



5 April 2004

Ministry of Trade and Industry

PROPOSAL FOR A DIRECTIVE ON SERVICES IN THE INTERNAL MARKET

Nature and scope of the proposal for a Directive

The proposal for a Directive is by nature a new **framework Directive with a large scope**. Once adopted it will be applied, as a rule, to all services of economic interest, except for financial services, electronic communications services and transport services, for which there are already specific sectoral Directives. Thus its scope covers health services and probably even many social services, although the text of the proposal is not clear enough in this respect. As regards social services the proposal mentions as services covered by the scope of the Directive for instance personal domestic services involving assistance for older people. On the other hand, it is stated that its scope does not cover “non-economic activities, nor activities performed by the State for no consideration as part of its social, cultural, education and judicial functions where there is no element of remuneration”.

Services provided by professionals exercising regulated professions, such as physicians and nurses, are likewise covered by the scope of the proposed Directive. Thus the services provided by social and health care professionals will probably be covered by the Directive as services of persons practising a profession.

The proposal for a Directive is a part of the complex of measures aiming to improve the internal market. Other measures by the Commission related to this theme are e.g. the Green Paper on services of general interest, state subsidy systems and matters related to the mobility of professionals. The Green Paper discusses social security as a part of services of general interest that are of significance for the overall evaluation of the sector. Discussions about various public subsidies have contact points with subsidised social and health services. The discussion about these issues is still going on.

It is stated in the preamble to the proposal for a Directive that the definition of services is based on the case law of the European Court of Justice. Accordingly, the concept ‘services’ covers any self-employed economic activity performed for remuneration, without presupposing that the person for whom the service is performed pays it.



Since the Directive on services appears to introduce, both directly and indirectly, the principles of action of the internal market into social and health services, which are in other EU legislation regarded as covered by the national competence, the impact of the proposal for a Directive must indeed be deliberated very carefully. The Finnish Ministry of Social Affairs and Health wishes to stress that the special nature of social and health services must be taken into account in the consideration of the Directive. Otherwise it is possible that decisions concerning the internal market that are made by majority decision in the Council of Ministers could in practice influence e.g. the provision of social and health services.

Special nature of social and health services

In Finland, the basic principle is that the public sector is responsible for providing social welfare and health care. If the public sector does not itself produce certain services, it can purchase them from the private or the third sector. Those services must meet the same criteria as the public sector's own service provision, regarding e.g. quality and educational qualifications of the staff. The new Directive does not mean a change in the present situation in the respect that foreign companies can even at present act as service providers in Finland.

The central and local government and public corporations have to fulfil certain obligations when providing social welfare and health care. It is laid down in section 19 of the Finnish Constitution that the public authorities must secure, among others, statutory and adequate social and health services for everyone and promote the health of the population. The role of the public sector as the actor responsible for providing services that has been adopted in Finland must be taken under review if social and health services are to be considered on a par with market-based service provision. From the point of view of social and health services, for instance the full exercise of the fundamental rights, their continuance, smooth co-operation and confidence may constitute qualitative factors that are more significant than direct price competition.

According to **the country of origin principle** included in the proposal for a Directive, the Member States shall ensure that solely the national provisions of the country of origin are applied to service providers. By national provisions are meant provisions that concern the starting and carrying on of service provision, behaviour of the service provider, the quality and content of services, advertising, agreements and accountability of the service provider. This brings about problems in the social welfare and health care sector. In the present situation foreign service providers shall meet the requirements laid down in the Finnish legislation (e.g. authorisation granted by a State Provincial Office) and comply with the Finnish legislation, but according to the country of origin principle laid down in the proposal for a Directive that could not any more be required unambiguously. According to the proposal, the country of origin requirement applies in principle also in regard to social and health services to “services provided across borders” but not to service providers established in another country.

In practice it is probably impossible to make a distinction between services provided across borders and services established in another country – for instance in a situa-

tion where an Estonian medical centre provides services to Finns. It is not clear from the proposal for a Directive who should supervise the services provided by the Estonian medical centre in Finland since it is, in principle, question of establishment in another country. On the other hand, it is stated in article 16 of the proposal for a Directive that “the Member State of origin is responsible for the effective supervision of service providers established on its territory even if they provide services into other Member States”.

Observing the country of origin principle would endanger the legal safety of social and health care clients. If for instance an Estonian company provides medical services into Finland, in case of problems clients would have to demand their rights from the Estonian authorities. In practice it would be very difficult for a client to complain about a service to the competent supervisory authority in another country. Social and health services are often financed by a third party, and as the client’s right of self-determination is then reduced, legal safety issues are problematic. And similarly, **responsibility issues** regarding services purchased abroad are unclear. How is, e.g., a client compensated for continued treatment for an unsuccessful surgery performed abroad? Furthermore, the information targeted to consumers is often defective and their possibilities to evaluate the operations of companies is further weakened if social and health care companies operate in another Member State.

