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on the outcome of the peer review on legal form, shareholding and tariff requirements under the Services Directive

Accompanying the document

Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee
on Evaluating national regulations on access to professions

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INTRODUCTION

In its Article 15, the Directive 2006/123/EC on services in the internal market ("Services Directive") lists a series of requirements imposed on service providers, among which legal form, shareholding and tariffs.

These requirements are not strictly prohibited but have been identified by the Court of Justice of the EU as creating obstacles to the internal market in services. They can only be maintained in so far as they are non-discriminatory, justified by an overriding reason relating to the public interest and proportionate, i.e. no less restrictive measure could be used. As part of the transposition of the Services Directive, Member States were to screen their requirements and assess whether they met this three-step test.

The report on the implementation of the Services Directive published in June 2012[1] shows that, even though some Member States relaxed or suppressed some legal form and shareholding requirements as part of their implementation of the Services Directive, these requirements remain widespread among EU Member States. By contrast, most compulsory tariffs seem to have been abolished in the EU, with few exceptions, where they have been maintained by some Member States for professional services.

The Commission therefore announced in its Communication of 8 June 2012[2] that it would conduct a peer review on legal form and shareholding requirements. It also announced a Communication aimed at facilitating the mutual evaluation of regulated professions foreseen in the revised Professional Qualifications Directive. This latter Communication is published at the same time as this Staff Working Document in order to ensure a comprehensive examination of the national rules restricting the access to or the exercise of professions. It will focus on the requirements reserving the exercise of certain activities or the use of a professional title to the holders of specific professional qualifications.

The peer review took place following a methodology agreed beforehand with Member States. Discussions took place on 19 and 20 December 2012 in clusters of 7 to 8 Member States and were followed by plenary meetings of Member States' experts in January and February 2013. Fixed tariffs were also discussed in a plenary meeting.

1. THE PEER REVIEW PROCESS

1.1. Scope and methodology

The main objective of the peer review was to make it possible for Member States, together with the Commission, to better understand and compare the existing national or regional requirements and their justification.

[1] http://ec.europa.eu/internal_market/services/services-dir/implementation/implementation_report/index_en.htm

[2] "Communication on the implementation of the Services Directive: A partnership for new growth in services 2012-2015". COM (2012) 261 final
http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/COM_2012_261_en.pdf

In order for the discussions to go into the substance of the requirements and public interest justifications, the Commission decided to limit the peer review to legal form, shareholding and tariffs requirements in five professions, namely accountants, tax advisers, architects, veterinarians and patent agents. The professions concerned were chosen in business services and construction sectors, which were identified as key services sectors in the June 2012 Communication.

Discussions took place in December 2012 in small clusters of Member States in respect of legal form and shareholding requirements. The clusters were composed of Member States with different regulatory approaches. Factual data sheets prepared in advance by the Commission from the information gathered as a result of the mutual evaluation (2010), the performance checks (2011) and the Services Directive implementation report (2012), served as a basis for the discussions, enabling the exchanges of views to focus on regulatory approaches and proportionality issues rather than on information gathering.

Plenary meetings of Member States' experts were organised following the cluster meetings, both to gather feedback from the cluster discussions and to allow some of those Member States, which do not impose legal form and shareholding requirements, to present their regulatory systems.

Tariffs were discussed in a plenary meeting on the basis of factual data sheets prepared by the Commission.

1.2. Main objectives

The peer review gave Member States an opportunity to explain the rationale for their requirements, any changes made to their regulatory systems and the impact of these changes.

The purpose of the peer review was also to allow Member States to compare approaches and at times challenge the justifications and proportionality of different policy options. Member States were invited to explain how they used the discretion left to them in the Services Directive and compare the methods chosen to achieve public policy objectives. The aim of the discussions was to go beyond the purely legal obligations set by the Directive and to look, in particular, at the legal form, shareholding requirements and tariffs in a wider context, so as to gain some insight into the potential economic and societal benefits which the removal or relaxation of these requirements would bring.

2. RESULTS OF THE PEER REVIEW

2.1. Legal form and shareholding requirements in the EU

The peer review confirmed the diversity of approaches in the EU. Rules, which are often complex, vary from one Member State to the other, reflecting the strong weight of tradition and different historical evolutions. The peer review confirmed the existence of two broad regulatory approaches among EU Member States as regards the activities of regulated professions.

Under the first approach, regulated professionals traditionally used to perform their activities as ‘liberal’ professionals, i.e. as sole practitioners. Specific legal forms, often civil law

partnerships – also called professional companies, were created to enable them to perform their activities collectively. Commercial company forms are traditionally considered to be incompatible with the 'liberal' nature of the profession. The legal form requirements are often combined with capital ownership requirements, to preserve the 'liberal nature' of the activities. The most widespread requirement is that the capital of the company must be controlled by the qualified professionals who also work in the company. In certain Member States, these partnerships may also participate as majority shareholders in the capital of other professional companies. Restrictions may also be imposed on the voting rights or management positions, which may have to be reserved at least in part to qualified professionals. In such ventures, the participating professionals often are jointly liable for damages arising from their professional acts, though they can in some instances benefit from limited liability. Such a regulatory approach exists mainly, though with differences in substance and varying levels of intensity, in Austria, Belgium, Bulgaria, Cyprus, France, Germany, Italy, Malta, Portugal, Spain, Czech Republic, and Poland.

Since the adoption of the Services Directive, a few Member States abolished their legal form or shareholding requirements. This is the case, in particular, of Greece which did so for all professions, with limited exceptions. Hungary, by and large, did the same, and relies more on professional rules of conduct, as an alternative method of protecting service recipients and consumers.

Some other Member States, while keeping legal form and shareholding requirements, extended the choice of legal forms available to professionals and/or reduced the scope and/or intensity of shareholding requirements, though usually maintaining the obligation for professionals to hold a controlling stake. France, for instance, reduced its 75% shareholding requirement to 51% for several liberal professions (with exceptions, e.g. veterinarians and lawyers). Italy, which traditionally only allowed sole practitioners, recently opened the possibility to set up professional companies. The number of professionals and their participation in the share capital must be such as to determine a 66,6 % majority in the deliberations or decisions of shareholders. Spain and Cyprus have opened further company forms to regulated professionals. Portugal reduced the minimum capital ownership obligation to 51% for several professions, even though some exceptions remain.

