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WORKING DOCUMENT

on the Draft Services Directive[1]

Legal basis and scope of the draft
Right of Establishment

Committee on Employment and Social Affairs

Rapporteur: Anne Van Lancker

INTRODUCTION

This working document is based on the outcome of the public hearing,[2] on the impact-assessment study[3] and on other contributions by various organizations. Its aim is to outline possible orientations for the report in first reading on the Draft.

At the hearing, speakers and MEPs did not question the need for a directive on services, but there was a broad consensus that the Draft needs a lot of work before it will be acceptable. The vast majority of speakers had strong reservations about the potential effects of the country of origin principle (COOP) which could create regulatory competition between Member States and cause a lowering of standards. Most of them stated that the COOP can only be applied on the basis of a high degree of harmonisation and that it should be possible to derogate from the COOP on the basis of the 'rule of reason' exceptions authorised by the European Court of Justice (ECJ).

Many speakers criticized the horizontal character of the proposal and the fact that there is no distinction between what is purely commercial and what serves the public interest. Many argued that services of general interest such as health care, social services, education, cultural activities, but also regulated professions and labour market services should be excluded from the scope. They expressed the need to clarify and ensure that labour law is excluded from the scope (or at least from the coordinated field), and that guarantees are built in to respect national industrial relations systems and practices.

Conflicts with Rome I and Rome II or with (pending) directives on mutual recognition of qualifications, posting of workers, temporary agencies or Regulation 1408/71 were also pointed out. Moreover, the proposal should not pre-empt a future framework directive on services of general interest; on the contrary, such a framework directive should precede a services directive. Finally, shortfalls of the proposed mutual assistance between Member States were addressed.

The Commission has suggested modifications[4] to clarify intentions that are not adequately worded in the proposal. The Commission admits e.g. that occupational pensions, taxation (except fiscal discrimination) and all transport services (except cash-in-transit and transport of deceased persons) should be excluded from the scope. It also clarifies the possibilities of control by the host state in case of posting of workers and specifies the relation with Regulation 1408/71 in case of reimbursement of health care costs. On the basis of these notes the Council has produced a working document[5].

All this leads me to suggesting that the Commission should withdraw the proposal and present a new proposal, taking into account the critical assessments and the clarifications. If the Commission were not prepared to do so, the Parliament will have to amend this proposal very substantially in order to make it acceptable.

I will try to outline the most controversial aspects of the proposal and suggest options for amending them.

CONTROVERSIAL ISSUES & OPTIONS FOR AMENDMENTS

First, all activities of the EU have to serve the aims listed in Art 2 EC, in particular a high level of employment and social protection. Furthermore, the specific role of services of general economic interest is mentioned amongst the principles of the EC (Art 16 EC)**.** The concept as well as the specific provisions of the Draft should be examined against this background.
In principle, the aim described in Article 1 of the Draft should also refer to the (social) aims included in Art 2 EC.

LEGAL BASIS AND SCOPE

The Draft is based on Art 47(2) and 55 EC which relate to coordination of provisions concerning the taking-up and pursuit of activities as self-employed persons. The proposal aims at reducing barriers to the internal market of services; however, its horizontal nature implies that its provisions will have repercussions for other policy areas for which the EC Treaty provides a specific legal basis for Community action, e.g. culture (Art 151), public health (Art 152), protection of consumers (Art 153), transport (Art 70-80(2)).[6] Furthermore, the provisions on establishment and temporary service activities interfere with policy areas – such as public health, culture, education – for which Community action is only complementary to the national regulatory competences and for which the principle of subsidiarity applies. In addition, the far-reaching nature of the Draft raises the question as to whether the proposal respects the principle of proportionality.

The Draft has a broad scope; it covers purely commercial services as well as social services such as health, health care and household support services. By acting this way, the Draft fails to take into account that the services covered have heterogeneous features and raise a wide variety of public policy considerations.

For that reason, it would be preferable to continue with a sectoral approach. The Commission's concept may nonetheless work if additional activities or sectors are excluded *and* if important changes are made to the provisions on the establishment and the temporary provision of services. The Directive could function as a framework for a gradual harmonisation process coupled with mutual recognition of conditions governing access to and exercise of service activities across the EU.

In any event it should be seriously considered to exclude services of general (economic) interest (SG(E)I) entirely from the scope of the Draft. Even though this notion is not clearly defined at EU level, there is consensus that it covers activities such as network industry services, health services and social services such as welfare, employment services and social housing. The Draft includes all of those services of general interest.[7] The discussion about the role of the EU in defining these services and the way they are organised and financed is however the object of a separate process launched by a Green Paper and followed by a White Paper on Services of General Interest.[8] In order not to affect this process and not to anticipate a framework directive on SGI, the Draft should not apply to services that are guaranteed or financed by the State to fulfil its duties in the social, educational, cultural, judicial fields as well as its duties in the areas of health care and welfare. This is particularly the case for educational, cultural, audiovisual services, health care and social services (including

placement of workers, vocational/professional training), water distribution and purification services, electricity distribution services, management of waste services, services of protection of the environment. The fact that several of those activities feature among the derogations from the COOP (Art 17) is not enough: they should be totally excluded from the scope. Furthermore, some of the activities the Commission already proposed to exclude (Art 2 (2)) need to be better defined.

