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STATEMENT OF THE COUNCIL'S REASONS

Subject : Common position adopted by the Council on [.....] with a view to adopting a Directive of the European Parliament and of the Council on Services in the Internal Market

COMMON GUIDELINES

Consultation deadline for Bulgaria and Romania: 24.07.2006

STATEMENT OF THE COUNCIL'S REASONS

I. INTRODUCTION

1. The Commission adopted its original proposal¹ on 13 January 2004 with the aim to provide a legal framework that would eliminate the obstacles to the freedom of establishment for service providers and the free movement of services between the Member States, giving both providers and recipients of services the legal certainty they need in order to exercise these two fundamental freedoms enshrined in the Treaty. The Proposal was examined and discussed extensively in the Council and its preparatory bodies under successive Presidencies.
2. The Committee of the Regions delivered its Opinion on 30 September 2004².
3. The European Economic and Social Committee delivered its Opinion on 10 February 2005³.
4. The European Parliament adopted its Opinion at first reading on 16 February 2006.
5. The Commission adopted its amended proposal on 4 April 2006. The amended proposal builds to a large extent on Parliament's Opinion and on discussions held in the Council.
6. On 29 May 2006, the Council (Competitiveness) reached a political agreement, with the abstention of Belgium and Lithuania, on a compromise text with a view to adopting its common position.
7. The Council adopted its common position in accordance with Article 251 of the EC Treaty on [...]

¹ COM(2004) 0002.

² OJ C 43, 18.2.2005, p. 18.

³ OJ C 221, 8.9.2005, p 113.

II. OBJECTIVES

The objectives of the draft Directive are:

- To improve the basis for economic growth and employment in the EU.
- To achieve a genuine internal market in services by removing legal and administrative barriers to the development and exercise of service activities.
- To strengthen the rights of recipients of services.
- To establish legally binding obligations for effective administrative co-operation between Member States.

III. COMMON POSITION

The common position adopted by the Council reflects to a considerable degree the opinion of the European Parliament at first reading. Most of Parliament's amendments were already incorporated in the Commission's amended proposal, key elements of which have been incorporated in the common position. Thus, a substantial number of Parliament's amendments have been reflected either in full or in part in the common position. The common position also contains a certain number of new provisions, which the Council considers to be essential in ensuring an efficient implementation of the Directive and contributing to the proper functioning of the internal market.

All modifications to the Commission's amended proposal introduced by the Council in its common position have been accepted by the Commission.

Analysis of the Common Position

General provisions (Articles 1-4)

Specific areas of law (Article 1)

As regards the subject-matter of the Directive and its relationship with specific areas of law (fundamental rights, labour law, criminal law, the protection or promotion of cultural and linguistic diversity and media pluralism) the common position largely reflects Parliament's amendments (7, 8, 9, 290, 291, 297, 298, 299, relevant part of 72). A new recital 10 is added to clarify a number of rules of a general character that are independent from the access to or the exercise of a service activity. A number of minor drafting changes in Article 1 aim at making its content more explicit and unambiguous.

Scope of application (Article 2)

In its common position, the Council has consolidated and further clarified the scope of application of the Directive, taking account to a very large extent of the amendments adopted by Parliament at its first reading. More precisely, the common position reflects the content of Parliament's amendments (in particular Amendments 10, 13, 14, 15, 16, 17, 18, 19, 20, 44, 20, 70, 71, 73, 74, 78, 79, 80, 81, 82, 205, 206, 207, 208, 211, 212, 213, 232, 233, 252, 294, 295, 296, 300, 302/332, 302/333, 304, 305, 306, 403 and relevant parts of Amendments 72 and 289).

In Article 2(2)(a) the addition of the word 'non-economic' serves to clarify the term 'services of general interest' which is not always used in a uniform manner by the Member States. Other rewording in Article 2(2) (c), (f) and (i) aims at clarification and at meeting various concerns expressed by Member States.

