

ETUC Position on Internal Market Services Package

Adopted at the Executive Meeting of 13 and 14 June 2017

Introduction

On 10 January, the European Commission presented a new Services package, that includes proposals for the European Services e-card (composed of a regulation and directive), a Services Notification Procedure (directive), a Proportionality Test (directive) and guidance on reform recommendations for regulation in professional services (communication).

The ETUC position

From the Commission's perspective, the aim of the proposals included in the Services package is to improve cross-border provision of services in the internal market. At the same time, the ETUC stands for a fair internal market that reinforces the European social model and guarantees and respects workers' rights and decent working conditions, fair competition, high-quality public services and consumer protection. Thus, the ETUC supports legislative initiatives within the internal market only if they comply with these requirements.

However, the legislative proposals as presented do not reinforce but rather undermine the social dimension of the internal market. The proposals will not guarantee or improve the enforcement of workers' rights in Europe and the fight against social fraud.

The proposal for the European Services e-card raises concerns over its impact on the enforcement of companies' obligations and workers' rights. It focuses on making provision of services easier for companies, without addressing the social challenges of the internal market. The proposal risks weakening enforcement capacities of Member States and by doing that it will dissuade them from acting to protect workers' rights, quality of services and protection of consumers.

The European Services e-card will not contribute to a level playing field in Europe. It will facilitate fraudulent practices and letter-box companies instead of going in the direction of a fair internal market. By introducing elements of a country of origin principle and by reviving a 'Bolkenstein style' debate, if it continues with this package the Commission would send a negative signal to European workers and citizens, in a context of rising populism and Euroscepticism. Therefore, the ETUC calls on the European Institutions to reject the proposal.

It must be added that social partners in the construction, services and insurance sectors have previously voiced fundamental concerns about the legislative proposals for a European services e-card and question their real capacity to strengthen the European Single market. They draw attention to the introduction of a standardised "proof of insurance" document, the requirement that insurers provide a summary of their customers' "track records", the turning back to the country of origin principle and the quality of preliminary impact assessment. However, their concerns were not addressed and no proper consultations have been organised. The ETUC finds this inconsistent with the statement *A New Start for Social Dialogue*, signed last year by the European social partners, the European Commission and the presidency, providing for the substantial and meaningful involvement of social partners in European policy-making.¹

¹ Joint statement "A new start for social dialogue" signed on 27 June 2016 by European Commission Vice-President for the Euro and Social Dialogue Valdis Dombrovskis; Commissioner for Employment, Social Affairs, Skills and Labour Mobility Marianne Thyssen; the European cross-industry social partners (ETUC, BUSINESSEUROPE, UEAPME, CEEP) and by the Netherlands Presidency of the Council of the European Union. Available at: <http://ec.europa.eu/social/BlobServlet?docId=15738&langId=en>.

The proposal for the improvement of Services Notification Procedure intervenes significantly in the democratic processes in the Member States. Member States adopt regulations to protect public interest and not necessarily to create barriers. The European Commission must reconsider the necessity of introducing the complex consultation process and alert mechanism and re-evaluate its impact on the national legislative process. Any notification process must not stop or impede national legislative processes. For these reasons, the proposal must be rejected.

It is in the competence of the Member States to decide on the necessary level of protection and the proportionate instruments to achieve this protection. The proposal for a Proportionality Test, instead of preventing unnecessary barriers to free movement of workers and services, will create additional administrative burdens and legal uncertainty in the national law-making process. In turn, additional administrative burdens could dissuade the Member States from passing necessary social regulations in the future. The proposal in its current form therefore is not suitable for achieving its initial aim, and the ETUC urges the EU institutions to oppose the proposal.

Towards a fair internal market

The Commission must now refrain from launching initiatives that focus only on making provision of services easier for companies without addressing the social challenges of the internal market. The “social market economy” approach must be back at the core of the European Union and its internal market. While rejecting the proposals included in the Services package, the ETUC remains in favour of discussing rules and principles to establish a fair internal market.

