

The Implementation of the Services Directive in Austria

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1 General Remarks on the Transposition Strategy and General Understanding of the Implementation

1.1 Main References Used in this Research

It should be noted that as of today (8 July 2011), the main implementing bill at the federal level (draft government bill 317dB XXIV GP) has yet not passed the Austrian Parliament. The reason for this delay is entirely unrelated to Directive 2006/123/EC. However, given the horizontal nature of the Directive encompassing competences of the States, implementing this Directive by federal law requires an amendment of the Austrian constitution, namely, the insertion of a new

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competence clause. Such a clause requires a two-thirds quorum in Austrian Parliament, which is not available to the current majority in the Austrian government. Consequently, the support of opposition parties would be needed to some extent. Such support, however, is not available independent of the subject matter at stake—and consequently also not for the transposition of the Directive—due to a political dispute between the government and opposition parties, as already mentioned, entirely unrelated to the Directive.

All legislation documents—the draft, the initiative by the Austrian government, and parliamentary procedures—can be accessed at http://www.parlament.gv.at/PG/DE/XXIV/I/I_00317/pmh.shtml. Our work relies mainly on these documents and, above all, the governmental initiative.

The Styrian implementing bill (*Gesetz vom 15. Dezember 2009, mit dem das Steiermärkische Akkreditierungsgesetz, das Steiermärkische Aufzugsgesetz 2002, das Steiermärkische Baugesetz, das Steiermärkische Bauproduktengesetz, das Steiermärkische Berg- und Schiführergesetz 1976, das Steiermärkische Elektrizitätswirtschafts- und -organisationsgesetz 2005, das Steiermärkische Prostitutionsgesetz, das Steiermärkische Schischulgesetz 1997, das Steiermärkische Tanzschulgesetz 2000 und das Steiermärkische Veranstaltungsgesetz geändert werden—DLRL-Anpassungsgesetz*) was announced in the Styrian Law Gazette on 2 March 2010 (*Steiermärkisches Landesgesetzblatt* 2010/7; see www.ris.bka.gv.at).

The implementing bill of Upper Austria (*Landesgesetz vom 30. April 2010, mit dem das Oö. Tanzschulgesetz 2010 erlassen und das Oö. Sportgesetz, das Oö. Bautechnikgesetz, das Oö. Leichenbestattungsgesetz, das Oö. Campingplatzgesetz, das Oö. Luftreinhalte- und Energietechnikgesetz 2002, das Oö. Kinderbetreuungsgesetz und das Oö. Natur- und Landschaftsschutzgesetz 2001 geändert werden (Oö. Dienstleistungsrichtlinie-Anpassungsgesetz 2010)*) was announced in the Law Gazette of Upper Austria on 30 April 2010 (*Landesgesetzblatt von Oberösterreich* 2010/30; see www.ris.bka.gv.at).

The implementing bill of Vorarlberg (*Gesetz zur Umsetzung der Dienstleistungsrichtlinie—Sammelnovelle*) was announced in the Law Gazette of Vorarlberg on 13 April 2010 (*Landesgesetzblatt von Vorarlberg* 2010/12; see www.ris.bka.gv.at).

The implementing bill of Salzburg (*Gesetz, mit dem das Salzburger Landessicherheitsgesetz, die Salzburger Feuerpolizeiordnung 1973, das Salzburger Kinderbetreuungsgesetz 2007, das Salzburger Tierzuchtgesetz 2009, das Salzburger Landeselektrizitätsgesetz 1999, das Salzburger Schischul- und Snowboardschulgesetz, das Salzburger Bergführergesetz, das Salzburger Tanzschulgesetz, das Gesetz über den Betrieb von Motorschlitten, das Salzburger Campingplatzgesetz, das Salzburger Veranstaltungsgesetz 1997, das Bauproduktengesetz, das Luftreinhaltegesetz für Heizungsanlagen, das Salzburger Baupolizeigesetz 1997, das Gesetz über die Errichtung des Nationalparks Hohe Tauern im Land Salzburg, das Salzburger Höhlengesetz, das Salzburger Heilvorkommen- und Kurortgesetz 1997 und das Salzburger Leichen- und Bestattungsgesetz 1986 geändert werden (Salzburger Landesgesetz zur Umsetzung der EU-Dienstleistungsrichtlinie)*) was announced in the Law Gazette of Salzburg on 26 February 2010 (*Salzburger Landesgesetzblatt* 2010/20; see www.ris.bka.gv.at).

As far as the implementation of the provisions of Directive 2006/123/EC regarding procedures by electronic means is concerned, see <http://www.digitales.oesterreich.gv.at/site/6367/default.aspx> and <http://www.bmwfj.gv.at/Wirtschaftspolitik/Standortpolitik/Seiten/EU-RichtlinieüberDienstleistungenimBinnenmarktundihreUmsetzunginÖsterreich.aspx>.

1.2 Impact of the Services Directive

1.2.1 Profound Cause of Changes to National Law?

According to the European Commission, implementation necessitates a differentiating methodical approach requiring the adoption of *new* sectoral and horizontal provisions, as well as the *amendment* of existing (sectoral and horizontal) laws.¹ However, the draft government bill (317dB XXIV GP)² rather seeks to comply with horizontal implementation objectives due to the adoption of the horizontal Services Act (*Dienstleistungsgesetz*, henceforth draft DLG) and the Internal Market Information System (IMI) Act. In addition, a few adaptations of the *Allgemeines Verwaltungsverfahrensgesetz*³ (henceforth AVG), of the *Verwaltungsstrafgesetz*⁴ (henceforth VStG), and the 1991 *Verwaltungsvollstreckungsgesetz*⁵ (VVG) and of a few substantive laws were carried out; however, these few adaptations are rather of formal nature.

In Austria, the transposition of Directive 2006/123/EC constitutes a minimum transposition (see <http://www.bmwfj.gv.at/Wirtschaftspolitik/Standortpolitik/Seiten/EU-RichtlinieüberDienstleistungenimBinnenmarktundihreUmsetzungunginÖsterreich.aspx>) which does not exceed the requirements contained in the Directive. The main innovations in the Austrian substantive administrative law and administrative procedural law are the Points of Single Contact (POSC), the comprehensive introduction of tacit (fictitious) authorisation, and provisions on transnational administrative assistance.