As far as the exclusion of social services concerned, in Article 2(2)(j) the common position refers to social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State. The Council also added a new sentence in Recital 28 stressing that the Directive should not affect the principle of universal service in Member States' social services.

The Council is not in a position to accept Amendment 75, since Recital 20 already contains the relevant explanation of telecommunications services. Amendment 77 on the exclusion of legal services is not taken on board given that Article 3 already provides that in case of a conflict between the provisions of the Services Directive and a provision of another Community instrument governing specific aspects of the services activity the provision of the latter will prevail.

Relationship between the Directive and other provisions of Community law (Article 3)

The common position follows the approach of Parliament's amendments 21, 83, 219, 307 subject to minor redrafting in order to clearly state that in the event of a conflict with other relevant Community instruments, the relevant provisions of those instruments shall prevail. Article 3(1) contains an indicative list of such Community instruments. The common position also stresses in Article 3(2) that the Directive does not concern rules of private international law, and in particular not those which guarantee that consumers benefit from the protection granted by the consumer legislation in force in the Member States.

Definitions (Article 4)

The common position reflects the amendments 1-3, 5-6, 11, 23-26, 93-94, and 97-98 subject to minor redrafting, 39, 84, 88 to 90, 95 and 308, in principle, but redrafted in order to make the text consistent with existing Community legislation or with the scope of the Directive.

In addition, the common position has completed Recitals 37 and 40 and added a new Recital 38. The Council has not taken on board amendments 4, 85 and 86 on definitions of 'service' and 'public service obligations'. Amendment 96, on the definition of "worker", is considered redundant in relation to the re-defined scope of application and is therefore not incorporated in the common position. Amendment 92, with regard to the notion of "competent authorities", and amendment 87, on the notion of "provider" are not taken on board for reasons of coherence with other relevant Community legislation. Finally, the common position does not take on board amendment 22, deleting the list of services covered by the Directive contained in Recital 33, which is reinstated, with minor drafting modifications in order to reflect the amended scope of application.

Administrative simplification (Articles 5-8)

The common position largely reflects the relevant amendments of the European Parliament (27, 29-30, 31, 32, 33, 99, relevant parts of amendment 100, 104, 105-106 and 108-111, 309). In Article 6 (1), by using the preposition "through" instead of "at", the Council seeks to clarify that the role of the points of single contact may be limited to acting as an intermediary between the service provider and the competent authorities.

The common position provides that the establishment of European forms will be carried out according to the comitology procedure and adds a new Recital 45 which suggests a number of considerations that Member States may take into account while examining the need for simplifying procedures and formalities.

The Council has not been able to take on board certain amendments, which are considered not to be in line with the Council's approach, such as amendment 102 since pro forma registration with the points of single contact would be an unnecessary administrative burden, or amendment 103, because a European point of single contact would represent an unnecessary administrative structure and would be contrary to the principle of subsidiarity.

Amendment 310 has not been taken on board since a reference to the supervision of compliance with Directive 96/71/EC, which is not affected by the present proposal, is not considered to be appropriate.

The common position does not incorporate amendment 107 since it would remove the obligation to provide information by electronic means, which is an essential tool for administrative simplification, amendment 111, apart from the revised timetable, or amendment 32 because electronic procedures are an essential measure of administrative simplification and can also be used for original documentation since proof of authenticity can be provided by electronic means.

Freedom of establishment for providers (Articles 9-15)

The common position reflects amendments 34, 35, 36, 37, 38, 40, 41, 42, 112-113, 115 and 117, 118-122, 124-127, 128 and 129, part of amendments 30 and 130, 131-133 and 136-137, 138, 140, 141, 142 and 143, 144-145, 146, 147-149, 150 and 242. Minor drafting changes were considered necessary in some cases for reasons of clarity and the Council believes that the substance of the European Parliament's amendments is not affected.

