

25 May 2005

**DRAFT REPORT (PART I) BY EVELYNE GEBHARDT (RAPPORTEUR IMCO)
ON DIRECTIVE ON SERVICES IN THE INTERNAL MARKET****UNICE COMMENTS***Draft 3***INTRODUCTION**

UNICE is following with great attention discussions by the European Parliament on the proposed directive on services. In particular, it has special interest in the work by the rapporteur Evelyne Gebhardt (PES/DE) of the Internal Market and Consumer Protection Committee which is the lead Committee for this proposal.

The present documents expresses UNICE's comments on the first part of Ms Gebhardt's draft report which covers the "country-of-origin" principle and the scope of the directive.

It is worth recalling that UNICE supports the horizontal approach taken by the Commission in the directive with the aim of promoting cross-border trade and establishment in the internal market for services. A well-functioning internal market for services is crucial to Europe's competitiveness and its ability to attain the Lisbon objectives of increased growth and employment. However, some specific provisions of the proposal need to be adjusted and further clarified.

SUMMARY CONCLUSIONS:

UNICE believes that Ms Gebhardt's proposal will not serve to attain efficiently the objectives sought by the Commission's proposal or be able to create a well-functioning internal market for services that is crucial for meeting the Lisbon objectives of increased growth and employment. It is also of the opinion that her proposal would lead to increased legal uncertainty and regulatory burden.

Ms Gebhardt excludes too many sectors from the directive's scope and replaces the country-of-origin principle with mutual recognition, which is undermined by a long list of derogations and exceptions, and too much discretionary power for Member States to object to the MRP on the basis of reasons of general interest. She also calls for wide-scale minimum standards harmonisation for an extensive list of services.

In the light of the above, UNICE does not support Ms Gebhardt's approach.

SUMMARY ANALYSIS OF MS GEBHARDT'S DRAFT AMENDMENTS¹

I. SCOPE OF THE DIRECTIVE (Amendments 1-3)

Exclusions from the scope of the directive:

1. *Services of general interest (SGI)*, which are defined by 9 criteria (e.g. universal coverage, security of supply, continuity, etc.)
2. Services which, while being commercial in nature, pursue a general interest objective and are thus subject to specific public-sector funding requirements (i.e. services of general economic interest-SGEI), including
 - *health, social security and social services*
 - *educational and cultural services*
 - *audiovisual services*
3. Services guaranteed or funded in whole or in part by public funding with a view to securing or maintaining public interest objectives.
4. Labour Law and social insurance legislation in the Member States
5. EC legislation on consumer protection, labour law and reparation of loss and damage

UNICE comments:

The numerous exclusions introduced greatly limit the possibilities of free establishment and provision of services covered by the mutual recognition principle. It is not clear which services would be covered by some of the far-reaching exclusions, which goes against the horizontal nature of the directive.

Regarding the list of criteria defining services of general interest, UNICE does not support the use of criteria in the directive. It should be up to the Member States to decide what areas are to be considered as "services of general interest".

Regarding services of general economic interest, UNICE does not agree with the exclusion of services of general economic interest from the scope of the directive: these services should be covered by the directive insofar as they are open to competition. In addition, the examples listed by the rapporteur are too far-reaching. There might be commercial services within the health care sector, education, culture and audiovisual sectors, where it might be justified to open up for cross-border marketing. Also, the definition of these services should be left to the discretion of Member States.

As for the areas excluded, the rapporteur includes labour law and consumer protection in block, UNICE believes that it is a wrong approach to foresee broad and ill-defined exclusions of policy areas and does not provide legal certainty. In regard to labour law and social insurance legislation, the right approach would be to ensure that the directive is without prejudice to the matters covered by regulation 1407/71 on coordination of social security systems and directive 96/71 on posting of workers.

¹ The summary analysis principally focuses on the new elements introduced by the rapporteur as compared with the Commission's proposal.

II. MUTUAL RECOGNITION PRINCIPLE (MRP) (Amendment 5)

The rapporteur replaces the country-of-origin principle (COO) with MRP. The latter reads as follows:

“Mutual recognition principle

1. An economic operator who performs a service in a Member State in accordance with the law of that Member State may offer the same service without hindrance in another Member State.”

UNICE comments:

UNICE would not in principle be opposed to the use of other instruments or principles as long as legal certainty is secured and it is ensured that any economic operator who is legally established and performs a service in a Member State in accordance with the law of that Member State may offer and carry out the same service without hindrance in another Member State.

However, UNICE believes that the principle as proposed by the rapporteur will not achieve that.

MRP only prohibits the country of destination from restricting incoming cross-border services but does not address the question of what law is applicable to the service provider and the provision of the service. As a consequence, providers offering cross-border services would face legal uncertainty and it would be up to a judge to determine the law applicable only when a case goes to a court.

Furthermore, the Gebhardt report proposes a long and far-reaching list of derogations and exceptions to the MRP and allows the country of destination to restrict incoming cross-border services by invoking reasons of general interest which are link to large and unduly general policy areas. This approach means that MRP is virtually a principle for discretionary use by Member States.

UNICE is also opposed to amendment 5 introducing Article 16. 1a on areas to which MRP will not apply for the same reasons expressed above regarding exclusion of labour law.

