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**NOTE**

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From : General Secretariat of the Council  
To : Permanent Representatives Committee (Part 1)

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No. Cion prop.: 6174/04 COMPET 18 SOC 58 JUSTCIV 23 CODEC 192  
No. prev. doc.: 9350/05 COMPET 108 ETS 13 SOC 233 JUSTCIV 92 CODEC 414

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Subject : Proposal for a Directive of the European Parliament and of the Council on  
services in the internal market

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Delegations will find in the Annex a working document from the Presidency on the above-mentioned proposal.

This document consolidates :

- progress achieved in the Working Party under the UK Presidency on Chapters I, III and VI, including relevant recitals;
- progress achieved in the Working Party under the Luxembourg Presidency on Chapters II, IV and V, including relevant recitals, as set out in document n° 9350/05;
- clarifications that were provided for during the Dutch Presidency, consolidated with the Commission's proposal in document n° 5161/05.

Specific comments and concerns expressed by delegations and the Commission regarding the Chapters examined under the UK and Luxembourg Presidencies are set out in footnotes for indicative purposes. In any case, positions reflected in this document are not to be considered as final.

This consolidated text will serve as a basis for further discussions in the Working Party on Competitiveness and Growth. \*

Please note that all delegations maintain a general scrutiny reservation on the proposal.

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\* New wording added compared with the Commission's proposal is underlined. Parts of the initial Commission's proposal which have not been retained in the new version are indicated with strike-through. Recitals are in italics. New recitals are in underlined italics.

## Chapter I

### General provisions

#### *Article 1*<sup>1 2 3 4</sup>

#### **Subject-matter**

This Directive establishes general provisions facilitating exercise of the freedom of establishment for service providers and the free movement of services.

This 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.<sup>5</sup>

This Directive does not deal with the abolition of monopolies providing services nor with aids granted by Member States which are covered by common rules on competition.

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<sup>1</sup> All delegations: general reservation on all Articles. Reservations on scope have not been reiterated as reservations to Articles 16-19.

<sup>2</sup> A large number of delegations believe the Directive should be neutral as regards labour law matters.

SE: addition of “This Directive does not affect labour relations between workers and employers”. This is supported by BE, CY, DE, DK, EL, FI, FR, LU, IT, MT, and SI, although BE prefers to add: “The Directive does not affect labour relations between workers and employers, taking into account Community and national law.”. EE, HU, PL oppose SE suggestion. CZ, HU, IE, EE, LT, LV, NL, SI, COM: scrutiny reservation. PT: prefers “This Directive does not affect labour relations”.

SE, supported by CY, DK, EL, FR, SI: also proposes additional Article 2(2)e new: “This Directive does not in any way affect the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike or to take other actions covered by specific industrial relations systems in Member States.” AT, SI: exclude all areas of labour law in Article 2.

<sup>3</sup> IT, NL exclude criminal law (see also Member States’ positions in Footnotes 9, and 10). DE, PT: reservation on criminal law.

<sup>4</sup> CZ: add “this Directive shall apply without prejudice to Article 86(2) of the Treaty.

<sup>5</sup> AT: delete this paragraph as issues should be dealt with in Article 2.

The Directive does not affect the freedom of the Member States to define, in conformity with Community law<sup>6</sup>, what they consider to be services of general economic interest, how those services should be organised and financed and what specific obligations they should be subject to.

This Directive does not affect measures taken at Community or national level, in respect of Community law, in order to promote cultural and linguistic diversity and to ensure the defence of pluralism.<sup>7</sup>

***Recital 1:** The European Union is seeking to forge ever closer links between the States and peoples of Europe and to ensure economic and social progress. In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the ~~free movement of services~~ freedom to provide services and the freedom of establishment are ensured. The elimination of obstacles to the development of service activities between Member States is essential in order to strengthen the integration of the peoples of Europe and to promote balanced and sustainable economic and social progress.*

***Recital 2:** The report from the Commission on "The State of the Internal Market for Services"<sup>8</sup> drew up an inventory of a large number of barriers which are preventing or slowing down the development of services between Member States, in particular those provided by small and medium-sized enterprises (SMEs), which are predominant in the field of services. The report concludes that a decade after the envisaged completion of the internal market, there is still a huge gap between the vision of an integrated European Union economy and the reality as experienced by European citizens and service providers. The barriers listed affect a wide variety of service activities across all stages of the service provider's activity and have a number of common features, including, in particular, 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.*

***Recital 3:** Since services constitute the engine of economic growth and account for 70% of GDP and employment in the majority of Member States, this fragmentation of the internal market has a negative impact on the entire European economy, in particular on the competitiveness of SMEs, and prevents consumers from gaining access to a greater variety of competitively priced services. The European Parliament and the Council have emphasised that the removal of legal barriers to the establishment of a genuine internal market is a matter of priority for achieving the goal set by the Lisbon European Council of making the European Union the most competitive and dynamic knowledge-based economy in the world by 2010. Removing those barriers is essential in order to revive the European economy, particularly in terms of employment and investment.*

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<sup>6</sup> FR: insert "and with the principle of subsidiarity"

<sup>7</sup> LU: scrutiny reservation on this paragraph.

<sup>8</sup> COM (2002) 441 final.

**Recital 4:** *It is therefore necessary to remove barriers to the freedom of establishment for service providers in Member States and barriers to the freedom to provide services as between Member States and to guarantee providers and recipients the legal certainty necessary for the exercise in practice of those two fundamental freedoms ~~of the Treaty~~ as laid down by Articles 43 and 49 of the Treaty. Since the barriers in the internal market for services affect operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there, it is necessary to enable service providers to develop their service activities within the internal market either by becoming established in a Member State or by making use of the freedom to provide services. Service providers should be able to choose between those two freedoms, depending on their strategy for growth in each Member State.*

**Recital 5:** *Those barriers cannot be removed solely by relying on direct application of Articles 43 and 49 of the Treaty, since, on the one hand, addressing them on a case-by-case basis through infringement procedures against the Member States concerned would, especially following enlargement, be extremely complicated for national and Community institutions, and, on the other hand, the lifting of many barriers requires prior coordination of national legal schemes, including the setting up of administrative cooperation. As the European Parliament and the Council have recognised, a Community legislative instrument makes it possible to achieve a genuine internal market for services.*

**Recital 6:** *This Directive establishes 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. That framework is based on a dynamic and selective approach consisting in the removal, as a matter of priority, of barriers which may be dismantled quickly and, for the others, the launching of a process of evaluation, consultation and complementary harmonisation of specific issues, which will make possible the progressive and coordinated modernisation of national regulatory systems for service activities which is vital in order to achieve a genuine internal market for services by 2010. Provision should be made for a balanced mix of measures involving targeted harmonisation, administrative cooperation, the country of origin principle and encouragement of the development of codes of conduct on certain issues. That coordination of national legislative regimes should ensure a high degree of Community legal integration and a high level of protection of general interest objectives, especially of consumer protection, which is vital in order to establish mutual trust between Member States.*

**Recital 6a:** *This Directive concerns only service providers established in a Member State and does not cover external aspects. It does not concern negotiations within international organisations on trade in services, in particular in the framework of GATS.*

**Recital 6b:** *The objective of this Directive is to create a legal framework to ensure the free movement of services between Member States and not to harmonise criminal law<sup>9</sup> as such.<sup>10</sup>*

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<sup>9</sup> SE: insert "including criminal procedure"

<sup>10</sup> IT: include in Article 1. IE support inclusion in an Article. DK, EL: reservation on whether it is sufficient to include this text in a recital rather than in Article 1.

**Recital 7:** *It is necessary to recognise the importance of the roles of professional bodies and professional associations in the regulation of service activities and the development of professional rules.*

**Recital 7a:** *~~As regards services of general interest, the Directive covers only services of general economic interest, i.e. services that correspond to an economic activity.~~ As regards services of general interest, the Directive covers only those services which are performed for an economic consideration; i.e. services of general economic interest. Furthermore, certain services of general economic interest, such as in the field of transport, are excluded from the scope of application of the Directive and certain other services of general economic interest, for example, postal services are derogated from the country of origin principle. The Directive does not affect the freedom of the Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how these services should be organised and financed and what specific obligations they should be subject to. This Directive does not deal with the follow-up to the Commission White Paper on services of general interest.*

**Recital 7b** (ex Recital 35): *It is appropriate that the provisions of this Directive concerning freedom of establishment and freedom to provide services should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States to liberalise services of general economic interest nor to privatise public entities providing such services nor to abolish existing legal or de facto monopolies for other activities, notably those of lotteries or certain distribution services. ~~or to privatise certain sectors.~~*

**Recital 7c:** *This Directive does not deal with the funding of services of general economic interest and does not apply to systems of aids granted by Member States, ~~in particular,~~ for example, in the health and social fields or in the audiovisual and cultural sector, which are covered by Title VI Chapter 1 on rules on competition in the Treaty.*

**Recital 7d:** *This Directive, and in particular the provisions concerning authorisation schemes and the territorial scope of an authorisation, does not interfere with the division of regional or local competence within the Member States, including regional and local self-government.*

**Recital 7e** (ex Recital 29)<sup>11</sup>: The overriding reasons relating to the public interest to which reference is made in certain ~~harmonisation~~ provisions of this Directive are those recognised by the Court of Justice in its case-law relating ~~relation~~ to Articles 43 and 49 of the Treaty. The concept of overriding reasons relating to public interest has been developed progressively by the Court of Justice in its case-law and may continue to evolve. In addition to , ~~notably~~ public policy, public security, public health, provided for in Article 46 of the Treaty, the Court of Justice has already recognised, for example, that the protection of workers, consumers, recipients of services, including patient safety and ensuring high standards in education, ~~workers and,~~ the environment, the urban environment- and town and country planning<sup>12</sup>, the health of animals, intellectual property, the conservation of the national historic and artistic heritage, or social policy objectives, cultural policy, including the safeguard in the audio-visual sector of the freedom of expression of the various components (in particular social, cultural, religious and philosophical) existing in Member States, the maintenance of press diversity and policy for the promotion of the national language constitute overriding reasons relating to the public interest.<sup>13 14</sup>

**Recital 7f New**: For the purposes of the Directive, public policy includes the protection of minors, vulnerable adults and human dignity and other matters that fall within that expression as interpreted by the Court of Justice, similarly, the expression public security includes public safety.

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<sup>11</sup> BE, UK: replace in some articles the concept of “objectively justified by an overriding reason of general interest” by “objectively justified”.

<sup>12</sup> ES: delete reference to "town and country planning".

<sup>13</sup> EL, FI, FR,: add reference to the protection of pharmaceutical distribution systems.

<sup>14</sup> MT: include "national ethical considerations."

## Article 2

### Scope

1. This Directive shall apply to services supplied by providers established in a Member State.
2. This Directive shall not apply to the following activities: <sup>15 16 17 18 19 20 21 22 23 24 25 26</sup>

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- <sup>15</sup> AT, CY, FR: exclude services of general economic interest. CZ, EE, EL, FI, HU, IE, IT, LT, LV, MT, NL, PL, PT, SE, SI, SK, UK: believe SGEIs can be included in the proposal. BE: "This Directive must not apply to public services which are guaranteed or financed by public authorities for social, educational or cultural objectives. These services are services of general interest and any economic character is secondary to their social, educational or cultural or general societal objectives. Given this, these services must be excluded from the scope of the proposed Directive. This should be made clear explicitly for the following services: education, culture, audio-visual, healthcare, social services, employment (including temporary employment of workers and vocational training), distribution and purification of water, energy distribution, management of waste and environmental protection."
- <sup>16</sup> AT, CY, DE, DK, FR, LV, LU: (but LU retain Article 23), EL, HU, MT, PT, SI, SK: exclude all health services. MT: explicitly exclude pharmacies. IE, IT, PL, UK: exclude only publicly funded health services. CZ, FI, EE, NL: maintain the inclusion of health services. ES, SE: reservation on application to health services.
- <sup>17</sup> AT, CY, DE, FR, HU, SI: exclude social services. IE: exclude only publicly-funded social services. LV, SE: reservation on the application of social services.
- <sup>18</sup> MT, SK: exclude such education services as are covered by the Directive. AT, DE: exclude state education or educational institutions primarily financed by the state. PT: scrutiny reservation on impact on higher education.
- <sup>19</sup> MT: exclude electricity and gas services. IE, UK: reservation on inclusion of electricity and gas. MT, UK: exclude water and waste water services. UK: reservation on services related to oil.
- <sup>20</sup> CY, EL, FR, PT: exclude "audio-visual services, however they are produced, distributed or transmitted, including radio broadcasting and cinema." DE: exclude radio and television broadcasting and "systems of aids granted by Member States in the audio-visual and cultural sector, which are covered by general rules on competition in the Treaty". ES: scrutiny reservation on audio-visual services including radio broadcasting. MT, SE: reservation on the application of audio-visual services.
- <sup>21</sup> AT, DE, FR: exclude the services of collecting societies.
- <sup>22</sup> IE: exclude services related to the use of weapons and explosives and the movement of animals. DE: exclude services related to the use of weapons, explosives, pyrotechnical articles and accreditation, certification in the area of IT security as well as nuclear and radiation protection laws; exclude use of animals for experimental and other scientific purposes and inspections in the organic farming system as well as requirements for goods or their use.
- <sup>23</sup> DE: reservation on inclusion of construction. MT: concerned about the safety aspects of services related to Maltese stone (e.g. architects and stonemasons).
- <sup>24</sup> PT: Exclude assayers and services certifying gold and other precious metals.
- <sup>25</sup> CY, FR: Exclude private security and investigation services.
- <sup>26</sup> DE: Scrutiny reservation regarding general provisions e.g. of public planning and building law, environmental or plant protection law.



- (a) ~~financial services as defined in Article 2(b) of Directive 2002/65/EC; services of a banking, credit, insurance, occupational or personal pension, investment or payment nature;~~
- (b) electronic communications services and networks, and associated facilities and services, with respect to matters covered by or referred to in Directives 2002/19/EC<sup>27</sup>, 2002/20/EC<sup>28</sup>, 2002/21/EC<sup>29</sup>, 2002/22/EC<sup>30</sup> and 2002/58/EC<sup>31</sup> of the European Parliament and of the Council;
- (c) transport services<sup>32</sup>, with the exception of transport of cash or valuables in transit and the transport of deceased persons; ~~to the extent that they are governed by other Community instruments the legal basis of which is Article 71 or Article 80(2) of the Treaty.~~
- (d) activities covered by Article 45 of the Treaty<sup>33</sup>;
- (e) gambling activities which involve wagering of a stake with pecuniary value in games of chance, including lotteries and betting transactions.
3. This Directive ~~does~~ shall not apply to the field of taxation, ~~with the exception of the prohibition of discriminations provided for in Articles 14 and 20~~ 16 to the extent that the restrictions identified therein are not covered by a Community instrument on tax harmonisation.

<sup>27</sup> OJ L 108, 24.4.2002, p. 7.

<sup>28</sup> OJ L 108, 24.4.2002, p. 21.

<sup>29</sup> OJ L 108, 24.4.2002, p. 33.

<sup>30</sup> OJ L 108, 24.4.2002, p. 51.

<sup>31</sup> OJ L 201, 31.7.2002, p. 37.

<sup>32</sup> FR: exclude all transport services. IE: exclude cash in transit, scrutiny reservation on transport of deceased persons.

<sup>33</sup> FR: insert "professions and activities involving participation on a permanent or temporary basis in the exercise of official authority in a Member State" and delete the reference to Article 45 TEC. DE: scrutiny reservation on FR wording. AT: support FR wording and add "such as notaries". FR idea of more specific wording supported by AT, CY, EL, LT, LU, LV, CY, EL, MT, PT, SK exclude notaries, lawyers, bailiffs and tourist guides. SK: exclude executors. NL: reservation notaries, lawyers and services with a medical and ethical dimension. ES: suggest "notaries carrying out tasks of a public nature under national law." LT, MT: exclude notaries and bailiffs. IE, SK: clarify which services fall under Article 45 EC.

**Recital 9:** *Financial services should be excluded from the scope of this Directive since those activities are currently the subject of a specific action plan aimed, as is this Directive, at achieving a genuine internal market for services. ~~Financial services are defined in 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. That Directive defines a financial service as~~ This exclusion concerns any service of a banking, credit, insurance, occupational or personal pension, investment or payment nature, including reinsurance, currency exchange, clearing and settlement systems, securities custodianship and investment advice.*

**Recital 10:** *In view of the adoption in 2002 of a package of legislative instruments relating to electronic communications networks and services, as well as to associated resources and services, which has established a regulatory framework to facilitate access to those activities within the internal market, notably through the elimination of most individual authorisation schemes, it is necessary to exclude issues dealt with by those instruments from the scope of this Directive.*

**Recital 11:** *(new) This Directive does not apply to electronic communications services and networks with respect to matters covered by the Directives adopted as part of the electronic communication regulatory package in 2002. This exclusion from the scope of application applies not only to questions specifically dealt with in these Directives but also to matters for which the Directives explicitly leave the possibility to Member States of adopting certain measures at national level.*

**Recital 12:** *~~Since~~ Transport services, including urban transport, port services, taxis and ambulances are excluded from the scope of this Directive regardless of whether are already covered by a set of Community instruments specific to that field, they should be excluded from the scope of this Directive to the extent that they are regulated by other Community instruments adopted under Articles 71 and 80(2) of the Treaty. However, this Directive applies to services that are not regulated by specific instruments concerning transport However, the transport of, such as cash or valuables in transit or the transport of mortal remains deceased persons are included in the scope of this Directive given that Internal Market problems have been identified in these fields.*

**Recital 12a** (ex Recital 11): *In view of the fact that the Treaty provides specific legal bases for taxation matters and for the Community instruments already adopted in that field, it is necessary to exclude the field of taxation from the scope of this Directive, with the exception, however, of the provisions concerning prohibited requirements and the free movement of services. Harmonisation in the field of taxation has been achieved notably through Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different Member States, Council Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States and Council Directive 2003/49/EC of 3 June 2003 on a common system of taxation applicable to interest and royalty payments made between associated companies of different Member States. The present Directive does not aim to introduce specific new rules or systems in the field of taxation. Its sole objective is to remove restrictions, certain of which are fiscal in nature, and in particular those which are discriminatory, on freedom of establishment and the free movement of services, in accordance with the case law of the Court of Justice of the European Commission, hereinafter "the Court of Justice", with respect to Articles 43 and 49 of the Treaty. The field of value added tax (VAT) is the subject of harmonisation at Community level, in accordance with which service providers carrying out cross border activities may be subject to obligations other than those of the country in which they are established. It is nevertheless desirable to establish a system of "one stop shops" for service providers, in order to enable all their obligations to be fulfilled by means of a single electronic portal to the tax authorities in their home Member State.*

Article 3<sup>34</sup>

**Relationship with other provisions of Community law<sup>35</sup>**

Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.

~~Application of this Directive shall not prevent the application of provisions of other Community instruments as regards the services governed by those provisions.~~

Other Community instruments, in particular those governing specific service activities fully apply<sup>36</sup> and are complemented by this Directive.

In cases not provided for elsewhere in this Directive, where a conflict arises between a provision of the Directive and a provision of another Community instrument existing at the date of adoption<sup>37</sup> of the Directive and which affects the service in question, the provision of the other Community instrument shall prevail. <sup>38 39 40</sup> - -

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<sup>34</sup> All delegations: general reservation on Articles 3 and 4.

<sup>35</sup> BE, CY, DK, FR, IE, NL, SE: all consider that more detail is required on the interaction between the Directive and other Community instruments with minimal clauses.

<sup>36</sup> FR: Reservation on the remainder of this sentence.

<sup>37</sup> AT, DE, DK, FR, IT, MT, PT: delete "existing at the date of adoption". ES: scrutiny reservation. The Presidency believes this matter is clarified by its new Recital 13a.

<sup>38</sup> CLS: of view that new conflict provision will only apply where cumulative application of this Directive and another Community instrument is not possible. Method adopted concerning future instruments merely clarifies that effect is not to pre-judge what the legislator will do in the future.

<sup>39</sup> HU, LV: Scrutiny reservation. HU: Complete with last sentence of Recital 13.

<sup>40</sup> CZ, LU, NL: Reservation, revert to 9350/05 wording. SK: Scrutiny reservation.

**Recital 13:** *There is already a considerable body of Community law on service activities, especially the regulated professions, postal services, television broadcasting, information society services and services relating to travel, holidays and package tours. Service activities are also covered by other instruments which do not deal with a specific category of services, such as those relating to consumer protection. This Directive builds on, and thus complements, the Community acquis. Where a service activity is already covered by one or more Community instruments, this Directive and those instruments will all apply, the requirements laid down by one adding to and complementing those laid down by the others. Accordingly, ~~appropriate provisions should be laid down, including provision for derogations, in order to prevent incompatibilities and to ensure consistency as between all those Community instruments~~<sup>41</sup> Conflicts between the Directive and other Community instruments have been identified and are provided for in the Directive, including by means of derogations. However, it is necessary to provide a rule for any residual and exceptional cases where there is a conflict between a provision of the Directive and a provision of another Community instrument.-The existence of such a conflict should be determined in compliance with the rules of the Treaty on the right of establishment and the free movement of services.*

**Recital 13a:** A conflict between a provision of the Directive and a future Community instrument should be avoided in the drafting and negotiation of such an instrument.<sup>42</sup>

**Recital 13b:** This Directive is consistent with and does not affect Directive EEC/89/552 ("Television Without Frontiers" Directive), including its definition of when a broadcaster is deemed to be established in a Member State, which continues to fully apply. This Directive also does not pre-empt the possible future revision of the "Television Without Frontiers" Directive. Furthermore, it does not affect the specificity of audiovisual services in international negotiations on trade in services.

