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WORKING DOCUMENT

on the Draft Services Directive[1]

Freedom to provide services
Relationship with other Community instruments

Committee on Employment and Social Affairs

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FREEDOM TO PROVIDE SERVICES

As regards the provision of services on a temporary basis, Art 16 of the Draft provides that service providers will only have to comply with the provisions of the country in which the service provider is established. The Draft does not give a clear definition of what is meant by the temporary nature of a service activity, which gives room for abuses. The definition of 'establishment' included in Art 4(5) refers to the pursuit of an economic activity through a fixed establishment of the provider for an indefinite period. On the basis of these criteria, the dividing line between activities constituting an establishment and activities constituting a temporary service activity is not clear. Nor does the current definition prevents service providers from setting up special constructions (e.g. letter box companies) in a Member State with lower taxation, environmental, consumer and/or social requirements. Under the Treaty this would qualify as a form of establishment. Consequently, the Member State under whose laws the letter box company is incorporated, will for the purposes of the Draft be the country of origin. In order to avoid abuse, the definition of establishment needs to be sharpened.

The coordinated field to which the scope of the COOP is linked covers any requirement applicable to access to and the exercise of a service activity, in particular requirements governing the behaviour of the provider, the quality of content, advertising, contracts and the provider's liability. However, regarding this 'coordinated field', the Draft only contains a series of information duties which service providers have to comply with and provisions on professional insurance and guarantees and information of recipients on the existence of after-sale guarantees.[2] This lack of balance is an open invitation to perform services while complying with the regulations of the Member State with the lowest standards.

The COOP can only work if there is a minimum level of harmonisation at EU level or if there are at least comparable rules within the Member States: minimum harmonisation should relate to quality norms, the protection of public order, minimum vocational training, professional qualification requirements and supervisory mechanisms. Standards relating to quality of services, protection of consumers, employees and environment should also be safeguarded. Such a harmonisation process is only realistic if criteria and conditions are designed for each specific category of services. In order to restore the balance important changes need to be made.

The scope of the COOP must correspond to the areas that are actually coordinated in the Directive (see Art 26-28), with a possible extension to areas harmonized by other existing Community instruments. This would require a modification of the definition of the coordinated field.

In the absence of any harmonisation, Member States should continue to justify exceptions to the COOP in accordance with the case law relating to Art 49 of the Treaty.[3] This means that the Directive should not go further than the Treaty itself and that it should not affect the rule of reason exceptions recognised by the European Court of Justice (ECJ). This approach would allow to limit the various sets of derogations mentioned in Art 17-19, thus improving clarity and transparency. It does not prevent further harmonisation (coupled with mutual recognition) in respect of certain service activities.

Finally, the set of derogations provided for in the Draft calls for a number of specific suggestions. The general derogations to the COOP in Art 17 should mainly focus on the

existing Community instruments, requirements and acts that currently provide mechanisms that are clearly inconsistent with the COOP. Art 18 on the temporary derogations lacks any specific guarantee that harmonisation measures will be taken at Community level. In the absence of such guarantee, it is recommendable to exclude these services permanently from the COOP. The suggestion of a general statement of conformity with the Treaty and the Court's jurisprudence would also replace Art 19 on the case-by-case derogations which restricts the list of rule of reason grounds (recognised by the ECJ) on the basis of which a Member State can take derogatory measures relating to a service provider established in another Member State.

RELATIONSHIP WITH OTHER COMMUNITY INSTRUMENTS

There is a lack of coordination between the Draft and other Community instruments. Many experts have raised concerns on the conflict between the COOP and existing labour law provisions included in the Posting Directive and Rome I [4] and Rome II.

As regards the posting of workers, Art 17(5) provides that the COOP does not apply to 'matters covered by the Posting Directive'. This exclusion does not provide for legal clarity. It is not enough to prevent disruptive interference with important aspects of individual and collective labour law. The term 'matters covered by the Posting Directive' would need further clarification and probably adaptation to exempt all matters related to cross border posting of workers that are dealt with in the Posting Directive. Hence my suggestion to exclude this topic from the scope. The exemption should not only refer to the set of minimum requirements, and the minimum regulations provided for in the Posting Directive, but to all forms of extension and implementation that are allowed by the Posting Directive (f.i. possibility for Member States to impose compliance with other matters than listed in Article 1, possibility to base the implementation of the Posting Directive on generally binding collective agreements or specific collective bargaining systems, reference to all regulations dealing with temporary agency work etc).

