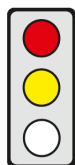


KEY ISSUES

Objective of the Regulation: Providers of certain construction services or other business services should be able to provide their services more easily in other Member States.

Affected parties: Providers and consumers of construction and business services.



Pro: The attempt to facilitate the cross-border provision of services is basically welcome but it will hardly strengthen the internal market.

Contra: (1) In addition to the Point of Single Contact, the Member States are forced to implement a second organisational structure for the registration and approval of foreign service providers under commercial law.

(2) The proposed Regulation is unlawful because it cannot be based on Art. 114 TFEU but only on Art. 53 and 62 TFEU, and the latter only authorise the adoption of Directives. The procedure for issuing the E-Card is in breach of EU law because parts of it are disproportionate.

CONTENT

Title

Proposal COM(2016) 824 of 10 January 2017 for a **Regulation** of the European Parliament and of the Council **introducing a European services e-card and related administrative facilities** and **Proposal COM(2016) 823** of 10 January 2017 for a **Directive** of the European Parliament and of the Council **on the legal and operational framework of the European services e-card**

Brief Summary

References to Articles using the abbreviation “Reg” relate to the proposed Regulation, those without abbreviation to the proposed Directive.

► Context and objectives

- A service provider that is established in a Member State (home Member State), can provide its services in another Member State (host Member State) in two ways:
 - temporarily, i.e. without an establishment in the host Member State (Freedom to Provide Services, Art. 56 TFEU),
 - permanently, i.e. with an establishment in the host state (Freedom of Establishment, Art. 49 TFEU):
- The implementation of the two freedoms into national law is governed, inter alia, by the Services Directive [2006/123/EC]. It provides, in particular, that a service provider from another EU country must meet all the national requirements of the host Member State - e.g. proof of certain qualifications - insofar as these requirements are justified and proportionate.
- A foreign service provider also meets the requirements of the host Member State if it meets “equivalent” requirements in the home Member State [Art. 10 (3) and 16 (1) (c) Services Directive; Art. 49 or 56 TFEU].
- The cross-border provision of services and establishment of branch offices is nevertheless rare. This is particularly true of services for businesses and in the construction industry.
- For providers of construction and business services, the Commission therefore wants
 - to introduce an electronic European services card (E-Card) in order to reduce costs caused by red tape when they want to operate across borders, and
 - to facilitate the conclusion of professional liability insurance in the host Member State.

► Functioning of the E-Card and E-Card Application

- The European Services E-Card (E-Card) is electronic proof - voluntary for the service provider - that it
 - is legally established in the home Member State (Art. 4, Recital 17) and
 - complies with the commercial law requirements of the host Member State in order to (Art. (3))
 - provide the registered service temporarily in the host Member State (E-Card 1) or
 - establish a branch office for the provision of the registered service in the host Member State (E-Card 2).
- The requirements for the issue of an E-Card are:
 - The service provider has its principle place of business in the EU (Art. 8, Recital 22).
 - It wants to provide construction or business services in the host country which are covered by both
 - the Services Directive (Art. 2 (2), sentence 1),
 - and this Directive (Art. 2 (1) in conjunction with the Annex to the Directive).

