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Directorate-General External Policies

Policy Unit

INFORMATION NOTE
ON STATE OF PLAY ON THE
FREE MOVEMENT OF SERVICES
(THE SERVICES DIRECTIVE)

Abstract:

This note provides background information on the proposal for a Directive on services in the internal market (COM (2004)002), presented by the Commission in January 2004. The proposal's objectives and key features are examined, followed by a summary of the main points of contention and a review of course of the legislative procedure so far and likely future developments.

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Background and Purpose of the Proposal

The proposal for a Directive on Services in the Internal Market is part of the wide-ranging process of economic reform launched by the Lisbon European Council in March 2000, with a view to making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. Considering that services generate almost 70% of GNP and jobs in the Union and offer considerable potential for growth and job creation, there was general agreement that here lay a key to attaining the Lisbon objectives. The EU Heads of State and Government therefore invited the Commission and the Member States to devise a strategy aimed at eliminating the obstacles to the free movement of services. The need to take action in this field was also highlighted at the Stockholm and Barcelona Summits in 2001 and 2002.

In response to the Council's call, the Commission set out an Internal Market Strategy for Services in December 2000. The aim of this strategy, which received the full support of both the Member States and the European Parliament, is to enable services to move across national borders within the European Union just as easily as within a single Member State. It was followed up in July 2002 by the Commission Report on the State of the Internal Market for Services, which marked the completion of the first phase in the strategy and provided as exhaustive a list as possible of barriers that exist in the internal market for services, their common features and their estimated economic impact.

Having identified the obstacles in its 2002 report, the Commission proceeded to the second stage of the strategy, involving the development of appropriate solutions, and in particular, of a horizontal legal instrument. Drafted under the energetic leadership of then Internal Market Commissioner Frits Bolkestein, the proposal for a directive was presented by the Commission in January 2004. Its declared aim is to facilitate the exercise of the freedom of establishment for service providers in the Member States and the free movement of services between Member States. To this end, the proposal strives to eliminate remaining legal obstacles to the achievement of a genuine internal market in services, and to guarantee service providers and recipients the legal certainty they need in order to exercise in practice these two fundamental freedoms enshrined in the Treaty.

Key Features of the Proposed Legislation

Legal form: framework directive - Given the specific features of the various national systems for regulating services, the proposal does not aim to lay down detailed rules or to harmonise all the aspects. Rather, it addresses the questions that are vital for the smooth functioning of the internal market in services, clearly setting out the results to be achieved without prejudging the legal techniques for doing so. This includes, in particular, a clarification of the respective roles of the Member State of origin and the Member State of destination of a service.

Differentiated approach: prohibition vs. evaluation - Among the various obstacles to a single market for services identified in the 2002 report, the proposal prohibits those requirements (listed in Article 14) which, particularly in the light of the case-law of the Court of Justice, are manifestly incompatible with the freedom of establishment, especially where they have a discriminatory effect. Other requirements (listed in Article 15), that have major restrictive effects on the freedom of establishment and have been reported by interested parties, but may be justified in certain cases, are to be evaluated individually against conditions laid down in the Directive (essentially, objective general interest and proportionality). Member States will have

to screen their legislation for such requirements, abolish them unless they meet the criteria, and report on the process.

Governing principle: country of origin - In essence, service providers will be subject only to the law of the country in which they are established, and Member States may not restrict services provided by operators established in another Member State. This will enable operators to provide services in one or more other Member States without being subject to those Member States' rules. This principle also means that the Member State of origin is responsible for the effective supervision of service providers established on its territory even where they provide services into other Member States.

Streamlined procedures: single point of contact - This concept implies that a service provider must be able to complete all the formalities and authorisation procedures required for the exercise of service activities through one and the same body, rather than having to tour a number of different authorities and offices.

The consequence: increased administrative co-operation - In order to ensure that supervision is effective, the proposal provides for a high degree of administrative co-operation between authorities by organising the allocation of supervisory tasks, exchange of information and mutual assistance. This clearly is vital for ensuring the high level of mutual trust between Member States without which the country of origin principle could not function.

Derogations for the sake of coherence - A number of aspects are however exempt from the country-of-origin principle in view of existing Community legislation in the relevant fields. This includes issues covered by Directive 96/71/EC (posting of workers), Regulation (EEC) No 1408/71 (social security), as well as certain instruments on the free movement of persons and the recognition of qualifications. On similar grounds, the transport of waste (Regulation (EEC) No 259/93) is also excluded. A second category of derogations to the governing principle covers activities subject to very specific and widely varying national regulations, such as notarial acts, postal services, and electricity, gas and water distribution services, as well as total prohibitions justified by reasons of public policy, public security or public health.