¹ See Commission, *Handbook on the Implementation of the Services Directive* (2007), p. 8.

² RV 317 BlgNR XXIV. GP - Regierungsvorlage betreffend Bundesgesetz, mit dem ein Bundesgesetz über die Erbringung von Dienstleistungen (Dienstleistungsgesetz—DLG) und ein Bundesgesetz über das internetgestützte Behördenkooperationssystem IMI (IMI-Gesetz) erlassen, das Preisauszeichnungsgesetz, das Konsumentenschutzgesetz, das Allgemeine Verwaltungsverfahrensgesetz 1991, das Verwaltungsstrafgesetz 1991 und das Verwaltungsvollstreckungsgesetz 1991 geändert und einige Bundesgesetze aufgehoben werden.

³ *Allgemeines Verwaltungsverfahrensgesetz BGBl 1991/51 idF BGBl I Nr. 2009/20*, which can be translated as the General Administrative Procedure Act.

⁴ *Verwaltungsstrafgesetz BGBl 1991/52 idF BGBl I Nr. 2009/20*, which can be translated as the Regulatory Offence Procedure Act.

⁵ *Verwaltungsvollstreckungsgesetz BGBl Nr. 53/1991 idF BGBl I Nr. 3/2008*, which can be translated as the Administrative Execution Act.

1.2.2 Involvement in the Transposition Process

The transposition process involved competent ministries on the federal level, the authorities of the States, the representatives of the Austrian cities and municipalities, as well as the chambers (of commerce, of labour) concerned, and various interest groups. The process was coordinated by the competent Ministry for Economics, Family and Youth and, to coordinate the interests and positions of the States on the state level, by the *Landeshauptleutekonferenz* and the *Landesamtsdirektorenkonferenz*.

1.3 (National) Scope of Application

1.3.1 Scope of the Services Directive

In contrast to Chapter IV of Directive 2006/123/EC, which explicitly links to cross-border services,⁶ other chapters (e.g., Ch. III) do not contain such an informative reference, leaving room for interpretation, particularly as, whether this part also applies to purely internal situations. However, in our opinion, the Directive covers only transnational situations.

At first, the systematic placement of Article 47 TEC, which constitutes, together with Article 55 TEC, the legal basis of the Directive, rather speaks against a broad approach. It is located in the same chapter as Article 43 TEC, which explicitly refers solely to cross-border situations. In its legal practise, the European Court of Justice (ECJ) opines that the fundamental freedoms are not applied to purely internal situations:

It has consistently been held that the Treaty rules governing freedom of movement and regulations adopted to implement them cannot be applied to cases which have no factor linking them with any of the situations governed by Community law and all elements of which are purely internal to a single Member State.⁷

Although it is true that some chapters of the Directive do not give explicit information concerning their field of application, this does not imply that these parts of the Directive would also be applicable to purely internal situations.

The content of the Directive, which does not provide detailed objectives, and regulation of the entire services sector of the Member States,⁸ as well as the context of Article 47 para 2 TEC do not support a broad approach. However, clarification of this problematic question will require a decision by the ECJ.

Concerning the argument of reverse discrimination to which supporters of the Directive's broad applicability sometimes refer, it has to be clarified that some Member

⁶ Compare Article 16 para 1 SD: 'Member States shall respect the right of providers to provide services in a Member States *other* than that in which they are established' (emphasis added).

⁷ Joined Cases C-64/96 and C-65/96, Uecker and Jacquet [1997] ECR I-3171, para 16.

⁸ Böhret et al. (2006), pp. 239 f.

States' law systems already provide for the principle of equal treatment.⁹ However, this is not a result of internal market rules and, as long as no potential danger for the establishment of the internal market arises, an issue that domestic legislators and jurisdictions, respectively, must deal with. In Austria, the Constitutional Court¹⁰ decided that reverse discrimination has to be objectively justified to be in accordance with the constitutional principle of equal treatment. In the absence of justification, it recognises reverse discrimination to be an infringement of that principle.

Originally, the implementation draft (32/ME XXIV GP) by the competent Ministry for Economics, Family, and Youth sought to allow domestic service providers, as well to refer to the laws implementing Directive 2006/123/EC. For example, it should have been possible to contact the POSC in purely internal situations. Thus, the POSC would also have been available for Austrian service providers, which would have necessitated a specific provision in the AVG (§ 20a AVG). However, as a consequence of the resistance by the States and the agreed minimum transposition, the draft government bill (317dB XXIV GP) refrains from this approach. In consequence, domestic service providers are not allowed to claim rights from the implementation laws of the Directive.

1.3.2 Application of Transposing Legislation to Domestic Service Providers

The provisions of the draft DLG are applicable only to transnational service providers—see §§ 2 (scope of application), 6 (POSC), and 7 draft DLG (information to providers and recipients provided by the POSC).

1.3.3 Application of Transposing Legislation Beyond Service Providers

As a consequence of the agreed minimum transposition, the draft DLG implementing Directive 2006/123/EC does not provide for an application for everyone. For example, it does not provide for general and universal standards for the way in which authorities deal with all citizens/economic stakeholders/service providers.

1.3.4 Equal Treatment of Domestic and Transnational Service Providers

As can be seen from the implementation draft (32/ME XXIV GP) by the competent Ministry for Economics, Family, and Youth, there has been discussion about the equal treatment of domestic and transnational service providers. However, as a consequence of the requirement of a (still pending) amendment to the Austrian Constitution, the draft government bill (317dB XXIV GP), especially the draft DLG, provides for a narrower scope of application.

⁹ For example, Austria.

¹⁰ Verfassungsgerichtshof (VfGH), VfSlg 14.963.

1.4 Incorporation of Transposing Legislation

Similar to the German situation, Austrian administrative law consists of a general codification of procedures, on the one hand, and various substantive laws regulating specific fields of administration, on the other. The latter contain material standards and/or peculiar procedural rules, completing the general ones.