- The service is not covered by the European Professional Card [Directive 2005/36/EG] (Art. 9); the European Professional Card guarantees, for certain professions, that professional qualifications acquired by employees or self-employed people in their home Member State are recognised in the host Member State and thus already facilitates the cross-border provision of services for these professions.
- The service provider applies for the E-Card in its home Member State (Art. 8).
- Member States set up coordinating authorities which are responsible for receiving applications and the issue, withdrawal and cancellation of the E-Card (E-Card procedure) (Art. 17 Reg).
- The E-Card is valid for an indefinite period (Art. 7 (2)).
- ▶ **Assessment of the application in the home Member State (E-Card 1 and 2)**
 - Within one week of receiving an application, the home Member State must (Art. 11 (1))
 - examine whether the service provider is lawfully established in the home Member State,
 - attach missing information which is available from other authorities of the home Member State (“once-only” principle) and
 - send the application to the coordinating authority of the host Member State.
- ▶ **Additional procedure for the provision of temporary services (E-Card 1)**
 - After receiving the application, the host Member State must (Art. 12 (1) and (2))
 - within two weeks, inform the service provider and the home Member State of any national requirements under commercial law applicable to the service and
 - within four weeks, decide whether to object to the issue of the E-Card because the applicant does not fulfil the requirements of the home Member State which are permitted under EU law.
 - The home Member State must (Art. 12 (3))
 - reject the application if the host Member State objects or
 - issue the E-Card if the host Member State does not object.
- ▶ **Additional procedure for the provision of permanent services (E-Card 2)**
 - Within six weeks of receipt of the application, the host Member State must examine whether a national approval or application requirement exists which is permitted under EU law (Art. 13 (1) and (2)).
 - Where this is the case, the service provider can submit proof that it complies with the corresponding requirements (Art. 13 (3)).
 - Within one week after submission of proof, the host Member State must (Art. 13 (4))
 - issue the E-Card or
 - inform the service provider and the home Member State of its intention to reject the application, and allow the service provider one week to respond.
 - The host Member State must decide, within one week of the response or expiry of the deadline, whether to issue the E-Card or definitively reject the application (Art. 13 (4), sub-para. 4).
 - Where the host Member State fails to comply with one of the deadlines, the E-Card is deemed to have been issued (Art. 13 (6)).
- ▶ **Suspension and revocation of the E-Card (E-Card 1 and 2)**
 - E-Cards can only be revoked or - where the effect is only supposed to be temporary - suspended by the issuing Member State (jointly herein: “cancelled”) (Art. 15, 16)
 - Grounds for cancellation are - in some cases with additional requirements - in particular (Art. 15 and 16):
 - The service provider is banned from providing the service specified on the E-Card in a host Member State or in the home Member State (Art. 15 (1) and Art. 16 (1) and (2)).
 - The E-Card holder provides the service as an employee (pseudo-self-employment) or gave false information in the E-Card procedure (Art. 15 (2)).
- ▶ **Procedural simplifications for service providers (E-Card 1 and 2)**
 - The E-Card procedure is carried out via an electronic platform (E-Card platform) (Art. 8 Reg).
 - The E-Card procedure prohibits the authorities in the Member States from demanding formal proof of the authenticity of documents - such as by way of the notarisation of simple copies or the certification of translations of documents (Art. 9 (2) and (3) Reg).
 - The E-Card procedure permits the automatic translation of documents (Art. 9 (3) Reg).
 - Member States are not permitted to require any information from the holder of an E-Card, during other administrative procedures, which is already available via the E-Card platform (Art. 6).
- ▶ **Professional liability insurance**
 - In many Member States, service providers must provide proof of professional liability insurance in order to carry out certain services. Insofar as the service provider has such insurance in the home Member State, the insurer must provide the service provider with an insurance certificate on request (Art. 5 and 11 Reg).
 - Depending on the reason for issue, this certificate must contain
 - for the application for an E-Card: information on the validity in other Member States and on the insured sums (Art. 5 (1) Reg),
 - for the conclusion of an additional insurance in the host Member State: information relating to any existing or lapsed liability claims by third parties (Art. 11 (1) Reg).
 - Insurers, or professional associations offering professional liability insurance, must offer it to service providers from other Member States under the same conditions (Art. 12 and 13 Reg).

Statement on Subsidiarity by the Commission

A uniform EU-wide improvement in cooperation between authorities in the Member States, and the harmonisation of the administrative procedures in the Member States, can only be implemented at EU level.

Policy Context

The proposals form part of the Services Package which also contains proposals by the Commission on the examination under EU law of new requirements for services issued by Member States [COM(2016) 821] and on testing the proportionality of new professional regulations in the Member States [COM(2016) 822] (see cepPolicyBrief).

Legislative Procedure

10 January 2017 Adoption by the Commission
 Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union
 Open Entry into force

Options for Influencing the Political Process

Directorates General:	DG Growth (Internal Market, Industry, Entrepreneurship and SMEs)
Committees of the European Parliament:	Internal Market and Consumer Protection (leading), Rapporteur: Morten Løkkegaard
Federal Ministries:	Federal Ministry for Economic Affairs and Energy (BMWi)
Committees of the German Bundestag:	Economic Affairs and Energy (leading)
Decision-making mode in the Council:	Qualified majority (acceptance by 55% of Member States which make up 65% of the EU population)

Formalities

Legislative competence:	Directive: Art. 53, 62 TFEU (Internal market for establishments and services), Regulation: Art. 114 TFEU (Internal Market)
Form of legislative competence:	Shared competence (Art. 4 (2) TFEU)
Procedure:	Art. 294 TFEU (ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

Ordoliberal Assessment

The elimination of obstacles for the cross-border provision of services gives rise to more competition which in turn leads to lower prices and more innovation. In addition, companies that use services have more choice. **The Commission's attempt to facilitate the cross-border provision of services** by way of the E-Card, **is basically welcome but will in fact hardly strengthen the internal market** for services. In addition, it will give rise to a large amount of red tape for authorities in the Member States.

With the E-Card, **Member States are forced to implement, in addition to the Point of Single Contact** stipulated in the Services Directive [2006/123/EG] - designed to facilitate the registration and approval procedure for foreign service providers under commercial law -, **a second organisational structure for the registration and approval of foreign service providers** under commercial law.