The provisions of the proposal for a Directive could in practice lead to a situation that Finland could not require that foreign service providers take out the patient insurance required by the Finnish legislation for health services provided in Finland. That would mean that patients are put in an unequal position in regard to the compensation of patient injuries, and that would affect the overall patient safety, realisation of patients’ rights and quality requirements. It should be possible to require that also foreign service providers take out patient insurance.

The provision of social and health services is a part of the national social and health policy. Also the EC Treaty starts from the principle that social and health services come under the national competence (article 152). It must be possible to guarantee through national regulation and supervision that the statutory rights and the objectives that are set out are realised, as well as client safety, equality issues and the cost-effectiveness of the entire provision of social and health services. From the point of view of the planning and development of the social and health service system it is important that the public sector can, as necessary, guarantee that the demand for services is met also in those areas in which they cannot be provided for competitive prices. The market of social and health services is in many respects incomprehensive, which means that supplementary regulation is needed here compared with other functions of the service market. Creation of competitive circumstances in the social welfare and health care sectors that demand special skills and qualifications has proved to be very difficult, partly because of the nature of this market.

There are big differences in the level of knowledge of service providers and consumers. It is difficult to give detailed quality requirements and to compare services; all this presupposes special professional skills. In regard to social and health services, clienthood is not always self-evident since the purchaser of the service is often an actor other than its user. Often it is not possible to ensure a full right of self-determination and ability of the user of care services to make rational choices be-

tween different services. From the point of view of the total economy of the system it is also important to control the prices. Therefore, particular attention should be paid to securing an adequate right to regulate social and health services.

Freedom of movement of services, access to the market and the competitive circumstances in the market also affect the content of services and their institutional structure (realisation of the principle of subsidiarity). Publicly financed or subsidised services (at the national or local level) are primarily a manifestation of local solidarity, which does not apply to the population of the entire EU. In a tax-financed system, for instance differentiated charges according to the municipality of residence can in some cases be appropriate.

It does not appear unambiguously from the proposal for a Directive to how large an extent it would be applied to social services. From among social services, as services covered by the Directive are mentioned "personal domestic services such as assistance for old people". In practice it is difficult to draw a borderline between personal domestic services and other social services. It is also unclear whether the Directive would apply within social services e.g. to purchased services, service vouchers and services that are either free of charge or largely subsidised.

At present, social services in principle come solely under the national competence. The special nature of social services different from other services should be taken into consideration also in the application of the internal market rules. In Finland the public sector is under law obliged to ensure that there are quality social services available to all members of society. Social services significantly contribute to safeguarding the equality and the exercise of the fundamental rights of the citizens, and also to maintaining the coherence of society. Social services are often 'public commodities' and the benefit gained through them is shared by all members of society. Thus, social services are not basically market-oriented services, and their clients cannot be considered on a par with consumers. With a view to guaranteeing patient safety and an equitable supply of services regionally and socially it is important to define adequate quality requirements for services and to ensure their supervision at the national level in the future as well.

The national health service system functions according to the same principles and values as the social service system. Health services are however, based on the case law of the European Court of Justice, regarded as services referred to in the Treaty and thus subject to the provisions applied to the internal market. The Court of Justice expressly stated in a case concerning assumption of the costs of health services that a care service does not lose its character as a service performance for the reason that the national health authority or a system that grants benefits as performances in kind is responsible for it.

According to the proposal for a Directive, a company providing services from another Member State may not be required to give a notification of its operations or to apply for authorisation or registration. The advance supervision according to the Finnish Act on Supervision of Private Social Services (603/1996) and the Act on Private Health Care (152/1990) could thus only be applied to domestic service providers. If the Directive is implemented in the proposed form, when observing defects in operations of foreign service providers Finnish authorities could interfere only in **single**

cases and **afterwards**, based on the case-by-case derogations referred to in article 19.

The proposed Directive presents some derogations from the country of origin principle to the effect that certain safety mechanisms could be used in relation to the safety and health of services and to the protection of minors. It is unclear if e.g. Finnish authorities could on that basis set out quality requirements for social and health services provided from other EU States in situations in which they operate wholly on a private basis (e.g. prior supervision).

If the country of origin principle has to be applied categorically to the provision of social and health services, that would mean that the national authorities have no more a right to define quality requirements for them. This is problematic especially because local knowledge and understanding of the local circumstances, as well as the clients' need to be understood in their native language are integrally linked with the quality of services. The proposal for a Directive could also lead to a situation where the provisions on, among others, supervision of social and health would have to be justified separately.

