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HEALTH AND SAFETY COMMISSION

DRAFT SERVICES DIRECTIVE - UK NEGOTIATING LINES

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Issue

1. The UK negotiating response to the draft Directive on Services in the Internal Market, and opportunities for the Commission to influence the Directive's development.

Timing

2. **Over the next three months** Member States' representatives and the European Commission will be moving from clarifying issues to starting to negotiate possible solutions.

Recommendation

3. The Commission is invited to seek opportunities to promote the UK negotiating objective to 'uphold UK standards on health and safety in all circumstances' in the context of securing the overall economic benefits which the Government anticipates.

Background

4. The European Commission's proposed Directive on Services in the Internal Market aims to increase EU trade in services with consequent economic benefits. DTI recently published on its web site the overall UK negotiating lines (**Annex 1**) for influencing the Directive's development.
5. Last July, HSC responded to the DTI consultation on the draft Directive:

<http://www.hse.gov.uk/consult/condocs/dtiservices.htm>

6. HSC took the view that the 'simplification' and 'establishment' provisions (such as the requirements for single points of contact and electronic access to services) had the potential to promote better regulation across Europe, if mainly practical problems were sorted out.
7. But the Directive's country of origin approach, which would make service providers operating temporarily in the UK subject only to their home Member State requirements, risked undermining controls on health and safety risks and increasing rates of work-related injuries and ill-health. HSC considered that health and safety at work regulation should be excluded from country of origin. We have been working with DTI with the aim of building on the potential benefits of the Directive and of overcoming the risks. More detail can be found in Annex 2 (Memorandum from HSC to the House of Lords' Sub-Committee B (Internal Market)).
8. The Directive would call for new effort from HSE and local authorities:
 - assisting the development and operation of one or more single points of contact to point firms to regulatory services (building on HSE Infoline experience);
 - further developing electronic access to regulatory services (building on existing work under *Modernising Government*);
 - in developing and operating mutual assistance arrangements with other Member States if country of origin applies to health and safety at work;
 - reviewing and reporting on compliance of GB authorisations with the Directive's criteria for objective necessity, proportionality, and non-discrimination.
9. The European Commission is proposing possible administrative pilots in the first three areas. HSE may be able to assist with the development of useful approaches.

Consideration

10. The UK strongly supports the market-opening aim of the Commission's proposals and shares its' objective to see the Internal Market become a reality for services as well as goods.
11. The current Luxembourg Presidency aims to make progress towards a final Directive, as will the UK when it takes over the presidency in July.
12. A first European Parliament reading of the EC's draft Directive seems likely to take place during the summer. The EP's Internal Market committee rapporteur has recently issued a working document, available at: http://www.europarl.eu.int/meetdocs/2004_2009/documents/DT/551/551156/551156en.pdf
13. It will be important to find means in the next few months to promote improvements in the Directive so as to get satisfactory regulation across Europe; to defend Britain's sensible standards and our effective framework for employers and others to manage work-related health and safety risks.
14. The Commission is invited to seek opportunities to promote the UK negotiating objective to 'uphold UK standards on health and safety in all circumstances'. The key messages are:
 - The simplification and establishment provisions will encourage better regulation across Europe, once the mainly practical problems are sorted.
 - The 'country of origin principle' will increase the opportunities for temporary service providers to work in other member states. However, these benefits are outweighed by factors which will possibly reduce health and safety standards, such as confusion

of requirements, damage to effective employer communication about risk, increased risks of harm, difficulties with enforcement even when there is immediate or serious risk, and increased costs.

15. Some Member States are not as supportive of the Directive as a whole, while others are totally opposed to it. It has been argued that the Directive will not progress without considerable re-working. Whilst negotiation is still very much in progress, this is an ideal time to promote the UK line, in what could be a drawn out process.
16. Commissioners may wish to forward the details of contacts in the EU Parliament, European Commission, and other Member States to the chair. The Chair may then be able to contact them in order to seek support for a Directive which aids better regulation whilst maintaining health and safety standards. It would be appreciated if the Commission could consider possible contacts, and forward their details to the Chair by Tuesday 17 May 2005.
17. We will offer advice and draft letters if requested.