**Recital 13c:** This Directive is consistent with and does not affect Directive 2005/36/EC on the recognition of professional qualifications<sup>43</sup>. It deals with questions other than those relating to professional qualifications, for example professional indemnity insurance, commercial communications, multidisciplinary activities and administrative simplification. Concerning temporary cross-border service provision, a derogation from the country of origin principle in this Directive ensures that the Title II on the free movement of services of Directive on recognition of professional qualifications is not affected. Therefore, none of the measures applicable in the host Member State under the Directive on recognition of professional qualifications is affected by the country of origin principle.

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<sup>41</sup> DE: Insert that the Directive does not affect Directive 2000/31 within its coordinated field.

<sup>42</sup> AT, DE, MT, PL, PT: Delete this recital.

<sup>43</sup> OJ L 255, 30.9.2005, p. 22.

**Recital 13d** (ex Recital 8): *This Directive is consistent with other current Community initiatives concerning services, particularly those relating to the competitiveness of business-related services, the safety of services<sup>44</sup>, and work on patient mobility and the development of health care in the Community. It is also consistent with current and recent initiatives concerning the internal market, such as the proposal for a Regulation of the European Parliament and of the Council on sales promotions<sup>45</sup> in the internal market<sup>46</sup>, and those concerning consumer protection, such as the ~~proposal for a~~ Directive on unfair commercial practices<sup>47</sup> and the ~~proposal for a~~ Regulation of the European Parliament and of the Council on cooperation between national authorities responsible for the enforcement of consumer protection laws ("the Regulation on consumer protection cooperation")<sup>48 49</sup>.*

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<sup>44</sup> COM (2003) 313 final; OJ C 299, 10.12.2003, p. 1.

<sup>45</sup> FR: delete reference to sales promotion.

<sup>46</sup> COM (2002) 585 final.

<sup>47</sup> COM (2003) 356 final.

<sup>48</sup> COM (2003) 443 final.

<sup>49</sup> EL: Insert reference to travel operators.

## Article 4

### Definitions

For the purposes of this Directive, the following definitions shall apply<sup>50</sup>:

- (1) "service" means any self-employed economic activity, as referred to in Article 50 of the Treaty, consisting in the provision of a service<sup>51</sup> for consideration;
- (2) "provider" means any natural person who is a national of a Member State<sup>52</sup>, or any legal person, as referred to in Article 48 of the Treaty, established in a Member State, who offers or provides a service<sup>53</sup>;
- (3) "recipient" means any natural person who is a national of a Member State<sup>54 55</sup> or legal person, as referred to in Article 48 of the Treaty, established in a Member State who, for professional or non-professional purposes, uses, or wishes to use, a service;<sup>56</sup>
- (4) "Member State of origin" means the Member State in whose territory the provider of the service concerned is established;

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<sup>50</sup> IE: Insert definition of consumer (a person acting outside the scope of his trade, business or profession).

<sup>51</sup> IE: replace "of a service" by "any such activity".

<sup>52</sup> IE: scrutiny reservation on "who is a national of a Member State" in Article 4(2) and Article 4(3).

<sup>53</sup> IE: current text does not take account of third country nationals lawfully resident in a Member State providing services in a Member State as natural rather than legal persons.

<sup>54</sup> AT, EE, HU, LT, LU, LV, NL, PL, PT, SI, SK: delete "who is a national of a Member State". FI: concerns as regard the application of Article 21. IT favours deletion subject to revision of Articles 20-22. Presidency suggests this issue might be dealt with by a recital underlining that Member States remain free to extend the scope of recipient to non-EU nationals in national implementing measures.

<sup>55</sup> IE: Insert "or who is lawfully resident in a Member State".

<sup>56</sup> IE: suggest replacing first line "recipient means any natural person, other than a consumer, who is a national of a Member State or who is lawfully resident in a Member State." And add definition of consumer as "a person acting outside the scope of his trade, business or profession".

- (5) "establishment" means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, through a fixed establishment of the provider for an indefinite period;<sup>57</sup>
- (6) "authorisation scheme" means any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision<sup>58</sup>, concerning access to a service activity or to the exercise thereof;
- (7) "requirement" means any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice or the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy;<sup>59</sup>
- (8) "competent authority" means any body or authority which has a controlling, supervisory or regulatory role in a Member State in relation to service activities, including, in particular, administrative authorities, professional bodies, and those professional associations or other professional organisations which, in the exercise of their legal autonomy, control, supervise or regulate in a collective manner access to service activities or the exercise thereof;

~~(9) (moved to Article 16)~~

~~(10) (moved to Article 23) "hospital care" means medical care which can be provided only within a medical infrastructure and which normally requires the accommodation therein of the person receiving the care, the name, organisation and financing of that infrastructure being irrelevant for the purpose of classifying such care as hospital care;~~

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<sup>57</sup> CZ, MT, PL: insert "the take up and" before "the actual pursuit of an economic activity". IE: redraft to read: " 'establishment' means the actual pursuit of a service, as defined in this Directive, in a fixed premises [or infrastructure] for an indefinite period, or for a definite period where the provider is established for a given period and where he rents the building or installation through which he pursues his activities, or where a Member State grants an authorisation for a limited period in relation to a particular service".

<sup>58</sup> BE, MT, SK: reservation on "or an implied decision".

<sup>59</sup> DE: add "and that is directly and specifically aimed to regulate the supply of a service".



- (11) ~~"Member State of posting" means the Member State in whose territory a provider posts a worker in order to provide services there;~~
- (12) "lawful employment" means the salaried activity of a worker, performed in accordance with the national law of the Member State of origin of the provider;
- (13) "regulated profession" means a professional activity or a group of professional activities as referred to in Article 3(1)(a) of Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications<sup>60</sup>, ~~access to which or pursuit of which, or one of the modes of pursuing which, is conditional, directly or indirectly, upon possession of specific professional qualifications, pursuant to laws, regulations or administrative provisions;~~
- (14) "commercial communication" means any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not in themselves constitute commercial communications:
- (a) information enabling direct access to the activity of the undertaking, organisation or person, including in particular a domain name or an electronic-mailing address;
  - (b) communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration.

**Recital 14:** *The concept of service covers a wide variety of ever-changing activities, including business services such as management consultancy, certification and testing; facilities management, including office maintenance and security; advertising; recruitment services, including employment agencies; and the services of commercial agents. That concept also covers services provided both to businesses and to consumers, such as legal or fiscal advice; real estate services such as estate agencies; construction, including the services of architects; ~~transport; distributive trades~~ wholesaling and retailing, including in relation to goods; the organisation of trade fairs; car rental; travel agencies; and security services. It also covers consumer services, such as those in the field of tourism, including tour guides; audiovisual services; leisure services, sports centres and amusement parks; health and health care services; and household support services, such as help for the elderly. Those activities may involve services requiring the proximity of provider and recipient, services requiring travel by the recipient or the provider and services which may be provided at a distance, including via the Internet.*

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<sup>60</sup> OJ L 255, 30.9.2005, p. 22.

**Recital 15:** *As the Court of Justice has consistently held with regard to Articles 49 et seq of the Treaty, the concept of service covers any economic activity normally provided for remuneration, without the service having to be paid for by those benefiting from it and regardless of the financing arrangements for the remuneration received in return, by way of consideration. Any service whereby a provider participates in the economy, irrespective of his legal status or aims, or the field of action concerned, thus constitutes a service.*

**Recital 16:** *According to the jurisprudence of the Court of Justice, the assessment of whether certain activities, in particular activities which are publicly funded or provided by public entities, constitute a 'service' has to be carried out on a case by case basis in the light of all their characteristics, in particular the way they are provided, organised and financed in the Member State concerned. The Court has held that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the services in question and has recognized that ~~T~~the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State in the context of its ~~duties~~ ~~fulfilment of its~~ in the social, cultural, educational and judicial fields ~~legal obligations~~, such as courses provided under the national education system, or the management of social security schemes which do not engage in economic activity. The payment of a fee by recipients, for example, a teaching or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system does not in itself constitute remuneration<sup>61</sup> because the service is still essentially financed by public funds. These activities are, therefore, not covered by the definition in Article 50 of the Treaty and do not therefore fall within the scope of this Directive.<sup>62</sup>*

**Recital 16a:** *According to the case-law of the Court of Justice, a self-employed economic activity is carried out by legal persons or by natural persons, other than workers within the meaning of Article 39 of the Treaty. This also includes situations where these persons provide a service through their employees.*

**Recital 17:** *This Directive does not concern the application of Articles 28 to 30 of the Treaty relating to the free movement of goods. The restrictions prohibited pursuant to the country of origin principle cover the requirements applicable to access to service activities or to the exercise thereof and not those applicable to goods as such. The Court of Justice has held that the manufacturing of a tangible object, rules concerning products and qualities of goods are matters which fall within the scope of Articles 28 to 30 of the Treaty. Rules concerning extraction of natural resources would similarly fall within the rules on free movement of goods.<sup>63</sup> Agricultural production, forestry and fishing, concerning items listed in Annex I of the Treaty, are not services for the purposes of the Directive.*

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<sup>61</sup> FI: delete the beginning of this sentence and replace by "In cases where the state is providing services in social, health, cultural, educational and judicial fields for no consideration, but a recipient pays a minor fee which is notably lower than the production cost of this service, this fee does not in itself constitute a remuneration".

<sup>62</sup> FI: replace last sentence by "As such, these activities are [...] not covered by the definition in Article 50 of the Treaty and do not therefore fall within the scope of the Directive."

<sup>63</sup> CZ: does not support new text. COM, HU, PL: deletion of text on extraction of natural resources.

**Recital 18:** *The concept of provider covers any natural person who is a national of a Member State or any legal person who is engaged in a service activity there, in exercise either of the freedom of establishment or of the freedom to provide services. The concept of provider is thus not limited solely to cross-border service provision within the framework of the freedom to provide services but also covers cases in which an operator establishes itself in a Member State in order to develop its service activities there. On the other hand, the concept of a provider does not cover the case of branches in a Member State of companies from third countries because, under Article 48 of the Treaty, the freedom of establishment and free movement of services may benefit only companies constituted in accordance with the laws of a Member State and having their registered office, central administration or principal place of business within the Community.*

**Recital 18 a:** *The Treaty provisions on establishment leave economic operators free to choose the legal form which they deem suitable to carrying out their activity. Accordingly, legal persons within the meaning of the Treaty mean all entities constituted under, or governed by, the law of a Member State, irrespective of their legal form.*

**Recital 18 b:** *The place at which a service provider is established should be determined in conformity with the case-law of the Court of Justice according to which the concept of establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. The Court has held that establishment also involves, inter alia, cases where a provider participates, on a stable and continuous basis, in the economic life of the Member State in question and where an activity is carried out without a foreseeable limit to its duration. This requirement is also fulfilled where a company is constituted for a given period or where it rents the building or installation through which it pursues its activity. It may also be fulfilled where a Member State grants authorisations for a limited duration only in relation to a particular service.*

**Recital 18 c:** *An establishment does not need to take the form of a subsidiary, branch or agency, but can consist of an office managed by a provider's own staff or by a person who is independent but authorised to act on a permanent basis for the undertaking, as would be the case with an agency. According to this definition which requires the actual pursuit of an economic activity at the place of establishment of the service provider, a mere letter box does not constitute an establishment.*

**Recital 18 d:** *In cases where a provider has several places of establishment it is important to determine from which place of establishment the actual service concerned is provided; in cases where it is difficult to determine from which of several places of establishment a given service is provided, this is the place where the provider has the centre of his activities relating to this particular service.*

**Recital 19:** *Where an operator travels to another Member State to exercise a service activity there, a distinction should be made between situations covered by the freedom of establishment and those covered, due to the temporary nature of the activities concerned, by the free movement of services. As regards the distinction between the application of the freedom of establishment and the freedom to provide services respectively according to the case-law of the Court of Justice the key element is the question whether the economic operator is established or not in the Member State where he provides the service concerned. If he is established in the Member State where he provides his services, he comes under the scope of application of the freedom of establishment. If by contrast the economic operator is not established in the Member State of destination of the service he is a cross border service provider covered by the freedom to provide services. The Court of Justice has consistently held that the temporary nature of the activities in question must be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodical nature or continuity. In any case, the fact that the activity is temporary does not mean that the service provider may not avail himself of equip himself with some forms of infrastructure in the host Member State, such as an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of providing the<sup>64</sup> service in question.*

**Recital 19a:** *The Court of Justice has consistently held that a Member State retains the right to take measures in order to prevent service providers from abusively taking advantage of the Internal Market principles. Abuse by a provider must be established on a case by case basis.<sup>65</sup>*

**Recital 20:** *The concept of authorisation scheme covers, inter alia, the administrative procedures for granting authorisations, licences, approvals or concessions, and also the obligation, in order to be eligible to exercise the activity, to be registered as a member of a profession or entered in a register, roll or database, to be officially appointed to a body or to obtain a card attesting to membership of a particular profession. Authorisation may be granted not only by a formal decision but also by an ~~implicit~~ implied<sup>66</sup> decision arising, for example, from the silence of the competent authority, or where a provider must notify a competent authority of his intention to commence his service and the competent authority has a given period during which it may object or may remain from the silent ee of the competent authority or from the fact that the interested party must await acknowledgement of receipt of a declaration in order to commence the activity in question or for the latter to become lawful.<sup>67</sup>*

**Recital 21:** *~~The concept of the co-ordinated field covers all requirements applicable to access to service activities and to the exercise thereof, in particular those laid down by the laws, regulations and administrative provisions of each Member State, whether or not they fall within an area harmonised at Community level or are general or specific in nature and regardless of the legal field to which they belong under national law~~*

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<sup>64</sup> MT: insert "temporary".

<sup>65</sup> EE, HU, LU, LT, NL, PL: against inclusion of this recital. AT, DE: deletion of second sentence. BE: wishes further elaboration of this recital in light of the case-law.

<sup>66</sup> BE, MT: reservation on "implied decision".

<sup>67</sup> BE, CY, FI, FR, IE, IT: concerned by link to Article 13(4). BE: exclusion for environmental and building authorisation.

## Chapter II<sup>68</sup>

### Freedom of establishment for service providers

#### SECTION 1

#### ADMINISTRATIVE SIMPLIFICATION

#### Article 5

#### Simplification of procedures

1. Member States shall examine ~~simplify~~ the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined under this paragraph are not sufficiently simple, Member States shall simplify them.
2. Where Member States require a provider or recipient to supply a certificate, attestation or any other document proving that a requirement has been satisfied, they shall 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. They may ~~not~~ only require that a document from another Member State be produced in its original form, or as a certified copy or as a certified translation, ~~save in the cases where such requirements are provided for in other Community instruments or where such a requirement is~~ are objectively justified by an overriding reason relating to the public interest.<sup>69</sup>

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<sup>68</sup> All delegations have a scrutiny reservation on this Chapter. Several delegations pointed out that the provisions of this Chapter are closely linked to the scope of application of this Directive and that their final positions, in particular on Sections 2 and 3, would depend on the outcome of the discussions on the scope. BE, DE, IE, IT, PT, SK: scrutiny reservation on time limits and deadlines set out throughout this Chapter.

<sup>69</sup> DE: reservation on this sentence. Replace “only” by “systematically”. ES: delete “are provided for in other Community instruments”.

3<sup>70</sup>. Paragraph 2 shall not apply<sup>71</sup> to the documents referred to in Article 46 50 of Directive 2005/36/EC of the European Parliament and of the Council<sup>72</sup> on the recognition of professional qualifications or in Article 45(3) of Directive 2004/18/EC of the European Parliament and of the Council on the coordination of procedures for the award of public works, supply and service contracts or in Article 3(2) of the Directive 98/5/EC of the European Parliament and of the Council 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<sup>73</sup> and in Council Directive 68/151/EEC, as amended by Directive 2003/58/EC as regards disclosure requirements in respect of certain types of companies and Council Directive 89/666/EEC concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State<sup>74</sup>.

4. The Commission may, where appropriate and feasible, in accordance with the procedure referred to in Article 42(2), establish harmonised European forms concerning certificates, attestations or other documents required for the establishment of a service provider<sup>75</sup>.

***Recital 22:** One of the fundamental difficulties faced, in particular by SMEs, in accessing service activities and exercising them is the complexity, length and legal uncertainty of administrative procedures. For this reason, following the example of certain modernising and good administrative practice initiatives undertaken at Community and national level, it is necessary to establish principles of administrative simplification, inter alia through the introduction, coordinated at Community level, of a system of single points of contact, limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time has elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the red tape involved in submitting documents, the use of discretionary arbitrary powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. Such practices have particularly significant dissuasive effects on providers wishing to develop their activities in other Member States and require coordinated modernisation within an enlarged internal market of twenty-five Member States.*

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<sup>70</sup> ES, NL, AT, PL, UK: replace the list of instruments by a reference to “EC instruments which include document disclosure requirements”.

<sup>71</sup> PT: insert the word “namely”.

<sup>72</sup> OJ L 255, 30.9.05, p. 22.

<sup>73</sup> OJ L 134, 30.4.2004, p. 114. [~~Proposal for a Directive of the European Parliament and of the Council on the coordination of procedures for the award of public works, supply and service contracts~~]

<sup>74</sup> AT, DE, MT, SE: add a reference to Directive 96/71/EC on posting of workers.

<sup>75</sup> DE, SK: delete “where appropriate and feasible”. DK, UK: consider this paragraph unnecessary.

**Recital 22a:** *In order to examine the need for simplifying procedures and formalities Member States may in particular take into account their necessity, number, possible duplication, costs, clarity, accessibility as well as the delay and practical difficulties that they could give rise to for the service provider concerned.*

**Recital 23:** *In order to facilitate access to service activities and the exercise thereof in the internal market, it is necessary to establish an objective, common to all Member States, of administrative simplification and to lay down provisions concerning, inter alia, single points of contact, the right to information, procedures by electronic means and the establishment of a framework for authorisation schemes. Other measures adopted at national level to meet that objective may involve reduction of the number of procedures and formalities applicable to service activities and the restriction of such procedures and formalities to those which are essential in order to achieve a general interest objective and which do not duplicate each other in terms of content or purpose.*

**Recital 24:** *With the aim of administrative simplification, general formal requirements, such as a certified translation, must not be imposed, except where objectively justified by an overriding reason relating to the public interest, such as the protection of workers. It is also necessary to ensure that an authorisation normally permits access to, or exercise of, a service activity throughout the national territory, unless a new authorisation for each establishment, for example for each new hypermarket, is objectively justified by an overriding reason relating to the public interest, such as protection of the urban environment.*

## Article 6

### Single points of contact

1. Member States shall ensure that, by 31 December 2008 at the latest, it is possible for a service provider to complete the following procedures and formalities at a contact point known as a "single point of contact":
  - (a) all procedures and formalities needed for access to his service activities, in particular, all necessary declarations, notifications or applications for authorisation from the competent authorities, including applications for inclusion in a register, a roll or a database, or for registration with a professional body or association;
  - (b) any applications for authorisation needed to exercise his service activities.
2. Member States may provide for the single points of contact to charge a non-discriminatory, proportionate and reasonable fee related to the activities of the single points of contact under subparagraphs (a) and (b).<sup>76</sup>
3. The creation of single points of contact does not interfere with the allocation of functions or competences among competent authorities within each national system nor the exercise of official authority.
4. The establishment of single points of contact does not prevent direct contacts between service providers and competent authorities.

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<sup>76</sup> PT, SK: delete "non-discriminatory". CZ: delete "under subparagraphs (a) and (b)".



**Recital 25:** *It is appropriate to provide for single points of contact in order to ensure that each provider has a single point at which he can complete all procedures and formalities. The number of single points of contact per Member State may vary according to regional or local competencies or according to the activities concerned. Where several authorities at regional or local level are competent, one of them may assume the role of single point of contact and coordinator. Single points of contact may be set up not only by administrative authorities but also by chambers of commerce or crafts, or by the professional organisations or private bodies to which a Member State decides to entrust that function. Single points of contact have an important role to play in providing assistance to providers either as the authority directly competent to issue the documents necessary to access a service activity or as an intermediary between the provider and the authorities which are directly competent. In its Recommendation of 22 April 1997 on improving and simplifying the business environment for business start-ups<sup>77</sup>, the Commission was already encouraging Member States to introduce points of contact to simplify formalities.*

**Recital 25a:** *The fee which may be charged by single points of contact should be proportionate to the cost of procedures and formalities with which they deal. This does not prevent Member States to entrust the single points of contact with the collection of other administrative fees such as the fee of supervisory bodies.*

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<sup>77</sup> OJ L 145, 5.6.1977, p. 29.

## Article 7

### Right to information<sup>78</sup>

1. Member States shall ensure that the following information is easily accessible to providers and recipients through the single points of contact:
  - (a) requirements applicable to providers established in their territory, in particular those requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities;
  - (b) the contact details of the competent authorities enabling the latter to be contacted directly, including the particulars of those authorities responsible for matters concerning the exercise of service activities;
  - (c) the means of and conditions for accessing public registers and databases on providers and services;
  - (d) the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers;
  - (e) the contact details of the associations or organisations, other than the competent authorities, from which providers or recipients may obtain practical assistance.
2. Member States shall ensure that it is possible for providers and recipients to receive, at their request, assistance from the competent authorities, consisting in information on the way in which requirements referred to in point (a) of paragraph 1 are generally interpreted and applied.
3. Member States shall ensure that the information and assistance referred to in paragraphs 1 and 2 are provided in a clear and unambiguous manner, that they are easily accessible at a distance and by electronic means, and that they are kept-up-to-date.

