EUROPEAN TRADE UNION CONFEDERATION (ETUC)

ETUC DEMANDS MAJOR CHANGES TO THE DRAFT DIRECTIVE ON SERVICES IN THE INTERNAL MARKET

The voice of 60 millions workers

INTRODUCTION

In the framework of the strategy to complete the internal market in services, the European Commission has published a proposal for a directive on services [1]. This proposal has stimulated many discussions. The European Trade Union Confederation (ETUC) wishes to contribute to this debate by presenting the ETUC's view of the Commission's main arguments.

The ETUC acknowledges the possible potential for job creation in many service sectors across Europe. It recognises efforts in the Commission's draft directive to improve the efficiency of the internal market through reducing administrative costs and simplifying procedures for service providers [2].

The ETUC is gravely concerned about some of the main provisions in the European Commission's draft directive on services in the internal market. It warns that they could speed up deregulation, seriously erode workers' rights and protection and damage the supply of essential services – like health care – to European citizens.

[1] Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on services in the internal market - COM(2004) 2 final/3 - 5.3.2004

[2] ETUCs Resolution on the Service Directive adopted by the Executive Committee in Brussels on 17-18 March 2004. Available at: http://www.etuc.org

SUMMARY

1. The social dimension of the Lisbon Strategy is largely missing:
   a serious and adequate impact assessment is necessary

2. Freedom of Establishment:
   Member States need effective instruments to protect citizens and workers

3. Country of Origin Principle:
   danger of the race to the bottom

4. Labour Law and Collective Agreements:
   no obstacles, but essential ingredients of Social Europe

5. Posting of Workers:
   implementation and enforcement in the country where work is performed is essential

6. Services of General Interest:
   no priority for market forces

1 THE SOCIAL DIMENSION OF THE LISBON STRATEGY IS LARGELY MISSING: A SERIOUS AND ADEQUATE IMPACT ASSESSMENT IS NECESSARY

European Commission (EC): *The aim of the directive is to promote a genuine internal market in services. It is necessary in order to reach the objectives launched by the Lisbon European Council in 2000 with a view to making the EU the most competitive and dynamic knowledge-based economy in the world by 2010.*

European Trade Union Confederation (ETUC): The ETUC regrets that the Commission has adopted a unilateral approach to the Lisbon Strategy. The Lisbon Strategy is based on three pillars, linking economic reform with promoting sustainable economic growth, better quality jobs and social cohesion. The social dimension is largely missing from the directive.

An internal market in services is an integral part of the EU common market. However, to work well, markets need to be based on clear rules that promote high standards and acceptable minimum quality standards that consumers can trust. Therefore, it is absolutely essential that sufficient protective measures are written into the directive to ensure that it would not generate uncertainty, transferring risk from economic activity to consumers and workers.

There is no serious impact assessment. In fact, the Extended Impact Assessment [3] is inconsistent and unclear. On the one hand, it recognises that it is very difficult, if not impossible, to provide a reliable global estimate of the effect of barriers to services on the EU economy, while on the other, it states that millions of jobs will be created.

The evaluation should make a comprehensive analysis focused on the issue of job creation and better quality jobs within the EU. It is important that the potential benefits of the directive are not exaggerated. It is highly questionable, for example, whether the directive would bring any benefits with regard to health services. As currently organised, they are already successful in creating employment, and in many cases skilled and high-paying jobs [4]. If this is already happening, why risk undermining it by introducing a measure that could create a race to the bottom? This success could be reinforced not by increasing competition, but by investing in training and increasing support from public spending.

The ETUC is demanding an in-depth study of the social impact on workers, employers and service recipients, taking into account the views of European trade unions, something which is considered to be especially necessary due to the lack of consultation before the draft was presented.

[3] Commission Staff Working Paper. COM (2004) 2 final.

[4] "Employment in Europe 2004" report published by European Commission - DG Employment and Social Affairs, 2004.