Under the second approach, qualified professionals may provide their services via companies, be it commercial companies, without any requirement to control such companies. In practice, the professional will provide his services in the name of the company and thus benefit from the company's limited liability. This approach exists in several Member States including Denmark, Finland, Hungary, Sweden, the Netherlands, and the United Kingdom and to some extent also in Germany. There are variations in the regulatory choices made in these Member States. Some Member States regulate the activities (as opposed to) the professionals. This results in some of Member States with no or very few legal form and shareholding requirements having a fairly high number of regulated professions. For example, the UK has 220 regulated professions, which contrasts with France's 150.[3] Another approach is not to regulate the provision of the service but rather to control the quality of the service provided. A

[3] http://ec.europa.eu/internal_market/qualifications/regprof/index.cfm

good example exists with regard to building permit applications. While in some Member States building permit applications may only be lodged by qualified architects and public authorities will only check conformity with the land planning laws, other Member States, like Sweden, do not impose restrictions on who can lodge a building permit application, but public authorities employ qualified architects who will check that the plans are sound.

2.2. Effect of legal form and shareholding requirements on establishment

Restrictions on legal form and shareholding have an impact on both secondary and primary establishment. Secondary establishment refers to the situation where an undertaking already established in a Member State sets up a branch or subsidiary in another Member State. Primary establishment refers to the creation of a first undertaking.

2.2.1. Restrictions on secondary establishment

Subsidiaries are the most common form of secondary establishment of companies wishing to expand their operations, in their home or in another Member State. Restrictions on legal form and shareholding in the Member State in which secondary establishment is sought, however, can prove a significant obstacle for incoming service providers.

Clearly, the most stringent requirement is to only allow a professional activity to be carried out as a sole practitioner. Such a rule makes the establishment of any sort of legal structure impossible, be it as a secondary or as a primary establishment. This type of restriction only subsists in rare cases.

When Member States allow the collective performance of professional activities, subject to legal form and shareholding requirements, the effect of these requirements on the setting up of subsidiaries will depend on three aspects: (1) Must the control of the company be in the hands of individual professionals (i.e. natural persons)? (2) If "professional companies" may qualify as controlling shareholders, under which conditions do companies from other Member States which provide the same professional services qualify as "professional companies"? (3) Can the professional services be provided by companies other than "professional companies"?

The rule requiring that professional companies be controlled by natural persons means that legal persons cannot be controlling shareholders. This makes it impossible for a professional company to be the subsidiary of another company. In other words, a Danish company providing accounting services will not be able to set up a subsidiary to provide the same services in Italy, because for any company providing accounting services in Italy the number of professionals registered with a professional order and their participation in the share capital must be such as to determine a 66.6 % majority in the deliberations or decisions of shareholders.

Some Member States allow professional companies (i.e., not just individual professionals) to control other professional companies. This brings relative, though welcome, flexibility. However, with regard to secondary establishment, the key question will then be whether the Member State which allows professional companies to control other professional companies recognises as "professional companies" any company, which lawfully provide the same professional services under the laws of another Member State. This may not be the case if the professional companies from other Member States are set up as commercial companies, even

if they provide their services lawfully under the rules of their home Member State. If they are not recognised as professional companies in the host Member State, they will not be able to set up subsidiaries there.

Such rules on capital ownership create a bottleneck on secondary establishment in particular where the Member State which imposes such rules, in addition, makes of the legal form requirement a condition to provide the professional service.

The following example illustrates this.

Member State A leaves professionals free to choose the legal form under which they want to operate. A professional decides to set up a commercial company through which he provides his professional services.

Member State B requires that professional companies be controlled by individual professionals and/or other (civil) professional companies.

Unless the company of Member State A is considered a professional company in Member State B (which is unlikely since it is a commercial company), it is left with the following choice as regards setting up a secondary establishment in Member State B:

- either it sets up a subsidiary as a commercial company, but that company will not be able to provide architectural services (because it will not qualify as a professional company),
- or individual professionals affiliated with it set up a professional company in Member State B, but, by definition, the individual professionals will control the professional company. It will therefore not be a subsidiary of the company based in Member State A.

2.2.2. Restrictions on primary establishment

Legal form and shareholding restrictions do not only have an impact on secondary establishment, they also affect primary establishment.

Legal form and shareholding requirements enable the collective performance of the professional activity while preserving the 'liberal' character of the profession and allegedly its independence. While the case is often made that these restrictions are conducive to a high service quality and thus protect service recipients (see paragraph 2.3 below), they also reduce the scope for competition, hamper business development and innovation.

As in the case of secondary establishment, the rule limiting the professional activity to sole practitioners constitutes the most stringent restriction to primary establishment, as it excludes the collective performance of the service activities. This is the case, for instance, of veterinarians in Luxembourg and France, and of patent agents in Belgium and Bulgaria.

The collective performance of service activities via legal forms with a high level of personal liability, like partnerships without limited liability, is argued to have a strong disciplinary effect on the professionals and to ensure a better quality of service via mutual control by the business partners. Such rules, however, can at the same time hamper the development of

professional activities and a balance should be found between the need to ensure the quality and the restrictiveness of the measures taken.

Where Member States allow for the collective performance of the service activities via company forms, the main issue in terms of business creation and development will be the requirement that the majority of the share capital be held by the professionals. This will be the case in particular when this requirement applies to many, if not all, regulated professions. Where this is the case, it means that in practice professional companies can perform one type of activity only. It makes it impossible to set up multidisciplinary companies.

For example, the requirement that 51% of the shares of accounting firms must be held by accountants will make it impossible for such firms to associate with tax advisers, if tax advisers are subject to the same 51% ownership requirement.

Such ownership rules, which impose in practice a "one company – one activity" model, hamper the emergence of new, more innovative business models which would enable companies to offer a wider range of services. The discussions which took place as part of the peer review confirmed this.

These requirements can also have a direct impact on the innovation and growth capacity in certain sectors. The peer review showed that, where such rules exist, innovation can be hampered by problems in accessing affordable capital. An example was given, in the context of the legal profession, of software currently being developed which delivers legal advice based on the analysis of the complete case law. Such software requires significant investment which many law firms cannot make because their compulsory capital structure does not allow them to have recourse to outside capital.

