

## Draft services directive

### EPSU note on the report adopted on 22 November by the Internal Market and Consumer Protection Committee (IMCO) and SGEI

The EPSU Executive Committee at its meeting on 29/30 November discussed the outcome of the vote in the IMCO Committee on 22 November. The consensus view was that the draft directive is still far from acceptable and that much effort is needed to secure a better result in the plenary vote on 15 February.

The trade union mobilisation in Strasbourg on 14 February (see General circular 18) will be an important way of exerting pressure on the European Parliament but individual contacts with MEPs are also necessary if we are to achieve this.

We will continue to argue for the full exclusion of SGI/SGEI from the scope of the directive.

### Critique of the IMCO text

The IMCO result of 22 November leaves many of the directive's major shortcomings intact:

#### 1 *Economic freedom is paramount*

The primary objective of the directive remains intact; i.e., to facilitate the exercise of freedom of establishment for services providers and the free movement of services by means of the elimination of obstacles (Article 1). Recital 1 now says that this process of eliminating obstacles should take account of other objectives of the Treaty (e.g. on cohesion) and recital 2 calls for a balanced approach etc, but this does not change the logic of the directive, i.e. all obstacles (i.e., regulations) to trade need to be challenged. The directive still supports an implicit hierarchy in freedoms by giving exclusive prominence to the "fundamental" (economic) freedom to provide services across borders (see recital 4) whereas other freedoms, e.g. social rights and collective bargaining are at best excluded, and at worst dismantled. There is no recognition anywhere in the directive that some "obstacles" (such as public service obligations) are necessary, indeed desirable.

Regarding labour law and collective bargaining, the text now says is that the directive is "*without prejudice*" to labour law etc (Article 1). This is certainly an improvement. However, while Article 4(7) says that "*rules laid down by collective agreements shall not be seen as requirements within the meaning of this directive*", this is qualified by recital 7, which says that the role of social partners in regulating services activities should be recognised "*so long as they do not hamper the development of competition between economic operators.*" Furthermore, recital 6 (c) justifies the exclusion of labour law by the fact that there is a specific Treaty base (Article 136) to deal with this rather than because the EU does not consider this an obstacle to trade.

#### 2 *Public services are seen as any other services*

Public services are still covered by the directive. The IMCO committee has only excluded SGI so the text covers all services "*that correspond to an economic activity and are open to competition*" (recital 8(a)), unless they are excluded under Article 2 (scope). Furthermore, the exclusion of SGI (Article 2(a)) is rather disingenuous, as Member States will not be able to determine this: if a service is open to competition it is not a SGI but a SGEI and therefore falls under the scope of the directive. Indeed, by presenting SGI as "non-market" services,

the directive defines SGEI as “market” services (and of course they are not, otherwise they would not be SGEI).

Furthermore, nowhere in the directive does it explain what “*open to competition*” will mean in practice (i.e., how much competition does there have to be and in how big an area? Will local authorities have any say in this or not?) We fear this will lead to greater legal uncertainty, rather than less. Recital 15 clarifies that payment by recipients of services does not necessarily constitute remuneration, which is helpful; but should the uncertainty over economic and non-economic, and over SGI and SGEI, be resolved through the service directive? We do not think so.

### 3 *Administrative simplification yes, but how will it work in practice?*

The text is contradictory on a number of issues: Member States cannot request original copies or certified translation of documents from services providers except in special circumstances, but the IMCO committee has added “*this provision shall not affect the right of Member states to require translations of documents in their own national languages.*” Member States are encouraged to provide information and advice in “*plain and intelligible language*” (Article 7 (2)), for example via the internet (recital 25 (a)) but nothing is mentioned about translations.

Member States cannot limit authorisations to specific parts of their territory, unless objectively justified (Article 10(4)). However, Article 10 (6a) says that this does “*not call into question the allocation of competences, at local or regional level...*”

The text calls for the establishment of single points of contact, to be coordinated by the Commission (article 6(1b)). However, recital 25 says that “*The number of single contact points may vary according to regional or local competences or according to the activities concerned...(they) may be set up not only by administrative authorities but also by chambers of commerce or crafts, ..by professional organisations or by private bodies...*”

Little is said on the resource implications. Indeed, recital 66b simply says it is essential to develop “*clear, legally-binding obligations for Member States to cooperate effectively*”.... This is at odds with the softly-softly approach on quality of services, for example, where Article 31 (5) only asks Member States in cooperation with the Commission to “*encourage the development of voluntary European standards*” (e.g. through codes of conduct).

