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TUC Response

# EU Directive on Services in the Internal Market

## Introduction

The TUC welcomes this opportunity to comment to the DTI on the proposal for a Directive on services in the internal market. As both the Directive and the DTI consultation paper make clear, this is a horizontal Directive with the potential to have a major impact on the service sector across EU member states and thus on the EU economy as a whole. Wide consultation and thorough debate are essential to ensure that both the overall thrust and the detail of the Directive are right, and that the Directive, when implemented, does not generate unwelcome and unintended consequences. This is especially important because, as has been acknowledged by the DTI during the consultation process, some major areas of uncertainty remain, including whether certain sectors areas would be covered by the Directive,

The TUC commends the DTI for the consultation process it has put in place. It is essential that the responses generated are listened to and taken into account by the DTI in the negotiations with member states and the Commission that will follow.

The TUC considers that the proposed timetable for the Directive is very ambitious. This is too important a Directive to be rushed through, and the EU timetable must if necessary be adjusted to allow proper assessment, consideration and revision to take place.

### The need for and aims of the Directive

The stated aim of the Directive is to promote a genuine internal market in services; the TUC recognises that an internal market in services is an integral part of the EU common market.

However, to work well, markets need to be based on clear rules that promote high standards of trading conduct and acceptable minimum quality standards that people can trust. Such rules need to operate across the market as a whole. While the Directive does contain some measures to establish mutual trust among member states, the TUC believes that the Directive's proposals in this area are insufficient. There is a further issue of timing, as it is proposed that this work proceed in tandem with measures to abolish barriers to the free movement of services across member states. Promoting the free movement of services across member states in the absence of EU-wide rules that generate trust among EU citizens would generate considerable uncertainty in the market, transferring risk for economic activity from business to consumers and workers. It is absolutely essential that sufficient protections are written into the Directive to ensure that this is not the case.

The preamble sets the Directive in the context of the economic reform programme launched by the Lisbon European Council in 2000. However, the Lisbon strategy explicitly linked economic reform with promoting sustainable economic growth, better quality jobs and social cohesion. The social dimension of the internal market cannot be divorced from the economic dimension, as recognised by Jacques Delors in the original proposals for the establishment of an EU common market. Yet in the

current draft the social dimension is largely missing from this Directive; it is essential that this is rectified.

The TUC regrets that the Commission has put forward this Directive on Services in the Internal Market while progress on a Framework Directive on Services of General Interest has stalled. This is problematic; some of the most serious concerns of the TUC and the trade union movement relate to the potential impact of this Directive on the area of essential public and social services (see below for further detail on this). A Framework Directive on Services of General Interest, setting out definitions, clarifications of EU policy and appropriate protections for this vital area, should be a priority for EU work on the services sector. It should also be a prerequisite for a Directive on Services in the Internal Market - clear definitions of public services or services of general interest would allow these areas to be ringfenced effectively, thus addressing a major area of concern in relation to the current proposals. The TUC believes that there should be a legislative standstill on the Directive on Services in the Internal Market until a Framework Directive on Services of General Interest has been agreed.

### Impact assessment

It is vital that a proper impact assessment examining both expected gains and potential problems resulting from the Directive be carried out. At present, there is great uncertainty both within the Commission and within member state governments about how the Directive will affect particular sectors and areas of operation. In the absence of a proper impact assessment it is impossible either to make a convincing case for the need for change or to address potential problems. It is simply irresponsible to propose such sweeping changes without carrying out a thorough impact assessment with full consultation with relevant stakeholders, including sectoral organisations and trade unions.

It is also important that the potential benefits of the Directive are not exaggerated. For example, the DTI points to the fact that services account for 54% of EU economic output but just the 20% of EU trade as evidence of the trade restrictions faced by services providers. However, some services will always be provided on a local basis, and trade will always be less that output in services. Neither the DTI nor the Commission make any attempt to assess what proportion of services could be expected to be traded after the introduction of the Directive. Some of the barriers to trade in services are 'natural' barriers based on geographical proximity, language needs and so on, and this must be taken into account when assessing the Directive's potential impact.

### Freedom of establishment

The principle of freedom of establishment is a key pillar of the internal market. The TUC supports the principle that companies established within the EU should be free to establish themselves within other member states, so long as they respect the rules of those countries.

Simplification of rules relating to establishment and increasing access to information through single points of contact and electronic communications are all sensible measures to promote freedom of establishment.

