

## **The Lithuanian Free Market Institute: on the proposal for a Directive of the European Parliament and of the Council on services in the internal market**

The Lithuanian Free Market Institute (LFMI) has analysed a proposal for a Directive (COM(2004) 2 final/3) presented by the European Commission and its impact assessment and examined the position of Lithuania and those of other member states on the proposal. LFMI is of the opinion that the implementation of the proposed Directive, within the scope envisaged in the proposal, would advance the economic development and people's welfare across the European Union in all respects.

The objective of the proposal for a Directive is to provide a legal framework that will eliminate the obstacles to the free movement of services between the Member States: the freedom of establishment for service providers in other Member States and the freedom of cross-border service provision, or the provision of services by operators from their Member State of origin into another Member State without getting established there. While services account for the biggest share of GDP, the movement of services within the European Union is incomparably scantier than the movement of goods. This means that the regulatory restrictions that the Member States apply present a drag on the huge potential for economic growth. A free movement of services would provide conditions for the establishment and operation of new businesses and allow consumers to choose among a wider variety of services available and a bigger number of competing service providers.

### **Obstacles to the implementation of the Directive**

The biggest obstacle to the implementation of the provisions laid down in the proposal is posed by the disputes concerning the extent to which a free movement of services is to be implemented rather than the way it is to be achieved. There are four most frequently cited arguments against the implementation of the proposed provisions:

1. It is claimed that the application of the measures set out in the proposal (especially the country of origin principle and the provisions concerning the posting of workers in another Member State) would preclude effective supervision of service activities and therefore deregulation would damage the quality of services. In addition to that, service providers would choose to migrate to countries with more flexible regulation.
2. It is argued that the measures laid down in the proposal, especially those concerning the movement of health care and social services, exceed the competence of the EU authorities and curb the powers of the Member States and their regional policy.
3. It is asserted that a free movement of health care services may jeopardise national health care budgets and force the Member States to revise the requirements and restrictions that they imposed on service providers.
4. It is stated that national authorities will fail to ensure strong mutual assistance that is needed for a successful implementation of the proposed provisions.

1. The first argument builds on the assumption that it is not consumer choice among competing service providers but administrative requirements and control that determine the quality of services. However, the measures listed in the Directive are designed for the very purpose of facilitating the establishment of such a quality-price ratio which consumers in the EU Member States need. Under the current legal and administrative regulation of services, situations may occur when consumers are forced to use expensive services even though they do not need a given level of quality or control. If consumers needed the existing quality,

service providers who wanted to hold out in the competitive battle would not be able to diminish the quality even if obligatory standards were lower.

Migration of service providers to countries with more flexible regulation would be logical and useful. For one thing, it would allow consumers to use a greater number and a wider range of services available. Second, it would help the Member States to evaluate and improve their regulatory environment.

2. The second argument is being interpreted too broadly in explaining the competence of the Member States in the area of health care. This Directive is intended to achieve the free movement of services, which is the prerogative of the European Community. With a view to securing the rights of the Member States in regulating the provision of health care, this Directive does not aim to harmonise all the national rules applicable to the provision of health care. The application of the country of origin principle enshrined in the Directive will make it possible for the various national regimes applicable to the provision of health care to co-exist. In addition to that, the Directive avoids interference with the institutional supervision of health care services.

The argument concerning the violation of the subsidiarity principle is based on the postulation that the national state, not the Communities, have to make decisions concerning the quality and organization of specific services. However, the provisions of the Directive will provide conditions not only for national authorities but also for consumers to choose, and decide on, health care and social services. This will accommodate the implementation of the principle of subsidiarity and make it possible to bring decision making regarding specific choices closer to the consumer.

3. It is welcome that the provisions of the Directive will lead the Member States to revise their health care policies, especially the restrictions imposed on service providers (e.g. the freedom of establishment). The health care systems in virtually all Member States lack effectiveness. Patients do not receive timely and quality services, while possibilities to choose among service providers are limited. If the objectives in question are to be achieved, it is essential to create conditions for greater competition among service providers and, in the case of the new Member States, for additional investments in this field too. Therefore the measures envisaged in the proposal for a Directive would help to bolster competition among service providers, to increase patient choice and as a result to enhance the quality of services available and the effectiveness of the system.

