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Making the Services Directive work - The completion of the Internal Market for Services and the Services Impact Test

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I. Background (I)

- The need to complete the Internal Market for Services in view of the Euro-crisis: "More ambitious ways of boosting growth, such as the completion of a single European market for services, are sadly not even on the table." (The Economist, Editorial 'Europe's choice', May 26th 2012)
- See also conclusions of European Council of March 24/25th 2011: need to take national measures to boost productivity, efficiency and competition by opening up the protected sectors of f.ex. business services and retail by removing 'unjustified barriers'
- + cfr. Mario Monti in Italy: taking up 'corporatism' by liberalisations, but quickly loosing political support

I. Background (II)

The Services Directive (SD) as response to slow completion of the Internal Market

- Refusal of the 'Country of Origin' principle in the original Bolkestein Directive by the European Parliament => negotiations => actual SD
- Fall back position: jurisprudence of Court of Justice on Internal Market for services: necessity and proportionality principles
- SD makes distinction between the 'black list' (art. 14 – forbidden regulations) and grey zone with requirements to screen (art. 9, 10, 15, 16)

I. Background (III)

- The very recent Communication of the European Commission of 8 June 2012 (COM(2012)261 final) seems to express disappointment in the reported screening results and asks for a renewed action:

“Member States must eliminate all restrictions and authorisations which are not justified on the basis of the Directive, and in particular should review the necessity and proportionality of requirements imposed on service providers. For any remaining restrictions which may be justified on the basis of the Directive, they should assess the economic benefits of eliminating them and take action where necessary.”
- The crucial question now is how this “re-screening” (or re-examinations) must be done or on which precise screening grounds. The Commission provides no answer for this.

II. Services Impact Test (I)

Services Impact Test was developed by Flemish Government in 2008 to do the screening of Flemish regulations

SIT makes the link between the methodology of the Impact Assessment (IA) with the three subsequent screening requirements or tests, based on principles of:

- Necessity ('justified by an overriding reason of general interest') => IA-chapters "problem analysis and policy goal"
 - Suitability ('suitable for securing the attainment of the objective') => IA-chapter "options"
 - Proportionality ('they must not go beyond what is necessary to attain that objective' + 'not be possible to replace those requirements with other, less restrictive measures which attain the same result' => IA-chapter "effects")
- ⇒ This link with Impact Assessment is crucial to have better screening and better reporting to the Commission
- ⇒ SIT is sort of a fyke or fish trap for regulatory barriers to trade

II. Services Impact Test (II)

More specific: the SIT requires evidence-based and methodologically sound answers to the following questions in order to meet subsequent tests:

- Problem => what is the societal risk? What behaviour is causing the problem?
- Policy goal => in SMART + will attainment result in end of societal problem
- Options => what are the other analysed policy instruments and why not accepted?
- Effects => what are the costs of the regulation (delay costs, operational costs, administrative burdens, efficiency losses)
- Implementation => how is the enforcement done in practice? Severe sanctions? Severe control?

II. Services Impact Test (III)

How to report in the Interactive Policy Making (IPM)-system?
IPM-system only allowed a limited amount of motivational text.

For the necessity test

Crucial part	Core indicator	Value: (-- / - / 0 / + / ++)
* The societal problem	* is direct: * is objective: * is probable: * results in huge damages for many people:
* The human behaviour	* is at the core and origin of societal problem: * is problematic:
* The attainment of policy goals solves the societal problem	* Specific: * Measurable: * Accepted: * Relevant: * Timely:
Sum:		(Lightly or severely) negative/ neutral/positive

● *Conclusion: the requirement of permit system is (not) justified by an overriding reason of general interest. (Possible explanation)*

III. Case study

- What is the initial Belgian IKEA-regulation? (now there is a new version)
- It is a permit system for location of major retail stores, hence nick name 'IKEA'
- It has four permit criteria (vaguely defined)
 - Impact on urban fabric
 - Impact on employment
 - Impact on spatial order and mobility
 - Impact on existing businesses

III. Case study (II)

SIT application on original IKEA-regulation (I):

- Forbidden requirement: impact on existing businesses => leads to 'economic planning'
- Necessity test: regulation endures the test for the three criteria of urban renewal, spatial planning and mobility, but not for employment
- Suitability test: three remaining criteria are suitable but not indispensable (other options are possible, like existing regulations for spatial planning of environment protection)

III. Case study (II)

SIT application on original IKEA regulation (II):

- Proportionality test: the three remaining criteria and permit system as a whole lead to high costs (f.ex. delay costs) for service providers (retail businesses) in comparison to other options, and therefore lead to trade distortions (creating substantial welfare losses for the economy).
- Enforcement test: the enforcement (sanctions) is necessary, suitable but not proportional (a forced closure has severe consequences for the service provider of retail business)

IV. What Next?

- Flemish SIT has its first victory: abolishment of permit system for travel agencies by beginning of 2014
- Commission should support and guide the Member States (MS) in re-screening, based on a new handbook for the implementation of the SD, based on the SIT
- Commission should also sue MS before the Court of Justice when re-screening results prove to be a laughing stock (not only for black list) => create jurisprudence
- Commission should invest heavily in the implementation and enforcement of Services Directive, by a thorough examination of the 'grey zone' reporting (f.ex. more personnel or more consultants)