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NEGOTIATING CHAPTER «FREEDOM OF ESTABLISHMENT AND FREEDOM TO PROVIDE SERVICES» UKRAINE'S ACCESSION TO THE EU: WHERE DO WE STAND AND WHAT NEEDS TO BE DONE?

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COMPARATIVE ANALYSIS OF UKRAINIAN AND EUROPEAN HORIZONTAL LEGISLATION

SERVICE DIRECTIVE : SUMMARY

Freedom of establishment and freedom to provide services – one of the key negotiating chapters that creates conditions for the effective functioning of the internal market

- **Horizontal legislation encompasses general issues and principles that are applied across all sectors of the economy.**
- The Services Directive is a key piece of secondary legislation that elaborates on the provisions of Articles 49 and 54 of the Treaty on the Functioning of the European Union (TFEU).
- **Objectives of the Directive:**
 - Eliminating administrative and legal obstacles that hinder the free provision of services.
 - Ensure transparency and simplification of administrative procedures for companies.
 - Guaranteeing consumer rights, particularly through standards of information transparency and quality of services.
 - Increasing the competitiveness of the services market, which will contribute to economic growth and job creation.
- Some types of services are excluded from the Directive's scope, as they require specific regulation. This includes non-commercial services of general interest, financial services, healthcare services, audiovisual services, etc.

CHAPTER II. ADMINISTRATIVE SIMPLIFICATION

Ukraine has successfully implemented a number of reforms aimed at simplifying administrative procedures. However, not all innovations are fully harmonised with the provisions of the Services Directive

- **Simplification of procedures:**
 - Ukraine needs a more dynamic approach to administrative facilitation and cooperation with the EU. .
- **Single Point of Contact and the Right to Information:**
 - Administrative service centres and are close to the concept of ‘single point of contact’ provided for in the EU Services Directive.
 - The Diia. Business portal provides access to a wide range of administrative services. However, some services require additional authorisation from other government agencies.
 - Ukrainian legislation focuses on transparency and general accessibility of information but does not specify support for consultations for entrepreneurs and citizens.
- **Procedures via electronic means:**
 - Ukraine's electronic administrative service delivery standards are significantly closer to the EU. However, further unification and digitalisation is needed.



CHAPTER III. FREEDOM OF ESTABLISHMENT FOR PROVIDERS (1)

The principles of authorisation in Ukraine are not in line with the European ones. Moreover, there are barriers for entrepreneurs from EU member states

- **Authorisation schemes and Conditions for granting authorisation:**
 - In Ukraine, the legislation on licensing and permitting procedures is mainly focused on ensuring transparency and justification of the need for permits or licences.
 - However, the relevant EU regulation prescribes more detailed requirements for the justification and review of authorisation schemes. For example, Member States must demonstrate that such schemes comply with the principles of non-discrimination, proportionality and necessity; that they are justified by the public interest; and that the objective cannot be achieved by less restrictive means (e.g., through post factum review).
 - Ukrainian legislation excludes the arbitrary use of powers by the competent authorisation authorities. .
- **Duration of Authorization:** Ukraine has similar rules to the European ones; by default, authorisations do not have an expiry date. However, ‘single points of contact’ should be introduced to minimise the costs associated with providing information to the competent authorities.
- **Selection among multiple candidates:** The Ukrainian Law on Concessions ensures transparency and impartiality in selecting candidates for authorization. However, only Ukrainian legal entities can be concessionaires, requiring foreign companies to establish a representative office in Ukraine, violating the EU non-discrimination principle. The law also does not provide for criteria such as general interest, environmental protection or cultural heritage.



CHAPTER III. FREEDOM OF ESTABLISHMENT FOR PROVIDERS (2)

The principles of authorisation in Ukraine are not in line with the European ones. Moreover, there are barriers for entrepreneurs from EU member states

- **Authorisation procedures:**
 - The Law of Ukraine ‘On Administrative Services’ stipulates transparency of procedures, availability of information, reasonable timeframes for consideration of applications, publishing procedures in advance, impartiality in the consideration of applications and guarantees notification of the applicant of the outcome of the consideration. However, the Ukrainian legislation does not provide for the possibility of automatic authorisation in case of absence of a response within the established time limit provided for by the Directive (the so-called ‘tacit consent’).
- **Prohibited requirements:** Ukrainian legislation does not contain any provisions that would prevent the application of discriminatory requirements to service providers from EU member states.



