UNICE
THE VOICE OF BUSINESS IN EUROPE

NOTE

9 March 2006

Assessment of the European Parliament first reading amendments in view of elaboration of the Commission's modified proposal on the services directive

I. Overall political assessment

UNICE is greatly disappointed about the serious undermining of the directive by the EP amendments which deprive it of much of its value.

The proposed changes will introduce legal uncertainty in the text and increase the room for new barriers and restrictions which would run counter the very objectives of the proposal. Also directive's provisions on transparency and screening of national requirements and procedures have been considerably weakened which goes against good and efficient governance.

In the light of the above, UNICE has urged the Commission to secure a meaningful directive which provides a clear and qualitative legal and administrative framework for the internal market for services and that has practical effects for promotion of growth and employment in the EU.

Only amendments that truly facilitate establishment and cross-border provision of services should be accepted. A well-drafted text is key to ensure legal clarity. With this aim in mind, UNICE has asked the Commission that before agreeing on a modified proposal, it should carry out a legal and economic impact assessment of the EP changes taken on board.

UNICE is particularly concerned about the amendments that:

1. Reduce the scope of the directive further
2. Weaken administrative simplification and promote red tape
3. Increase legal uncertainty and risk of multiple interpretations
4. Deal with exclusion of labour law and industrial relations aspects

Detailed comments on the above-mentioned amendments are developed in the next section of the note.

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II. Specific comments on key amendments

1. REDUCTION OF SCOPE OF THE DIRECTIVE (ARTICLE 2)

Sectors excluded:

Services of general interest, healthcare services, temporary work agencies, security services, transport, social services, legal services, audiovisual services, gambling, and professions and activities linked to the exercise of public authority (e.g. notaries) and tax services. Industries covered by legislation specific to their sector are also excluded, e.g. financial services, electronic communications services and networks.

Comments:

-temporary work agencies (amends. 300-301)

This exclusion should not be accepted. Temporary work agencies play an important role for a smooth functioning of the labour market and should benefit from the advantages of the directive provisions. There is no reason to exclude them from the benefits of freedom of establishment and administrative simplification. Furthermore, the concerns with regard to the risks of "social dumping" in case of cross-border provision of services by these agencies are already addresses by the posting of workers directive which continues to apply fully and explicitly foresees that the rules of the host country apply to the conditions for the supply of workers by temporary work undertakings.

-social services (amend. 252)

This exclusion is too-far reaching and raises legal uncertainty. It should be clearly delineated and limited to services with a clear social welfare objective and of a non-commercial nature. Also most social welfare services would already be covered by the exclusion of services of general interest.

-healthcare services (amends. 304 and 78)

Exclusion of public health services is justified but the proposed exclusion of health services including also private services goes too far and should be narrowed down so that the scope of the directive also covers private health services.

2. INCREASED RED TAPE AND REDUCED ADMINISTRATIVE SIMPLIFICATION (ARTICLES 5,9,12,13,15, 26, 27,30)

2.1 Increased red tape:

-Information obligations on providers (Amend. 184/article 26)

This amendment should be rejected. It increases the burden on providers unnecessarily by requiring them to provide the same information to three different

addressees: the service recipient, the European single point of contact and the national single point of contact of the host country. This multiplication of bureaucracy is not justified. The information covered by those obligations strictly concerns the recipient which should be the only addressee of the information (e.g. details of the professional liability insurance). There are concerns that Member States could use this provision to maintain or introduce notification of prior declaration schemes.

-Professional insurance and guarantees (Amend. 188/article 27)

This amendment should be rejected. It would allow Member States to impose an obligation on service providers to submit prior written declarations informing the competent authorities of the host state.

This formality amounts to a mere authorisation mechanism. It will increase the burden on the service provider and bureaucracy unnecessarily and eventually would deter companies from providing cross-border services.

The aim to provide information about professional insurance is already addressed in article 26 as amended which provides that providers must make available certain information, including on professional liability insurance, to the recipient.

2.2 Reduced administrative simplification:

- Tacit authorisation (Amend. 134/article 13.4)

The deletion of the tacit authorisation should be rejected. It is a practice of good and efficient governance.

- Requirements to be evaluated (Amend. 151/article 15.6)

This amendment should be rejected. The Commission's initial proposal creates the duty of Member Sates to notify to the Commission about new legislative or administrative acts that they may adopt which deal with the requirements set out in the relevant paragraphs of article 15. This duty will increase transparency and promote better regulation and should be maintained.

