



COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 25.07.2006
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2004/0001 (COD)

**COMMUNICATION FROM THE COMMISSION
TO THE EUROPEAN PARLIAMENT**

pursuant to the second subparagraph of Article 251 (2) of the EC Treaty

concerning the

**common position of the Council on the adoption of a Directive of the European
Parliament and of the Council on Services in the Internal Market**

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1. BACKGROUND

Proposal transmitted to the European Parliament and the Council 06.02.2004
(document COM(2004)2 final – 2004/0001(COD) on:

European Economic and Social Committee opinion delivered on: 09.02.2005

Committee of the Regions opinion delivered on: 29.09.2004

European Parliament opinion (first reading) delivered on: 16.02.2006

Amended proposal transmitted on: 06.04.2006

Common position adopted with qualified majority on: 24.07.2006

2. AIM OF THE COMMISSION PROPOSAL

The Commission proposal aims at:

- improving the basis for economic growth and employment in the EU;
- achieving a genuine Internal Market in services by removing legal and administrative barriers to the development of service activities;
- strengthening the rights of consumers as users of services;
- establishing legally-binding obligations for effective administrative co-operation between Member States.

3. COMMENTS ON THE COMMON POSITION

3.1. General comments

The common position adopted by the Council retains indeed the essence of the Commission's amended proposal which, in turn, incorporated a large majority of the amendments adopted by the European Parliament in its first reading. Furthermore, as regards the key elements of the proposal (notably the exclusions from the scope of application and the provisions dealing with

the freedom to provide services) the Council's common position has respected the political agreement reached by the European Parliament, which is reflected now in the common position, as it was indeed in the Commission's amended proposal.

Overall, the common position incorporates, either fully or in spirit, all of the European Parliament's amendments which were accepted by the Commission at the Plenary. In respect of some other issues, it meets the concerns expressed in the European Parliament's amendments and finds solutions to these concerns, although the drafting may be different. Finally, the common position also contains a number of additional new provisions that will enhance transparency and cooperation between Member States and the Commission, which may be instrumental in ensuring proper implementation of the Directive.

The main aspects of the common position are commented on in detail below. Firstly, those which respond to the European Parliament's amendments are addressed. These constitute the majority since both the Commission's amended proposal and the Council's common position have taken on board the majority of the European Parliament's amendments. Secondly, other issues added by the Council in its common position are set out.

3.2. Aspects of the common position responding to the European Parliament's amendments

3.2.1. Scope of application and other general provisions (Articles 1-4)

Specific areas of law (Article 1). Concerning 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 incorporates the substance of the European Parliament's amendments (7, 8, 290, 291, 297, 298, 299, relevant part of 72) and of the amended proposal with some drafting adjustments which are accepted by the Commission as they aim at improving the text without changing the substance of the vote in the European Parliament or of the Commission's amended proposal.

Scope of application (Article 2). With regard to the scope of application of the Directive, the common position takes account to a great extent of the amendments adopted by the European Parliament in its first reading. Concerning **services of general interest** the common position fully reflects the content of the amendments of the European Parliament (see in particular amendments 13, 44, 73 and relevant parts of amendments 72 and 289) and, in comparison to the amended proposal, it further clarifies in the text of Article 2 that non-economic services of general interest fall outside the scope of the Directive. In relation to **transport services and port services** the common position confirms the exclusion of all transport services, including port services, as adopted in the European Parliament's amendments 20 and 306. In comparison to the amended proposal, the wording of the exclusion for transport services was slightly modified to bring it into line with the wording of Article 51 of the Treaty and it was merged with the exclusion of port services. This does not change the substance of the provision and is therefore accepted by the Commission. As regards **audiovisual services** the substance of the European Parliament's amendments 19 and 79 is reflected in the common position. The common position slightly redrafts the relevant text in Article 2 of the amended proposal to clarify that the exclusion of audiovisual services covers cinematographic services; this is accepted by the Commission. Relating to the exclusion of **social services**, European Parliament's amendments (see amendments 252, 294, 295 and 296) have also been taken into account in the common position. Compared to the Commission's amended proposal the

common position further clarifies that services provided by charities are also covered by the exclusion; the Commission accepts this text because it is of the opinion that the definition contained in the common position will improve the legal certainty as far as the exclusion of social services is concerned. Compared to the Commission's amended proposal the common position further adds exclusions concerning ***services provided by notaries and bailiffs who are appointed by an official act of government***. This exclusion is essentially in line with the European Parliament's amendments 18 and 81 and it is accepted by the Commission. Finally, the common position has confirmed the exclusion of ***services of temporary work agencies, health services, gambling activities, private security services and taxation*** from the scope of application of the Directive as provided for by the European Parliament's amendments (see in particular 17, 19, 78, 80, 82, 300, 302/332, 304) as well as by the Commission's amended proposal.

