REPORT ON THE RESPONSE TO THE PUBLIC CONSULTATION INTO THE EU 'DIRECTIVE ON SERVICES IN THE INTERNAL MARKET'

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(For a complete description of each article refer to the full text of the directive)

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1 Summary of Commission Proposals

The European Commission published its proposals to increase services trade in the European Community on 16 January 2004. The proposal took the form of the 'EU Directive on Services in the Internal Market'. This wide ranging framework directive will have implications for every sector of the economy, which covers a large slice of the total economy. The areas not covered are those excluded by Article 2,

which are financial services, transport and telecommunication[1]. The Directive does not cover non-economic services.

The key elements of the Commission's proposals are:

Freedom to establish a business in another Member State:

- A review by all Member States of the administrative procedures they require foreign service providers to complete in order to establish on their territory i.e. that these be in line with EU law, non-discriminatory and proportionate. Also:

  - creation of single points of contact where providers can comply with all necessary formalities
  - simplification of authorisation procedures to make them more transparent;
  - easy availability and provision of intelligible information;

Freedom to provide services abroad, without being established there:

- Application of the principle of mutual recognition on the basis of country of origin. This would mean a business based in one Member State would be able to provide its services to customers in another Member State, where it is not established, on the basis of the regulations of its home country.

2 Consultation Process

DTI launched a Public Consultation on the Directive on 29 March 2004 at a seminar in Methodist Central Hall, Westminster. Invitations were sent out to 1500 business and stakeholder organisations and over two hundred attended to see a presentation by Dr Schaub, the Director General of the Internal Market Directorate of the Commission. All invitees were sent a comprehensive consultation document that outlined the key issues, as seen by DTI, and asked a number of specific questions.

In addition to the launch event, five regional events were held, (Glasgow, Cardiff, Manchester, Birmingham, Belfast) as well as a number of presentations to stakeholder groups. On each occasion views, questions and opinions on the Directive were invited from the audience.

In addition to the presentation events full details of the Commission proposals and how to participate in the Public Consultation were provided on the DTI website.

3 Statistical analysis of the response

A total of 116 responses were received from a wide variety of stakeholders. The table below identifies the major groupings.

Type of Organisation	Number of responses
Small to medium sized business	11
Big Business	6
Regulators	19
Industry/Consumer Representative organisation	71

[1] To the extent the matter falls within the scope of the EU telecommunications package of 2002

Trade Unions	5
Local Authorities	4
Total	116

Some consultees fitted more than one of the above descriptions but have only been included in one category.

By far the largest response came from industry and consumer representative bodies. An analysis of the responses by interest group or industry they represent reveals the following main themes.

- Consumers
- Construction
- Gas installation
- Private Security
- Entertainment (fairgrounds etc)
- Gambling
- Healthcare & Pharmacy
- Workers (Trade Unions)
- Regulated Professions
- Travel
- Advertising, Publishing and Media

A total of 25 consultees responded using the questions posed in the Consultation document. The vast majority were regulators or representative bodies. Very few answered or provided substantial information in response to questions relating to, current barriers to the provision of services across EU borders or establishing in another Member State and the subsequent cost to business of those barriers.

4 Summary of responses by Services Directive chapter

4.1 Chapter 1 – General Provisions

4.1.1 Article 1- The responses that have specifically touched on the broad aims of the Directive are largely supportive. However, many of the supportive comments are qualified by objections to specific provisions. Even amongst the most outspoken critics of the Directive, the trade unions, UNISON have recognised the need for a European framework directive on services. However, UNISON, also believe that framework legislation on Services of General Interest is needed at the same time to protect the quality of public services.

Amongst those that support the Directive there is concern that patchy implementation will mean that the aims of the Directive will not be entirely realised. At the other end of the scale, the British Medical Association believe the text has been drawn up in haste and should be entirely withdrawn and re-drafted as it is *"clearly not ready for consideration by the European Parliament or Council"* . The BMA do not accept that the Directive will only cover areas already exposed to competition and believe the Directive will undermine the status of hospitals as services of general interest.