In terms of the rules governing establishment, the key principle is that these rules should be non-discriminatory and should not discriminate against service providers on the basis of their nationality. The TUC is concerned that article 15 setting out the requirements to be evaluated goes beyond this basic principle of non-discrimination into the territory of determining how member states should regulate services that are within their territory. The TUC believes that member states should remain free to regulate services within their territory according to nationally determined priorities, so long as such regulations are non-discriminatory. We are

not convinced that asking member states to evaluate all the measures listed in article 15 against the principles of non-discrimination, over-riding public interest and proportionality is necessary for the promotion of the internal market in services, or a useful way to proceed. However, if article 15 is to remain, we believe it is essential that 3(b) is changed so that the conditions are subject simply to a public interest test, and that the word 'over-riding' is removed. An 'over-riding public interest' test is too high a test - 'justified by the public interest' is sufficient; and we also believe that use of the word 'over-riding' will lead to confusion and legal uncertainty, in contradiction to the aim of the Directive.

### Definition of establishment

Because of the country of origin rule, which will be discussed below, the definition of 'establishment' is extremely important, determining whether a service provider operating in another country is required to follow the legal requirements of their country of origin or the host country where they are providing the service. Establishment is defined in article 4 (5) as: 'the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, through a fixed establishment of the provider for an indefinite period'. We are concerned that a service provider could use fixed-term renting and employment contracts to circumvent this definition of establishment on the basis that it was not for an indefinite period. Recital 19 increases the possibility of confusion and abuse, by saying that infrastructure and the use of a geographical base should not be taken as indicating establishment. It is also important that the definition of establishment does not exclude seasonal service providers, common, for example, in the agricultural sector and tourist sectors. The definition of establishment must be clarified and tightened so that the Directive does not give rise to unintended consequences.

### Country of origin rule

Probably the most controversial part of the Directive is the country of origin principle set out in article 16. According to this principle, service providers established in one member state would be able to offer services in another member state according to the relevant rules of the country where they are established, and would not have to comply with the requirements of the country where they are operating. Article 16 expressly forbid member states from imposing requirements 'governing the behaviour of the provider, the quality or content of the service'.

To work well, without lowering standards and creating uncertainty and additional risk for consumers, the country of origin rule should be accompanied by harmonisation rules governing quality, content and in particular safety standards of services. Where the EU has introduced the country of origin rule to date - for example, in the financial and television sectors – it has gone hand in hand with measures to harmonise the conditions of establishment. The TUC believes that the country of origin rule is best applied on a sectoral basis on a time scale that allows proper discussion and agreement on harmonisation measures and appropriate derogations. In the absence of harmonisation, the country of origin rule undermines the ability of member states to regulate the activities that take place in their territory and to determine the minimum standards that they believe are appropriate to protect their citizens. The TUC does not believe that it is appropriate to introduce the country of origin rule on a horizontal basis in the absence of harmonisation, as proposed in this Directive.

If the country of origin rule is to remain on a horizontal basis as currently proposed, it is absolutely essential that the derogations are clarified and extended.

### Health and safety

The TUC is very concerned about the implications of the country of origin rule for health and safety standards. While our concerns are framed in the context of the

implications for the UK, other member states with highly developed health and safety regulations face the same issues.

The Directive covers some very high-risk areas, some of which require authorisations in order to operate in the UK. For example, domestic gas fitters must be certified as competent, and asbestos removal contractors must notify the Health and Safety Executive (HSE) of their work plans so that they can be inspected in advance of work being carried out. Authorisations are also required for the nuclear industry, offshore installations, railways and explosives storage. It is clearly vital that these systems of authorisations and inspections continue, in order to safeguard the public interest.

Under the Directive, it is the country of origin that has responsibility for supervising the provider of temporary services in another member state. In the case of health and safety inspection, this is clearly impractical and wasteful of resources. The Health and Safety Executive in the UK could not be expected to carry out inspections of UK companies operating abroad; and nor could the inspectorates of other member states be expected to inspect companies operating outside its territory. Even if HSE inspectors carried out an inspection on behalf of other member state inspectorates, the basis for any requirement to implement changes would appear to be law in the country of origin. This would put HSC inspectors in an impossible position of needing to know the health and safety regulations of all other member states.

In situations of risk, it is essential for workers' and public safety that HSE inspectors are able to take immediate action against unsafe practices, including serving Prohibition Notices to stop work immediately to prevent risk of serious personal injury. It would not be appropriate for prior liaison with another member state

government to be a prerequisite for action by the inspectors, as required by the Directive in Articles 19 and 37.

