

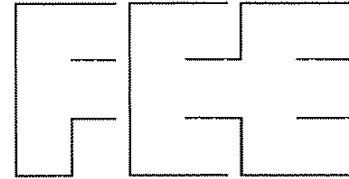
Date
19 October 2004

Le Président

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cc. Dr. Alexander Schaub
Ms Margot Fröhlinger

Dear Commissioner,

Re: Proposal for a Directive on the Services in the Internal Market

FEE, the representative organisation of the accountancy profession in Europe, welcomes the opportunity to comment on the proposal for a Directive on Services in the internal market (COM (2004)2).

Overall, FEE supports the underlying objective of the proposed Directive to facilitate the free provision of services in the internal market. Progress in this direction is to be welcomed.

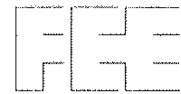
However, FEE also upholds the need, when considering freedom of movement and freedom of provision, to differentiate between the regulated areas (which do vary from country to country) and non-regulated areas of the profession's activities. In practice, it is also relevant to make a clear distinction between regulated profession and regulated activities. Such distinctions help to identify the most appropriate corresponding instruments to facilitate freedom of movement and of service provision.

In that respect, it is important that consistency is ensured between different ongoing initiatives of the European Commission and in particular the Proposal for a Directive on the Recognition of Professional Qualifications (COM (2002) 119 final) of 7 March 2002 and the Proposal for a Directive on Statutory Audit of Annual Accounts (COM (2004) 0177). Without prejudice to the ongoing discussions in the European Parliament and Council on these proposals, it seems to us that their provisions are not entirely consistent with the Services Directive. Some inconsistencies or risks of inconsistency are identified below.

1. General comments

1.1. Definitions

Article 4 of the proposed Services Directive defines the concepts of services and of regulated professions. Article 3 of the proposed Directive on Recognition of Professional Qualifications also proposes a definition of regulated profession and professional qualification. We assume that the two definitions will be fully consistent at the end of the legislative process, which is not the case at this moment. Furthermore, some difficulties arise over their practical use in relation to the accountancy profession.



In the Services Directive, "regulated profession" means "a professional activity or a group of professional activities, the access to which, the practice of which, or one of its modes of pursuit, is subject, directly or indirectly, to legislative, regulatory or administrative provisions concerning possession of specific professional qualifications." However, aside from statutory audit – which is regulated in all EU Member States through the Eighth Directive - there is not a uniform delineation across Member States of the regulated activities of the profession. Certain activities undertaken by the accountancy profession are regulated in some countries but not in others. In some instances, an activity which is reserved to the accountancy profession in one country is undertaken by another regulated profession or is not regulated in another Member State.

As a matter of principle, FEE believes that an approach by activity (or by different kind of services, which in our understanding has the same meaning) allows more discriminating justifications of possible restrictions as mentioned in article 15. However, paragraph 2.1 below demonstrates that this approach can raise a number of issues which need to be properly addressed.

1.2. The Opportunity to Apply a Different Treatment to Statutory Auditing

The role and position of the statutory audit function in the corporate governance systems in each Member State need to be carefully considered. FEE supported the European Commission's proposal to regulate the different aspects of statutory auditing in the proposed Directive on Statutory Audit (COM (2004) 0177), including entry requirements, registration, ethics and professional standards, supervision, investigations, sanctions, public oversight and also cross border provision of services. It is essential to ensure that all necessary safeguards apply to protect users of auditors' report and more broadly the public interest.

The required knowledge of the national law together with the high expectation of the public in the work of the auditor is hardly compatible with the horizontal approach which is applied by the proposal for a Directive on the recognition of professional qualifications under which rules for a large number of widely diverging professions would be introduced. For that reason, FEE supported the European Commission's proposal to insert a specific provision on this issue in the proposed Directive on Statutory Audit (article 14).

The proposed Directive requires approval and registration of the statutory auditor in the Member State of destination. It also requires supervision by the Member State where the audit services are provided and cooperation between the regulatory or oversight authorities in the Member States concerning cross-border activities.

Therefore, there is a serious risk of inconsistency between the Directive on Statutory Audit and the Services Directive which should be seriously considered if statutory audit is not entirely exempted from the application of the provisions of the Services Directive. An example of such a risk is the provision on professional indemnity assurance in article 27.1. FEE has repeatedly argued that an initiative of the European Commission in the area of professional liability of statutory auditors is a matter of urgency. The application of this provision of the Services Directive in this case would only make the current situation more difficult.