4.1.2 Article 2 – There is a broad spectrum of views ranging from complete agreement with the scope of the Directive to it being, *"too wide ranging"*. Many consultees felt they needed further clarification of exactly what was covered, for example, local authorities, who are unsure whether local services, provided by

Councils for a small charge, are actually covered by the Directive. Security and transport industries, are again unsure which, if any, parts of their sector will be covered by the directive.

Several responses suggested that further derogations were required and they can be grouped into the following categories: employment law, health and safety regulations, health professions and pharmacy provision, services provided by local authorities, TV broadcasting, tax policy.

Gambling revealed a real difference of opinion within the industry: five responses specifically mentioned the treatment of gambling and lotteries. Three suggested that there should be a general derogation for gambling from the entire Directive, whilst the other two suggested that the derogation already went too far and that gambling should be covered by all the provisions of the Directive.

4.1.3 Article 3 – The relationship between the Services Directive and the Mutual Recognition of Professional Qualifications Directive (MRPQ) was by far the biggest concern of consultees. Whilst some just wanted clarification that the two directives were compatible, others identified apparent inconsistencies. Those areas identified as being inconsistent were the 'Single Point of Contact' and the 'Exchange of Information' requirements.

Two responses suggested that article 3 should include a reference to Member States implementing the Directive in compliance with ECJ case law. The Bar Council identified an apparent inconsistency between the Services Directive and ECJ case 309/99 Wouters, in particular Article 30 (1) (a). The Law Society suggested a drafting change that would clarify the precedence of specific EC legislation over this horizontal Services Directive. The Service Directive overlap with the private international law rules, (referred to colloquially as Rome 1 (contractual law) and Rome 2 (tort and non-contractual law)) was highlighted by the CBI as an area that appeared to require further work

Media organisations were particularly concerned that the Services Directive should not cut across or add to the provisions of the Television Without Frontiers Directive.

Finally, on this article it was suggested, by one of the health professional bodies, that Article 152 (5) of the Treaty gave an exemption for the delivery of health services from the scope of the directive.

4.1.4 Article 4 – Many consultees indicated that they thought the current list of definitions were adequate. Those that suggested the current definitions were inadequate can be separated into two categories.

Firstly, there are those that want a clearer definition of the terms already listed in Article 4. A number of consultees and particularly the Trade Unions wanted a much clearer definition of the term 'establishment'. Of particular concern to the Trade Unions was the *"weak"* definition of 'establishment' combined with the Country of Origin Principle. The HSC want the definition of 'establishment' *"clarified and tightened"* to include seasonal workers.

Other currently listed terms that were considered to require clearer definition were; 'service', 'hospital care', 'co-ordinated field', 'regulated profession'. In each case consultees were concerned that Member States might arrive at different interpretations of terms used and that as presently drafted the Services Directive did not provide sufficiently clear guidance to ensure consistent implementation.

Secondly, there were consultees who felt there should be additional terms defined in Article 4. The Trade Unions would like to see a definition of 'Temporary Provision'. Others would like to see the following terms defined for the purposes of the Directive: 'general interest', 'public interest'(Articles 5,9,10, 11, 13, 15, 36), 'posting' (Articles 4, 17, 24, 25), 'public protection', 'easily accessible' (Article 7, 13, 26), 'arbitrary' (Article 10) and 'discretionary' (Article 10).

4.2 Chapter 2 – Freedom of Establishment for Service Providers

4.2.1 Article 5 – This article divided consultees into two clear opposing groups, particularly concerning the wording of Article 5.2. Regulators felt that discretion to see original documents only when justified by an overriding reason related to the public interest was unacceptable and could leave their authorisation schemes open to abuse. This issue relates back to the definition issue in Article 4 where in was suggested that a clearer definition of 'public interest' was required. On the other side of the argument some businesses and business representative bodies felt that Member States would exploit the wording of article 5.2 to maintain many authorisations they currently impose.

