

By **Paul Foley**
Partner
McKeever Rowan

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e: pfoley@mckr.ie



THE SERVICES DIRECTIVE OPENING UP CROSS BORDER TRADE IN SERVICES

The objective of the **Services Directive** is to release the untapped growth potential of services markets in Europe, by removing legal and administrative barriers to trade in the services sector.

Services account for around 70% of both EU output and EU employment, yet for relatively low shares of intra EU trade (24%) and investment.

The Directive will be of particular benefit to **small and medium sized businesses** seeking to provide services¹ within the scope of the Directive at a distance from their home member state to another member state or to establish in the other member state for the purposes of providing services.

The Directive has been implemented in the UK by the Provision of Services Regulations 2009 ("Regulations") and is expected to be implemented in Ireland very shortly.

The UK Regulations apply to all businesses operating in the services sector subject to certain important exclusions and work on the principle that if you are not specifically excluded, you are within the scope of the Regulations, when you provide services through an establishment in the UK or at a distance from Ireland into the UK.

Key duties imposed on service providers by the Regulations

- via a central online portal which each member state must provide, ensure any administrative or authorisation requirements are applied for and complied with
- provide minimum levels of information to service recipients, so recipients can make more informed decisions
- provide recipients with certain additional information if requested
- observe certain requirements relating to a complaints procedure
- ensure compliance with other regulations that additionally apply such as those implementing the Unfair Commercial Practices Directive, the Distance Selling Directive, the eCommerce Directive, the WEEE Directive and legislation that requires companies make certain levels of disclosures regarding its status etc.

The benefits of the Directive

- a service provider seeking to provide services in another Member State will have access to an online portal through which it can apply online for all licenses to do business in the member state. In the UK, this is available through the UK Government's main communication channel for business at www.businesslink.gov.uk (section 'applying for authorisation and licences online')²

¹ The word **Service** is defined as a self employed economic activity (normally provided for remuneration).

² **Regulation 15** of the Regulations provides that in general you should not have to satisfy criteria when applying for a licence if you have already met equivalent or essentially comparable requirements or controls in the UK or another EEA state. For example you should not be made retake examinations when you already have equivalent qualifications. You may be asked to assist a competent authority in determining whether this is the case by providing any necessary information that they may ask. Regulation 15(4) requires that you must provide the requested information within a reasonable time of being requested to do so, otherwise the competent authority may subject you to duplicate requirements.

- competent authorities whether in the UK or other EEA States, cannot make the access to or the carrying out of a service subject to an authorisation scheme or requirement unless this can be justified against specific criteria³
- the Directive removes unjustifiable or discriminatory requirements such as nationality or residence requirements or restrictive requirements (such as an economic needs test) affecting the establishment of a service activity in the UK or in providing a service into the UK from another EEA State
- the Directive provides for competent authorities in different states to co-operate including for a UK competent authority to pass relevant documentation already in its possession to the competent authority in the country concerned, rather than the business having to do it itself
- Under the terms of the Directive all EEA states must set up points of single contact (PSC) that will make it possible for a service provider to apply and pay for authorisations fully on line. The European Commission is providing a web gateway to all the PCSs across Europe which will carry the EUGO brand. This will provide one way of searching for a relevant member state PSC.

Services within the scope of the Directive

Business Services: management consultancy, professional services such as lawyers, accountants and actuaries, advertising, certification and testing services, facilities management services, office maintenance, fitting and maintenance of equipment, renting of equipment, logistics, waste management, training providers, and the services of commercial agents

Services provided to both business and to consumers: estate agents and letting agents, conveyancing, construction services such as architects and builders, restaurants and catering services, distributive trades, postal services, storage services, financial advisers and the organization of trade fairs.

Consumer services: such as tourism, including tour operators and tour guides, travel agents, leisure services and sports centres, child minders, amusement parks, private schools and universities, providers of post graduate studies, language schools, vocational training, driving instructors, MOT services, entertainment, veterinarians, gardeners, cleaners, plumbers and electricians.

Services not within the scope of the Directive include

financial services, insurance, pensions, investment funds, electronic communications services, transport services, healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private, temporary work agencies' services, private security services, audiovisual services, gambling services, certain social services provided by the State, etc

Many of these out of scope services are regulated separately. For example the provision of investment services are already regulated by the markets in financial instruments directive.

