

# **THE COMPETITION AUTHORITY**



## **Submission to Forfas on the Proposed EU Directive on Services in the Internal Market**

**Submission No: S/04/003**

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## **1. Overall Views of The Competition Authority**

The proposed EU Directive on Services in the Internal Market aims to increase the ease with which trade in services can be conducted between European citizens and businesses. It aims to do this by reducing regulatory requirements to conduct cross-border trade in services and by requiring Governments to provide simplified administrative procedures.

Rather than creating a multitude of directives aimed at each service type, the Commission has gone for a broad approach to freeing up the cross-border provision of services. This approach was necessitated by the fact that the factors inhibiting companies from providing their services in other Member States occur all along the business chain - from researching the market to providing after sales service - and are similar across all sectors.

The Competition Authority strongly supports this far-reaching initiative, and believes that Ireland should too. The Authority very much welcomes the importance publicly placed on the measure by the Government, and the obvious priority it has been receiving during the Irish Presidency.

The proposal will bring benefits to all citizens of the EU, both as an instrument of consumer protection policy and as an instrument for competition policy and competitiveness. Indeed Ireland stands to gain more than many other Member States from early adoption, in view of the comparatively heavier burden of regulation elsewhere.

The Directive complements the Competition Advocacy work of The Competition Authority (for example the Authority's current Study of competition in the professions); it also complements the programme of regulatory reform set out in the Government's White Paper: *Regulating Better*.

Although we are very supportive of the proposal generally, even a quick reading shows that the draft Directive is multi-layered and complex, and requires a detailed assessment as to the implications for the economic sectors affected in Ireland, and the way they are currently regulated.

The approach of Irish negotiators in Brussels should therefore be one of strong backing for the proposal overall. This should be coupled with resistance to any weakening of the individual provisions of the draft - indeed, Ireland should argue for the text to be strengthened in a number of areas, for example Articles 14 and 15, and 29 and 30.



## 2. The Basic Issue

Obstacles to new firms entering a market encourage those already in the market to rest on their laurels, and not constantly seek cost saving efficiencies. Barriers to entry to particular sectors, State rules that dampen competition in particular markets, and the administrative burden of complying with excessive legislation and regulation, all contribute to an inefficient cost base, higher wages and higher prices. Legislation, regulation, and other policy measures which unnecessarily hinder the forces of competition thus operate directly against the interests of enterprise and consumers, and must be removed, or replaced with less restrictive alternatives. This is essentially what the proposed Directive sets out to do.

## 3. Benefits of the Proposed Directive

From a competition perspective, the proposed Directive has the following key benefits:

1. By reducing the cost and risk of doing business in other Member States, the Directive will facilitate Irish businesses in expanding abroad, and Irish consumers in engaging service providers from elsewhere in the EU. All of this implies greater competition in services markets in Ireland and in the EU, which leads to greater efficiency and lower prices, and which is ultimately good for consumers.
2. Greater competition in services in the EU will also contribute greatly to the EU's competitiveness. This is vital in ensuring sustainable employment in the EU - 70% of the EU's work force is employed in the services sector. Compared to trade in goods, where barriers have largely been removed at this stage, the services sector has traditionally been much more protected to date. Businesses competing on the international stage will benefit from lower cost, higher quality business services, reducing their cost base and giving them a competitive edge.
3. If Irish firms are to succeed abroad, it is vital that they face the full rigours of competition at home too, and the opening up of further domestic markets to international competition can only strengthen the ability of Irish firms to compete, **both** at home and abroad. The cumulative effect of increased competition in domestic markets (including



markets that serve consumers directly and not businesses) on the productivity and efficiency of Irish firms can only be beneficial to consumers, businesses and overall growth in the economy.

4. It is widely acknowledged that there is much regulation in Ireland that is not necessary and that imposes high costs on the economy. However, a succession of recent reports have shown that most other EU Member States are even more heavily regulated than Ireland. The obvious conclusion is that, from a comparative perspective, Irish enterprise has more to gain than most from early adoption of the Commission's proposal – and indeed from a strengthening of its provisions.
5. The proposal will also underpin, and give a necessary impetus to, Government policy in the area of Regulatory Reform, and strengthen its resolve to implement in a determined and effective way the aims and policies set out in its recent White Paper: *Regulating Better*. This resolve will be tested to the full by such as Articles 14 and 15 of the draft Directive, which will require domestic regulations (including self-regulation) to be systematically screened across the service economy, and individual laws, administrative practices or self-regulatory rules either fully justified or scrapped.

#### **4. Chapter I - Scope**

The Commission has been commendably ambitious in the coverage of the proposed directive and, at first sight, only a small number of sectors have been excluded from the scope, viz. telecoms, transport and financial services. These sectors already have Directives aimed specifically at supporting cross-border sales and establishment, or are currently being addressed with the aim of having sector-specific rules. However, a closer look shows that there are in fact a myriad of possible exceptions and derogations provided for in later Articles.

It is understandable that matters and issues *already* covered by specific Directives could be exempted, as in Article 17's treatment of postal services, electricity, posting of workers and many others. However, it is less easy to understand, for example, why health professions are being given special treatment in Article 19; this should be further justified by the Commission.



## **-- RESIST CLAIMS FOR SPECIAL PROTECTION**

The proposal will probably take some years to be finalised and adopted. During that time, there are likely to be considerable, concerted and sustained efforts by private vested interest groups to have the proposal watered down, or to have this or that sector excluded, or given more favourable treatment. This may come at pan-European level (and be manifested, for example, within the Council or the Parliament), or at the level of individual Member States, perhaps even including Ireland. The possibility also exists of undesirable trade-offs between Member States to exclude particular sectors. The argument will generally be made that the sector concerned (be that healthcare, a specific profession or other) is "special", "different", "unique" etc., and that the Directive should not therefore apply.