The Austrian legislator finally decided to implement the Directive by adopting entirely new legislative acts and to amend existing laws only insofar as they were in contradiction to the provisions of the Directive. The main innovations of Directive 2006/123/EC—POSC, tacit (fictitious) authorisation, transnational administrative cooperation—were implemented by the draft DLG, horizontally, on the federal level. State laws were amended punctually. In fields covered by the new provisions, such as transnational situations, the AVG statutes are not applied. These latter come into use only when the newly adopted provisions do not suffice. In other words, the provisions implementing the Directive are *leges speciales*.

In addition to this, the authorities in charge of the screening procedure sought to eliminate contradictions between administrative laws and the Directive so that service providers may rely upon the entirely new adopted acts, on the one hand, and beyond that on the existing proceedings.

1.5 The Relationship of the Services Directive to Primary EU Law

1.5.1 Relationship to Article 49 and 56 TFEU

Pursuant to Article 3 para 3 Directive 2006/123/EC, Member States are obliged to implement and apply the provisions of the Directive “in compliance with the rules of the Treaty on the right of establishment and the free movement of services”. Thus, the Directive must be interpreted in light of the Treaties and the jurisprudence of the ECJ.

1.5.2 Problems in this Context

Problems can arise not only from the partial poor wording and systematic of the Directive, but also from gaps therein, such as the lack of provisions governing the discriminatory requirements of Member States, restricting the freedom to provide services and possibilities for justification.

Article 2 of the Directive clarifies the fields of services that do not fall within the scope of its application. As a consequence of the direct applicability of Articles 49 ff and 56 ff TFEU and the non-applicability of the Directive in these fields, there is no need to amend national legislation.

1.6 Screening

The Austrian administrative law system divides competences between different levels, for example between federal, state, and, local authorities. Thus, the different territorial authorities (“Gebietskörperschaften”) are responsible for compliance of the procedural and substantive laws with the requirements of the Services Directive (SD). According to a governmental decision of 12 March 2008, the competent authorities on the federal and state levels had to screen the relevant legislation, under individual responsibility, through 31 August 2008, and amend the respective laws in cases of non-compliance. On the federal level, the ministries had to screen legislation in their enforcement areas according to the *Bundesministeriengesetz*, and on the state level the state governments had to screen legislation falling within the competence of the States. Furthermore, cities and municipalities had to review their local provisions to comply with the Directive’s requirements, for example, market regulations and regulations regarding graveyards. As coordinator of the implementation process, the Ministry for Economics, Family, and Youth assigned a study to the University of Salzburg to identify the demand for legislative amendments on all levels and to define the most appropriate uniform approach regarding the reporting duties pursuant to Article 39 of the Directive.

2 Individual Articles of the Services Directive

2.1 Article 6 SD: Point of Single Contact (POSC)

2.1.1 Establishment of the POSC

In Austria, as in many other Member States, a person seeking the transnational provision of services had to face a large number of administrative bodies, for example, tax offices, building authorities, and competent courts, to receive a tax ID, a building permit, or an entry in the register of companies, and thus complete all procedures and formalities. In implementing Article 6 of the Directive, which, without doubt, constitutes one of its core provisions, the Austrian legislator established the POSC.

The question of allocating the POSC *in concreto* has been a topic of lively discussion. Besides the entrustment of existing authorities or institutions to be newly created, the entrustment of chambers (e.g., chambers of commerce, bar associations, and architectural associations) in their function as for the respective profession responsible institutions was discussed. On the one hand, a certain similarity can be gleaned between the procedures to be accomplished through the POSC and the admission and registration procedures with chambers.¹¹ In addition,

¹¹ For Germany, see Windoffer (2006), pp. 1216 f.

the comprehensive experience of chambers concerning cooperation with administrative authorities would also be advantageous. However, misgivings concerning the entrustment of chambers expressed in Germany¹² are also of relevance for the Austrian legal system. In particular, the assignment of general administrative duties to chambers would necessitate fundamental amendments to the relevant laws. Chambers would no longer exclusively act in the interests of its members but would have to also serve “external” purposes. The Austrian implementation draft (32/ME XXIV GP) foresaw the insertion of § 20a into the AVG.¹³ This should ensure the opportunity of using the POSC not only in the scope of the Directive, but also generally, and thus also for purely internal situations. However, this approach triggered the resistance of the States and some ministries.¹⁴ Consequently, the draft was amended so that the POSC are now exclusively covered by the draft DLG and cover only transnational situations.

2.1.2 Subjective Understanding, Competence Structure, Authorities with POSC-Function, Liability, Involvement of Private Partners

In § 6 para 1 draft DLG the creation of nine POSC (one for every State) is provided for, located in its respective *Amt der Landesregierung*,¹⁵ which is an already existing institution at the state level. Administrative competences were not allocated in the course of the introduction of the POSC. The service provider can submit written requests during the proceeding of first instance at the POSC, who must forward them to the competent authority. The qualification as POSC relates to the perspective of the service provider,¹⁶ who must gain the impression to deal with one single institution.

The Austrian concept seeks the establishment of POSC as mere mail-administrating centres that do not decide on the merits. Thus, the establishment of the POSC

¹² See Cremer (2008), p. 655.

¹³ ME 32 BlgNR XXIV. GP.

¹⁴ Compare, for example, SN 17 zu ME 32 XXIV. GP 12. zu § 20, *Stellungnahme von: Amt der Salzburger Landesregierung Legislativ- und Verfassungsdienst zu dem Ministerialentwurf betreffend ein Bundesgesetz über die Erbringung von Dienstleistungen (Dienstleistungsgesetz - DLG) und ein Bundesgesetz über das Internal Market Information System (IMI) (Gesetz – IMI-G) erlassen, das Allgemeine Verwaltungsverfahrensgesetz 1991, das Verwaltungsstrafgesetz 1991 und das Verwaltungsvollstreckungsgesetz 1991 geändert und einige Bundesgesetze aufgehoben werden (Sammelgesetz Dienstleistungsrichtlinie)*; SN 35 ME 32 XXIV. GP 2.1. zu § 20 AVG, *Stellungnahme von: Amt der Burgenländischen Landesregierung zu dem Ministerialentwurf betreffend ein Bundesgesetz über die Erbringung von Dienstleistungen (Dienstleistungsgesetz - DLG) und ein Bundesgesetz über das Internal Market Information System (IMI) (Gesetz – IMI-G) erlassen, das Allgemeine Verwaltungsverfahrensgesetz 1991, das Verwaltungsstrafgesetz 1991 und das Verwaltungsvollstreckungsgesetz 1991 geändert und einige Bundesgesetze aufgehoben werden (Sammelgesetz Dienstleistungsrichtlinie)*.

