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**UNICE COMMENTS ON THE EUROPEAN COMMISSION'S
PROPOSAL FOR A DIRECTIVE ON SERVICES IN THE INTERNAL MARKET****A. Introduction**

On 13 January 2004, the European Commission published a proposal for a directive on services in the internal market. The aim of this proposal is

- to establish a genuine internal market in services as part of the process of economic reform launched by the Lisbon European Council,
- to provide a legal framework to eliminate obstacles to two fundamental freedoms enshrined in the Treaty: the freedom of establishment for service providers and the free movement of services between Member States and EFTA/EEA States.¹

With regard to the freedom of establishment, the proposal includes provisions on

- administrative simplification measures including single points of contact and electronic means of completing procedures,
- principles which authorisation schemes for service activities must respect.

With regard to the free movement of services, the proposal aims at reducing existing obstacles through

- establishment of the country-of-origin principle combined with the principle of mutual recognition, with a number of derogations,
- guaranteed right of recipients to use services from another Member State without hindrance, with a possibility for Member States to reimburse health-care costs in another EEA country subject to authorisation,
- creation of an assistance mechanism for recipients using a service of an operator established in another Member State.

B. General comments on the need for a directive

UNICE welcomes the Commission's intention to promote cross-border trade and establishment in the internal market for services. Both are important elements for the creation of a strong services sector in Europe that is vital to productivity, innovation and employment in the European economy. Because of the economic importance of the

¹ With the Agreement on the European Economic Area (the EEA Agreement), the EU Internal Market was extended in 1994 to include the three EFTA/EEA countries Norway, Iceland and Liechtenstein. Thus the EU Internal Market now consists of 28 countries after the latest enlargement on May 1. Any reference to "Member States" in this document should therefore be understood to cover all 28 countries.

sectors concerned, 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. In particular, unnecessary administrative obstacles to cross-border trade in services have proven to be a serious restriction to Europe's economic development.

Through its member federations, UNICE represents small, medium and large companies from all sectors of activity. About half of these enterprises are active in the services sectors. Moreover, manufacturing enterprises are not only users of services, but they generate an increasingly important part of their turnover from product-related services themselves. This is due to the fact that services are becoming an increasingly integral part of industrial manufacturing by providing added value to products such as machinery. Consequently, restrictions to trade in services can also have serious negative repercussions on trade in goods and on growth and employment in the industrial sector. The Commission initiative is thus highly relevant for all these European companies.

Small and medium-sized companies constitute the majority of service enterprises. They are therefore particularly affected by the lack of transparency concerning the conditions for exercising their activity in another Member State or obstacles preventing them from using the services of a supplier established in another EEA country. The persistence of these difficulties more than ten years after the 1992 deadline for the completion of the Internal Market clearly shows that relying on existing legislation and on ECJ jurisprudence has not been sufficient to create an effective internal market for services. The proposed directive constitutes a useful step to improve compliance with the existing legal acquis.

European companies represented by UNICE welcome in particular:

- simplification of administrative burdens brought about by the creation of single points of contact; this can benefit in particular SMEs looking for business opportunities in other Member States,
- identification and evaluation of national regulations that serve as barriers to cross-border establishment and service provision; comparing existing rules with the requirements of the directive will contribute to more consistency and less discretion on the part of Member States when deciding which rules are necessary for reasons of public policy, health or safety,
- application of the country-of-origin principle, although distinctive clarifications are necessary in many areas,
- the provisions for derogations from the country-of-origin principle and in particular for matters covered by the posting of workers directive, although the current drafting could be misinterpreted as seeking to undermine its practical implementation. Further, some parts of article 24 should be redrafted as suggested in section 6.
- approach of phased implementation and the possibility for harmonisation, possibilities for alternative, voluntary methods of regulation such as codes of conduct.

Covering the great variety of problems targeted by the proposed directive in one single instrument is ambitious. However, UNICE believes that this approach is also realistic and appropriate. Combining the country-of-origin principle and mutual recognition with targeted harmonisation and mutual assistance between national authorities provides an appropriate basis for tackling the diversity of obstacles in the service activities covered by the proposed directive. The reliance on Member States to review and remove obstacles constitutes an inbuilt mechanism for gradual implementation. This approach can only work if Member States genuinely comply.

