12 July 2005

DRAFT REPORT (PARTS I+II)[1] ON DIRECTIVE ON SERVICES IN THE INTERNAL MARKET BY EVELYNE GEBHARDT (RAPPORTEUR/COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION)

UNICE COMMENTS

INTRODUCTION

UNICE is following with great attention discussions in the European Parliament on the proposed services directive. 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 document provides UNICE's comments on both part 1 (UNICE comments of 26 May) and part 2 of Ms Gebhardt's draft report.

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 foster Europe's competitiveness and its ability to attain the Lisbon objectives of increased growth and employment. UNICE is particularly supportive of simplification of administrative burden, removal of unjustified barriers caused by national regulations, broad application of the country-of-origin principle, increased legal clarity especially regarding existing Community legislation, and an efficient system of control and supervision. However, it recognises that 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 create a well-functioning internal market for services that is crucial for meeting the Lisbon objectives of increased growth and employment. Her proposal would in many regards be a step backwards from what is already in the EC Treaty and existing case law by the European Court of Justice. It would lead to increased legal uncertainty and regulatory burden that would stifle the European economy further.

Too many sectors are excluded from the directive's scope and the country-of-origin principle is replaced with a "mutual recognition principle", which is undermined by a long list of derogations and exceptions, and too much discretionary power for Member States to restrict services on the basis of reasons of general interest. The draft report also calls for simultaneous wide-scale minimum harmonisation for an extensive list of services. Furthermore, it increases administrative burden and allows for more room to impose restrictions on provision of services.

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

[1] Draft report of 11 May 2005 by Evelyne Gebhardt (2004/001(COD) Par 1 and Par 2.

SUMMARY ANALYSIS OF MS GEBHARDT'S DRAFT AMENDMENTS[2]

I. SCOPE OF THE DIRECTIVE (Amdts 7, 8, 9, 11, 14, 20, 51-60, 69)

The directive only applies to commercial services defined as the sale of a service for purely economic and financial purposes.

Exclusions from the scope of the directive:

1. Services of general interest (SGI), which are characterised by a list of 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 requirements (unclear whether this corresponds to the notion of 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. Occupations and activities directly connected to the exercise of official authority (according to ECJ case law, this category does not include activities of security firms and security systems firms and activities specific to the profession of lawyer).
5. Labour law (including the right to take industrial action and reach collective agreements) and social insurance legislation in the Member States.
6. Existing Community legislation or other initiatives on consumer protection, labour law and reparation of loss and damage.
7. Areas of service activities covered by sectoral directives (no specification).
8. Gambling activities and access to activities for the judicial or extra-judicial recovery of debts.
9. Transport services, including taxis and ambulances BUT not cash in transit and transport of mortal remains.

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. It is also unclear whether or not the rapporteur understands in the same way exclusions from the scope of the directive and derogations from the country of origin (in this case mutual recognition). In our view, the implications are substantially different.

Regarding the list of criteria defining services of general interest, UNICE does not support the use of criteria in the directive. Furthermore, several of the criteria used are very unspecific ("legal certainty", "sustainability") and might cover a wide range of services which

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

commonly would not be considered as SGEI. It should be up to the Member States to decide, in conformity with the EC Treaty, what areas are to be considered "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 in conformity with the EC Treaty in particular, articles 16, 86 and 87 thereof.

As for the areas excluded, the rapporteur includes labour law and consumer protection en bloc, UNICE believes that it is a wrong approach to foresee broad and ill-defined exclusions of policy areas and it does not provide legal certainty. UNICE would prefer a clear reference to the specific laws concerned by this exclusion. 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 1408/71 on coordination of social security systems and directive 96/71 on posting of workers.

II. COMPATIBILITY WITH OTHER COMMUNITY LEGISLATION (Amdts 6, 12, 13)

The directive should be “without prejudice to other current Community initiatives” (instead of “should be consistent with”)

The Commission’s provision that This Directive builds on and thus complements the Community acquis is replaced by an exclusion of “all areas of service activities which are already covered by one or more Community instruments.”