Irish negotiators should be highly sceptical of these claims and generally resist them, as they amount simply to special pleading by private, usually producer, interests for some form of "protection" from competition. These private interest arguments are normally dressed up as being in the public interest, but experience suggests that such claims rarely stand up to rigorous analysis. The protection of private interests in the mistaken belief that it is a public interest imposes substantial costs on the economy in terms of loss of competition (and competitiveness/productivity) and in terms of unnecessary red tape.

There will be less chance of this occurring if the debate in Ireland – and the input to forming the national view to be taken to the draft Directive – is transparent and open. A good start has been made on this through the current consultation process. The next step should be for all submissions received by Forfas (whether in this or future consultation rounds) to be published. There are, moreover, well-recognised methods for taking account of legitimate public policy objectives in a transparent, objective and proportionate way without actually excluding particular sectors from the scope of the proposal, and this helpful approach should continue throughout the whole process.



## 5. Chapter II – Freedom of Establishment

Articles 5 to 13 aim to simplify start-up formalities for businesses establishing from another EU Member State. These Articles will cover a wide range of laws, regulations and other requirements, including company registration requirements, planning permissions, public permits and licences of various kinds, e.g. for employment agencies, tour operators, auctioneers etc. They will present a considerable implementation challenge but this is not insurmountable, and the significant benefits, over the long term, are such that they should be supported.

The *black list* of prohibited requirements in Article 14 is generally welcome, and should be supported.

However, Article 15, containing a *grey list* of requirements which only have to be “evaluated” by Member States, as opposed to being prohibited outright, is more problematic. While superficially attractive, the requirement on Member States to check the types of requirements set out in this Article for compatibility with the Directive turns out to be very cumbersome, uncertain, and too easily avoided. This is particularly the case for requirements which are fundamentally anti-competitive and anti-consumer, for example –

1. quantitative or territorial restrictions, including those based on population or geographic distance from other businesses,
2. bans on a service provider having more than one outlet in the Member State concerned,
3. fixed minimum prices,
4. bans on below-cost selling, and
5. obligatory tying of the service provided, to some other service.

The Article proposes only that Member States will have to justify retaining any such requirements, and the only check on the validity of such justifications is a peer review by other Member States and, ultimately, a “Report” by the Commission by the end of 2008. In addition to being very weak in itself, that procedure carries too much risk of regulatory capture by vested interests, and a disinclination by the reviewing Member States to be overly critical of other



States, given that they themselves may be subject to the same pressures. It would be preferable if many of the more egregious "requirements" in the grey list were prohibited under Article 14, and the Authority suggests that this is what Ireland should argue for in the negotiations.

### **-- MONITORING MECHANISM REQUIRED**

There is a need for some sort of monitoring mechanism from the outset, some person, institution or mechanism who can see to it that Member States are actually doing what they are supposed to be doing from the date of adoption of the Directive – in other words, someone to "ride shotgun". Simply waiting a number of years (after adoption) for legislation to be transposed in 25 Member States will not be satisfactory on this point, as the aims – and indeed some of the detailed requirements – of the Directive could be frustrated quite easily by transposition delays, obfuscation, or the mere effluxion of time.

## **6. Chapter IV – Quality of Services**

The Competition Authority is currently running a major Study on the state of competition in the supply of professional services<sup>1</sup>. We therefore have considerable experience at this stage of the economic issues involved, and can confirm that many of the professions we are looking at show strong evidence of barriers to entry, restrictions on behaviour (e.g. bans on advertising, cold-calling etc.) and restrictions on organisational form (e.g. bans on multidisciplinary activity, or on company formation) – the very issues that the Directive sets out to address.

In this context, a close reading of the draft shows that, in some cases, the Commission is giving with one hand, and taking away with the other. For example, Article 29 requires Member States to remove all general prohibitions on advertising by the "regulated professions"<sup>2</sup>, but then defers to "*the specific nature of each profession*", and allows professional rules relating to "*the*

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<sup>1</sup> See [www.tca.ie](http://www.tca.ie).

<sup>2</sup> "Regulated professions" is defined extremely widely in Article 4, and is not limited to the traditional "liberal professions" of medicine, law etc. So long as a person is required (even indirectly) to hold a particular qualification in order to practise, the profession involved will be a "regulated profession".



*independence, dignity and integrity of the profession*" to dictate such advertising rules. Unfortunately, this type of approach will lead to demands for a myriad of exemptions and exceptions by professional service providers of all kinds and their representative lobbyists who will claim (as they regularly do domestically) that this or that professional rule is objectively justifiable and that it should therefore get some kind of "clearance". In reality, many of these rules can be used to avoid competitive pressures on service providers – and indeed to cloak anticompetitive (in the widest sense) activity. Ireland should make it clear, in straightforward terms, that truthful advertising should be as permissible for self-employed professionals (including those are self-regulated) as much as for any other sector of the economy, and press for Article 29 to be amended accordingly.

The same problem of ambivalence arises with Article 30. The Directive starts off by prohibiting Member States from restricting providers to one business activity, or from forming multidisciplinary businesses, and that would of course be welcome. However, it then allows a derogation from this prohibition in relation to "the regulated professions". Given that the latter term is extremely widely drafted (see Footnote 2), the Article will thus have little effect. Ireland should press for this derogation to be removed; failing that, its scope should be significantly lessened.

## **7. Conclusion**

The proposed Directive has the capacity to be one of the most far-reaching Directives in the economic arena for many years. The Authority will be very interested in continuing to examine its implications in more depth, and how it can be further strengthened. We would also be prepared to contribute, as required, to the evolution and development of an Irish approach to Council negotiations.