4.2.2 Article 6 – A total of 35 consultees gave a positive response to the concept of Single Points of Contact (SPC). However, even amongst those that gave a positive response there were doubts about how they would work in practice and the additional resource they would require. The legal and health professions in particular did not see how they would work.

DTI was identified by a number of consultees as the body that should coordinate the introduction of single points of contact. All interest groups indicated that they should be included in the process of developing SPC.

It was suggested that the inconsistency in the approach to SPC in the Services Directive and the MRPQ could lead to confusion and that efforts should be made to ensure the two Directives are compatible. Additionally some businesses were concerned that the SPC should not become another layer of bureaucracy.

4.2.3 Article 7 & 8 – Very few comments on these specific articles. The Consumers' Association were concerned that Article 7 (3) assumed that all consumers had easy access to the internet and suggested the word 'including' should replace 'and' after 'distance'.

Concern was expressed that Article 8 should not prevent competent authorities from insisting on seeing original documents where necessary.

4.2.4 Article 9 – Those UK regulators that responded were generally of the opinion that their authorisation schemes were in compliance with the provisions of article 9. A number felt that it should be put beyond doubt that authorisation schemes are

acceptable in cases involving the public interest. The health professions wanted clarification that their authorisations would not be covered by the provisions of article 9. Pharmacies bodies, in particular, are concerned that the ability of the UK Government to maintain its right to control the NHS and allocate resource as it sees fit would be affected if the pharmacy 'Control of Entry Regulations' fall within the scope of the Directive. A recommendation by the OFT to revoke the 'Control of Entry Regulations' was rejected in 2003 due to strong public protest. Pharmacy bodies would like clarification of the effect of Article 9 and urge Government to ensure that 'Control of Entry Regulations' have a derogation.

OFCOM were concerned that the Services Directive as currently drafted would affect the UK's ability to impose regulation on radio services that are authorised in other Member States. Radio broadcasting is not currently regulated at EU level.

At the other end of the scale several consultees suggested that the wording of article 9 was too vague and that it should be strengthened and go further to ensure all unnecessary authorisations were reviewed and removed.

4.2.5 Article 10

The health professions were concerned that the provisions of article 10(3) were open to the interpretation that health professionals registered in one Member State would not need to seek a separate registration when working in another. This they said would not be acceptable and they want an explicit reference to the acceptability of authorisations for health care professionals.

OFCOM were concerned about the impact on its licensing and authorisation procedures for regulating the broadcasting industry and in particular radio broadcasting. They feel that the Directive introduces uncertainty in a range of areas that may require changes to the UK's regulatory framework, potentially increasing the regulatory and administrative costs for business and consumers.

4.2.6 Article 11 – This article attracted only a few but very specific comments.

The Royal Mail are concerned the Directive does not appear to deal with the withdrawal of authorisations because of unacceptable quality of service. Royal Mail would expect to see rival operators subject to the same sanctions as it could expect if found to be providing unacceptable service.

The security industry was unhappy with the unlimited element of authorisations as the Security Industry Authority (SIA) reviewed licenses to ensure there had been no breaches and to maintain standards. For similar reasons health professions had problems with the idea of unlimited authorisations. Again the issue of providing a clear definition of 'overriding public interest' in Article 4 was raised.

The Independent Committee for the Supervision of Standards of Telephone Information Services (ICSTIS) would like to see 'child protection' added to the wording of Article 11 (1) (c).

4.2.7 Article 12 – HM Prison Service and Pharmacy bodies both identified possible problems with this article. Pharmacy premises licenses are granted without time limit due to the expensive and time consuming process to get a licence.