UNICE comments:

UNICE does not support the automatic and blanket exclusion of services or categories of services already regulated at Community level. It prefers the Commission’s proposal which provides that the directive will not apply to matters relating to a service or service category already covered by existing Community legislation but it will apply to aspects which are not covered by the existing legislation (so-called gap-filling effect). The proposed directive then completes and complements the provisions of such sector legislation for the matters not covered in it. This should be made clear in the directive.

III. DEFINITIONS (Amdts 61, 63-64, 66)

-Deletion of “coordinated field” and any reference to it in the text of the directive: UNICE supports the use of this term which adds legal certainty and clarifies the scope of the directive.

-Definition of “commercial services”**:** This term is not used in ECJ jurisprudence and its meaning is unclear. UNICE prefers the Commission’s text which uses the term “service” as referred to in article 50 of the Treaty.

-Definition of “requirement”: UNICE does not support the removal from this definition the rules of professional bodies, or the collective rules of professional associations or other

professional organisations, adopted in the exercise of their legal autonomy. The latter does not deal with labour law as such or collective agreements which are negotiated between employers and employees, it has to do with obligations that are decided unilaterally and therefore its inclusion in the definition is justified.

IV. FREEDOM TO PROVIDE SERVICES

1. MUTUAL RECOGNITION PRINCIPLE (MRP) (Amdts 5, 17, 30, 111)

The country-of-origin principle (COO) is replaced 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."

2. EXCEPTIONS/DEROGATIONS FROM MRP (i.e. application of legislation of country of destination) (Amdts 14, 33, 111, 114-118)

2.1 Indicative lists of services in annex (business to consumer services: environmental services, travel services, cultural and sporting services, etc): amendments 149-151.

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

3. OTHER DEROGATIONS EXTENDED TO FREE PROVISION OF SERVICES:

The draft report renames Chapter 2 "Administrative simplification" originally named "Freedom of establishment". This means that articles 5-8 of the directive apply to both freedom of establishment and free provision of services**.** Consequently, requirements objectively justified by an overriding reason relating to the public interest can be imposed by authorities to impede not only freedom of establishment but also free provision of services.

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 applicable law only when a case goes to a court.

Furthermore, the Gebhardt report proposes a long and far-reaching list of derogations and exceptions to MRP and allows the country of destination to restrict incoming cross-border services by invoking reasons of general interest which are linked 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 111 introducing Article 16. 1a on areas to which MRP will not apply for the same reasons expressed above regarding exclusion of consumer protection and labour law. In addition, amendment 115 explicitly foresees application of the entire legislation of the country of destination in these areas. This is contrary to the EC Treaty, since the ECJ has allowed application of rules restricting incoming services also in these areas only as an exception and never accepted across the board application of an entire area of law. It is also contrary to specific Community rules such as the posting of workers directive and the Rome Convention on the law applicable to contractual obligations.

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 indicative lists of service categories to which different principles apply does not seem to improve the necessary legal clarity to enhance cross-border trade in 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 derogations 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 opposes the proposed extensive interpretation of reasons of general interest 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 which 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.

UNICE therefore cannot support the use of MRP as set out by the rapporteur 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, although some clarifications are necessary.

<u>Additional harmonisation</u> (Amdts 5, 113)

Where necessary, 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 quantify.

It is indicated that the additional harmonisation and enforcement of the mutual recognition principle should take place "at the same time".

UNICE has concerns about the feasibility and usefulness of this approach which will necessitate the adoption, over a likely lengthy timeline, of a large number of accompanying harmonisation measures which will increase regulatory burden.

Although UNICE could support targeted harmonisation, it would oppose obligatory prior harmonisation which would delay implementation of the directive unnecessarily. UNICE prefers the Commission's line where a decision on harmonisation is made through ad hoc assessment and independent of implementation of the directive.