In Article 14(6) it is added that the prohibition of consultation of competing operators does not concern consultation of the public at large and in Article 14(7) a Member State may require either insurance or financial guarantees, although there is no such obligation for a provider established in that Member State.

The common position does not take on board amendments 134 and 28 because tacit authorisation (in the absence of a reply from the authorities) is key to facilitating the freedom of establishment, nor amendment 135, because this would create an additional burden for the applicants and render judicial review more difficult. In Article 13, the common position introduces some changes in paragraphs 3 and 4 and Recital 63 on tacit authorisation, in particular by allowing Member States to apply a time extension for the procedure when this is

justified by the complexity of the issue, and provided that the applicant is duly informed of the extension and of the reasons therefore. This aims at making authorisation schemes transparent and duly accessible to economic operators, without depriving national administrations of a certain margin of appreciation. An addition is made in Recital 63 to explain that the possibility for Member States to put in place different arrangements for authorisation procedures where justified by overriding reasons relating to the public interest can include rules providing that in the absence of a response within a certain time period the application is deemed to have been rejected and that such tacit rejection is open to challenge before the courts.

In Article 15(4), the common position introduces some changes concerning the application of the evaluation process to services of general economic interest (SGEI), aiming at clarifying that the evaluation mechanism provided for should not obstruct the performance of tasks assigned to services of general economic interest and at meeting concerns of the European Parliament which preferred a total exclusion of SGEI from the evaluation process. The common position contains a wording in Article 15(6) and (7) the purpose of which is to lighten the burden of Member States from the obligations under this Article and to meet concerns by the European Parliament which wanted to go further by deleting the notification obligation. In particular, the common position deletes from paragraph 6 the phrase "and the need for it arises from new circumstances". In paragraph 7, the common position adds, for the purposes of legal certainty, a sentence explaining that the notification in accordance with Directive 98/34/EC will also fulfil the obligation of notification under this Directive.

The Council has not taken on board amendments 116 and 209 because the obligation to evaluate and report on authorisation schemes is an essential measure for facilitating the access to and the exercise of service activities. However, the common position specifies in a new Recital 58 that the reporting obligation concerns only the existence of authorisation schemes and not the criteria and conditions for the granting of an authorisation. The Council cannot accept amendment 114, considering that it would make the text less clear.

Amendment 120 proposes a new Recital 61, which has been included in the common position for the purpose of clarifying that the requirement of non-duplication does not prevent Member States from applying their own conditions but merely require them to take into account equivalent conditions already fulfilled by the provider in another Member State. In addition, the common position reflects the substance of amendment 121, but with a different wording. However, the common position does not include amendment 122 because if decisions to grant an authorisation were to be excluded from the obligation to state reasons, judicial review administrative decisions, in particular for third parties, would become less effective or even virtually impossible. Likewise, the common position does not take on board amendment 151, because deletion of the notification obligations would seriously affect the evaluation process.

Freedom to provide services and related derogations (Articles 16-18)

Concerning the freedom to provide services (Article 16) the common position fully reflects the European Parliament's amendments (45 to 47, 152 and 293/rev4). A new Recital 82 is added to clarify the application of Member States' rules on employment conditions.

Concerning the additional derogations from the freedom to provide services (Article 17) the Common Position takes on board the amendments of Parliament (53, 48, 50, 51, 54, 161, 162, 163, 165, 169, 170, 171, 172, 173, 174 and 175, 400, 404) with a minor change in paragraph 12 on the shipment of waste. Article 18 of the original proposal on transitional derogations has been deleted in line with the relevant Parliament amendment.

Amendments 164, 167 and 168 are not considered relevant following the changes in Article 16. The Council has not taken on board amendment 176, because the case-by-case derogations relating to the exercise of a health profession, the public health and to public policy are redundant as a result of the exclusion of health services from the scope of application and the new wording of Article 16.

Rights of recipients of services (Articles 19-21)

Regarding the rights of recipients of services, the Common Position largely reflects the corresponding Parliament amendments (178, 180, 247, 55 partly) with minor changes or additions.

