



Mr Robert Howe
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Dear Mr Howe

**DRAFT DIRECTIVE ON SERVICES IN THE INTERNAL MARKET HSC
RESPONSE TO DTI CONSULTATION**

I am responding to DTI's consultation as Secretary to the Health and Safety Commission (HSC). I attach your response form completed with answers to relevant general questions and those for regulators. In this letter I wish to set those answers in the wider context of ensuring sensible control of work-related health and safety risks. Thank you for the additional time in which to respond.

The HSC recognises the importance to the UK economy of encouraging trade in services. However, HSC has great concerns about the potential effect of certain aspects of the Directive as it is currently drafted.

The proposals for **simplification** contain a good deal that is positive in promoting proportionality and transparency in regulation. More comments on this and the other matters raised below are in **Annex I**.

However, the **country of origin principle** would remove temporary service providers (TSPs) operating in a host Member State (MS) from the host MS health and safety regulation. The TSP would instead be subject to the requirements and authorities of their country of origin (home MS), albeit by way of liaison between host and home MS. This approach has been used in the E-Commerce Directive 2000/31, but that covers services in which there is no physical contact with the service recipient, and generally no work activity of a kind which could create risks to others' health and safety. Seeking to apply country of origin to work-related health and safety risks is quite another matter.

Better Regulation principles are the guiding light for health and safety regulatory measures proposed by HSC, together with effectiveness in controlling risk. HSC believes that the provisions and impact of the draft Services Directive should be assessed on the same basis.

HSC believes that the 'Country of Origin Principle' is not feasible in relation to health and safety regulation and enforcement. If implemented, this area of the Directive seriously risks undermining health and safety standards in Britain. Therefore HSC seeks an exemption for health and safety from the Country of Origin Principle.

The Posted Workers Directive also aims to free up trade in services, but it ensures the protection of workers posted to a host MS by making them subject to the **host** MS health and safety regulation. This seems to HSC the more sensible approach. The vast majority of the anticipated trade benefits from the Directive would seem likely to come from abolishing the kinds of requirement which would directly discriminate against service providers setting up in another MS, as set out in Articles 14 and 15.

It could be argued that the home MS health and safety regulation overall may set out to achieve the same ends in controlling a particular risk. HSC does not make any assumptions that health and safety standards are necessarily lower in another MS. But within the broad EU framework of health and safety regulation there is much variation in approach. One MS specific requirements seem likely to work best in the broader context of that country's framework for managing risk.

HSC is also concerned that DTI's consultation paper refers to the health and safety at work only by implication. I am aware that many bodies with a strong concern about work-related health and safety have been considering the draft Directive but some may not have seen a connection. This letter will appear on the Health and Safety Executive's (HSE) web site to draw attention to these important issues.

I attach **(Annex 2)** some industry examples which may help to illustrate some of the issues raised in this letter and the attached response form. HSE officials are available to participate in further discussions and clarify the HSC's remarks.

In summary, HSC considers that the Directive's simplification provisions will give a boost to proportionate and non-discriminatory regulation. But HSC believes that 'country of origin' threatens widespread fault lines in regulation and employer control of risks to peoples' health and safety from the work of temporary service providers, which could lead to more work-related injuries and deaths.

Yours sincerely

A handwritten signature in black ink, appearing to read "Susan Mawer". The signature is fluid and cursive, written in a professional style.

Susan Mawer
Secretary
Health & Safety Commission

More specific comments

Simplification

The draft Directive's timetable for **reviewing and justifying authorisations** and setting up **electronic access** is unrealistic. There is no indication in the Directive of what standard of electronic access would be required; nor is there any basis for identifying suitable and unsuitable applications, or setting priorities as under the UK Modernising Government initiative which HSE is already pursuing. Additional resources will be needed depending on the final scope of the Commission's intentions, and the time available for change, otherwise resources may have to be drawn from HSC strategic priorities.