In social and health services the distinction between hospital and non-hospital services is not as clear as the proposal for a Directive lets to understand. This is of importance in particular because people could according to the draft Directive freely seek **non-hospital services** in another Member State without a prior authorisation and receive the same refunds from the national social security system as for care provided in the home country. A prior authorisation could be required for hospital care. The proposed provision does not take into account differences in care practices between Member States: for instance use of hospital care and the length of periods of care varies considerably between the countries. On the other hand, the provision could mean that a person can apparently have a day surgery (does not require "accommodation of the person" in the care institution) without a prior authorisation. The costs of even a day surgery may be very high.

If implemented, the proposal for a Directive would confirm that the principles of the case C-385/99 Müller-Fauré concerning certain Member States apply to all Member States, despite differences in their health service systems. An earlier legal practice (Decker-Kholl) has been applied in Finland so that the Social Insurance Institution may grant a patient compensation for care services acquired without a prior authorisation in another Member State. The compensation is determined on the basis of the Health Insurance Act and the fixed national rates. The relationship between the proposal concerning health services and Regulation 1408/71 however remains obscure. E.g. the provision on seeking care overlaps with the corresponding provision of Regulation 1408/71 and obliges, unlike the Regulation, that Member States provide for the procedure of seeking care in a law. Also the use of the prior authorisation procedure under the Regulation in situations other than those in which the person seeks care (e.g. E111, E119, E128) is unclear, and likewise is it unclear if the local authorities could be obliged to refund health services obtained in another EU country. The criterion for such an interpretation could be that the service would in this way be economically more advantageous for the patient than the refund from health insurance which is on average 25 – 35 per cent of the real costs.

Ultimately, the proposal for a Directive could mean that people can freely seek health services (not hospital care) in another EU country and the municipality of residence is in that case obliged to cover the costs of care.

The Finnish authorisation system for **pharmacies** would have to be taken under review, since the retail sale of medicines should according to the proposal be considered comparable to other distribution services. Articles 9 – 15 in the proposal regulate the authorisation procedures and their conditions. Several provisions contain rules that restrict authorisation procedures in a way that would constitute an obstacle to the present Finnish authorisation system for pharmacies. The Finnish system has proved justified from the point of view of the coverage and effectiveness of pharmaceutical service.

Even the authorisation system for **sick transport** will have to be reconsidered if the proposal for a Directive is implemented.

The country of origin principle in the proposal for a Directive should neither be applied to the practising of health care professions or to provision of health care services by private law corporations. The Member State in which a professional carries on activities/services are provided must have the right to supervise the activities by measures based on both prior supervision (recognition of the competences of professionals and the authorisation system for private health service providers) and subsequent supervision (e.g. right to cancel the right to exercise activities). It should be possible to demand in these areas e.g. presentation of the documents referred to in article 5.2. (the proposal for a Directive allows this for an "overriding reason of general interest").

Issues concerning occupational safety and health

Provisions on posting employees in another Member State in connection with provision of services are laid down in a separate Directive (96/71/EC). The authorities of the Member State of posting supervise in virtue of it the observance of the rules on employment and working conditions. The Directive on services does not interfere in matters concerning occupational safety and health and its supervision, and it does not appear to bring any changes to the protection of employees.

It must be taken care in the continued preparation of the Directive that foreign service providers can also in the future be required compliance with the same employment conditions as domestic service providers, as well as compliance with the provisions concerning occupational safety and health in general.

Article 24 (3) in the proposal includes an obligation for the competent authority of the Member State of origin to communicate to the competent authority of the Member State of posting information concerning a posted employee and his or her employment and working conditions up to two years from the end of the posting. This provision should be deliberated further since it appears unclear at this stage what benefit could possibly be obtained by communicating information afterwards.

Concepts used in the proposal for a Directive

The proposal for a Directive uses several **concepts** that have not been defined precisely (services of general economic interest, medical health services, hospital care c. non-hospital care). Furthermore, the proposal refers to other **processes** as if their outcome would not already be known (free movement of patients [Communication by the Commission in March], the Green Paper of the Commission on services of general interest, revision of the rules on the co-ordination of social security systems, IGC negotiations etc.).

It is difficult to draw a **borderline between services of general interest and services of general economic interest**. The Directive concerns services of general interest that are also of economic interest. In practice all social and health services involve economic interest as well.

The concepts used in the Directive should be so clear that the role of the Commission's Directorate-General for Competition and the European Court of Justice in the final interpretation of them will remain less significant than it is at present.