UNICE therefore can not support the use of MRP as the tool to achieve diligent and swift implementation of an efficient internal market for services and provide legal certainty. It advocates maintaining the COO principle as proposed in the Commission’s draft.

Exceptions/derogations from the MRP (i.e. application of legislation of country of destination) (Amendments 9 and 17)

2.1 List of services in annex (business to consumer services: environmental services, travel services, cultural and sporting services, etc)

2.2 Derogations for reasons of general interest (including reasons of social policy, consumer and environment protection, public security, public health or public order)

UNICE comments:

On the use of lists of services/categories, in an evolving and fast-changing market such as that for services, a regulatory framework based on positive and negative lists of service

categories to which different principles apply does not seem to improve the necessary legal clarity to enhance cross-border trade of services. Quite the contrary, it may create legal uncertainty as regards new services or services that are not easily categorised among the listed sectors.

Regarding derogation for reasons of general interest by which Member States can restrict provision of services on the basis of grounds relating to social policy, consumer and environment protection, public security, public health and public order, UNICE rejects the rapporteur's proposal which is drafted in a way that grants unlimited discretion for MS to stop free movement of services, which is at the core of the directive. The rapporteur's approach also seems to shift the burden of proof from public authorities to service providers that should prove that they respect the host country's rules for the above areas. This is extremely difficult to carry out and would put providers in a situation of legal uncertainty. It could even result in multiplication of obstacles to the free movement of services.

UNICE insists that the reasons qualifying as reasons of general interest should be limited to public security, public health and public order.

Additional harmonisation (Amendment 7)

The Commission shall propose minimum standards of harmonisation for:

- services excluded from the scope of the Directive by article 2 (1c) not yet covered by existing EU legislation (e.g. health, social, cultural services)
- services for which MRP applies listed in the annexes (including more than ten service categories)

UNICE comments:

The use of the MRP is coupled with a wide plan for a sectoral harmonisation approach. The rapporteur proposes adoption of new harmonisation legislation to set out minimum standards covering a great number of service sectors which are difficult to identify.

It is unclear what the rapporteur's purpose with this approach is. In particular, it is not certain what time frame is foreseen for the proposals of minimum standards of harmonisation as regards the implementation of the directive, namely whether additional harmonisation should take place concomitantly with or prior to the implementation of the directive.

Although UNICE could support targeted harmonisation, it would oppose obligatory prior harmonisation and prefers the Commission's line where decision on harmonisation is made through ad hoc assessment. Furthermore, the rapporteur's proposal for wide harmonisation on minimum standards is unrealistic and would necessitate a lengthy legislative process that may lead to increased regulatory burden.

III. CONTROL AND SUPERVISION (Amendment 5)

The country of destination where the service is performed will be responsible for supervision in close cooperation with service provider's country of origin.

In addition, the rapporteur removes the list of prohibited requirements (art. 16 of the directive) which prevented MS from imposing certain specific restrictions to provision of services by foreign providers.

UNICE comments:

Regarding the shift of control to the authorities of the country of destination principle, UNICE could accept it as long as the cooperation with the country of origin's authorities is properly ensured and an efficient balance of responsibilities between both countries' authorities is guaranteed. It is also essential that this does result in increased burden on service providers.

Nevertheless, UNICE opposes the removal of the list of prohibited requirements (art. 16 of the directive) preventing Member States from imposing certain requirements on foreign service providers. Those requirements were identified by Commission's reports as unjustified barriers to the provision of services and should be lifted. The removal would be a big step in the wrong direction and run counter the very objectives of the directive.

UNICE also underlines the need for an efficient surveillance regime in all Member States, for a clear procedure for cooperation between the surveillance authorities. The lack of efficient market surveillance must not be an excuse for more burdens on companies.

IV. SPECIFIC PROVISIONS ON THE POSTING OF WORKERS (Amendment 13)

The rapporteur deletes article 24 of the directive.

UNICE comments:

UNICE does not support amendment 13. However, it agrees that clarification of article 24 is necessary.

UNICE broadly supports the approach of Article 17(5) and (24), which refers the issue of posting of workers to directive 96/71. It fully shares the view expressed in the recent Commission communication on implementation of directive 96/71 that there is no need to revise the directive and insists that the wording of Article 24 should be compatible with the posting of workers directive. In that context, the current drafting of sub-section 2 in Article 24(1) and of Article 24(2) could be misinterpreted as seeking to undermine the practical implementation of directive 96/71.

UNICE is fully in favour of administrative simplification, including in the areas covered by the posting of workers directive but recognises that the host country has to be aware of the presence of posted workers for directive 96/71 to be implemented in practice. This simplification should not create legal uncertainty or transfer the administrative burden on the company using the services of the employer of the posted worker.

Concerning Article 24(1)c, UNICE fully agrees that obliging the provider to establish a legal structure in the host Member State would be contrary to the freedom to provide cross-border services and is not necessary for the implementation of the posting of workers directive. However, it believes that the other parts of Article 24 should be redrafted to the effect that

- the host Member State is responsible for carrying out in its territory the checks, inspections and investigations necessary to ensure compliance with the employment and working conditions applicable under directive 96/71/EC and for taking, in accordance with Community law, measures in respect of a service provider who fails to comply with those conditions,
- the country of origin is fully cooperating with the host country in providing documents required by the host country.