Relationship of the Directive with other provisions of Community law (Article 3). The common position follows the approach of the European Parliament's amendments (21, 83, 219, 307) and of the amended proposal and therefore clearly states that the Directive does not affect other Community instruments and that, in the event of a conflict with other Community instruments governing specific aspects of access to and exercise of a services activity, the provisions on those specific aspects in such instruments shall prevail. Furthermore, the common position also confirms that the Directive does not concern rules of private international law, in particular those which guarantee that consumers benefit from the protection granted to them by the consumer protection rules laid down in the consumer legislation in force in their Member States.

Definitions (Article 4). The common position reflects the amendments of the European Parliament (1-3, 5-6, 11, 25-26, 93-94, and 97-98) and the text of the amended proposal concerning the definition of terms used in the Directive.

3.2.2. Administrative simplification (Articles 5-8)

Simplification of procedures (Article 5). The common position integrates the amendments of the European Parliament (see amendments 27, 29-30, 99; relevant part of amendment 100) as endorsed by the amended proposal, subject to minor redrafting. Thus, a new sentence in paragraph 1 makes it clear that Member States' obligation to simplify their procedures and formalities will arise when, upon examination, these appear to be "not sufficiently simple". This addition can be accepted by the Commission.

Points of single contact (Article 6). The common position essentially endorses the text of the amended proposal, based on the relevant amendments (104 and 309) of the European Parliament. By changing the preposition "at" to "through" in paragraph 1, it further clarifies that the role of the points of single contact may be limited to acting as an intermediary between the service provider and the competent authority/ies. This clarification can be accepted by the Commission.

Right to information (Article 7). The common position integrates the amendments of the European Parliament (31, 33, 105-106 and 108-110) accepted in the amended proposal, subject to minor redrafting relating to the non-interference of the Directive with Member States' legislation on the use of languages.

Procedures by electronic means (Article 8). The common position integrates the text of the amended proposal, which drew on the European Parliament's amendments (relevant parts of amendment 32 and 111). The common position clarifies in Recital 52 that the obligation to

provide for procedures by electronic means does not prevent Member States from offering other means, in addition to electronic ones, to complete procedures and formalities. In addition, the common position extends the possibility to apply non-electronic procedures to cases where it is necessary to vet the personal integrity of the provider or his responsible staff. Lastly, the common position provides in paragraph 3 that rules designed to facilitate interoperability must take into account "common standards developed at Community level". These changes can be accepted by the Commission, as they improve the text.

3.2.3. Freedom of establishment for providers (Articles 9-15)

Authorisation schemes (Article 9). The common position integrates the text of the amended proposal (which had incorporated amendments 35 and 112-113 and, partially, amendments 37, 115 and 117), subject to minor drafting changes in paragraph 3. The Commission can accept this modification, since it enhances the clarity of the text without altering the substance of the European Parliament's amendment.

Conditions for granting of authorisation (Article 10). The common position integrates the text of the amended proposal, partially based on the European Parliament's amendments (amendments 34, 118, 119, 120, 121, 122), subject to minor drafting changes. Unlike the amended proposal (which had endorsed the European Parliament's amendment 120), the common position does not provide in paragraph 3 that Member States, when assessing whether conditions for granting authorisations in another Member State are equivalent or essentially comparable, shall consider the effect and effectiveness of their enforcement. This deletion is acceptable to the Commission because the sentence gave rise to concerns relating to its practicability. Finally, the common position specifies in paragraph 6 that decisions granting an authorisation need not be reasoned or open to challenge before the courts; this is in line with amendment 122 of the European Parliament, which had not been integrated into the amended proposal. The Commission can accept this addition.