Targeted harmonisation in the general interest - In certain essential fields where too wide a divergence in the level of protection would undermine the mutual trust that is vital to the acceptance of the country of origin principle, the proposal sets out specific, harmonised rules in accordance with the case-law of the Court of Justice. Such targeted harmonisation is provided for notably in the field of consumer protection, as well as towards the simplifying administrative procedures and eliminating certain types of requirement;

Implementation: phased approach - Given the scale of the obstacles identified in the report, the task of establishing a genuine area with no internal borders for services will take time. The modernisation of certain rules applied by the Member States will require fundamental changes, additional harmonisation specific to certain activities, and take due account of the development of Community integration in other fields. In order to avoid a static approach that tackles a single problem and leaves the others unresolved, the proposal for a Directive adopts a phased approach aimed at achieving a genuine internal market for services by 2010.

Main Points of Debate

As witnessed by the broad support given to the Commission Strategy on services in 2000 and its follow-up report in 2002, the underlying notion of a pressing need to open up the Single Market

for services is generally accepted. Consequently, the aim of reducing administrative obstacles, and the single point of contact model in particular, met with widespread approval.

However, the Commission proposal has been criticized as too far-reaching in its liberal approach, and as difficult to implement in practice. While such criticism at first mainly emanated from Commissioner Bolkestein's political opponents, more recently it has come from several Member State governments, in particular from both Germany and France, with the latter voicing a categorical refusal in early February, following Mr. Barroso's presentation of economic priorities in the European Parliament. Reservations about the proposal can be grouped under two headings:

Scope of the proposal: The European Commission has made it clear that the proposal would not apply to services of a non-economic nature as defined by the European Court of Justice, e.g. administration or public education, provided by the State as part of its mission and without remuneration. Nor would it apply to commercial services for which specific legislation already exists, such as financial services, electronic communications or transport.

Nevertheless, as all other types of services would be covered by the Directive, a number of professional organisations have argued for exemptions, with the tacit or overt support of several Member States. ***Health care*** organisations in particular have pointed out that the theoretical provider-recipient relation is complicated in this sector by the involvement of a third, financing party, creating asymmetry of information and legal uncertainty about reimbursements. The ***legal professions*** have argued the public nature of their services, intricately meshed with each Member State's legal and judicial system. More generally, concerns were raised about the lack of clear definitions and rules taking account of the specifics of ***services of general interest*** in the European model.

While a degree of fine-tuning on some of these issues appears possible, introducing a raft of sectoral exemptions would counteract the horizontal approach which was felt to be necessary in order to provide a meaningful impulse for growth.

Country of origin principle: The practical consequences of implementing this principle have also been called into question, with many considering that deregulation had been taken too far. Despite the Commission's best efforts and assurances, ***legal uncertainty*** was still seen as a major risk. Its alleged impact could range from consumers unaware of possible loopholes between applicable domestic and foreign legislation, through service sector workers exposed to diminishing levels of social protection, to supervisory authorities required to work closely with 24 or more national authorities of other member States and their evolving legislation.

Some critics have called for a radical overturn, replacing the country of origin principle with that of the host country legislation already applicable for the posting of workers. This however would only constitute a minor improvement over the status quo.

A possible answer to both sets of concerns might lie in an extension of the targeted harmonisation instrument already contained in the proposal to pre-empt the risk of a 'race to the bottom', in particular any feared side-effects on the social protection of workers.

Status of Procedure

Faced with the criticism quoted above from the very outset, the European Commission proceeded, all through 2004, to provide a series of clarifications and explanations, aimed both at

the general public and more specifically at the members of the European Parliament's Committee on the Internal Market and Consumer Protection.

Under the leadership of its rapporteur, Ms Evelyne GEBHARDT (PES), this committee has been conducting several debates, as well as a public hearing on 11 November 2004. This was supplemented by separate hearings both in the EPP-DE (9 December 2004) and in the PES Group (15 February 2005). Eight other parliamentary committees are in the process of finalising opinions contributing legislative amendments.

The Council, in its "Competitiveness" formation, has been discussing the proposal in depth at its meetings of 11 March and 22 December 2004, and again as recently as 7 March 2005. No decision has been reached yet, and on the latest occasion, France and Germany reiterated their rejection of the proposal in its present form out of concern over social dumping risks.

While calls for a withdrawal of the proposal went unheeded, the European Commission has indicated a considerable degree of flexibility, which was publicly welcomed by the EP Rapporteur. The emerging consensus on procedure appears to tend towards an extensive re-writing of the proposed legislation. Despite the considerable volume of drafting work this would entail, the Rapporteur remains confident that the European Parliament's First Reading in this co-decision procedure could be concluded before the Summer recess, or during the September plenary at the latest.
