YRKESORGANISASJONENES
SENTRALFORBUND

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Deres ref.:	*Vår ref.:*	*Dato:*
200601742-1/TAJ/SMS	275/226/2006/RB rah	10. mai 2006

Høring av Europakommisjonens reviderte forslag til rammedirektiv for tjenester

Det vises til høringsbrev fra departementet av 10. april d.å. med høringsfrist 9. mai d.s. og korrespondanse per e-post mellom YS og NHD 27. og 28. april d.s. vedrørende utsatt frist til 10. mai. YS setter pris på departementets imøtekommenhet om utsatt frist slik at saken kunne behandles i YS' Sentralstyre.

Generelt
Innledningsvis viser vi til vårt høringsbrev til departementet av 19. mars 2004 vedrørende det første utkastet til direktiv. Flere av våre bekymringer som ble tatt opp da, er siden blitt ivaretatt gjennom behandlingene i Europaparlamentet og det reviderte utkastet til direktiv som nå foreligger til høring. Fortsatt er det forbedringspotensial på enkelte punkter. Generelt er det etter YS' syn klokt å legge til grunn kompromissforslaget som Europaparlamentet kom frem til. I den sammenheng ønsker vi også å henvise til vedlagte juridiske vurdering av det nye forslaget, som er gjort av Den Europeiske Faglige Samorganisasjon – EFS.

For YS som hovedorganisasjon for arbeidstakere, er vårt primære anliggende å ivareta faglige rettigheter for våre medlemmer. Samtidig er en viktig grunnpilar for fagbevegelsen internasjonal solidaritet, herunder å bidra til utvikling av faglige rettigheter i andre land. Med dette utgangspunktet støtter YS opp om prinsippet om gjensidig godkjenning. Dette er det stor grad av enighet om innenfor varehandelen, hvor man samtidig har begrensninger knyttet til hensyn til helse, miljø og sikkerhet. Dette bør etter YS' syn også være førende for tjenestesektoren, hvor gjensidig godkjenning av tjenesteytelser må skje med hensyn til faglige rettigheter.

Utstasjonering vs. opprinnelsesland
En kjerneutfordring i denne saken har vært uklart forhold mellom opprinnelseslandsprinsippet og utstasjoneringsdirektivet. Utgangspunktet er å tillate tjenester over landegrensene. Dette må imidlertid skje på en måte som ivaretar ansattes lønns- og arbeidsvilkår.

Det reviderte utkastet til direktiv stiller ikke krav om at virksomheter som har tjenesteytere utstasjonert skal ha en representant, kontaktperson eller adresse i utstasjoneringslandet som det kan rettes henvendelser til, eller inngås tariffavtale med. Dette gjør det vanskelig å inngå tariffavtaler for utstasjonerte arbeidstakere. Det gjør det også vanskeligere for myndigheter i utstasjoneringslandet å føre tilsyn med lønns- og arbeidsvilkår. I sum undergraver mangelen

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på representasjon dermed de rettighetene utstasjonerte arbeidstakere skal være sikret i henhold til utstasjoneringsdirektivet.

> *Forslag:*
> *I direktivet må det stilles krav om stedlig representasjon når det dreier seg om mer enn korte tjenesteoppdrag. Alternativt må direktivet åpne for at det enkelte medlemsland kan stille krav om slik representasjon.*

Tjenester av allmenn interesse

YS anser det uheldig at man i artikkel 2 velger å gi en uttømmende oppramsing av hvilke sosiale tjenester som ikke skal omfattes av direktivet. Etter vårt syn var den tidligere formulering med eksemplifisering bedre. En uttømmende liste harmonerer dårlig med bestemmelsen i samme artikkel om at hver enkelte medlemsstat selv definerer hva som er "tjenester av allmenn interesse" og som dermed skal ligge utenfor direktivets virkeområde. Oppramsingen kan gi inntrykk av å være en begrensning i forhold til hva som kan defineres som "tjenester av allmenn interesse".