4.2.8 Article 13 – Almost without exception every consultee who commented on Article 13 suggested that 13(4) was either completely unacceptable or would pose problems for UK regulatory regimes. In particular the health professions and the security industry wanted it to be made very clear that they would not be subject to the provisions of Article 13 (4). In a related issue the Consumers' Association wanted a guarantee that consumers would be entitled to compensation from an organisation at fault when an authorisation had been granted under the terms of 13(4) that should in fact have been withheld.

4.2.9 Article 14 – The Consumers' Association are concerned that Art. 14(7) will mean that consumers will be forced to make claims against funds or insurers based in another Member State. The cost of this could make the process impractical.

The Law Society is concerned with the potential implications of Article 14 (7) for the Law Society Compensation Fund. All registered lawyers are obliged to contribute unless they can demonstrate they have equivalent coverage in their home bar. The requirement may be caught by Article 14 (7) because, according to the Law Society, it implies that lawyers who do not have equivalent cover cannot shop around. Article 14 (7) should be reworded to make clear that it does not apply in respect of a fidelity fund maintained and administered for the benefit of clients of lawyers under the jurisdiction by a professional lawyers' body.

Local authorities are often required to promote local economic development and regeneration efforts and are concerned that the provisions of Article 14 (1) will cut across this work.

4.2.10 Article 15 – Again two distinct opinions on the provisions of Article 15. The trade unions have strongly suggested that, provided requirements are non-discriminatory, Member States should be able to regulate as they see fit and argue that many of the requirements listed in Article 15 are actually essential to ensure social cohesion and service quality. The TUC believe that if Article 15 is to remain then it is essential that 15 (3)(b) is changed so that the conditions are subject simply to a public interest test, and that the word 'overriding' is removed.

In the other camp business believes that some of the requirements in article 15 should have found their way into article 14. The Scotch Whisky Association (SWA) suggest the Government should seek the removal of 15 (2)(h) and that national controls should be maintained. The IoD are concerned that 15 (6) will give sweeping power to the Commission to order the abolition of laws passed in Member States.

4.3 Chapter 3 – Free Movement of Services

4.3.1 Article 16 – By far the article that attracted most comments. Many bodies with regulatory and supervisory functions were concerned that the impact of the Country of Origin Principle (CoOP) would undermine regulatory regimes in the UK. Of particular concern were the health and safety implications of a service provider working in the UK on a temporary basis and, apparently, not being subject to UK health and safety law. The HSC were particularly strong on this point stating that temporary service provision should remain subject to UK authorisations and that the HSE should continue to be able to issue a prohibition notice without prior liaison with another Member State. Other regulatory regimes that were specifically

mentioned as weakened by the CoOP were: ATOL, fairgrounds safety, CORGI, Security Industry and ICSTIS.

The trade unions strongly oppose the CoOP on a number of different grounds. They are worried there will be a race to the lowest standards in the EU as a result of service providers establishing themselves in the Member State with the weakest regulatory regime and then providing crossborder services back into their original country of origin. They do not believe that Member States regulators will have the incentive or capability to effectively enforce standards of crossborder, temporary service provision. One effect the Unions envisage is the competitive advantage that will be gained by temporary service providers over established businesses because they will not be subject to the same criteria.

The security industry see the CoOP as profoundly damaging to the ability of the Security Industry Authority to perform its functions as regulator. They consider that the Private Securities Act 2001 would be completely undermined opening the door to unscrupulous operators to set themselves up in Member States with weak legislation and provide services on a temporary basis.

Medical and Healthcare professions do not believe the application of the CoOP is appropriate in their case and want an assurance that it will not apply. The Royal College of Midwives highlights a particular problem with ensuring fairness. It is the case in the Netherlands that the state covers the cost of insuring midwives against medical malpractice. This is not the case for midwives practising independently in the UK. Given the fact that the cost of such insurance in the UK is extremely expensive, it is only fair that any midwifery practice that is Dutch-owned but operating in the UK does not enjoy medical malpractice insurance paid for by the Dutch government.

