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COUNCIL DIRECTIVE

of 15 October 1968

concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in retail trade (ISIC ex Group 612)

(68/363/EEC)

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Articles 54 (2) and (3) and 63 (2) and (3) thereof;

Having regard to the General Programme for the abolition of restrictions on freedom of establishment,[1] and in particular Title IV C thereof;

Having regard to the General Programme for the abolition of restrictions on freedom to provide services,[2] and in particular Title V C thereof;

Having regard to the proposal from the Commission;

Having regard to the Opinion of the European Parliament[3];

Having regard to the Opinion of the Economic and Social Committee[4];

Whereas the General Programmes provide for the abolition, after the end of the second year of the second stage of the transitional period and before the end of the second stage, of all discriminatory treatment based on nationality with regard to establishment and the provision of services in retail trade;

Whereas, by reason of the differences existing between Member States in respect of retail trade, it is desirable to specify as exactly as possible the activities to which this Directive applies;

Whereas the commercial activities of itinerant traders and hawkers or pedlars, including the activities of persons who sell in open-air markets and of those who sell in covered markets but not from permanently fixed installations, will be liberalised by a further Directive;

Whereas activities in respect of the letting out of goods for hire which are not covered by other Directives fall within the scope of this Directive;

Whereas goods may be resold or let out for hire not only to individuals or households for their private use, but also to small-scale users for the purposes of their trade or profession where this resale or letting out for hire constitutes a secondary activity in relation to the overall activity of the retail trader;

Whereas this Directive also covers the resale or letting out for hire of goods after processing, treatment or preparation for sale, where such operations are customary in the branch of trade in question;

Whereas Article 2 (3) of the Council Directive of 7 July 1964[5] concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in mining and quarrying (ISIC Major Groups 11–19) and Article 2 (2) of the Council Directive of 7 July 1964[6] concerning the attainment of freedom of establishment and freedom to provide services in respect of activities of self-employed persons in manufacturing and processing industries falling within ISIC Major Groups 23–40 (Industry and small craft industries) restrict the rights of a producer who establishes himself as such in another Member State and sells his own products in that State to selling from a single establishment in the country of production, until such time as trade in the products in question has been liberalised by other Directives;

Whereas, as a result of the entry into force of this Directive, retail trade in a large number of products will be liberalised; whereas, in respect of such products, the restriction to selling in a single establishment in the country of production will accordingly no longer apply; whereas, therefore, a producer

[1] OJ No 2, 15.1.1962, p. 36/62.
[2] OJ No 2, 15.1.1962, p. 32/62.
[3] OJ No 187; 9.11.1965, P./2914/65.
[4] OJ No 199, 20.11.1965, p. 3009/65.
[5] OJ No 117, 23.7.1964, p. 1871/64.
[6] OJ No 117, 23.7.1964, p. 1880/64.

establishing himself in another Member State on the basis of the Council Directives of 7 July 1964 referred to above will, by virtue of those same Directives, be authorised, to the extent that trade in the products in question has been liberalised, to sell his own products from more than one establishment in that Member State;

Whereas the effect of this Directive must also be to allow industrial or small craft producers, following liberalisation hereunder of retail trade in the products in question, to establish themselves in another Member State, not as producers but in order to sell their own products directly to the ultimate consumer from one or more establishments;

Whereas activities in respect of retail selling of goods by auction must also be included in the scope of this Directive;

Whereas this Directive does not apply to retail trade in medicinal and pharmaceutical products; whereas, in accordance with the General Programmes, those activities will be liberalised at a later date;

Whereas, having regard to the differences which exist between Member States with regard to the organisation of retail trade in tobacco and in salt, those activities should be excluded from the scope of this Directive;

Whereas this Directive does not apply to retail trade in toxic products or pathogens; whereas it has become evident that, having regard to the provisions laid down by law, regulation or administrative action in force in the Member States, special problems arise in respect of these activities concerning the protection of public health;

Whereas the General Programme for the abolition of restrictions on freedom of establishment provides that restrictions on the right to join professional or trade organisations must be abolished where the professional activities of the person concerned necessarily involve the exercise of this right;

Whereas the position of paid employees accompanying a person providing services or acting on his behalf will be governed by the provisions laid down in pursuance of Articles 48 and 49 of the Treaty;

Whereas separate Directives, applicable to all activities of self-employed persons, concerning provisions relating to the movement and residence of workers, and where necessary Directives on the co-ordination of the safeguards required by Member States of companies or firms for the protection of the interests of members and of others, have been or will be adopted;

Whereas, moreover, in some Member States retail trade in certain products is governed by rules relating to the taking up of that trade, while other States will, where necessary, adopt such rules; whereas, therefore, certain transitional measures, the purpose of which is to make it easier for nationals of other Member States to take up and pursue activities in retail trade, are the subject of a separate Directive;

HAS ADOPTED THIS DIRECTIVE:

Article 1

Member States shall abolish, in respect of the natural persons and companies or firms covered by Title I of the General Programmes for the abolition of restrictions on freedom of establishment and freedom to provide services (hereinafter called 'beneficiaries'), the restrictions referred to in Title III of those General Programmes affecting the right to take up and pursue the activities specified in Articles 2 and 3.