2 FREEDOM OF ESTABLISHMENT: MEMBER STATES NEED EFFECTIVE INSTRUMENTS TO PROTECT CITIZENS AND WORKERS

EC: *The proposal will help to reduce red tape by simplifying administrative procedures and formalities. Authorisation procedures would be screened and, when unjustified, removed. Member States will have to abolish a number of restrictions on establishment such as nationality requirements and "economic need tests"* [5].

ETUC: The directive creates obstacles to Member States' ability to deal with quality and prevention.

Legal certainty and a level playing field are normally achieved by laying down common rules and equal standards. The European Commission should try to bring forward basic harmonisation, as it did for the establishment of the internal market. This is precisely what is missing in the draft.

Removing unjustified barriers should not mean that justified barriers also have to be abolished. **There is a need to lay down minimum standards or common standards for the principal issues in order to safeguard the public interest, workers' rights and protection**. Member States should remain free to regulate services within their territory according to nationally determined priorities, as long as regulations are not discriminatory. Such requirements are essential to ensure social cohesion and service quality.

If Member States are allowed under Community law to apply authorisation schemes or other measures and instruments to national service providers, but are not allowed to apply them to foreign service providers wishing to establish themselves on their territory, the end result is unfair competition, and an indirect attack on the continuation of these national instruments.

National systems for health and safety protection are in danger

In the view of the ETUC, the proposal will lead to an intolerable reduction in Member States' capacity to adopt guarantees on quality and safety [6]**.** Health and safety regulations are not harmonised at European level. Therefore, if the country of origin principle applies, we could find different layers of protection for workers at the same workplace. This will affect regulations laid down either by institutions such as public authorities or collective agreements adopted by social partners. The draft (Article 15(5)) lays down a prohibition on Member States introducing any new requirements to service providers unless they prove not only that these are necessary, objective and proportional, but also that they arise from a new circumstance. It will seriously undermine the ability of Member States to require better health and safety conditions at the workplace.

Potential abuses in temporary agency work will be more difficult to prevent

The ETUC is convinced that the Draft Services Directive is not the right place to deal with temporary agency work, and in particular not with the special aspects of authorisation schemes, licensing and registration, monitoring, supervision and enforcement that continue to be necessary in a sector that is so vulnerable to possible abuses and fraud [7].

The Draft Directive on Temporary Agency Work should deal with this issue in a balanced way, taking into account also the Private Employment Agencies Convention of the International Labour Organisation [8], which explicitly allows for systems of licensing and supervision, to allow Member States to protect their labour markets, and promote good quality temporary agency work.

Therefore, all forms of employment services and intermediary services on the labour market should be excluded from the draft. At the same time, a directive regulating temporary agency work should be adopted.

[5] The requirement to pass an "economic needs test" means that new businesses can only enter markets if, in the opinion of the regulator, there is a demand unsatisfied by existing operators.

[6] For example, "preventive services" are very different within Member States. In Belgium they must be formed as non-profit-making organisations, with a management which combines trade union participation with elements of public supervision. In the UK, these preventive services are practically non-existent. Therefore, there is a "free market" of consultancy regarding prevention that escapes all public or trade union surveillance. Regarding the use of scaffolding, there are huge disparities within Member States. While in some countries "flying scaffolding" is tolerated without restrictions, in others it is tightly controlled.

[7] Authorisation, licences and registration could be very efficient and low-barrier ways to prevent abuses and fraud, for instance with regard to temporary agency work. Even a country like the Netherlands, where the licensing system was abolished six years ago because the temporary agency sector was thought to be mature enough to ensure normal business practices, has recently gone back on this decision, because of the explosive growth of mala fide intermediaries employing an increasing number of undocumented migrant workers, making enormous profits and escaping every public control.

[8] Convention concerning Private Employment Agencies (No. 181), adopted by the ILO Conference in 1997 with an overwhelming majority and the support of all 'old' EU Member States (already ratified by three of the new Member States), see in particular Article 3 of this Convention.