However, the Council is not in a position to accept the addition of the word 'solely' (amendment 177) to the non discrimination clause set out in Article 20, since this could be interpreted as allowing discrimination if based on other grounds. Amendment 179, providing for a new Article 22a, cannot be taken on board since the Chapter on administrative simplification contains sufficient details on the role of the points of single contact. Concerning the reimbursement of costs for healthcare received in another Member State (Article 23 of the original proposal), the common position takes on board amendments 56 to 62 and 180/247, deleting Article 23 and corresponding recitals.

As far as the provisions on posting of workers and posting of third country nationals (Articles 24 and 25 of the original proposal) are concerned, the common position follows the approach of Parliament (amendments 181, 182/248, 63-64, 183/249 and 65-66) and deletes Articles 24 and 25 of the original proposal.

Quality of services (Articles 22-27)

Regarding the provisions related to the quality of services, the common position largely reflects the approach of Parliament (amendments 64, 67, 185, 187, 188, 190, 194, 195, 196). For reasons of clarity, Article 22 regroups all information requirements provided for in other parts of the Directive. Article 23 of the common position confirms that professional liability insurance is not mandatory. The procedure in case of failure in the insurance market is not included, it being unnecessary since the professional liability insurance is not mandatory anymore.

The common position does not incorporate amendments 184 and 186 since they would create an unnecessary burden on service providers. Nor is amendment 191 taken on board because the relevant information on after-sales guarantees must be provided to recipients by service providers. Amendment 192 cannot be accepted since the link with other Community legislation on after-sales guarantees has to be explicitly mentioned. The common position does not take on board amendments 193 and 210 because the Council believes that the obligation to evaluate and report on restrictions on multidisciplinary activities is an essential measure for facilitating access to, and exercise of, service activities.

Administrative cooperation (Articles 28-36)

The common position reflects fully or the spirit of the corresponding amendments of the European Parliament (in particular amendments 68-69, 197-198, 200-203) but with some restructuring, which has been necessary following the new structure of the Chapter on the freedom to provide services.

Convergence programme and final provisions (Articles 37-46)

The common position incorporates, with minor redrafting, Parliament's amendments (in particular amendments 70, 71, 205, 206, 207, 208, 211, 212, 213). A new Recital 114 is added to describe the objective of the codes of conduct.

An important element introduced by the common position in Article 39(5), is a process by which Member States shall present a report to the Commission on national requirements whose application could fall under Article 16(1) third sub-paragraph and Article 16(3). The Commission shall communicate these requirements to other Member States and provide analyses and orientations on their application in the context of the Directive. The Council considers that this provision, which is a key element of the overall balance of the agreed text,

creates an efficient system of monitoring national legislation that may constitute an obstacle to the freedom to provide services. Although under certain circumstances this obligation could create some initial burden for national administrations, it would nevertheless minimise administrative burden and costs for service providers and by helping Member States to identify existing obstacles it would facilitate the implementation of the Directive.

In Article 40, the common position introduces a regulatory committee. The common position introduces a new Article 43 on the protection of personal data. In Article 44(1), the common position takes on board the Parliament's amendment and extends the implementation period to 3 years. The common position also contains a new recital encouraging Member States to draw up tables to illustrate the correlation between the Directive and the transposition measures.

IV. CONCLUSION

The Council considers that its common position, which is the result of extensive preparatory work and negotiations since 2004 and which is fully supported by the Commission, is well in line with the objectives of the proposed Directive. Thus, the common position seeks to establish a well defined legal framework, which would enhance for both providers and recipients of services the legal certainty and the ability to exercise the fundamental freedoms enshrined in the Treaty.

The Council has taken due account of Parliament's Opinion at first reading and of the Commission's amended proposal. It notes that there is a significant convergence of positions between the three Institutions, in particular as regards the fundamental provisions of the draft Directive. This convergence is well reflected in the common position.