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<sup>78</sup> FR, UK: Propose a new paragraph in Article 1 stating that this Directive does not affect security vetting requirements which are justified for reasons of national security. CLS considers this addition not necessary as these requirements have to be respected in any case (cf. Article 296 of the Treaty).

4. Member States shall ensure that the single points of contact and the competent authorities respond as quickly as possible to any request for information or assistance as referred to in paragraphs 1 and 2 and, in cases where the request is faulty or unfounded, inform the applicant accordingly without delay.
5. Member States shall implement paragraphs 1 to 4 by 31 December 2008 at the latest.
6. Member States and the Commission shall take accompanying measures in order to encourage single points of contact to make the information provided for in paragraphs 1 and 2 available in other Community languages.

***Recital 25b:*** *The obligation for Member States to ensure that relevant information be easily accessible to providers and recipients can be fulfilled by rendering accessible this information through an Internet web site. The obligation for competent authorities to assist providers and recipients does not require these authorities to provide legal advice in individual cases but concerns only general information on the way in which requirements are usually interpreted or applied. The way in which information is provided to providers and recipients is for each Member State to determine within the framework of the Directive. Issues such as liability for providing incorrect or misleading information are for Member States to determine.*

## Article 8

### Procedures by electronic means

1. Member States shall ensure that, by 31 December 2008 at the latest, all procedures and formalities relating to access to a service activity and to the exercise thereof may be easily completed, at a distance and by electronic means, at the relevant single point of contact and with the relevant competent authorities.
2. Paragraph 1 shall not apply to the inspection of premises on which the service is provided or of equipment used by the provider, or to physical examination of the capability<sup>79</sup> of the provider.
3. The Commission shall, in accordance with the procedure referred to in Article 42(2), adopt detailed rules for the implementation of paragraph 1 with a view to facilitating the interoperability of information systems and use of procedures by electronic means between Member States<sup>80</sup>.

**Recital 26:** *The setting up, in the reasonably near future, of electronic means of completing procedures and formalities will be vital for administrative simplification in the field of service activities, for the benefit of providers, recipients and competent authorities. In order to meet that obligation as to results, national laws and other rules applicable to services may need to be adapted. This obligation does not prevent Member States from, in addition to electronic means, also making available other means of completing such procedures and formalities. The fact that it must be possible to complete those procedures and formalities at a distance means in particular that Member States must ensure that they may be completed across borders. The obligation as to results does not cover procedures or formalities which by their very nature are impossible to complete at a distance.*

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<sup>79</sup> IE, FI: add “or of the character”. NL, UK: add “or to personal examination of the integrity of the provider and/or its employees”.

<sup>80</sup> DE: replace this paragraph by “In order to facilitate the interoperability of information systems and the use of procedures by electronic means the Member States and the Commission should agree on common open standards.”

## SECTION 2

### AUTHORISATIONS

#### Article 9

#### Authorisation schemes

1. Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless all of the following conditions are satisfied:
  - (a) the authorisation scheme does not discriminate against the provider in question;
  - (b) the need for an authorisation scheme is objectively justified by an overriding reason relating to the public interest<sup>81</sup>;
  - (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an *a posteriori* inspection would take place too late to be genuinely effective.
2. In the report referred to in Article 41, Member States shall identify their authorisation schemes and give reasons showing their compatibility with paragraph 1.
3. This section shall not apply to those aspects of authorisation schemes which are governed directly or indirectly ~~either imposed or permitted~~ by other Community instruments<sup>82</sup>.

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<sup>81</sup> BE: delete “by an overriding reason relating to the public interest”.

<sup>82</sup> DE: reservation. Scope of the exemption is insufficient. BE, IT: prefer original wording. DK, IT, UK: replace this paragraph by “This Section shall not apply to authorisation schemes that are either imposed or permitted by Community instruments, whether explicitly or implicitly, or which are reasonable in the circumstances where Member States are permitted to adopt measures by Community instruments the form of which is unspecified.”

**Recital 27:** *The possibility of gaining access to a service activity may be made subject to authorisation by the competent authorities only if that decision satisfies the criteria of non-discrimination, necessity and proportionality. That means, in particular, that authorisation schemes should be permissible only where an a posteriori inspection would not be effective because of the impossibility of ascertaining the defects of the services concerned a posteriori, due account being taken of the risks and dangers which could arise in the absence of a prior inspection. However, the provision to that effect made by this Directive cannot be relied upon in order to justify authorisation schemes which are prohibited by other Community instruments such as Directive 1999/93/EC of the European Parliament and the Council of 13 December 1999 on a Community framework for electronic signatures<sup>83</sup>, or Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the internal market ('Directive on electronic commerce'<sup>84</sup>). The results of the process of mutual evaluation will make it possible to determine, at Community level, the types of activity for which authorisation schemes should be eliminated.*

**Recital 27a:** *Provisions in this Directive relating to authorisation schemes concern cases where the access to or exercise of a service activity by economic operators require a decision by a competent authority. This concerns neither decisions by competent authorities to set up a public or private entity for the provision of a particular service nor the conclusion of contracts by competent authorities for the provision of a particular service which is governed by rules on public procurements.*

**Recital 27b:** *According to the case law of the Court of Justice, public health and social policy objectives constitute overriding reasons relating to the public interest, as referred to in recital 7e, which can justify the application of authorisation schemes and other restrictions applicable to health care or social services.*<sup>85</sup>

**Recital 27c:** *The prohibition of discrimination to which reference is made in certain provisions of this Directive refers to the case law of the Court of Justice in relation to Articles 43 and 49 of the Treaty which requires the abolition of any direct or indirect discrimination on the grounds of nationality or, in the case of companies, the location of the registered office. This includes notably discrimination against a provider or a recipient of services on account of the fact that he is established or resident in a Member State other than the one in which the service is provided. According to the Court's case law the principle of equal treatment, of which Articles 43 and 49 of the Treaty embody specific instances, prohibits not only overt discrimination by reason of nationality or, in the case of a company, its seat, but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result*<sup>86</sup>.

**Recital 27d:** *In order to facilitate access to and exercise of service activities, it is important to evaluate and report on authorisation schemes and their justification. This reporting obligation concerns only the existence of authorisation schemes and not the criteria and conditions for the granting of an authorisation.*

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<sup>83</sup> OJ L 13, 19.1.2000, p. 12.

<sup>84</sup> OJ L 178, 17.7.2000, p.1.

<sup>85</sup> DE, ES: reservation on this Recital.

<sup>86</sup> DK, MT, SK: add a reference to Articles 45 and 46 of the Treaty.

**Conditions for the granting of authorisation<sup>87</sup>**

1. Authorisation schemes shall be based on criteria which preclude the competent authorities from exercising their power of assessment in an arbitrary ~~or discretionary~~ manner.
2. The criteria referred to in paragraph 1 must be<sup>88</sup>:
  - (a) non-discriminatory;
  - (b) objectively justified by an overriding reason relating to the public interest;
  - (c) proportionate to that public interest objective;
  - (d) ~~precise and unambiguous~~ clear<sup>89</sup>;
  - (e) objective;
  - (f) made public in advance.
3. The conditions for granting authorisation for a new establishment shall not duplicate requirements and controls which are equivalent or essentially comparable as regards their purpose, to which the provider is already subject in another Member State or in the same Member State.<sup>90</sup> The contact points referred to in Article 35 and the provider shall assist the competent authority by providing any necessary information on those requirements.

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<sup>87</sup> BE: replace “objectively justified by an overriding reason relating to the public interest” by “within the limits of the Treaty” in paragraphs 2 (b) and 4.

<sup>88</sup> DK: reservation on link with Danish national legislation on television and radio broadcasting.

<sup>89</sup> HU, PL, COM: prefer initial text.

<sup>90</sup> DE: delete “or essentially comparable”. MT, SE, UK: add “except where such requirements and controls are objectively justified for each establishment”. CY, DE, EL, IT, PT, UK: add “It is for the provider to satisfy the competent authority that the requirements are equivalent or essentially comparable”. BE: reservation on “as regards their purpose”.

4. The authorisation shall enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory, including by setting up agencies, subsidiaries, branches or offices, except where an authorisation for each individual establishment or a limitation of the authorisation to a certain part of the territory is objectively justified by an overriding reason relating to the public interest<sup>91</sup>.
5. The authorisation shall be granted as soon as it has been established, in the light of an appropriate examination, that the conditions for authorisation have been met.
6. ~~(moved to Article 13§6b) Any refusal or other response from the competent authorities, including withdrawal of an authorisation, shall be fully reasoned, in particular with regard to the provisions of this Article, and shall be open to challenge before the courts.~~

***Recital 27e:*** The authorisation should normally enable the provider to have access to the service activity, or to exercise that activity, throughout the national territory except if a territorial limit is justified by an overriding reason relating to the public interest. For example, the protection of the urban environment justifies to require an authorisation for each individual physical installation on the national territory. This provision does not affect the regional or local competences for the granting of authorisation within the Member States.

***Recital 27f:*** The provision relating to the non duplication of conditions for the granting of authorisation does not prevent Member States from applying their own conditions which are specified in the authorisation scheme. It only requires that competent authorities, when considering whether these conditions are met by the applicant, take into account the equivalent conditions which have already been satisfied by the applicant in another Member State. This provision does not require the application of the conditions for the granting of authorisation provided in the authorisation scheme of another Member State.

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<sup>91</sup> DE, EL, FR, IT, MT,UK: end sentence after “objectively justified”.



## Article 11

### Duration of authorisation

1. An authorisation granted to a provider shall not be for a limited period, except in cases where:
  - (a) the authorisation is being automatically renewed or is subject only to continued compliance with requirements,<sup>92</sup>
  - (b) the number of available authorisations is limited<sup>93</sup>; or
  - (c) a limited authorisation period can be objectively justified by an overriding reason relating to the public interest<sup>94</sup>.
2. Paragraph 1 shall not concern the maximum period during which the provider must actually commence his activity after receiving authorisation.
3. Member States shall require the provider to inform the relevant single point of contact provided for in Article 6 of ~~any~~ the following changes in his situation which is likely to affect the efficiency of supervision by the competent authority, including, in particular:
  - (a) the creation of subsidiaries whose activities fall within the scope of the authorisation system,
  - (b) ~~or changes in his situation~~ which results in the conditions for authorisation no longer being met, or which affects the accuracy of information available to a recipient.
4. This Article does not affect the possibility for Member States to provide for the withdrawal of authorisations, in particular in cases where the conditions for the granting of the authorisation are no longer met.

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<sup>92</sup> LT, PL: reservation on this indent.

<sup>93</sup> ES, MT, UK: add “for an objectively justified reason”. ES: add two additional indents allowing for exceptions in case the authorisation is related to public service or to personal characteristics of temporary nature.

<sup>94</sup> MT, UK: end sentence after “objectively justified”.

**Selection from among several candidates**

1. Where the number of authorisations available for a given activity is limited because of the scarcity of available natural resources or technical capacity, Member States shall ensure that authorisation schemes are based on ~~apply~~ a selection procedures providing to ~~potential~~ candidates ~~which provides~~ full guarantees of impartiality and transparency, including, in particular, adequate publicity about the launch of the procedure<sup>95</sup>.
2. In the cases referred to in paragraph 1, authorisation must be granted for an appropriate limited period and may not<sup>96</sup> be open to automatic renewal, nor confer any other advantage on the provider whose authorisation has just expired or on any person having any particular links with that provider.

**Recital 28:** *In cases where the number of authorisations available for an activity is limited because of scarcity of natural resources or technical capacity, as may be the position, ~~for example, with regard to the award of analogue radio frequencies or the exploitation of hydro-electric plant,~~ a procedure for selection from among several potential candidates must be adopted, with the aim of developing through open competition the quality and conditions for supply of services available to users. Such a procedure must provide guarantees of transparency and impartiality and the authorisation thus granted must not have an excessive duration, or be subject to automatic renewal, or confer any advantage on the successful provider. In particular, the duration of the authorisation granted must be fixed in such a way that it does not restrict or limit free competition beyond what is necessary to enable the provider to recoup the cost of investment and to make a fair return on the capital invested. ~~Cases where the number of authorisations is limited~~ This provision does not prevent Member States from limiting the number of authorisations for reasons other than scarcity of natural resources or technical capacity. These authorisations remain in any case subject to the other provisions of this Directive relating to authorisation schemes. In addition, Member States are not precluded from adopting rules on the efficient use of resources.*

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<sup>95</sup> ES: add “and its resolution”.

<sup>96</sup> DK, SE: add “if not objectively justified by an overriding reason of general interest”.

## Article 13

### Authorisation procedures

1. Authorisation procedures and formalities shall be clear, made public in advance and such as to provide relevant ~~interested~~ parties with a guarantee that their application will be dealt with objectively and impartially.
2. Authorisation procedures and formalities shall not be dissuasive and shall not unduly complicate or delay the provision of the service. They shall be easily accessible and any charges which the relevant parties may incur from their application shall be proportionate to the cost of the authorisation procedures ~~in question~~ and the functions of the competent authority<sup>97</sup>.
3. Authorisation procedures and formalities shall provide ~~interested~~ relevant parties with a guarantee that their applications will be processed as quickly as possible and, in any event, within a reasonable period which is fixed and published in advance<sup>98</sup>.
4. Failing a response within the time period set in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place in respect of ~~certain~~ specific activities, where objectively justified by overriding reasons relating to the public interest.<sup>99</sup>
5. All applications for authorisation shall be acknowledged as quickly as possible. The acknowledgement must specify the following:
  - (a) the period for response referred to in paragraph 3;
  - (b) the available means of redress;<sup>100</sup>
  - (c) where applicable, a statement that in the absence of a response within the period specified, the authorisation shall be deemed to have been granted.

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<sup>97</sup> ES, HU, LT, COM: prefer original text. ES: add “and shall not exceed the cost of authorisation”.

<sup>98</sup> MT, UK: add “where objectively justified, authorisation procedures and formalities need not have a fixed deadline for response to an application”.

<sup>99</sup> A large majority of delegations: reservation on the substance of this paragraph.

<sup>100</sup> DE: delete (b).

6. In the case of an incomplete application ~~or where an application is rejected on the grounds that it fails to comply with the required procedures or formalities, the persons having an interest in the matter~~ applicants must be informed as quickly as possible of the need to supply any additional documentation<sup>101</sup> and about possible effects on the period for response referred to in paragraph 3.
- (a) Where an application is rejected on the grounds that it fails to comply with the required procedures or formalities, applicants must be informed as quickly as possible of this rejection.
- (b) *(ex Article 10§6)* Except for the case of the granting of an authorisation, any other decision ~~response~~ from the competent authorities, including refusal or withdrawal of an authorisation, Any refusal or other response from the competent authorities including withdrawal of an authorisation, shall be fully reasoned, in particular with regard to the provisions of this Article, and shall be open to challenge before the courts.<sup>102</sup>

***Recital 28a:*** This Directive provides that failing a response within a time period, authorisation shall be deemed to have been granted. However, different arrangements may nevertheless be put in place in respect of certain activities, where objectively justified by overriding reasons relating to public interest. This could be the case for example in respect of health services or for activities which create particular risks for third parties such as private security services.

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<sup>101</sup> EE, SI: Delete sentence after “documentation” and add “The counting of the period for response referred to in paragraph 3 shall start upon the receipt of a complete application.”

<sup>102</sup> CY, EL, LV, PL, PT, COM: this paragraph should also apply in case of granting of an authorisation. MT: add “and other appeal bodies”.

## SECTION 3<sup>103</sup>

### REQUIREMENTS PROHIBITED OR SUBJECT TO EVALUATION

#### *Article 14*

#### **Prohibited requirements<sup>104</sup>**

Member States shall not make access to or the exercise of a service activity in their territory subject to compliance with any of the following:

- (1) discriminatory requirements based directly or indirectly on nationality or, in the case of companies, the location of the registered office, including in particular:
  - (a) nationality requirements for the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies;
  - (b) a requirement that the provider, his staff, persons holding the share capital or members of the provider's management or supervisory bodies be resident within the territory.
- (2) a prohibition on having an establishment in more than one Member State or on being entered in the registers or enrolled with professional bodies or associations of more than one Member State;
- (3) restrictions on the freedom of a provider to choose between a principal or a secondary establishment, in particular an obligation on the provider to have his principal establishment in their territory, or restrictions on the freedom to choose between establishment in the form of an agency, branch or subsidiary;
- (4) conditions of reciprocity with the Member State in which the provider already has an establishment, save in the case of conditions of reciprocity provided for in Community instruments concerning energy;

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<sup>103</sup> BE, DK, EL, IT, MT: reservation on the compatibility of Articles 14 and 15 with Article 46 of the Treaty. FI: specific reservation on Article 14 (1), (3) and (5) as well as on Article 15 (2)a, (2)b and (2)e with regard to pharmacies.

<sup>104</sup> FR: delete paragraphs (5) and (6) as well as Recital 32.

- (5) the case-by-case application of an economic test making the granting of authorisation subject to proof of the existence of an economic need or market demand, or an assessment of the potential or current economic effects of the activity, or an assessment of the appropriateness of the activity in relation to the economic planning objectives set by the competent authority. This prohibition does not concern planning requirements which are not of an economic nature but pursue overriding reasons relating to the public interest,<sup>105</sup>
- (6) the direct or indirect involvement of competing operators, including within consultative bodies, in the granting of authorisations or in the adoption of other decisions of the competent authorities, with the exception of professional bodies and associations or other organisations acting as the competent authority;<sup>106</sup>
- (7) an obligation to provide or participate in a financial guarantee, or to take out insurance, from a service-provider or body which is established in their territory. This does not affect the possibility for Member States to require financial guarantees or insurance as such nor does it affect requirements relating to the participation in a collective compensation fund, for instance for members of professional bodies or organisations;<sup>107</sup>
- (8) an obligation to have been pre-registered ~~entered, for a given period~~ in the registers held in their territory or to have previously exercised the activity ~~for a given period~~ in their territory.<sup>108</sup>

**Recital 30:** *In order to establish a genuine internal market for services, it is necessary to abolish any restrictions on the freedom of establishment and the free movement of services which are still enshrined in the laws of certain Member States and which are incompatible with Articles 43 and 49 of the Treaty respectively. The restrictions to be prohibited particularly affect the internal market for services and should be systematically dismantled as soon as possible.*

<sup>105</sup> DE, ES: reservation on last sentence. UK: replace the last sentence by “This provision does not concern tests or planning requirements which are objectively justified by an overriding reason of general interest”.

<sup>106</sup> MT, UK: add “Paragraph 6 shall not preclude consulting competing operators provided that the outcome of a consultation is not determinative of an authorisation or other decision”.

<sup>107</sup> UK: add “or in relation to motor insurance schemes”. ES: end sentence after “as such”.

<sup>108</sup> ES: reservation concerning the link with Directives 77/249/EEC and 98/5/EC.

**Recital 31:** *The Court of Justice has consistently held that the freedom of establishment is predicated, in particular, upon the principle of equal treatment, which entails the prohibition not only of any discrimination on grounds of nationality but also of any indirect discrimination based on other grounds but capable of producing the same result. Thus, access to a service activity or the exercise thereof in a Member State, either as a principal or secondary activity, may not be made subject to criteria such as place of establishment, residence, domicile or principal provision of the service activity. Similarly, a Member State may not restrict the legal capacity or the right to bring legal proceedings of companies incorporated in accordance with the law of another Member State on whose territory they have their primary establishment. Moreover, a Member State may not confer any advantages on providers having a particular national or local socio-economic link; nor may it restrict, on grounds of place of establishment, the provider's freedom to acquire, exploit or dispose of rights and goods or to access different forms of credit or accommodation in so far as those choices are useful for access to his activity or for the effective exercise thereof.*

**Recital 32:** *The prohibition of economic tests as a prerequisite for the grant of authorisation covers economic tests as such, but not requirements which are objectively justified by overriding reasons relating to the public interest such as those referred to in Recital 7e, such as protection of the urban environment, including in the area of pharmaceutical distribution systems. That prohibition does not affect the exercise of the powers of the authorities responsible for applying competition law. The prohibition of direct or indirect involvement of competing operators in the granting of authorisations does not concern the consultation of organisations such as chambers of commerce on matters other than individual applications for authorisation.*

**Recital 32a:** *With respect to financial guarantees or insurance, the prohibition of requirements only concerns the obligation that the requested financial guarantees or insurance must be from a financial institution established in the Member State concerned.*

**Recital 32b:** *With respect to pre-registration, the prohibition of requirements only concerns the obligation that the provider was prior to the establishment pre-registered for a given period in a register held in the Member State concerned.*

**Requirements to be evaluated**

1. Member States shall examine whether, under their legal system, any of the requirements listed in paragraph 2 are imposed and shall ensure that any such requirements are compatible with the conditions laid down in paragraph 3. Member States shall adapt their laws, regulations or administrative provisions so as to make them compatible with those conditions.
2. Member States shall examine whether their legal system makes access to a service activity or the exercise of it subject to compliance with any of the following ~~non-discriminatory~~ requirements:
  - (a) quantitative or territorial restrictions to the access to a service activity, in particular in the form of limits fixed according to population, or of a minimum geographical distance between service-providers;
  - (b) an obligation on a provider to take a specific legal form, in particular to be a legal person, to be a company with individual ownership, to be a non-profit making organisation or a company owned exclusively by natural persons;
  - (c) requirements which relate to the shareholding of a company, in particular an obligation to hold a minimum amount of capital for certain service activities or to have a specific professional qualification in order to hold capital in or to manage certain companies;
  - (d) requirements, other than those concerning professional qualifications or provided for in other Community instruments, which reserve access to the service activity in question to particular providers by virtue of the specific nature of the activity;
  - (e) a ban on having more than one establishment in the territory of the same State;
  - (f) requirements fixing a minimum number of employees;



- (g) fixed minimum and/or maximum tariffs with which the provider must comply;<sup>109</sup>
  - (h) prohibitions and obligations with regard to selling below cost and to sales;<sup>110</sup>
  - (i) requirements that an intermediary provider must allow access to certain specific services provided by other service-providers;<sup>111</sup>
  - (j) an obligation on the provider to supply other specific services jointly with his service.<sup>112</sup>
3. Member States shall verify that requirements referred to in paragraph 2 satisfy the following conditions:
- (a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality or, with regard to companies, according to the location of the registered office;
  - (b) necessity: requirements must be objectively justified by an overriding reason relating to the public interest;<sup>113</sup>
  - (c) proportionality: requirements must be suitable for securing the attainment of the objective pursued; they must not go beyond what is necessary to attain that objective; and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result.