V. CONTROL AND SUPERVISION (Amdts 32, 111, 137-141)

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

The provisions regarding mutual assistance in the event of case-by-case derogations are deleted: mutual assistance becomes a mere "exchange of information". In addition, inspections by the host country may entail measures against the provider, which was forbidden by article 36.2.a.

It also grants a role to the single point of contact in facilitating supervision and control but is not specified.

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, UNICE could accept this 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 not result in increased burden on service providers and that the Member State of destination will not be able to use its control mechanisms to restrict incoming services.

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 the Commission's report 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 is also concerned about the tasks granted to the single point of contact which go beyond its initial purpose of information focal point and resemble those of a control and supervision body.

Ms Gebhardt's proposal based on the shift of the control to the authorities of the country of destination could lead to administrative abuses and administrative burdens. UNICE does not support it and would prefer a system whereby the control and main competence for supervision, including sanctions, resides with the authorities of the country of origin and authorities of the host Member State are competent to establish the facts of the case and therefore to carry out some investigation activities but not to impose sanctions. In addition,

authorities can have recourse to the procedures envisaged in articles 19 an 37 regarding case-by-case derogations of the country-of-origin principle.

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.

VI. SPECIFIC PROVISIONS ON THE POSTING OF WORKERS (Amdts 48, 49, 59, 123)

The rapporteur deletes articles 24 and 25 of the directive.

UNICE comments:

UNICE does not support amendment 123. 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.

VII. ADMINISTRATIVE SIMPLIFICATION: NEW STRUCTURE OF THE DIRECTIVE (Amdts 71-72)

Chapter 2, originally named “Freedom of establishment” is replaced by “Administrative simplification”. As a consequence, articles 5-8 of the directive apply to both freedom of establishment and freedom to provide services**.**

a. Single points of contact/SPC (Amdts 22, 77, 79)

The functions of the SPC are extended: it covers establishment and also provision of services. Its competences are:

-to apply mutual recognition as provided in article 16 (2a) which allows for derogations from the MRP for reasons of general interest and notify the Commission if MRP is refused

-to assess the equivalence of protection levels

-to establish means of redress for providers whose offers of services have been turned down

-to provide with "all the information necessary for compliance with Article 16".

b. Introduction of "the pro forma registration" (Amendments 23 and 76, 77) in order to:

- inform the country of destination of the presence of service providers,
- allow providers of cross-border services to enjoy the same rights and be subject to the same obligations,
- ensure quality of services and offer the recipients of services the possibility of lodging a complaint via the single point of contact.

UNICE comments:

UNICE would prefer to maintain the structure of the Commission's proposal differentiating freedom of establishment and free provision of services.

Concerning the single points of contact: UNICE does not agree with the duty to inform the single points about all kind of information and to empower them to apply mutual recognition. Does that mean that they amount to an authorisation, surveillance body? They should principally manage the relevant information and not act as control mechanism. This would also deeply interfere with Member States' competence to organise their administration.

Concerning the pro forma registration It is not clear what the purpose of this formality is. It is intended not to add burden on the service provider but in fact it will increase bureaucracy, costs and delays and may act as a way of public control in order to be able to authorise provision of services by foreign providers. UNICE would strongly oppose this approach that may result in deterring provision of services.

VIII. FREEDOM OF ESTABLISHMENT

New Chapter II A: it only covers authorisation schemes (Articles 9-13) and prohibited requirements (articles14-15).

a. Authorisation schemes (Amdts 19, 24, 86, 87, 90, 91, 94, 97-98)

- Authorisations can be withdrawn or revoked:
    1. when justified by regulation or administrative regulations
    2. authorisation is linked to an obligation
    3. especially when the conditions for authorisation are no longer being met
- Tacit authorisation is deleted
- Deletion of the duty to identify and justify compatibility of authorisation schemes with article 9.1.

b. Prohibited requirements (Amdts 102-108)

The following prohibited requirements are deleted, which seems to indicate that they are permitted:

- economic tests
- the direct or indirect involvement of competing operators in the granting of authorisations or other decisions of the competent authorities, except for professional associations acting as the competent authority

- obligations to provide or participate in client protection funds and collective insurance schemes that are managed or negotiated by professional associations.