Duration of authorisation (Article 11). Selection from among several candidates (Article 12). The common position integrates the text of the amended proposal, largely based on the European Parliament's amendments (36, 38, 124-127, 128 and 129; part of amendments 30 and 130).

Prohibited requirements (Article 14). The common position integrates the text of the amended proposal, chiefly based on the European Parliament's amendments (41, 138, 140 and 141, 40, 142 and 143), with additions in paragraph 6 (the ban on consultation of competing operators does not concern consultation of the public at large) and in paragraph 7 (insurance is equated with financial guarantees: Member States may still impose either one of those, as long as there is no obligation to take them out from a provider established in that Member State). The Commission can accept these additions as they improve the clarity of the text.

Requirements to be evaluated (Article 15). The common position follows the approach of the amended proposal and the European Parliament's amendments (42, 144-145, 147-149 and 242; 146 and 150) endorsed by it, while making some changes in the provision (see below, § 3.3).

3.2.4. *Freedom to provide services and derogations (Articles 16-18, corresponding to Articles 16-19 in the Commission's amended proposal)*

As regards the provision on the ***freedom to provide services (Article 16)*** the common position fully reflects the European Parliament's amendments (see amendments 45 to 47, 152 and 293/rev4) which were incorporated into the Commission's amended proposal, and adds a new recital (82) containing clarifications on the application of Member States' rules on employment conditions. Concerning the related ***additional derogations (Article 17)*** the common position also reflects the amendments of the European Parliament (53, 48, 50, 51, 54, 161, 162, 163, 165, 169, 170, 171, 172, 173, 174 and 175, 400, 404) and integrates the text of the amended proposal with a minor redrafting in paragraph 12 as regards shipment of waste. The provision on ***transitional derogations (Article 18 of the Commission's original proposal)*** has been deleted in line with the European Parliament's vote in first reading and with the Commission amended proposal. Finally, the common position confirms the text of the amended proposal with regard to ***case-by-case derogations (Article 18, corresponding to Article 19 of the Commission's amended proposal)***.

3.2.5. *Rights of recipients of services (Articles 19-21, corresponding to Articles 20-23 in the Commission's amended proposal)*

Concerning the ***rights of recipients of services (Articles 19-21)*** the common position reflects to a very large extent the amendment adopted by the European Parliament as well as the Commission amended proposal. More specifically, as regards the provisions on ***prohibited restrictions and non-discrimination (Articles 19-20)*** the common position confirms the text of the amended proposal apart from the deletion of paragraph c) which is accepted by the Commission. On ***assistance for recipients (Article 21)*** the common position reflects, with minor changes, the European Parliament's amendment 178 and the amended proposal. Finally, the common position follows fully the approach of the European Parliament and of the amended proposal and confirms the deletion of the provisions on the ***reimbursement of healthcare received in another Member State*** which were contained in Article 23 of the original proposal.

3.2.6. *Posting of workers and of third country nationals (Articles 24 and 25 of the original proposal)*

The common position follows the approach of the European Parliament (amendments 181, 182/248, 63-64, 183/249 and 65-66) and of the amended proposal and thus confirms the deletion of Articles 24 and 25.

3.2.7. *Quality of services (Articles 22-27, corresponding to Articles 26-32 in the Commission's amended proposal)*

Concerning the provision on ***information on providers and their services (Article 22, former Article 26 of the Commission's amended proposal)***, the common position reflects the European Parliament's vote as well as the amended proposal as regards the obligation for the provider to disclose information on its legal status and form. Furthermore all information requirements which were already required by other provisions of the Directive (such as on insurance or guarantees, after-sales guarantees, multidisciplinary activities and codes of conduct) are grouped together in this article, which is accepted by the Commission. On professional liability insurance (Article 23, former Article 27 of the Commission's amended

proposal), the common position follows the approach of the European Parliament (see in particular amendments 64, 187, 188 and 190) and of the amended proposal and confirms that professional insurance is not mandatory. The common position inserts a number of minor changes to the amended proposal such as the transfer of paragraph 2 on information requirements to Article 26 and the deletion of the procedure in the case of failure in the insurance market, which was in fact redundant given the non mandatory character of the professional insurance. Finally, in relation to provisions on multidisciplinary activities (Article 25, former Article 30 of the Commission's amended proposal), policy on quality of services (Article 26, former Article 31) and settlement of disputes (Article 27, former Article 32) the common position confirms in full, with only minor drafting adjustments, the texts of the European Parliament's amendment and of the amended proposal.