CHAPTER IV. FREE MOVEMENT OF SERVICE

To provide services in Ukraine, foreign providers must register a representative office on the same basis as Ukrainian legal entities (which contradicts the requirements of the Services Directive)

- **Freedom to provide services:** Member States shall respect the right of providers to supply services in a Member State other than the country where they are registered. The state where the services are provided shall ensure free access and free operation of such activities on its territory.
- **Additional exceptions to the freedom of supply of services and individual exceptions:** a number of services, such as postal, energy and water supply, as well as data protection, intellectual property and visa requirements, are excluded from the scope of the freedom of supply of services. Exceptional restrictions on the freedom to provide services are permitted for security reasons, subject to the requirements of proportionality and mutual assistance.
- **Prohibited restrictions:** Member States are prohibited from applying requirements to service recipients that restrict the use of services supplied by providers registered in another EU country.
- **Non-discrimination:** Member States must ensure that service recipients are not subject to discriminatory requirements based on their nationality or place of residence. .
- **Assistance to recipients:** Member States must ensure that recipients are able to receive critically important information in their country of residence.

CHAPTER V. QUALITY OF SERVICES (1)

Ukraine needs to significantly improve its consumer protection mechanism

- **Information about providers and their services:**
 - The Law on Consumer Rights Protection contains general provisions on the obligation to provide information about business entities and their services, but these are not detailed to the level required by the Directive.
 - For example, disclosure requirements on professional titles, guarantees, contractual provisions on applicable law and relevant authorities are not mandatory for all commercial providers.
- **Professional liability insurance and guarantees:** There is no obligation to insurance for risk-related services in Ukraine.
- **Commercial communications of regulated professions:** Ukrainian law does not contain any provisions establishing special rules for advertising of regulated professions.



CHAPTER V. QUALITY OF SERVICES (2)

Ukraine needs to significantly improve its consumer protection mechanism

- **Multidisciplinary activities:**
 - Ukraine has regulations governing multidisciplinary activities in certain fields, particularly to ensure compliance with professional ethics and independence.
 - However, no general regulation has been found that covers all types of multidisciplinary activities in different professional contexts.
- **Quality of services policy:** There is no broad legal framework for defining and improving the quality of services policy in Ukraine.
- **Dispute resolution:** Ukrainian regulations cover the main aspects of consumer information but are less detailed in terms of international standards and comprehensive guarantees, as required by the Directive.



CHAPTER VI. ADMINISTRATIVE COOPERATION

Ukraine has no mechanism for effective international administrative cooperation with the EU

- **Mutual assistance:** Member States should cooperate to effectively control providers and their services.
- **Obligations of the Member State of registration:** The Member State where the provider is registered must provide information about it upon request from another Member State.
- **Supervision of the Member State of registration:** Provides oversight of compliance with national requirements in the event of a temporary relocation of the provider.
- **Supervision of the Member State where the service is provided:** Responsible for monitoring the activities of the provider on its territory.
- **Alert mechanism:** In the event of a serious health or safety risk, Member States are obliged to notify the parties involved quickly.
- **Reputation of providers:** Member States shall provide information on disciplinary measures and other sanctions upon request of the competent authorities.
- **Related measures:** The Commission, together with the Member States, establishes an electronic information exchange system.

Ukraine needs to develop international cooperation at the sectoral level with the EU

- **Codes of conduct at EU level:** Member States, in cooperation with the Commission, should take complementary measures to encourage the development at Community level (particularly by professional authorities, organisations and associations) of codes of conduct aimed at facilitating the provision of services or the establishment of providers in another Member State, in accordance with Union law.
- In Ukraine, such rules exist in the form of regulation of codes of conduct applicable to certain areas of activity. For example, the legislation provides that professional associations and organisations may develop and implement codes of ethics and conduct for their members to ensure compliance with quality standards and transparency of service delivery.
- However, in the Ukrainian context, there is no specific requirement to develop such codes at the national or international level with a focus on facilitating the cross-border provision of services, as provided for in the EU Directive.
- Also, the requirement to ensure access to such codes through electronic means is less clearly regulated in Ukrainian legislation.

WHAT NEEDS TO BE CHANGED?

- Introduce a legislative framework for authorisation. This framework should be more dynamic and based on the principle of ‘evidence-based policy’.
- Fully implement the principle of ‘tacit consent’ for authorisation.
- Improve the criteria for selecting among several candidates when the number of licences is limited.
- Integrate rules that would open access to the Ukrainian services market for entrepreneurs from EU member states.
- Improve the quality of information about services and introduce insurance for risk-related services.
- Introduce a dynamic approach to improve the quality of services.
- Introduce more comprehensive guarantees for consumers and more effective dispute resolution mechanisms.
- Ensure administrative cooperation with the EU at the government level.
- Ensure sectoral integration into the EU at the level of producers and associations.