By contrast with the Point of single Contact, the E-Card has the advantage for foreign service providers that the applicant can carry out the registration and approval procedure with an authority in the home Member State. The applicant can therefore communicate in its native language. Foreign service providers will nevertheless have to communicate directly with the authorities in the host Member State when providing cross-border services because a foreign service provider will have to carry out reporting obligations, arising under tax, employment and social insurance law, in relation to the authorities in the host Member State. These reporting obligations must generally be carried out in the language of the host Member State. The advantage of the E-Card for foreign service providers will be limited by this.

Impact on Efficiency and Individual Freedom of Choice

The indefinite validity of the E-Card reduces the cost of red tape for foreign service providers by removing the need for renewal. It also provides for a level playing field with domestic service providers because the latter are generally also given indefinite approval. Nevertheless, indefinite validity can lead to problems if a Member State issues new requirements for service providers. These will always apply to domestic service providers but it is unclear whether, due to the indefinite validity of the E-Card, foreign service providers will also be affected by such new requirements. If not, it will give rise to discrimination against the country's own nationals. Clarification in the wording of the legislation is required.

It is also problematic that the host country has to rely on details provided by the service provider in order to determine whether the latter is lawfully established in the home Member State. This gives rise to a risk that letter-box companies will be set up, in Member States where the authorities do not carry out careful checks, simply in order to obtain an E-Card. The incentive to carry out careful checks is reduced by the fact that, in the home Member State, an E-Card does not necessarily amount to proof that a service provider has been lawfully established there. The consequences of failing to make a careful check are, in this case, only felt in other countries. The rule that the Member States are not permitted to require service providers to submit formal proof of the authenticity of the documents or certified translations, on the one hand, reduces the administrative burden on the service providers. On the other hand, Member States have, as a result, less chance of discovering fraud. The authorities should therefore be permitted to require proof of authenticity if they have substantiated grounds to suspect fraud. The fact that Member States are not permitted to require information contained on the E-Card, protects the service provider from unnecessary red tape.

Impact on growth and employment

Negligible.

Impact on Europe as a business location

Negligible.

Legal Assessment

Legislative Competency

The proposed Directive complies with competence requirements. Under Art. 53, or Art. 53 in conjunction with Art. 62 TFEU, as appropriate, the EU can harmonise legislation of the Member States by way of Directives in order to realise the freedom of establishment and/or the freedom to provide services.

The proposed Regulation is however unlawful because it cannot be based on the general internal market competence of Art. 114 TFEU - as envisaged by the Commission - but only on the competence to realise the freedom of establishment under Art. 53 and the competence to realise the freedom to provide services under Art. 62 TFEU - which take precedence over Art. 114 TFEU (Art. 114 (1), sentence 1 TFEU). The proposed Regulation exclusively serves the realisation of these basic freedoms by way of the harmonisation of the legislation of the Member States [Art. 1 Reg, Recital 8 Reg, p. 8 COM(2016) 824] and has no substantive regulatory effect going beyond that. **Art. 53 and 62 TFEU, however, only authorise the adoption of Directives.**

Subsidiarity

Unproblematic.

Proportionality with respect to Member States

The procedure to issue E-cards is in breach of EU law as parts of it are disproportionate (Art. 5 (1), sentence 2 TEU) because there is a risk that the requirements of the host Member State, applicable to the provision of services, cannot be adequately checked.

Firstly, processing times of between one and six weeks are too short. This is particularly true for the crucial equivalence assessment which can vary significantly from case to case, in complexity and length. Secondly, the host Member States can no longer verify the authenticity of documents or their translations although this would not excessively complicate the E-Card procedure. Thus the procedure for issuing the Professional Card – which the Commission designates to be effective [p. 42 et seq. COM(2016) 824] – allows for verification - such as certification - where there is substantiated reason to doubt the authenticity of documents.

Compatibility with EU Law in other respects

Unproblematic.

Impact on German Law

The *Bundesländer* will have to adapt their commercial legislation and, where appropriate, their general law on administrative procedure. Trade associations are responsible for the exercise of many regulated professions and they will have to adapt, above all, their procedural rules.

Conclusion

The attempt to facilitate the cross-border provision of services is basically welcome but it will hardly strengthen the internal market. In addition to the Point of Single Contact, Member States are forced to implement a second organisational structure for the registration and approval of foreign service providers under commercial law. The proposed Regulation is unlawful because it cannot be based on Art. 114 TFEU but only on Art. 53 and 62 TFEU, and the latter only authorise the adoption of Directives. The procedure for issuing E-cards is in breach of EU law because parts of it are disproportionate.