Detailed assessment

The European Services e-card

While the e-card proposal aims to reduce administrative barriers for companies providing cross-border services, it raises concerns over its impact on the enforcement of companies’ obligations and workers’ rights: The following elements of the proposal, in the ETUC’s view, will lead to the reduction of supervision and quality of controls and inspections for the host Member State and as a result will impact on the efficient enforcement of rights and duties:

Short time lines for review of applications

The proposal provides short time limits to review applications and pass decisions. For the temporary provision of services - one week for the home Member State and two weeks for the host Member State. If the host Member State misses the deadline and does not react, the e-card can be issued automatically by the home Member State authorities. For the opening of branches and agencies - one week for the home Member State and four weeks for the host Member State. The ETUC doubts the practical ability and capacity of the Member States to effectively examine applications for the e-card within such short deadlines.

The Internal Market Information System (IMI), created in 2007, is regarded as the main digital communication tool between Member States. However, a Special Report of the European Court of Auditors highlighted that the IMI system is not considered useful and efficient by Member States’ public authorities on grounds of quality and speed of exchange of information.² Therefore, the ETUC is concerned about the efficiency of communication between the Member States considering quality and speed of exchange of information in the IMI system and the short deadlines to issue an e-card.

² European Court of Auditors. Special Report nr.5. 2016. “Has the Commission ensured effective implementation of the Services Directive?”

Available at: http://www.eca.europa.eu/Lists/ECADocuments/SR16_05/SR_SERVICES_EN.pdf. p. 24-26.

At the same time, it should be noted that several Member States have or are setting-up electronic verification schemes (social ID-cards or alternative schemes). The proposed services e-card is not at all complementary to the national schemes. This double structure (one EU and one national) will inevitably lead to a highly undesirable conflict of interests.

Indefinite validity period

Once the e-card is issued, it is in force until it is suspended or revoked. The effects of the indefinite duration of the e-card do not reflect the reality of the fast-changing nature of business and the fact that information submitted once could rapidly become outdated.

'Once and only' principle and enforcement of duty to update information

While the proposal is without prejudice to the enforcement of posting obligations, the performance of checks, inspections and investigation during provision of services, the proposal prohibits Member States from requesting information which is already contained in the e-card. Companies will be obliged to update information included in the e-card, however, the proposal does not provide any guidance on how the home Member State can enforce this duty. As a result, although important information regarding the genuine economic activity of the company might change, there is no mechanism to force companies to ensure update of information. It is not clear whether inspection authorities in the host Member State will be able to require the updating of information which was uploaded onto the e-card but has become outdated. In this way, the 'once and only' principle could exacerbate the already existing enforcement problems at the national level.

Revocation and suspension of European Services e-card

The procedure to revoke the e-card in case of fraud is impractical as it requires a long legal process and in case of temporary service provision falls under the competence of the home Member State authorities. In addition, the closed list of preconditions (reasons) to suspend and revoke the e-card excludes other reasons that might come up in the future. The proposal does not provide for clarity on what happens to the validity of the e-card during litigation over its revocation and suspension. The provision for Member States to impose sanctions on fraudulent service providers whose e-cards have been revoked is missing.

Missing details in the practical process regarding the e-card

The Commission keeps the competence to adopt a wide range of implementing measures for handling and processing applications, processing of suspensions, revocations, updates and cancellations of the e-card. These rules will be drafted at a later stage without guarantees that social partners will be consulted in this process.

Harmonising format of professional liability insurance

The proposal intends to make it an obligation for insurance distributors, as well as bodies appointed by a home Member State to provide compulsory insurance, to provide a harmonised description of the core elements of coverage to their client in the format of an insurance certificate. Trade unions in the finance sector pointed out that it is difficult to standardise the key information across the EU and impose a single format on insurance documents, including reports on clients' claims. This could lead to crucial information being omitted, and impact on the quality of insurance tools in Europe.

Impact on regulation of posting of workers

The proposal interferes with the agreed regulations of the Enforcement Directive 2014/67/EC, in particular on the submission of prior notification declarations to the host Member State before the beginning of posting.