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<sup>109</sup> DE, IT: reservation on (g). FR: delete (g).

<sup>110</sup> CY, DE, EL, FR, IT, PT: delete (h). IE: scrutiny reservation. NL: selling below cost should not apply to alcohol.

<sup>111</sup> CY, DE, FR, PT: delete (i).

<sup>112</sup> LT, SK: add new (k): “any unreasonable restrictions on opening hours of service providers”.

<sup>113</sup> MT: scrutiny reservation on burden in case of specific geographical situations.

4. In the mutual evaluation report provided for in Article 41, Member States shall specify the following:
- (a) the requirements that they intend to maintain and the reasons why they consider that those requirements comply with the conditions set out in paragraph 3;
  - (b) the requirements which have been abolished or made less stringent.
5. From the date of entry into force of this Directive, Member States shall not introduce any new requirement of a kind listed in paragraph 2, unless that requirement satisfies the conditions laid down in paragraph 3, ~~and the need for it arises from new circumstances.~~
6. Member States shall notify to the Commission any new<sup>114</sup> laws, regulations or administrative provisions which set requirements as referred to in paragraph 5, together with the reasons for those requirements, except if these requirements result from international agreements<sup>115</sup>. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall not prevent the adoption by Member States of the provisions in question.

Within a period of 3 months from the date of notification, the Commission shall examine the compatibility of any new requirements with Community law and, as the case may be, shall ask the Member State in question to take the necessary measures to modify the envisaged or adopted new requirements in order to ensure their compatibility with Community law. ~~adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them.~~

The notification of a draft national law in accordance with Directive 98/34/EC as amended by Directive 98/48/EC will at the same time fulfil the obligation of notification provided for in this Directive<sup>116</sup>.

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<sup>114</sup> CZ, EE, EL, PL, SK: replace “new” by “draft”.

<sup>115</sup> CZ, DE, EL, FI, HU, PL, UK: add “or other Community instruments”. DE: local authorities should not be subject to notification obligations. DE: add “or measures taken to implement a ruling by the Court of Justice of the EC”.

<sup>116</sup> FR: reservation on paragraph 6 and Recital 36a. DE: add after “98/48/EC”: “or other Community instruments”.

**Recital 33:** *In order to coordinate the modernisation of national rules and regulations in a manner consistent with the requirements of the internal market, it is necessary to evaluate certain non-discriminatory national requirements which, by their very nature, could severely restrict or even prevent access to an activity or the exercise thereof under the freedom of establishment. This evaluation process is limited to the compatibility of these requirements with the criteria already established by the Court of Justice on the freedom of establishment. It does not concern the application of Community competition law. Member States must ensure, during the transposition period of this Directive, that such requirements are necessary and proportionate and, where appropriate Where such requirements are discriminatory or not objectively justified by an overriding reason relating to the public interest, as referred to in recital 7e, or where they are disproportionate, they must be abolished or amended ~~them~~. The outcome of this assessment will be different according to the nature of the activities and the public interest concerned. In particular, according to the jurisprudence of the Court of Justice, such requirements could be fully justified when they pursue public health or social policy objectives. Moreover, those requirements must in any case be compatible with Community competition law.*

**Recital 33a:** *The mutual evaluation process provided for in this Directive does not affect the freedom of Member States to fix in their legislation a high level of protection of public interests, in particular for achieving health, including patient safety, and social policy objectives. Furthermore, the mutual evaluation process has to take fully into account the specificity of services of general economic interest and of the particular tasks assigned to them. These may justify certain restrictions to the freedom of establishment in particular where these pursue the protection of public health and social policy objectives. For example, concerning the obligation to take a specific legal form in order to exercise certain services in the social field, the Court has already recognised that it can be justified to submit the service provider to a requirement to be non profit making.*

**Recital 34:** *The restrictions to be examined include national rules which, on grounds other than those relating to professional qualifications, reserve access to activities such as ~~games of chance testing or surveying~~ to particular providers. Similarly, among the requirements to be examined are "must carry"<sup>117</sup> rules applicable to cable operators which, by imposing an obligation on an intermediary service provider to give access to certain services delivered by specific service providers, affect his freedom of choice, access to programmes and the choice of the recipients. The evaluation of the compatibility of fixed minimum and/or maximum tariffs with the freedom of establishment concerns only tariffs imposed by competent authorities specifically for the provision of certain services and not, for example, general rules on price determination such as for the renting of houses.*

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<sup>117</sup> DE, FR, PT: delete the reference to “must carry” rules.

**Recital 34a:** The mutual evaluation process means that during the transposition period, Member States will first have to conduct a "screening" of their legislation in order to ascertain whether above mentioned requirements exist in their legal systems and, at the latest by the end of the transposition period, Member States must draw up a report on the results of their screening. Each report will be submitted to all other Member States and interested parties. Member States will then have six months in which to submit their observations on these reports. At the latest by 31 December 2008, the Commission will draw up a summary report, accompanied where appropriate by proposals for further initiatives. If necessary the Commission, in cooperation with the Member States, will assist the Member State in order to design a common methodology.

**Recital 36:** *The fact that this Directive specifies a number of requirements to be abolished or evaluated by the Member States during the transposition period is without prejudice to any infringement proceedings against a Member State for failure to fulfil its obligations under Articles 43 or 49 of the Treaty.*

**Recital 36a:** In the event of an extension of the scope of application of Directive 98/34/EC to services other than information society services, the notification procedure provided for in that Directive will, for the services concerned, replace the obligation of notification provided for in this Directive.

## Chapter III<sup>118</sup>

### Free movement of services

#### SECTION 1<sup>119</sup>

##### COUNTRY OF ORIGIN PRINCIPLE AND DEROGATIONS

###### *Article 16*

###### Country of origin principle

(1) *new*: This Article is without prejudice to the derogations in Articles 17 to 19.

(1A) Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.<sup>120</sup>

(1B) *new*: "Coordinated field" means any requirement applicable to access to service activities, or to the exercise thereof.

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<sup>118</sup> All Member States: general reservation on Articles 16-19.

<sup>119</sup> FR, PT, BE, EL and DK have a substantive reservation on Articles 16 to 19. DK, PT, FR and EL question the country of origin principle as such. FR considers that these Articles are not acceptable as currently worded and as the balance now stands in the proposal for a Directive. FR reservation concerning the omission of certain justifications and restrictions recognised by ECJ and general reservation on structure of Articles 16 to 19. BE could accept the country of origin principle on condition that the proposal for a Directive is amended to make the service provider subject to certain rules identical to those of the Member State in which the service is actually provided, relating to access to and the exercise of a service activity and relating to control (for the purposes of protection of employees and of those seeking employment, protection of consumers and service clients, protection of public health and the environment, as well as for purposes of public policy).

<sup>120</sup> DE, IE, MT, NL: (the latter supported by HU) all suggest different formulations for what is covered or not covered by the concept of coordinated field.

(1C) *new*: The coordinated field ~~Paragraph 1~~ shall cover, ~~national provisions relating to access to and the exercise of a service activity~~, in particular<sup>121</sup> those requirements governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider's liability.

122 123 124 125 126 127 128

(1D) *new*: The coordinated field shall not cover:<sup>129 130</sup>

- (a) provisions applicable to individual acts of service providers or their employees, which are not committed in the ordinary course of providing a service, but on the occasion of the service provision;
- (b) criminal provisions of the Member State to which a provider moves, applicable to individual acts of service providers or their employees, which do not specifically regulate [or specifically affect]<sup>131</sup> access to and exercise of a service activity; or<sup>132</sup>

<sup>121</sup> CY, FR, IT, NL, PT: delete "in particular". COM, LV, PL: oppose.

<sup>122</sup> FR, PT: derogate "advertising, contracts and provider's liability."

<sup>123</sup> AT, DE, DK, EL, FI, IT: derogate matters covered by Rome Convention. COM, LT, LU, LV: oppose. FI: information on the content of a contract should be regarded as a contractual obligation.

<sup>124</sup> AT, CZ, DE, DK, EL: derogate matters covered proposed Rome II Regulation. COM, LT, LU, LV: oppose. DE: scrutiny reservation on law on unfair competition including advertising, also could be dealt with in Article 18.

<sup>125</sup> CY, IT, SI, SK: delete "contracts and provider's liability" and replace with "It shall not, however, affect the rules determining the law applicable to contractual and non-contractual obligations." MT: support, but replace "obligations" with "liabilities". COM, IE, LU, LT, LV oppose. FI: Whether advertising is legal should be determined according to the law of the country of origin. If advertising is unlawful according to the law of the country of origin, then the question of compensation for damage caused should be determined according to the rules of private international law.

<sup>126</sup> NL: propose country of origin principle to apply in field of private international law to business to business relations only and furthermore in relation to non-contractual private international law obligations to unfair competition only. SI: oppose.

<sup>127</sup> SE: reservation on the application of rules determining the law applicable to contractual and non-contractual obligations.

<sup>128</sup> FR: add "Member States may apply their national rules on criminal law and criminal proceedings within the coordinated field."

<sup>129</sup> New text, Member States have not had an opportunity to comment.

<sup>130</sup> PT: opposes defining the coordinated field in negative terms.

<sup>131</sup> UK: delete text in square brackets.

<sup>132</sup> LV: prefers "specifically".

- (c) other requirements which do not either specifically regulate or specifically affect access to or exercise of a service activity
- (2) The Member State of origin, in accordance with Article 34 and in relation to matters falling within the co-ordinated field, shall be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State.
- (3) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide services in the case of a provider established in another Member State, in particular, by imposing any of the following requirements:
- (a) an obligation on the provider to have an establishment in their territory;
  - (b) an obligation on the provider to make a declaration or notification to, or to obtain an authorisation from, their competent authorities, including entry in a register or registration with a professional body or association in their territory;<sup>133</sup>
  - (c) an obligation on the provider to have an address or representative in their territory or to have an address for service at the address of a person authorised in that territory;<sup>134</sup>
  - (d) a ban on the provider setting up ~~a certain~~ the necessary infrastructure for temporary service provision in their territory, including an office or chambers, which the provider needs to supply the services in question;
  - (e) an obligation on the provider to comply with requirements, relating to the exercise of a service activity, applicable in their territory;<sup>135</sup>
  - (f) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;

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<sup>133</sup> CZ, FR, MT, PT: concerns about Article 24(1)(b) to be reflected here also. SE: concerns about environmental authorisations. SE: concerns about private security services. IT: delete "entry in a register ... in their territory"; COM: opposes.

<sup>134</sup> CY, DK, FI, FR, MT: concerns about Article 24(1)(c) to be dealt with here also. SE: supported by MT, SI: propose "an obligation on the provider to have an address or representative in their territory or to have an address for service at the address of a person authorised in that territory; this does not prevent requirements on the service provider who posts workers into their territory to designate one of the workers or another person in that territory to represent the service provider for the duration of the service provision."

<sup>135</sup> FR, IT, PT, SK: add "except for requirements justified by the public interest".

- (g) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
  - (h) requirements which affect the use of equipment which is an integral part of service provided;<sup>136</sup>
  - (i) restrictions on the freedom to provide the services referred to in Article 20, the first subparagraph of Article 23(1) or Article 25(1).
- (4)<sup>137</sup> **138**

**Recital 37:** *In order to secure effective implementation of the ~~free movement of~~ freedom to provide services and to ensure that recipients and providers can benefit from and supply services throughout the Community regardless of frontiers, it is necessary to establish the principle that a provider may be subject only to the law of the Member State in which ~~he is established~~ the place of establishment, through which the service concerned is provided, is located. According to the definition of establishment this requires that the service provider actually pursues an economic activity through a fixed establishment in this Member State. The principle is essential in order to enable providers, especially SMEs, to avail themselves with full legal certainty of the opportunities offered by the internal market. By thus facilitating the free movement services between Member States, ~~the~~ principle, together with harmonisation and mutual assistance measures, also enables recipients to gain access to a wider choice of high quality services from other Member States. ~~The~~ principle should be complemented by an assistance mechanism enabling the recipient, in particular, to be informed about the laws of the other Member States, and by the harmonisation of rules on the transparency of service activities.*

**Recital 37a new (ex Recital 21):** *The concept of the coordinated field covers all requirements applicable to access to service activities and to the exercise thereof, in particular those laid down by the laws, regulations and administrative provisions of each Member State, whether or not they fall within an area harmonised at Community level or are general or specific in nature and regardless of the legal field to which they belong under national law. However the coordinated field does not include requirements which do not concern the service activity or the service provider as such. Thus requirements which do not specifically regulate or specifically affect the service provider do not fall within the coordinated field. This is because they have to be respected by service providers in course of carrying out their economic activity in the same way as by individuals acting in their private capacity. Examples of such requirements include, road traffic rules, rules concerning the development or use of land, including town and country planning, and building regulations or standards, and concerning the protection of buildings of special architectural or historical interest.*<sup>139</sup>

<sup>136</sup> PT: should only apply to discriminatory and disproportionate rules.

<sup>137</sup> SE, supported CY, DK: propose wording on Member States ability to carry out checks and inspections and ability to apply certain rules justified by public interest. LV: opposes.

<sup>138</sup> DE: exclude public procurement rules.

<sup>139</sup> DE: add plant protection law.



**Recital 37b new:** *In relation to criminal law the coordinated field does not cover general rules of criminal law, because they have to be respected by service providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity. Only requirements that concern the economic activity of the service provider would fall under the coordinated field. Criminal offences which specifically affect, even if they do not necessarily specifically regulate, service activities are to be found, for example, in the areas of advertising, unfair competition or data protection. Examples of rules of criminal law which do not specifically regulate or specifically affect service providers would be criminal offences of causing damage to property or violations of speed limits. Although these rules might have a particular impact on service activities such as demolition services or services relying on road transport, they apply to the service provider in the same way as to any member of the public. In the same way, the law applicable to individual acts of service providers or their employees, including criminal acts, does not fall within the coordinated field when they are not committed in the course of providing a service but on the occasion of the service provision. An example of such an act would be where a provider uses the opportunity of providing his service to commit a theft.*

**Recital 38:** *Except for cases where a derogation under Articles 17 or 18 applies, it is also necessary to ensure that supervision of service activities is carried out by the Member State where the establishment of the provider providing the service is located at source, that is to say, by the competent authorities of the Member State in which the place of establishment, through which the service is provided, is located provider is established. The competent authorities of the Member State-country of origin are best placed to ensure the effectiveness and continuity of supervision of the provider and to provide protection for recipients not only in their own Member State but also elsewhere in the Community. However, this responsibility does not imply that the authorities of the Member State of origin must themselves carry out checks and controls on the territory of the Member State where the service is provided; such measures shall be taken by the authorities of the Member State where the service is provided pursuant to the mutual assistance obligations and the partnership between national authorities established in this Directive. In order to establish mutual trust between Member States in the regulation of service activities, it should be clearly laid down that responsibility under Community law for supervision of the activities of providers, regardless of the place where the service is provided, lies with the Member State of origin. Determination of judicial Court jurisdiction does not fall within the scope of this Directive. Jurisdiction of Courts in civil matters is dealt with in but within that of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>140</sup>, or other Community instruments such as 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<sup>141</sup>.*

**Recital 39:** *As a corollary to the principle that the law of the country of origin should apply and that the country of origin should be responsible for supervision, it is necessary to lay down the principle that Member States may not restrict services coming from another Member State.*

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<sup>140</sup> OJ L 12, 16.1.2001, p. 1. Directive as last amended by the Act of Accession 2003.

<sup>141</sup> OJ L 18, 21.1.1997, p. 1.

**Recital 39a (new):** Except for cases where a derogation under Articles 17-19 applies, it is necessary to ensure that service providers are able to take equipment which is integral to the provision of their service with them when they travel to provide services in another Member State. In particular, it is important to avoid cases in which the service could not be provided without the equipment, situations in which service providers incur additional costs, for example, by hiring or purchasing different equipment to that which they habitually use or by needing to change significantly the way they habitually carry out their activity.

**Recital 39b (new)** This concept of equipment does not refer to physical objects which are either supplied by the provider to the client or become part of a physical object as a result of the service activity (for example, building materials or spare parts) or consumed or left in situ in the course of the service provisions (for example, combustible fuels, explosives, fireworks, pesticides, poisons or medicines).

### General derogations from the country of origin principle

Articles 16, 20, 34 and 35 shall not apply to the following:

- (1) in the postal sector, postal services covered by ~~within the meaning of point (1) of Article 2 of Directive 97/67/EC of the European Parliament and the Council;~~<sup>143</sup>
  - (2) in the electricity sector, transmission, distribution and supply services covered by ~~within the meaning of points (3), (5) and (19) of Article 2 of Directive 2003/54/EC of the European Parliament and of the Council;~~<sup>144</sup>
  - (3) in the gas sector, services covered by gas transmission, distribution, supply and storage services within the meaning of points (3), (5) and 19 of Article 2 of Directive 2003/55/EC of the European Parliament and of the Council;<sup>145</sup>
  - (4) water distribution and supply services and waste water services;<sup>146</sup>
  - (5) ~~as regards the terms and conditions of employment concerning workers within the meaning of Directive 96/71/EC, matters covered by that Directive and, in relation to their other terms and conditions of employment, the Rome Convention on the law applicable to contractual obligations;~~<sup>147</sup> 148
- (5a) *new*: requirements concerning health and safety at work;
- (5b) *new*: terms and conditions of work and employment concerning workers recruited in the Member State where the service is provided;

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<sup>142</sup> IT: no need for references to sectoral instruments, by virtue of Article 3, recital would suffice.  
COM, LV: oppose.

<sup>143</sup> OJ L 15, 21.1.1998, p. 14.

<sup>144</sup> OJ L 176, 15.7.2003, p. 37.

<sup>145</sup> OJ L 176, 15.7.2003, p. 57.

<sup>146</sup> DE: add waste management services.

<sup>147</sup> DE: add "including the regulations to implement the legal or administrative provisions of Art 3 of Directive 96/71/EC". LV: opposes.

<sup>148</sup> EE, HU, LT, LV, PL: against.

- (6) as regards data protection, matters covered by Directive 95/46/EC of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data;<sup>149</sup>
- (7) as regards lawyers, matters covered by Council Directive 77/249/EEC to facilitate the effective exercise by lawyers of freedom to provide services;<sup>150 151</sup>
- (8) as regards professional qualifications, matters covered by Title II<sup>152</sup> ~~the provisions of Article [...]~~ of Directive 2005/36/EC on the recognition of professional qualification;
- (9) as regards social security, the provisions of Regulation (EEC) No 1408/71[(EC) No 883/2004] of the European Parliament and of the Council on the coordination of social security systems<sup>153</sup> determining the applicable legislation;<sup>154 155</sup>
- (10) as regards administrative formalities concerning the free movement of persons and their residence, the provisions of Directive 2004/38/EC of the European Parliament and the Council on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC<sup>156</sup> that lay down the administrative formalities that beneficiaries must undertake before the competent authorities of the host Member States;
- (11) as regards ~~in the case of posting~~ third country nationals who move to another Member State in the context of the provision of a service, ~~the requirements referred to in Article 25(2) for a short stay visa imposed by the Member State of posting, subject to the conditions set out in Article 25(2)~~;<sup>157</sup>

<sup>149</sup> OJ L 281, 28.11.1995, p. 1.

<sup>150</sup> OJ L 78, 26.3.1997, p. 17.

<sup>151</sup> CY, EL, MT: extend to all types of legal services. LV: opposes. LU: clarify that Directive 98/5/EC is not affected by this Chapter. BE: concerns about legal professions.

<sup>152</sup> DE: add reference to "Title IV". COM, LV: oppose. FR, PT: exclude all of Directive 2005/36/EC.

<sup>153</sup> OJ L 166, 30.4.2004, p.1.

<sup>154</sup> NL: reservation concerning liability of sub-contractors for social security payments.

<sup>155</sup> EL, FR: reservation

<sup>156</sup> OJ L 158, 30.4.2004, p.77.

<sup>157</sup> EL, FR: reserve on link to Article 25. AT delete reference to Article 25(2).

