

CEPI Position Paper on the Services Package
A response to the European Commission's services package "A Services Economy that works for Europeans" dated 10 January 2017

Introduction

On 10 January 2017 the European Commission published the services package of legislative and non-legislative initiatives "A services economy that works for Europeans". This package includes draft legislative proposals on the services e-card, proportionality test and services notification procedure and a non-legislative communication containing guidance on reform recommendations for regulation in professional services. The real estate sector is one of the priority sectors addressed in the guidance, and has already been the subject of a detailed examination in the course of the mutual evaluation exercise carried out in accordance with Article 59 of the Professional Qualifications Directive.

The real estate professions are semi-regulated, with large differences in the level of regulation where it exists. These differences have already been explored at length by the European Commission in the scope of the mutual evaluation exercise referred to above. To this analysis we would add that these differences are reflected in the diversity of professional practice and structures applicable in the different housing markets. It is not desirable to make policy decisions concerning regulation without being aware of the differences which exist and also the reasons for them. Professional regulations are not just a barrier, they exist in many countries for reasons of public interest including consumer protection and the avoidance of fraud. The aim of legislation at European level should be to ensure that professionals can work in different countries within the single market whilst respecting the law and regulations of the host Member State.

The services package consists of four elements:

1. The European services e-card

The aim of the services e-card is to introduce a simplified administrative procedure for the provision of cross-border service activities by companies or the self-employed. In the first instance it will be available to certain business and construction services. We understand that it is not the intention that it be made available at present to those professions which (like real estate agents) are able to apply for the European Professional Card (EPC). Therefore we will limit our comments on this particular initiative. Nevertheless we are concerned that there is some potential for overlap between the services e-card and the EPC and ask for clarity and clear guidelines as to when these different instruments should be used. There must be clear differentiation between the two. The Commission is currently assessing the initial results of the implementation of the EPC, and those results need to be fully assessed before the introduction of the services e-card. Existing national requirements and standards must be fully respected.

2. Introduction of a proportionality assessment of national rules on professional services

The proposed introduction of the proportionality test assumes that the review of professional regulation in the individual Member States is inconsistent and has a negative effect on the provision of cross-border services. However there is an existing body of legislation, notably in the Services Directive and Professional Qualifications Directive, which, together with the case law of the ECJ provides a framework for the assessment of professional regulation and whether or not it is proportionate and justified. The proportionality principle set out in Article 5(4) of the Treaty of European Union provides that the content and form of union action must not exceed what is necessary to achieve the objectives of the Treaties. Procedures for review already exist including the possibility of infringement procedures when necessary.

The proportionality test is intended to guide the way in which EU Member States decide whether new service regulations are needed in the event of consideration of new proposals for regulation or changes to existing professional regulation. We welcome the emphasis on the importance of identifying clearly the risk to the consumer and effects of potential new measures on business and job creation. However, we question the need for a uniform approach to this at EU level based on public interest. The proposed proportionality test is likely to increase the amount of work for the legislator and will not necessarily result in increased certainty for consumers.

It is clear that professional regulation remains the competence of the Member States. We would contend that this is a decision which should take, in the real estate sector, careful account of the needs and particularities of the real estate professions and also markets in the particular country. It is not clear that the proposed harmonised approach, in the form of a pre-defined proportionality test, is really necessary. There is a danger that it will make the system less flexible and less able to reflect the importance of quality of services in particular circumstances.

The proportionality test could also violate the sovereignty of the Member States, infringing against the principle of subsidiarity. Whilst we support the efforts of the European Commission to achieve a more level playing field for professional services, there is already the existing possibility for the Commission to perform periodical evaluation of existing regulations in terms of proportionality, without putting in place a more complicated framework.

3. Guidance for national reforms in regulation of professions

The guidance on reform needs relating to professional services is in the form of a communication which recognises that the regulation of professional services is a prerogative of the Member States. It also recognises that different regulatory models exist. Reform recommendations are formulated for each Member State taking into account the specific regulatory environment in place. The communication and its annexes provide a detailed analysis of the regulations which apply to a number of professions including real estate agents. It confirms that regulatory approaches in the real estate sector vary significantly across countries. There are differences also in the history of regulation in various countries, with regulation in some having been in place for a long time, in others it has been more recently introduced, while in some other countries the profession has been deregulated.

In the guidance there are a number of recommendations addressed to Member States concerning the exercise of and/or access to the profession. The detailed analysis per country in the accompanying Staff Working Document makes it clear that there are a number of differences in the tasks and responsibilities undertaken by real estate agents in different countries. These largely reflect differences in practice between legal systems and real estate markets. All will require careful evaluation by the relevant national authorities. Notably regulation is being introduced in the Czech Republic for reasons of consumer protection. There are also intentions to regulate the profession in Germany. The national authorities need to be allowed time to consider these recommendations carefully in consultation with stakeholders.

4. Improved notification of draft national laws on services

The changes to the notification procedure concerning new requirements covered by the Services Directive will mean that Member States will be obliged to notify in advance the proposed introduction of such requirements (rather than retrospectively). We welcome the increased transparency involved in the new procedure and involvement of external stakeholders. However, the changes may make the introduction and amendment of professional regulation more difficult and time-consuming. We also fear that the change in procedure will have constitutional implications for many Member States, quite simply because they will be put in the position of having to notify the Commission before a national measure is implemented, raising the prospect of the Commission directing the national legislature to make changes to a measure over which it in fact retains competence. This raises concerns about the impact on parliamentary sovereignty because it places constraints on the ability of the national parliament to decide in accordance with its national law and requirements. We do not consider it necessary to give the European Commission an "a priori" veto on new regulation.

The obligation to designate a competent authority responsible at national level for the operation of the notification procedure risks infringing the Member States' right to organise their own affairs. In combination with the proposed

introduction of a proportionality test the amendments to the notification procedure risk undermining the national sovereignty of the Member States.

Conclusion

We welcome the efforts of the Commission to make professional regulation more transparent and to establish a more level playing field. However we must stress that the means used to achieve these ambitions must not be disproportionate. There remain difficulties in some Member States about the implementation of the Professional Qualifications Directive which need to be investigated. Member States also need time to follow up on the mutual evaluation of regulated professions which has already been carried out and the current guidance addressed to them in relation to the selected professions which in turn national authorities are still evaluating.

While we support the goal of the Commission to make it easier to provide cross-border services, we are concerned that to remove national regulations where they exist in the real estate sector could risk creating a vacuum which is not in the interest of professionals or consumers. It is necessary to look carefully at the reasons for the existence of regulation. Deregulation or regulation should not be an end in themselves and must be considered very carefully. Care must be taken to understand the needs of the very different real estate markets and legal and economic environments in order to make the single market work for professionals and consumers.

The right of Member States to introduce and maintain regulation should be respected. The legal and commercial environment for the provision of professional services differs throughout the EU. It is not clear that a uniformly applicable proportionality test would be helpful, there is a danger that it could be too rigid and risk confusion.

The services package, and particularly the proposals for the introduction of a proportionality test and the new notification procedure, raise serious questions about subsidiarity and the proportionality of the proposed introduction of these measures in a standardised way. We ask the EU regulators to examine the current proposals very carefully, taking account of the complexity of the real estate sector and the different models which exist for its regulation.

CEPI aisbl

Brussels, 23 May 2017

CEPI (1094652600-90) groups 24 national associations representing real estate professionals in EU and EFTA countries. Its objective is to voice the interests of the real estate sector and professions to the European institutions, improve market knowledge, strengthen working relationships between professionals, and oversee their professional ethics, professional practices and quality of education.