The Posting Directive only deals with situations where the worker performs work on a temporary basis in another Member State than the Member State in which he habitually works (for the service provider). It needs to be situated in the broader context of Rome I. According to Rome I, the law applicable to his employment contract is the law of the country where he normally works (Art 6) but in these circumstances certain mandatory rules of the country where the work is performed apply (Art 7). The Posting Directive contains minimum rules on employment and working conditions of the country where the work is performed. Excluding the matters covered by the Posting Directive does not eliminate the conflict between the Draft and Rome I in the situation in which the worker is not a temporary posted worker within the meaning of the Posting Directive.[5] Under the Draft, the COOP (or the free choice of law) would apply and set aside the Rome I rules, which in these cases would lead to the application of the law and/or at least the mandatory rules of the host country. Similarly, the COOP would set aside Rome II according to which the mandatory rule of the host state could be applied.

At the same time, Art 24 of the Draft reduces the effectiveness of labour inspection conducted by the host Member State on the basis of the Posting Directive because it prohibits that State from making service providers subject to obligations that are essential for the inspection services of the State in which services are provided such as to obtain an authorisation or a registration, to make a declaration, etc. This is particularly important for those countries

where implementation and enforcement depends on collective bargaining and the role of social partners. Under the current circumstances, labour law provisions can only be effectively enforced in the Member State where the work is performed; the system of administrative cooperation proposed by the Commission to facilitate enforcement between Member States lacks the necessary safeguards in order to be an efficient tool of labour law enforcement.
For these reasons, Art 24 should be deleted and Arts 17(5) and 17(20) replaced by a clear statement that the law applicable to workers employed for the provision of services is the Posting Directive, Rome I and other relevant Community and national labour law.[6]

As regards contractual and non-contractual obligations in fields other than labour law, the Draft contains general derogations to the COOP that are inspired by the rules of conflict of law included in Rome I and Rome II: freedom of choice of contract law, consumer contracts to the extent that they are not completely harmonised at EU level, non-contractual liability of service provider in case of an accident. However, the Rome I and II rules have a much wider scope. Experts demonstrated that these rules are more appropriate to safeguard a proper balance between interests involved. They also explained that the unrestricted introduction of the COOP would increase legal uncertainty, amongst others because service providers will be offering competing services under a different legal regime.

In conclusion, the law applicable to contractual and non-contractual obligations should be dealt with Rome I & II[7] based on the specific and appropriate legal basis provided for in Art 61(c) and 65 EC.

As regards the assumption of health care costs, provisions that aim at converting the principles of patient mobility established by the ECJ into Community rules logically belong under Regulation 1408/71 and not under an internal market directive. Incorporating principles of patient mobility in Art 23 of the Draft implies that two distinct Community instruments and procedures will govern the access to health care costs outside the patient's home State.

While the Commission repeatedly stated that it intends to raise legal certainty and transparency for patients and Member States,[8] the proposal is unclear as to what conditions and formalities can be imposed on non-hospital care provided abroad. Furthermore, it seems to go further than the Court's case-law: it extends the rule that assumption of programmed hospital care costs provided abroad may be not less than for similar care in the home state to all types of health care.[9] It does not maintain the possibility for Member States to apply differential reimbursement rates for contracted care and non-contracted care (applied in the same way abroad and in the own country). Finally, the definition of hospital care included in Art 4 (10) does not reduce legal uncertainty: notions such as 'medical care' and 'provided within a medical structure' can be interpreted differently in the various Member States.[10] If Member States do not comply with the case law on patient mobility, as was suggested by the Commission, that should not be a reason to include this topic in the scope of a legislative text as the Draft. The proper course of action would be to start infringement proceedings (Art 226 EC) or to deal with this issue under Regulation 1408/71.

[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] Draft Services Directive, Articles 26-28.
[3] European Parliament, Public Hearing on the proposal for a Directive on services in the internal market, Thursday, 11 November 2004, Brussels: The Country of Origin Principle by Berend Jan Drijber, 5-6.
[4] See European Parliament, Public Hearing on the proposal for a Directive on services in the internal market, Thursday, 11 November 2004, Brussels: Professor Niklas Bruun, Employment issues, Memorandum; Catelene Passchier, Contribution on behalf of the ETUC.
[5] This may be the case for instance: 1) if he is only hired to be posted to another Member State, and before that moment has not been employed in the country of origin by the service provider, 2) if he is a citizen from the host country, employed in the host country by a service provider which is established elsewhere, 3) if he is posted for a longer period to the host country, and therefore not anymore to be considered 'temporary' posted.
[6] European Parliament, Public Hearing on the proposal for a Directive on services in the internal market, Thursday, 11 November 2004, Brussels: Professor Niklas Bruun, Employment issues, Memorandum, 22.
[7] European Parliament, Public Hearing on the proposal for a Directive on services in the internal market, Thursday, 11 November 2004, Brussels: Position Paper by Paul Beaumont, Professor of European Union and Private International Law, University of Aberdeen.
[8] 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, 2.
[9] This means also for urgent care during a temporary stay and for ambulatory care.
[10] See also 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, 9.