¹⁵ Department of the state government.

¹⁶ Schliesky (2005), p. 891.

does not require any reallocation of competences. In any case, amendments would have been covered by the competences clause contained in § 1 para 1 draft DLG.

The POSC acts functionally for the competent authorities. Thus, the responsible administrative units beyond on federal, state, or community level are liable for damages caused by non- or mis-performance of the POSC.¹⁷ Should the POSC act for various governmental units, compensation must be divided between those units proportionally to their competence areas.¹⁸

However, in our opinion, the mere delivery function of the POSC does not entirely meet the requirements of the Directive. Even if the Directive certainly does not require the POSC to take binding decisions on the merits, the latter is supposed to offer “assistance”¹⁹ to providers.²⁰ In particular, such a “partner of proceeding” would have the function to work actively towards a correct and prompt completion of the proceeding²¹; However, this is not the case with the Austrian POSC.

No private partners are involved in performing the duties of the POSC.

2.2 Article 7 SD: Right to Information

According to Article 7 para 1 of Directive 2006/123/EC, Member States have to ensure that certain information is easily accessible through the POSC. In this connection, the POSC is obliged to provide information itself and does not only serve as an intermediary station. A mere reference or the reproduction of existing legislation will not suffice to meet the Directive’s requirements.²² In implementing this article, § 7 para 1 of draft DLG states that the POSC has to provide, among other things, information concerning admission conditions, competent authorities, remedies, and other supporting institutions not constituting authorities (e.g., the *WKO Gründerservice* at the Austrian Chamber of Commerce).

To fulfil its information duties towards the service provider, the POSC, on its part, depends on information from the competent authorities. The draft DLG thus stipulates an obligation of the respective competent authority to provide any information to the POSC that is necessary for the fulfilment of its duties.²³ As far as information going beyond the information duties of the POSC is concerned, the

¹⁷ Cover page and explanations for 32/ME XXIV. GP.

¹⁸ Ibid.

¹⁹ Recital 48.

²⁰ See also the term *intermediary*, contained in Recital 12 of Recommendation 97/344/EC on improving and simplifying the business environment for business startups.

²¹ Windoffer (2006), p. 1213.

²² Commission, *Handbook on the Implementation of the Services Directive*, 2007, p. 21.

²³ § 6 draft DLG.

POSC may refer the service provider to the competent authority. Rights to information were therefore not extended in the context of the transposition process. However, the POSC must provide information only within the scope of the Directive.

2.3 Article 8 SD: Procedures by Electronic Means

Similarly to the legal situation in Germany, Austrian law did not contain the right of the applicant to use an electronic procedure.

In implementing Article 8 of Directive 2006/123/EC, the implementation draft (32/ME XXIV GP) sought to introduce § 20a para 6 AVG. However, because of the resistance mentioned previously, the government refrained from coverage also of purely internal situations and, instead, proposed § 10 draft DLG. It provides that the POSC and the authorities have to establish the conditions to accomplish the whole procedure in electronic form, as well as electronic notification, for cross-border situations.

Nevertheless, the service provider also has the opportunity to carry out the proceedings by non-electronic means, as far as legal provisions allow for this approach. A compulsory provision of electronic channels would discriminate against applicants who do not possess electronic means.²⁴ Thus, other means of administrative procedures have not been abolished. The POSC will have to publish technical prerequisites or organisational restrictions of electronic correspondence on the Internet.

According to § 6 para 4 draft DLG, the POSC has to inform the service provider in case a certain form of application is obligatory.

Being competent for e-government in general, the *Bundeskanzleramt* coordinated the technical premises for the transposition of Directive 2006/123/EC to comply with the requirements regarding procedures by electronic means. The Plattform Digitales Österreich is concerned with the electronic provision of information for service providers and recipients, the electronic handling of procedures, and the electronic means of transnational administrative assistance. To define the technical architecture and requirements, a task force has been established in the context of the cooperation of the Federation, the States, the Cities, and Municipalities and the economy (Digitales Österreich). The main starting point for the electronic service for service providers and recipients is the help.gv.at portal (www.help.gv.at) of the *Bundeskanzleramt*, a government agency help site on the Internet offering information necessary for living and working in Austria, but since the POSC are located at the *Ämter der Landesregierungen*, the help.gv.at portal will not have any official role in the implementation of Directive 2006/123/EC. The help.gv.at portal will therefore provide additional navigation and information functions.

²⁴ Cover page and explanations for 32/ME XXIV. GP *Sammelgesetz Dienstleistungsrichtlinie*.

The provision of information for transnational service providers and recipients by the nine POSC started within the time limit on 28 December 2009 (see <http://www.eap.gv.at>). The electronic handling of procedures, however, will commence with the adoption and entry into force of the relevant legislation, providing a legal basis for establishing the technical facilities for electronic procedures. It should be pointed out, and this seems to be problematic in our view, in light of the requirements of Article 8 of Directive 2006/123/EC, only procedures applied at least five times a year throughout Austria will be handled by electronic means, according to the decision of the *Landesamtsdirektorenkonferenz* in April 2008 (see <http://www.bmwfj.gv.at/Wirtschaftspolitik/Standortpolitik/Seiten/EU-RichtlinieüberDienstleistungenimBinnenmarktundihreUmsetzunginÖsterreich.aspx>).