3 COUNTRY OF ORIGIN PRINCIPLE: DANGER OF THE RACE TO THE BOTTOM

EC: *This principle will help all those enterprises established in one Member State that wish to provide services across borders without establishing themselves, by being bound only to the national rules of their home Member State. It therefore enables operators to provide services in one or more other Member States without being subject to those Member States' rules. Authorisation schemes will be removed when possible and only justified by overriding reasons of public interest. This principle also means that the Member State of origin is responsible for the effective supervision of the service providers established on its territory even if they provide services into other Member States.*

ETUC: The country of origin is attractive for industries that seek to maximise their profits by minimising legal risks. **The application of this principle could increase the real risk of abuses of competition in those areas that are not harmonised Europe-wide.** These types of measures would encourage service providers to move their headquarters to the EU Member States with the lowest tax rates, environmental requirements and protection of workers' rights. On the other hand, authorities in countries with the highest standards of protection will be obliged to lower them, in order to stay competitive.

The ETUC does not believe that Member States' regulators will have the incentive or capability to effectively enforce standards of cross-border, temporary service provision. Competitive advantage will be gained by temporary service providers over established business because they will not be subject to the same criteria and, therefore, it will establish the **opposite of a level playing field** – which is in total contradiction to internal market principles.

The application of the country of origin principle allows various national regimes to co-exist in the same host country and leads to the juxtaposition of 28 national regulations. **It exacerbates unfair competition and a race to the bottom, to the least regulated and lowest standards.** Under this principle, uniform law would no longer apply in the Member State concerned. Instead, the law would vary from person to person or from company to company, depending on which country the service providers came from. The national legal systems of each Member State would therefore enter into direct competition with each other. This situation could have negative consequences, causing a risk of full-scale dumping, and accelerated social dumping in particular.

For example, health professions are not harmonised at EU level, and medical skills and competences vary from one Member State to another. Health services cannot be subject to a principle whereby the scope of competence of health professions is not the same from one state to another.

The ETUC believes that the rule should be preceded by basic harmonisation rules governing quality, content and, in particular, safety standards of services. Therefore, to avoid massive transfers of head offices and relocations it would be best to propose European minimum standards, for instance, common rules for service providers who wish to offer services across borders.

4 LABOUR LAW AND COLLECTIVE AGREEMENTS: NO OBSTACLES, BUT ESSENTIAL INGREDIENTS OF SOCIAL EUROPE

EC: *According to the Commission, the Draft Services Directive "does not aim to address issues of labour law as such". Nevertheless, collective agreements, such as those drawn up by the social partners, may be obstacles to the free movement of services* [9].

ETUC: On the basis of all the proposed texts and explanations on the table, the ETUC is convinced that **the directive interferes with labour law** issues in a far-reaching and totally unacceptable way.

This is the combined effect of the country of origin principle (Article 16) and its derogations (Article 17), which are not clear and not sufficient. The draft directive does not seem to respect important provisions of international private law [10]. These provisions guarantee that workers are always protected at least by the so-called mandatory rules of the country in which they perform their work. There is a real danger that in all situations of cross-border provision of services in which workers are involved (most situations!) and the Posting of Workers Directive [11] does not apply (i.e. in situations of long-term posting, or where foreign service providers hire local workers), either the law of the country of origin (of the service provider) would apply, or the law "chosen" by the parties (in practice: the law of the country that would suit employers best).

This would lead to an outrageous infringement of the labour law and collective bargaining systems of the Member States of the EU. Even public labour law, like working time legislation and health and safety regulations, which in most Member States have a territorial effect, could be brought into question. Although the draft directive does not explicitly tackle collective bargaining arrangements, the ETUC is very worried about several aspects in the text that could put **industrial relations systems and collective bargaining** in the Member States in danger, and could interfere with fundamental rights like freedom of association and collective bargaining, and the right to take industrial action.

Some specific issues need to be raised here:

- The definition of a "requirement" (Article 4) seems to cover collectively agreed measures. In several Member States, it is the social partners that deal with, for instance, the conditions for hiring out workers in collective agreements. In some Member States, it has been a deliberate policy to move away from public intervention and leave the issue fully or partly for regulation by the social partners. If these measures are allowed under current Community law, it should not be possible to alter them on the basis of the Services Directive.

