



GUIDANCE NOTES ON ARTICLE 9(a) OF THE SERVICES (INTERNAL MARKET) ACT

Services (Internal Market) Act (Chapter 500 of the Laws of Malta)

Enforcement Directorate

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GUIDANCE NOTES ON ARTICLE 9(a) OF THE SERVICES (INTERNAL MARKET) ACT

1. Introduction and Scope

1.1. The Services (Internal Market) Act (Chapter 500 of the Laws of Malta) (“the Act”) establishes the general framework for facilitating the exercise of freedom of establishment for service providers and the free movement of services in the internal market pursuant to Directive 2006/123/EC (the Services Directive).

1.2. Subsidiary legislation made under the Act consists of the following two Regulations:

(a) The Designation of Various Entities Regulations (Subsidiary Legislation (S.L.) 500.01) which establishes, under Regulation 7, that the Director General (Consumer Affairs) shall be responsible to ensure that the rights of recipients and potential recipients of a service shall not be subjected to discriminatory requirements mentioned under article 9(a) of the Services (Internal Market) Act.

(b) The Establishment of Sanctions and Penalties Regulations (S.L. 500.02) which establishes, under Regulation 3, the procedure and penalties to be followed by the Director General (Consumer Affairs) when carrying out his functions under Article 10(2) of the Act and Regulation 7 of S.L. 500.01.

1.3. Article 9(a) of the Act implements Article 20(2) of the Services Directive and specifically states that:

9. Recipients and potential recipients of a service shall not be subjected to discriminatory requirements, including:

(a) limitations to access to services in Malta through a provider’s general conditions that contain discriminatory provisions relating to the nationality or place of residence of the recipient, provided that this does not preclude the possibility for a provider to provide for differences in the conditions of access where those differences are directly justified by objective criteria.

1.4. The purpose of this Article is to help service recipients, especially consumers, access offers available on the markets of other Member States and make the most

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of the internal market. According to the Act, service recipients means any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community Acts, or any legal person as referred to in Article 54 of the Treaty on the Functioning of the European Union (“the TFEU”), and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use a service.

- 1.5. On the other hand, the obligation to apply the said Article falls upon the providers of a service, namely any natural person who is a national of a Member State, or any legal person as referred to in Article 54 of the TFEU and established in a Member State, who offers or provides a service.
- 1.6. It is important to first understand the concept of ‘service’ as covered by the Services Directive. As a basic rule, the Services Directive applies to all services which are not explicitly excluded from it. The concept of ‘service’ is in line with Article 57 TFEU. Thus, within the meaning of the TFEU and the Services Directive, a ‘service’ is constituted by the following activities:
 - (a) activities of an industrial character;
 - (b) activities of a commercial character;
 - (c) activities of craftsmen; and
 - (d) activities of the professions.
- 1.7. Moreover, the activity must normally be provided for remuneration, in other words, it must be of an economic nature.
- 1.8. Without being exhaustive, the following can be mentioned as examples of services covered by the Directive: distribution of goods and services (retail), services in the field of tourism such as travel agencies, leisure services such as services provided by sports centres and amusement parks, rental and leasing services (including car rental), the activities of most of the regulated professions, craftsmen, the organisation of events, advertising and recruitment services.

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- 1.9. The Services Directive however explicitly excludes a number of services from its scope. Nevertheless, national rules and regulations relating to excluded services have to comply with other rules of Union law, in particular with the freedom of establishment and the freedom to provide services as guaranteed in Articles 49 and 56 TFEU. The excluded services include:
- (a) Financial services, including banking, credit, insurance and re-insurance, occupational and personal pensions, securities, investment funds, and payment and investment advice. This includes also the list in Annex I to Directive 2013/36/EU on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms (transposed into Maltese legislation through the European Passport Rights for Credit Institutions Regulations (S.L. 371.11)).
 - (b) Electronic communication services and networks, and associated facilities and services. However, these services are only excluded with respect to matters covered by the five directives included in the so-called “telecoms package”, namely Directives 2002/19/EC (Access Directive), 2002/20/EC (Authorisation Directive), 2002/21/EC (Common Regulatory Framework), 2002/22/EC (Universal Services Directive) and 2002/58/EC (Directive on Privacy and Electronic Communication) as transposed into Maltese legislation. Matters not covered by these five directives are covered by the Services Directive.
 - (c) Services in the field of transport, including urban transport, which cover the transport services falling within the scope of Title VI TFEU. Thus, this exclusion covers air transport, maritime and inland waterways transport, including port services, as well as road transport. This exclusion does not cover services which are not transport services such as driving school services, removal services, car rental services, funeral services or aerial photography services. It also does not cover either commercial activities in ports or airports such as shops and restaurants.
 - (d) Services of temporary work agencies which cover the service of hiring out workers provided by temporary work agencies.