While there is some harmonisation of health and safety standards across the EU, there are significant variations in approach across different member states. For example, EU health and safety law covers employees and sometimes the self-employed, but not members of the public in the vicinity, which is covered by UK requirements. Fuller harmonisation and a thorough impact assessment of the impact of the varying approaches to health and safety across member states would be prerequisites to allowing the country of origin approach to operate in this vital area. In the absence of these, the TUC believes that it is absolutely essential that health and safety requirements are specifically listed as derogations from the country of origin rule in article 17.

We would expect some health and safety requirements – perhaps all - to be covered by article 17 (17), which allows derogation from the country of origin rule for the 'protection of public health'. However, this is by no means clear, and it is a matter of regret that the wording of the Directive leaves much room for uncertainty and concern. A full derogation for all health and safety requirements must be made absolutely explicit in the Directive itself.

### Other necessary derogations – healthcare, care and social services, transport services, construction, matters covered by the DDA, environmental regulation

The Government has a duty to its citizens to ensure a safe and clean environment and to safeguard high standards in essential services involving the care of vulnerable people. There is no assessment in the Directive or the DTI consultation paper of the variations in requirements in these areas across the EU. Given this, there is every possibility that the application of the country of origin rule in these areas would lead

to a lowering of standards. This is unacceptable, and the TUC believes that the Government would be neglecting its duty towards its citizens if it allowed such essential areas to be covered by the country of origin rule.

We note that there is ongoing discussion between the DTI and the Commission to clarify whether care services would in fact be covered by the Directive. This lack of clarity and the apparent lack of thought given to these issues in the drafting of the Directive is again highly regrettable, giving rise to considerable uncertainty and concern. It is essential that the intentions behind the Directive are clarified as soon as possible to allow informed debate to take place.

In the area of social care, a wide rang e of care standards have been developed in the UK, covering care homes for older people, children's homes, nursing homes and domiciliary care. The aim of these national care standards is to promote the health, welfare and quality of life of service users and to reduce the risks to their safety and wellbeing. The standards include qualifications and training of staff, safe working practices, standards for premises, quality of care, child protection, adequacy of staff, vetting of staff, safety and security, personal care and space requirements.

It is essential that the Directive is amended so that it is absolutely clear that service providers operating in these areas will be considered to be 'established', and will therefore have to comply with the national care standards and other relevant regulation.

In the area of health, the Directive appears to be written with the insurance-based systems that operate in some other member states in mind, and the UK's National Health Service does not fit easily into its provisions. The TUC believes that health care as a whole should be excluded from the Directive.

While most transport services are excluded from the scope of the Directive on the basis that there are covered by existing EU Directives, in some key areas this is not the case. It is important to public safety that transport services should be regulated in an integrated manner, and therefore all transport services should be excluded from the country of origin rule.

Construction is both one of the most dangerous sectors to work in and one in which standards of work have major implications for consumers and the public at large. For standards in this area to be regulated effectively, it is absolutely essential that construction companies are all working to the same set of regulations at any one site. If the country of origin rule were to be applied in this sector, it would be possible to have the bizarre situation in which companies working on the same project were applying different quality standards, employing workers on different terms and conditions and applying different health and safety standards. This would result in considerable confusion about which standards should be adhered to, creating vast difficulties in terms of enforcement and an unacceptable risk of the lowering of both quality and health and safety standards. It is therefore essential that construction be derogated from the country of origin principle. It should be noted that the European Federation of Building and Woodworkers in the EEC and the European Construction Industry Federation have put out a joint statement calling for the country of origin principle not to be applied to construction.

There is no cross-EU regulation governing the rights of disabled people not to be discriminated against in terms of access to goods and services. It is therefore necessary for disability access regulation, covered in the UK by the Disability Discrimination Act, to be excluded from the country of origin rule.

For consumers to be subject to many different sets of laws in terms of implementing their rights would be unacceptable, transferring the complexities of the internal

market from business entities to individual consumers. Consumer protection is mentioned as an area for harmonisation measures in article 40; but until sufficient harmonisation is operation, consumer protection regulation should be derogated from the country of origin rule.

The environmental is mentioned as a potential basis for derogation in article 17 (17). This should be made into an explicit derogation for environmental regulations.

### The relationship between the draft Services Directive and Labour Law

As stated above, the TUC is seriously concerned that this Directive fails to give due recognition to the social dimension of the common market. While one of the principal aims of the social dimension has been the harmonisation of basic employment standard across EU Member States, this goal has not yet been fully realised. Significant disparities remain between industrial relations systems, employment practices, social protection and living standards with different Member States.