> *Forslag:*
> *YS mener at teksten derfor bør tilbakeføres til den form Europaparlamentet valgte å gi den ved sin behandling 16. februar 2006.*

Krav - kollektivavtaler

Definisjonen av hva som regnes som et "krav" i artikkel 4 nr. 7 er problematisk. Der sies det at kollektivavtaler defineres til ikke "as such" - i seg selv (vår oversettelse) å være krav. Modifiseringen indikerer at bestemmelser i tariffavtaler likevel kan ses som krav under gitte, men ikke spesifiserte omstendigheter og dermed kan vurderes i henhold til de kriterier slike krav må oppfylle. Dette betyr at bestemmelser som omfatter lønns- og arbeidsvilkår for tredjeparter, for eksempel ansatte hos underentreprenører, kan underlegges vurderinger i forhold til artiklene 14 og 15.

> Forslag:
> *YS mener direktivet ikke bør inneholde bestemmelser som kan virke begrensende på retten til å inngå kollektive avtaler. Teksten bør derfor tilbakeføres til den form Europaparlamentet valgte å gi den ved sin behandling 16. februar 2006.*

Vi håper departementet har nytte av vårt høringssvar og vi ser frem til en fortsatt konstruktiv dialog i denne saken. Til orientering gjør vi oppmerksom på at vi også vil fremføre disse synspunktene gjennom vår paraplyorganisasjon Den Europeiske Faglige Samorganisasjonen – EFS.

Med vennlig hilsen
Yrkesorganisasjonenes Sentralforbund – YS

Randi G. Bjørgen
YS-leder

ETUC/CP/CMJ/JN060405

First political and legal assessment by ETUC
of key provisions in which there are textual changes according to the revised draft proposal of the Services Directive in relation to the compromise in the European Parliament, presented by the Commission on 4 April 2006

Preliminary comments

It is positive that the Commission has taken general approach to accept exclusion of labour law, collective bargaining and industrial action. Changes in the text raise a few questions that need to be clarified in the next stages. Main problem however remains recital 6h as adopted by the EP!

On excluded sectors the texts have been clarified.
It is a very positive signal that the Commission has resisted the temptation and all the pressure to include temporary agencies or social services in their entirety back in the text! On social services however, the old text seemed to have allowed a non-exhaustive interpretation, whereas the new text clearly limits the exclusion to enumerated forms of social services, but with an important addition i.e. support to persons in need (those mentioned can be interpreted in a wide sense, and may well include the most relevant social services).

A further positive judgement needs to be made about Article 16, which has stayed almost untouched. The problematic part is the 'compromise' by PES and EPP on Article 16,3. ETUC and/or its affiliates will need to find a clever way to address this issue towards the Council and Member States, without attacking the compromise package of the EP, for example by using legal arguments of consistency: how can the ECJ interpret two different notions of public interest and overriding reasons?

Overall provisional judgement

The Commission has tried to safeguard all the important issues, while touching relatively 'lightly' on sensitive issues. ETUC has therefore welcomed the revised proposal (*), while raising questions of legal clarity and consistency on some changes in the text, and after a more in depth analysis should call on the Council and - with its affiliates - on Member States to improve the text, and solve, for example, a few major 'inconsistencies' such as recital 6h on fundamental rights, and Article 16,3 on 'overriding reasons' (including social policy) in case of cross border provision of services. This last issue can become especially problematic when implementing the various 'prohibited requirements', mentioned in Article 16,2 (notably under b) where social policy justifications should be allowed.[1]

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* press release 4.4.2006: ETUC values Commission's efforts to respect main provisions of the European Parliament's compromise on the Services Directive

ETUC/CP/CMJ/JN060405

1. On the exclusion of individual and collective labour law

Article 1,6: exclusion of labour law from subject matter

- Reference to *collective labour law* (all aspects of collective bargaining, including extending and enforcing collective agreements) has been deleted in article 1.6 and is now addressed in 1.7 together with the Monti-clause instead. The Commission has argued that it on one hand accepts the exclusion, but for reasons of legal clarity and coherence this issue should be addressed in 1,7.
  At the same time, Recital 6g which explains the exclusion, still refers to 'relations between social partners' that should not be affected, which is a broad exclusion.
  However, this could be problematic, as now it seems as if collective labour law is only respected as far as it can be seen as within the scope of the fundamental right to collective bargaining.
- Confusing reference to the fact that *labour law* is only not affected when it is *'applied in compliance with Community law'* (while labour law is not harmonised).
- However, more analysis is needed.