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- (e) Healthcare services including pharmaceutical services provided by health professionals to patients to assess, maintain and restore their state of health, whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private. Services which are not provided to a patient but to a health professional or to a hospital such as accounting, or cleaning services are not covered by this exclusion. Moreover, the exclusion does not cover activities which are not designed to maintain, assess or restore patients' state of health, such as activities which are designed to enhance wellness or to provide relaxation including sports or fitness clubs. It should also be made clear that this exclusion concerns only services relating to human health and thus veterinary services are not excluded from the scope of the Directive.
- (f) Audiovisual services, including cinematographic services, whatever their mode of production, distribution and transmission, and radio broadcasting. However, other services linked to audiovisual services or to radio broadcasting, such as advertising services or the sale of drinks and foods within cinemas are not excluded from the Directive.
- (g) Gambling activities as regulated by the Gaming Act (Cap. 400) and the Lotteries and Other Games Act (Cap. 438) which includes wagering a stake with pecuniary value in games of chance, including in particular, numeric games such as lotteries, scratch cards, gambling services offered in casinos or licensed premises, betting services, bingo services and gambling services operated by and for the benefit of charities or non-profit organisations. In contrast, games of skill, gaming machines that do not give prizes or that give prizes only in the form of free games and promotional games whose exclusive purpose is to encourage the sale of goods or services are not covered by this exclusion. Furthermore, services provided in casinos, for example the sale of food and drinks are also not covered by this exclusion.
- (h) Activities which are connected with the exercise of official authority as set out in Article 51 TFEU. This exclusion, in line with the case law of the Court of

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Justice of the European Union, only covers specific activities and does not encompass entire professions.

- (i) Social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised by the State. These services are, however, not excluded if they are provided by other providers, for example private operators acting without a mandate from the State, such as childcare provided by private nannies or other childcare services (such as summer camps).
- (j) Private security services which cover services such as surveillance of property and premises, protection of persons (bodyguards), security patrols or supervision of buildings as well as the depositing, safekeeping, transport and distribution of cash and valuables. Services which are not “security services” as such, for instance the sale, delivery, installation and maintenance of technical security devices, are not covered by this exclusion.
- (k) Services provided by notaries and court marshals, appointed through an official act of Government.
- (l) Services in the field of taxation.

2. Disclaimer

2.1. This document is exclusively intended for guidance purposes and does not constitute legal advice.

2.2. For further information, please contact the Enforcement Directorate.

3. Non-Discriminatory Requirements

3.1. Service providers must not discriminate on the grounds of nationality or place of residence in the general conditions of access made available to the public at large. However, conditions of access that are negotiated on an individual basis with one service recipient are excluded from the provisions of Article 9(a) of the Act. It is to be pointed out, that this possibility for exclusion is only allowed to account for the

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particularities of the contract at hand and cannot be used to introduce differences in treatment based generally on nationality or place of residence which do not take into consideration such particularities.

- 3.2. For example, tailor-made terms that are negotiated with a particular service recipient are usually based on the special characteristics of the recipient in question, including characteristics such as the history of custom with the service provider, his ability to pay, or other special requests not covered by Article 9(a) of the Act and such terms can only be made on a case-by-case basis.
- 3.3. In line with the elaboration on “general conditions of access” provided in the Commission Staff Working Document on the application of Article 20(2) of the Services Directive, it is to be noted that general conditions of access made available to the public at large can be understood as all the terms and conditions, and all other information made available by the service provider through various means of information published in advertisements, on websites or in (pre-) contractual documentation. These are understood to apply in the absence of an agreement to the contrary entered into directly with the service recipient.
- 3.4. This also includes practices which apply generally without being laid down in published information or in documentation made available by the provider, such as information provided by way of telephone/mobile communications, sms and e-mails or letters addressed to service recipients in response to requests for information.
- 3.5. Any such discrimination that is based on nationality or the place of residence of recipients, such as discriminatory tariffs or requirements solely imposed on nationals of other Member States, for instance, the obligation to supply specific documents or request specific payment methods for the use of a service, are prohibited. As to payment methods, it is also pertinent to point out that Regulation 21 of the Consumer Rights Regulations (S.L. 378.17) prohibits traders from charging consumers, in respect of the use of a given means of payment, fees that exceed the cost borne by the trader for the use of such means. Furthermore, if a recipient wishes to pay using a credit card issued in another Member State, this recipient cannot be discriminated against by incurring surcharges which do not apply if the credit card is issued in Malta.

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3.6. Furthermore, if the provision of the service necessitates the provision of a valid identification document, there should be no specific reference as to what type of document is to be provided, subject that this is a valid document according to the laws of the Member State of issuance and provided that the identity of the person can be duly verified. Where the service to be given requires the application of credit checks and/or deposit requirements, these should not differ from those of Maltese nationals. It is also pertinent to point out that identity documents should be limited to verifying the identity of the person and should not also be used as a means of confirming the person's residence.