COMPARATIVE ANALYSIS OF UKRAINIAN AND EUROPEAN SECTORAL LEGISLATION

REGULATION OF SELECTED SERVICES

We analyse the main differences between the European and Ukrainian regulation of services in the context of selected areas

- **Recognition of qualifications** - ensuring labour mobility and harmonisation of professional requirements to facilitate the work of specialists in different countries.
- **Concession contracts** - principles for attracting private capital to socially important projects, including transport and infrastructure, with an emphasis on competition and transparency.
- **Postal services** - standards of transparency, accessibility and tariff regulation for the efficient functioning of cross-border services.
- **Transport** - freedom to provide transport services within the EU, covering maritime, air, rail and road transport, including international and short sea shipping.
- **E-commerce and other ICT services** - commitments to data protection, cyber risk management and cyber threat prevention through common certification standards and cooperation between countries.
- **Media services** - standards for traditional and digital platforms, including online video and social media, with a particular focus on the protection of minors and transparency of ownership.
- **Healthcare services** - the right of patients to access cross-border healthcare services with reimbursement of costs, which contributes to the improvement of the level of service through the exchange of information and the development of eHealth.
- **Travel services** - protection of consumer rights to transparency of information, financial guarantees and the possibility of compensation in case of non-fulfilment of the contract.

MUTUAL RECOGNITION OF QUALIFICATIONS

- EU legislation creates favourable conditions for the mobility of professionals by providing transparent and standardised procedures for the mutual recognition of professional qualifications between member states.
- Recognition of foreign educational documents in Ukraine is a more complex process.
- In most cases, the process includes detailed verification of documents, verification of the status of the educational institution and analysis of the qualification's compliance with Ukrainian standards. This approach is more complicated and bureaucratic compared to the EU, where transparency and simplicity of procedures are preferred.
- **We recommend the following:**
 - Simplification of procedures for the recognition of diplomas of EU member states;
 - Engagement in European professional organisations;
 - Introduction of preferential employment conditions for specialists from EU member states.



CONCESSION CONTRACTS

- Directive 2014/23 establishes common European rules for the granting of concession contracts, regulating issues relating to operational risk, the relationship between public authorities and private partners, and the obligation to comply with competitive procedures.
- Ukrainian law provides the legal framework for concession agreements. It defines the procedure for conducting concession tenders, regulates the use of electronic systems to ensure transparency of procedures, and stipulates the obligations of concessionaires, including the transfer of operational risk to the private partner.
- However, compared to the EU Directive, the Concession Law is less detailed in some aspects, such as standards of legal certainty, SME promotion and reporting requirements. In addition, the obligation for foreign enterprises to register a representative office in Ukraine in order to conclude a concession contract is contrary to European principles of non-discrimination.
- **We recommend the following:**
 - Introduce more clear provisions to ensure equal access to concessions and competitive procedures;
 - Introduce a mechanism to facilitate the participation of SMEs in tenders;
 - Introduce additional monitoring and reporting mechanisms;
 - Develop mechanisms for risk assessment and transfer to concessionaires, taking into account the principles of the EU Directive

INTERNATIONAL POSTAL SERVICES

- EU legislation ensures high transparency of tariffs, allowing consumers to easily compare delivery terms and prices between countries. It also imposes on national regulatory authorities the obligation to control tariffs and ensure that they are economically justified, which contributes to a fair market conditions and maintains competitiveness.
- Ukrainian legislation regulates the general provisions for the provision of postal services, including the rights and obligations of operators and users. However, it does not provide for detailed requirements on tariff transparency and tariff reasonableness oversight, which can make it difficult for users to access tariff information and create a risk of non-transparent competition.
- **We recommend the following:**
 - Introduce a requirement for transparency of tariffs for delivery services, allowing consumers to compare conditions and prices;
 - Introduce an obligation for postal service operators to publish detailed information on tariffs and delivery conditions;
 - Empower the national regulator (the National Commission for the State Regulation of Communications and Informatisation - NCCIR) to monitor tariffs and ensure that they are in line with market conditions;
 - Develop a mechanism for objective assessment of tariffs to avoid unjustified price differences.



TRANSPORT SERVICES

- The creation of a legal framework for the admission of EU transport operators to the Ukrainian market was envisaged by the EU-Ukraine Association Agreement. Unfortunately, there has been no significant progress in this area.
- Unlike the EU legislation, Ukraine does not have a full equivalent of legislation ensuring the freedom to provide services to foreign operators, as provided for in the EU regulations.
- **We recommend the following:**
 - Implementation of regulations that support free market access for international operators from the EU, particularly for short-sea shipping;
 - Harmonisation of legislation with European regulations to improve competitiveness and integration into the EU transport market.



