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The future of services in the Internal Market

Pavel Klenovsky
Czech Metrology Institute

Seminar “ Legal Metrology & EU directives, New Legislative Framework”
Zagreb, Croatia, 3 – 4 November 2010



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DISCLAIMERS:

- the corresponding pieces of legislation are written in a rather heavy legal language and are relatively long – not all the articles will be presented, only the overall philosophy and relations to metrology, all of them available on the Internet
- the presentation contains a number of personal opinions and interpretations of the author, representatives of CEC might see the matters otherwise – the place of final resort is the European Court of Justice



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The subject matter of this issue:

the interpretation and implementation of one of the EC fundamental rights: free movement of services (e.g. various activities of a service character around measuring instruments) on the Internal (Single) Market

the corresponding articles in the EC Treaties (**the Treaty establishing the European Community - TEC**) are articles 49 – 55 (Chapter 3) whereas provisions of art. 45 – 48 (freedom of establishment) are applicable to these matters

Article 49 Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.



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Article 52 (1)

In order **to achieve the liberalisation** of a specific service, the Council shall, on a proposal from the Commission and after consulting the Economic and Social Committee and the European Parliament, **issue directives** acting by a qualified majority.

Article 47(2)

For the same purpose, the Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. **In other cases the Council shall act by qualified majority.**



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A thorough analysis and public inquiry clearly indicated that the provisions of those articles were not consequently implemented in legal practice of many Member States → a legal action foreseen by TEC was considered necessary.

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Life situations to which „recognition“ of services is applicable in metrology:

1. a service provider established in one MS authorized therein to make initial verification of radar speedometers goes (with all its equipment) to another MS and verifies those MIs on its territory (**non-harmonized regulated area**)
2. a service provider established in one MS authorized therein to subsequently verify NAWIs goes to another MS and verifies NAWIs on its territory (**non-harmonized area associated with a harmonized MI**)
3. a service provider - accredited or non-accredited calibration lab – established in one MS goes to another MS and calibrates MIs on its territory (**non-regulated area**)



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What is the difference between the situations when mutual recognition applies and when the legislation on services applies ?

- here a **service (provider)** travels, in mutual recognition a **(regulated) product** travels across borders of MS



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Current legal situation in this area – a new EC legal act called shortly the **Service Directive (SD)**:

- full name: **Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market**
- prepared under the auspices of **DG Internal Market and Services**
- based on art. 47 and 55 of the Treaty establishing the EC (TEC)
- the deadline for transposition into national legislations: **December 28th, 2009** – since this date the directive is effective
- an extensive reporting on implementation required to that date (art. 39 Mutual evaluation)



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General scope:

- **the basic aim is to facilitate cross-border provision of services on the Internal Market, not e.g. to liberalize services of general economic interest or to abolish some monopolies etc. (art.1 (2) and (3)) – Member States are completely free to assign (by legislation) some service-type activity to a sole national (e.g. Government or non-profit) champion**
- **it does not cover application of art. 28 to 30 TEC on free movement of goods (Recital 76) – this is covered either by the harmonized legislation (conformity assessment activities) or by principles of mutual recognition, the issue at stake here is a free access to services**



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General scope:

- but SD does cover activities (services) of conformity assessment associated with putting products on the market and into use (as free as possible access to them)
- **activities not falling under SD are specified in art. 2 (2)** – that should be carefully checked first
- in case of a conflict with a specific EC legal act concerning the access to services or to their execution in some specific areas or in certain professions this **specific legislation prevails** (so called **regulated professions, conformity assessment activities**) – art. 3, par. 1



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General scope:

- **cross-border services** (the provider is not established in the host country – Chapter IV) and **services provided by a provider established in the host country** (Chapter III) should be carefully distinguished (Recital 77) – cross-border services are very close to the situation of **the country of origin** (the provider is not established in the host country) and the case-law provides a very broad scope for them (e.g. Schnitzer C-215/01 etc.)



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General scope:

- the draft was originally based on **the principle of the country of origin** – finally not accepted, **service providers are subject to requirements of the host country** (where the service is rendered) when they seek establishment there or in provision of cross-border services in specific situations (art. 17 and 18)
- Recital 70: **services of general (public) economic interest** - those provided in application of a **special task in the public interest** entrusted to the provider by a Member State (MS) (**overriding reasons relating to the public interest**) – this is closely related to activities in legal metrology



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General scope:

- by art. 17 (1) **provisions on cross-border services in art. 16 do not apply to services of general economic interest** → providers of those services have therefore to be (somehow) established in the host MS and provisions of Chapter III are applicable to them
- at the same time a restriction of an **authorization** is accepted for services of general economic interest → **the establishment issues and authorization schemes governing an access to a service are therefore treated jointly** in Chapter III (art. 9 – 15), an authorization in the host country requires some sort of presence in that country so that it is logically associated with the establishment issue



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General scope:

- authorizations are permissible under **very strict conditions**, they have to be **necessary, non-discriminatory** (the applicant can be established in any MS), **non-arbitrary** etc.
- if those conditions are fulfilled the authorization has to be granted **(an entitlement to get the authorization)**
- authorizations under basically same conditions from abroad should be recognized or taken into account (a good example is Slovakia versus the Czech Rep.)