The proposal provides three options regarding the prior notification declaration on posting (PND). The host Member State will be able to choose one of these three options:

- a) make no changes: the e-card holder will submit the PND to the host Member State according to its national legislation that implements article 9 of the Enforcement Directive;
- b) use the IMI system to direct service providers to the website with national procedures for submission of the PND;
- c) allow submission of the PND through the IMI system in the home Member State keeping full control over requirements regarding content of the PND.

While the PND process and requirements are thus not changed by this initiative and stay under the full control of the host Member State, the proposal introduces opportunities for the Member State to combine the processes of e-card and enforcement of posting obligations. The ETUC believes that the option of submitting the PND through the IMI system is not necessary. No reasoning is provided to justify the proposed changes. Stepping out of agreed unified principles on submission of prior notification declarations directly to the host Member State as provided by the Enforcement Directive will create more confusion and legal uncertainty both for service providers and public authorities. The introduction of a new coordinating authority beside the existing system of points of single contact also creates an unnecessary duplicate bureaucracy.

Improvement of the Services Notification Procedure

The ETUC is concerned that a three-month consultation process and additional three-month alert period will significantly interfere with and even impede national legislative procedures. A draft legislative proposal can significantly change during the law-making process at national level. If a draft law is amended, the Member State must notify the Commission again and restart the consultation process. To avoid notifying the Commission of any change during discussions at national level, a Member State should then 'freeze' the legislative process for the consultation period, which will prolong every national legislative process on new rules on services for three to five months.

The Commission will have an opportunity to influence and evaluate the draft proposals before national social partners and legislators can. The time and administrative resources invested in the consultation process of the notification procedure, therefore, will not improve the standard-setting process, but on the contrary, will create more administrative burdens and disturb the discussion process at national level. Moreover, in the countries that have a specific system of setting standards for professions and qualifications involving social partners and professional organisations, the proposal might undermine existing successful models. Finally, one last potentially harmful aspect relates to disruption of sectoral provisions and sectoral bargaining.

The aim of ensuring proper notification discipline could be achieved by a simple ex-ante information procedure, namely informing of the intention to adopt specific legislation. It should also clarify that where standards for professions and qualifications are set by or with social partners and professional organisations, their involvement is guaranteed during notification processes. Notification procedure cannot be used as an excuse by the Member State governments for not properly consulting or taking account of social partners' views. The social partners should be involved in any subsequent discussions and amendments of the proposal where the Commission has objected or commented.

National proportionality assessment on new rules for professional services

From the wording of the proposal on the proportionality test it is not clear whether this proportionality assessment is applicable to draft legislation only or also to any slight amendments made to existing legislative provisions. It is uncertain when the proportionality assessment should be made as well as by which responsible public authorities, namely, public institutions responsible for drafting the legislative proposals and/or legislator or whether the proposal points in the direction of establishing specialised scrutiny bodies at the national level.

It is unclear how completion of the proportionality test followed by notification of its results to the Commission and assessment of comments sent by other Member States will be combined in practice with the ongoing legislative process at national level.

Moreover, by codifying the criteria of the proportionality test, the proposal limits the Member States in application of future decisions of the CJEU on the principle of proportionality. In addition, the proposal does not make any opt-outs or specific provisions for especially “sensitive” regulated professions whereas in practice the CJEU’s case law has always been more lenient to particular professions such as the healthcare sector). Health and social care professions should therefore be fully excluded from the Directive. Furthermore, the obligation to run proportionality tests in combination with obligations imposed by the notification procedure could considerably slow down national legislative processes and will leave less room for discussions at national level between relevant stakeholders involved in the legislative process. Lastly, the proposal would put national regulations for qualifications under pressure.

The proposal provides an obligation to inform relevant stakeholders before introducing new legislative or regulatory provisions and to give them the opportunity to make known their views. However, it does not impose an obligation to involve social partners and professional organisations where regulation of professions is made by them or with their close involvement. The ETUC is concerned about the impact of the proportionality test on systems where regulation of professions is carried out with the direct involvement of social partners and professional organisations. The aim of preventing infringement procedures can be achieved in a more proportionate way by adopting a recommendation that includes practical detailed guidelines for the Member States.