- (12) as regards the shipment of waste, matters covered by the authorisation scheme provided for in Articles 3 and 4 of Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community;<sup>158 159</sup>
- (13) copyright, neighbouring rights, rights covered by Council Directive 87/54/EEC<sup>160</sup> and by Directive 96/9/EC of the European Parliament and of the Council<sup>161</sup> as well as industrial property rights, including plant varietal rights;<sup>162 163 164</sup>
- (14) actions requiring by law the involvement of a notary;<sup>165</sup>
- (15) statutory audit;<sup>166</sup>
- (16) services which, in the Member State to which the provider moves temporarily in order to provide his service, are prohibited covered by a total when this prohibition which is justified by reasons relating to public policy<sup>167</sup> (including the protection of minors, vulnerable adults and human dignity), public security or for the protection of public health, animals or the environment;<sup>168 169</sup>
- (17) specific requirements of the Member State to which the provider moves, with which compliance is indispensable<sup>170</sup> for reasons<sup>171</sup> of public policy (including the protection of minors, vulnerable adults and human dignity) or public security or for the protection of public health, animals or the environment,<sup>172 173</sup> which are directly linked to:

<sup>158</sup> OJ L 30, 6.2.1993, p. 1.

<sup>159</sup> CZ: start sentence "As regards, waste management, the collection, disposal, and the recovery of waste".

<sup>160</sup> OJ L 24, 27.1.1987, p. 36.

<sup>161</sup> OJ L 77, 27.3.1996, p. 20.

<sup>162</sup> DE, FR: collecting societies should be excluded in Article 2. ES, FI, SE: reservation on collecting societies. IE: start paragraph "As regards the provision of the service involving".

<sup>163</sup> AT, FI, NL: add reference to collecting societies. COM, LV: oppose.

<sup>164</sup> PT: add "as well as subjects which merit protection under unfair competition rules".

<sup>165</sup> AT, CY, EL, ES FR, LT, MT, PT, SI, SK: wish notaries to be excluded in Article 2. FR, LU: not only notaries but also ministerial officers.

<sup>166</sup> CZ, SE: add reference to 8th Company Law Directive.

<sup>167</sup> SE: clarify that public policy includes prevention, investigation, detection and prosecution of criminal offences.

<sup>168</sup> AT, DE, CY, DK, MT, SE: add consumer protection.

<sup>169</sup> PT, SE: add "totally or partially".

<sup>170</sup> DE, FR, SE: reservation on term "indispensable".

<sup>171</sup> FR, MT and SE: refer to overriding reasons relating to the public interest.

<sup>172</sup> FR, IT, SE, UK: delete to the end of the paragraph. LT: opposes.

<sup>173</sup> SE: add consumer protection and safety of services.

- (a) the particular characteristics of the location or place<sup>174</sup> where the service is provided,
- (b) the particular risk created by the service at the place where the service is provided,
- (c) the particular risk created by the service provider at the place where the service is provided,<sup>175</sup> or
- (d) the imposition of reporting obligations on a service provider regarding specific cases of which the provider becomes aware in the course of the service provision;<sup>176 177</sup> specific requirements of the Member State to which the provider moves, that are directly linked to the particular characteristics of the place where the service is provided, and with which compliance is indispensable for reasons of public policy or public security or for the protection of public health,, or the environment;
- (18) the authorisation system applicable to the reimbursement of hospital care;<sup>178 179</sup>
- (19) the registration of vehicles leased in another Member State;
- (20) the freedom of parties to choose the law applicable to their contract<sup>180 181</sup>
- (21) ~~contracts for the provision of services concluded by consumers to the extent that the provisions governing them are not completely harmonised at Community level;~~<sup>182 183</sup>

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<sup>174</sup> DE, DK, FR: reserve on "at the place" in (a), (b) and (c).

<sup>175</sup> CY, DE, EL, ES, IE: reservation.

<sup>176</sup> DK: require derogation for reporting of infectious diseases. UK: require derogation for reporting of suspicion of money laundering. EE, HU, PL: oppose addition of reporting obligations. NL: scrutiny reservation.

<sup>177</sup> CZ, EE, IT, HU, MT, PL: (with addition of public safety): prefer previous text.

<sup>178</sup> NL: add "as defined in Article 23."

<sup>179</sup> Request to delete derogation by Member States wishing to remove health care from the Directive (cf Article 23).

<sup>180</sup> AT, CZ, DE, DK, EL, FI, PT: delete Article 17 (20) -17(23).

<sup>181</sup> NL: add "or to their non-contractual obligations".

<sup>182</sup> LU: reservation on deletion of last part of 21.

<sup>183</sup> IE: cross reference to Article 44 to clarify that consumer redress under the country of origin principle is dealt with by mutual assistance.

- (22) the formal validity of contracts creating or transferring rights in immovable property, where contracts are subject, under the law of the Member State in which the property is located, to imperative formal requirements,<sup>184</sup>
- (23) the non-contractual liability of a provider in the case of an accident causing bodily injury or physical damage to property involving a person and occurring as a consequence of the service provider's activities<sup>185</sup> in the Member State to which he has moved temporarily.
- (24) healthcare and social care services.<sup>186</sup>
- (25) <sup>187 188 189 190 191 192 193 194 195 196 197 198</sup>

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<sup>184</sup> SE: concerns about consumer protection.

<sup>185</sup> HU: derogate all non-contractual liability, except advertising and unfair competition.

<sup>186</sup> NL: opposes addition of healthcare and social care services.

<sup>187</sup> PT: derogate certification and accreditation services. DE exclude non-harmonised certification, accreditation, and conformity assessment services.

<sup>188</sup> FI: derogate agencies charging jobseekers, in line with ILO Convention 181.

<sup>189</sup> CY, ES, LU: derogate private security services. LV, NL oppose. BE, FI: concerns.

<sup>190</sup> ES derogate services provided at nuclear installations and services linked to nuclear energy.

<sup>191</sup> CY, MT, UK: derogation needed for explosives and weapons, DE, IE support. ES support in relation to explosives.

<sup>192</sup> PT: derogate officials administering bankruptcy and mediation in civil and commercial matters

<sup>193</sup> AT, CY, MT, SK: derogate higher education services. PT: reservation on impact on higher education.

<sup>194</sup> BE, DE, LU derogate temporary employment agencies. FI: reservation.

<sup>195</sup> ES: reservation on extraction services.

<sup>196</sup> UK: derogate "specific requirements of the Member State to which the provider and/or its worker moves, with which compliance is indispensable for the protection of workers;"

<sup>197</sup> DE: derogate cartel law as in Article 1 Directive 2001/31/EC.

<sup>198</sup> CY, DE, DK, MT, SE: derogate bio-ethically sensitive issues such as stem cell research, genetic diagnostics, and protection of human embryos. IE: reservation.

**Recital 40:** *It is necessary to provide that the rule that the law of the country of origin is to apply may be departed from only in the areas covered by ~~derogations~~, general, ~~or~~ transitional or case-by-case derogations. Those derogations are necessary in order to take into account the level of integration of the internal market or certain Community instruments relating to services pursuant to which a provider is subject to the application of a law other than that of the Member State of origin. In relation to case-by-case derogations ~~Moreover, by way of exception~~, measures against a given provider may also be adopted in certain individual cases and under certain strict procedural and substantive conditions. In order to ensure the legal certainty which is essential in order to encourage SMEs to provide their services in other Member States, those derogations should be limited to what is strictly necessary. ~~In particular, case by case~~ Such derogations should be possible only for reasons related to the safety of services, exercise of a health profession or matters of public policy, ~~such as the protection of minors~~, and to the extent that national provisions in this field have not been harmonised. In addition, any restriction of the freedom to provide services should be permitted, by way of exception, only if it is consistent with fundamental rights which, as the Court of Justice has consistently held, form an integral part of the general principles of law enshrined in the Community legal order.*

**Recital 40a:** *In areas covered by derogations from the country of origin principle, the applicable law has to be determined according to general principles governing the territorial scope of application of national law and rules on private international law and in conformity with Article 49 of the Treaty. In these areas the law applicable to the contractual and extra contractual obligations of the service provider is determined in accordance with instruments on private international law. For example, in relation to workers falling within Directive 96/71/EC, the law applicable to terms and conditions of their employment not covered by that Directive is determined in accordance with the Rome Convention. The same would apply in relation to the question of whether a provider has chosen the law applicable to his contract and contracts concluded by consumers. ~~pending complete harmonisation of laws relating to consumer contracts, the applicable law is determined by the Rome Convention. The concept of a contract concluded by a consumer includes a contract concluded on behalf of a consumer concluded by an agent.~~*

**Recital 41:** *In cases where a provider moves temporarily to a Member State other than the Member State of origin, it is necessary to provide for mutual assistance between those two States so that the ~~former~~ Member State where the service is provided can carry out checks, inspections and enquiries at the request of the Member State of origin or carry out such checks on its own initiative if these are merely factual checks. Moreover, it should be possible in the case of posted workers for the Member State ~~of posting where the service is provided~~ to take action against a provider established in another Member State in order to ensure compliance with the employment and working conditions applicable under Directive 96/71/EC.*

**Recital 41a:** *The derogation concerning postal services covers both activities reserved to the universal service provider and other postal services.*<sup>199</sup>

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<sup>199</sup> SK: include reference to clearance, sorting transport and delivery of post.



**Recital 41b:** *The country of origin principle does not apply to terms and conditions of employment which, pursuant to Directive 96/71/EC concerning the posting of workers, apply to workers posted for providing a service into the territory of another Member State. In such cases, Directive 96/71/EC stipulates that service providers have to comply with terms and conditions of employment in a listed number of areas applicable in the Member State where the service is provided. These are: maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, including overtime rates, the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people, equality of treatment between men and women and other provisions on non-discrimination. This concerns not only such terms and employment conditions which are laid down by law but also those laid down in collective agreements provided that they are either officially declared or de facto universally applicable within the meaning of Directive 96/71/EC.*

**Recital 41c:** *The derogation from the country of origin principle for matters covered by Directive 96/71/EC includes the right for the Member States where the service is provided to determine the existence of an employment relationship and the distinction between self-employed persons and employed persons, including “false self-employed persons”.*

**Recital 41d new:** *Since Directive 96/71/EC covers health and safety at work requirements applicable to posted workers only, it is necessary to include a separate derogation for such requirements. The derogation would apply, for example, to self-employed persons and to health and safety at work requirements which protect the public generally.*

**Recital 42:** *It is appropriate to provide for derogation from the country of origin principle in the case of services which are covered by a general prohibition in the Member State to which a provider has moved, if that prohibition is objectively justified by reasons relating to public policy, public security or public health, including for reasons relating to the protection of human dignity. This derogation also covers cases where services are prohibited but are allowed under certain specific circumstances. That derogation should be limited to general prohibitions and should not, for example, cover national schemes which, while not prohibiting an activity in a general manner, reserve the exercise of that activity to one or several specific operators, or which prohibit the exercise of an activity without prior authorisation. The fact that a Member State permits an activity, but reserves it to certain operators, means that the activity is not subject to a general prohibition and is not regarded as inherently contrary to public policy, public security or public health. Consequently, a general derogation for ~~the exclusion~~ of such an activity from the country of origin principle scope of the Directive would not be justified.*

**Recital 43:** *The country of origin principle should not apply to specific requirements, laid down by the Member State to which a provider has moved, the rationale for which is inextricably linked to the particular characteristics of the place where the service is provided, or to the particular risk created by the service at the place where the service is provided, and which must be fulfilled in order to maintain public policy, public safety, public health or the protection of the environment. Such would be the position, for example, with regard to rules concerning the protection of nuclear installations or in the case of authorisations to occupy or use the public highway, requirements relating to the organisation of public events or requirements relating to the safety of building sites including rules on working environment or the protection of workers, self-employed persons, or the public.*

**Recital 43a new:** *The concept of place is not restricted to a geographical location, but covers categories of places such as nuclear installations, schools, children's homes and rivers.*

**Recital 44:** *The exclusion from the country of origin principle of matters relating to the registration of vehicles leased in a Member State other than that in which they are used follows from the case-law of the Court of Justice, which has recognised ~~accepted~~ that a Member State may impose such an obligation, in accordance with proportionate conditions, in the case of vehicles used on its territory. That exclusion does not cover occasional or temporary rental.*

~~**Recital 45:** *A number of Directives concerning contracts concluded by consumers have already been adopted at Community level. However, the approach followed by those Directives is one of minimal harmonisation. In order to limit as far as possible divergences between consumer protection rules across the Community that fragment the internal market to the detriment of consumers and enterprises, the Commission stated in its Communication on consumer policy strategy 2002-2006<sup>200</sup> that one of its key priorities would be full harmonisation. Furthermore, the Commission stressed in its Action Plan on "A more coherent European contract law"<sup>201</sup> the need for greater coherence in European consumer law which would entail, in particular, a review of the existing law on contracts concluded with consumers in order to remedy residual inconsistencies, to fill gaps and to simplify legislation.*~~

**Recital 46:** *It is not appropriate to apply the country of origin principle to the field of contracts concluded by consumers for the supply of services ~~only to the extent that Community Directives provide for full harmonisation, because in such cases the levels of consumer protection are equivalent.~~ The derogation from the country of origin principle relating to the non-contractual liability of a provider in the case of an accident involving a person and occurring as a consequence of the service provider's activities in the Member State into which he has moved temporarily concerns physical or material damage suffered by a person in the accident.<sup>202</sup>*

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<sup>200</sup> OJ C 137, 8.6.2002, p. 2.

<sup>201</sup> OJ C 63, 15.3.2003, p. 1.

<sup>202</sup> LU: oppose changes.

Article 18

**Transitional derogations from the country of origin principle**

1. Article 16 shall not apply for a transitional period to the following:<sup>203 204 205</sup>
  - (a) ~~the way in which~~ services related to transport of cash and valuables in transit<sup>206</sup> ~~cash-~~  
~~in-transit services are exercised;~~
  - (b) ~~gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions;~~
  - (eb) ~~access to~~ the activity of judicial recovery of debts.
2. The derogations referred to in ~~points (a) and (e) of~~ paragraph 1 of this Article shall not apply after the date of application of the harmonisation instruments referred to in Article 40(1) ~~or in any case after 1 January 2010.~~
3. ~~The derogation referred to in point (b) of paragraph 1 of this Article shall not apply after the date of application of the harmonisation instrument referred to in Article 40(1)(b).~~

***Recital 46a:*** The derogation from the country of origin principle relating to the judicial recovery of debts and the reference to a possible future harmonisation instrument concerns only the access and the exercise of activities which consist, notably, in bringing actions before a Court relating to the recovery of debts. These provisions do not concern requirements relating to the professional qualification of the service provider nor judicial procedures, including acts of enforcement by judicial officers, which come under community policy on justice and cooperation.

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<sup>203</sup> CZ, FI, EL, SI: add derogation for temporary work agencies. NL, LV: oppose.

<sup>204</sup> NL: move all derogations to Article 17. COM, FR, LV: oppose.

<sup>205</sup> BE: add private security services. NL: opposes.

<sup>206</sup> IE: delete.

## Article 19

### Case-by-case derogations from the country of origin principle

1. By way of derogation from Article 16, and in exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures relating to any of the following:<sup>207</sup>
  - (a) the safety of services, including aspects related to public health;<sup>208</sup>
  - ~~(b) the exercise of a health profession;~~
  - (b) the protection of public policy, including the protection of minors, vulnerable adults and human dignity. ~~notably aspects related to the protection of minors.~~
2. The measures provided for in paragraph 1 may be taken only if the mutual assistance procedure laid down in Article 37 is complied with and all the following conditions are fulfilled:
  - (a) the national provisions in accordance with which the measure is taken have not been subject to Community harmonisation in the fields referred to in paragraph 1;
  - (b) the measures provide for a higher level of protection of the recipient than would be the case in a measure taken by the Member State of origin in accordance with its national provisions;
  - (c) the Member State of origin has not taken any measures or has taken measures which are insufficient as compared with those referred to in Article 37(2);
  - (d) the measures are proportionate.
3. Paragraphs 1 and 2 shall be without prejudice to provisions, laid down in Community instruments, which guarantee the freedom to provide services or which allow derogations therefrom.

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<sup>207</sup> EL: broaden Article 19 to all overriding reasons of public interest to permit reduction of derogations in Article 17. NL: broaden Article to all overriding reasons of public interest on a case-by-case basis and with notification to COM. COM, ES, IE, LV, PL: oppose.

<sup>208</sup> PT: add definition of safety of services.

**Recital 47:** *It is necessary to allow Member States the possibility, exceptionally and on a case-by-case basis, of taking measures which derogate from the country of origin principle in respect of a provider established in another Member State, for certain reasons such as the safety of services. It should be possible to take such measures only in the absence of harmonisation at Community level. Moreover, that possibility should not permit restrictive measures to be taken in areas in which other Directives prohibit all derogation from the free movement of services, such as Directive 1999/93/EC or Directive 98/84/EC of the European Parliament and the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access<sup>210</sup>. Nor should that possibility permit the extension or limitation of derogations provided for in other Directives, such as Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities<sup>211</sup> or Directive 2000/31/EC.*

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<sup>209</sup> CY, DE, FR, IE, MT, PT, SE, UK: suggest "In cases of urgency 19(2) (a), (b) and (c) do not apply."

<sup>210</sup> OJ L 320, 28.11.1998, p. 54.

<sup>211</sup> OJ L 298, 17.10.1989, p. 23. Directive as amended by Directive 97/36/EC of the European Parliament and of the Council (OJ L 202, 30.7.1997, p. 60).

## Section 2

### RIGHTS OF RECIPIENTS OF SERVICES<sup>212</sup>

#### Article 20<sup>213</sup>

##### Prohibited restrictions

1. Within the scope of Article 16, 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, the following requirements: an obligation to obtain authorisation from or to make a declaration to their competent authorities.

(b) ~~discriminatory limits on tax deductibility or~~ on the grant of financial assistance provided for the use of a particular service 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;

(c) ~~requirements which subject the recipient to discriminatory or disproportionate taxes on the equipment necessary to receive a service at a distance from another Member State.~~

2. This Article shall apply in respect of matters which are not covered by derogations from the country of origin principle pursuant to Articles 17, 18 and 19.

**Recital 48:** *Restrictions on the free movement of services, contrary to this Directive, may arise not only from measures applied to providers, but also from the many barriers to the use of services by recipients, especially consumers. This Directive mentions, by way of illustration, certain types of restriction applied to a recipient wishing to use a service performed by a provider established in another Member State. Such discriminatory restrictions include national rules according to which financial assistance concerning the costs of language or vocational training are limited to cases where such training is carried out on the territory of the Member State concerned. This also includes cases where recipients of a service are under an obligation to obtain authorisation from or to make a declaration to their competent authorities in order to receive a service from a provider established in another Member State. This does not concern general authorisation schemes which also apply to the use of a service supplied by a provider established in the Member State of the recipient.*

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<sup>212</sup> Some Member States have a general reservation on the application of Articles 20-22 to healthcare.

***Recital 48a:*** The concept of financial assistance provided for the use of a particular service does not apply to systems of aids granted by Member States, in particular in the health and social fields or in the audio-visual and cultural sector, which are covered by Title VI Chapter 1 on rules on competition in the Treaty or to general financial assistance not linked to the use of a particular service, for example to students grants or loans<sup>214</sup>.

***Recital 48b:*** The equipment necessary to receive services at a distance from another Member State would include equipment such as antennae used for the reception of television signals.

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<sup>214</sup> DE: reservation. Distinction between state aids and financial assistance not -sufficiently clear (in the context of vocational training, financial support for re-skilling the unemployed, and state support for film production) given that the German language version of the text uses the word "Beihilfen".

**Non-discrimination**

1. Member States shall ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence.<sup>215</sup>
2. Member States shall ensure that the general conditions of access to a service, which are made available to the public at large by the provider, do not contain discriminatory provisions relating to the nationality or place of residence of the recipient, but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria.

**Recital 49:** *In accordance with the Treaty rules on the free movement of services, as interpreted by the Court of Justice, discrimination on grounds of the recipient's nationality or national or local residence is prohibited. Such discrimination could take the form of an obligation, imposed only on nationals of another Member State, to supply original documents, certified copies, a certificate of nationality or official translations of documents in order to benefit from a service or from more advantageous terms or prices. However, the prohibition of discriminatory requirements does not preclude the reservation of advantages, especially as regards tariffs, to certain recipients, if such reservation is based on legitimate, objective criteria, such as a direct link to taxes paid by those recipients.*

**Recital 50:** *If an internal area without frontiers is to be effectively achieved, Community citizens must neither be prevented from benefiting from a service which is technically accessible on the market, nor be made subject to different conditions and tariffs, by reason of their nationality or place of residence. The persistence of such discrimination with respect to the recipients of services highlights, for the Community citizen, the absence of a genuine internal market in services and, in a more general sense, compromises the integration of the peoples of Europe. The principle of non-discrimination within the internal market means that access by a recipient, and especially by a consumer, to a service on offer to the public may not be denied or hampered by application of a criterion, included in general conditions made available to the public, relating to the recipient's nationality or place of residence. It does not follow that provision may not be made in such general conditions for variable tariffs and conditions to apply to the provision of a service, where those tariffs, prices and conditions are directly justified for objective reasons such as additional costs effectively incurred because of the distance involved or the technical characteristics of the provision of the service, or different market conditions, or extra risks linked to rules differing from those of the Member State of origin.*

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<sup>215</sup> ES: supported by FR: proposes to add at the end of paragraph 1 "but without precluding the possibility of providing for differences in the conditions of access where those differences are directly justified by objective criteria."



