

**MISCONCEPTIONS
CONCERNING THE
SERVICES DIRECTIVE**

UNICE issued its views on the proposal for a directive on services in the internal market (hereinafter “the proposed directive”) in October 2004¹. The purpose of the present paper is to respond to the misconceptions and unfounded criticisms generated during the debate on the proposed directive, particularly regarding application of the country of origin principle.

Misconception 1: The Services Directive would lead to “social dumping”

It is feared that service providers from those EU countries with lower labour costs and social standards would be able to provide cheaper services, by sending workers to other EU countries without having to comply with core working conditions and labour law rules of the host country. Fears relate especially to service providers from the new Member States.

The above fear is unfounded.

The 1996 posting of workers directive is applicable in the case of workers who perform work outside the country where they normally work for a limited period of time. This directive protects posted workers against “social dumping” by obliging Member States to ensure that, whatever the law applicable to the employment relationship, companies posting workers in a host country guarantee to those posted workers the terms and conditions of employment laid down in the host Member State’s legislation covering matters such as maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, conditions for hiring-out of workers, in particular by temporary employment agencies; health and safety at work, equality of treatment between men and women and other provisions on non-discrimination.

Workers in the construction sector are granted special protection. For that sector, the host Member State must ensure that not only of the local legislation but also the universally applicable collective agreements or arbitration awards are respected.

As the proposed directive only lays down minimum provisions, Member States may always do better and decide to impose respect of universally applicable collective agreements to sectors other than construction. They can also extend the list of issues to which the host country law applies, to meet public policy provisions and in compliance with the Treaty.

The services directive foresees a general derogation from the country of origin principle for all matters covered by the posting of workers directive. Furthermore the host country is in charge of controlling compliance with the posting of workers directive on its territory. However, some provisions of the proposed directive which could be misinterpreted as undermining the practical implementation of the posting of workers directive should be clarified. Also needed is a clear definition of the notion of establishment as to avoid the possibility of using a “shell company” or a “mail box firm” as the basis for an establishment.

¹ See UNICE position paper on the directive of 4 October 2004 (www.unice.org).

Misconception 2: The Services Directive would lead to a “race to the bottom” of public health, safety and environmental standards

Some argue that a country that imposes lower requirements in the field of environment, public safety, health and liability could be a more attractive host country for service providers which could then offer services across other EU countries under conditions with which local service providers cannot compete. As a consequence, the government of the country in which the service is provided will be pressured to loosen the rules and lower standards, gradually leading to a convergence towards lower standards across the EU.

This fear is also groundless. The proposed directive already provides, in derogations from the country of origin principle, for a range of safeguards regarding public order, public safety or public health whereby Member States can draw up national rules covering those fields that foreign service providers must also comply with.

Misconception 3: The Services Directive would lead to privatisation of “public services”

The proposed directive will not force Member States to liberalise or privatise “public services” or open them up to competition. The directive is merely intended to facilitate and simplify the development of service activities at EU level in those areas which are already open to competition. In addition, it will still be up to each Member State to decide the areas which would or would not be open to competition.

Some argue that the proposed directive should not apply to the so-called services of general economic interest (SGEIs - as opposed to services of general interest, i.e. public services). The proposed directive only confirms the abundant jurisprudence of the European Court of Justice that SGEI (such as postal services, electricity, gas and water distribution services, etc.), when (and only when) open to competition, are subject to the EU treaty obligations, consisting mainly in non-discrimination between nationals and other EU nationals. The proposed directive has however, made some derogations from the country of origin principle, because of the specifics of some of these services or because they are already covered in existing EU directives (like postal services, electricity, gas, etc.).

Misconception 4: The Services Directive would lead to legal uncertainty and “legal dumping”

Some argue that the country of origin principle would forbid the judicial authority from applying the local penal law to a foreign service provider. This is wrong since national penal laws always prevail, except for the penal aspects related to a fraudulent breach of contract.

There are also criticisms on the potential conflict with other existing laws governing contractual and non-contractual obligations that would undermine legal certainty to the detriment of providers and users. This is an extremely complex subject. First of all, the directive does not prevent the choice of law in the contract between the parties and, in addition, excludes from the country of origin principle all service contracts concluded by consumers unless they are governed by EU maximum harmonisation law. The freedom of the parties to choose the applicable law does not apply to the regulations and supervision of the country of destination regarding issues of public health, safety and security. The question is which law applies in cases where there is no contract and no choice has been expressed or it is unclear. The directive seems to offer a clear rule answering those questions: the country of origin principle applies and therefore it is the law of the country of origin of the service provider which applies from the moment of the conclusion of the contract. Clarifications might however be necessary so as to determine which legislation is applicable to labour contracts that are not covered by the posting of workers directive. Further analysis might be necessary as to ensure that there is no risk of contradiction between application of the country of origin principle by default (i.e. in case of no clear choice of law by the parties) and the provisions of the International Convention on the law applicable to contractual obligations (also known as “Rome I”).