Costs and Benefits

18. DTI have published a Regulatory Impact Assessment (<http://www.dti.gov.uk/ccp/topics2/pdf2/servicesria.pdf>), which considers benefits and costs in broad terms. Approaches to EU institutions need to draw attention to economic factors relating to control of work-related risks.

Financial/Resource Implications for HSE

19. If country of origin were to apply to health and safety at work regulation roughly to the extent the present draft Directive indicates, we estimate that £1.25 million per year in HSE resources (current prices) would need to be diverted to making it work. This would be through mutual assistance between Member State authorities. This assumes for example that the present partial derogation in Article 17(17) would exclude serious risks subject to UK authorisations, eg asbestos licensing; and that decisions on any prosecution would be for the Member State in which the temporary service provider operates. Neither is certain at this stage.
20. More work will be needed to identify financial implications from the proposals, taking account of results emerging from the proposed administrative pilots (paragraph 10 above), and from the negotiations in Europe.

ANNEX 1 UK Negotiation Lines

Following the analysis of the responses to the DTI consultation with stakeholders, during the negotiations the UK will seek to achieve the following main objectives:

- Strongly support the market opening objectives of the proposed Directive, in particular through:
 - simplification and better regulation: and
 - support for the country of origin principle;
- Ensure that the proposed Directive does not cover taxation, publicly funded health services and occupational pensions;
- Ensure that the proposed Directive does not impinge upon UK criminal law and policy or on immigration and social security policy;
- Clarify the relationship with sector-specific legislation;
- Uphold UK standards on health and safety in all circumstances;
- Maintain high standards of protection for workers, consumers, the environment and animals;
- Ensure that the proposed Directive does not affect sensitive policy areas where regulation is principally not for economic motives; and
- Negotiate an acceptable outcome as regards Private International Law.

DTI recognise that considerable work will be needed to develop workable practical solutions in many areas, including single points of contact and the mutual assistance procedures governing the supervision of providers of temporary services (particularly in cases of urgency).

Annex 2 – HSC Memorandum to House of Lords Sub Committee B (Internal Market)

HOUSE OF LORDS SELECT COMMITTEE ON THE EUROPEAN UNION

SUB-COMMITTEE B (INTERNAL MARKET)

Inquiry into the proposed Directive on Services in the Internal Market

DRAFT SERVICES DIRECTIVE – IMPACT ON HEALTH AND SAFETY STANDARDS IN GREAT BRITAIN

A memorandum by the Health and Safety Commission

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DRAFT SERVICES DIRECTIVE – IMPACT ON HEALTH AND SAFETY STANDARDS IN GREAT BRITAIN

A memorandum by the Health and Safety Commission

Summary

1. The Health and Safety Commission (HSC) considers that the draft Services Directive will encourage better regulation across Europe through its simplification and establishment provisions. This will promote sensible health and safety measures, and a more level playing field for UK business abroad. HSC welcomes the Directive's broad intent. HSC comments address issues in the draft Directive as published last year with the Department of Trade and Industry's (DTI) consultation paper. But, this memorandum also discusses potential improvements in the Directive which appear to be emerging from discussions in Europe.
2. HSC has also considered the likely impact of the country of origin approach to opening markets to temporary service providers. HSC is concerned that this approach, as it stands, risks seriously undermining sensible UK controls on work-related health and safety risks. HSC therefore welcomes the Government's declared negotiating stance, which, in the context of an overall wish to promote the economic benefits of the Directive, seeks to uphold UK standards on health and safety in all circumstances.