Article 1,7: fundamental rights

Monti-clause has been accepted, and now also refers to the fundamental right to negotiate, conclude and enforce collective agreements.

Recital 6h (EP 7d) has stayed unchanged, which means the Commission has not seen this as contradictory to the Monti-clause.

Article 3: relationship to other Community instruments

The language in Article 3 has been slightly adapted, but main principles and approach adopted by the EP has been kept intact.

Article 4,7: rules in collective agreements not to be seen as requirements

The Commisison has adapted the text slightly, to say, that those rules shall not *'as such'* be seen as requirements within the meaning of the Directive. With this change they announce in a hidden way, that the content of those provisions may in certain situations be seen as a *'requirement'* that needs to be scrutinized.

2. On the excluded sectors

- Exclusion of social security in article 1.6 is limited to *'social security legislation as referred to in art. 4 of regulation 1408/71'*

- Language is clearer on
  - exclusion of 'services of temporary work agencies'
  - 'private' security services

- **SGIs and SGEIs**

Article 2, scope

- Transport is now more in general excluded: '*Transport services and transport related services falling within the scope of title V of the EC Treaty*'
- Exclusion of public **and** private health services now clear; ambiguous language in other parts of the Directive has been deleted.
- Social services: non-exhaustive reference to social services '***such as*** *social housing, childcare and family services*' has now been changed to an exhaustive list: social services '***relating to*** *social housing, childcare and* ***support*** *of families* ***and persons in need***', with the argument that exclusions need legal clarity.

Article 15,4 The Commission slightly adapted the approach laid down in EP 15,5 ('*Paragraphs 1 to 4 do not apply to legislation in the field of services of general economic interest and social insurance schemes, including compulsory health insurance schemes.*'). The text now reads: '*Rules provided for in par. 1 to 3 only apply to legislation in the field of SGEI in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular task assigned to them.*' This means that there is not a general carve out, but a conditional one – this change is in line with article 86.2 of the Treaty.

3. Overriding reasons of public interest

Article 4 (7a)

Text has been slightly changed, to read "*Overriding reasons relating to the public interest" means reasons recognized* ***as such*** *in the case law of the Court of Justice,* ***including*** *the following grounds:.... etc:*

Although in different words, the list is still a non-exhaustive list. However, this could mean that overriding reasons have to be explicitly recognized as such by the ECJ.

4. Freedom to provide cross border services

Article 16

The Commission has accepted the text adopted by the EP almost in its entirety, clearly convinced that this is a very sensitive and vulnerable compromise. Changes in the wording of 16,3 may seem on first view to limit the public interest justifications to article 1, but this is not a correct interpretation. What the text means to do is to say, that MS's - even when keeping requirements because they are justified – can only keep and apply them when they are non-discriminatory, proportional, etc.

Very problematic is that the Commission sticks explicitly to the limited list of 16,3 as adopted by the EP and has not dared to bring back in the issues of **social policy** and consumer protection. Moreover, in all explanations

the Commission recognizes that it is deliberately meant as a more limited set of justifications than the overriding reasons of article 4.

5. Control and supervision

The Commission uses the text from the working group in the Council, which the EP adopted in principle. Main responsibility for control and supervision falls on authorities in the Member State where the service provider is established. However, host member states keep right to supervision and control in important areas. According to article 35, the activity of the service provider on the territory of the host state will be supervised by host state authorities, but with limit to requirements under article 16 and 17. Further analysis will be needed.