The Consumers' Association proposes that the CoOP should not apply to consumer protection. The certainty that the CoOP would afford to service providers would lead to uncertainty for consumers who would be faced with national rules of 25 Member States. OFT would like clarification of whether Article 16(2) intends to place a proactive monitoring obligation on supervising authorities or whether they will only be required to act on complaints.

Many consultees were strongly in favour of CoOP. Amongst those that supported the principle were organisations that represent large sections of UK business. The Small Business Council stated that the CoOP *"was particularly welcome"*, the British Retail Consortium said *"This is the only basis on which there can be an opening up of the cross border trade in services"* and the Advertising Association stated that *"the CoOP will allow companies established in the EU to be able to take advantage of the Internal Market and that barriers to this freedom will deny EU citizens getting the quality and choice they deserve"*. Others to support the principle were: Association of British Bookmakers, Engineering Council, Mail Order Traders Assoc, British Chambers of Commerce, Institute of Directors, Tesco, Airdale Intl and Direct Marketing Association.

4.3.2 Article 17 – A large number of consultees (23) specifically stated that health and safety and/or consumer protection legislation should be included in the derogations listed in Article 17. Several consultees recognised that article 17(17) was

probably intended to address the issue of health and safety but all felt that it was to weak and that the reference had to be far more explicit.

Health professions were reasonably certain that they had a derogation from the CoOP but several felt there should be a specific reference to health provision in Article 17. The reference in article 19 (1) (b) to health professions caused some anxiety that the derogation in article 17 was not comprehensive. Added to concerns on health care provision were calls for social care and child protection to be derogated.

Royal Mail do not believe the current derogation for postal services is sufficient and would mean that whilst universal service providers were derogated from the CoOP, non-universal service providers would not be.

Broadcasters (and OFCOM) felt that the Country of Origin provisions in the TVWF Directive were sufficient and that the further application of the Services Directive would not be appropriate. Therefore the TVWF Directive should be specifically derogated from Article 16 of the Services Directive.

There are a whole range of specific areas where consultees felt there should be further derogations:

- Disability Discrimination Act (DDA) – Disability Rights Commission felt that temporary service providers would not have to respect the requirement of the DDA which goes much further in protecting the rights of disabled people than current EU legislation.

- Assisted conception service - Human Fertilisation and Embryology Authority are not convinced that the derogation in article 19 for 'protection of public policy' is a sufficient safeguard.

- Insolvency – The Institute of Chartered Accountants, of England and Wales, believe that Insolvency, which is a regulated profession in the UK, should be protected as such by a derogation from the CoOP.

- Arts/Culture – Equity asked for a derogation for art and culture on the basis that producers were likely to employ performers from countries that have weak social legislation.

- Security Industry / Prison Escort Service – Several security industry stakeholders were concerned about the impact of the CoOP on the Security Industries Act.

- Gas Safety – CORGI and other gas industry stakeholders wanted clarification that the CoOP would not apply to the gas installation industry. If there is no derogation in article 17 then one should be added on the basis that maintenance of high UK safety standards in an industry that has potentially serious implications for public safety was of overriding importance.

There were alternative views expressed that suggested that either the current list of derogations were sufficient and no further derogations should be added or that in fact article 17 already went too far. Derogations suggested as being unnecessary included, gambling and the MRPQ Directive. Again the suggestion was made that 'Overriding public interest' would be abused by some Member States.

Finally, on article 17 the Association of Consulting Engineers wanted an assurance that Article 17 (20) gave parties the right to contract on any terms they wish. On a related point the Law Society, of England and Wales, were concerned that Article 17(21) had the potential to create a new principle of private international law that was inconsistent with the Rome convention.

4.3.3 Article 18 – Only specific comment related to the gambling derogation. Stanley Leisure Ltd said that the transitional derogation for gambling should be time limited.

