

27 April 2006

## **Assessment of the Commission's amended proposal for a directive on services in the internal market (published on 4 April 2006)**

### ***I. Overall assessment***

UNICE notes that the Commission's amended proposal is largely based on the changes proposed by the European Parliament in February which entail substantive changes to the initial proposal.

UNICE believes that, despite some improvements in the proposal regarding the freedom of establishment and administrative simplification and cooperation between public authorities, there is still a need for a broader scope and increased legal certainty as regards cross-border provision of services so that the directive can truly meet its objectives of growth and employment.

In particular, UNICE regrets that the Commission has endorsed the drastically reduced scope of the directive and is opposed to the exclusion of temporary work agencies. The exclusion of labour law and the fact that the posting of workers directive also covers these agencies give good reasons for the inclusion of this sector in the scope, and for it to benefit from provisions on administrative simplification and increased information and transparency.

Moreover, the new provisions on applicable law in case of cross-border provision of services, namely articles 16 and 17, remain too vague and will necessitate abundant jurisprudence to clarify their meaning. The new wording of these articles shifts the burden of proof from public authorities to service providers who will often have to have recourse to courts to know their obligations and challenge restrictions on the freedom to provide services. In order to counterbalance the loss of legal certainty, and to increase transparency and information, UNICE proposes the introduction of a system of notification and a registry of the national restrictions that Member States can impose on foreign service providers in application of article 16.3.

UNICE calls upon the EU institutions and especially urges the Council to play a leading role in introducing the necessary improvements in the proposal and securing the legal certainty necessary to create a genuine internal market for services in the EU. Further, it is of utmost importance that, prior to agreeing on its common position, the Council evaluates carefully the economic and legal effects of the amendments, particularly as regards impact on the competitiveness of the European services sector and in the light of the objectives of the directive.

## **II. Specific comments**

### **1. EXCLUSIONS FROM SCOPE OF THE DIRECTIVE (ARTICLE 2)**

- services of temporary work agencies

UNICE is opposed to this exclusion. Temporary work agencies play an important role for smooth functioning of the labour market and should benefit from the advantages of the directive's provisions.

- social services relating to social housing, childcare and support of families and persons in need;

Further clarification is necessary to define what can be considered social services within the meaning of the directive and therefore excluded from its scope. It should be made clear especially that social services of an economic character operated by the private sector and not mandated by the State should remain in the scope.

- healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private;

The definition of health care services is too broad and should be further clarified, for instance by referring to activities reserved to regulated professions and those which are provided directly to a patient. UNICE is still of the opinion that private health services should be included in the scope.

### **2. LEGAL FRAMEWORK APPLICABLE TO CROSS-BORDER PROVISION OF SERVICES**

#### **ARTICLE 16:**

UNICE does not consider that the new article 16 offers enough legal certainty and would have preferred previous versions which clearly stipulated the law applicable to cross-border provision of services.

Article 16 is ambiguous as to the power of Member States to impose national restrictions on incoming services. This power remains too wide and uncertain. It is therefore indispensable that the grounds on which Member States can justify national restrictions are not widened and that they are limited to public policy, public security, public health and protection of the environment, and that they respect the principles of non-discrimination, necessity and proportionality.

This article will necessitate a prominent role by the ECJ to clarify its meaning and, in particular to interpret the general principles and criteria that Member States must respect when they decide to impose curbs on foreign service providers. Since there is no legal certainty as to the applicable law to cross-border provision of services in the

directive, the decision is ultimately transferred to ECJ jurisprudence on a case-by-case basis.

This will ultimately act as a deterrent for companies, especially SMEs, to offer their services across frontiers.

In order to counterbalance the loss of legal certainty in article 16 and to increase transparency and information, UNICE considers that a system of notification and a registry of the national restrictions that Member States can impose on foreign service providers should be introduced in article 16 or elsewhere in the directive, for instance in Chapter V on Administrative Cooperation. UNICE proposes the following wording:

*“Member States shall notify to the Commission any existing or new laws, regulations or administrative provisions which set requirements as referred to in paragraph 3, together with the reasons for those requirements. The Commission shall communicate the provisions concerned to the other Member States. Such notification shall not prevent the adoption by Member States of the provisions in question.*

*A public registry shall be established with the national requirements adopted pursuant to paragraph 3. This information shall also be made available at the single points of contact.”*

#### **GENERAL DEROGATIONS FROM ARTICLE 16 (ARTICLE 17)**

- All services of general economic interest (SGEI)

This derogation from article 16 is unclear insofar as it is left to the Member States to decide which service falls under this category of services and consequently not covered by article 16. A closed list would offer more legal certainty. Therefore, the words “*inter alia*” should be removed.

#### **RELATIONSHIP WITH CONSUMER PROTECTION RULES IN PRIVATE INTERNATIONAL LAW (ARTICLE 3.2, 2<sup>ND</sup> SENTENCE)**

Article 3.2 second sentence is legally unsound and misleading and should therefore be deleted. It gives an interpretation of the application of private international rules as regards the protection of consumers which is inaccurate and should be strictly considered of a merely declaratory nature and not having any legally binding status. For this reason, article 3.2 should be removed from the body of the directive and, at the most, used in the recitals.

#### **RELATIONSHIP WITH CRIMINAL LAW (ARTICLE 1.5)**

This provision should be clarified so that it is made clear that the directive does not affect general criminal law matters, and at the same time it should allow the possibility to challenge certain non-general criminal provisions (e.g. criminal sanctions for breaches of labour law, consumer policy or administrative law) in the light of the directive and particularly of article 16 therein.

If a specific exclusion of criminal law from the scope of the Directive is to be maintained, we propose that this be limited to 'general' criminal law, i.e. criminal

provisions which specifically affect access to or exercise of a service activity should continue to be covered by the Directive.

### **3. MISCELLANEOUS**

#### **- Requirements to be evaluated - Services of General Economic Interest (article 15.4)**

Article 15.4 provides that paragraphs 1 to 4 of Article 15 only apply to legislation in the field of Services of General Economic Interest insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular task assigned to them.

Further clarification should be made providing criteria and terms determining when application of the evaluation obligations of article 15 obstructs the performance of the task assigned to a service of general economic interest.

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