Country of origin principle

HSC makes the following further observations on the Directive as it is currently drafted (discussed in more detail in the response to DTI's specific questions):

- Proportionate control of serious risks needs to be maintained. TSPs should remain subject to GB authorisations, which I am confident would be justified under the Directive. I believe this may be intended by the derogation in Article 17(17) though this is not at all clear at present.
- Proportionality also requires that inspectors should continue to be able to issue a Prohibition Notice stopping work immediately to prevent a risk of serious personal injury, without the need for **prior** liaison with another MS authorities as the draft Directive requires.
- The country of origin approach does not seem to accord with consistency of regulation in GB, as TSPs and domestic service providers would be regulated differently.
- The integrity of health and safety regulation, would be undermined by the country of origin approach in relation to kinds of work activity which create serious risks of harm and in which co-operation and co-ordination between service providers is essential to control risk (eg construction, or a variety of industrial maintenance activities). The derogation in Article 17(17) does not satisfactorily address this, even taking account of paragraph 43 of the recital.
- The definition of temporary would seem to include providers operating seasonally or otherwise regularly in a host MS. There would be no reason why such providers should not be treated as established and subject to host MS regulation. This will be vital in agriculture for example.

- Allowing TSPs to operate under their home MS health and safety regulations would increase transparency of regulation for them, but introduce uncertainties for workers and members of the public in the host MS. These uncertainties will be felt most in relation to those work-related incidents have resulted in people being injured or killed.
- The mutual assistance arrangements would seem to permit HSE and local authority inspectors to continue to carry out preventive inspections targeted on activities or employers who create the greatest risks, though any enforcement would be carried out on the authority of the home MS.
- In terms of accountability of authorities, HSC is not clear how people in GB would be able to hold to account other MS authorities for enforcement decisions which they feel are wrong. What access would complainants have to judicial review or a similar remedy in such circumstances?
- There is also a need to ensure that any member of the public who may be affected by work activity (section 3 HSWA) continues to be protected by health and safety legislation. This is not a requirement under EU health and safety directives, with a few detailed exceptions. It will be essential to avoid a patchwork of variable provision, complicated by possible contractual requirements to follow host MS regulation, and potentially uneven cross-border enforcement depending on the resources MS are able to bring to it. This could lead to unacceptable public uncertainty over what protections may apply.

Industry examples for consideration

Construction

The network of service providers in a typical construction project is complex, and may already involve providers from other MS. Successful delivery of even a modestly sized project demands good planning, communication and co-ordination. Control of project risks is central. This includes controlling risks to health and safety and thereby avoiding the inevitable and often considerable disruption to a project if an incident occurs.

The construction sector has one of the worst health and safety records of any industry in GB. One of HSC's priority programmes is designed to achieve marked reductions in the harm people are suffering in this area of work. GB industry stakeholders are working together actively to reduce the present toll of injury, work-related ill health, and deaths.

The form of health and safety regulation in the sector recognises the degree of risk, the interdependence of parties, and the fact that health and safety risk must be considered in design as well as project management stages. Regulations provide a common basis for communication about risk, including businesses' assessment of the competence of possible contractors.

The GB Construction, Design and Management Regulations place special requirements on key players in any construction project to prevent risk at the earliest stage in the process, beginning with design. The CDM Regulations also require co-operation and co-ordination in risk management. These Regulations reflect the nature of construction projects. This approach is founded on a consensus among industry stakeholders. HSE is seeking to establish what approach other MS have adopted, but are not yet aware of any similar approach.

The proposed regulation of one or more firms by one of more other MS under varying requirements on a single site would add to the complexity of co-ordinating risk control measures and could create dangerous confusion.

Temporary service providers could be active in a variety of functions, including for example scaffolding, demolition, gas fitting, supply and operation of heavy plant, mobile tower cranes. The risks which need to be controlled are not only to workers, but also to members of the public who happen to be visiting a site, or just in the vicinity – scaffolding, crane and wall collapses, or explosion often have effects beyond the site.

HSE inspectors may need to respond quickly to a complaint which suggests serious risk. HSE inspectors may issue a Prohibition Notice, with delayed or

immediate effect in order to stop work which causes serious risk of personal injury. A prohibition notice may for example stop ill-considered demolition work until a system of work is in place which will control risks. A Prohibition Notice may occasionally need to stop work across an entire site affecting several businesses, including temporary service providers.