The role of HSC

3. HSC is responsible in Great Britain for advancing effective strategies for reducing work-related injuries, ill-health and deaths. 235 workers and 167 members of the public¹ were killed in work-related incidents in 2003/04; and 30,666 workers suffered major injury. A total of 39 million working days were lost to work-related injury and ill-health. These figures represent unacceptable and largely preventable levels of individual suffering, and economic cost between £13.1 and £22.2 billion per year. Many of these incidents do not come to the notice of the wider public. Sometimes they are front page news, for example when 21 cockle pickers drowned in Morecambe Bay.
4. HSC promotes sensible measures to manage work-related risks. This benefits employees and others affected by work. It also benefits employers, whose investment in risk management is repaid in higher productivity, lower costs, and enhanced reputation.
5. These risks arise from work activities which include the wide range of services within scope of the draft Directive. These services include suppliers of labour in agriculture and shellfish harvesting, as well as architectural, construction, engineering and maintenance services, and the distributive trades and fairgrounds. DTI's 2004 consultation paper indicates that about half of all enterprises in the UK are in 'market services', as are 49% of all UK employee jobs. This underlines the importance of sensible risk controls.
6. HSC makes proposals to Government for improving and simplifying the statutory and voluntary framework for health and safety regulation based on wide public consultation

¹ excluding suicides and trespassers on the railways

and expert advice. HSC is committed to regulation which fully reflects better regulation principles. HSC is assisted by the Health and Safety Executive (HSE). HSE is also responsible for proportionate enforcement in accordance with the HSC Enforcement Policy Statement.

‘Simplification’ and ‘establishment’

7. The Directive’s simplification and establishment provisions would require easy access to regulatory services for all businesses, and equitable treatment of competitor service providers moving in permanently from another Member State. Experience in health and safety regulation leads HSC to support the idea of single points of contact, electronic access to regulatory services, and requirements to ensure that authorisations are objectively necessary, proportionate, and non-discriminatory. In health and safety regulation, authorisations include licences for asbestos removal, explosives manufacture and storage, and nuclear installations.
8. HSE already has a single point of contact, *Infoline*, which deals with more than 270,000 enquiries per year from business and other stakeholders. The European Commission (EC) may wish to draw on this experience in its proposed administrative pilot in this area. HSE has also been developing electronic access in response to the Modernising Government agenda.
9. However, these provisions need to be made more workable. For example, further developments in electronic access under the Directive should allow Member State authorities to prioritise and select projects on the basis of cost-benefit considerations, not a blanket requirement. HSC believes the EC intend single points of contact to provide ready access to expert decisions on health and safety authorisations. But the current wording of Article 6 suggests single points of contact could be new authorities. This needs to be clarified.
10. As the draft Directive indicates, authorisations should be used only when objectively necessary and proportionate, and they should not be used to discriminate against other Member States’ service providers. HSC believes that authorisations used in GB health and safety regulation will readily meet these criteria. But, one aspect of Article 10, on conditions for granting authorisations, gives HSC cause for concern. Article 10(3) would prevent a Member State from applying authorisation requirements to a business if its home Member State already applies controls ‘equivalent or essentially comparable’ in purpose.
11. Authorisations are only used under health and safety at work regulation where no less stringent measure will be enough to ensure that serious risk is adequately controlled. The authorisation process is vital to an effective working relationship between business and HSE in high risk areas. There is thus a strong argument that other Member State authorisations, dealing with asbestos stripping for example, could not be equivalent or essentially comparable. However, HSC wishes to see the intentions of Article 10(3) clarified, in favour of ensuring UK standards of health and safety continue to apply. Otherwise, Article 10(3) risks undermining the coherence of controls on high risk work activities, creating potential problems similar to those the Article 17(17) derogation needs to overcome in country of origin.