- Authorisation schemes (Amend 116/article 9.2)

This amendment should be deleted. The obligation for Member States to include in a report identification of and justification for their authorisation schemes should be maintained. This is a justified exercise in the light of the better regulation and simplification objectives of the EU agenda. It is also of paramount importance for the sake of democratic transparency and in order to avoid the use of authorisation schemes which may be discriminatory, disproportionate or too restrictive.

- Simplification of procedures (Amend. 100/article 5.1)

The wording of article 5.1 "*Member States shall* ***authenticate and, if appropriate,*** *simplify the procedures and formalities*" is unclear and dilutes the obligation on Member

States to effectively simplify procedures and formalities applicable to access and exercise of a service. The wording of the Commission's initial proposal is better, provides a clear obligation on Member States to simplify and should be kept.

- Multidisciplinary activities (Amend. 193/article 30.4)

This amendment should be rejected. There is no justification for deletion of the reporting obligation on Member States regarding requirements applicable to providers in cases of multidisciplinary activities and their justification.

- Selection from among several candidates (Amendment 130/Article 12.2 a (new))

The practical legal effect of the amendments is unclear. It is redundant and should be deleted.

3. LEGAL UNCERTAINTY AND RISK OF MULTIPLE INTERPRETATIONS

NEW ARTICLE 16: FREEDOM TO PROVIDE SERVICES

General comments on new article 16:

This amendment renders article 16 too unclear. It is open to multiple interpretations which may result in imposition of new national barriers and maintenance of others what should be removed otherwise.

The plenary amendment fails to offer legal certainty and is ambiguous as to the power of Member States to restrict incoming services. It is therefore vital that the grounds on which Member States can justify national restrictions are not interpreted extensively and strictly limited to public policy, public security, public health and protection of the environment.

This amendment will necessitate a prominent role by the ECJ to clarify the legal framework for cross-border services 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 the ECJ jurisprudence on a case-by-case basis.

Specific comments:

On art. 16.2: the proposed list of banned practices does not include the ban on declarations and on the obligation to have a representative in the territory of the host Member State. These practices have been removed from the original text in which they were identified as obstacles to the free movement of services. The removal of these practices should not be accepted.

On art. 16.3: it stipulates grounds which would allow Member States to limit the freedom to provide services through national rules. These grounds are public policy, public security, environmental protection and public health. Member States can also continue to apply, in conformity with Community law, their rules on employment conditions, including those laid down in collective agreements.

This new paragraph 3a is redundant and should be deleted. It repeats the criteria already spelled out in paragraph one when it refers to the principle of necessity. Also as regards to employment issues, these matters are already addressed in article 1 paragraph 7.

GENERAL DEROGATIONS FROM ARTICLE 16 (ARTICLE 17)

New derogations adopted:

- Services of general economic interest (SGEI) (Amend. 400).
- Private International Law (Amends. 53-54, 170)

Comments:

-on SGEI: A general derogation from article 16 for this category of services should not be accepted. A closed list offers more legal certainty and therefore the words *"inter alia"* from the Parliament text should be deleted.

-on Private International Law: a block exemption for Private International Law should be rejected. However, a derogation from article 16 for labour law aspects covered by article 6 on individual employment contracts of the Rome Convention on law applicable to contractual obligations could be acceptable.

OVERRIDING REASONS OF PUBLIC INTEREST (AMENDS.30, 34, 37, 39, 40, 41,100, 111, 115, 118, 121, 125, 126, 134, 140, 149, 202, 242, 308)

- Introduction of a definition (Amend. 308/Article 4, point 7)

There are serious concerns about the implications of this introduction. The definition includes a long list of criteria considered by the European Court of Justice in case law produced over years. Those criteria are a result of a case-by-case review and continue to evolve as the ECJ jurisprudence develops.

They should not be understood as criteria that automatically and systematically amount to a valid criterion of overriding reasons of public interest in the sense of the directive. This is of utmost importance since this concept is used in numerous places in the directive (in particular in recitals 24, 27 a (new), 27 d (new), 29, 31, 32, articles 4, 5, 8, 9, 10, 11, 13, 14 point 5, 15 and 36).

For legal clarity, this definition should be rejected.