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General scope:

- the scope of various kinds of an establishment is very wide (a branch office of **an EU legal person – Recital 36** - is enough if not proved otherwise), it is not up-front necessary to establish a subsidiary (legal entity) in the host country just for the purpose of authorization



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General scope:

- **Cross-border provision:**
 - (art.1) Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.
 - The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.
 - art. 1 a) to c) + art. 2: a list of forbidden restrictions on free cross-border provision of services, inter alia **obligation to have an establishment in the host country** (art. 2a) or to obtain authorization (art. 2b)



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General scope:

- **Quality of services (Chapter V):**
 - (art.22) various kinds of information that providers have to make available to recipients – quite an extensive list.
 - among others, a registration of the provider with a professional organization in case of regulated professions.
 - art. 22, (3) a): MS have to ensure that providers supply , at a recipients´ request, the info on the price of the service
 - art. 23 professional liability insurance and guarantees
 - art.24 commercial communications by regulated professions – **professional rules to be non-discriminatory and justified**



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General scope:

- **Quality of services – art. 25 Multidisciplinary activities:**
 - herein specified providers are exempt from a ban on requirements to provide services separately or jointly
 - Those providers are:
 - a) regulated professions
 - **b) providers of certification, accreditation, technical monitoring, test or trial services, in so far as is justified in order to ensure their independence and impartiality.**



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General scope:

- **Quality of services – art. 25 Multidisciplinary activities:**
 - **art. 25 for multidisciplinary activities MS shall ensure:**
 - **(a) that conflicts of interest and incompatibilities between certain activities are prevented;**
 - **(b) that the independence and impartiality required for certain activities is secured;**



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General scope:

- **Policy on quality of services – art. 26:**
 - (art. 1) MS should encourage providers to take action on a voluntary basis in order to ensure the quality of service provision, in particular through use of one of the following methods:
 - (a) **certification or assessment of their activities by independent or accredited bodies;**
 - (b) drawing up their own quality charter or participation in quality charters or labels drawn up by professional bodies at Community level.
 - availability of info on quality marks (2) + various encouragements as regards quality of services (3 – 5)



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General scope:

- **Administrative cooperation – Chapter VI:**
 - various provisions on mutual assistance and cooperation inclusive **liaison points in MS** and supply of information
 - **principles of supervision** by the MS of establishment of service providers and of supervision by the MS where the service is provided (both have to be carried out)
 - **alert mechanism** in case of acts or circumstances relating to a service activity that could cause serious damage to the health or safety of persons or to the environment
 - information on the **good repute of providers** (insolvency etc.)



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General scope:

- **Administrative cooperation – Chapter VI:**
 - the exchange of the required information is now achievable through a special secured internet application **Internal Market Information System (IMI)** at
http://ec.europa.eu/internal_market/imi-net/
 - each MS is represented in IMI by a national coordinator (**NIMIC – National IMI Coordinator**), in the CR at the Ministry of Industry and Trade



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Application to (legal) metrology:

- their relation to SD has to be analyzed
- an possible exclusion point applicable to metrology in art. 2 (2) is (i): **an exercise of official authority** (+ art. 45 of TEC concerning the right of establishment)
- art. 45 of TEC: The provisions of this chapter shall not apply, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with **the exercise of official authority**



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Application to (legal) metrology:

- 2(2) i: activities which **are connected** with the exercise of official authority as set out in Article 45 of the Treaty
- the question is what is a precise definition of the **exercise of official authority**
- the problem is that there is no such clear and official definition of this legal term (e.g. not in SD, Article 4 - Definitions, not even in recitals)
- the closest thing derived from the EC case-law is that such activity has in some way **restrict personal rights** of citizens (e.g. surely activities made by police, less surely subsequent verification with stamping, surely not accreditation)



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SUBSEQUENT VERIFICATION + OFFICIAL MEASUREMENTS:

- an argument can be consistently maintained that subsequent verification and official measurements are an exercise of official power out of the following reasons:
 1. Even private subjects can carry out activities possessing the character of exercise of official authority **if authorized by the State** – thereby they become bodies of official authority (quite a similar situation to official notaries being out of the scope of the Directive).
 2. It is a tool for decentralization of state administration which is one of the attributes of state administration as such. The activity of such subjects remains exercise of official authority.
 3. The authorized subjects normally issue, as a result of their activities, an **individual administrative act** which is a clear evidence of official authority as it is an act of public (not private) law.