FEE believes in that respect that the exemption provided by article 17.15 of the Services Directive should be expanded. The best solution would then be to scope out statutory audit totally from this Directive.



2. Specific comments related to cross border provision of services

2.1. Professional rules applicable to cross border provision of services

As explained above, some activities usually provided by accountants are regulated in some Member States and not in others. This means that a service could be provided in a Member State where the activity is regulated by a service provider of a Member State where the activity is not regulated. This individual could be:

- a member of a regulated profession, which supposes that he will satisfy entry requirements and accordingly have a recognised professional qualification;
- an individual who is not affiliated to any professional organisation and has no recognised professional qualification.

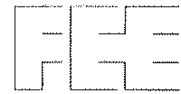
If the individual is a member of a regulated profession, it is not only assumed that he has met the entry requirements to become a member of this profession but that he will also be required to respect the code of conduct of this profession and be subject to the discipline of his professional body (or a public body in charge of the oversight of the profession). Consequently, even when applying the country of origin principle, the member of this regulated profession who is providing a service in another Member State will be subject to a system of professional rules equivalent to those in the host country. FEE believes that the provision of cross border services in such cases would be perfectly acceptable throughout the European Internal Market.

If the service is provided by an individual who is not a member of a regulated profession in the country of origin, the situation is more difficult. The proposed Directive on Recognition of Professional Qualifications identifies the problem. Article 13.2 of the political agreement provides that access to the profession shall be granted to applicants who have pursued the profession (activity) on a full time basis for two years during the previous 10 years in another Member State which does not regulate that profession (activity), providing that they possess one or more attestations of competence or documents providing evidence of formal qualification.

No similar provision exists in the Services Directive, which means that if the service provider is established in a Member State where the activity is not regulated and is not affiliated to any professional organisation, there would be no adherence to any kind of professional rules either in the country of origin or in the country where the service is provided.

The pro-forma registration envisaged by the Qualifications Directive does not solve the problem for two reasons:

- It does not address issues which are not linked to market access (insurance, ethics, etc). In these areas, if there are no professional rules in the country of origin, the application of the principle of the country of origin means that no rule will be enforceable, even when the service is regulated in the host country:
- It will not be possible to refer individuals to any supervisory or disciplinary mechanism in the Member State of origin. Furthermore, even within the scope of the Qualifications Directive, governments should be made clearly responsible for developing adequate arrangements to supervise and discipline those providing regulated services under a pro-forma declaration but who have not become members of a professional body in the host country and cannot, therefore, be subject to host country supervision and discipline arrangements.



Accordingly, FEE believes that the Services Directive should *authorise* the Member State of destination to apply local professional rules, including supervision and discipline arrangements, when an activity regulated in its territory is not regulated in the country of origin of the services provider. This provision would ensure a similar level of protection of consumer rights as is already applied in the Member State where the service is provided.

2.2. Supervision

FEE considers that a proper application of the country of origin principle requires the equivalence of the mechanisms of supervision or oversight of the professional activities in the Member States. In practice the following difficulties may exist:

- As explained above, certain activities may not be regulated in all Member States and consequently not submitted to any supervision.
- Member States may not authorise the nationally competent authority to sanction wrong doing outside its own territory in another Member State.
- Exchange of information may be prohibited or restricted on the basis of rules linked to professional secrecy or privacy rules imposed to the administrative or disciplinary bodies.
- The mechanisms of supervision (ex ante or ex post) and the sanctions in case of wrong doing are often divergent.

Therefore, FEE believes that Chapter V of the proposed Directive is essential as it requires that the power of supervision provided for in national law remains effective when a service is provided into another Member State. A mutual assistance between competent authorities of Member States is necessary in order to ensure the supervision of providers and the services they provide; articles 35 to 37 organise such mutual assistance on the basis of the home country control principle. The main issue remains however to evaluate how far these provisions can meet the objective.

The first question relates to the body which has to provide mutual assistance. The proposed Directive is unclear on that as it refers to “the Member State” or to “one or more point of contact”. This might not be sufficient to overcome the legal obligation of, for instance, professional disciplinary bodies to respect a confidentiality principle.

Article 35.4 requires that the Member State of origin undertakes checks, inspections and investigations requested by another Member State and inform the latter of the results. If all the information needs to be provided through an administrative centralised procedure (which seems to be the case when article 37 is applicable), the system will create a burdensome bureaucracy, not a true mutual assistance. Furthermore, it is not clear that problems linked to privacy or professional secrecy will be solved.