E-COMMERCE AND OTHER ICT SERVICES

- European legislation establishes unified rules to ensure a high level of cybersecurity in all EU member states. It aims at eliminating differences in the implementation of cybersecurity measures, ensuring harmonisation of standards and maintaining supply chain protection. Obligations include cyber risk management, cyber incident reporting and international coordination, creating a common approach for all member states.
- Ukrainian legislation focuses on domestic aspects of cybersecurity, including the protection of systems of critical importance and cooperation between public and private entities.
- **We recommend the following:**
 - Harmonise cybersecurity standards to create a unified approach that meets the requirements of NIS 2;
 - Introduce vendor risk management mechanisms to avoid compromising systems through third-party vulnerabilities;
 - Implement a national certification framework for ICT products and services, similar to the European one, to increase trust in digital technologies and ensure the security of cross-border services;
 - Specify incident reporting requirements to ensure prompt response and minimise potential damage from cyber threats.



MEDIA SERVICES

- EU legislation covering audiovisual services includes both traditional television media and online platforms, as well as video-on-demand services and video sharing platforms. The Law of Ukraine ‘On Media’ also regulates the activities of television media and online platforms but is less detailed in its regulation of video-sharing platforms and social media compared to European standards.
- The EU Directive contains provisions on the protection of minors from harmful content and sets out requirements for warnings about the content of programmes. It covers a broad range of regulation to protect children in the digital environment.
- **We recommend the following:**
 - Adaptation of online platforms and social media regulation to EU standards to ensure effective control and protection of users;
 - Strengthening the requirement for transparency of media ownership to increase trust and ensure openness;
 - Ensuring additional protection of minors in the digital environment by introducing clear requirements for online platforms.



HEALTHCARE

- Directive 2011/24 and the Ukrainian healthcare legislation have similar objectives aimed at ensuring access to healthcare services for citizens, but their approaches and level of support for cross-border healthcare differ significantly.
- The European Directive provides patients with the right to healthcare services in any EU member state with reimbursement of costs, establishes national contact points for information, and supports interstate cooperation in the field of rare diseases and eHealth.
- In contrast, Ukrainian legislation provides a limited opportunity for treatment abroad only in cases where treatment is not possible domestically, and this opportunity has strict eligibility criteria and is dependent on state funding.
- **We recommend the following:**
 - Introducing partial reimbursement for cross-border treatment to facilitate access to medical services abroad.
 - Harmonisation of quality standards for medical services with European ones to increase the competitiveness of Ukrainian institutions.
 - Cooperation with other countries in the treatment of rare diseases and information exchange.
 - Development of eHealth and telemedicine to facilitate cross-border treatment.



TOURISM SERVICES

- European Directive 2015/2302 establishes a high level of protection for tourists by regulating the obligations of operators to inform, compensate and support consumers in the event of breaches of contract.
- Consumers have the right to withdraw from the contract without penalty under certain conditions, which increases the flexibility of protecting their rights. The Directive also provides for mandatory financial guarantees for refunds and repatriation in the event of the organiser's insolvency.
- Ukrainian legislation lacks detailed provisions on compensation and financial mechanisms for consumer protection. The information obligations of organisers in Ukraine are less detailed and not fully in line with European standards.
- **We recommend the following:**
 - Introducing clear requirements for compensation and obligations of operators in the event of contractual failure, following the example of the EU Directive;
 - Extending financial guarantees to protect tourists in the event of operator bankruptcy;
 - Update the provisions on information responsibilities to ensure that tourists have access to comprehensive information before concluding a contract;
 - Increasing the level of administrative liability and introducing penalties for breach of obligations to inform and perform tourist services.



WHAT NEEDS TO BE CHANGED?

- **Recognition of qualifications:** simplification of recognition of EU diplomas, accession to European organisations, preferences for EU specialists.
- **Concessions:** equal access to concessions, participation of SMEs, monitoring, risk assessment.
- **Post:** transparency of tariffs, authority of the National Commission for the State Regulation of Communications, objective assessment of tariffs.
- **Transport:** market access for EU carriers, harmonisation of regulations.
- **ICT services:** cybersecurity standards, risk management, certification.
- **Media:** regulation of platforms, transparency of ownership, protection of minors.
- **Healthcare:** reimbursement of expenses for treatment abroad, quality standards, cooperation with other countries.
- **Tourism:** compensation and obligations of operators, financial guarantees, information obligations, fines.