Article 22

**Assistance for recipients<sup>216</sup>**

1. Member States shall ensure that recipients can obtain, in their Member State of residence, the following information:
  - (a) information on the requirements applicable in other Member States relating to access to and exercise of service activities, in particular those relating to consumer protection;
  - (b) general information on the means of redress available in the case of a dispute between a provider and a recipient;
  - (c) the contact details of associations or organisations, including ~~Euroguichets and the contact points of the European extra-judicial network (EEJ-net)~~ the contact points of the European Consumer Centres Network (EEC-Net), from which providers or recipients may obtain practical assistance.
  
2. Member States may confer responsibility for the task referred to in paragraph 1 to single points of contact or to any other body, such as Euroguichets, the contact points of the European extra-judicial network (EEJ-net), consumer associations or Euro Info Centres.

By the date specified in Article 45 at the latest, Member States shall communicate to the Commission the names and contact details of the designated bodies. The Commission shall transmit them to all Member States.
  
3. In order to be able to send the information referred to in paragraph 1, the relevant body approached by the recipient shall if necessary contact the relevant body for the Member State concerned. The latter shall send the information requested as soon as possible. Member States shall ensure that those bodies give each other mutual assistance and shall put in place all possible measures for effective co-operation.

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<sup>216</sup> AT, BE, DE, ES, FR, IT: reservation on the cost and practicability of the Article, including with regard to language issues.

4. The Commission shall, in accordance with the procedure referred to in Article 42(2), adopt measures for the implementation of paragraphs 1, 2 and 3, specifying the technical mechanisms for the exchange of information between the bodies of the various Member States and, in particular, the interoperability of information systems.<sup>217</sup>

***Recital 50a:*** *The way in which information is provided to recipients in their Member State of residence is for that Member State to determine within the framework of this Directive. Issues such as liability for providing incorrect or misleading information are for Member States to determine.*<sup>218</sup>

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<sup>217</sup> DE: questioned the need for paragraph 4 and suggested replacing it with "In order to facilitate the interoperability of information systems and the use of procedures by electronic means the Member States and the Commission should agree on common open standards".

## Article 23

### Assumption of health care costs

1. Member States may not make assumption of the costs of non-hospital care in another Member State subject to the granting of an authorisation, where the cost of that care, if it had been provided in their territory, would have been assumed by their social security system.

The conditions and formalities to which the receipt of non-hospital care in their territory is made subject by Member States, such as the requirement that a general practitioner be consulted prior to consultation of a specialist, or the terms and conditions relating to the assumption of the costs of certain types of dental care, may be imposed on a patient who has received non-hospital care in another Member State.

- 1a. (ex Article 4§10) “hospital care” means medical care which, in the Member State of affiliation of the patient, is provided in a hospital infrastructure either because the care requires accommodation of the patient or it can only be provided within a hospital infrastructure because it is highly specialised or presents a manifest risk to the patient. The name, organisation and financing of that infrastructure is irrelevant for the purposes of classifying such care as hospital care ~~means medical care which can be provided only within a medical infrastructure and which normally requires the accommodation therein of the person receiving the care, the name, organisation and financing of that infrastructure being irrelevant for the purposes of classifying such care as hospital care;~~
2. Authorisation to receive hospital care in other Member States shall be granted in accordance with Member States shall ensure that authorisation for assumption by their social security system of the cost of hospital care provided in another Member State is not refused Article 22 of Regulation (EEC) 1408/71 [and with Article 20 of Regulation (EC) No 883/2004] of the European Parliament and of the Council on the coordination of social security systems. where the treatment in question is among the benefits provided for by the legislation of the Member State of affiliation and where such treatment cannot be given to the patient within a time frame which is medically acceptable in the light of the patient's current state of health and the probable course of the illness.

3. Member States shall ensure that the level of assumption by their social security system of the costs of health care provided in another Member State is not lower than that provided for by their social security system in respect of similar health care provided in their territory. The assumption of costs is limited to the actual costs of the health care received.
4. Member States shall ensure that their authorisation systems for the assumption of the costs of health care provided in another Member State are in conformity with Articles 9, 10, 11 and 13.

**Recital 51:** *In accordance with the principles established by the Court of Justice with regard to the freedom to provide services, and without endangering the financial balance of Member States' social security systems, greater legal certainty as regards the reimbursement of health costs should be provided for patients, who benefit as recipients from the free movement of services, and for health professionals and managers of social security systems.*

**Recital 52:** *Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community<sup>219</sup> and, in particular, its provisions regarding affiliation to a system of social security, fully applies to employed and self-employed workers who provide or take part in the supply of a service. This Directive complements Regulation (EEC) 1408/71 with respect to the reimbursement of costs for non hospital care for which no prior authorisation has been sought by the patient.*

**Recital 53:** *Article 22 of Regulation (EEC) No 1408/71, which concerns authorisation for assuming the costs of health care provided in another Member State, contributes, as the Court of Justice has emphasised, to facilitating the free movement of patients and the provision of cross-border medical services. This provision continues to fully apply to hospital care where according to the jurisprudence of the Court of Justice Member States can maintain requirements of prior authorisation for the assumption of costs received in other Member States. It also continues to fully apply to non hospital care if patients ask for an authorisation in order to benefit from the special scheme applicable under Regulation 1408/71. The purpose of Article 22 of Regulation (EEC) 1408/71 that provision is to ensure that insured persons possessing an authorisation have access to health care in another Member State under conditions which, as regards the assumption of costs, are as favourable as those applying to insured persons in that Member State. It thus confers on insured persons rights they would not otherwise have and facilitates the free movement of services. On the other hand, that provision does not seek to regulate, nor in any way to prevent, reimbursement, at the rates applicable in the Member State of affiliation, of the costs of ~~health~~ non hospital care provided in another Member State ~~even~~ in the absence of a prior authorisation.*

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<sup>219</sup> OJ L 149, 5.7.1971, p. 2. Regulation as last amended by the Act of Accession 2003.

**Recital 54:** *In the light of the case-law developed by the Court of Justice on the free movement of services, it is necessary to abolish the requirement of prior authorisation for reimbursement by the social security system of a Member State for non-hospital care provided in another Member State, and Member States must amend their legislation accordingly. In so far as the reimbursement of such care remains within the limits of the cover guaranteed by the sickness insurance scheme of the Member State of affiliation, abolition of the prior authorisation requirement is not likely to seriously ~~to~~ disrupt the financial equilibrium of social security systems. As the Court of Justice has consistently held, the conditions under which Member States grant non-hospital care on their own territory remain applicable in the case of care provided in a Member State other than that of affiliation in so far as those conditions are compatible with Community law. By the same token, authorisation schemes for the assumption of costs of care in another Member State must comply with this Directive as regards the conditions for granting authorisation and the related procedures.*

**Recital 55:** *As the Court of Justice has consistently held with regard to the free movement of services, a system of prior authorisation for the reimbursement of hospital care provided in another Member State appears justified by the need to plan the number of hospital infrastructures, their geographical distribution, the mode of their organisation, the equipment with which they are provided and even the nature of the medical services which they are able to offer. The aims of such planning are to ensure, within each Member State, sufficient permanent access to a balanced range of quality hospital care, to secure efficient cost management and, so far as is possible, to avoid wastage of financial, technical or human resources. In accordance with the case-law of the Court of Justice, the concept of hospital care must be objectively defined ~~and a system of prior authorisation must be proportionate to the general interest objective pursued~~ taking into account the costs and the need for planning relating to hospital infrastructures.*

**Recital 56:** *Article 22 of Council Regulation (EEC) No 1408/71 specifies the circumstances in which the competent national institution may not refuse an authorisation sought on the basis of that provision. Member States may not refuse authorisation in cases where the hospital care in question, when provided in their territory, is covered by their social security system, and treatment which is identical or equally effective cannot be obtained in time in their territory under the conditions laid down by their social security system. The Court of Justice has consistently held that the condition relating to acceptable delay must be considered together with all the circumstances of each case, taking due account not only of the medical condition of the patient at the time when authorisation is requested, but also his medical history and the probable evolution of his illness.*

**Recital 57:** *The assumption of costs, by the social security systems of the Member States, in respect of health care provided in another Member State must not be lower than that provided for by their own social security system for health care provided in their territory. As the Court has consistently pointed out with regard to the free movement of services, in the absence of authorisation, the reimbursement of non-hospital care in accordance with the scales of the Member State of affiliation would not have a significant effect on the financing of its social security system. In cases where authorisation has been granted, in the framework of Article 22 of Regulation (EEC) No 1408/71, the assumption of costs is made in accordance with the rates applicable in the Member State in which the health care is provided. However, if the level of coverage is lower than that to which the patient would have been entitled if he had received the same care in the Member State of affiliation, the latter must assume the remaining costs up to the level which would have applied. Member States are not required to assume travel expenses.*

**Recital 57a:** *The distinction between hospital care and non hospital care is according to the jurisprudence of the Court of Justice based on the fact that medical services provided in a hospital take place within an infrastructure with undoubtedly distinct characteristics and that in particular, the number of hospitals, their geographical distribution, the mode of their organisation and the equipment with which they are provided, as well as the nature of the medical services which they are able to offer are matters for which planning must be possible. The necessary planning not only ensures that there is sufficient and permanent access to a balanced range of high-quality hospital treatment but also that costs are controlled and inefficiency of financial, technical and human resources is prevented. Accordingly medical care has to be considered as hospital care within the meaning of the jurisprudence of the Court not only if it requires accommodation of the patient but also if it requires hospital infrastructure including emergency and intensive care facilities in case of treatments which present a particular risk for the patient or highly specialised and very cost intensive medical equipment which is normally limited to hospitals such as computer tomography.*

## Section 3

### POSTING OF WORKERS

#### Article 24

#### Administrative simplification and cooperation relating to the posting of workers ~~Specific provisions on the posting of workers~~<sup>220</sup>

1. *(new)* According to Article 17(5) of this Directive, Directive 96/71/EC will continue to be applicable fully to the workers posted to another Member State..
- 1A Where a provider posts a worker to another Member State in order to provide a service, the Member State ~~of posting~~ where the service is provided shall carry out in its territory the checks, inspections and investigations necessary to, ~~or shall otherwise,~~ ensure compliance with the employment and working conditions applicable under Directive 96/71/EC and shall take, ~~or ensure the worker can take,~~ in accordance with Community law, measures in respect of a service provider who fails to comply with those conditions.

As regards the derogation in Article 17(5) concerning the posting of workers, ~~However,~~ the Member State ~~of posting~~ where the service is provided may not make the provider or the posted worker subject to any of the following obligations insofar as they apply only in relation to posted workers: as regards the matters referred to in point (5) of Article 17:

- (a) to obtain authorisation from, or to be registered with, its own competent authorities, or to satisfy any other equivalent requirement;<sup>221</sup>
- (b) to make a declaration to competent authorities or other bodies. Member States may continue to require a single declaration upon or after the beginning of the posting, provided this requirement complies with the following conditions:<sup>222 223 224</sup>

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<sup>220</sup> AT, BE, CY, DE, EL, FR, IT, MT: support deletion of Article 24. DK, SE: either delete or rework as in MD 48/05. CZ, EE, FI, IE, HU, LT, LV, NL, PL, PT, SI, SK, UK: oppose such deletion. PL: oppose changes to Article 24.

<sup>221</sup> MT: delete 1(a-b), and 1(d) and recitals 58 and 59.

<sup>222</sup> LU: consider that declaration prior to the beginning of the posting is necessary to allow for proper control mechanisms and to ensure the protection of workers, in particular regarding compliance with health and safety standards.

<sup>223</sup> EL, PT: consider it indispensable to retain declarations.

<sup>224</sup> HU, LT: do not wish a general system of declaration.

- (i) a declaration can only be imposed in sectors where this is proportionate for overriding reasons relating to the protection workers and where there is a particular risk of non-compliance with the terms and conditions applicable to posted workers. These sectors shall be identified by Member States and notified to the Commission who shall assess the proportionality of the declaration requirement;
  - (ii) the information required in a declaration and any sanction for non-compliance with the declaration requirement must be proportionate to the protection of posted workers;
  - (iii) it must be possible to file a declaration electronically, and from 31 December 20XX, in any Community language.<sup>225</sup>, other than a declarations relating to an activity referred to in the Annex to Directive 96/71/EC which may be maintained until 31 December 2008
- (c) to have a representative established in its territory. This does not prevent Member States from requiring a service provider who posts workers into their territory to designate one of the workers to represent the service provider for the duration of the service provision;  
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- (d) to hold and keep employment documents in its territory or in accordance with the conditions applicable in its territory which by their nature and purpose are normally held at the place of establishment. This does not affect obligations to hold and keep documents at the place of posting which by their nature and purpose are created at the place at which the service is provided, such as time sheets or documents relating to health and safety issues specific to the location at which the service is provided. <sup>227</sup>

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<sup>225</sup> CZ, LU: clarify that this objective is linked the IMI system.

<sup>226</sup> FI, DK, EL, MT, SE, SI: retain right to require a representative on its territory and written documentation.

<sup>227</sup> DE: delete Article 24 (1)(b-d). SE delete 24(1)(d)



2. In the circumstances referred to in paragraph 1, the Member State of origin shall ensure that the provider takes all measures necessary to be able to communicate as quickly as possible the following information, both to its competent authorities and to those of the Member State where the service is provided ~~of posting, within~~ and to hold this information at their disposal until two years<sup>228</sup> after ~~of~~ the end of the posting service provision:
- (a) the identity of the posted worker;
  - (b) his position and the nature of the tasks attributed to him;
  - (c) the contact details of the recipient;
  - (d) the place where the service is provided;
  - (e) the start and end dates for the posting;
  - (f) the employment and working conditions applicable under Directive 96/71/EC and applied to the posted worker.

In the circumstances referred to in paragraph 1, the Member State of origin in accordance with Article 4 of 96/71/EC shall assist the Member State of posting to ensure compliance with the employment and working conditions applicable under Directive 96/71/EC and shall, on its own initiative, communicate to the Member State where the service is provided ~~of posting~~ the information specified in the first subparagraph where the Member State of origin is aware of specific facts which indicate possible irregularities on the part of the provider in relation to employment and working conditions.

**Recital 58:** *As regards the posting of workers in the context of the provision of services in a Member State other than the Member State of origin, it is necessary to clarify the division of roles and tasks between the Member State of origin and the Member State of posting, in order to facilitate the free movement of services. The present Directive does not aim to address issues of labour law as such. The division of tasks and the specifying of the forms of cooperation between the Member State of origin and the Member State of posting facilitates the free movement of services, especially by abolishing certain disproportionate administrative procedures, while also improving the monitoring of compliance with employment and working conditions in accordance with Directive 96/71/EC.*

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<sup>228</sup> LU: extend the deadline to three years.

**Recital 59:** *In order to avoid discriminatory or disproportionate administrative formalities, which would be a disincentive to SMEs in particular, it is necessary to preclude the Member State of ~~posting~~ where the service is provided from making postings subject to compliance with requirements such as an obligation to request authorisation from ~~the~~ its authorities. However, given that in certain sectors the risk of non-compliance with working conditions in the Member State where the service is provided may be particularly high, the ~~obligation~~ prohibition to ~~make~~ require a declaration to the authorities of the Member State of ~~posting~~ should also be prohibited where the service is provided does not prevent Member States from requiring declarations where they are proportionate for reasons relating to the protection of workers. Such declarations can only be required under conditions specified in this Directive, which aim to reduce administrative burdens for operators, and only upon or after the beginning of the service provision. In order to provide for legal certainty and transparency, the sectors in which such an elevated risk is present need to be determined precisely and must be notified to the Commission who shall assess the proportionality of the declaration requirement. However it should be possible to maintain such an obligation until 31 December 2008 in the field of building work in accordance with the Annex to Directive 96/71/EC. In that connection, a group of Member State experts on the application of ~~that~~ Directive 96/71/EC are studying ways to improve administrative cooperation between Member States in order to facilitate supervision.*

**Recital 59a:** *(new) The restrictions on Member States' ability to impose obligations on providers and posted workers concern rules aimed at the control of posted workers per se. They do not apply to rules which may affect posted workers, but also affect other sections of a Member State's workforce, for example, rules regulating the employment of young people which require the authorisation of employers.*

**Recital 59aa :** *(new) . The Directive prevents Member States from imposing on service providers posting workers on their territory to systematically ship all employment documents which are normally kept at the place of establishment of the company to their territory and keep them there; this does not concern documents which in the normal course of work are established and kept at the work place, such as time-sheets. Moreover, this provision does not prevent the host Member State authorities from demanding the service provider directly to submit documents in the event of a control and from enforcing that demand in case of non-compliance. In such cases the authorities can require that the documents must be transferred as quickly as possible for example via express mail, by fax or e-mail. Furthermore, as regards employment and working conditions other than those laid down in or permitted by Directive 96/71/EC, it should not be possible for the Member State of posting to take restrictive measures against a provider established in another Member State.*

**Recital 59b:** *This Directive is without prejudice to the law of the Member State concerning collective action to defend the interest of trades and professions. It is also without prejudice to the negotiation and conclusion of collective agreements.*<sup>229</sup>

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<sup>229</sup> FI, LU: suggest including this recital in text. LV: considers recital unnecessary.

### Posting of third country nationals

1. Subject to the possibility of derogation as referred to in paragraph 2, where a provider posts a worker who is a national of a third country to the territory of another Member State in order to provide a service there, the Member State of ~~posting~~ where the service is provided may not require the provider or the worker posted by the latter to hold an entry, exit, residence or work permit, or to satisfy other equivalent conditions.<sup>232</sup>
2. Paragraph 1 does not prejudice the possibility for Member States to require ~~a short term visas or residence~~ permits for third country nationals who are not covered by the mutual recognition regime provided for in Chapter IV of Title 2 Article 21 of the Convention implementing the Schengen Agreement. Paragraph 1 does not prejudice the possibility for Member States to oblige third country nationals to report to the competent authorities of the Member State in which the service is provided on or after his entry.<sup>233</sup>
3. In the circumstances referred to in paragraph 1, the Member State of origin shall ensure that a provider posts only a worker who is resident in its territory in accordance with its own national rules and who is lawfully employed in its territory prior to the posting.<sup>234</sup>

The Member State of origin shall not regard a posting made in order to provide a service in another Member State as interrupting the residence or activity of the posted worker and shall not refuse to readmit the posted worker to its territory on the basis of its national rules.<sup>235</sup>

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<sup>230</sup> AT, BE, CY, DE, DK, FR, MT: support deletion of Article 25. CZ, EE, FI, HU, IE, LT, LV, NL, PL, SI, SK, UK: oppose. PT: position on Article 25 depends on solution on Article 24(1)(b)(i). CZ, EL, ES, MT: reserve position.

<sup>231</sup> HU, LV: Article should only come into force once transitional provisions of Accession Agreements have expired.

<sup>232</sup> ES: delete equivalent conditions.

<sup>233</sup> DK: question legal base.

<sup>234</sup> DE: must include minimum period for lawful employment in Member State from which posted and maximum period for posting. Temporary agency workers should be excluded from this Article.

<sup>235</sup> ES: add "From moment of entry posted workers should have documentation which proves the relationship between the worker and employer issued by the Member State of posting."

The Member State of origin shall communicate to the Member State of posting where the service is provided, upon its request and in the shortest possible time, information and guarantees regarding compliance with the first subparagraph and shall impose the appropriate penalties in cases of non-compliance.

This Article does not affect the principle of Community preference as referred to in the annexes of the Accession Treaties.

***Recital 60:** By virtue of the free movement of services, a service provider is entitled to post workers even if they are not Community citizens but third country nationals, provided that they are legally present and lawfully employed in the Member State of origin.. It is appropriate to place the Member State of origin under an obligation to ensure that any posted worker who is a third country national fulfils the conditions for residence and lawful employment laid down in its legislation, including with regard to social security. Workers employed by an undertaking established in a Member State and who are sent out to another Member State for the purposes of providing services there do not purport to gain access to the labour market of that second State, as they return to their country of origin or residence after the completion of their work.<sup>236 237</sup> Therefore it is necessary to prevent Member States from imposing work permits or equivalent measures concerning entry, exit or residence<sup>238</sup> insofar as these measures are aimed at limiting access to the labour market. It is also appropriate to preclude the host Member State from imposing on the worker or the provider any preventative controls, especially as regards right of entry or residence permits, except in certain cases. In particular, this does not prevent Member States from imposing requirements for visas or residence permits or residence certificates where permissible as a result of the application of the Convention implementing the Schengen Agreement ~~It is also appropriate to preclude the host Member State from imposing on the worker or the provider any preventative controls, especially as regards right of entry or residence permits, except in certain cases.~~ Whereas persons possessing the uniform Schengen visa are not required to obtain another visa of the same kind within the Schengen area, outside the Schengen area, the right of the Member States to impose measures concerning their immigration policy is not affected. Nor should it be possible for the host Member State to impose any obligations such as possession of an employment contract of indefinite duration or a record of previous employment in the Member State of origin of the provider.<sup>239</sup>*

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<sup>236</sup> DK: replace sentence with "workers employed by an undertaking established in a Member State and who are posted to another Member State for the purpose of providing services are obliged to return to their country of origin or residence after completion of the service".

<sup>237</sup> PT: replace existing phrase "do not purport to gain access to the labour market" with "are not entitled to enter the labour market"

<sup>238</sup> IE: delete "concerning entry, exit or residence".

<sup>239</sup> DE, EL: delete final sentence. DK: delete " possession of an employment contract of indefinite duration or".