The following requirements are no longer covered by the duty to be evaluated, which also seems to indicate that they are permitted:

- Quantitative or territorial restrictions
- Fixed minimum and/or maximum tariffs
- Prohibitions and obligations regarding selling below cost and to sales
- Requirements that intermediary providers must allow access to services by other providers.

UNICE comments:

On authorisation schemes: UNICE opposes the deletion of the duty of Member States to identify and justify their schemes. This is a justified exercise in the light of the better regulation and simplification objectives of the EU agenda.

UNICE is also opposed to the deletion of the tacit authorisation which is a practice of good and efficient governance.

Further more, the directive should only determine how authorisations should be granted, not how they should be revoked. Member States already have safeguards to revoke authorisations. The draft report provides exercise of this power when an authorisation is linked to an obligation, this is misleading. UNICE prefers no reference to this issue or just a clarification that obligations and conditions should be proportionate and respect the criteria referred to in §1 of article 11.

On prohibited requirements: UNICE opposes the proposed deletion of several prohibited requirements and particularly of those subject to evaluation. The proposal for evaluation is a fair idea which aims to assess whether the listed requirements are no longer proportionate and must be prohibited.

IX. QUALITY OF SERVICES (Amdts 124-128, 144)

Information on providers and their services

-Information must be made available to the recipient and also to the single point of contact in the host country.

- It does not take into account the provider's preference in the provision of the information.

-It turns the list of additional information requirements from a duty valid upon the request of the recipient to a general automatic obligation, including information on codes of conduct.

UNICE comments:

The draft report imposes additional burdens on service providers, who have to supply information automatically, (not at the request of the recipient), and who cannot decide how and when they fulfil this requirement. UNICE prefers the above information to be provided when asked for by the recipient.

The proposed obligation to submit such information to single points of contact is superfluous and lacks added value. It is also cumbersome not only on providers but also on points of contact that will be responsible for registration and filing.

It is also difficult to understand why the provider is not allowed to decide to some extent how to communicate the information. The draft report is excessively prescriptive and undermines the ability of the provider, who is best placed to know, to meet the needs and expectations of his customers.

X. INFORMATION ON PROFESSIONAL INSURANCE AND GUARANTEES (Amdts 129-131)

-Member States can oblige providers who first move from one country to another in order to provide a service to inform the host country via a written declaration prior to the provision of the service. That prior written declaration must include any professional insurance and be renewed once a year.

-Information by providers to recipients on insurance and guarantees is made automatically compulsory and not at recipient's request.

-Member States can oblige service providers to furnish proof of insurance.

UNICE comments:

UNICE does not support these proposals that unnecessarily increase bureaucracy and costs on providers without providing any added value.

It is unclear what the justification is to make compulsory a pre-registration for all services.

Information on insurance and guarantees should be compulsory when is proven to be necessary if not it should be made obligatory upon request by the relevant party. The proposed amendments oblige service providers to inform Member States authorities regarding insurance and bank guarantees. UNICE does not support this new obligation. Such an obligation should only concern providers and his clients.

XI. RIGHTS OF SERVICES RECIPIENTS (Amdts 118-120)

Prohibited restrictions:

- Focus on market access for providers and not on use of service by recipients

- Deletion of requirement imposing unfair taxes on recipient regarding necessary equipment for service provision.

UNICE comments:

UNICE prefers it to focus on *the use of a service* since this article deals with the rights of recipients who are the users of the services.

Also UNICE opposes amendment 120 (unfair taxes). The rapporteur justifies the deletion of the ban by referring to Directive 97/7/EC which deals with consumer distant contracts but she overlooks that companies can also act as service recipients. It is then justified to maintain it.