Finally, labour law issues are directly affected in different ways. Collective agreements, and extended collective agreements (*erga omnes*) in particular, might be scrutinised under the draft provisions. Therefore, all labour law issues, including rules of international private law with regard to the law applicable to employment relationships, should be excluded from the scope and the coordinated field. An additional argument for excluding these issues from the Draft is that social policy matters are covered by a separate legal basis in the Treaty (Art 137 EC). Moreover, the Draft should not affect trade union rights, the freedom of association and collective bargaining, including the right to take industrial action, and the protection of collective bargaining systems.

ESTABLISHMENT

Given that most cross border services are likely to be pursued through a fixed establishment in the host state, it will narrow down the Member States' margin to translate their duties in the social sphere into national/regional authorisation requirements. The Draft needs to provide that Member States are entitled to make the access to and exercise of a service activity subject to an authorisation scheme and requirements pursuing 'an overriding reason relating to the public interest' in a non-discriminatory and proportional manner, to the extent that these schemes have not been harmonised.

The draft provisions on establishment include the notion of 'an overriding reason relating to the public interest' (see Art 5(2), Article 9(1), b) and Article 10(4)). This is derived from the case-law of the ECJ and does not only cover the protection of workers, consumers, recipients of services or urban environment[9], but also a non-exhaustive range of grounds in the areas of public policy, public security, social policy, public health, cultural policy and intellectual property.[10]

As to the conditions for granting an authorisation, Art 10(4) provides that an authorisation should give the service provider access to the service activity throughout the national territory. This clashes with the constitutional order of Member States in which regional authorities are entitled to grant authorisations which give access to a specific region. As regards the duration of authorisation, Art 11 does not allow the withdrawal of an authorisation if inspections show that the service provider does not comply with the conditions for granting it. According to Art 13(4), an authorisation is deemed to have been granted when the authorities fail to respond within a reasonable time period. This could raise problems of (lack of) proof and, therefore, reduce legal certainty. These articles should thus be amended.

Regarding the prohibited requirements and requirements to be evaluated (Arts 14-15), the Draft is not clear as to the impact for authorisation schemes that are essential for specific services presently included, such as health care, welfare and labour market services (f.i. requirements to be evaluated such as quantitative and territorial restrictions, requirements fixing a minimum number of employees, fixed minimum or maximum tariffs and prohibited

requirements such as the case-by-case application of an economic test and the obligation to participate in financial guarantee or to take insurance).

Furthermore, Member States will have to screen their national authorisation schemes (also regarding requirements to be evaluated) in accordance with the mutual evaluation procedure in Art 47. Again, this procedure is likely to reduce the margin of Member States to fulfil their duties in the social field. Firstly, the screening operation covers both cross-border situations and internal situations. Secondly, as regards the requirements to be evaluated, the procedure also applies to new national legal acts that can only be introduced if new circumstances arise. This would give the Commission a *de facto* right to veto new national regulation falling within the wide scope of the screening provision.

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[1] Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM (2004) 2. Hereinafter refer to as "the draft"

[2] Public hearing on the proposal for a directive on services in the internal market, organized by IMCO and EMPL, 11 November 2004. Directorate-general for internal policies, Notice to members IV/2004 – PE 350.059v01-00.

[3] Towards a European directive on services in the internal market: analysing the legal repercussions of the draft services directive and its impact on national services regulations, Wouter Gekiere, Institute for European Law, Catholic University Leuven, 24 September 2004.

[4] Explanatory note on the activities covered by the proposal, 10865/04, 25 June 2004; Explanatory note on the provisions related to the posting of workers with a particular emphasis on art.24, 11153/04, 5 July 2004; Explanatory note on the provisions relating to the assumption of health care costs incurred in another Member State with a particular emphasis on the relationship with Regulation 1408/71, 11570/04, 16 July 2004.

[5] General Secretariat of the Council, DG C1, Working document n°1, Working Party on Competitiveness and Growth (services), 15 November 2004 (57pp).

[6] As regards transport services, the Commission refers to Article 71 and 80 (2) EC (Draft Services Directive, Article 2 (c)).

[7] The fact that they would be excluded cannot be derived from consideration 16 of the draft which just states: "… activities performed, for no consideration, by the State in fulfilment of its social, cultural, educational and legal obligations. These activities are not covered by the definition in Article 50 of the Treaty and do not therefore fall within the scope of this Directive."

[8] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – White Paper on Services of General Interest, COM 2004 (374).

[9] See for instance Draft Services Directive, consideration 24 and 29.

[10] Towards a European directive on services in the internal market: analysing the legal repercussions of the draft services directive and its impact on national services regulations, Wouter Gekiere, Institute for European Law, Catholic University Leuven, 24 September 2004, 11.