Similar issues may arise in other sectors like architecture or health, where access to capital to acquire new tools (often IT-based) may be made more difficult by requirements that capital ownership remains in the hands of individual professionals.

2.3. Convergence of public interest reasons across Member States

Even though legal form and shareholding requirements are restrictions to the freedom of establishment, they may nonetheless be maintained to the extent that they are justified by an overriding reason relating to the public interest (article 15(2) Services Directive).

The peer review revealed a strong convergence of the "overriding reasons relating to the public interest" invoked by Member States to justify legal form and shareholding requirements. This contrasts strongly with the variety of regulatory frameworks and the wide variations in the intensity of the restrictions, which exist in the Member States.

The two overriding public interest grounds, which Member States cited most often in the peer review as justifying restrictions to the freedom of establishment, were the need to ensure the quality of the service (thus indirectly consumer protection) and the need to ensure the independence of professionals. Other overriding public interest grounds, such as professional secrecy, may come into play in particular in other service activities which were not subject to the peer review.

At first sight, the need to ensure service quality per se seems indisputable. The actual need for a high level of service quality, however, should be assessed in light of the risk linked to poor service performance (see paragraph 2.4 below).

The need to ensure the independence of professionals was considered both as necessary because of the "liberal" nature of the professions and because of the need to protect professionals from undue pressure, which could distract them from their professional duty towards their clients. Holding a controlling stake in their business venture would be necessary to shield them from the pressure which a non-professional controlling shareholder could exert on them, e.g., to enhance the venture's profitability at the expense of service quality. Independence of a profession, therefore, is also often cited as necessary to ensure the quality of the service provided.

Interestingly, however, the need to ensure the independence of professionals varies greatly between Member States and from one profession to the other. For example, while one Member State will impose such restrictions on veterinarians, it will not do so on accountants, or vice versa. Some other Member States will not have any such restrictions, be it that they consider that the independence of the professionals is not essential to the performance of that activity or that they ensure independence by other means, like rules of conduct or rules on incompatibility.

Furthermore, it was not always quite clear during the peer review discussions how precisely legal form and shareholding requirements are necessary to meet the stated public interest objectives, nor whether measures which would be less restrictive on establishment were actually explored.

2.4. Divergent application of the proportionality test

2.4.1. The proportionality test (Art. 15 Services Directive)

Article 15 of the Services Directive[4] imposes on Member States a three-stage proportionality test, when assessing legal form and shareholding requirements:

1. Ensure that the measure is non-discriminatory;
2. Identify the overriding reason related to the public interest justifying the measure; and
3. Ensure that the measure is proportionate i.e. that the public interest objective could not be met with a measure which is less restrictive.

Stage 1 does not seem to have raised too much difficulty and measures in place apply to all professionals. By contrast, the implementation of stages 2 and 3 raises questions.

[4] The criteria defined in Article 15(3) of the Services Directive (non-discrimination, necessity, proportionality) are the same as those set out in Article 59 of the proposed Professional Qualifications Directive. Article 15(3) of the Services Directive applies them to several conditions for access to and exercise of the professional activity, while Article 59 of the Professional Qualifications Directive provides for a new transparency and mutual evaluation which will cover restrictions pertaining to the requirements to become a qualified professional and be recognised as such (qualification requirements and related reserved activities).

While there is little doubt that a high quality of services is positive, this should be assessed in light of the risk or consequences to which the provision of a low quality service would expose consumers/service recipients. The risk will evidently vary depending on the service activity concerned. Clearly, service quality will be of particular importance where it serves another public interest objective, such as consumer protection, safety or protection of health. The same applies to the independence of the professionals. The need to ensure service quality and the independence of the profession will not have the same degree of intensity as a public interest objective whether one speaks of veterinary, architectural, accounting, tax advising and patent agency services, to name only the services considered in the peer review. Member States, however, do not seem to have made a concrete assessment of the actual need to ensure service quality and the independence of the profession in each case.

In accordance with Article 15 of the Services Directive Member States should have examined whether their legal system makes access to and exercise of service activities subject to compliance with requirements set out in paragraph 2 of the same Article and whether the requirements satisfy the conditions of non-discrimination, necessity and proportionality, set out in paragraph 3.

2.4.2. Were restrictions assessed?

The discussions in the mutual evaluation and the peer review revealed that some Member States suppressed restrictions for some professions, or reduced them (e.g., by making additional company forms available and/or by reducing the majority control of the share capital by professionals from 75% to 51%), while others maintained very strong restrictions such as 100% capital ownership and sole practice.

Of course, there may be variations in the Member States' assessment of their public interest objective, even though there can be doubts as to whether the proportionality assessment was carried out rigorously and consistently. This is the case, in particular, when the restrictions applied within the same Member States do not seem to rely on a clear methodology. It may be difficult to understand for example which overriding reason relating to the public interest justifies that patent agents may be subject in some Member States to stricter legal form and shareholding requirements than veterinarians, even though the latter's activities seems more sensitive from a public interest point of view.

2.4.3. Were less restrictive alternatives taken into account?

The proportionality test requires that less restrictive alternatives be taken into account. In general, this seems not to have been done, at least not in a consistent and systematic way.

In particular, the assessment of proportionality requires that due consideration be taken of the global environment in which the professional service activity takes place. If other mechanisms and safeguards are in place which seek to meet public interest objectives, these should be taken into account when determining the need for legal form and shareholding requirements, and if so, the restrictiveness of those requirements.

Indeed, when professionals (1) have a regulated professional qualification and (2) benefit from a protected professional title and (3) a reserve of activities, when in addition (4) their professional order issues rules of conduct (including on the prevention of conflicts of interest)

and (5) they are subject to insurance/guarantee requirements to protect consumers, one can reasonably question the extent to which legal form and shareholding requirements are necessary in addition to all other safeguards to protect the independence of the profession and ensure the quality of the service. In light of the obstacles which legal form and shareholding requirements impose on establishment, this question cannot be avoided.

A careful assessment of proportionality would have required assessing the actual need for restrictions on establishment in light of the public interests to protect, if any. It would have also required Member States to ensure that there were no less restrictive measures capable of meeting the public interest objectives.