2.4 Article 9 SD: Authorisation Schemes

2.4.1 Means of Less Restrictive Measure

It must be re-emphasised that the Austrian legislator decided that laws adopted in implementing Directive 2006/123/EC do not cover purely internal situations. Thus, authorisation schemes are maintained whenever there is no cross-border dimension. As far as transnational service provision is concerned, it should be noted that neither the legislator on the federal level nor the nine legislators on the state level are dealing with the replacement of authorisation schemes by notifications and a posteriori inspections (*Anmeldeverfahren statt Genehmigungsverfahren*) in a general way. Obviously, the screening of authorisation procedures confirmed the necessity and proportionality of these requirements. Only the initiative for the implementing bill of Upper Austria abolishes the authorisation procedure for the opening of dancing schools and replaces this requirement by a simple notification.

2.4.2 Existing Authorisation Schemes/Procedures

Basically, authorisation schemes in Austria differentiate between three modes of authorisation, comparable to the German approach. The first mode of authorisation constitutes in a notification towards the authority. This suffices in order to be allowed to provide the service. This applies, for example, to crafts (*freie Gewerbe*) according to the *Gewerbeordnung* (GewO). To meet the conditions of the second mode of authorisation, one not only has to notify the authority, but the latter also materially examines whether the conditions for exercising the profession are met. Here, the applicant is allowed to pursue his or her activity during the examination process, but would eventually have to stop later if the authority finds a conflict with the permission conditions. An example would constitute a facility site permission (*Betriebsanlagengenehmigung*) for a normal facility site (*Normalanlage*) according to the GewO. The last group of permission processes concerns examinations processes, where the applicant must not provide services until permission is obtained

from the authority. The GewO also contains an example for this group, namely, sensitive crafts (*sensible Gewerbe*).

In our opinion, only the last group of authorisation schemes needs a check of its compatibility with the provisions of Directive 2006/123/EC. Crafts qualified as sensitive are, for example, those dealing with weapons, pyrotechnics, or laboratories. At first sight, it seems that the maintenance of authorisation schemes in this connection could be justified on the basis of public interest and health. The GewO also qualifies travel agencies as sensitive crafts. Here, a justification on the basis of the reasons mentioned above seems rather unlikely. However, a justification on the basis of consumer protection is conceivable, proportionality seems questionable. However, it seems rather unlikely that the requirement for the receipt of a licence as a chimney sweeper complies with the targets of the Directive 2006/123/EC. In our view, no justification exists for making the receipt of a licence for this sensitive craft dependent on residence in Austria.²⁵

2.4.3 Simple Notifications

Neither the legislator on the federal level nor the nine legislators on the state level deal with simple notification requirements in a general way. Only the implementing bill of Upper Austria abolishes the authorisation procedure for the opening of dancing schools and replaces this requirement by a simple notification (*Anmeldungsverfahren statt Genehmigungsverfahren*). We are of the opinion that simple notification requirements (*Meldepflichten*) are not covered by Chapter III, of Directive 2006/123/EC. This section deals exclusively with authorisation schemes, the conditions for the granting of authorisations, and the duration of authorisations, as well as authorisation procedures (Articles 9–13). Nevertheless, simple notification requirements are to be qualified as requirements in the sense of Article 4 para 7 and have to be screened in the ambit of Article 16 of Directive 2006/123/EC.

2.5 Article 10 SD: Conditions for the Granting of Authorisation

2.5.1 Recognition of Requirements

In contrast to the wording of question 5A (the Questionnaire is reprinted as Annex to this book), Article 10 para 3 of Directive 2006/123/EC does not concern the recognition of authorisations granted in the state of (first) establishment of the service provider, but the recognition of already fulfilled requirements for such an authorisation in the state of (first) establishment. The intention of this duty of recognition is for requirements not to be duplicated at the expense of the service

²⁵ Compare § 121 para 1 section 2 GewO.

provider in the state of (second) establishment. Article 10 para 3 of Directive 2006/123/EC does not affect the recognition of professional qualifications (Article 3 para 1 d of Directive 2006/123/EC). The state duty of the (second) establishment to recognise requirements already fulfilled by the service provider in the state of (first) establishment can be deduced from the standing jurisprudence of the ECJ. Neither the legislator on the federal level nor the nine legislators on the state level are deal with this duty of recognition in a general way, although there would be two possibilities to implement Article 10 para 3. The duty could be anchored in the draft government bill (317dB XXIV GP)—in the draft DLG—or in the specific administrative laws on federal or state level. In the absence of an explicit implementation clause in federal or state law, the relevant laws must be interpreted according to the principle of harmonious interpretation in light of Article 10 para 3 of the Directive. Furthermore, Article 10 para 3 may be regarded as precise and unconditional, and therefore capable of producing a direct effect as a consequence of the poor transposition.

2.5.2 Granting Authorisation Throughout the Whole National Territory and Exceptions

The implementation of Article 10 para 4 of Directive 2006/123/EC could have constituted a veritable challenge for the Austrian legislator, since the Austrian legal system is based on a federal organisation. On the one hand, Article 10 para 4 explicitly requires that an authorisation, once granted, shall be basically valid throughout the national territory. On the other hand, due to a systematic approach, this might be interpreted narrowly, since Article 10 para 7 states that any distortions of the competences of regional and local authorities must be avoided. Thus, the question arose as to which obligations a national legislator had to meet to comply with these requirements.

The Austrian legislator obviously took the line of least resistance and emphasised the aspect of avoidance with the allocation of competences. According to the Austrian legislator, any discussion on the validity of authorisations throughout the national territory is superfluous, and no amendments of the status quo are regarded as necessary. Neither the legislator on the federal level nor the nine legislators on the state level deal with the scope of authorisations granted, especially authorisations granted by single States, in a general way.

However, in our opinion, Article 10 paras 4 and 7 of Directive 2006/123/EC must not be interpreted in a way that authorisations with a scope throughout the national territory are only requested by Article 10 para 4 if the allocation of regional and local competences remains unaltered. To meet the objective in Article 10 para 4, national measures and instruments are conceivable without touching upon the allocation of competences, so for example, the automatic recognition of one State's authorisation in all the other States or the simple notification of the authorisation granted in one State to the authorities in the other States and the subsequent recognition.