In the event of the temporary movement of the provider, article 36 requires that the competent authorities of the Member State where the service is provided participate in the supervision. We believe that such terminology could be more appropriate to define the bodies which have to provide mutual assistance. However, paragraph 2 includes a very important limitation: the competent authorities have no more power than is authorised in their Member State. This demonstrates that the systems will not be equally effective, will not cover non-regulated activities and will not eliminate the problem of professional secrecy.

Finally, the procedure proposed to impose sanctions having an impact in another Member States is unclear. If article 37 has to be applied, as explained above, this will create a very burdensome bureaucracy at the level of Member States and also at the level of the Commission.

In conclusion, FEE believes that two conditions are necessary to make the system credible:

- Mutual assistance should exist and be organised at the level of competent authorities in the Member States which have the right to supervise a professional activity. The Commission should then receive information from the Member States on these competent authorities and be able to identify a competent authority.
- The Directive should be very clear on the possibility to exchange information even when covered by professional secrecy, but in this case the receiver of the information should be obliged to respect the same confidentiality obligations as those applicable to the provider of the information.

2.3. Professional Indemnity Insurance

Article 27.1 requires Member States to ensure that providers whose services present a particular financial risk to the recipient are covered by appropriate professional indemnity insurance in view of the nature and extent of the risk, or by any other guarantee or compensatory provision which are equivalent or essentially comparable as regards their purpose.

In principle, we support this requirement. We would like however to make two observations:

- It is not clear that appropriate indemnity insurance will always be available. There would be a real risk if the amounts of a service provider's professional indemnity insurance were disclosed that speculative claims could be based on the insurance held rather than on the amount lost and it is frequently a condition of such insurance that the amount of insurance is not disclosed. Furthermore, we are also concerned about the compulsory requirement for indemnity insurance in areas that are not well defined.
- As explained above, professional activities are not consistently regulated in the Member States. This means that Member States could have different interpretations of a service which presents a particular financial risk. The application of the principle of the country of origin would have unacceptable consequences for consumers and competitors. It is not clear that paragraph 5 of article 27 addresses this issue adequately.

2.4. Commercial Communication

FEE supports the second paragraph of article 29 of the proposal which requires that "Member States shall ensure that commercial communications by the regulated professions respect, on the basis of the specific nature of each profession, professional rules which are in conformity with Community law, relating, in particular, to the independence, dignity and integrity of the profession as well as professional secrecy".

The first paragraph is ambiguous as it is not clear whether it requires the removal of all prohibitions, which would contradict paragraph 2 or only a total prohibition of commercial communications, which could be understandable.

2.5. Multidisciplinary Activities

Article 30 of the proposed Directive restricts the possibility for Member States to limit multi-disciplinary activities. However, derogations are introduced for regulated professions, in so far this is justified in order to guarantee compliance with different rule of professional ethics and conduct. FEE supports this provision which is proportionate and allows appropriate treatment of a situation which varies from Member State to Member State.



Nevertheless, in the longer term, the question may be raised as to why the exercise of a specific activity in partnership authorised in a Member States (for instance Wirtschaftsprüfer and Rechtsanwalt in Germany) is not authorised in other Member States (see ECJ, in case c-309/99: Wouters).

3. Code of Conduct at Community Level

Article 39 encourages the drawing up of a code of conduct at Community level. It proposes Member States to be asked to take accompanying measures to encourage professional bodies to implement at national level the code of conduct adopted at Community level.

The policy of FEE is to support global standards, which includes the Code of Ethics adopted by the International Federation of Accountants (IFAC). The explanatory memorandum of the proposed Directive on Statutory Audit refers explicitly to this code. Except for very exceptional circumstances, such as for instance the implementation of the Directive on electronic communication, FEE believes that additional requirements to this code at Community level should be avoided.

* * *

Summarising the observations made above, FEE believes that the proposed Directive on Services would be improved if amendments were introduced in order to:

- Clarify the distinction between rules applicable to services and rules applicable to individuals carrying out a profession.
- Scope out statutory audit because it is fully regulated by another Directive.
- Insert a provision allowing national competent authorities to exchange the necessary information.
- Accept that the services provider who is not submitted to equivalent professional rules in the country of origin has to comply with the rules applicable in the country where the service is provided.
- Delete the required disclosure of the amount of insurance coverage and revise other negative impacts of Article 27.

We would be pleased to meet you at your convenience in order to explain our concerns in more detail.

Yours sincerely,

David Devlin
President