FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES

The freedom of establishment and the freedom to provide services guarantee mobility of businesses and professionals within the EU. Expectations concerning the full implementation of the Services Directive are high, as the (full) freedom to provide services is of crucial importance for the completion of the internal market. Yet, obstacles to these freedoms remain and the COVID-19 pandemic introduced new challenges altogether. The own-initiative report on tackling non-tariff and non-tax barriers in the single market, which is expected to be voted on in January 2022, spells out how the economic recovery from COVID-19 should be carried out in order to mitigate the negative effects on the freedom of establishment and the freedom to provide services most effectively.

LEGAL BASIS

Articles 26 (internal market), 49 to 55 (establishment) and 56 to 62 (services) of the Treaty on the Functioning of the European Union (TFEU).

OBJECTIVES

Self-employed persons and professionals or legal persons within the meaning of Article 54 TFEU who are legally operating in one Member State may: (i) carry out an economic activity in a stable and continuous way in another Member State (freedom of establishment: Article 49 TFEU); or (ii) offer and provide their services in other Member States on a temporary basis while remaining in their country of origin (freedom to provide services: Article 56 TFEU). This implies eliminating discrimination on the grounds of nationality and, if these freedoms are to be used effectively, the adoption of measures to make it easier to exercise them, including the harmonisation of national access rules or their mutual recognition (2.1.6).

ACHIEVEMENTS

A. Liberalisation in the Treaty
   1. ‘Fundamental freedoms’

The right of establishment includes the right to take up and pursue activities as a self-employed person, and to set up and manage undertakings, for a permanent activity of a stable and continuous nature, under the same conditions as those laid down by the law of the Member State concerned regarding establishment for its own nationals.
Freedom to provide services applies to all services normally provided for remuneration, insofar as they are not governed by the provisions relating to the freedom of movement of goods, capital and persons. The person providing a ‘service’ may, in order to do so, temporarily pursue their activity in the Member State where the service is provided, under the same conditions as are imposed by that Member State on its own nationals.

2. The exceptions

Under the TFEU, activities connected with the exercise of official authority are excluded from freedom of establishment and provision of services (Article 51 TFEU). This exclusion is, however, limited by a restrictive interpretation: exclusions can cover only those specific activities and functions which imply the exercise of authority. Furthermore, a whole profession can be excluded only if its entire activity is dedicated to the exercise of official authority, or if the part that is dedicated to the exercise of public authority is inseparable from the rest. Exceptions enable Member States to exclude the production of or trade in war material (Article 346(1)(b) TFEU) and to retain rules for non-nationals in respect of public policy, public security or public health (Article 52(1)).

B. Services Directive – towards completing the internal market

The Services Directive (Directive 2006/123/EC) strengthens the freedom to provide services within the EU. Its implementation deadline was 28 December 2009. This directive is crucial for completing the internal market, since it has huge potential for delivering benefits to consumers and SMEs. The aim is to create an open single market in services within the EU while at the same time ensuring the quality of services provided to consumers. According to the Commission communication entitled ‘Europe 2020 – A strategy for smart, sustainable and inclusive growth’, the full implementation of the Services Directive could increase trade in commercial services by 45% and foreign direct investment by 25%, bringing an increase of between 0.5% and 1.5% in GDP. The directive contributes to administrative and regulatory simplification and modernisation. This is achieved not only through the screening of the existing legislation and the adoption and amendment of relevant legislation, but also through long-term projects (setting up the Points of Single Contact and ensuring administrative cooperation). The implementation of the directive has been significantly delayed in a number of Member States in relation to the original deadline. Its successful implementation calls for sustained political commitment and widespread support at European, national, regional and local levels.

ROLE OF THE EUROPEAN PARLIAMENT

Parliament has been instrumental in liberalising the activities of the self-employed. It has ensured a strict delimitation of the activities that may be reserved for nationals (e.g. those relating to the exercise of public authority). It is also worth mentioning the case that Parliament brought before the Court of Justice of the European Union against the Council for failure to act with regard to transport policy. This case, brought in January 1983, led to a judgment of the Court (Case No 13/83 of 22 May 1985) condemning the Council for failing to ensure free provision of international transport services or lay down conditions enabling non-resident carriers to operate transport services within a Member State. This was in breach of the Treaty of Rome. The Council
was thus obliged to adopt the necessary legislation. The role of Parliament has grown with the application of the codecision procedure provided for in the Treaty of Maastricht, and now of its successor, the ordinary legislative procedure, to most aspects of freedom of establishment and provision of services.

Parliament also played a crucial role in the adoption of the Services Directive, and it is closely following its implementation. In addition, it is putting pressure on the Member States to fulfil their obligations under the directive and to ensure its proper implementation. On 15 February 2011, Parliament adopted a resolution on the implementation of the Services Directive, and on 25 October 2011 a resolution on the Mutual Evaluation Process of the Services Directive. Following the Commission communication of 8 June 2012 on the implementation of the Services Directive, Parliament’s Committee on the Internal Market and Consumer Protection (IMCO) prepared a report entitled ‘the Internal Market for Services: State of Play and Next Steps’, which was adopted in plenary on 11 September 2013.