**Recital 61:** *Following the adoption of Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality<sup>240</sup>, third country nationals are covered by a system of cooperation on the application of social security schemes to employed persons and to members of their families moving within the Community, established by Regulation (EEC) No 1408/71, under which the rules of the country under whose social security scheme the worker is insured are to apply.*

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<sup>240</sup> OJ L 124, 20.5.2003, p. 1.

## Chapter IV<sup>241</sup>

### Quality of services

#### Article 26

##### Information on providers and their services

1<sup>242</sup>. Member States shall ensure that providers make the following information available to the recipient:

- (a) the name of the service provider, the geographic address at which he is established, and the details which enable him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;
- (aa) the legal status and form of the provider;
- (b) where the provider is registered in a trade or other similar public register, the name of that register and the provider's registration number, or equivalent means of identification in that register;
- (c) where the activity is subject to an authorisation scheme, the particulars of the relevant competent<sup>243</sup> authority or the single point of contact;
- (d) where the provider exercises an activity which is subject to VAT, the identification number referred to in Article 22(1) of Directive 77/388/EEC;
- (e) in the case of the regulated professions, any professional body or similar institution with which the provider is registered, the professional title and the Member State in which that title has been granted;
- (f) the general conditions and clauses, if any, used by the provider;

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<sup>241</sup> All delegations have a scrutiny reservation on Chapter IV. Several delegations have a specific reservation on Chapter IV pending the outcome of the discussions on the scope of application of the Directive.

<sup>242</sup> ES: reservation on (e), (i) and (j). DE: move (i) and (j) to paragraph 3 and delete (f) and (g). FR, AT: scrutiny reservation on (h). FI, LV, PL: scrutiny reservation on (i). PT: reservation. In (i): add method for calculating price information and in (h): add period of validity and territorial cover. SK: delete (f). NL: move (h), (i) and (j) to paragraph 3.

<sup>243</sup> FI: add “supervisory” after “competent”.

- (g) the existence of contractual clauses concerning the law applicable to the contract and/or the competent courts, if any, used by the provider;
- (h) the existence of an after-sales guarantee, if any, not imposed by law;
- (i) the price of the service, where a price is pre-determined by the provider for a given type of service;
- (j) the main features of the service, if not already apparent from the context.

2<sup>244</sup>. Member States shall ensure that the information referred to in paragraph 1, according to the provider's preference:

- (a) is supplied by the provider on his own initiative;
- (b) is easily accessible to the recipient at the place where the service is provided or the contract concluded;
- (c) can be easily accessed by the recipient electronically by means of an address supplied by the provider;
- (d) appears in any information documents supplied to the recipient by the provider, setting out a detailed description of the service he provides.

3<sup>245</sup>. Member States shall ensure that, at the recipient's request, providers supply the following additional information:

- ~~(a) the main features of the service;~~
- ~~(b)~~ (a) where the price is not pre-determined by the provider for a given type of service, the price of the service or, if an exact price cannot be given, the method for calculating the price so that the recipient can check it, or a sufficiently detailed estimate;
- ~~(c) the legal status and form of the provider;~~

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<sup>244</sup> UK: reservation on this paragraph. IE: delete “according to the provider’s preference” and indent (a).

<sup>245</sup> IE: reservation on “at the recipient’s request”. AT, PL: scrutiny reservation on (a). DE, ES, FI, LT, NL, AT: delete last sentence of (c). DE, FR: reservation on (d). MT: move (c) to paragraph 1. PT: reservation on (a) and (d).

- (d) (b) as regards the regulated professions, a reference to the professional rules applicable in the Member State of origin and how to access them;
- (c) on their multidisciplinary activities and partnerships which are directly linked to the service in question and on the measures taken to avoid conflicts of interest. That information shall be included in any information document in which providers give a detailed description of their services;
- (d) the content of an after-sales guarantee and the essential criteria for its application, in particular, its period of validity and territorial cover and whether it is an after-sales guarantee imposed by law. This sub-paragraph does not affect the regulation of after-sales guarantees provided for in other Community instruments;

[Moved from Art. 39(3)]

- (da) any codes of conduct to which they are subject and the address at which these codes may be consulted by electronic means, specifying the language version available;
- (e) where a provider is subject to a code of conduct, or member of a trade association or professional body, which provides for recourse to a non-judicial means of dispute settlement, information in this respect. The provider shall specify how to access detailed information on the characteristics of and conditions for the use of non-judicial means of dispute settlement.

4. Member States shall ensure that the information which a provider must supply in accordance with this Chapter is made available or communicated in a clear<sup>246</sup> and unambiguous manner, and in good time before<sup>247</sup> conclusion of the contract or, where there is no written contract, before the service is provided.
5. The information requirements laid down in this Chapter are in addition to requirements already provided for in Community law and do not prevent Member States from imposing additional information requirements applicable to providers established in their territory.

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<sup>246</sup> MT: add “understandable”.

<sup>247</sup> DE, MT, NL: replace “in good time before” by “prior to”.



6. The Commission may, in accordance with the procedure referred to in Article 42(2), specify the content of the information provided for in paragraphs 1 and 3 of this Article according to the specific nature of certain activities and may specify the practical means of implementing paragraph 2<sup>248</sup>.

**Recital 62:** *It is appropriate to provide that, as one of the means by which the provider may make the information which he is obliged to supply easily accessible to the recipient, he is to supply his electronic address, including that of his website. Furthermore, the obligation to present certain information in the provider's information documents presenting his services in detail should not cover commercial communications of a general nature, such as advertising, but rather documents giving a detailed description of the services proposed, including documents on a website.*

**Recital 62a:** *It is appropriate to ensure that information concerning providers and their services is made available to recipients, whilst taking into account the need to avoid imposing an excessive burden on providers, in particular on SMEs.*

**Recital 62b:** *It is appropriate to ensure that providers make available to recipients information on the existence or otherwise of an after-sales guarantee, on its content and on the essential criteria for its application. This information obligation does not affect the determination of the law applicable to the contract. After-sales guarantees are contractual obligations which are covered by the derogation from the country of origin principle for contracts concluded by consumers to the extent that the provisions governing them are not completely harmonised at Community level.*

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<sup>248</sup> BE, DE, FI, FR,IT,UK: reservation on use of comitology procedure.

**Professional liability insurance and guarantees**

1. Member States shall ensure that providers whose services present a direct and particular risk to the health or safety of the recipient or a third person, or to the a particular financial security of risk to the recipient, are obliged to subscribe covered by to professional indemnity liability insurance appropriate to the nature and extent of the risk, or to provide by any other guarantee or compensatory provision or similar arrangement<sup>251</sup> which is equivalent or essentially comparable as regards its purpose.<sup>252</sup>
2. Member States shall ensure that providers supply a recipient, at his request, with information on the insurance or guarantees referred to in paragraph 1, and in particular the contact details of the insurer or guarantor and the territorial coverage.<sup>253</sup>
3. When a provider establishes himself in their territory, Member States may not require professional liability insurance or a ~~financial~~ guarantee from the provider where he is already covered by a guarantee which is equivalent, or essentially comparable as regards its purpose and the coverage it provides in terms of the insured risk, the insured sum or a ceiling for the guarantee and possible exclusions from the coverage, in another Member State in which the provider is already established.

Where equivalence is only partial, Member States may require a supplementary guarantee to cover those aspects not already covered.

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<sup>249</sup> HU, IE, LV, NL, LU, LT, EL, IT, UK: opposed to mandatory professional liability insurance. ES, FI, FR, SK: whilst supporting such a requirement, want to have more clarity and precision, in particular as regards activities covered by the criteria applied. DE, LV, PT: scrutiny reserve on this Article.

<sup>250</sup> IE: concerns at implications for re-insurance market.

<sup>251</sup> ES, FR, EE: delete “or similar arrangement”. EL, PL: scrutiny reserve on this inserted text. IT: redraft as “or similar requirement” in line with paragraph 4.

<sup>252</sup> ES, SK: replace “particular risk” with “significant risk”. FI: insert reference to financial security of third persons as this is mentioned in Recital 63. BE, supported by SK: should take account of environmental risks.

<sup>253</sup> BE, CZ: delete “at his request”. MT: move this paragraph to Article 26.

4. ~~Paragraphs 1, 2 and 3 do not affect professional insurance or guarantee arrangements provided for in other Community instruments. Paragraphs 1, 2 and 3 do not apply where insurance or guarantee or similar requirements for providers are imposed or explicitly permitted~~<sup>254</sup> by other Community instruments.
5. For the implementation of paragraph 1, the Commission may<sup>255</sup>, in accordance with the procedure referred to in Article 42(2), establish a list of services which exhibit the characteristics referred to in paragraph 1 and establish common criteria for defining, for the purposes of the insurance or guarantees referred to in that paragraph, what is appropriate to the nature and scope of the risk and may establish a procedure including notification to the Commission which would, in the event of verifiable failure of the insurance market<sup>256</sup> to provide adequate insurance, allow for the replacement of the obligations in this Article by an information requirement for a limited period of time.<sup>257</sup>
6. In this Article:<sup>258</sup>
- “direct and particular risk” means a risk foreseeable before the service is provided and arising directly out of and during or following the delivery of the service;<sup>259</sup>
  - “health or safety” means, in relation to a recipient or a third person, death or serious personal injury giving rise to incapacity to carry on the activities of the injured person’s normal life or to carry on the trade, profession, business or employment carried on before the injury and for a period of not less than 7 days;<sup>260</sup>

<sup>254</sup> PL, EL: concern on “or explicitly permitted”. COM: do not like “or explicitly permitted”.

<sup>255</sup> SK: replace “may” with “shall”. FR: prefers “shall”.

<sup>256</sup> DE, IT, LT: would concept of ‘market failure’ include failure in one Member State?

PT: concern about how to define market failure.

<sup>257</sup> FI, FR: delete the inserted text.

<sup>258</sup> FI, SI, IT, PT: scrutiny reserve on this paragraph. PL: move definitions to a recital.

<sup>259</sup> LT, DE, EE, EL, IT, SE: Further clarity on "direct and particular risk"

<sup>260</sup> FI, EE, FR, LT: delete reference to 7-day time limit.

- “financial security” means, in relation to a recipient, substantial losses<sup>261</sup> of money or in value of property;
- “professional liability insurance” means insurance taken out by a provider in respect of potential liabilities to recipients and, where applicable, third parties arising out of the provision of the service<sup>262</sup> that he holds himself out as providing in the course of the exercise of his trade, profession or vocation.

***Recital 63:*** Any operator providing services involving a direct and particular health, safety or financial risk for the recipient or a third person should be covered by appropriate professional indemnity liability insurance, or by another form of guarantee which is equivalent or comparable, which means, in particular, that he should have adequate insurance coverage for services provided in one or more Member States other than the Member State of origin. A direct and particular risk for the health of the recipient is present in the field of health services

***Recital 63b:*** The insurance or guarantee has to be appropriate to the nature and extent of the risk. That means that service providers need cross-border coverage only if they actually provide services into other Member States. It is not necessary to lay down more detailed rules concerning the insurance coverage and to fix for example minimum thresholds for the insurance sum or limits on exclusions from the insurance coverage. Service providers and insurance companies should maintain the flexibility to negotiate insurance policies precisely targeted to the nature and scope of the risk. Furthermore, it is not necessary that an obligation of appropriate insurance is laid down by law. It is sufficient if an insurance obligation is part of deontological rules laid down by professional bodies. Finally, there is no obligation for Member States to provide for an obligation for insurance companies to provide insurance.

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<sup>261</sup> HU: “financial security” should not be measured in terms of loss.

<sup>262</sup> FR: delete sub-clause starting with “that he holds ...”.

*Article 28 (content moved to Article 26)*

**~~After-sales guarantees~~**

1. ~~Member States shall ensure that providers supply a recipient, at his request, with information on the existence or otherwise of an after sales guarantee, on its content and on the essential criteria for its application, in particular, its period of validity and territorial cover.~~
2. ~~Member States shall ensure that the information referred to in paragraph 1 appears in any information documents supplied by providers, setting out a detailed description of the services offered.~~
3. ~~Paragraphs 1 and 2 do not affect the regulation of after sales guarantees provided for in other Community instruments.~~

Article 29

**Commercial communications by the regulated professions<sup>263</sup>**

1. Member States shall remove all total prohibitions on commercial communications by the regulated professions.
2. Member States shall ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional secrecy<sup>264</sup>, in a manner consonant with the specific nature of each profession. Professional rules on commercial communications must be non-discriminatory, objectively justified by an overriding reason relating to the public interest and proportionate.

**Recital 64:** *It is necessary to put an end to the total prohibitions of commercial communications by the regulated professions, not by removing bans on the content of a commercial communication but rather those which, in a general way and for a given profession, forbid one or more forms of commercial communication, such as a ban on all advertising in one or more given media. As regards the content and methods of commercial communication, it is necessary to encourage professionals to draw up, in accordance with Community law, codes of conduct at Community level.*

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<sup>263</sup> DK, ES, NL: commercial communications by regulated professions should be subject to mutual evaluation, and accordingly, be added to the list in Article 41§1.

<sup>264</sup> UK: wishes to replace “professional secrecy” by “legal privilege and confidentiality”.

### Multidisciplinary activities

1. Member States shall ensure that providers are not made subject to requirements which oblige them to exercise a given specific activity exclusively or which restrict the exercise jointly or in partnership of different activities.

However, the following providers may be made subject to such requirements<sup>265</sup>:

- (a) the regulated professions, in so far as is justified in order to guarantee compliance with the rules governing professional ethics and conduct, ~~which vary according to the specific nature of each profession~~ and is necessary to ensure their independence and impartiality;
  - (b) providers of certification, accreditation, technical monitoring, test or trial services in so far as is justified in order to ensure their independence and impartiality<sup>266</sup>.
2. Where multidisciplinary activities between providers referred to in paragraph 1(a) and (b) are authorised, Member States shall ensure the following:
    - (a) that conflicts of interest and incompatibilities between certain activities are prevented;
    - (b) that the independence and impartiality required for certain activities is secured;
    - (c) that the rules governing professional ethics and conduct for different activities are compatible with one another, especially as regards matters of professional secrecy<sup>267</sup>.

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<sup>265</sup> UK: proposes to add a new indent specifying that such requirements may be applied if justified by an overriding reason relating to the public interest. FI, NL, SI, SK, COM: oppose this suggestion. ES: proposes to add an obligation for Member States to justify requirements referred to in this sub-paragraph.

<sup>266</sup> DE: this indent should be extended to “Sanierungsträger”.

<sup>267</sup> NL : reservation on this sub-paragraph. Considers difficult for Member States to control the content of private agreements.

~~3-~~ (content moved to Article 26) ~~Member States shall ensure that providers supply the recipient, at his request, with information on their multidisciplinary activities and partnerships and on the measures taken to avoid conflicts of interest. That information shall be included in any information document in which providers give a detailed description of their services.~~

3. 4- In the report referred to in Article 41, Member States shall indicate which categories of providers are subject to the requirements laid down in paragraph 1, the content of those requirements and the reasons for which they consider them to be justified.

***Recital 64a: It is necessary and in the interest of recipients, in particular consumers, to ensure that service providers have the possibility to offer multidisciplinary services and that restrictions in this regard be limited to what is necessary to ensure the impartiality and independence and the integrity of regulated professions. This does not affect restrictions or prohibitions to carry out particular activities which aim at ensuring independence in cases in which a Member State entrusts a service provider with a particular task notably in the area of urban development.***



**Policy on quality of services<sup>268</sup>**

1. Member States shall in cooperation with the Commission, take accompanying measures to encourage:
  - (a) providers to take action on a voluntary basis in order to ensure the quality of service provision, in particular through use of one of the following methods by:
    - (a) - having their activities certified or assessed by independent bodies;
    - (b) - drawing up their own quality charter or participating in quality charters or labels drawn up by professional bodies at Community level.
  - (b) professional bodies, as well as chambers of commerce, ~~and~~ craft associations and consumer associations, within Member States to cooperate at Community level in order to promote the quality of service provision, especially by making it easier to assess a provider's competence<sup>269</sup>.
  - (c) the development of independent assessments, notably by consumer associations, in relation to the quality and defects of service provision, and in particular the development at Community level of comparative trials or testing and the communication of the results.
2. Member States shall ensure that information on the significance of certain labels and the criteria for applying labels and other quality marks relating to services can be easily accessed by recipients and providers.
- ~~3. Member States shall, in cooperation with the Commission, take accompanying measures to encourage professional bodies, as well as chambers of commerce and craft associations, within Member States to cooperate at Community level in order to promote the quality of service provision, especially by making it easier to assess a provider's competence.~~

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<sup>268</sup> UK, IE: delete this Article. CY, EL, IT, LV, SK, SI: support the Article. BE, MT, PT: wish to strengthen this Article further.

<sup>269</sup> ES: wishes more flexibility for Member States.

4. ~~Member States shall, in cooperation with the Commission, take accompanying measures to encourage the development of independent assessments, in relation to the quality and defects of service provision, and in particular the development at Community level of comparative trials or testing and the communication of the results.~~
5. 3. Member States and the Commission shall encourage the development of voluntary European standards with the aim of facilitating compatibility between services supplied by providers in different Member States, information to the recipient and the quality of service provision.

**Recital 65:** *In order to increase transparency and promote assessments based on comparable criteria with regard to the quality of the services offered and supplied to recipients, it is important that information on the meaning of quality labels and other distinctive marks relating to these services be easily accessible. That obligation of transparency is particularly important in areas such as tourism, especially the hotel business, in which the use of a system of classification is widespread. Moreover, it is appropriate to examine the extent to which European standardisation could facilitate compatibility and quality of services. European standards are drawn up by the European standards-setting bodies, the European Committee for Standardisation (CEN), the European Committee for Electrotechnical Standardisation (CENELEC) and the European Telecommunications Standards Institute (ETSI). Where appropriate, the Commission may, in accordance with the procedures laid down in Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998<sup>270</sup> laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services, issue a mandate for the drawing up of specific European standards.*

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<sup>270</sup> OJ L 204, 21.7.1998, p. 37. Directive as last amended by the Act of Accession 2003.

**Settlement Handling of disputes**<sup>271</sup>

1. Member States shall ~~take the general measures necessary to~~ ensure that providers supply contact details, in particular a postal address, fax number or e-mail address, to which all recipients, including those resident in another Member State, can send a complaint ~~or a request for information on~~ about the service provided.
2. Member States shall ~~take the general measures necessary to~~ ensure that providers respond to the complaints referred to in paragraph 1 in the shortest possible time in the circumstances of the case and where the complaint is justified make best efforts to find appropriate solutions<sup>272</sup>.
- ~~3.~~ (*content moved to Article 26*) ~~Member States shall take the general measures necessary to ensure that providers are obliged to demonstrate compliance with the obligations laid down in this Directive as to the provision of information and to demonstrate that the information is accurate.~~
- 3.4 Where a financial guarantee is required for compliance with a judicial decision, Member States shall recognise equivalent guarantees lodged by ~~with~~ a credit institution or insurer provider or body established in another Member State. Such credit institutions must be authorised in a Member State in accordance with Directive 2000/12/EC of the European Parliament and of the Council relating to the taking up and pursuit of the business of credit institutions and such insurers in accordance, as appropriate, with Directive 73/239/EEC of the European Parliament and of the Council on taking up and pursuit of the business of direct insurance other than life assurance and Directive 2002/83/EC of the European Parliament and of the Council concerning life assurance.

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<sup>271</sup> DE, IT : scrutiny reservation on paragraphs 2 and 3.

<sup>272</sup> BE, FR: delete “where the complaint is justified”.

5- ~~(content moved to Article 26) Member States shall take the general measures necessary to ensure that providers who are subject to a code of conduct, or are members of a trade association or professional body, which provides for recourse to a non-judicial means of dispute settlement, inform the recipient accordingly, and mention that fact in any document which presents their services in detail, specifying how to access detailed information on the characteristics of and conditions for the use of such a mechanism.~~

*Recital 65a: In order to solve potential problems with compliance with a judicial decision, it is appropriate to provide that Member States recognise equivalent guarantees lodged by institutions or bodies such as banks, insurance providers, or other financial services providers established in another Member State.*<sup>273</sup>

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<sup>273</sup> FR: scrutiny reservation.

**Information on the good repute of providers**

1. ~~Member States shall, at the request of a competent authority in another Member State, supply information on criminal convictions, penalties, administrative or disciplinary measures and decisions concerning insolvency or bankruptcy involving fraud, taken by their competent authorities in respect of the provider, which are liable to bring into question either his ability to conduct his business or his professional reliability.~~
2. ~~The Member State which supplies the information referred to in paragraph 1 shall at the same time specify whether a particular decision is final or whether an appeal has been lodged in respect of it, in which case the Member State in question should provide an indication of the date when the decision on appeal is expected. Moreover, that Member State shall specify the provisions of national law pursuant to which the provider was found guilty or penalised.~~
3. ~~Implementation of paragraph 1 must comply with the rights guaranteed to persons found guilty or penalised in the Member States concerned, especially as regards the protection of personal data.~~

## Chapter V<sup>274</sup>

### Mutual assistance and supervision

#### Article 33 (ex Article 35)<sup>275</sup>

#### Mutual assistance - General obligations

1. ~~In accordance with Article 16,~~ Member States shall give each other mutual assistance and shall put in place all possible measures for effective cooperation with one another in order to ensure the supervision of providers and the services they provide.
2. For the purposes of ~~this Chapter paragraph 1,~~ Member States shall designate one or more points of contact, the contact details of which shall be communicated to the other Member States and the Commission. The Commission shall publish and regularly update the list of points of contact.
3. Member States shall supply the information requested by other Member States or the Commission by electronic means and within the shortest possible period of time.<sup>276</sup>
4. Information requests and requests to carry out any checks, inspections and investigations under this Chapter shall be duly motivated,<sup>277</sup> in particular by specifying the reason for the request. Information exchanged shall be used only in respect of the matter for which it was requested.

