany, Austria and Greece - were referred to the European Court of Justice (ECJ). However, they were concluded before being considered by the Court.

The Points of Single Contact (PSCs) should play a significant role in the implementation of the Directive and they were closely monitored by the Commission. By the end of 2009, 21 out of 27 MS had established "First generation PSCs", though the degree to which administrative procedures could be completed online, and used cross-border, varied.

The mutual evaluation exercise foreseen in the Directive required each MS to assess the justifications for national requirements on service providers and to share their findings with other MS. Its purpose was to increase understanding of the reasons underlying the requirements in place and to encourage MS to compare their regulatory approaches and share best practices, removing requirements which are agreed to be unjustified. The methodology consisted of individual MS self-assessments, discussions in clusters of five MS and plenary meetings with all MS. According to the Court, mutual evaluations were an innovative practice, managed well by the Commission and subsequently also used for other Directives such as the Professional Qualifications Directive.

Despite the Commission managing the mutual evaluation process well, the barriers were only partly lifted, indicating that there was still a long way to go to complete implementation.

In 2011 and 2012 the Commission undertook "performance checks" to assess "how different pieces of EU legislation are applied and how they work on the ground" from the perspective of different users of the Single Market. They covered three sectors considered important for cross-border trade in the EU: construction (contributing 6.3% to GDP), business services (11.7%) and tourism (4.4%).

The checks showed that there is a very close link between the Directive and the Professional Qualifications Directive. Recognition of qualifications is often needed before an individual is allowed to provide services or set up a cross-border business. They also identified barriers in national legislation imposing requirements for special shareholding structures and insurance. The Court considers that the results of the checks could have supported further systematic enforcement of the Directive by the Commission addressing the economically most

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<sup>1</sup> Czech Republic, Estonia, Croatia, Lithuania, Hungary, Malta, Netherlands, Sweden.

significant issues.

The Court observed that there was a lack of economic impact assessment because the Commission did not have sufficiently detailed economic data to cover the activities concerned by the Directive.

### Implementation

Despite the PSCs being the most prominent tool for the implementation of the Directive, they were only partially effective due to the differences in the way they were embedded in MS administrative structures. Other tools, including the Internal Market Information System (IMI) and the European Consumer Centre Network (ECC-net), also developed with the intention of improving trade in services within the EU were underused.

MS delays in setting up Points of Single Contact led the Commission to create two expert groups to help MS establishing them. The EUGO expert group dealt with the PSCs in general (bears the name of the common brand across Europe for identification of PSC websites) and the e-procedures expert group focused on the more technical matters involved in enabling service providers to complete administrative procedures online. The different level of ambition of the MS administrations resulted in diverse quality of PSCs. In 2012, the Commission developed a 'Charter for the electronic Points of Single Contact under the Services Directive' (PSC Charter) to serve as a guideline for those countries that intend their PSCs to go beyond that which is legally required. However, this Charter was not so successful either according to a study contracted by the Commission. In addition, the Court observed that the PSCs were difficult to find and that awareness among businesses remained low.

The IMI system created to develop mutual assistance between MS was more frequently used to cooperate on requests relating to other directives. Another task of the IMI was to launch an alert mechanism that would warn against a specific service provider and this function was rarely used by the MS administrations. The notification of new national requirements - an obligation set in the Directive - was not well used by the MS and the Court observed that the inclusion of standstill periods and publicly accessible website containing requirements could improve the value of the system.

The Commission and MS have set up a network of European Consumer Centres (ECC-net) to provide information and give assistance to service recipients who have problems with traders in other countries<sup>1</sup>. Centres in this network are jointly funded by the EU budget and national funds. The Court observes that consumers, when aware of breach of rights, considered it was not worth making a complaint. The ECA gives examples of discriminatory practices towards consumers. The Court also highlights that article 20.2 of the Directive has led to uncertainty for businesses about their obligations especially when selling cross-borders.

To resolve the most significant types of problems relating to service providers, the Commission used the Consumer Protection Cooperation (CPC) Network to conduct "sweeps" which consist of EU-wide screening of website in particular online sectors. Simultaneously, coordinated checks are made to identify breaches of consumer law and to subsequently ensure

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<sup>1</sup> This concern article 20 of the Directive on non-discrimination which states that MS should ensure that service recipients must not be subject to discriminatory requirements based on their nationality or place of residence and that access to a service should be similarly unrestricted.

its enforcement. According to an external evaluation carried out in 2012, the resulting enforcement rate was high for all sectors, although the impact of sweeps could be increased through more publicity and follow-up actions to ensure continued compliance.

### Enforcement

The Court observed that SOLVIT is rarely used for the Service Directive. In addition it has limited personnel and technical capacity to handle complex business cases.

The EU Pilot is a confidential mechanism for the exchange of information between the Commission and the MS. It is a pre-infringement system appreciated by MS with an average duration of Directive cases of 16.6 months. The information on EU pilot cases is not public and therefore they do not benefit other interested parties nor do they contribute to creating an established EU legal practice.

Another enforcement tool is the infringement procedures based on a complaint received by the Commission or on the Commission's own initiative. It can end with a referral to the Court of Justice of the European Union. Despite the "zero-tolerance policy" announced in 2012, the Commission decided that only the most restrictive requirements covered by the Directive to be within the scope of its "zero tolerance". For that reason, few infringement cases were started. Those that were launched took longer than the target set by the Commission. The Court also observed that individual services-related complaints were followed up on a regular basis, with extensive communication between the Commission and the MS. However, once the infringement procedures started, there were long periods of inactivity.

