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PROGRESS REPORT

From : Presidency

To : Council

No. Cion prop. : 6174/04 COMPET 18 SOC 58 JUSTCIV 23 CODEC 192

Subject : Proposal for a Directive of the European Parliament and of the Council on services in the internal market

I. INTRODUCTION

During the UK Presidency, the Working Party on Competitiveness and Growth has continued work on the proposal for a Directive on Services in the Internal Market, in the light of the conclusions of the 2005 Spring European Council, which state:

“In order to promote growth and employment and to strengthen competitiveness, the internal market of services has to be fully operational while preserving the European social model. In the light of this ongoing debate which shows that the directive as it is currently drafted does not fully meet these requirements, the European Council requests all efforts to be undertaken within the

legislative process in order to secure a broad consensus that meets all these objectives. The European Council notes that effective services of general economic interest have an important role to play in a competitive and dynamic economy”.

The Working Party has focused its work on the scope of the proposal (Chapter I), free movement of services (Chapter III) and the convergence programme (Chapter VI). It has also held discussions on Article 27 of Chapter IV. This approach complements that under the Luxembourg Presidency which dealt with Chapters II, IV (with the exception of Article 27), and V (cf. report to the June Competitiveness Council and set out in document 9350/05 + REV 1 (fr,cs,dk,de,es,fi,it,lt,lv,nl,pl,pt,se)).

II. MAIN RESULTS OF THE WORKING PARTY DISCUSSIONS

Technical discussions in the Working Party have allowed substantial progress to be made. The full results of this work are set out in document 13643/05.

The following summarises the main results of the work on the proposal since 1 July 2005:

a) Scope of the proposal

- Clarification that services of general interest of a non-economic nature (certain public services financed by the State) do not fall within the scope of the proposal, for example, primary and secondary State education.
- Confirmation that the Directive should not affect Member States' right to determine both the organisation and financing of services entrusted with public service missions by the Member States (services of general economic interest), and the specific obligations to which they should be subject.

- Improved provisions to determine clearly how the proposal will interact with other Community legal instruments, including those regulating professional qualifications and network services such as electricity, gas, postal services, and water services. The Presidency believes that this is a significant measure to improve legal certainty for service providers and others who will be affected by the Directive.
- In addition, many Member States wish to see the exclusion of certain other economic activities (see Section V), and a number of Member States wish to see an exclusion for all Services of General Economic Interest (as defined by each Member State in its own territory).

b) Posting of workers and worker protection

- **Workers rights** - New text has been proposed which clarifies the relationship with labour law, in particular to ensure that the proposal does not affect matters covered by the Posting of Workers Directive ¹, and contractual employment rules governed by the so-called Rome Convention (which covers rules determining the applicable law to contracts including employment contracts).
- **Posted workers** - The Commission identified a number of administrative barriers faced by service providers when posting workers to other Member States. Technical discussions have revealed that some Member States consider that such barriers should be dealt with in the context of the Services Directive - and in that light the Presidency has put forward suggestions on a way forward. However, other Member States have serious reservations with this approach and call for the deletion of this section of the proposal.

¹ Directive 96/71 on the Posting of Workers covers: maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, including overtime rates, the conditions of hiring-out workers, in particular the supply of workers by temporary employment undertakings, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people, equality of treatment between men and women and other provisions on non-discrimination. This concerns not only such terms and employment conditions which are laid down by law but also those laid down in collective agreements provided that they are either officially declared or de facto universally applicable within the meaning of the posted workers directive.

c) Free movement of services

- The Working Party has worked extensively on the question of how to create a Directive which facilitates free movement of services. There is broad understanding that the Services Directive should contain substantive provisions in this area to give effect to Treaty freedoms. But the responsibilities and obligations of the home and host country must also be clarified and host Member States need to be able to maintain the ability to pursue legitimate public policy objectives.
- This technical work in the Working Party has resulted in significant clarifications to the provisions on free movement of services, especially with regard to worker protection issues, criminal law and protections in relation to private law for consumers.
- More work remains to be done, *inter alia*, on the interaction with private international law. However, some Member States have registered fundamental reservations about the country of origin principle as set out in the Commission's proposal whereas others support the principle while recognising that further work needs to be done.