In appreciation of the Commission's efforts to evaluate the need for and the impact of the proposal for business, it is necessary, in UNICE's view, to evaluate continuously during the legislative process the impact of this proposal on the competitiveness of Europe's companies.

To sum up, UNICE welcomes the Commission proposal and broadly agrees with the approach advocated. However, some specific provisions of the proposal need to be adjusted. In this regard, UNICE would like to make the following comments.

C. Detailed comments

The following proposals for adjustments are, in UNICE's view, of great importance to ensure that the single market in services is working well and that unfair competition is avoided. It is highly desirable that Council and Parliament integrate them during the legislative process.

1. On the scope (Article 2)

The directive is meant to cover all services with a limited number of exceptions mentioned in Article 2. UNICE agrees with the scope proposed in Article 2 but believes that it would be desirable to express more clearly which services are covered and which are not covered. This is important in order to provide legal certainty to companies. In this respect, the text on the scope of application of the directive should be more developed.

2. On definitions (Article 4)

The notion of "Member State of posting"[Article 4(11)] to designate a country receiving posted workers is misleading and should be replaced by the expression "host country" which is much less ambiguous. Article 4 should also contain a clear reference to the definitions provided in Article 2 of Directive 96/71. Moreover, the definition of "establishment" - a key term in the directive with regard to the distinction between service provision by establishment or through cross-border trade - should be more precise in order to exclude so-called mail-box firms. This definition should be consistent with existing definitions of "establishment" in accordance with EU legislation and case law.

3. On freedom of establishment (Articles 5-15)

Articles 9 to 15 set criteria for authorisation schemes which exist in some Member States for exercising a service activity. UNICE broadly welcomes the approach proposed by the Commission. UNICE believes, however, that there may be room for simplifying and clarifying the proposed text. For example, the fact that Articles 9 to 15 refer to "access to a service activity or the exercise thereof" in a section on freedom of establishment makes it very difficult to understand whether the provisions on authorisation procedures defined in the directive are only applicable to service providers wishing to establish themselves in another Member State or if Articles 9 to 15 also concern authorisation procedures that may exist for service providers who

wish to exercise an activity in another Member State without formally establishing themselves in that country. In particular, the criteria for exceptions to the general prohibition on authorisation schemes foreseen in Article 9(1) should also form the basis for exceptions to the general prohibition on declaration, notification and authorisation requirements of Article 16(3)b.

4. On free movement of services (Articles 16-19)

Articles 16 to 19 establish the principle of country-of-origin and define the derogations from this principle. UNICE welcomes the proposed approach to remove obstacles to the free movement of services and avoid duplication of authorisation and supervisory procedures. As a general rule, however, the host country must remain able to control the quality or content of a service, and in this regard, mutual cooperation between national administrations plays an important role. At a technical level, market surveillance should be increased along the lines of product market practice.

European business is aware that some permanent sectoral derogations from the country-of-origin principle are necessary, for example when there are overriding public policy reasons and controls cannot be properly exercised by the country of origin. However, UNICE insists that the general derogations from the country-of-origin principle on grounds of public policy, security or health foreseen in Article 17(17) should be non-discriminatory, fully justified and regularly assessed to check that they are not used to undermine the main objective of the directive, which is to reduce obstacles to the free movement of services. Too many permanent and transitional regimes create legal uncertainty. They increase the information and compliance burden on service providers and make cross-border service provision less transparent for users.

UNICE would like to stress that the freedom of choice of contract law is an essential principle in private law. In this context, UNICE strongly supports the derogation from the country-of-origin principle, as foreseen in Article 17(20).