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SUBSEQUENT VERIFICATION + OFFICIAL MEASUREMENTS:

4. This act is initiated **not on a basis of a contract** but by an application made by the user.
5. The State is customarily liable for any damage brought about by those authorized subjects as a result of an illegal decision or an illegal administrative procedure .
6. Provision of an activity for **a fee is no barrier here**, no provision exists that official authority cannot be executed for a fee. On the other hand, exercise of official authority made for a fee is supported by a decision of the ECJ (C-451/03).



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SUBSEQUENT VERIFICATION + OFFICIAL MEASUREMENTS:

7. The fact that those subjects do not possess compulsory powers is again no barrier for those activities to be exercised by official authority. No definition of the term “official authority” is available where it is firmly associated with compulsory powers. On the other hand, the obligation e.g. to secure the outputs (stamping) of authorised subjects is enforceable by way of an administrative body (+ the right of entry to the premises of the user).



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SUBSEQUENT VERIFICATION + OFFICIAL MEASUREMENTS:

8. Subsequent verification might therefore be an exercise of official authority: without fair measurements guaranteed by Government where public interests are at stake any society will gradually disintegrate.
9. The situation is similar to e.g. notaries who are appointed by an official act of Government (2) (I) which are excluded under (I).
10. In case of accreditation (a service made for a fee) the CEC itself (DG EI) considers it to be an execution of official authority (see EC Regulation no. 765/2008). The main reason is that they should be free of commercial interests to be able to decide independently under various conflicting interests – but this is an everyday situation in subsequent verification of measuring instruments like fuel dispensers and taximeters as well.



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SUBSEQUENT VERIFICATION + OFFICIAL MEASUREMENTS - comments:

- **it is sometimes admitted that verification made by (or reserved to) a Government body is an exercise of official authority but verification made by authorized private bodies is not**
- **fully in line with SD verification of a category of legally controlled measuring instruments can be assigned solely to a Government (or public) body defined by law on metrology – this has already been made in Slovakia by par. 23 (4) of Law on metrology (no. 142/2000 Coll. as amended) and it can be extended to cover measuring instruments used by the police to enforce various transport legislations (like e.g. in Austria)**



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SUBSEQUENT VERIFICATION + OFFICIAL MEASUREMENTS - comments:

- **MI**s used for enforcement by police and **MI**s used to charge fees directly to citizens and verified on-site (taximeters, dispensing pumps, balances) can reasonably be defended to be an exercise of official power (their malfunction can potentially restrict the right of citizens)
- and monopoly of e.g. Government body in these areas could serve as a safeguard against manipulation with errors within stated tolerances (mpe´s)



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SUBSEQUENT VERIFICATION + OFFICIAL MEASUREMENTS - comments:

- if subsequent verification is not accepted to be an exercise of official authority to stay outside the SD then there is no way how to stop any authorized body from another Member State (MS) to make finally the activity on the territory of any other MS (see art. 9, par. 3, art. 14, 15) - Law on metrology will have to be amended to allow for that
- in this context an attention should be paid to **art. 25 on multidisciplinary activities**: par. (1) (b) enables to subject service providers in certification, accreditation etc. to **requirements which oblige them to exercise a given specific activity exclusively** or which restrict the exercise jointly or in partnership of different activities (e.g. a **requirement of a separation of repairs from subsequent verification**)



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SUBSEQUENT VERIFICATION + OFFICIAL MEASUREMENTS - comments:

- **this provision is very much applicable to subsequent verification (or to the other regulated activities in metrology) as verification is often in some countries made together with repairs of those instruments**
- **this provision should be used to a maximum extent – this is e.g. the aim to be followed in Germany here, it has been implemented in Finland (Inspecta) – the result being that the number of potential applicants for authorization will be significantly reduced. Such a provision has already been applied in Slovakia (by par. 10 (7) of Decree no. 210/2000 Coll.)**



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LEGAL METROLOGY ACTIVITIES - summary:

- subsequent verification and official expert measurements (to a lesser extent) could (probably) be defended as an execution of official authority - if not, they are (at least) services of general economic interest under the SD
- conformity assessment activities in the EC harmonized area are services of general economic interest without any doubt
- installation and repair of legally controlled MIs and calibrations of MIs are „normal“ cross-border services – there are no signals of any problems in their provision outside the home country even without the SD (with the exception of the CR and Slovakia)



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SITUATION/POSITIONS IN SOME MS – Czech Republic:

- the SD transposition was supported by a special legal act on services and by an act making changes in other acts (to bring them in line with the SD)
- there was a running dispute between the corresponding department of the Ministry of Industry and Trade on one side and COSMT and CMI on the other side about the character of activities in legal metrology
- the act on services is basically about cross-border services , the services of general economic interest are not covered (not even in changes of the other acts)