The country of origin principle ensures that service providers who want to provide their services across borders on a temporary basis only have to comply with the law of their country of establishment without having to adapt to the laws of 28 different countries. It thus provides for the necessary legal certainty, especially for SMEs that would not otherwise engage in cross-border service supply.

Some fear that service providers would choose as a permanent basis of establishment the EU Member State where the rule applied in case of conflict would be the most favourable for the provider. This would then lead to legal dumping, due to the fact that the EU Member States would compete to attract service providers to their territory and would therefore bring their legislation down to a lower level of protection for consumers. This theory does not match economic reality, where companies choose a country of establishment (i.e. to become their “country of origin”) when and only when there is a potential market for their activity and not depending on the legislation of a country in case of possible conflicts with consumers – conflicts that companies hope to avoid at any cost.

Misconception 5: The proposed directive would undermine professional qualifications

There is a fear that the proposed directive might lead to the diminution of the quality of the services provided by some sensitive professions that are regulated at national level. The proposed directive has in fact anticipated these concerns by excluding the regulated professions from implementation of the country of origin principle. Indeed, the directive excludes the services covered by the soon-to-be-adopted directive on the recognition of professional qualifications. These are notably professions in the healthcare sector (doctors, nurses, dentists, midwives, pharmacists and all the healthcare professions that are regulated at national level (specific diploma, specific authorisation process, etc.) but also professions such as architects, engineers, accountants, etc. The main purpose of the directive on professional qualifications is to consolidate and simplify some 15 existing directives, some of which date as far back as 1977. The new Directive should ensure that all EU Member States have mutually recognised the various national systems, and that professionals provide all necessary documents to the relevant authority of the host country when delivering cross-border services. The proposed directive will leave these arrangements unchanged.

Misconception 6: The proposed directive would lead to the dismantling of national health and social security systems

There are two misconceptions here that need to be tackled:

1. This first misconception is that governments would lose their independence in organising their health and social security systems. This is clearly a misinterpretation of the proposed directive. It is Member States’ responsibility to decide to what extent and under what conditions private operators, for example private hospitals, may provide services funded by the social security system. If a foreign private hospital from another EU Member State wants to set up in a host country, it will need the authorisation of the competent national authorities and will be subject to the national law. This is covered in the proposed directive by the freedom of establishment and is not covered by the country of origin principle which only applies for cross-border provision of services.
2. The second misconception is that the proposed directive would swell the beneficiaries of a better social security system and further increase the costs up to a point where it might collapse. This is also incorrect. What the proposed directive will actually do is, for EU consumers of non-hospital healthcare services in another EU country, to ensure that the assumption of health-related costs is set at the same level as that assumed by the social security system of the country of residence of the consumer. The proposed directive should, however, ensure its compatibility with regulation 1408/71 on coordination of social security systems.

Misconception 7: The implementation of the country of origin principle would lead to the introduction of uncontrolled providers

It is argued that host country principle should prevail because it allows the national government and relevant authorities to control adherence to national regulation on their own territory.

Implementation of the country of origin principle essentially means that Member States must allow services businesses (covered by the provisions) to operate under the laws and rules which apply in the country in which these businesses are based. It should be clearly understood that the directive does not prevent the national authorities from carrying out any checks they wish to make on any service providers that are on their territory. It only ensures that these checks are non-discriminatory towards foreign service providers.

But how can the foreign service providers be supervised? Some argue that there is a risk of inadequate supervision. This is indeed a problem. But, just as with other directives, a joint solution has to be found in everybody's interest. National governments will have to provide supervision in close liaison with one another, and national inspectorates will have to work together. Numerous articles of the proposed directive deal with cooperation procedures between Member States, so as to ensure that national administrations and the various regulatory authorities will progressively understand the various regimes of their neighbouring countries and that these regulations will progressively be simplified for the benefit of all providers and the differences will be narrowed. The proposed directive is a kick-start to such a move that would not otherwise be possible, except through sector-specific harmonisation that would inevitably take more time. True mutual assistance between national administrations is one of the major aspects of this proposed directive; therefore the text should provide the necessary means to secure this assistance.