2.5. Alternative practices

The peer review revealed the existence of some alternative models, even though these may not necessarily be labelled as best practices. Variety also exists among those regulatory regimes which maintain legal form and/or shareholding requirements mainly in Austria, Spain, Italy, France, Belgium, Portugal, Luxemburg, and to some extent also in Greece, Cyprus and Germany. Among these models, some practices may have a less restrictive impact on establishment than others.

2.5.1. Legal form and shareholding requirements linked to the use of a professional title as opposed to being a condition for the provision of the service

In many cases, legal form and shareholding requirements are a pre-requisite to the provision of professional services via an undertaking. As explained under paragraph 2.2.1. above, when this requirement is combined with restrictions on shareholders, it constitutes a strong obstacle to secondary establishment.

In some cases, however, the legal form and shareholding requirements will only be a condition for the use of the professional title by the company, but not for the provision of the service.

For architects in Germany, for example, the legal form and shareholding requirements are exclusively linked to the use of the professional title by the company, but not to the provision of the service. If the company is to bear the professional title ‘architect’ in its name (e.g. “Schmidt Architekten”), then it must meet legal form and shareholding requirements. But architects may set up any other form of company, through which they can provide architectural services, as long as the company does not include the word “architect” or “architectural” as part of its name (e.g. “Schmidt Design”).

In a somewhat similar way, in Bulgaria the title "design office" can be used subject to shareholding requirements without reserving the professional activity to companies with such titles. In other words, the service must be provided by qualified professionals, but the legal form and shareholding requirements are only a condition for the use of the professional title by the company, not for the provision of the service.

Such a rule is much less restrictive on establishment than shareholding requirement for the provision of the service. It does not stop professionals from other Member States, no matter their home regulatory regime, from setting up subsidiaries. The only restriction is that their

subsidiary may not bear the professional title. Furthermore, such a rule, if extended to other professions, has a much lighter effect on primary establishment, since it makes the setting up of multidisciplinary firms possible.

2.5.2. Capital vs. voting rights or management control

In order to keep the control of a company in the hands of professionals, a common approach is to require the majority shares to be held by the professionals. This may be combined with the obligation for the professionals to hold the majority of voting rights and to control the board of the company. However, other Member States, which share the same public interest objective, require only the majority of voting rights or management positions to be held by the professionals and have no rule on capital ownership. This is the case, for example, of Italy, which imposes on professionals the obligation to hold such a participation in the share capital as to determine a 66.6 % majority in the deliberations or decisions of shareholders. Limiting the control obligation to voting rights or management control allows for more flexibility with regard to the financing model of a company, while allowing the control to be held by the professionals over the decisions which may affect the quality of service, or to avoid some unwanted influences from third parties.

It seems, however, that applying only voting rights/management position related requirements without any imposing restrictions on shares, is rather limited. In the majority of cases, the two or three requirements (majority shares, voting rights, management position/membership of the Board) are applied concurrently, which raises further doubts as to the proportionality of such combined requirements.

2.5.3. Control level thresholds

It is clear that while asking for majority shares to be held by professionals, different levels of restrictions can be imposed. Only few Member States still impose requirements to hold 100% of the capital and/or of voting rights.

Austria imposes an obligation for the professionals to exercise a decisive role in the decision-making system of patent agency companies, without being subject to instructions from or approval by other shareholders, and to hold 100% of voting rights in veterinarian services companies. A 75% capital ownership requirement exists in Slovakia for tax advisors, in France for veterinarians, though France reduced the minimum capital ownership requirement to 51% for most other professions. Italy imposes an obligation on professionals to hold such a participation in the share capital as to determine a 66.6 % majority in the deliberations or decisions of shareholders, no matter the service activity but allows that the voting rights be held by any regulated professionals, irrespective of the type of activity.

The most common requirement, however, is to have 51 % of capital and voting rights to be held by the professionals.

With 51% being sufficient to control the day-to-day activity of a company, it is quite difficult to understand the rationale for a 100% holding requirement, be it for shares or voting rights. This is all the more so since reforms have taken place in several Member States, leading to the reduction of such requirements. In comparison, 100% requirements seem unduly restrictive and their proportionality is very difficult to demonstrate. The same reasoning applies to all

thresholds above 51%, such as 75% and 66.6%, though of course with less force than in the case of 100% capital ownership and/or voting rights requirements.

Minimum capital and or voting rights thresholds should of course be considered in conjunction with other requirements that may apply concurrently, such as the obligation to control the management of the company. The combination of several requirements having the same objective raises prima facie doubts about proportionality.

2.5.4. Majority requirements vs. incompatibility rules

As mentioned above, requirements related to the majority of shares to be held by professionals (natural or legal persons) of a given sector are mainly justified by the need to avoid conflicts of interest /to ensure the independence and impartiality of professionals and to ensure the quality of the professional service.

Where needed, however, the independence of professionals can be achieved via rules on the joint exercise of certain professions/activities. Article 25 of the Services Directive provides that restrictions on multidisciplinary activities can be applied to regulated professions as long as they are justified to guarantee the compliance with the rules of professional ethics and conduct, which may vary from one profession to another. In addition, such restrictions should be necessary to ensure the independence and impartiality of the profession.

The peer review showed that some Member States make use of restrictions on joint activities, defining in legislation which activities could or could not be exercised jointly. For example, in Belgium, Greece, Denmark, France and Spain, veterinarians may not associate with companies distributing medicines and sanitary products. In Austria, architects cannot have multidisciplinary activities with construction related businesses.

This approach is less restrictive on establishment than controlling shareholding requirements. Indeed, incompatibility rules will specifically target conflicts of interest or situations which would put the independence of the professionals at risk and thereby entail a possible risk for service recipients. Unlike stringent majority shareholding requirements, such a targeted approach does not exclude all forms of multidisciplinary associations.

2.6. Tariffs in the EU

The peer review confirmed the conclusions of the 2011 report on the mutual evaluation process, i.e. that most Member States either did not have fixed tariffs or they abolished them when implementing the Services Directive. This said, compulsory tariffs continue to exist in a limited number of Member States, in particular for professional services.

The focus of the peer review was on fixed minimum tariffs as maximum tariffs were identified in very few cases and on the same five professions as for legal form and shareholding requirements.