The Regulations do not affect the manufacture or sale of goods. However ancillary services relating to goods such as retail maintenance or after sales services could be subject to the Regulations.

Information you as a service provider must make available

If the services you provide are within the scope of the Directive, you must provide the following information to recipients in the UK:

- the name of your business;
- your legal status and form (ie. limited liability company or sole trader)
- the geographic address at which you are established and details by which you may be contacted rapidly and communicated with directly (including, where the provider may be contacted and communicated with by electronic means, the details of how the provider may be so contacted and communicated with);

³ an authorisation scheme can only be imposed if broadly speaking (a) the scheme is non discriminatory, (b) it can be justified by an overriding reason relating to the public interest such as public policy, public security or public health and (c) the objective of the authorisation cannot be attained by less restrictive means. Additionally if all you want to do is provide cross border services without setting up an establishment, the UK competent authority can only impose a requirement on the provider if it is non discriminatory, necessary and proportionate.

- where you are registered in a trade or other similar public register, the name of the register and your registration number or equivalent means of identification in that register;
- where the activity is subject to an authorisation scheme in the United Kingdom, the particulars of the relevant competent authority or the electronic assistance facility referred to in regulation 38;
- where the activity is subject in another EEA state to a scheme equivalent to an authorisation scheme, the particulars of the authority involved or the single point of contact in that state;
- where you exercise an activity which is subject to VAT, the identification number;
- where you are carrying on a regulated profession, any professional body or similar institution with which you are registered, the professional title and the EEA state in which that title has been granted;
- the general terms and conditions, if any, used by you;
- the existence of contractual terms, if any, used by you concerning the competent courts or the law applicable to the contract;
- the existence of any after-sales guarantee if any not imposed by law;
- the price of the service, where a price is pre-determined by you for a given type of service;
- the main features of the service, if not already apparent from the context;
- where you are subject to a requirement to hold any professional liability insurance or guarantee, information about the insurance or guarantee and in particular (i) the contact details of the insurer or guarantor, and (ii) the territorial coverage of the insurance or guarantee. The BIS state that they would not expect to see full details of the insurance held (but you should bear in mind that the Consumer Protection Regulations may require such policies be made available to recipients). Where it is the case that only you as the provider can lodge a claim with the insurer or that the insurer will only deal with you as the provider, this provision does not change that. In other words, this provision does not change your legal right with regard to the insurer.

In the case of the UK, the Regulations provide that you can make this information available in any of the following ways:

- supply it at your own initiative,
- make it easily accessible to the recipient at the place where the service is provided or the contract for the service is concluded, for example at your premises,
- make it easily accessible to the recipient electronically by means of an address supplied by the provider, or
- include it in any information documents you supply to the recipient, which set out a detailed description of the service you provide.

Further information which you must make available

Dispute Resolution If you are subject to a code of conduct or are a member of a trade association or professional body that gives access to a non judicial dispute resolution procedure, then you should inform the recipient of that fact, mention it in any information document that describes your service in detail and specify how to access information on the procedure.

Complaints You must also make available contact details where recipients can request information or make a complaint – this must include a telephone number and one or more of a postal address, fax number, or email address. If you have one, you should also give your official address (that is an address required of you by law for receiving communications). If this is the same as your postal address, there is no need to give it twice.

Information you must supply if asked

- where the price is not pre-determined, the price of the service, or if an exact price cannot be given, the method for calculating the price so that it can be checked by the recipient, or a sufficiently detailed estimate;
- if you are carrying on a regulated profession, a reference to the professional rules applicable in the EEA state in which the provider is established and how to access them;
- information on other activities undertaken by you which are directly linked to the service in question and on the measures taken to avoid conflicts of interest; that information should be included in any information document in which you give a detailed description of your services
- any codes of conduct to which you are subject and the address at which these codes may be consulted by electronic means, specifying the language available.

The information must be given in good time before the contract is concluded or before the service is provided, when there is no written contract. This is so that the recipient has enough time to digest the information and change their mind about entering the contract. The duty to give information before conclusion of the contract does not apply if the consumer asks for it after conclusion of the contract (assuming that the relevant information is of the sort that you must supply if asked).