Misconception 8: The country of origin principle in the proposed directive is a dangerous precedent

The proposed directive is not the first case where the country of origin principle has been put forward. It is often forgotten that a great deal of experience has already been gained with this principle. First of all, it has applied to free movement of goods for a long time, whereby products that conform to the legislation in Member State A (country of origin) can legally circulate and be sold in Member State B (host country) of the EU without being supervised or authorised. This has contributed to the success of the single market in goods.

But the country of origin principle has also been adopted and is implemented in four other EU directives: the television without frontiers directive, the e-commerce directive, the directive on the electronic signature and the data protection directive.

Misconception 9: The proposed directive will cover all services

The exact scope of the proposed directive and in particular, the coverage of the country of origin principle is often misunderstood. Although, it is virtually impossible to list those services exhaustively, available reports allow us to have a rather accurate estimation of the scope of the proposed directive.

It is important to distinguish between services excluded from the scope of the Directive, services that are covered by all provisions of the directive except by the country of origin principle, and services covered by the country of origin principle:

1. Services excluded from the scope

One often hears that the proposed directive will undermine existing EU legislation on services and that it covers around 70% of EU GDP. Neither of these remarks is correct.

There are many sectors excluded from the scope of proposed directive:

- general sectors such as services of general interest (e.g. police and justice),
- services covered by the article 45 of the EU treaty (e.g. notaries, bailiffs, etc.)
- financial services,
- transport services, and
- electronic communication services

This leaves approximately 50% of EU GDP covered by the proposed directive.

In addition, it is necessary to specify that the proposed directive does not abrogate or supplant existing EU legislation that already harmonises many aspects of European citizens' and companies' activities, such as the existing directives on safety, security, working time, consumer protection, etc. As usual, the specific legislation has priority over general legislation such as this proposed directive; this is explicitly stated in article 3 of the proposed directive. In fact, the basis of the proposed directive is to set up rules to be applied by default if nothing else is yet harmonised at EU level.

2. Services excluded from the country of origin principle

Furthermore, there is a long list of derogations from the country of origin principle. It is important to understand the scope of these exclusions, which have been introduced for the purpose of responding to potential confusion. There are 23 derogations in the proposed directive, plus some transitional derogation, to be applied up to 2010, and derogations in some individual cases under specific conditions. Many service sectors are excluded from the principle **because the existing legislation is based on a different approach**, for example:

- postal services,
- distribution of electricity,
- distribution of gas,
- distribution of water,
- legal services (lawyers and barristers),
- services regulated by the directive on professional qualifications, i.e. all professional services that require a specific qualification. These are in particular (please note that the following list is not exhaustive and there may be some variation among Member States):
 - architects,
 - civil engineers,
 - accountants,
 - pharmacists,
 - doctors,
 - nurses,
 - midwives and most medical professions,
 - veterinarians, etc.

Given the combined economic importance of these services sectors, the coverage of the proposed directive as regards the free movement of services is further reduced.

Last but not least, the country of origin principle does not cover service by a provider to an individual consumer as soon as this work is regulated by a contract in an area that is not completely harmonised at Community level. Except for the electronic signature directive and the unfair commercial practices directive, all other areas involving consumer protection are not fully harmonised. This would mean that all business-to-consumer ("B2C") provision of services would not be covered by the country of origin principle.

3. Services sectors that are covered by the country of origin principle

It is always difficult to make a positive list, in particular because there are new services invented every day. However, should we try to make a list for the sake of understanding and subject to verification that they are not subject to specific EU legislation, one would find that the cross-

border provision of services under the country of origin principle would apply directly to all business-to-business relations that are in the following sectors:

Business services, like

- advisory and management consulting,
- legal or fiscal advisory services,
- certification services,
- engineering consulting,
- IT management consulting,
- advertising,
- new agencies,
- marketing services,
- design services,
- trade fairs services,
- after-sales services and other maintenance services;
- security services,
- cleaning industry,
- facilities management services
- real estate services,
- recruitment services
- temporary agencies;

Distribution services like

- wholesale services,
- services of commercial agents,
- retail distribution services (butchers, bakers, grocery trade, etc);

Construction services (masons, painters, plumbers, etc.)

Tourism and catering services

- tourism agencies,
- tourist guides,
- Catering services, etc.

Vehicle renting services,

Household support services and private healthcare services

Audiovisual services (TV, music, film creation and production, etc.)

Leisure services, sports centres and amusement park services, gardening services,

Personal care services, such as physiotherapists, etc.