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SITUATION/POSITIONS IN SOME MS – Czech Republic:

- those changes did affect Law on Metrology but only marginally (more like quietly adopting the idea that those activities does not fall under SD)
- so that on the surface the position of COSMT/CMI is accepted (but verbally not accepted) but one never knows here – there is no explicit expression of consent on the part of the Ministry



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SITUATION/POSITIONS IN SOME MS – F.R. of Germany:

- the responsible department of the Ministry of Economy and Innovation was split into 2 parts – the one side, in line with policy of DG IMS, maintains that activities in legal metrology (subsequent verification and official measurements) are services (of general economic interest), the other one however asserts that one has taken a look at the aim of those activities
- outputs from subsequent verification are namely used in actions of market surveillance and of metrological supervision (over MIs, at users) which are clearly executions of official authority – out of this reason, **initial verification in non-harmonized area and subsequent verification have been decided to be outside the SD** (effectively, the execution of official authority)



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SITUATION/POSITIONS IN SOME MS – UK:

- the communication from Mr.P.Edwards (NWML): in case of SD we are not sure about the scope of execution of official authority in application to legal metrology and we are trying to find out what is the view of CEC
- their view (as regards subsequent verification) 2 years ago was that the testing itself falls under the SD whereas the application of a seal (mark) to a measuring instrument is an act of official authority (? – such a split is not a very helpful position)



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POSITION OF CEC DG IMS:

- I as a member of WELMEC Chairman´s Group made steps to make the point of application of the SD in legal metrology one of the points of the agenda of WELMEC Committee meeting in May 2008
- The WELMEC Secretariat asked all the members to send in their positions on the subject matter which was available and analyzed in autumn 2008
- the problem was on the agenda of the Measuring Instruments´ Committee of the CEC on July 23 and 24th, 2008 as well
- it seems that in WELMEC the opinion that at least subsequent verification is an execution of public power prevails
- in autumn 2008 this question was submitted to the Internal Market and Services DG for clarification – see document no. MI-08-003, authors: M.Giorello and S.Fritz, CEC DG IMS



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POSITION OF CEC DG IMS:

- basically, they argue that in case of accreditation it is a wish of DG EI (?) whereas the activities of LM are services due to the fact that they are made for a fee (?) – actually, not a position of principle
- in that way they make out of the SD a laughing stock: DG IMS envoys have been traveling throughout Europe with a message that any activity made for a fee is a service under the SD but, out of a sudden (without any reasons), in case of accreditation it is no more the case
- we are therefore facing a paradoxical situation when an activity being by 80 – 90 % in the non-regulated area becomes without any reasons an execution of official authority with a hard national monopoly but an activity being totally in the regulated area of metrology aimed at consumer protection under tense circumstances is not
- the question prevails whether metrology community will somehow respond to this situation (WELMEC ?)



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SUMMARY OF OPTIONS (how to handle e.g. subsequent verification as a service type of activity):

- 1. To assign the service activity under consideration by way of national legislation to a competent national body – it is perfectly OK with SD (see the situation in Germany)**
- 2. To win the argument (on national and European level) that the activity under consideration is an execution of official authority so that it does not fall under SD by way of art. 2 (2) i)**
- 3. If this attempt is not successful or you wish to do so the activity is simply a service of general economic interest under SD and all the requirements therein have to be complied with (it has to be pointed out that they are quite restrictive)**
- 4. In this latter case, a requirement of separation of repairs from verification can (at least) be used.**



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CONCLUSIONS:

- adjustments of individual pieces of legislation across the board might not be an easy and straightforward process, several steps (approximations) will possibly be needed
- the reasons for subsequent verification and official measurements (to a lesser extent) to be an exercise of official authority are defensible
- in metrology the activities touched by SD are extremely non-harmonized across the EU – especially those associated with measuring instruments already in use so that up to now they have not been subject to any harmonization from the Community level which can create a number of controversies in the transposition process
- especially those MS where matters are well under control may suffer from such harmonization with the least regulated situations in the EU as examples which could lead to a disruption of the current national systems

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CONCLUSIONS:

- the matter is governed by a directive for transposition of which (being rather complicated) the MS are responsible so that it is not advisable to do nothing on the national level and wait until some economic operator starts complaining or puts the matter before ECJ in the worst case
- finally, even if some criticism of both EC legal acts (mutual recognition + service directive) has been exercised in both presentations it has to be stressed that the Single Market is without any doubt one of the best achievements and benefits in the EU and it would be beneficial for everybody in Europe if all your countries join it one day (even if nothing else happens on the political side)



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Thank you for your
attention!



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