III. PROGRESS IN THE EUROPEAN PARLIAMENT

The Internal Market and Consumer Protection Committee's vote was held on 22 November, whilst the European Parliament is expected to adopt its opinion at first reading in the course of January 2006.

The Presidency has maintained close links with the European Parliament. A representative has attended all the formal and ad hoc meetings of the Internal Market and Consumer Protection Committee on the Directive. Based on these contacts and without prejudice to the final outcome of the first reading vote, it is clear that the European Parliament has focused on similar issues to those of the Council.

IV. OVERALL CONCLUSIONS

- The technical work summarised above constitutes significant progress in increasing the quality and comprehensibility of the text. The Presidency believes it is a good basis for future work.
- The new text retains the ambition of removing barriers to cross-border service provision, but permits Member States the freedom, in accordance with the case law, to pursue their legitimate public policy objectives.
- Importantly, the results of the technical work lay the foundations for a Directive which can promote growth and employment and strengthen competitiveness while enabling Member States to retain the core features of their social model. Furthermore, this has been done in a way that acknowledges that effective services of general economic interest have an important role to play in a competitive and dynamic economy.
- With a view to making rapid progress once the European Parliament has given its opinion, the Presidency believes political guidance on next steps is desirable.

V. QUESTIONS FOR THE COUNCIL

Technical discussions have shown that three key issues require political input. These are: the scope; posting of workers and worker protection; and the free movement of services .

Question 1 - Scope

The Working Party has clarified that certain publicly provided and publicly funded services - for example primary and secondary State education - are non-economic activities and therefore are not covered by the Services Directive. In addition, most Member States consider that the scope should be further limited to exclude certain economic activities, as they believe the particular characteristics of these activities make them inappropriate for inclusion in this horizontal instrument.

The Presidency notes that a large majority of Member States wish to remove taxation and gambling services from the scope and has reflected this in its consolidated text. It also notes that a significant majority of Member States wishes to exclude publicly-funded or all healthcare. A number of Member States wish to exclude further sectors such as audio-visual services, social services and notarial services.

Most Member States consider that it is important for legal certainty that there is an agreed list of exclusions valid for all Member States. This would remove the risk that the scope of application of the Directive would be different between Member States. Further work is needed on such exclusions.

Does the Council agree that an approach based on specified and agreed exclusions is the right way forward?

Question 2 - Posting of workers and worker protection

There has been much concern that the country of origin principle and the interaction of the Directive with existing worker protection rules might lead to a lowering of standards in the host Member State. Commissioner McCreevy has confirmed that this was not the Commission's intention. The technical discussions in the Working Party have helped to clarify matters in this regard and removed some misunderstanding.

In particular, new text clarifies the relationship with worker protection law - it ensures that the proposal enables the host country to continue to apply to all workers - national rules on matters covered by the Posting of Workers Directive. The Working Group has also clarified that contractual employment rules governed by the so-called Rome Convention (which covers rules determining the applicable law to contracts including employment contracts) are similarly unaffected by the Directive. Further work needs to be done. In addition there remains a diversity of views on how best to tackle administrative barriers faced by service providers posting workers to other Member States.

Does the Council agree that the Directive should be neutral with regard to worker protection rules? Does the Council agree that further work is required both to clarify the relationship between the Services Directive and existing worker protection rules² as well as to address administrative barriers to the posting of workers?

Question 3 - Provisions on free movement of services

The country of origin principle is designed to give effect to the existing Treaty (Article 49) freedom to provide services. The Working Party has taken an approach based on clarifying the respective rights and obligations of the home and host Member States. There remains more work to be done to further clarify these responsibilities, and to ensure coherence with the jurisprudence. Nevertheless some Member States have expressed concern that the country of origin principle could lead to a lowering of standards in some key areas. However, others have stressed the importance of this principle to ensure free movement of services. A balance clearly needs to be struck.

Does the Council agree that the objective of the Directive should be to further facilitate the free movement of services, whilst maintaining host Member States' ability to pursue legitimate public policy objectives and that further work should be done on this basis?

² The rules set out in footnote 1 and contractual employment rules covered by the Rome convention