Article 2

1. The provisions of this Directive shall apply to activities of self-employed persons in retail trade (ISIC ex Group 612)[1] with the exception of retail trade in medicinal and pharmaceutical products, in toxic products and pathogens, in tobacco and in salt.

The provisions of this Directive shall not apply to commercial activities of itinerant traders, hawkers or pedlars. Neither shall they apply to activities of persons who sell in open-air markets or who sell in covered markets but not from permanently fixed installations, even where such activities are not subject to provisions of national law regarding itinerant traders or hawkers or pedlars.

This Directive shall not apply to examination of the organs of sight or hearing, or of other organs or parts of the body, carried out with a view to the fitting, adjustment or sale of appliances for the correction of sight or hearing defects, or of orthopaedic appliances.

2. For the purposes of this Directive, 'activities in retail trade' means activities pursued by any natural person, or company or firm, who habitually and by way of trade buys goods in his own name and on his own account and resells such goods directly to the final consumer.

The goods may be resold either in the unaltered state or after such processing, treatment or preparation for sale as is customary in retail trade.

3. The provisions of this Directive shall apply also to the retail sales activities of producers who,

[1] International Standard Industrial Classification of All Economic Activities (Statistical Office of the United Nations, Statistical Studies, Series M No 4, Rev. 1, New York 1958).

without being established as such in the host country, themselves sell their products in that country to the final consumer.

4. The provisions of this Directive shall, in like manner as for the sales activities referred to in paragraphs 1 to 3, apply also to activities in respect of the letting out of goods for hire, in so far as such activities do not fall within the scope of the other Directives. The activities excluded for that reason are set out in the Annex to this Directive.

Article 3

The provisions of this Directive shall apply also to activities of self-employed intermediaries who, habitually and by way of trade, carry out retail selling by auction on behalf of others.

Article 4

Activities connected with the exercise of official authority in a Member State shall, in the Member State in question, be excluded from the provisions of this Directive. These activities are as follows:

in France:

the sale by auction of goods and other articles of moveable property by *officiers publics* or *officiers ministériels;*

in Italy:

the sale by auction of goods by *mediatori* in the exercise of their official duties;

in Germany, Belgium, Luxembourg and the Netherlands:

participation by court bailiffs and notaries in auction sales.

Article 5

1. Member States shall in particular abolish the following restrictions:

(a) those which prevent beneficiaries from establishing themselves or providing services in the host country under the same conditions and with the same rights as nationals of that country;

(b) those existing by reason of administrative practices which result in treatment being applied to beneficiaries that is discriminatory by comparison with that applied to nationals.

2. The restrictions to be abolished shall include in particular those arising out of measures which prevent or limit establishment or provision of services by beneficiaries by the following means:

(a) *in Belgium:*

— the obligation to hold a *carte professionelle* (Article 1 of the Law of 19 February 1965);

(b) *in Germany:*

— the fact that the granting of an authorisation for the retail selling of explosives is, in respect of foreign nationals, subject in certain *Länder* to a test of economic necessity *(Bedürfnisprüfung)* and in other *Länder* to the condition of at least three years' prior residence in the Federal Republic of Germany;

— the requirement that natural persons wishing to carry on the retail sale of arms and ammunition within the meaning of the *Waffengesetz* of 18 March 1938 must be of German nationality *(Waffengesetz* paragraph 7 (2) and paragraph 3 (2);

— the rule prohibiting the granting of an authorisation to carry on retail trade in arms and ammunition to any foreign legal person, or to any domestic legal person a majority of whose capital is held by foreign nationals (paragraph 10 of the *Verordnung* implementing the *Waffengesetz* of 19 March 1938);

(c) *in France:*

— the obligation to hold a *carte d'identité d'étranger commerçant (décret-loi* of 12 November 1938, Law of 8 October 1940);

— exclusion from the right to renew commercial leases *(décret* of 30 September 1953, Article 38);

— the requirement as to reciprocity imposed on foreign nationals wishing to carry on trade in carrier pigeons (Law of 27 June 1957, *décret* of 22 April 1958);