- In respect of the posting of workers, it is prohibited to require a service provider to have a representative on the host territory (Article 24). This prohibition directly interferes with the system of industrial relations and collective bargaining in Sweden and Denmark, and cannot therefore be accepted.

- The draft regulates the free movement of services, which is a fundamental right. Collective rights, however, such as the freedom of association, the right to negotiate, the right to sign collective agreements and the right to take sympathy action, are also important fundamental rights, which must not be undermined under the plea of free movement. Although the draft recognises that a restriction on the freedom to provide services may be legitimate when considerations of fundamental rights or freedoms are at stake, this is not satisfactory, because it is only on an exceptional basis [12].

Therefore, labour law should be excluded from the scope of the directive. The exception of the Posting of Workers Directive cannot be an obstacle to the application of more favourable employment and working conditions than the minimum standards laid down in the Posting Directive. Wages and working conditions which are regulated by collective agreements in the country where the activity is exercised should be respected.

[9] Report from the Commission to the Council and the European Parliament on the state of the internal market for services presented under the first stage of the Internal Market Strategy for services. COM(2002) 441 final, page 50.

[10] As regulated in the Rome I Convention (contractual obligations) and currently under discussion in respect of a Rome II regulation (non-contractual obligations).

[11] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal L 18/1, 21/01/1997; see below.

[12] Recital 40 "...In addition, any restriction to provide services should be permitted, by the way of exception, only if it is consistent with fundamental rights which, as the Court of Justice has consistently held, form an integral part of the general principles of law enshrined in the Community legal order". A more open approach in respect of Member States is recognised by the Court of Justice in the judgment 14 October 2004 - Case C-36/02 – Omega – i.a. by allowing a margin of discretion (paragraph 31) or by acknowledging differences in the systems of protection (paragraph 38).

5 POSTING OF WORKERS: IMPLEMENTATION AND ENFORCEMENT IN THE COUNTRY WHERE WORK IS PERFORMED IS ESSENTIAL

EC: *Service providers will benefit from the abolition of requirements to obtain prior authorisations and declarations from the host Member State, the obligation to ship all labour documents normally held at the head office of the company to the place of posting and keep them there, and the obligation to designate a representative established in the host Member State. The conditions laid down by Directive 96/71/EC concerning the posting of workers in the framework of the provision of services are out of the scope of the directive (Article 17 point 5). Regarding the posting of third country nationals, the Member State of posting will no longer be able to require the service provider or the worker posted to undergo burdensome administrative requirements such as work permits, without however affecting those immigration controls which are still allowed between Member States.*

ETUC: It is clear that cross-border posting of workers and temporary agency work are not excluded altogether from the scope of the directive. Within this context, it is of major importance for enterprises and workers that **derogations for the posting of workers should lead to a clear legal framework.** This is not at all the case. The draft directive therefore may have the effect of making the cross-border provision of services even more complicated!

Aspects that urgently need clarification are therefore: What if a Member State applies more mandatory rules to posted workers than the minimum provided for in this Directive? Do they still apply, as long as they stay within the area of the Posting Directive? How to interpret in this regard the formula "matters covered by the Posting Directive"?

The Posting of Workers Directive only covers situations of "temporary posting". In the current situation it is already not at all clear when there is a situation of "temporary" posting, and when the posting is no longer temporary. In the future, it may become much more important to have clarity about this, to be able to judge which law the employer will have to apply to the employment relationship.

The proposals to limit Member States' powers to monitor and enforce their own national regulations are a major point of concern.

The obligation to make a declaration to the authorities of the host Member State will be prohibited, although a temporary derogation (for the construction sector) until the end of 2008 is being proposed. Under this rule, the provider is not obliged to inform the host Member State about the employment and working conditions applied to the posted worker, which may lead to deregulation and social dumping. The ETUC questions why the derogation is only maintained until the end of 2008, and proposes that a simple European system of declaration should be established. The question of how the country of origin is to be informed of possible infringements in the host Member State, which is no longer allowed to exercise systematic supervision and impose penalties, remains unanswered. According to the draft, it is the responsibility of the Member State of origin to ensure that the service provider only posts workers who fulfil the conditions of residence and lawful employment as laid down in the legislation of the country of origin. The host Member State may not impose any preventive controls either on workers or on the service provider. In the ETUC's view, this would deprive host Member States of effective tools to prevent and monitor potential abuses. Although an obligation of co-operation between Member States is laid down, it can hardly be seen as a substitute.