Fixed tariffs for architectural services seem to apply only in Germany. Minimum and maximum rates apply for certain architectural services, which are considered to be indispensable for the proper execution of the contract, but it is possible to agree to deviate

from them. The Bulgarian Chamber of Architects and the Greek Economic Chamber provide an indicative method for the calculation of prices to be charged for architectural services. Professional Chambers in Slovenia, Slovakia and Liechtenstein also issue recommended rates.

Tariffs for tax advising services exist in Cyprus where minimum tariffs apply in the absence of an agreement to the contrary between the parties. In Germany, minimum tariffs apply and the parties to a contract for tax services can only agree a price that is higher than the minimum rate set by the Federal Ministry of Finance. Recommended tariffs are also in force in Liechtenstein and the Slovak professional chamber issues recommended tariffs.

In Poland, the Ministry of Justice (after consultation with the professional bodies) sets compulsory minimum tariffs for patent attorney services. In Slovakia, the Industrial Property Office gives guidance on the various aspects of tariff settlement.

As regards veterinarian services, a general system of fixed tariffs applies in Austria, and binding minimum fees apply in Bulgaria, without any possibility in either Member State to deviate from them by contractual agreement. In Germany, there are minimum and maximum tariffs with the option to deviate from them subject to prior written agreement. There is also possibility to apply different tariffs for the long-term care of close herds. In Estonia and Slovenia, the professional bodies set recommended minimum rates.

No tariffs apply to accounting services, except in Liechtenstein where recommended tariffs exist.

2.6.1. Effect of fixed tariffs on establishment

Restrictions in respect of fixed tariffs have an impact in respect of establishment, by depriving service providers of the possibility of competing on price or on quality. This restriction renders establishment (either principal or secondary) in a Member State less attractive because new entrants cannot attract consumers by offering lower prices (in case of fixed minimum tariffs) and would be discouraged from offering higher quality services (due to fixed maximum tariffs). Though not compulsory, 'recommended tariffs' could lead in practice to the same effect as compulsory tariffs, certainly when applied in the context of cross-border provision of services.

2.6.2. Public interest reasons invoked by the Member States

The few Member States which maintain fixed tariffs justify them by a need to ensure consumer/ service recipient protection. In case of minimum tariffs, such protection would be derived from either a higher quality of service that a minimum tariff would ensure. Maximum tariffs would arguably prevent service providers from charging unjustified fees in cases when consumers are limited in their choice because of the limited number of players on the market.

Nevertheless, other Member States that do not have such tariffs or have abolished them contested the fact that fixed minimum tariffs would ensure high-quality of services, while at the same time such requirements clearly deprive consumers of more competitively priced services.

2.6.3. Divergent application of the proportionality test

Article 15 of the Services Directive imposed on Member States a three-stage proportionality test for tariffs, as explained above under section 2.4.1.

Similarly as for legal form and shareholding requirements, the analysis of the need for high quality of services needs to be assessed in line of the risk to which the provision of low quality services would expose consumers/service recipients.

It is however not always clear how such compulsory tariffs would necessarily lead to better quality for the benefit of the consumers. Several Member States did not have such tariffs in place to begin with so no proportionality test needed to be performed. Other Member States considered that compulsory tariffs do not ensure consumer protection and proceeded to abolish such minimum tariffs. In particular, Spain, Greece, Italy, and Malta abolished fixed tariffs (and/or the ability for professional orders to set fixed tariffs). Some other Member States indicated they suppressed some of the applicable tariffs (e.g. architects in Belgium, veterinarians in Romania).

In respect of those Member States that maintained them, no information was provided in respect of alternative, less restrictive measures which would have been considered for meeting the public interest objective at stake.

In particular, a general assessment of the global environment in which professional activities take place should have been performed. In this respect, general competition rules ensuring a functioning market, general contract rules prohibiting abusive tariffs, professional rules and the proper information of consumers would be sufficient to protect the consumer.

Moreover, as explained above, tariffs requirements should be considered in conjunction with other concurrent ones, such as legal form and shareholding, which Member States justify by similar objectives. The combination of several requirements with the same objective raises prima facie doubts about proportionality

3. CONCLUSIONS

Legal form and shareholding requirements can make the setting up of subsidiaries impossible in practice. The restrictions apply both to primary and secondary establishment, i.e. to the setting up of a business and to the setting up of subsidiaries, which is the most common form of secondary establishment. Both legal form and shareholding requirements have a negative impact on establishment.

Legal form requirements will be particularly restrictive when the capital must be held by individual professionals and only professional companies may provide the service. In such cases, professional companies from other Member States will not be able to set up secondary establishments at all. Such obstacle means that there are sectors of the economy where freedom of establishment is heavily restricted.

Shareholding requirements per se do not make establishment impossible. But the requirement that professionals must hold a controlling stake makes the creation of multi-disciplinary professional companies difficult or even impossible. The higher shareholding requirements are, the more they restrict establishment. Though further evidence of the precise economic and practical impact of such requirements would be beneficial, it is clear that they limit the choice of financial and business models for companies and thereby can hamper service innovation, have adverse consequences on service prices, and a negative effect on the competitiveness of such services.

In light of the importance of professional services for the economy, structural reforms in this field could continue to be addressed in the European Union via Country Specific Recommendations to Member States, together with a closer monitoring of their implementation. The most restrictive requirements on legal form and shareholding, such as 100% capital ownership requirements and sole practice obligations, for their part, could be best addressed with the Member States concerned, possibly leading to infringement proceedings.

While Member States screened their legislations as part of the 2010 Mutual Evaluation and several relaxed their rules, the peer review showed that they do not seem to have carried out a thorough proportionality assessment of legal form and shareholding requirements. The Commission, therefore, could work with Member States to ensure that they a carry out systematic and robust proportionality assessments in areas where the peer review has shown they are needed. In addition, the cumulative impact of requirements could be usefully addressed in the context of the forthcoming mutual evaluation of professional qualifications. Similarly, the knowledge of those regulatory systems which do not impose legal form and shareholding requirements and their possible impacts on the freedom of establishment should be deepened.

As a longer term action, a policy reflection should be launched on the steps which would be required to ensure the freedom of establishment of companies providing professional services in the Single Market, in particular in cross-border situations.