Other aspects

The proposal for a Directive reflects a strong trust in co-operation between authorities. It is proposed that the problems regarding the application of the Directive that are associated with the different developmental stages of the countries are reduced by improving the co-operation between the EU States' authorities. The increasing number of Member States indeed brings about a lot of challenges in this respect. Improving the co-operation between the competent authorities and organising e.g. an international exchange of information will take a long time, and it is in practice difficult to ensure consumer protection. The co-operation between the authorities of the different countries demands considerable resources: language skills, education and training, and more developed information systems. It is, as such, very much worth supporting to develop the actions of authorities and to enable a rapid access to information from other countries e.g. on possible malpractices.

As regards administrative issues, harmonisation of legislation does not guarantee elimination of differences in its implementation. The Member States' supervision and administration cultures differ considerably.

The financing, functions and regional subsidies of the present service system could be questioned as being national forms of support or misuse of monopolistic position or factors hampering the functioning of the market, in which case there is a danger that the administrative costs and the total costs will rise considerably.

The proposed Directive could lead to a situation where foreign and domestic service providers are not treated equally. The country of origin principle of the proposal for a Directive might favour foreign entrepreneurs by giving them better operational prerequisites. The competitive position must be equalised so that all service providers are subject to the same supervision and quality criteria. Otherwise there will be a danger that service providers register themselves in the Member State whose national legislation and steering practices are most advantageous for them. This could result

in unsound competition between the Member States e.g. in matters regarding quality and supervision.

The proposal for a Directive would obviously also allow companies or business enterprises owned by the public sector to provide freely services into other Member States. It should be really considered carefully if this is in harmony with the general conditions for free competition.

Position of the Ministry of Social Affairs and Health on the proposal for a Directive

Since the proposal for a Directive is in several respects vague and subject to interpretation, and the concepts and terms used in it have not been defined unambiguously, the adoption of it would lead to a situation where the Commission or, ultimately, the Court of Justice would decide on its interpretation and definitions. Therefore the proposal must be made more precise and, if that cannot be done, **the field of social welfare and health care must be totally excluded from its scope.**

Excluding social and health services from the scope of the Directive on services would be justified also because the definition of services in accordance with the preamble to the proposed Directive does not apply to non-economic services or services provided by the state as part of its social, cultural, education and judicial functions where there is no element of remuneration. Statutory services provided by other public corporations and local authorities should be regarded as comparable to services provided by the state. The services excluded from the scope of the Directive should include, apart from fully non-remunerative services, also such social and health services for which reasonable client charges are collected.

If the concepts used in the proposal for a Directive can be defined clearly, the proposed Directive could in principle clarify the position of social and health services. It would not be necessary to exclude social and health services in their entirety from the scope of the Directive if the proposal is revised as follows:

- 1) **The country of origin principle is not applied to social and health services, but they should be subject to the legislation of the country in which the services are provided. For instance all the social and health services provided in Finland should meet the same national quality and supervision obligations. A general derogation should be made from the country of origin principle in regard to social and health services and pharmaceutical service.**
- 2) **The concepts and terms used in the proposal for a Directive should be defined precisely and unambiguously (as the most important of them: services of general economic interest, other e.g. medical health services, hospital care c. non-hospital care, personal domestic services). It is particularly important to define establishment and provision of services, so as to clarify the distinction between these.**
- 3) **The rules concerning authorisation procedures should be revised so that derogations can be made in respect of social and health services and pharmaceutical service from articles 9 – 15 of the proposal for a Directive, in order to**

enable the achievement of the social and health policy objectives set out for these services and for pharmaceutical service. It is justified to obligate the providers of social and health services to comply with the conditions and obligations related to, for instance, guaranteeing patient safety, appropriate facilities and care practices and access to services.

4) Article 23 concerning assumption of health care costs shall be omitted from the Directive as it is a special issue not covered by its scope. Issues concerning the assumption of health care costs must be decided in a different context, since the definition of the criteria for refunding involves problems depending on e.g. differences between the insurance- and residence-based systems.

5) The relation of the proposal for a Directive to the retail monopoly on alcoholic beverages is unclear. It does not appear from the proposal if the country of origin principle also applies to the **retail sale of alcoholic beverages**. This could lead to a situation where e.g. an Estonian alcohol seller could after the entry into force of the Directive set up a shop selling alcoholic beverages in Finland. **A derogation from the country of origin principle should be made in regard to retail sale of alcoholic beverages.**

Since gambling games are intended to be covered by the scope of the Directive after a transition period (2005, the Commission's proposal for supplementary harmonisation) Finland must in a near future create a national gambling game strategy taking account of possible future EU regulation.

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