4.3.4 Article 19 – The inclusion of 'health profession' in article 19 (1) (b) has caused the health professions a great deal of concern. As outlined in comments on article 17 the health professions want the derogation in article 17 to be comprehensive.

4.3.5 Article 20 – No specific comments

4.3.6 Article 21 – Advertisers and broadcasters are concerned about the impact of article 21 on their right to refuse to provide services. Advertisers must have the right to refuse advertising that does not comply with the British Code of Advertising or that in the opinion of the advertiser is not in the interest of their readers or is likely to cause offence.

Broadcasters have expressed the concern that Article 21 may be misinterpreted in such a way as to undermine their right to determine the areas in which they conduct their business. One interpretation of 'place of residence' provisions in article 21(2) may be that if a service is technically available, a service provider cannot refuse to provide that service. The industry sees this as having far reaching consequences that would limit the freedom of service providers to determine business models.

ICSTIS do not believe article 21 is sufficient. Adult content in the premium rate sector has different standards across the EU Member States and ICSTIS expect countries that have much stricter rules on this issue to be able to discriminate on the basis of place of residence.

4.3.7 Article 22 – No substantial comments

4.3.8 Article 23 – The Consumers' Association support the principle of cross-border medical treatment. However, patients need clarity on issues such as prescription charges, complaints and redress.

4.3.9 Articles 24 & 25 – The major concern expressed most strongly by the Unions was the apparent weakening effect of the Services Directive on the Posting of Workers Directive (PWD). The perception, held not only by the trade unions, is that Article 24 (1) removes the tools required by the Member State of posting to

effectively carry out its obligations in the PWD. On a related issue the Chemical Industry Association believe it would not be wise to say that the Member State to which a worker has been posted cannot request such provisions as: prior authorisation, declarations, the service providers to have representation in the state of posting, or to hold employment documents in that state.

The trade unions would also like clarification with regard to how the Services Directive would interplay with industrial relations and, particularly, collective bargaining agreements.

4.4 Chapter 4 – Quality of Service

4.4.1 Article 26 – Business and business representative organisations were concerned that the requirements of article 26 have the potential to create significant amounts of extra red tape and will prove onerous and expensive for SMEs.

The Royal Mail were concerned by the absence of any requirement for a service provider to provide information on what complaint and redress procedures they operate and what compensation consumers can expect should a service fail.

OFT would like the text revised to state that it is mandatory for a service provider to supply the service recipient with the entire contract. This would ensure the proposed Directive reflects the provisions of the Package Travel Directive 90/314. With regard to Article 26 (3) (a&b), the OFT believes that it should be mandatory to state that service providers should include a description of the service and the price, (or method of calculation) in the scope of the contract, and to provide this information to the service recipient upfront. This would ensure consistency with the Distance Selling Directive 97/7. Furthermore, the OFT suggests that for the sake of clarity and consistency these provisions would be best placed in Article 26 (1).

4.4.2 Article 27 – There was concern about the availability of cover or indeed the willingness of the insurance industry to provide cover. Any reluctance on the behalf of insurers would present a serious impediment to the provision of services.

The Law Society of Scotland doubt whether the wording “whose services present a particular risk…” is wide enough to cover the situation where the provider has agreed to deliver a service but does not do so, the result being that the recipient suffers loss. Additionally they state that Article 27(4) will take account of the professional insurance and guarantee arrangements provided by the Lawyers Establishment Directive, but the 1977 Lawyers Services Directive makes no such provision, so there is likely to be a statutory gap to fill in relation to occasional services

The GMB feels that Article 27(1) is weakly worded and puts the onus on the recipient. GMB would like clarification on the scope and procedures for enforcing criminal law [?] etc in cases of injury or deaths caused by temporary crossborder service providers.

4.4.3 Article 28 – The Consumers' Association would like to see the deletion of 'at his request' in article 28.1. If the wording is kept the provider should be required to provide the information quickly.