3.7. However, not every difference of treatment necessarily constitutes discrimination. Difference of treatment qualifies as discrimination when different rules are applied to comparable situations or in the application of the same rule to different situations. Thus, in exceptional cases, service providers will be able to retain different conditions as long as these are justified by 'objective criteria'. These are objective reasons which justify the offering of different conditions according to the recipient's place of residence. The 'objective criteria' are to be based on the service provider's different circumstances, such as:

(a) Additional costs incurred because of:

3.7.a.1. The distance involved; or

3.7.a.2. The technical characteristics of the provision of the service;

(b) Different market conditions, such as higher or lower demand influenced by:

3.7.b.1. Seasonality;

3.7.b.2. Different vacation periods;

3.7.b.3. Pricing by different competitors

(c) Extra risks linked to rules differing between EEA states;

(d) The lack of sufficient intellectual property rights in a particular territory.

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- 3.8. These objective criteria could be used by a service provider to refuse the provision of a service or to adapt the conditions of an agreement to provide a service, however there must be a justifiable reason for doing so. It is easier to justify the adaptation of the conditions, such as by charging a higher price to cover any additional costs, rather than an outright refusal to provide the service.
- 3.9. A case in point is the refusal to supply goods in another Member State due to a lack of delivery options. Such refusal is generally not an objective reason in view of the fact that businesses can recover the additional cost incurred in delivering the goods by adding delivery and freight charges, as long as the consumer is informed of this charge in the pre-contractual information and prior to affecting any payment.
- 3.10. For further information on the application of Article 20(2) of the Services Directive, reference may be made to the Commission Staff Working Document with a view to establishing guidance on the application of Article 20(2) of Directive 2006/123/EC on services in the internal market (SWD(2012) 146 final, 8.6.2012).

4. Other Requirements - Information to be provided to a Recipient

- 4.1. A provider established in Malta shall make the following information available to a recipient at all times:
- (a) His name, legal status and form, the registered geographic address at which he is established and details enabling him to be contacted rapidly and communicated with directly and, as the case may be, by electronic means;
 - (b) Where the provider is subject to a code of conduct, is a member of a trade association or professional body which provides recourse to settlement dispute proceedings other than judicial proceedings, the details of such body and the manner how the information on the characteristics and conditions relating to such proceedings may be obtained;
 - (c) Where the provider is registered in a trade or other similar public register, the name of that register and the provider's registration number, or equivalent means of identification in that register;

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- (d) Where the activity is subject to an authorisation scheme, the particulars of the relevant competent authority or the single point of contact;
- (e) Where the provider exercises an activity which is subject to VAT, the identification number referred to in Article 22(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes - Common system of value added tax: uniform basis of assessment;
- (f) In the case of the regulated professions, any professional body or similar institution with which the provider is registered, the professional title and the Member State in which that title has been granted;
- (g) The general conditions and clauses, if any, used by the provider;
- (h) The existence of contractual clauses, if any, used by the provider concerning the law applicable to the contract and, or the competent courts;
- (i) The existence of an after-sales guarantee, if any, not imposed by law;
- (j) The price of the service, where a price is pre-determined by the provider for a given type of service;
- (k) The main features of the service, if not already apparent from the context;
- (l) Where the provider is subject to an insurance cover or other guarantee, the contact details of the insurer or guarantor and the territorial coverage.

4.2. The information referred to above:

- (a) Shall be provided at the provider's initiative; and
- (b) Shall be easily accessible to the recipient at the place where the service is provided, or the contract concluded; or
- (c) Can be easily accessed by the recipient electronically by means of an address supplied by the provider; or

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- (d) Appears on all documentation supplied to the recipient by the provider which sets out a detailed description of the service he provides.

4.3. A provider shall make the following information available at the recipient's request:

- (a) a reference to the professional rules applicable in the Member State of establishment and how to access them;
- (b) information on their multi-disciplinary activities and partnerships which are directly linked to the service in question and on the measures taken to avoid conflicts of interest. Such information shall be included in any information document in which providers give a detailed description of their services;
- (c) information, if any, on the provider's code of conduct, or membership of a trade association or professional body which provides for recourse to a non-judicial means of dispute settlement. The provider shall specify how to access detailed information on the characteristics of, and conditions for, the use of non-judicial means of dispute settlement.

4.4. The provider shall ensure that the above information is made available or communicated in a clear and unambiguous manner, and in good time, before the conclusion of the contract and, where there is no written contract, before the service is provided.

4.5. The final price should not change after the consumer has mentioned his country of residence, unless this possible change is expressly notified at the start of the purchase procedure, accompanied with the necessary justifications.

4.6. For further information on the Services Directive in general, one may access

5. Useful Links

5.1. MCAA Website: <http://www.mccaa.org.mt>

5.2. The Handbook on the implementation of the Services Directive:
http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf

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5.3. The European Commission's guidelines:

http://ec.europa.eu/internal_market/services/docs/services-dir/implementation/report/SWD_2012_146_en.pdf

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6. Revision History

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7. Contact Details

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