On 7 February 2013, Parliament also adopted a resolution with recommendations to the Commission on the governance of the single market, emphasising the importance of the services sector as a key area for growth, the fundamental character of the freedom to provide services, and the benefits of full implementation of the Services Directive.

Parliament has, as a matter of priority, worked on legislative proposals concerning telecommunications services, such as a regulation on electronic identification and trust services for electronic transactions in the internal market (Regulation (EU) No 910/2014), and a regulation laying down measures concerning the European single market for electronic communications and to achieve a ‘Connected Continent’. In its resolution of 4 July 2012, Parliament made recommendations to the Commission with regards to financial services in the area of access to basic payment services and consumer credit and mortgage credit (Directive 2014/17/EU). Parliament also adopted a resolution on package travel and assisted travel arrangements on 12 March 2014. The Mortgage Credit Directive (Directive 2014/17/EU) increases consumer protection by enforcing minimum regulatory requirements that Member States are required to meet to protect individuals with credit agreements on residential property and by ensuring that consumers are informed and financially capable of paying their mortgage loan. Additionally, the Directive on markets in financial instruments (Directive 2014/65/EU) aims to ensure regulation and transparency of EU-wide financial markets. In 2019, Parliament voted on Directive (EU) 2019/882 on the accessibility requirements for products and services. This directive aims to remove the barriers to free trade for products and services for citizens with disabilities and/or functional limitations.

A 2019 study commissioned by Parliament’s Policy Department for Economic, Scientific and Quality of Life Sciences found that the benefits generated by legislation that Parliament has adopted in the area of free movement of services, including professional qualifications and retail, have a value of EUR 284 billion annually in the area covered by the Services Directive, EUR 80 billion annually in the area of professional services and EUR 20 billion annually in the area of services relating to

---

public procurement. Similarly, another study[2] published by the Policy Department for Economic, Scientific and Quality of Life Policies on legal obstacles in Member States to single market rules shows that the services sector is an important contributor to economic growth in the EU. Services account for 24% of intra-EU cross-border trade of goods and services (an increase from around 20% in the early 2000s). The study also found that while services account for 78% of gross value added in the EU, regulatory heterogeneity and difficulties in accessing information add to the cost of doing business and restrict the free movement of services and freedom of establishment.

In its resolution of 17 April 2020 on EU coordinated action to combat the COVID-19 pandemic and its consequences, Parliament indicated that the single market is the source of European collective prosperity and well-being and that it is a key element of the immediate and continuous response to the COVID-19 outbreak. It also recalled in its resolution of 19 June 2020 that the Schengen area is a cherished achievement at the very heart of the EU project, and called on Member States to reduce restrictions on the freedom of movement and to step up their efforts to achieve the completion of Schengen integration.

On 25 November 2020, Parliament adopted a resolution entitled ‘Towards a more sustainable single market for business and consumers’, which focuses on different policy areas, in particular the area of consumer protection and business’s participation in the green transition (key to enhancing the sustainability of the single market). At the request of the IMCO Committee, the Policy Department for Economic, Scientific and Quality of Life Policies of Parliament’s Directorate-General for Internal Policies published a briefing entitled ‘The European Services Sector and the Green Transition’, which contributed to this resolution.

On 20 January 2021, Parliament adopted a resolution entitled ‘strengthening the single market: the future of free movement of services’. The resolution underlines the need to ensure the implementation of the single market rules for services and to improve the enforcement action of the Commission. It stresses the need to evaluate the level of implementation of the EU legal framework for services and to empower companies by providing them with better access to information.

The COVID-19 pandemic has seen many restrictions (re)imposed on free movement in the EU single market, including the free movement of services. A webinar[3] on the impact of COVID-19 on the single market and consumer protection organised by the Policy Department for Economic, Scientific and Quality of Life Policies on 9 November 2020 discussed this topic. It found that the EU services sector is likely to see significant shifts in the nature of demand and supply in years to come, brought about by accelerated technological advancement and changes in consumer behaviour as a result of the pandemic. Furthermore, a study[4] commissioned by the

Policy Department for Economic, Scientific and Quality of Life Policies was published and presented to the Committee on Internal Market and Consumer Protection in February 2021. It found that while the initial border closures imposed by Member States significantly impacted the delivery of cross-border professional services, the proliferation of digital tools has allowed a degree of normality to resume.

The draft own-initiative report on the tackling of non-tariff and non-tax barriers in the single market adopted by the IMCO Committee on 23 November 2021 is very topical in that regard, as it addresses not only the generally persisting barriers to the freedom of goods and freedom to provide services, but also specifically how COVID-19 is detrimental to the four freedoms (the free movement of goods, the free movement of people, the freedom of services and the freedom of movement of capital). This detriment to the four freedoms persists despite the extent to which digital tools remedied some of the economic hardship engendered by COVID-19 restrictions. The report is expected to be voted on in plenary on 17 January 2022.

Christina Ratcliff / Barbara Martinello / Kevin Paul Kaiser
12/2021