Fixed tariffs, in general, and compulsory minimum tariffs, in particular, are serious restrictions to the establishment of service providers. They also negatively influence consumers' choice and reduce competition on a market. It is highly questionable to what extent imposing minimum tariffs ensures a high quality of services. Member States do not seem to have analysed the proportionality of this type of requirement in professional services, in particular where other restrictions cater for the same public interest objective. Fixed tariffs only remain in few Member States and, therefore, could be usefully addressed bilaterally with the Member States concerned.

ANNEX

SUMMARY OF WORK IN CLUSTERS PER PROFESSION

1. ACCOUNTANTS

1.1 Business context

The Commission selected accountancy services as an activity for discussion because of its particular importance to SMEs.

Accountancy service providers may be qualified accountants or unqualified accountants depending on the Member State. Apart from large accounting firms, accountancy service providers are often SMEs themselves. In certain instances, they seek cross-border growth; this is particularly pertinent in instances where they want to accompany their existing 'home' clients when the latter grow and also where they themselves believe that they can be competitive in other Member States.

Businesses, mainly SMEs, often do not have the resources needed for day to day accounting and bookkeeping. Entrepreneurs drive the business and need to focus on running the business.

Given that accounting and bookkeeping are indispensable needs of SMEs, it is important for them to obtain these services at a reasonable cost.

1.2. Scope

To avoid confusion between accountancy services and audit services it is important to note that accountancy services cover accounting and bookkeeping and include:

- the recording of revenues and expenses;
- the preparation of monthly, quarterly and annual accounts;
- maintenance of 'ledgers' (lists of sales, expenses, debtors, creditors).

Audit on the other hand is a statutory requirement that entails the examination of the accounts by an independent third party.

According to the recently adopted Accounting Directive[5], which primarily applies to undertakings with limited liability, a statutory audit is only required for public interest entities (listed companies, credit institutions and insurance undertakings), large and medium-sized undertakings. This statutory audit can only be carried out by an approved statutory auditor or registered audit firm approved by the competent authorities of a Member State as provided for in the Statutory Audit Directive.[6]

Whereas accountancy services can be provided by qualified as well as unqualified accountants, audit can only carried out by qualified auditors.

[5] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC (OJ L 182, 29.6.2013, p. 19).

[6] Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audit of annual accounts and consolidated accounts (OJ L 157, 9.6.2006, p. 87).

Note: in certain Member States auditors are referred to as (Chartered) Accountants. Although the latter can also prepare accounts, for SMEs they would generally be more expensive than 'non-qualified' accountants.

It is, therefore, important to make a distinction between audit services on the one hand and accountancy and bookkeeping services on the other. Member States have to ensure that the distinction is clear, especially for SMEs; the latter are the largest users of 'external' accounting services.

1.3. Regulation

The general approach to regulation varies in that accounting and bookkeeping (as opposed to audit) are regulated in some Member States while not in others:

- The Czech Republic, Malta, Norway, Belgium, Greece, Hungary, Italy, Austria, Luxembourg, France and Romania regulate the accounting professions.

The differences in regulatory approaches essentially stem from:

- The clear distinction between auditing and accounting;
- The different perceptions with regard to independence, quality and verification.

Certain Member States do not see the need for independence as such services essentially comprise the outsourcing of internal functions. Also, a service provider is in any case bound by accounting standards, which the accounts will have to comply with. Moreover, if the service provider delivers a poor service the relationship could in any case be discontinued.

The need for regulating a function for which the 'client' bears eventual responsibility combined with the fact that unqualified accountants have been providing these services in various Member States for some time now raises the need for examining the level of regulation, if any, necessary to protect public interest. The 'public' would at least include the client, the service provider and the reader of the accounts and it may be the opportunity to determine what the costs/benefits of the approaches are.

Other Member States believe that a qualification, voluntary or obligatory, is an indication of quality. Some specific examples of the level of regulation in Member States are:

- Malta's regulations for 'accountancy firms' are quite close to those for 'auditors' and there are restrictions on the use of the name and voting rights.
- In Belgium, Italy and France, there are restrictions on the legal form and / or the shareholding.

As mentioned earlier, we must avoid confusion with restrictions that are placed on auditors in this regard. It is also worth noting that the Statutory Audit Directive currently in force does not place any restriction on legal form, although it allows Member States to have stricter requirements.

In view of the above, it is quite important, from the Commission's perspective, to consider the proportionality of the legal form and shareholding requirements for accountancy services.

1.4 Legal form and shareholding requirements

In the Netherlands, the majority of shareholding must be held by accountants (the legislation in the Netherlands focuses on the statutory auditors, thus a link with statutory audit directive

2006/43/EC). In the Czech Republic, a requirement limits the possibility for one individual to be the sole shareholder of a maximum of three limited liability companies.

Belgium imposes also legal form requirements: only a 'professional company' can provide the services. As regards voting rights requirements, professionals (natural persons or 'professional companies' for 'comptable agréé') must hold the majority of the voting rights in Belgium and 66.6% in Italy (any professional registered with a professional order). In addition, Belgium provides that the board of the company must be controlled by the professionals.

In Malta, voting and management requirements (more than 50% of the voting rights must be hold by accountants, accountant**s** account for more than 60% of the company's administrative and management bodies) are imposed but this is not the case for shareholding requirements. Accountancy services can be provided by the companies no fulfilling this requirement, but they cannot use the title "Certified Public Accountancy Firm".

1.5 Reasons of public interest

As regards public interest objectives in the regulation of accountants, Member States mentioned during the peer review the need for consumer protection, independence of the profession and quality of service, avoidance of tax fraud and money laundering, as well as professional secrecy.

2. ARCHITECTS

2.1 Regulation

Architects are a regulated profession in practically all Member States. Some Member States regulate only a certain type of architectural services or use of a specific title (e.g. Slovenia, Romania, and Denmark). In a number of Member States (Finland, Sweden, Norway, Netherlands) architects are not a regulated profession and in some of the Member states (Norway, Sweden, the Netherlands) the necessary checks are carried out by public authorities, for example, upon submission of building plans. In Denmark and the Netherlands, the title of an architect is protected without any reserve of activity.