Furthermore, one must pay attention to the recent jurisprudence of the ECJ, which states that the application for a licence for each province *separately* constitutes an infringement of EU law.²⁶ In the light of this recent judgement, the sufficiency of a declarative notification by the provider at the respective authority must be provided not only in the scope of Directive 2006/123/EC, but also in the field of application of the fundamental freedoms under Articles 49 ff and 56 ff TFEU, in general. In consequence, the approach of a declarative notification would be generally preferable for the whole indirect state administration, that are, purely internal situations as well. Exemptions are only allowed insofar as overriding reasons relating to the public interest are applicable, whereas an exemplary enumeration of those reasons as provided for in Directive 2006/123/EC appears to be suggestive. This should be explicitly clarified not only in the draft DLG, but also in the AVG and in substantive laws on the federal and state levels.

Since legislators on the federal and state levels act on the presumption that existing State authorisations are in compliance with the requirements of Article 10 para 7 of the Directive, no efforts have been made to identify overriding reasons relating to the public interest to justify authorisations whose scope is limited to the State's territory.

2.5.3 Entitlement to Grant Authorisation, Court Review of Administrative Decisions

The Austrian legal system already complied with the objective provided in Article 10 para 5 of Directive 2006/123/EC, where an applicant meeting all conditions has a right to receive an authorisation. In the case where the competent authority nevertheless issues a negative decision, the applicant has the opportunity to take remedies. A court concerned with an appeal against the decision of an authority will decide in fact and in law, and will also check how far the discretion of the authority complies with domestic law. In connection with the discretion of the authority, it must be emphasised that the discretion must also comply with national law, which, on its part, has to comply with the objectives of European Union law.

2.5.4 Reasoning of Administrative Decisions

Austrian administrative law and administrative procedural law already provides that every proceeding is executed by a legal decision (*Bescheid*) of which the applicant must be notified. This decision can be carried out orally or in writing, the latter form being the predominant one. Here § 58 para 1 AVG defines the basic

²⁶ ECJ, C-134/05, *Commission v. Italy* [2007], I-06251, para 64, which in this connection particularly criticises the applicant's additional obligation to have premises in each province in which the applicant intends to pursue activities, unless he or she confers the authority upon an authorised agent in that other province.

conditions a decision has to meet. Among other things, every decision must be reasoned pursuant to § 58 para 2, § 60, and § 67 AVG, except for the case where the authority fully grants the authorisation according to the application and no objections from other parties or participants (*Beteiligter*) exist. Thus, no further implementation obligations were identified in this regard.

2.5.5 Allocation of Competences

Since national legislators act on the presumption that existing State authorisations are in compliance with the requirements of Article 10 para 7 of Directive 2006/123/EC, no amendments of the allocation of competences in the context of Article 10 were deemed necessary.

2.6 Article 11 SD: Duration of Authorisation

Pursuant to Article 11 para 1 of Directive 2006/123/EC, authorisations shall be granted, in principle, for an unlimited period. As a consequence of the principle of unlimited validity of decisions in the Austrian legal system, anchored in the AVG, neither the legislator on the federal level nor the nine legislators on the state level have to take explicit measures in this regard. Limited periods can be determined by the competent legislators in the substantive administrative laws on federal or state level. However, neither the legislator on the federal level nor the nine legislators on the state level amend substantive administrative laws on the federal or state level in the context of the transposition of Directive 2006/123/EC.

2.7 Article 12 SD: Selection from Among Several Candidates

The requirements codified in Article 12 of Directive 2006/123/EC can already be deduced from the jurisprudence of the ECJ. The most prominent examples for services in this respect, gambling and urban transport, are excluded from the scope of application pursuant to Article 2 para 2 (d) and (h). Neither the legislator on the federal level nor the nine legislators on the state level deal with the requirements of Article 12 in a general way, or in the respective substantive administrative laws. Thus, the legislators did not ascertain any need for amendments of the legislation in force.

2.8 Article 13 SD: Authorisation Procedures

2.8.1 A Priori Determination of the Duration of Administrative Procedures

In § 18 AVG, the Austrian legislator provides that authorities must handle matters in an efficient and cost-saving manner towards all parties and participants.

This approach is complemented by § 73 para 1 AVG, which obliges authorities to make their decisions within six months of an application's receipt. In any case, substantive administrative laws may provide for a different time period; otherwise the general rule is applied. If the respective authority does not decide on the application within six months, the concerned party is allowed to submit a devolution application (*Devolutionsantrag*) according to § 73 para 2 AVG, thus allowing the higher federal or state authority to basically decide on the case's merits.

2.8.2 General Rule for the Duration

Under the scope of application of Directive 2006/123/EC, Article 12 paras 2 and 3 draft DLG provides that authorisations must be granted within three months.²⁷ Corresponding to Article 13 para 3 of Directive 2006/123/EC, § 12 para 2 draft DLG the time limit of three months may be extended by the competent authority for a limited time.

2.8.3 Exceptions of the General Rule for the Duration

However, § 12 draft DLG only constitutes an “opting in”- clause, since the federal or state legislator competent for the respective substantive administrative law can deviate from this provision. A competent legislator for the respective substantive administrative law, though, must examine whether a deviation from the three-month period is justified. This is particularly possible in situations where mandatory requirements exist (e.g., in some multiparty proceedings).²⁸

2.8.4 Tacit Authorisation in the National Legal Order So Far

Pursuant to Article 13 paras 3 and 4 of Directive 2006/123/EC, in case the competent authority does not respond to the filed application within the set or extended time period, the authorisation “is deemed to have been granted” to the service provider. The Austrian AVG does not contain a tacit (fictitious) authorisation. However, some substantive administrative laws provide for this opportunity. For example, the Austrian *Vereinsgesetz*²⁹ provides in § 13 para 2 that the

²⁷ In relation to § 73 AVG, § 12 draft DLG constitutes a *lex specialis*.