— the rule that persons to whom authorisations to trade in firearms 'for defensive purposes' and ammunition therefor may be issued shall be French citizens (or, in the case of companies and firms, that proof of French citizenship be furnished in respect of members *(associés en nom),* active and sleeping partners *(commandités* and *commanditaires)* and managers *(gérants)* of firms *(sociétés de personnes)* and directors *(administrateurs)* and general managers *(directeurs centraux)* of companies limited by shares *(sociétés par actions)* Article 2 of the *décret-loi* of 18 April 1939, Article 1 of *décret* A of 14 August 1939, Articles 9 and 6 of *décret* B of 14 August 1939);

— the requirement, in the case of companies holding special authorisations to import petroleum products and marketing such

products, that the Chairman of the Board of Directors *(conseil d'administration)*, the Chairman and chief executive *(président-directeur général)* and a majority of the members of the Board of Directors be of French nationality, and the requirement that the holder of such authorisation reserve a certain number of posts within the administrative, technical and commercial management of the undertaking for French staff *(décret* No 65–144 of 26 February 1965);

(d) *in Italy:*

— the requirement that foreign nationals wishing to take up and pursue activities in respect of trade in carrier pigeons must obtain special authorisation (Law of 13 December 1928 No 3086);

(e) *in Luxembourg:*

— the limited period of validity of authorisations granted to foreign nationals (Article 21 of the Law of 2 June 1962).

Article 6

1. Member States shall ensure that beneficiaries have the right to join professional or trade organisations under the same conditions and with the same rights and obligations as their own nationals.

2. In the case of establishment, the right to join professional or trade organisations shall entail eligibility for election or appointment to high office in such organisations. However, such posts may be reserved for nationals where, in pursuance of any provision laid down by law or regulation, the organisation concerned is connected with the exercise of official authority.

3. In the Grand Duchy of Luxembourg, membership of the *Chambre de commerce* or of the *Chambre des métiers* shall not give beneficiaries the right to take part in the election of the administrative organs of those Chambers.

Article 7

No Member State shall grant to any of its nationals who go to another Member State for the purpose of pursuing any activity referred to in Articles 2 and 3 any aid liable to distort the conditions of establishment.

Article 8

1. Where a host Member State requires of its own nationals wishing to take up any activity referred to in Article 2 or in Article 3 proof of good repute and proof that they have not previously been declared bankrupt, or proof of either one of these, that State shall accept as sufficient evidence, in respect of nationals of other Member States, the production of an extract from the 'judicial record' or, failing this, of an equivalent document issued by a competent judicial or administrative authority in the country of origin or the country whence the foreign national comes showing that these requirements have been met.

Where the country of origin or the country whence the foreign national comes does not issue such documentary proof of no previous bankruptcy, such proof may be replaced by a declaration on oath made by the person concerned before a judicial or administrative authority, a notary, or a competent professional or trade body, in the country of origin or in the country whence that person comes.

2. Where a host Member State imposes on its own nationals wishing to take up activities in retail trade in arms, ammunition or explosives or activities in respect of the retail selling of alcoholic beverages or of milk in bulk certain requirements as to good character or good repute, and proof that such requirements are satisfied cannot be obtained from the document referred to in the first subparagraph of paragraph 1, that State shall accept as sufficient evidence in respect of nationals of other Member States a certificate issued by a competent judicial or administrative authority in the country of origin or in the country whence the foreign national comes indicating that the requirements in question have been met. Such certificate shall relate to the specific facts regarded as relevant by the host country.

3. Documents issued in accordance with paragraph 1 or with paragraph 2 may not be produced more than three months after their date of issue.

4. Member States shall, within the time limit laid down in Article 9, designate the authorities and bodies competent to issue these documents and shall forthwith inform the other Member States and the Commission thereof.

5. Where in the host Member State proof of financial standing is required, that State shall regard certificates issued by banks in the country of origin or in the country whence the foreign national comes as equivalent to certificates issued in its own territory.

Article 9

Member States shall adopt the measures necessary to comply with this Directive within six months of its notification and shall forthwith inform the Commission thereof.

Article 10

This Directive is addressed to the Member States.

Done at Luxembourg, 15 October 1968.

For the Council

The President

G. SEDATI

ANNEX

Activities excluded from the scope of this Directive

(Article 2 (4), second sentence)

ISIC ex Group	Excluded activities
012	Letting out for hire of farm machinery.
640	Real estate, letting of property
713	Letting out for hire of automobiles, carriages and horses
718	Letting out for hire of railway carriages and wagons
839	Renting of machinery to commercial undertakings
841	Booking of cinema seats and renting of cinematograph films
842	Booking of theatre seats and renting of theatrical equipment
843	Letting out for hire of boats, bicycles, coin-operated machines for games of skill or chance
853	Letting of furnished rooms
854	Laundered linen hire
859	Garment hire