Country of origin

12. HSC believes that the balance of opportunities and risk, and benefits and costs, to business, to employees and to others affected by work does not generally support extending the country of origin approach to work-related health and safety risks.
13. Country of origin seeks to assist service providers operating temporarily in another Member State by making them subject to their home Member State requirements. But harmonisation of health and safety regulation across Europe is no more than work in progress in many sectors. The health and safety record in Great Britain is among the best in the European Union. Country of origin risks importing poor health and safety practices in some temporary service providers' operations. It risks undermining standards more widely when temporary providers supply services to other businesses. It also risks undercutting responsible businesses.
14. Construction is one example where risks can be controlled only by professionals, clients, sub-contractors, suppliers and workers co-operating in the management of risks. Doing this effectively requires everyone to sing from the same sheet, in this case the same health and safety requirements. There are welcome indications that the EC does not intend building sites at least to be subject to country of origin. But, this kind of co-operation and coordination is needed in many other spheres too, for example anywhere one or more contractors carry out maintenance of buildings, machinery, process plant, electrical or electronic systems.
15. HSC understands that a further draft of the Directive being discussed in Brussels working groups may effectively exclude regulation of conditions for workers from country of origin, including work-related health, safety and welfare requirements. This would be a sensible and welcome development.
16. The draft Directive as sent out for consultation last year would have increased bureaucracy for business in this area, as well as adversely affecting risk controls. Health and safety and other conditions for 'posted workers', those sent by a service provider to another Member State, are to be regulated by the host Member State under the Posted Workers Directive, as now. But country of origin as formulated appeared to mean that workers recruited by a temporary provider in the host member state would be subject to the home Member State health and safety requirements. The temporary provider would then face two sets of requirements. HSE and DTI drew EC attention to this. The Posted Workers Directive approach allows for sensible and effective control of risks to workers – HSC hopes the final Directive will indeed adopt it for all workers.
17. However, country of origin would still apply to regulation of risks to non-employees such as members of the public affected by work activities, eg people in the vicinity of scaffolding work in the street, or who risk inhaling legionella bacteria from an ill-maintained office cooling unit. European Union legislation does not deal consistently with risks to the self-employed, and says little or nothing about risks to members of the public. Other Member States' requirements appear to vary considerably. Again country of origin would introduce damaging discontinuities to health and safety regulation.
18. In the experience of HSC and HSE, the vast majority of employers wish to comply with health and safety requirements, which are no more than what sensible business should do anyway to control risks. Most employers actively seek to manage risks. But there

are a minority who have no respect for people's health and safety, or who deliberately cut corners. HSC is concerned that such unscrupulous businesses will seek to exploit temporary service provider status. Some will claim to be subject to country of origin even when they continuously or regularly operate in a Member State, and may well succeed in staying one step ahead of the regulator. Country of origin risks introducing uncertainties in relation to health and safety regulation which unscrupulous businesses would seek to exploit.

19. The regulation of work-related health and safety risks is designed to safeguard people, so far as is reasonably practicable, from risks which can lead to harm, sometimes to a lifetime of serious ill-health or to death. This is good for individuals and it is good for business. As regards health and safety at work, HSC considers that the modest increase in certainty for temporary service providers from country of origin in its unmodified form is outweighed by confusion of requirements, damage to effective employer communication about risk, increased risks of harm, and consequent costs.
20. Article 17(17) currently appears to offer a partial derogation from country of origin for health and safety requirements, targeted on especially serious risks. But, Article 17(17) does not yet appear to be worded so as to take account properly of the issues raised above. HSE is working with DTI to seek to address these kinds of problem. HSC understands there are some positive signals emerging from discussions in Europe, but HSC also considers it should comment on the draft Directive as it is publicly available. A priority for the EC in developing the Directive should be to ensure that the extent of the Article 17(17) derogation safeguards necessary and proportionate controls on work-related risks to people's health and safety.

Enforcer costs

21. Under the Directive, country of origin would be made to work by means of requirements for mutual assistance between Member State enforcing authorities. The sub-committee may wish to note HSE's current estimate of the resources which HSE would need to devote to mutual assistance, based on the way the country of origin approach currently appears to impact on health and safety. HSE estimates that the annual cost would be at least £1.25 million. This raises the question whether all 25 Member States' authorities would be able to find the resources to support their end of the mutual assistance process.
22. Local authorities also enforce health and safety requirements in certain sectors – HSC understands that local authorities are considering the impact of the draft Services Directive and the potential cost implications.