²⁸ RV 317 BlgNR XXIV. GP—Regierungsvorlage betreffend Bundesgesetz, mit dem ein Bundesgesetz über die Erbringung von Dienstleistungen (Dienstleistungsgesetz—DLG) und ein Bundesgesetz über das internetgestützte Behördenkooperationssystem IMI (IMI-Gesetz) erlassen, das Preisauszeichnungsgesetz, das Konsumentenschutzgesetz, das Allgemeine Verwaltungsverfahrensgesetz 1991, das Verwaltungsstrafgesetz 1991 und das Verwaltungsvollstreckungsgesetz 1991 geändert und einige Bundesgesetze aufgehoben werden, 4.

²⁹ Vereinsgesetz, BGBl I Nr. 66/2002 idF BGBl I Nr. 45/2008, which can be translated as the Voluntary Association Act.

application for the foundation of a voluntary association according to that law is deemed granted if the authority does not prohibit the activity within six weeks after receipt of the application. The voluntary association is deemed to be founded with expiry of the veto period. However, the possibility of tacit (fictitious) authorisation constitutes more the exception than the rule in Austrian law.

In the implementation of the Directive, § 12 para 1 draft DLG provides that in case the competent authority does not respond to the filed application within the set or extended time period, a tacit (fictitious) authorisation is granted to the service provider.

2.8.5 Formal and Substantive Effects of Tacit Authorisation

As far as the effects of a tacit (fictitious) authorisation are concerned, it must be pointed out that the tacit (fictitious) authorisation is a substitute for the authorisation normally granted in the form of a formal decision (*Bescheid*) and settles the filed application in a formal and substantive way. The legal effects of a tacit (fictitious) authorisation and of a formal decision (*Bescheid*) are equivalent. In the case of a tacit (fictitious) authorisation, it is not possible to prescribe conditions or limitations.

2.8.6 Rules of Formally Granted Authorisations Applicable to Tacit Authorisations

The provisions of the AVG about the *ex officio* modification or repeal of formal decisions (*Abänderung und Behebung von Amts wegen*) and about the reopening of the procedure (*Wiederaufnahme des Verfahrens*) (§§ 68–70 AVG) are applicable also to tacit (fictitious) authorisations.

2.8.7 Further Information on the National Implementation of Tacit Authorisation

As mentioned in the “Comments on the Services Directive Questionnaire”, it is important to know not only the duration of the procedure but also the commencement of the time period for the decision. The Austrian legislator is setting up the POSC as a mere mail-administrating centre, that is, it is not to decide on an application’s merits and solely delivers each application to the competent authority. According to § 13 para 3 AVG, the respective authority is obliged to return any incomplete or faulty applications to the applicants for revision. The POSC is not authorised to check the application. In § 12 para 3 draft DLG, it is explicitly pointed out that the time period of decision starts with the receipt of an application free from defaults. Since only the authority can assess whether an application is complete or not, the decision period can only start with the authority’s receipt of the application.

Pursuant to § 12 para 4 draft DLG, in case the competent authority does not respond to the filed application within the set or extended time period and a tacit (fictitious) authorisation is granted to the service provider, the competent authority must confirm the authorisation to the provider as soon as possible. All parties must be notified of this written confirmation of the granted authorisation. All parties are entitled to apply for a formal confirmation of the authorisation granted in the form of a formal decision (*Bescheid*) within a time limit of four weeks. However, § 12 para 4 draft DLG also constitutes an “opting in” clause, since the federal or state legislator competent for the respective substantive administrative law may deviate from this provision.

Similar to the understanding prevailing in Germany, the term “response” in Article 13 para 4 of Directive 2006/123/EC is read as “notified” and not “decided”. Thus, the tacit (fictitious) authorisation is not applicable if notification has already been made regarding the formal decision (*Bescheid*). The relevant point in time for issue will in most situations be the delivery in writing, but Austrian law also provides for the opportunity of oral publication and authentication by the authority according to § 62 para 2 AVG.

2.9 Articles 14, 15, 16 SD

2.9.1 Need of Adaptation?

The need Austrian legislators have identified to adapt national rules on the federal and state levels to implement Articles 14–16 of Directive 2006/123/EC is very weak (see <http://www.bmwfj.gv.at/Wirtschaftspolitik/Standortpolitik/Seiten/EU-RichtlinieüberDienstleistungenimBinnenmarktundihreUmsetzunginÖsterreich.aspx>, according to which adaptation requirements are assessed to be rather weak). As a consequence, there have been no amendments of substantive administrative laws on the federal level in the context of the draft government bill (317dB XXIV GP). In addition, the nine legislators on the state level made very few amendments of substantive administrative laws when dealing with Articles 14–16 of Directive 2006/123/EC. For example, the implementing bill of Upper Austria abolishes the authorisation procedure for the opening of dancing schools and replaces this requirement by a simple notification. Furthermore, also following requirements are abolished: the ban on multiple ownership for ski schools, the needs test for burial facilities, etc. (see www.ris.bka.gv.at).

According to a government decision of 12 March 2008, the competent authorities on the federal and state levels had to screen the relevant legislation under individual responsibility through 31 August 2008, and to amend the respective laws in case of non-compliance. On the federal level, the ministries had to screen legislation in their enforcement areas according to the *Bundesministerien-gesetz*; on the state level the state governments had to screen legislation falling within the competence of the States. In the function of coordinator of the implementation process, the Ministry for Economics, Family and Youth assigned a

study to the University of Salzburg to identify the demand for legislative amendments on all levels.

2.9.2 Discussion on the Self-Screening of the Member States

There were no discussions about the self-screening of Member States.

2.9.3 Discourses on these Articles

All obvious problems or discourses regarding Articles 14–16 of Directive 2006/123/EC are described under “[Need of Adaptation?](#)” above.

2.10 Articles 14–19 SD

As far as the provisions of Directive 2006/123/EC regarding prohibited requirements and restrictions (Articles 14–16 and 19 of Directive 2006/123/EC) and exemptions (Article 16 para 3 and Articles 17 and 18 of Directive 2006/123/EC) are concerned, the Austrian legislators on the federal and state level, confronted with the output of the screening process, apparently did not see any need to implement these articles—besides Article 18 of Directive 2006/123/EC—in an explicit way. Article 18 of Directive 2006/123/EC is implemented by § 20 draft DLG. There have been discussions about the most appropriate form and location for the implementation of Article 16 para 3 of Directive 2006/123/EC, but the federal legislator finally decided not to provide for a(n explicit) corresponding free movement clause in the draft DLG.