All infringement procedures closed resulted in the MS concerned amending its legislation, thereby remedying the problems identified. Only one case was referred to the Court of Justice, against Hungary to contest its legislation on issuing luncheon, leisure and holiday vouchers, and in October 2015 the case was still pending.

In addition to infringement procedures the Commission is trying to influence MS by including Services Directive-related recommendations in Country Specific Recommendations (CSR) issued in the context of the European Semester. The Court observed however that not all MS act upon the recommendations appropriately and that there is no evidence that CSRs are more effective in removing barriers than infringement procedures.

### **Conclusions**

The Commission has a duty to co-ordinate policy on the European Single Market and seek removal of unjustified obstacles to trade in the field of services. Some years after the deadline for implementation of the Services Directive, barriers to the internal market for services covered by the Directive still exist. The Commission has set up a number of mechanisms to identify barriers, created support structures to assist MS in reducing them and set up alternative conflict resolution measures. However, the Commission has been hampered to pursue legal proceedings, partly due to the length of the procedure and partly due to its lack of confidence in the strength of the legislation. Overall, the Commission hasn't been fully effective in ensuring the implementation of the Directive.

At the same time, it is recognised by the MS that the Commission has done much on a practical level to help them implement the Directive during and after transposition, by

organising group discussions for the mutual evaluation process as well as providing guidance during regular thematic expert group meetings. Guidance for transposition was issued in the form of the 'Handbook on implementation' which though considered useful, was not released in time for the start of the three-year period and thus contributed to delays in full transposition.

### **ECA's recommendations**

In light of its findings the ECA recommends that:

1. The Commission should draft guidance for transposition and issue it as soon as possible after adoption;
2. Results from exercises such as mutual evaluations and performance checks should be followed-up to resolve non-compliance; the Commission and the Member States should address the economically most significant issues;
3. The Commission should endeavour to ensure that the issue of data necessary for assessing impacts of new legislation is addressed early in the legislative procedure;
4. MS should respect the PSC Charter by, for example, making information available in multiple languages and enabling completion of all administrative steps necessary for provision of services across borders;
5. The legislator should introduce a standstill period for the notification of draft requirements and ensure that they are published on a publicly available website to allow better access and timely scrutiny;
6. The Commission should amend the annex of the Consumer Protection Cooperation Regulation so that it includes Article 20 of the Services Directive (non-discrimination);
7. The Commission should not delay the starting of an EU Pilot case where an issue has been identified. Information on the issues resolved via EU Pilot should be shared, contributing to disseminating best practice;
8. The Commission should reduce the length of the infringement procedures as much as possible. It should apply an approach to initiating infringements based on risks and economic importance of the issue concerned. Finally, given that the Commission itself considers that important issues of implementation can only be decided by the Court of Justice, it should refer them where necessary.

### **European Commission's replies**

Much of the Directive is based on a proportionality assessment to be conducted by the MS on a case by case basis, and the Commission must take that into consideration (e.g. articles 15 and 39 requiring MS to evaluate certain requirements). Action is therefore decided not by level of confidence, but by legal basis. Length of judicial procedure has never been a deterrent to the opening of infringement files. For unconditional obligations contained in the Directive, the Commission has acted promptly with a more than 30 own initiative investigations.

The handbook was available 7 months after the adoption of the Services Directive, and 29

months before the deadline for transposition. Extensive consultation and discussions with the MS took place before the publication of the handbook, and the content was therefore well known to MS beforehand.

The Commission accepted all the Courts' recommendations. With regard to recommendation 7, the Commission confirms that it does not disclose whether an EU Pilot on a particular subject-matter is pending against a particular MS. The publication would be contrary to the confidentiality obligations it has vis-à-vis the MS in the context of pre-infringement action.

### **Recommendations by the rapporteur:**

#### The European Parliament:

1. Welcomes the Court's report, endorses its recommendations and is pleased that the Commission accepts these and will take them into account in future;
2. Notes that despite the limitation of its scope by the exclusion of provision of some services, the Directive has a very broad field of application which required the Commission to have a set of measures to ensure its correct implementation;
3. Stresses that the services market has not achieved its full potential and that the impact on growth and jobs of successful implementation of the Services Directive is high; while the potential economic benefit of full implementation of the Directive is still not known, the Commission should develop a study in order to estimate the output gains in the most possibly reliable quantitative terms;
4. Encourages subsequent inclusion of more sectors in order to achieve a broader removal of sectorial obstacles to market integration with a final goal of removing of barriers in the internal market for services and developing full EU's potential for growth, competitiveness and job creation;
5. Considers that MS could have made better use of the measures provided by the Commission to support transposition, implementation and enforcement specially by sharing the problems faced in the different stages of the procedure, discussing possible common solutions and exchanging best practices;
6. Agrees that the Commission should reduce the length of infringement procedures as much as possible,
7. Regrets that tools as the Points of Single Contact (PSC), the Internal Market Information System (IMI) and the European Consumer Centres (ECC-net) were not sufficiently known and used by businesses and consumers when having an issue related to the application of the Services Directive;
8. Notes that the provision of services online continue to be limited due to uncertainties for providers and recipients.