The directive also seeks to limit Member States' right to check the legal status of a third country national posted to their territory. It should, however, remain possible for Member States to take appropriate measures to prevent the exploitation of irregular migrant labour equally by both, cross-border and national, service providers.

In recent case law, the European Court of Justice has determined that in order to give the host Member State a guarantee ensuring that the situation of those non-EU nationals is lawful, it will be possible to impose an obligation on the service provider to supply the local authorities with information such as residence, work permit and social coverage in the home Member State [13].

[13] Judgement of the Court (First Chamber) 21 October 2004 – C-445/03 – Commission vs. Luxembourg, paragraph 46

6 SERVICES OF GENERAL INTEREST: NO PRIORITY FOR MARKET FORCES

EC: *The proposed directive applies only to services which are of an economic nature [14] and it does not interfere with the definition and organisation of these services, which, in principle, remain the responsibility of the Member States. However, as far as such services are considered as economic activities, including health and social welfare services, the EU has the responsibility to ensure that they are delivered in conformity with the rules and principles of Community law.*

ETUC: It is highly regrettable that the Commission has introduced services of general economic interest within the scope of the proposal.

If the directive leads to Member States removing regulations and prevents them from planning the future of these services, then the consequences will be the same as liberalisation. The ETUC considers that the challenges the EU faces on healthcare and eldercare are too important to leave to the market. Public authorities must be able to exercise control and may have laws promoting services of general economic interest.

All services have an economic aspect. If services of general economic interest which are not remunerated will not be affected by the proposed directive, there is an argument for excluding services of general economic interest from the services directive until the relevant European law is enacted under the new Constitution, specifying the principles and conditions on which they are to operate to enable them to fulfil their missions. In the White Paper on Services of General Interest, the Commission promised to consult the civil society on the freedom of social and health services. A positive legal framework on SGI is needed.

Regarding **health services,** healthcare provision in all Member States is intrinsically linked to social security, which remains the sole responsibility of national authorities. These services belong to a public health policy which is defined by Member States and cannot be assimilated merely into the freedom to provide services. Therefore, the draft identifies two actors: the recipient and the provider of services. However, the health sector is generally built on a tripartite model: the patient, the provider and the payer / funder of health care. The proposal ignores the third party. Regulation within the health sector aims to bring individual actors' activities in line with public policy goals. Increased competition in the health sector will not necessarily produce more choice and reduce prices, but will certainly bring considerable deregulation. Furthermore, it is accepted that in health services, supply generates demand.

The proposal also covers the reimbursement of medical treatment received abroad, within the limits established in the case law of the European Court of Justice. The inclusion of those provisions in this directive (which deals with free provision of services and not with rights to social security) does not resolve the question of the ambiguity relating to the basis of the right and thus of the consequent unsafe legal basis. Thus, rights to social security of persons moving within the Union were already covered under Regulation 1408/71. It would therefore suffice, to take into account the judgements of the Court, to amend the provisions of this regulation.

It is true that the European Court of Justice has assessed the compatibility of national legislation governing **welfare services** with the EC Treaty governing the free movement of services. But, at the same time, it stressed that Member States retain their independence to organise their social security systems, which includes the organisation of social welfare systems [15].

It is highly questionable whether including welfare services in a horizontal directive on the internal market in services corresponds to the declarations made by the Commission in its White Paper on Services of General Interest, in which it expressly supported the view "that the personal nature of many social and health services lead to requirements that are significantly different from the network industries" [16].

Services of welfare care and all Services of General Interest should be excluded from the scope of the draft: welfare services cannot be assimilated with notions that ignore their specific characteristics.