2.2 Legal form requirements

Legal form requirements exist only in Croatia **(**only sole practice and partnerships are allowed). Other Member States allow for all legal forms available under national law. In some cases, there are limitations for exercise in practice for commercial companies. A couple of Member States used to have legal form requirements but have abolished them. This is the case notably for Cyprus and Greece.

2.3 Shareholding requirements

There is a difference between cases where requirements apply to all forms of companies and cases where these are applied only to "professional" companies/companies with a reserved title. Member States where shareholding requirements are applied to all legal forms include Austria (100% of shares by natural or legal persons), Cyprus (100%), France (more than 50%

of shares and voting rights to belong to natural or legal persons qualified as professionals); in Ireland, the requirement of "the control and management to be held by a registered person or persons" could amount in practice here too to a 100% requirement; Italy imposes upon professionals to hold such a participation in the share capital as to determine a 66,6 % majority in the deliberations or decisions of shareholders (any professional); Slovakia (majority of shares); Netherlands (majority of board).

Shareholding and voting right requirements are applied only in Belgium to professional/civil companies called "*sociétés d'architecture"* (60% owned and controlled by professionals as natural persons), while for commercial forms, the requirement to have the majority of shares applies in Bulgaria (‘design office’, minimum 50% of the capital held by professionals), in Czech Republic (majority in limited liability companies to be held by professionals), in Germany if the title "architect" is used in the company's name (majority of shares to be held by professionals), in Spain (for professional companies 51% of voting rights and capital to be held by professionals), in Malta (only sole practitioners or professional partnerships).

2.4 Shareholding by professionals from other Member States

There seem to be no clear restrictions in the majority of cases as the same rules apply to professionals from other Member States and to domestic ones. In order to fall into the percentage of capital to be held by professionals, shareholders must have their qualifications recognised. If shares are held by professionals from other Member States as non-professionals (no recognition of professional qualifications), they fall under the percentage open to third parties. In Member States where no shareholding and/or voting right requirements are imposed, the main requirement seems to be to have at least one professional (in a commercial company) either employed or mandated by the company in order to carry out the activity that is regulated.

2.5 Subsidiaries and branches

Often no clear distinction is made between secondary and primary establishment and mainly the same rules as for domestic/primary establishment apply to subsidiaries and branches. Some exceptions of clear distinction exist for example in Germany and Slovakia.

2.6 Reasons of public interest

All the Member States invoke mainly the same overriding reasons of public interest, such as the independence of profession, the quality of the service, consumer protection/protection of recipient of service. They are achieved via different approaches, which are roughly the following:

- Prior control of qualifications, regulating the ownership and legal form;
- More market oriented approach, often relying on self-regulation and voluntary associations (acting as quality filter);
- Reliance on checks done by public authorities.

3. PATENT AGENTS

3.1 Regulation

Patent agents are a regulated profession in many Member States. However, it is not a regulated profession in Sweden, Iceland and the UK (in these three countries the use of the title is protected), Denmark, Greece and Norway. In Cyprus and Malta, the patent agent profession is not a profession by itself and patent agent services are usually provided by lawyers.

3.2 Scope

The activity of filing patents on behalf of others is reserved to patent agents in Austria, Belgium, Bulgaria and the Czech Republic (lawyers or certain lawyers are allowed to carry out the activity too), Germany (shared with lawyers), Estonia, Spain, France, Ireland, Hungary, Italy, Lichtenstein, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovenia, Slovakia and Croatia. In Cyprus, the activity is reserved to lawyers.

In Belgium, Spain and Latvia, non EU-residents (and non-nationals in Latvia) cannot file themselves their patent application and need to do so through a patent agent. In Iceland, non-residents must use a patent agent that can be registered anywhere in the EEA.

3.3 Legal form requirements

In general, there are no legal form requirements with the exception of Belgium and Bulgaria where only sole practitioners are allowed (Bulgaria has announced plans to allow legal persons to operate).

Cooperative societies cannot be used in the Czech Republic (this is subject to change). In Germany, commercial partnerships cannot be used (a general rule for all liberal professions). In Cyprus, the legal forms accessible for lawyers would need to be respected. In Croatia, there is an establishment requirement together with a legal form requirement.

3.4 Shareholding requirements

In Austria, 100% of capital must be held by professionals, whereby former patent agents, their spouses and children are also allowed to hold capital. Professionals must be registered with the professional order. In Italy, the number of professionals (registered with any professional order) and their participation in the share capital must be such as to determine a 66,6 % majority in the deliberations or decisions of shareholders. In Germany, 51% of the shares and the majority of voting rights must be held by patent agents and shares must not be held for a third party.

In Poland, in limited liability companies and joint stock companies, the majority of shares should be owned by patent agents. They should also hold the majority of voting rights and be in majority in the supervisory board. In France, 51% of capital and voting rights should be held by professionals registered at the order. In Liechtenstein, the majority of the shares and of the voting rights must belong to EEA nationals.

Spain applies the majority rule for shareholding and voting rights only when professional companies are used for the provision of the service. This legal form is optional. In a professional company, the qualifying percentage of shares must be held by 'active practicing professionals' as the objective is to secure their professional engagement in the company.

3.5 Multidisciplinary activities and secondary establishment

It seems that Austria is the only Member State applying restrictions to multidisciplinary activities by patent agents. In Austria, there is a total ban on any other activity.

In Austria, professionals from other Member States can only act as sole practitioners. In case of setting up of a subsidiary or a branch of a company established in another Member State, national rules on shareholding would need to be respected in Germany and Poland. Spain "recognises" professional companies from other Member States.

3.6 Public interests at stake

The public interests at stake identified by Member States are the protection of consumers, the support to innovation and ensuring correctness of proceedings. Sweden indicated as a public interest, the credibility of professionals when providing services outside the country. There are very different degrees of regulation and restrictiveness in the various Member States.

4. TAX ADVISERS

4.1 Scope

It is important that Member States define tax advisory services as a service distinct from audit and legal advice. The potential is vast, especially for expansion in other Member States as tax compliance regarding payroll, VAT and income tax for SMEs throughout the EU is indispensable.

To avoid confusion between tax services on the one hand and audit and legal services on the other it is important to note that tax services cover:

- The preparation of the tax computation / calculation,
- Preparation of VAT returns,
- Preparation of payroll,
- Acting on behalf of the client before the tax authorities as the client's 'tax agent'.