### 4 *Authorisations and other requirements are seen as “old-fashioned”*

The language underpinning Articles 14 and 15 on abolishing and/or evaluating requirements speaks of coordinating “*the modernisation of national rules and regulations in a manner consistent with the requirements of the internal market...*” Recital 6 also refers to the need for the “*progressive and coordinated modernisation of national regulatory systems*” in order to achieve and internal market in services.

Although the directive says that public interest objectives can justify authorisation procedures (Article 9-13) for example in relation to social services (recital 27(d)) the text also states that the mutual evaluation procedure... “*will make it possible to determine, at Community level, the types of activity for which authorisation schemes should be eliminated*” (recital 27). Again, is it through the services directive that this should be done?

Similarly, although paragraphs 1-4 of Article 15 do not now apply to *legislation* in the field SGEI (recital 33) but the definition of *requirement* in Article 4(7) is wider and so the exemption is not clear.

Furthermore, some of the requirements in Article 15 (e.g. quantitative or territorial restrictions, minimum number of employees, minimum / maximum tariffs) may well be desirable for some commercial services. While Member States may justify such requirements in their evaluation report, they will do so in the context of the directive's objective, which is to place freedom of establishment/freedom to provide services above other considerations. This seems in contradiction to the overall EU objective of sustainable development.

#### 5 *Country of origin principle (COOP), remains intact*

The revised COOP principle in Article 16 (now called "freedom to provide services") is largely similar to the Commission's original text, although Article 17 now provides an exemption to (only) a limited number of SGEI "provided in another Member State". It is not clear how this will work in practice, not least given that SGEI are included in the directive as market services.

It also remains unclear how administration cooperation can be stepped up in light of the country of origin principle that leads to a complicated system between the prerogatives of the country of origin and those of the country of destination. Nor is it clear whether the exclusion of labour law / collective bargaining from the scope of the directive will be enough to prevent the country of origin principle leading to social dumping.

### Conclusion

The IMCO text is not acceptable. It does not take into account the widespread demands, and expectations for a major overhaul of the directive, including as regards its potential impact on public services and public sector. The IMCO amendments only exclude SGEI partially from certain Articles of the directive (and then with limitations). It is not clear at what level these exclusions would apply, e.g. whether local authorities would have any say in this or not.

Regulatory requirements are an integral part of the functioning of SGEI, and indeed the need for requirements increases with the amount of private sector involvement and with obligations regarding compliance with EC rules on state aids as public service compensation. The directive challenges the right of Member States, and local authorities, to regulate public services.

It is not appropriate for the services directive to include SGEI for many reasons, including:

- SGEI depend on regulation in a way that differentiates them from other services
- SGEI are subject to public service obligations that are justified by general interest criteria; such obligations cannot be seen as obstacles to trade
- there is no agreed distinction between SGI and SGEI, nor are there clear definitions, so excluding one and not the other makes little sense
- the objectives of SGEI are interrelated which makes relying on a list of excluded sectors risky
- If SGEI are included in the services directive then it will make EPSU's – and the European Parliament's - call for a positive legal framework for SGI/SGEI more difficult, if not impossible.

Furthermore, improved administrative cooperation (which EPSU supports) demands primarily first and foremost investment in training of public sector workers, human resources (e.g. labour and consumers' protection inspectors), translations, and of course EU standards. These are missing elements in the directive.

Deleted: ¶

Bearing this analysis in mind, contacts with MEPs (and governments) we ask affiliates to:

- continue to press for the general exclusion of SGI and SGEI from the directive (and not just SGI as agreed by IMCO). This means strengthening our arguments about why you cannot split SGI from SGEI and getting more support from the EPP in particular; and
- ensure that the exclusion of healthcare (agreed by IMCO) is maintained and that in addition, there is an explicit exclusion for social services, as well as for water and waste; and also to ensure a general exclusion of SGEI from Article 16 (not just those sectors listed).
- support the ETUC position on other elements of the directive (country of origin, labour law/collective bargaining...).

10.1.06