If allocations were made for the reimbursement of patients' health costs rather than on an institutional basis, the national health care budgets would not be threatened. Recipients who choose to use health care services provided by an operator established in another Member State should be entitled to the same reimbursement (no smaller than in the home country, as stated in the Directive) as in the case if they chose to receive these services in their own countries. If service providers start rendering health care services in other Member States, cross-border care would increase the supply of health care services (the variety and competition), while the number of recipients who are entitled to reimbursement from the national budgets would remain the same. Upon the achievement of the free movement of health care services, health care expenditure will go up only if (i) new service providers offer new reimbursable services which local service providers do not render, and (ii) new service providers offer services which are not reimbursable at present (or reimbursable services of better quality) but appear to create high demand and are finally listed as reimbursable services

(or the rate of reimbursement is raised). Both situations would be of benefit to the recipients of services and remain within the framework of the existing health care system.

In addition to that, allowance should be made for the provision that all service providers who want to provide reimbursable services have to conclude contracts with the authority handling reimbursement of health costs. So in any case the instruments of planning and limiting health costs will remain with the national authority responsible for public funding of health care. It is the transparency of these allocations and non-discrimination of service providers (by form of ownership, country of establishment, size, etc.) that will determine a successful achievement of the free movement of health care services.

4. Assuming that national authorities will not establish cooperation or mutual confidence makes any Community-level policy meaningless. In this case institutional reforms would be needed. On the other hand, the measures laid down in the proposal for a Directive are designed to strengthen the influence of recipients and to reduce that of the authorities. This may provoke a negative attitude and opposition of public administration institutions as an interest group. However, the flexibility of public administration institutions and their favourable attitude towards the consumer is vital for EU citizens in any case, regardless of whether this Directive is implemented or not.

### **Comments on the provisions of the Directive**

1. For the objectives of the Directive to be accomplished, it is essential to ensure that the list of the services embraced by the provisions of this Directive is not narrowed by foregoing the free movement of services which are subject to more rigid regulation (social services, health care services, etc.). It is also vital that derogations are kept to the minimum.
2. If the implementation of the Directive is to markedly reduce administrative barriers, it is crucial that the Directive does not contain any mandatory requirements for service providers that are either undefined or open to interpretation, such as:
  - Article 11 provides that an authorisation granted to a provider shall not be for a limited period, except in cases specified in the Directive. Case (a) where „the authorisation is being automatically renewed.” It is advisable to specify what automatic renewal means and to provide that automatic renewal is free of charge. Case (b) where „the number of available authorisations is limited.” It is advisable to indicate when the number of available authorisations may be limited.
  - Article 12 Part 1 deals with the selection among several authorised service providers where the number of authorisations available for a given activity is limited. It would be advisable to distinguish between two sides of the problem, i.e. the scarcity of available natural resources and technical capacity. In order to achieve effectiveness, it is important to grant more authorisations for service providers than the existing technical capacity allows and to enable service providers to share these scarce resources by way of competition and negotiation (as in the proposals concerning secondary trading of radio spectrum in electronic communication)<sup>1</sup>.
  - Article 15 Part 3 specifies conditions when the Member States may impose certain requirements for service providers as laid down in the aforesaid article.

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<sup>1</sup> See A report of the European Commission „Study on conditions and options in introducing secondary trading of radio spectrum in the European Community,” 2004

One of the conditions is necessity of requirements: „necessity: requirements must be objectively justified by an overriding reason relating to the public interest.” Given that the concept of the public interest may and often is broadly interpreted, it is advisable to spell it out.

- Article 19 provides that derogations from the requirements laid down in the Directive are applied only in exceptional circumstances. It is advisable to specify what exceptional circumstances imply.
- Article 27 indicates that „providers whose services present a particular risk to the health or safety of the recipient, or a particular financial risk to the recipient” are covered by professional indemnity insurance. This formulation is not clear enough and may be interpreted too broadly, thus threatening to increase business risk.
- Article 32 states that „providers are obliged to demonstrate compliance with the obligations laid down in this Directive as to the provision of information and to demonstrate that the information is accurate.” This requirement is altogether unspecific, and service providers would have difficulty evaluating the scope and costs of such a procedure in advance.