[14] In fact, Article 16 of the EC Treaty and Article III-122 of the new Constitutional Treaty refer only to services of economic general interest.

[15] Judgement 17 June 1997 - C-70/95 - Sodemare.

[16] White Paper on Services of General Interest, COM(2004) 374, 12.5.2004.

CONCLUSIONS

The internal market can only work by establishing a level playing field (for instance for takeover bids). The application of the country of origin principle without basic harmonisation could create the opposite of a level playing field, with 28 different national regulations competing one with another, and could run counter to anti-discrimination.

For the ETUC, the internal market is not an objective in itself, but an instrument to fulfil the social objectives of the EU Treaty: a high level of employment, better working and living conditions, equal opportunities, etc.

Jacques Delors offered the ETUC and affiliated national centres a "deal". The core of this deal was that in exchange for trade union support for the establishment of the internal market, the trade unions would get a strong social dimension, including social dialogue, social policy, health and safety policy – to summarise: a well-balanced approach taking into account the whole social impact of internal market legislation. The ETUC has the strong feeling that some supporters of the Services Directive are attempting to shuffle this balance away.

The draft as it stands is seriously flawed, as it threatens to undermine existing collective agreements, national labour codes, services of general interest and the success of the European social model as a whole. For these reasons, the ETUC cannot support it.

ETUC Member Organisations

National Trade Union Confederations

Austria	OGB
Belgium	CSC • FGTB • CGSLB
Bulgaria	CITUB • PODKREPA
Croatia	*SSSH
Cyprus	SEK • TURK-SEN
Czech Republic	CMKOS
Danmark	AC • FTF • LO
Estonia	EAKL • TALO
Finland	AKAVA • SA• STTK
France	CFDT • CFTC • CGT-FO
	CGT • UNSA
Germany	DGB
Greece	ADEDY • GSEE
Hungary	ASZSZ • ESZT • LIGA
	MOSz • MSzOSz • SZEF
Iceland	ASI • BSRB
Ireland	ICTU
Italy	CGIL • CISL • UIL
Latvia	LBAS
Lithuania	LDF • *LDS • LTUC
Luxembourg	CGT • LCGB
Macedonia (Fyrom)	*CCM
Malta	CMTU • GWU
Netherlands	CNV • FNV • MHP
Norway	LO • YS
Poland	NSZZ Solidarnosc
Portugal	CGTP-IN • UGT
Romania	BNS • CARTEL ALFA
	CNSLR-FRATIA • CSDR
San Marino	CDLS • CSdL
Serbia	*NEZAVISNOT
Slovakia	KOZ-SR
Slovenia	ZSSS
Spain	CC.OO • ELA • UGT
Sweden	LO • SACO • TCO
Switzerland	TRAVAIL.SUISSE • SGB/USS
Turkey	DISK • HAK-IS
	KESK • TüRK-IS
United Kingdom	TUC

*observers Confederations

European Industry Federations

EMF	European Metalworkers' Federation
EFFAT	European Federation of Food Agricultural and Tourism
ETUF-TCL	European Federation of Textile, Clothing and Leather
EFBWW	European Federation of Building and Wood Workers
EMCEF	European Mining, Chemical and Energy Federation
EPSU	European Federation of Public Service Unions
ETF	European Transport Federation
ETUCE	European Trade Union Committee of Education
UNI-EUROPA	European Federation of Services and Communication
EEA	European Alliance of Media and Entertainment
EFJ	European Federation of Journalists

ORDER FORM

Name ..... Organization .....

Adress .....

Tel/fax ..... E-mail .....

Please send me ... copies of this booklet

Date Signature

Send to

ETUC • Boulevard du Roi Albert II, 5 • 1210 Bruxelles • Belgium

Fax +32 2 224 04 75 • Email : amoreira@etuc.org

ETUC - Publications 2005

EUROPEAN TRADE UNION CONFEDERATION

Boulevard du Roi Albert II, 5
1210 Brussels • Belgium
Tel +32 2 224 04 11 • Fax + 32 2 224 04 54
E-mail : etuc@etuc.org • www.etuc.org