What you must do if you receive a complaint

You must (a) respond to complaints from recipients of the service as quickly as possible, and (b) make your best efforts to find a satisfactory solution to complaints from such recipients. However this does not apply to complaints that are vexatious.

Because the nature of complaints and circumstances vary so much, the UK Regulations do not define this further or set a time limit, but factors to consider include (i) the means and ease by which the recipient can be contacted (ii) the nature and complexity of a specific case (iii) the availability of the complainant (iv) whether information is needed from a third party (v) language issues.

Discrimination in your general conditions

The non discrimination requirement in article 20 of the Directive is probably its most controversial provision. Member States must ensure:

- (i) the **recipient**⁴ is not made subject to discriminatory requirements based on his nationality or place of residence; and
- (ii) 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.

The BIS guidance states, 'Objective criteria' are objective reasons which justify your offering different conditions according to the recipient's place of residence. It will be for you to determine what you consider to be objective criteria based on your own individual circumstances, but they could include:

- a) additional costs, incurred because of i) the distance involved; or ii) the technical characteristics of the provision of the service or b) different market conditions, such as higher or lower demand influenced by i) seasonality; ii) different holiday periods; iii) pricing by different competitors; c) extra risks linked to rules differing between EEA states; or d) the absence of sufficient intellectual property rights in a particular territory.

Commercial communications by regulated professions

Competent authorities may not impose a total prohibition on the use of commercial communications by providers of a service who are carrying on a regulated profession.

⁴ **"recipient"**, is defined in the Regulations as a person who, for professional or non-professional purposes, uses, or wishes to use, the service (but see regulation 5(3)); Reg 5(3) provides "Nothing in these Regulations applies in relation to a recipient of a service who is not: (a) an individual who is a national of an EEA state or who otherwise benefits from rights conferred by Community acts, or (b) a legal person (as referred to in Article 48 of the Treaty) who is established in an EEA state".

Rules made by a competent authority in relation to commercial communications by providers of a service who are carrying on a regulated profession must be:

- (a) non-discriminatory,
- (b) justified by an overriding reason relating to the public interest, and
- (c) proportionate.

“Commercial communications” means communications in any form designed to promote, directly or indirectly, the goods, services or image of a person carrying on a regulated profession, other than:

- (a) a communication consisting only of information allowing direct access to the activity of that person, including a postal address, a domain name or an e-mail address, or
- (b) a communication which has been prepared independently of the person making it (and for this purpose, a communication prepared without financial consideration is to be taken to have been prepared independently unless the contrary is shown).

Multi-disciplinary activities

Under Regulation 35, a competent authority may not subject the provider of a service to any requirement which:

- (a) obliges the provider to exercise a specific service activity exclusively, or
- (b) restricts the exercise, jointly or in partnership, of different activities.

However, this does not prevent a competent authority for a regulated profession from imposing a requirement if or to the extent that: (a) the requirement is justified in order to guarantee compliance with the rules governing ethics and conduct in that profession, and (b) the requirement is necessary in order to ensure the impartiality and independence of that profession.

Other laws which additionally apply

Where the services are cross border online retail, they are also subject to a number of European instruments, including the Distance Selling Directive, the eCommerce Directive, the Brussels regulation on jurisdiction and the recognition of enforcement of judgements in civil and commercial matters and the Rome I Regulation on the law applicable to contractual obligations (593/2008).

Two other significant areas to be considered by cross border online retailers and which would cause them to differentiate their prices, are copyright levies (copyright levies aimed at compensating the holders of intellectual property for the negative economic impact of private copying of media) and the WEEE Directive where differences in its transposition across member states create potential country specific costs for online retailers who are also producers or distributors of the articles covered by the Directive. For instance, differences relating to the way responsibility for collection of WEEE from private households is assigned depending on national legislation can have a significant impact on costs for online retailers.

Whilst the Services Directive should result in a significant boost to cross border trade in services, it is essential that service providers take specialist advice before establishing in other member states or provide cross border services to recipients in other member states, at as early a stage as possible.