3.2.8. *Administrative cooperation (Articles 28-36, corresponding to Articles 33-38 in the Commission's amended proposal)*

Mutual assistance, supervision and related provisions (Articles 28-36). The common position integrates with very minor changes the text of the amended proposal which itself had incorporated the amendments of the European Parliament (see in particular amendments 68-69, 197-198, 200-203) although it used a different structure based on previous discussions in the Council.

3.2.9. *Convergence programme and final provisions (Articles 37-46, corresponding to Articles 39-48 in the Commission's amended proposal)*

With regard to codes of conduct (Article 37, former Article 39 in the Commission's amended proposal), additional harmonisation (Article 38, former Article 40), and the review clause (Article 41, former Article 43), the common position confirms, with minor changes that do not affect the substance of these provisions, the European Parliament's amendments and the amended proposal. Finally, concerning the implementation period (Article 44 (1), former Article 45(1)), the common position incorporates the European Parliament's amendment and extends the implementation period to 3 years, instead of the 2 years which were envisaged in the amended proposal. This can be accepted by the Commission.

3.3. Other elements introduced by the Council in the common position

Authorisation procedures (Article 13). In comparison to the amended proposal, the common position makes some changes to paragraphs 3 and 4 of Article 13 and in Recital 63, which relate to the principle that authorisations are deemed to have been granted in the absence of a response by competent authorities. According to the common position Member States are allowed to extend the deadline for the reply 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 thereof. Furthermore, recital 63 explains that different arrangements for authorisation procedures that can be put in place by Member States, when objectively justified by overriding reasons relating to the public interest, may include rules providing for tacit rejection of the request upon expiry of the relevant time period. These changes should also meet concerns of the European Parliament which had voted for the deletion of the principle of tacit authorisations since this principle was considered as not allowing for sufficient flexibility. At the same time the aim of ensuring that authorisation procedures became more rapid and more predictable for economic operators will not be prejudiced. Therefore the Commission accepts the changes made to Article 13 in the common position.

Evaluation process relating to the freedom of establishment (Article 15). The common position makes some changes to paragraph 4 concerning the implication of the evaluation process for services of general economic interest. These modifications aim to clarify that the evaluation process should not obstruct the performance of tasks assigned to services of general economic interest. This should meet the concerns of the European Parliament concerning the potential effect of the evaluation process on SGEI. In the Commission's view it is clear that the evaluation process should not put at risk the performance of tasks of SGEI. The common position furthermore introduces changes with respect to notification requirements for Member States. This should address concerns of the European Parliament which considered the notification obligation as being too restrictive for Member States. In particular, the common position deletes from paragraph 6 the phrase "and the need for it arises from new circumstances". This deletion can be accepted. In paragraph 7, the common position adds a new sentence to explain that notification in accordance with Directive 98/34/EC will also fulfil the obligation of notification under this Directive. The Commission can also accept this insertion, which provides enhanced legal certainty for the national administrations and Community institutions alike. The Commission underlines that only information society services are currently covered by Directive 98/34/EC, as modified by Directive 98/48/EC.

Screening of national requirements (Article 39, corresponding to Article 41 in the Commission's amended proposal). The common position provides, in Article 39 (5), for a new procedure by which Member States shall present a report to the Commission on national requirements the application of which could fall under Article 16(1) third sub-paragraph and Article 16(3) and 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 Commission can accept these provisions since they increase transparency and legal certainty for economic operators.

Comitology (Article 40, corresponding to Article 42 of the Commission's amended proposal). The common position provides for a regulatory committee. The Commission can accept this provision.

Protection of personal data (Article 43). The common position inserts an Article on the protection of personal data which seeks to clarify that the application of the Directive and in particular the exchange of information between Member States shall respect rules on personal data. The Commission can accept this provision

4. CONCLUSIONS

The Commission takes the view that the common position retains the key elements of the Commission's modified proposal as well as those of the European Parliaments amendments. The Commission finds that the common position strikes a good balance and constitutes a viable compromise that will help achieving a genuine Internal Market in services as well as realising the objectives of the Lisbon strategy while respecting a high quality of services, including public services, social and consumer rights. The Commission therefore supports the common position adopted by the Council.