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<sup>274</sup> All delegations have a scrutiny reservation on Chapter V. A number of delegations have a specific reservation on Chapter V pending the outcome of the discussions on the scope of application and/or on the country of origin principle. UK: reservation on Articles 33§6, 33a§3 and 36§1 relating to the presumption of innocence.

<sup>275</sup> DE: scrutiny reservation on paragraphs 4, 6 and 9 of this Article.

<sup>276</sup> MT: would like a specific time limit to be determined in the text.

<sup>277</sup> HU, SK: replace “duly motivated” by “justified by an overriding reason of general interest”.

4. ~~(moved to Article 33a) The Member State of origin shall supply information on providers established in its territory when requested to do so by another Member State and in particular confirmation that a service provider is established in its territory and exercising his activities in a lawful manner.~~

~~The Member State of origin shall undertake the checks, inspections and investigations requested by another Member State and shall inform the latter of the results and, as the case may be, of the measures taken.~~

5. In the event of difficulty in meeting a request for information or in carrying out checks, inspections and investigations, the Member State in question shall rapidly inform the requesting Member State with a view to finding a solution.
6. ~~(ex Article 35§3, second indent) Upon gaining actual knowledge becoming aware of any unlawful conduct or specific acts by a provider established in another Member State or of specific acts that are likely to cause serious damage in the territory of a the Member State where the service is provided, the latter Member States shall inform the Member State of origin, within the shortest possible period of time.~~<sup>278</sup>
7. ~~(ex Article 34§2) In the event of receiving a request for assistance from competent authorities in another Member State, Member States shall ensure that providers established in their territory supply their competent authorities with all the information necessary for supervising monitoring their activities in compliance with their national laws.~~
- 8.6. Member States shall ensure that registers in which providers have been entered, and which may be consulted by the competent authorities in their territory, may also be consulted, in accordance with the same conditions, by the equivalent competent authorities of the other Member States.

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<sup>278</sup> EL, HU, MT, UK: oppose deletion of “unlawful”. NL: scrutiny reservation.

9. Member States may communicate to the Commission information on cases where other Member States do not fulfil their obligations of mutual assistance. Where necessary, the Commission, as set out in the Treaty, shall take appropriate measures in order to ensure that the Member States concerned comply with their obligations of mutual assistance. The Commission shall periodically inform Member States about the functioning of the mutual assistance provisions.<sup>279</sup>
10. This Article, with the exception of paragraph 6, shall apply, within the scope of this Directive, to all cases where a provider establishes in another Member State or provides cross-border services.<sup>280</sup>

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<sup>279</sup> EL: delete this paragraph.

<sup>280</sup> EL: scrutiny reservation on this paragraph. DE: reservation on the link with the Directive on posting of workers in this paragraph and in Article 33a paragraph 4.



**General mutual assistance obligations for the Member State of origin**

1. *(ex Article 35§4, first indent)* The Member State of origin shall supply information on providers established in its territory when requested to do so by another Member State and in particular confirmation that a service provider is established in its territory and, to their knowledge, is not exercising his activities in a lawful or unlawful manner.
2. *(ex Article 35§4, second indent)* The Member State of origin shall undertake the checks, inspections and investigations requested by another Member State and shall inform the latter of the results and, as the case may be, of the measures taken. In so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State. The competent authorities can decide on the most appropriate measures to be taken in each individual case in order to meet the request by another Member State.
3. *(ex Article 35§3, third indent)* Upon ~~becoming aware~~ gaining actual knowledge of any ~~unlawful~~ conduct or specific acts by a provider established in its territory which who is likely to provide services in other Member States, or of specific acts, that, to their knowledge, could cause serious damage to the health or safety of persons or to the environment, the Member States of origin shall inform all other Member States and the Commission within the shortest possible period of time.<sup>281</sup>
4. This Article shall apply, within the scope of this Directive, to all cases of cross-border service provision, including areas not covered by Article 16.

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<sup>281</sup> ES: a similar administrative cooperation system as for products should be established.  
DE, EL, MT, UK: oppose deletion of “unlawful”. IE: replace “to their knowledge” by “in their opinion”. DK: add animal health after “environment”.

Article 34

**Supervision by the Member State of origin in the event of the temporary movement of a provider to another Member State** ~~Effectiveness of supervision~~

1. Member States shall ensure that the powers of ~~monitoring~~ and supervision provided for in national law in respect of the provider and the activities concerned ~~are~~ is also exercised where a provider moves temporarily to service is provided in another Member State in order to provide a service without being established there.
2. Paragraph 1 neither requires nor entitles the Member State of origin to carry out factual checks and controls in the territory of the Member State where the service is provided. Such checks and controls are carried out by the authorities of the Member State where the service provider is temporarily operating, on request of the authorities of the Member State of origin.<sup>282</sup>
- ~~2. (moved to Article 33§7) Member States shall ensure that providers supply their competent authorities with all the information necessary for monitoring their activities.~~
3. This Article shall apply in respect of matters which are not covered by derogations from the country of origin principle pursuant to Articles 17 and 18.

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<sup>282</sup> DE: scrutiny reservation on last part of the sentence.

**Supervision by the Member State where the service is provided ~~Mutual assistance in the event of the temporary movement of the provider~~<sup>283</sup>**

1. In respect of the matters which are not covered by derogations from the country of origin principle pursuant to Articles 17 and 18 ~~covered by Article 16~~, where a provider moves temporarily to another Member State in order to provide a service without being established there, the competent authorities of that Member State shall participate in the supervision of the provider in accordance with paragraphs 2 and 3.
2. At the request of the Member State of origin, the competent authorities ~~referred to in paragraph 1~~ of the Member State where the service is provided shall carry out any checks, inspections and investigations necessary for ensuring effective supervision by the Member State of origin. In so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State. The competent authorities can decide on the most appropriate measures to be taken in each individual case in order to meet the request by another Member State<sup>284</sup>.
3. On their own initiative, ~~those~~ the competent authorities of the Member State where the service is provided may conduct checks, inspections and investigations on the spot, provided that those checks, inspections or investigations meet the following conditions<sup>285</sup>:
  - (a) they consist exclusively in the establishment of facts and do not give rise to any other measure against the provider, subject to the possibility of case-by-case derogations as provided for in Article 19;

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<sup>283</sup> AT: considers that the execution of administrative sanctions should be addressed.

<sup>284</sup> DK, MT: this paragraph should not apply to criminal investigations.

<sup>285</sup> FR: scrutiny reservation on this paragraph.

HU, IE: reservation. Consider that this paragraph can potentially restrict the free movement of services. DE, supported by AT: delete this paragraph in order to allow the Member State where the service is provided to be free to take any measures against the service provider.

MT, SE: the Member State where the service is provided should be allowed to take measures where it has exhausted all possibilities of mutual assistance.

- (b) they are not discriminatory and are not motivated by the fact that the provider is established in another Member State;
- (c) they are objectively justified by an overriding reason relating to the public interest and are proportionate to the objective pursued.

**Information on the good repute of providers**

1. Member States shall, at the request of a competent authority in another Member State, supply information, in conformity with their national law, on disciplinary or administrative actions or criminal sanctions ~~criminal convictions, penalties, administrative or disciplinary measures~~ and decisions concerning insolvency or bankruptcy involving fraud, taken by their competent authorities in respect of the provider, directly relevant to the service provider's competence or which are liable to bring into question either his ability to conduct his business or his professional reliability.
  
- 2.<sup>286</sup> Sanctions and actions referred to in paragraph 1 shall only be communicated if a final decision has been taken<sup>287</sup>. With regard to other decisions referred to in paragraph 1, the Member State which supplies the information referred to in paragraph 1 shall at the same time specify whether a particular decision is final or whether an appeal has been lodged in respect of it, in which case the Member State in question should provide an indication of the date when the decision on appeal is expected<sup>288</sup>.

Moreover, that Member State shall specify the provisions of national law pursuant to which the provider was found guilty or penalised.

3. Implementation of paragraphs 1 and 2 must comply with ~~the rights~~ rules on the provision of personal data and with rights guaranteed to persons found guilty or penalised in the Member States concerned, including by professional bodies. ~~especially as regards the protection of personal data.~~

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<sup>286</sup> EL, MT, PT: this paragraph should also cover any enforceable decisions.

<sup>287</sup> FR, UK: this sentence should also cover decisions. Add at the end of the sentence: “and any appeal process has been concluded”.

<sup>288</sup> PT: reservation on criminal decisions.

*Article 36a*

**Accompanying measures**

1. The Commission, in cooperation with Member States, shall establish an electronic system for the exchange of information between Member States.
2. Member States shall, in cooperation with the Commission, take accompanying measures to facilitate the exchange of officials in charge of the implementation of mutual assistance and training of such officials including language and computer training.<sup>289</sup>
3. The Commission shall assess the need to establish a multi-annual programme in order to organise relevant exchanges of officials and training.<sup>290</sup>

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<sup>289</sup> DE, IE: replace “take” by “consider”.

<sup>290</sup> DE: delete this paragraph.

*Article 37*

**Mutual assistance in the event of case-by-case derogations from the country of origin principle**

1. Where a Member State intends to take a measure pursuant to Article 19, the procedure laid down in paragraphs 2 to 6 of this Article shall apply without prejudice to proceedings before the courts including preliminary proceedings and acts carried out in the framework of a criminal investigation.
2. The Member State referred to in paragraph 1 shall ask the Member State of origin to take measures with regard to the service provider, supplying all relevant information on the service in question and the circumstances of the case.

The Member State of origin shall check, within the shortest possible period of time, whether the provider is operating lawfully and verify the facts underlying the request. It shall inform the requesting Member State within the shortest possible period of time of the measures taken or envisaged or, as the case may be, the reasons why it has not taken any measures.

3. Following communication by the Member State of origin as provided for in the second subparagraph of paragraph 2, the requesting Member State shall notify the Commission and the Member State of origin of its intention to take measures, stating the following:
  - (a) the reasons why it believes the measures taken or envisaged by the Member State of origin are inadequate;
  - (b) the reasons why it believes the measures it intends to take fulfil the conditions laid down in Article 19.
4. The measures may not be taken until fifteen working days after the date of notification provided for in paragraph 3.

5. Without prejudice to the possibility for the requesting Member State to take the measures in question upon expiry of the period specified in paragraph 4, the Commission shall, within the shortest possible period of time, examine the compatibility with Community law of the measures notified.

Where the Commission concludes that the measure is incompatible with Community law, it shall adopt a decision asking the Member State concerned to refrain from taking the proposed measures or to put an end to the measures in question as a matter of urgency.

6. In the case of urgency, a Member State which intends to take a measure may derogate from paragraphs 2, 3 and 4. In such cases, the measures shall be notified within the shortest possible period of time to the Commission and the Member State of origin, stating the reasons for which the Member State considers that there is urgency.

***Recital 65b:*** Member States, in conformity with conditions established in this Directive, may apply their national rules on criminal law and criminal proceedings with a view to taking all investigative and other measures necessary for the detection and prosecution of criminal offences, without there being a need to notify such measures to the Commission.<sup>291</sup>

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<sup>291</sup> IT: would like this text in the body of the Directive.



### Implementing measures

In accordance with the procedure referred to in Article 42(2), the Commission shall adopt the implementing measures necessary for the implementation of this Chapter, specifying the time-limits provided for in Articles 35 and 37 and the practical arrangements for the exchange of information by electronic means between ~~the single points of contact~~ Member States, and in particular the interoperability provisions for information systems.

**Recital 66:** *The development of a network of Member State consumer protection authorities, which is the subject of the proposal for the Regulation on consumer protection cooperation, complements the cooperation provided for in this Directive. The application of consumer protection legislation in cross-border cases, in particular with regard to new marketing and selling practices, as well as the need to remove certain specific obstacles to cooperation in this field, necessitates a higher degree of cooperation between Member States. In particular, it is necessary in this area to ensure that Member States require the cessation of illegal practices by operators in their territory who target consumers in another Member State.*

**Recital 66a:** Administrative cooperation is essential to make the Internal Market for services function properly. Lack of cooperation between Member States results in multiplication of rules applicable to service providers or duplication of controls for cross-border activities and can also be used by rogue traders to avoid supervision or to circumvent applicable national rules on services. It is, therefore, essential to provide for clear legally binding obligations for Member States to cooperate effectively.

**Recital 66b:** Cooperation between Member States requires a well functioning electronic information system in order to allow competent authorities easily to identify their relevant interlocutors in other Member States and to communicate in an efficient way.

**Recital 66c:** For the purposes of the Chapter on mutual assistance and supervision, “supervision” refers to activities such as monitoring and fact finding, problem solving, enforcement and imposition of sanctions, and subsequent follow-up activities.

**Recital 66d:** In normal circumstances mutual assistance shall take place directly between competent authorities. The points of contact designated by Member States shall be required to facilitate this process only in the event of difficulties being encountered, for instance if assistance is required to identify the relevant competent authority.

**Recital 66e:** *Certain obligations of mutual assistance apply to all matters covered by this Directive, including those relating to cases where a service provider establishes in another Member State. Other obligations of mutual assistance apply only in cases of cross-border provision of services, where the country of origin principle applies. A further set of obligations apply in all cases of cross-border provision of services, including areas not covered by the country of origin principle. Cross-border provision of services includes cases where services are provided at a distance and where the recipient travels to the Member State of origin of the service provider in order to receive services.*

**Recital 66f:** *The provisions of this Directive concerning the exchange of information regarding the good repute of providers do not pre-empt initiatives in the area of police and judicial cooperation in criminal matters, in particular on the exchange of information between law enforcement authorities and criminal records of the Member States.*

## Chapter VI

### Convergence programme

#### *Article 39*

#### **Codes of conduct at Community level**<sup>292</sup>

1. Member States shall<sup>293</sup>, in cooperation with the Commission, ~~take accompanying measures to encourage professional bodies at Community and national level to draw up the drawing up of~~ codes of conduct at Community level, in conformity with Community law, in particular in the following areas:
  - (a) the content of and detailed rules for commercial communications relating to regulated professions, as appropriate to the specific nature of each profession;
  - (b) the rules of professional ethics and conduct of the regulated professions which aim in particular at ensuring, as appropriate to the specific nature of each profession, independence, impartiality and professional secrecy;
  - (c) the conditions to which the activities of estate agents are subject.
2. Member States shall ensure that the codes of conduct referred to in paragraph 1 are accessible at a distance and by electronic means ~~and transmitted to the Commission.~~
3. [Moved to Article 26(3)]
4. Member States shall encourage professional bodies, organisations and associations to implement at national level the codes of conduct adopted at Community level.

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<sup>292</sup> ES: reservation on need for this Article.

<sup>293</sup> IE, SE: replace "shall" with "may".

**Recital 67:** *It is necessary to provide that the Member States, in cooperation with the Commission, are to encourage interested parties to draw up codes of conduct at Community level aimed in particular at promoting the quality of services and taking into account the specific nature of each profession. Those codes of conduct should comply with Community law, ~~especially competition law~~, including competition and consumer protection law.*

**Recital 67a:** *Codes of conduct at Community level are intended to set minimum standards of conduct and are complementary to Member States' legal requirements. They do not preclude Member States, in accordance with Community law, from taking more stringent measures in law or national professional bodies from providing for greater protection in their national codes of conduct.*

Article 40

**Additional harmonisation**<sup>294 295</sup>

1. The Commission shall assess, by [one year after the entry into force of this Directive] at the latest, the possibility of presenting proposals for harmonisation instruments on the following subjects:
  - (a) ~~the detailed rules for the exercise of cash-in-transit services~~ services related to transport of cash and valuables in transit,<sup>296</sup>
  - (b) ~~gambling activities which involve wagering a stake with pecuniary value in games of chance, including lotteries and betting transactions, in the light of a report by the Commission and a wide consultation of interested parties;~~
  - (c) ~~access to~~ the activity of ~~judicial~~ recovery of debts.<sup>297</sup>
2. In order to ensure the proper functioning of the internal market for services, the Commission shall assess the need to take additional initiatives or to present proposals for legislative instruments, particularly in relation to the following:<sup>298</sup>
  - (a) matters which, having been the subject of case-by-case derogations, have indicated the need for harmonisation at Community level;
  - (b) matters covered by Article 39 for which it has not been possible to finalise codes of conduct before the date of transposition or for which such codes are insufficient to ensure the proper functioning of the internal market;
  - (c) matters identified through the mutual evaluation procedure laid down in Article 41;
  - (d) consumer protection and cross-border contracts.

**Recital 68:** *This Directive is without prejudice to any legislative or other initiatives in the field of consumer protection.*

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<sup>294</sup> ES: reservation on this article.

<sup>295</sup> IT: general reservation on areas to be harmonised and timing.

<sup>296</sup> FR: concerns about the possibility of harmonisation of cash-in-transit services.

<sup>297</sup> IE, PT, LT: scrutiny reservation.

<sup>298</sup> IE: questioned the need for paragraph 2, particularly letter (b) and (d).

Article 41

**Mutual evaluation**<sup>299 300 301</sup>

1. By the [date of transposition] at the latest, Member States shall present a report to the Commission, containing the information specified in the following provisions:<sup>302</sup>
  - (a) Article 9(2), on authorisation systems;
  - (b) Article 15(4), on requirements to be evaluated;<sup>303</sup>
  - (c) Article 30(3-4), on multidisciplinary activities.
2. The Commission shall forward the reports provided for in paragraph 1 to the Member States, which shall submit their observations on each of the reports within six months. Within the same period, the Commission shall consult interested parties on those reports.
3. The Commission shall present the reports and the Member States' observations to the Committee referred to in Article 42(1), which may make observations.-
4. In the light of the observations provided for in paragraphs 2 and 3, the Commission shall, by 31 December 2008 at the latest, present a summary report to the European Parliament and to the Council, accompanied where appropriate by proposals for additional initiatives.

**Recital 69:** *The absence of a reaction from the Commission in the context of the mutual evaluation procedure provided for by this Directive has no effect on the compatibility with Community law of national requirements which are included in reports by Member States.*

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<sup>299</sup> Most Member States have reservations on the dates and time periods. COM has indicated willingness to consider slightly longer dates and time periods.

<sup>300</sup> BE, FR: reservation on entire Article and in particular on 41 (1) (b). DE: general reservation on the entire Article.

<sup>301</sup> COM intends to make a declaration to the effect that in accordance with existing practice, for example in relation to the implementation of Directive 98/34, it intends to provide the necessary translations of Member States' reports and observations. It also intends to issue written guidance on how such reports and observations should be structured.

<sup>302</sup> ES, DK, NL, FI: commercial communications by regulated professions should be subject to mutual evaluation. BE, FR, IT: are against this addition.

<sup>303</sup> IT: reservation on 41 (1) (b).

*Article 42*

**Committee**

1. The Commission shall be assisted by a Committee, consisting of representatives of the Member States and chaired by the Commission representative.
2. Where reference is made to this paragraph, Articles 5 ~~3~~<sup>304</sup> and 7 of Decision 1999/468/EC shall apply, in accordance with the provisions of Article 8 of that Decision.
3. The Committee shall adopt its rules of procedure.

**Recital 73** : *The measures necessary for the implementation of this Directive should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission*<sup>305</sup>.

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<sup>304</sup> CION: opposes change.

<sup>305</sup> OJ L 184, 17.7.1999, p. 23.

*Article 43*

**Report**

Following the summary report referred to in Article 41(4), the Commission shall, every three years, present to the European Parliament and to the Council a report on the application of this Directive, accompanied, where appropriate, by proposals for its amendment.



Article 44

**Amendment of Directive 1998/27/EC**

In the Annex to Directive 1998/27/EC, the following point shall be added:

"13. Directive.../EC of the European Parliament and of the Council of ... on services in the internal market (OJ L [...], [...], p. [...])".

***Recital 70:** Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests<sup>306</sup> approximates the laws, regulations and administrative provisions of the Member States relating to actions for an injunction aimed at the protection of the collective interests of consumers included in the Directives listed in the Annex to Directive 98/27/EC. In order to enable such actions to be brought in cases where the present Directive has been infringed, to the detriment of the collective interests of consumers, the Annex to Directive 98/27EC should be amended accordingly.*

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<sup>306</sup> OJ L 166, 11.6.1998, p. 51. Directive as last amended by Directive 2002/65/EC of the European Parliament and of the Council (OJ L 271, 9.10.2002, p. 16).

*Article 44 a*

**Protection of personal data**

The implementation and application of this Directive and, in particular, the provisions on Supervision shall respect rules on the protection of personal data as provided for in Directives 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data<sup>307</sup> and 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).<sup>308</sup>

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<sup>307</sup> OJ L 281, 23.11.1995, p.31. Directive as amended by Regulation (EC) No 1882/2003.

<sup>308</sup> OJ L 201, 31.07.2002, p.37.

*Article 45*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [2 years after the entry into force] at the latest. They shall forthwith communicate to the Commission the text of those provisions and a correlation table between those provisions and this Directive.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

*Article 46*

This Directive shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

*Article 47*

This Directive is addressed to the Member States.

Done at Brussels, [...]

*For the European Parliament*

*For the Council*

The President      The President

[...]

[ ... ]

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