5. On the rights of recipients of services (Articles 20-23)

With regard to the rights of recipients of services, UNICE fully agrees with the prohibition of discrimination contained in Article 21. This provision seems to be compatible with the requirement of Europe's companies that they retain the right to tailor their services to the special needs of their customers. These needs may be very different across Europe. Thus, the components of a service provided in different countries may vary, as do cost and price. This must not count as discrimination based on the place of residence of the recipient. Also, it must remain possible to adjust prices to "high potential" users who are likely to enter into long-term business relations with the provider, as compared with one-off purchases. Such differentiation, which is at the heart of market economics, should not be confused with unacceptable discrimination imposing different requirements based on nationality or place of residence. Thus, the terms "objective criteria" and "discriminatory requirements" should be more clearly defined in the proposed directive to take these concerns into account.

6. On the posting of workers (Article 24 and 25)

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.

7. On the quality of services (Articles 26-33)

As a general rule, UNICE believes that the application of Chapter IV should be restricted to business-to-consumer relations.

Information requirements (Article 26)

UNICE believes that information requirements for providers as contained in Article 26 should not be increased beyond the level already foreseen in national law or by professional bodies. Information requirements often add to the regulatory burden of the provider without necessarily serving the recipient's need for transparency. The information a recipient requires from the provider is not the same in every case. Apart from information relating to health and safety concerns, it should best be left to the market to decide what information is provided and should not be stipulated by law.

With regard to most of the information required in Article 26 (1), we do not think that there is a case of asymmetric information between providers and recipients that would justify regulatory action. In particular as regards business-to-business relations, the information foreseen in the proposal is available to the recipient as it is generally contained in the commercial contract. Where existing legal and voluntary instruments are insufficient to ensure that providers supply the information foreseen in this

provision and a need for further action can indeed be identified, Member States should give maximum discretion to providers as to the choice of means of information.

Professional insurance (Article 27)

In UNICE's view, there is no need for imposing additional professional insurance requirements. In the business-to-business area, contracts generally provide for liability insurance of the provider. Otherwise, legal provisions at national level apply which provide for such insurance. In any case, any potential new insurance scheme must remain optional. This applies to the whole of Articles 26 to 28.

After-sales guarantees (Article 28)

After-sales guarantees are almost always foreseen contractually in the business-to-business area. UNICE therefore believes that additional information requirements regarding these guarantees are unnecessary.

Quality of Services (Article 31)

European standards have proven to be a very useful tool for the free movement of products. However, services in the business-to-business area, as opposed to goods, are generally custom-made and tailored to the recipient. This must be taken into account by the standardisation bodies currently examining the potential for standardisation in the services sectors. Consequently, the development of standards for services should be market-driven and not mandatory. European labels, on the other hand, might be an appropriate way to avoid the lack of clarity and the discretionary handling of many labels at national and regional level. In the case of both standards and labels European solutions should be given clear priority over national solutions.

UNICE welcomes the Commission's intention to involve the professional bodies in the promotion of the quality of service provision. These bodies should also include European sectoral organisations.

8. On supervision (Articles 34-38)

UNICE believes that well-functioning mutual assistance of national authorities is indispensable if the country-of-origin principle is to promote fair and economically sound cross-border provision in services. The host country must be able to conduct controls and checks on foreign providers, as foreseen in Article 36. To this end, it is necessary to provide for enforcement mechanisms. In particular,

- difficulties of transmitting court rulings or administrative decisions from the country of origin to the host country need to be addressed,
- there has to be either an electronic network between the competent authorities' databases or a central register to provide quick access to the required information by the host country. Its competent authorities should not have to wait for the information to be provided on request from the country of origin. The authorities of

- the country of origin should be legally required to make the information available via this network or the central register as soon as it is known,
- at a technical level, cooperation between surveillance authorities needs to be strengthened.

D. Conclusion

To sum up, UNICE welcomes the Commission proposal for a directive on services in the internal market provided that its suggestions are taken into account and calls for a speedy examination by the Council and the European Parliament so as to allow rapid removal of obstacles to the exercise of fundamental freedoms guaranteed by the Treaty.

UNICE asks the Commission, the European Parliament and the Council to take its comments into account and remains at the disposal of EU institutions to discuss them further.

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