2.11 Articles 22–27 SD

Also with regard to Chapter V of Directive 2006/123/EC concerning the quality of services, Austrian legislators on the federal and state levels did not see a need to implement these articles—besides Article 22 of Directive 2006/123/EC—in an explicit way. The substantive administrative laws on the federal and state levels have apparently been deemed to be in line with the requirements of Directive 2006/123/EC. Article 22 of Directive 2006/123/EC is implemented explicitly by § 22 draft DLG for the application scope of the draft DLG, namely the transnational provision of services (see §§ 2 und 5 para 4 draft DLG). This is not only problematic from the point of view of the discrimination of domestic service provisions, but also interesting insofar as the information duties are also applicable to service providers who are third-country nationals or who are established in a third country.

Neither the legislator on the federal level nor the nine legislators on the state level deal with the role of Member States as initiators of private regulation in a

general way. In this context, the question remains as to whether Article 26 of Directive 2006/123/EC is open and suitable for a formal transposition by law.

2.12 Articles 28 ff. SD: Administrative Cooperation

2.12.1 Transnational Administrative Cooperation Prior to the Implementation of the Services Directive

Provisions about transnational administrative assistance prior to the transposition to Directive 2006/123/EC can be found in Austrian law insofar as European Union law (regulations, directives) obliges Member States to provide for transnational assistance, for example Directive 2005/36/EC on the recognition of professional qualifications, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services, or Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and 83/349/EEC and repealing Council Directive 84/253/EEC.

As regards domestic administrative assistance Article 22, *Bundes-Verfassungsgesetz*³⁰ provides that “all authorities of the Federation, the States and the municipalities are bound within the framework of their legal sphere of competence to render each other mutual assistance”. According to the jurisprudence of the Austrian Constitutional Court, Article 22, *Bundes-Verfassungsgesetz* is directly applicable but does not grant a subjective right.

2.12.2 Re-arrangement with National Rules on Administrative Cooperation

The provisions of the draft DLG concerning transnational administrative assistance (Articles 14–21) are applicable exclusively in the scope of application of the draft DLG (§ 2) and Directive 2006/123/EC (Article 2), respectively. As a consequence, national provisions for administrative assistance in general have not been touched or rearranged by the competent legislator.

2.12.3 Provisions on Financial Compensation for Transnational Administrative Cooperation

There are no rules on financial compensation for transnational administrative cooperation.

³⁰ *Bundes-Verfassungsgesetz BGBl.Nr. 1/1930 idF BGBl. I Nr. 2/2008*, which can be translated as the Federal Constitution.

2.12.4 Adaptation of the Rules on Data Protection and Professional Secrets

National provisions concerning data protection and professional secrets remain untouched in the course of the transposition of Directive 2006/123/EC.

Pursuant to Article 33 para 1 of Directive 2006/123/EC, Member States shall supply information at the request of a competent authority in another Member State, in conformity with their national law, on disciplinary or administrative actions or criminal sanctions and decisions concerning insolvency or bankruptcy involving fraud with respect to the provider that are directly relevant to the provider's competence or professional reliability. Article 33 para 2 stipulates that these sanctions and actions are only to be communicated if a final decision has been taken. Article 33 is implemented by § 17 draft DLG.

Article 2 (IMI-Gesetz) of the draft government bill (317dB XXIV GP) provides a legal basis for the operation and use of the IMI System.

2.13 Article 29 SD: Mutual Assistance—General Obligations for the Member State of Establishment

Pursuant to Article 29 para 1 of Directive 2006/123/EC, the Member State of establishment is to supply information on providers established in its territory when requested to do so by another Member State and, in particular, confirm that a provider is established in its territory and, to its knowledge, not exercising activities in an unlawful manner. Article 29 of Directive 2006/123/EC and its paragraph 1 are implemented by §§ 17 ff draft DLG. In the context of transnational administrative assistance also, data concerning the lawfulness of the service provision can be transmitted by Austrian authorities (§ 17 para 4 and §§ 18 ff draft DLG). The explanatory report accompanying the draft government bill (317dB XXIV GP) does not reveal whether the implementation of Article 29 para 1 of Directive 2006/123/EC has been regarded as problematic.

2.14 Problems and Discourses on Administrative Cooperation

There have been no problems and discourses on Chapter VI of the Services Directive that would be worth mentioning.

2.15 Convergence Programme (Chapter VII of the Services Directive)

There have been no problems and discourses on Chapter VII of the Services Directive that would be worth mentioning.

3 Assessment of the Impact of the Services Directive

3.1 Extent of the Impact

The transposition process of Directive 2006/123/EC was complicated due to the federal structure of the Republic of Austria, the allocation of competences between the Federation and States, and, finally, the differing attitudes and positions of competent authorities on the federal and state levels. The indispensable amendment of the Austrian constitution, namely, the insertion of a new competence clause, was highly controversial. Also controversial was the scope of the implementing draft DLG, particularly, where to locate the POSC and their function—authority or simple mail-administrating centre that does not decide on a case's merit. Federation and States solely agreed on not going beyond a minimum transposition. The question remains open as to whether the implementation measures can be regarded as a minimum transposition at all.

3.2 Assessment of the Transposing Legislation

The draft government bill (317dB XXIV GP) has not been adopted yet; the competent Ministry for Economics, Family, and Youth seems to be of the opinion that the draft meets the requirements of Directive 2006/123/EC.

3.3 Most Important and Profound Changes Induced by the Services Directive

In our view, the main innovations in Austrian substantive administrative laws and administrative procedural law are the POSC, the comprehensive introduction of the tacit (fictitious) authorisation and the provisions on transnational administrative assistance provided by the Directive.

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For legislation, jurisprudence and websites please refer to 1.1 of the report and footnotes directly.

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