Paragraph 58 of the Preamble states that 'this Directive does not aim to deal with Labour Law as such'. Nevertheless, the TUC believes that in a number key respects the draft Directive could have significant implications for labour law and its monitoring and enforcement. In the absence of significant improved protections for labour laws and health and safety within this Directive, the TUC is seriously concerned that it would lead to social dumping and the undermining of established protection for workers.

### (i) 'Country of Origin' Principle and Labour Law

The TUC is particularly concerned about the application of the 'country of origin' principle to labour law. This will inevitably add an additional layer of complexity

and confusion to the already complicated issue of territorial scope of statutory employment rights and the application of contractual conditions of employment.

It is essential that the Directive does not cut across established rights for employees under Article 6 of the Rome Convention. The TUC takes the view that all workers, employed in the UK on either a temporary or habitual basis, should be entitled to all UK statutory employment rights, where UK legislation affords better protection than the law provided in the worker's country of origin. This issue is particularly in important in relation to equal opportunities legislation, where in a number of important respects UK anti-discrimination legislation exceeds the minimum protections afforded by EU legislation.

The TUC is seriously concerned that the application of the country of origin principle will have significant detrimental implications for the monitoring and enforcement of labour law and the transparency of employment relationships. The TUC is not convinced that it will be feasible or effective for providers of cross border services to monitor and enforce employment laws from their country of origin. There will be particular problems of enforcement in the case of sub-contracted staff and agency workers who are supplied to provide services and who are supervised by other employers.

Of particular concern is the provision that details of the employment relationship will be held in the country of origin and not in the country where the individual temporarily or habitually carries out their work. This will restrict workers' ability to benefit from effective worker representation. It will also make it difficult for workers to enforce their statutory or contractual rights in any country, other than the country of origin of the enterprise. Non-UK workers, assigned to the UK could therefore face difficulties in bringing employment tribunal applications. This is likely to prove a particular problem in discrimination related cases, as equal

opportunities law permeates the employment relationship and applies in cases where, for the purposes of establishing less favourable treatment comparisons are made with individual/s employed by a different employer (for example, the Court of Appeal's decision in the *Allonby*).

The fact that details of the employment relationship will only be held in the country of origin will also make it more difficult for trade unions to monitor and enforce the Best Value regime, including the Code of Practice on workforce matters in Local Government, as they will have difficulties in accessing relevant documentation where services are contracted out to cross border providers.

The TUC therefore believes that labour law should be exempted from the country of origin principle. However, as a minimum the TUC believes it is essential that the Directive is amended to clarify its relationship with the Rome Convention.

The TUC also firmly believes that the Directive should be amended to make clear that all rights relating to worker representation, recognition and information and consultation, operating in a country other than the country of origin of the enterprise, should also apply to all workers whether habitually or temporarily carry out their work in that country.

### (ii) Posting of workers

According to Article 17 of the draft Directive, the country of origin rule does not apply to matters covered by Directive 96/71/EC on the posting of workers. However, Articles 24 and 25 will have significant negative repercussions for the monitoring and enforcement of the Posting of Workers Directive. Article 24(1) explicitly acknowledges the duties of the Member State of posting to carry out checks and inspections in its own territory necessary to enforce the employment

conditions protected by the Posting of Workers Directive and to take necessary measures against a service provider who fails to comply with the Directive.

However, the same paragraph provides Member States of Posting must remove any obligation on a service provider or posted worker to obtain authorisation or registration, or to keep employment documents in the territory to which the worker has been posted. As a result, the Directive deprives the Member State of posting of the effective tools needed to enforce the Directive. While the Directive creates a positive and welcome duty of the country of origin to assist the Member State of posting to enforce the terms of the Directive, this new duty is no substitute for existing enforcement arrangements. The TUC takes the view that Posted Workers should be totally excluded from the terms of the Directive owing to the temporary nature of their assignments and the fact they are covered by other EU legislation and policy.

The TUC has concerns about the limited scope and effectiveness of the existing Posting of Workers Directive and has made representations, via the ETUC, to the EC Commission, during the recent consultation on the future revision of the Directive. However, we also take the view that the UK has failed to implement the existing Directive fully as workers posted to the UK fail to qualify of the mandatory rights protected by the Posting of Workers Directive due to the restrictive territorial scope tests used in UK legislation. The TUC will make separate and more detailed representations to the Government on these points.