- Removal of "objectively" (Amend. 100/article 5;Amend. 115/article 9.1 b, Amend. 118/article 10.2 b, Amend. 121/article 10.4, Amend. 126/article 11.1 c, Amend. 149 and 242/article 15.3 b)

Removal of this word from the sentence "objectively justified by an overriding reason relating to the public interest" is not justified. It should be kept to ensure that the various possibilities that Member State may use on the grounds of an overriding reason relating to the public interest are adequately founded and reasoned. This will help avoid misuse of these possibilities.

RELATIONSHIP WITH CONSUMER LEGISLATION (AMENDS. 219 AND 307 /ARTICLE 3.3)

This amendment will create enormous legal uncertainty and should be rejected. It could be interpreted as if all national consumer legislation would be excluded from the scope of the directive and therefore prevail over the directive.

It is agreed that the services directive is not intended to regulate such matters but to set out the principles of the legal framework applicable to cross-border provision of services taking also into account existing Community legislation.

The proposed amendment would mean that Member States would be allowed at their discretion to impose any national restrictions based on consumer legislation to incoming services. This would be fatal for providers, especially SMEs, which would be forced to know in advance all the restrictions and obligations on consumer protection relevant to his service that a given country may impose. This legal uncertainty would render the cross-border provision of services for those companies virtually unaffordable and would increase unnecessarily the power of Member States to impose restrictions.

RELATIONSHIP WITH CRIMINAL LAW (AMENDS. 290-291/ARTICLE 1.5)

The amendment poses some concerns and is not clear about its practical effects. There is no question that the directive should not affect general criminal law matters, nevertheless the general problem is that there are many criminal law rules in all sorts of legislation (e.g. for breaches of labour law, consumer policy or administrative law) which, if they were not affected by the directive, would continue to apply.

This could have a double effect of not being able to challenge those criminal provisions in the light of the directive and of opening the possibility for member states to maintain existing restrictions in other areas by shifting them into their criminal provisions. It would also mean that criminal law rules would not need to be evaluated in art. 15.

If any exclusion of criminal law from the scope of the Directive is to be maintained at all, it should 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.

4. EXCLUSION OF LABOUR LAW / INDUSTRIAL ACTION /POSTING OF WORKERS

On labour law, including collective agreements (Amend. 9/recital 6 d new); Amend. 297/article 1.7)

It provides that labour law including collective agreements are excluded from the scope of the directive.

Comments:

The services directive is not intended to regulate such matters but to simply set out the principles of the legal framework applicable to cross-border provision of services taking also into account existing Community legislation.

In this regard, the interpretation of the exclusion of labour law raises serious concerns.. It is open to misinterpretation which may go against the aims of the directive.

A different wording is necessary to ensure the neutrality of the directive vis-à-vis labour law.

Article 1.7 on labour law should read:

"The directive is without prejudice to labour law, i.e. legal or contractual provisions concerning employment conditions, working conditions, including health and safety at work, and the relationship between employers and workers which are applicable in conformity with Community law."

On industrial action (Amends. 299/ recital 7 d (new); Amend. 298/article 1.7 and 1.8)

The services directive should be without prejudice to national provisions on right to strike and to take industrial action which remain of national competence.

However, there are serious concerns about the overemphasis on the right to take industrial action in the above amendments. This may be understood as giving a blessing to actions against companies aimed at preventing them from exercising their freedom to provide services guaranteed in article 49 of the EC Treaty.

The definition of conditions governing the right to strike and take industrial action should not be addressed by EU law. However, the exercise of this right, as for any other right, cannot be unlimited. It must also respect the fundamental freedoms enshrined in the EC Treaty.

The right to take industrial action must remain national but within the limits of the fundamental freedoms of the Treaty. With that aim in mind, article 1.7 should read as follows:

"7….. In particular ***it should be without prejudice to*** *the right to negotiate* ***and*** *conclude ~~, extend and enforce~~ collective agreements, and the right to strike and to take industrial action according to the rules governing industrial relations in Member States and* **exercised in accordance with the fundamental freedoms of the Treaty***. Nor shall it affect national social security legislation in the Member States.*

In addition, paragraph 8 in article 1 should be deleted. It is redundant and already covered in paragraph 7.

On posting of workers (Amends. 182, 183, 248 and 249/articles24-25)

Articles 24 and 25 on posting of workers have been deleted.

Comments:

Taking into account the Commission's recent decision to issue a Communication on the posting of workers directive including guidance for Member States, efforts should concentrate on improving article 16. As stated in the relevant comments above, Article 16 should be drafted in a way that ensures legal certainty and minimises the risk of multiple interpretations, and additional national restrictions on the freedom to provide services.

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