The British Chambers of Commerce felt that Article 28 places unreasonable burdens on business.

4.4.4 Article 29 – The Consumers Association proposes the deletion of the word 'dignity' to close a potential loophole for those professions who consider competition per se as undignified. CA would like to see "professional secrecy" altered.

4.4.5 Article 30 – The Law Society of Scotland welcomed the legislative re-statement of the Wouters judgement in article 30 and consider it appropriate that Member States be obliged to ensure that multidisciplinary activities are subject to rules on conflict of interest. The LSS also pointed out that 'Professional Secrecy' is not a doctrine recognised by any UK jurisdiction and believes a reference to the rules on confidentiality and privilege should be included. However there was a difference of opinion on this point the Bar Council felt this article should be redrafted to more broadly reflect the Wouters judgment.

4.4.6 Article 31 – There is a good deal of support for encouraging voluntary codes. Many consultees felt that they would lead to improvements in standards but that in order for them to work well, their use must be transparent and based on objective criteria.

Sceptics thought that poorly monitored voluntary codes could lead to confusion and actually hinder rather than help the market. There was also concern that they should not become another tier of bureaucracy that inhibited new entrants or impeded innovation.

The Consumers' Association suggested that Article 31(1a) should be amended to read either 'having their activities certified or assessed by independent third party bodies with full stakeholder participation against appropriate quality standards or codes of practice', or 31(1b) should provide some clarification of what will constitute "at Community level".

4.4.7 Article 32 – OFT suggest adding a provision to the effect that Member States ensure that the recipients of services are informed about how, if at all, the recourse to the non-judicial means of dispute settlement affects recourse to other means of dispute settlement such as statutory rights.

Consumers' Association would like 'telephone number' included in article 31(1) and suggest 'appropriate' should be replaced by 'satisfactory' in article 32(2). They would also like service providers to provide their legal address if it is not used in correspondence.

One other stakeholder believed that the requirements of article 32(2) are onerous and failed to take account of frivolous complaints.

4.4.8 Article 33 – Very few comments but those we had supported the provisions of article 33. The General Dental Council (GDC) suggest that it should

be improved to ensure the active exchange of 'fitness to practice' information between competent authorities. The CA believe the information should be made available to the public.

4.5 Chapter 5 - Supervision

4.5.1 Article 34 – There is a good deal of scepticism about the practicality of effective supervision. Problems of language and differing levels of monitoring in Members States are perceived as obstacles, as is the potential lack of resource that will be devoted.

4.5.2 Article 35 - The OFT has reservations regarding the wording of Article 35 (4), in particular the inclusion of the phrase, "exercising his activities in a lawful manner". The OFT is concerned this could be interpreted as a requirement to provide a positive guarantee of a service provider's repute. This could result in the OFT having to undertake investigations to verify that a service provider is behaving "in a lawful manner".

The Bar Council feel that term "unlawful conduct" is unclear and that Member States should have an obligation to share information that falls short of a criminal offence such as professional misconduct.

Citizens' Advice are concerned that Article 35 (5) appears to allow a Member State to notify that they will not be able to respond, with no back stop for enforcement action. They are unclear what sanctions, if any, there will be for failure to deliver on these requirements and how Member States will assist the service recipient in such cases.

The Consumers' Association suggest the insertion of *'or the economic interests of consumers'* , after 'health and safety of persons' in article 35 (3).

4.5.3 Article 36 – The Civil Aviation Authority (CAA) were concerned that the UK would be reliant on the effectiveness of the regulatory authorities of other Member States in keeping fraudulent traders out of the package travel industry. They also doubted consumers' ability to deal with authorities of other Member States due to language and cultural differences.

4.5.4 Article 37 – No comments

4.5.5 Article 38 – OFT is keen to see that the commitment to adopt measures to implement Chapter V on supervision is maintained.