However, in summary, the TUC is concerned that all posted workers may fall outside the territorial scope test used in National Minimum Wage legislation as by definition do not ordinarily work in the UK, (as highlighted in the case of *Jackson v Ghost Ltd* [2003] IRLR 824). The TUC also takes the view that the substantial connection test, most recently developed by the Court of Appeal in *Serco v Lawson,*

as applied to the relevant provisions of the Employment Rights Act 1996 (especially maternity rights and protection from dismissal and detriment) and working time legislation is too narrow and fails to meet the provisions of the Posting of Workers Directive. Staff working on non-UK-registered ships and aircraft who are also posted workers are also unjustifiably excluded from these rights listed above.

In general the TUC believes that the law on the territorial scope of UK employment law is complicated, difficult to apply and inaccessible to workers who face language difficulties and who lack legal representation or the financial means to bring tribunal proceedings. We therefore believe that the law should be revised and that a consistent territorial scope test is applied to all UK employment rights, which mirrors the territorial scope provisions used in the new discrimination legislation (on sexual orientation, religion and belief and disability).

### (ii) Implications for collectively agreed terms and conditions

The TUC is concerned about the likely negative repercussions of the draft Directive for established terms and conditions of employment collectively agreed between unions and employers at a workplace, sectoral or national level, which determine the going rate and conditions for employment.

One of the principle aims of the EU social dimension and the Posting of Workers Directive, in particular, was to avoid social dumping. The TUC is concerned that the liberalisation of the rules on services would result in the contracting-out of service provision to cross-border providers based in Member States which offer significantly poorer terms and condition of employment than those agreed in UK collective agreements. It could also threaten the operation of the Best Value regime, including the Code of Practice on workforce matters in Local Government, thereby undermining new protections recently introduced to tackle the problem of the two tier workforce.

Unlike in many other EU Member States, due to the distinctive nature of our industrial relations system and the legal status of UK collective agreements, the terms of sectoral and national agreements do not form mandatory terms for the purposes of either the Rome Convention or the Posting of Workers Directive. Therefore, cross-border service providers will not be bound by established terms and conditions of employment which otherwise apply to the sector or industry.

The Posting of Workers Directive provides the UK Government with the power to extend the application of collective agreements negotiated at a national level to posted workers. The TUC is calling on the Government to introduce measures to extend national agreements in the construction and other sectors to posted workers.

The TUC believes there is a need to clarify the relationship between the Services Directive and collective bargaining and industrial relations systems in Member States. We also believe the Directive should be amended expressly to state that collective agreements, negotiated at a national, sectoral or workplace level should apply to workers from other EU member states and third party countries.

### (iv) Temporary workers

The draft Services Directive cuts across the provisions the draft Temporary Agency Workers Directive, in particular Article 4, which would require Member States to review existing restrictions on the use of temporary agency workers and remove those restrictions, which could not be justified. Pending the adoption of the Temporary Agency Worker Directive, the TUC takes the view that agency work and employment businesses should be excluded from the scope of this Directive.

The TUC takes the view that the draft Temporary Agency Worker Directive provides the more sensible framework to regulate the future of the agency sector as it combines measures to liberalise the agency sector with basic employment rights,

guaranteeing fair treatment for temporary workers. It therefore enables agencies and employment business to provide services on a basis of fair competition, without under-cutting working conditions, pay or social protection of the workforce. The TUC therefore calls on the Government to take urgent steps to agree and adopt the Temporary Agency Worker Directive.

### Quality of Services

The TUC broadly supports the proposed measures to offer assurance on the quality of services. However, it is essential that sufficient time and resources are allocated by service providers to comply with the proposed regulations, and by member states to ensure that this is the case, before the country of origin rule becomes operational.

### Supervision

Article 34 requires member states to ensure that they can monitor and supervise service providers operating in another member state. The TUC does not believe that this is a practical proposition, and believes it creates a risk of service providers operating across borders falling between different monitoring authorities.

### Convergence programme

The TUC is concerned that the measures set out in articles 30 and 40 are insufficient to tackle the variations that exist between regulation in key areas in different member states. As argued above, a single market requires a single set of rules, and the proposals in the Directive are piecemeal and vague in terms of timing. Codes of conduct may be appropriate in some areas but in many others will not be sufficient. There is a danger of the proposals on convergence appearing to be tacked on, whereas harmonisation should be the centrepiece of proposals to promote an internal market in services.