In 'established' businesses, these functions are performed by in-house experts. But for smaller businesses this is done by an external service provider. It is worth noting that often for small businesses both accountancy and tax services may be carried out by the same service provider.

For the purposes of this discussion, we remain focussed on the needs of SMEs and not on complex tax structuring and advice, which is a business in itself. In some countries there is the possibility to qualify as a tax adviser independently of being an auditor or even a lawyer. For

the purpose of the peer review discussions, we are excluding auditors and lawyers who provide tax services.

It is important for SMEs to appreciate and recognise that for their day to day requirements they are not obliged to go to qualified accountants / lawyers; this would avoid the higher fees that such qualified professionals would charge.

4.2 Regulation

Tax advisors (as opposed to auditors and lawyers) are regulated in some Member States while not in others:

- Cyprus, Liechtenstein, France and Luxembourg reserve the activity for certain regulated professions.

- The Czech Republic, Germany, Poland, Croatia, Hungary, Greece, Austria, Portugal (specifically for tax returns), Slovakia, and Romania regulate tax advisors (who are neither lawyers nor auditors).

The differences in regulatory approaches of Member States essentially stem from:

- The clear distinction between audit, legal advice and tax advice;

- The different perceptions with regard to independence, quality and verification.

Certain Member States do not see the need for independence as such services essentially comprise the outsourcing of a function that is after all the responsibility of the business entity. Also, a service provider is in any case bound by tax laws, which the tax returns, calculations and computations have to comply with. Moreover, if the service provider delivers a poor service the relationship could in any case be discontinued.

4.3 Legal form and shareholding

The divergent perceptions in different Member States towards the activity have resulted in different approaches:

- Cyprus, Liechtenstein, France and Luxembourg apply requirements on the professions for whom the activity of tax advice is reserved.

- In Germany, Poland, Belgium, Italy, Slovakia, Austria there are restrictions on legal form and / or the shareholding. Portugal has restrictions deriving from the use of a professional company (for the preparation and submission of tax returns).

- The main differences in approaches appear to stem from different perspectives on where the responsibilities lie (with the business itself or with the tax advisor).

- Certain Member States believe that reserving or regulating tax advice enhances the quality and reliability of the tax calculations. It is not clear what the position is if the tax return is prepared in house by an in-house tax expert.

- To examine the case for continuing regulation it may be worth considering if the regulation of tax advice improves tax control and if Member States that do not regulate 'suffer' in this regard with regard to the assessment and verification of tax calculation.

4.4 Public interests at stake

There are two very different models regarding the public objectives. Tax advice is not regulated in certain Member States (e.g. Netherlands) since it's the client's responsibility to decide if he wants a qualified professional and to face potential consequences. The main interest of working with tax specialists is minimizing taxes. On the contrary, in other Member States (e.g. Germany) tax advisers are a liberal profession in charge of public policy objectives: respect of fiscal regulation and prevention of tax evasion.

5. VETERINARIANS

5.1 Regulation

Veterinary surgeon is a regulated profession in all Member States.

The regulatory approaches are less restrictive in some Member States than in others. Restrictions on legal forms and shareholding requirements are not the most common approach followed by Member States. Many Member States rely on other means to fulfil the objective of protecting public health and in particular on deontological rules, veterinary legislation and controls exercised by the national veterinary services.

In general, national rules apply to branches and subsidiaries. In some cases this prevents the opening of a branch or a subsidiary or makes it very difficult.

5.2 Legal form requirements

Legal form requirements apply in some Member States. These requirements are more or less stringent:

- sole practitioner (Liechtenstein – but reforms are envisaged),
- professional companies (Italy, France, Luxembourg),
- in Germany, different legal form requirements exist in different Länder: e.g in Bavaria and Berlin, veterinarians can only practice as sole practitioners, whereas in other Länder, veterinarians can practise as legal persons under private law.

Considerable legislative changes have taken place recently in Greece, where a requirement to practice as sole practitioner only has been replaced by the right to set up any form of company, without any restrictions on shareholding. A reform is on-going in Liechtenstein and is envisaged in France. A debate has started in Germany.

5.3 Shareholding, voting rights and management requirements

Capital ownership requirements apply in some Member States where professionals are required to hold a percentage of the capital. This percentage differs: Luxembourg 100%, France 75%, Spain 51% (of both capital and voting rights in ‘professional companies’) and some German landers 51%. In Italy, the number of professionals and their participation in the

share capital must be such as to determine a 66,6 % majority in the deliberations or decisions of shareholders (but any category of regulated professionals could hold shares).

In some cases, these professionals must be active in the company (e.g in Mecklenburg-Vorpommern in Germany). In some Member States, some professions are banned from participating in the capital of veterinarian practices. For instance, this is the case in France for companies distributing veterinary medicines and farmers.

In some other Member States, no shareholding requirements apply but voting rights and management requirements do (e.g. Sachsen in Germany). In Austria, veterinarians must hold 100% of voting rights.

5.4 Limitations on the number of practices and on multidisciplinary activities

In Liechtenstein and Portugal limitations seem to exist regarding participation in more than one veterinary practice. In Portugal, a veterinarian can only participate in another practice if his partners in the first practice agree.

Multidisciplinary activities are considered an asset in some Member States and a danger in some others (e.g. vets/training of dogs, vets/grooming, vets/pet shop, vets/pharmacy). In France, in Spain and in some German Länder, it seems that there is a complete ban on any multidisciplinary activities.

In other Member States, there are targeted bans on certain multidisciplinary activities. For instance, in Belgium, Greece and Denmark, sale, manufacturing and distribution of veterinary medicinal products cannot be performed jointly with a veterinarian practice; in Germany, in some Länder, a positive list of possible joint activities exist (e.g. Baden-Wurttemberg, Berlin, Brandenburg, Bremen). In some Member States, an authorisation seems to be required before some joint activities can be performed (e.g. Belgium, Italy and Croatia).

5.5 Public interests at stake

The public objective pursued by this regulation is the protection of public health. Member States also identified animal health, independence of veterinarians, the quality of veterinary services and safety and quality of food as reasons in the public interest which may justify regulating the exercise of the profession.