Asbestos removal may form part of a demolition and construction project. In GB, all asbestos removal contractors must hold a licence and notify HSE of each job 14 days in advance, with a plan of how the work will be carried out. The Asbestos Worker Protection Directive allows some flexibility in implementation - not all MS have a licensing scheme.

Domestic gas installation and maintenance

Health and safety regulations provide for non-governmental bodies (just one at present, CORGI) to certify the competence of gas fitters and maintain a register of those authorised to install and maintain gas appliances. This applies to work in domestic and commercial premises, though the risks from incompetent work arise mainly in domestic premises.

Faulty domestic gas installations result in about 30 deaths in GB each year from carbon monoxide poisoning and explosion; and perhaps two or three hundred major injuries. Among those most at risk of death are tenants in rented accommodation. Some unscrupulous landlords are tempted to rely on incompetent fitters. It would be important that home MS regulation of temporary service providers should not exacerbate the problems of ensuring that only competent persons work with gas.

It may be that the final Directive on Recognition of Professional Qualifications may allow GB to insist that gas fitters as temporary service providers are required to undergo assessment, top-up training if necessary, and registration. If not, it will be important to address this issue under the draft Services Directive.

On the basis of the information available to us, the approach to regulating gas safety appears to vary considerably across MS. For example, HSE understands that in France domestic gas fitters must have installations certified by a competent third party before being put into use. In the Netherlands, on the other hand, while we understand that there is a requirement on users to have their appliances regularly serviced, their installers are subject neither to third-party conformity certification as in France nor to personnel certification and registration as in GB.

fairgrounds

Fairground rides are an example of a highly mobile service where potentially serious risks to life and limb are controlled by competence and diligence in assembly, maintenance and testing by responsible operators and others.

Inspectors need to be able to stop rides immediately where there is serious risk of personal injury. Any lengthening in the chain of regulation risks allowing a few possibly dangerous providers to move on unchallenged.

The general and specific duties to safeguard health and safety apply, but fairground equipment is specifically excluded from the Supply of Machinery (Safety) Regulations 1992, which implemented the Machinery Directive. No authorisations are required. However, the fairground industry itself operates an inspection scheme.

Since the early 1990s, efforts have been made at CEN (the European Standards body) to develop a Standard to define safety rules related to structures and machines, both being integral parts of or constituting an amusement device itself. The Standard is in draft and consensus has still to be reached.

Agricultural services

Agriculture has a poor health and safety record. Agriculture is one of the Health and Safety Commission's industry priorities in its efforts to help cut the numbers of work-related injuries, ill-health cases and deaths.

Service providers in the agriculture sector undertake a variety of farming operations, eg ploughing, combine harvesting, or supplying labour for picking. Service providers (gangmasters) supplying and managing gangs of labourers, often brought from other MS, cause a good deal of concern because they include unscrupulous people indifferent to the health, safety and welfare of those they employ.

Concerns about some gangmasters' use of illegally employed labour, poor health and safety, and other abuse has prompted the introduction of legislation to license their activities. The Bill on Agricultural Gangmasters is currently before Parliament – the Department of the Environment, Food and Rural Affairs is the lead government department.

There is a risk that the Country of Origin approach may offer opportunities for evasion to unscrupulous gangmasters who decide to register their business in another MS.

IT services

Manufacturing industry relies heavily on computer controlled machines and process plant. The control of the plant itself, as well as the materials being worked on, give rise to often serious risks to health and safety. The quality of IT programming and 'maintenance' services are crucial to safety. In chemical process plant for example, failures could have dire consequences for workers and for members of the public living in the vicinity.

We are concerned that temporary service providers working to other MS requirements will introduce uncertainties into the process of assuring control of health and safety risks.

engineering design and installation

A steel walkway at Port Ramsgate collapsed. It had been designed and built in another European country, now a MS. Six members of the public were killed and several injured seriously when they fell 30 feet. HSE prosecuted and secured convictions and big fines against the Port (the client), the insurance industry body which certified safety - and also against the design company (a 'temporary service provider') and the fabricator, both from another MS. The other MS companies declined to pay fines totalling several hundred thousand pounds for their part in the incident. The draft Directive does not address important questions of criminal jurisdiction or enforcement of criminal fines.