4.6 Chapter 6 - Convergence Programme

4.6.1 Article 39 – There are differing views on the usefulness of 'Codes of Conduct'. Many consultees felt they were a good idea and suggested that in their industry there had already been some work done. Even amongst those that supported the idea it was felt that there would be real difficulties in getting agreement across 25 Member States.

Business did not want any increase on the burden to business and stated that if deemed necessary 'Codes of Conduct' should be drafted only after detailed

consultation on the cost to business. All other stakeholder groups also indicated that they would want to be involved in the process of developing 'Codes of Conduct'.

4.6.2 Articles 40 – 46 No substantial comments.

5 Clarification of frequently asked questions

5.1 Does the Services Directive cover services provided by local authorities?

The extent to which local authority services are covered by the provisions of the Services Directive will depend entirely on the economic nature of the service being provided.

Services that have been contracted out by local authorities, e.g. rubbish collection or road maintenance, and therefore have a clear economic nature will fall within the scope of the Services Directive.

5.2 Will services provided by the security industry fall within the scope of the Services Directive, in particular will prison escort services be covered?

Services provided by the private security industry will be covered by the provisions of the Services Directive. This includes prison escort services that are operated by private companies. The extent to which the industry regulator will be able to maintain its current authorisation procedures will depend entirely on their compatibility with the criteria outlined in Article 10.

It is not the intention of HMG to allow the Services Directive to undermine the work of the Security Industries Authority (SIA) and we have a continuing dialogue with the SIA.

5.3 Transport industry – what areas are covered?

The transport industry is almost entirely excluded from the provisions of the Services Directive, with the exception of transport of the deceased and cash-in-transit. The latter does however, have a temporary derogation from the Country of Origin Principle until 2010 or until the adoption of a piece of EC harmonising legislation in this area.

5.4 Are authorisations that regulate the health care professions in the UK covered by the provisions of article 9?

Access to and exercise of the activity of a healthcare professional is currently governed, to a large extent, by the relevant directives on the mutual recognition of professional qualifications. A proposal for a consolidating directive on the mutual recognition of professional qualifications, which will replace a number of existing directives, achieved political agreement in the Council in May. Article 3 of the proposed Services Directive states that it "…shall not prevent the application of provisions of other Community instruments as regards the services governed by those provisions." Consequently, the proposed Services Directive (except where there is a derogation – for example from the Article 16 country of origin principle, as

provided for by the currently incomplete reference in Article 17(8) to the proposed consolidating directive on the mutual recognition of professional qualifications) will complement existing Community legislation.

5.5 Will UK health & safety legislation be undermined by the Country of Origin Principle?

Article 17 of the Services Directive lists a number of derogations from the Country of Origin Principle. Article 17(17) in particular is relevant to health and safety concerns.

As a result of public and Whitehall consultation DTI recognise the current wording of Article 17(17) does not sufficiently safeguard the health & safety legislation in the UK. We are maintaining a dialogue with the Health & Safety Executive and the European Commission to resolve this issue.

5.6 What will prevent companies from establishing in Members States with weak employment and social legislation and then provide temporary services across EU borders on the basis of the legislative framework in the Member State in which they are established?

Companies will of course be free to establish in whichever Member State they wish and will indeed be free to then provide their services across EU borders to any one of the other 24 Member States.

However, article 17 (5) provides for a specific derogation from the Country of Origin Principle for the Posting of Workers Directive (Directive 96/71EC - PWD).

The PWD provides that posted workers, including temporary workers, will be subject to the working conditions of the Member State to which they are posted. Therefore, workers posted to the UK, even on a temporary basis, would enjoy the protection of UK employment legislation.

The Services Directive seeks to further enhance the enforcement of workers' rights by establishing a system of cooperation between Member States' administrations based on clear responsibilities and mutual obligations.

The jurisprudence of the European Court of Justice does, however, recognise that EC law cannot be abused in order to avoid the application of a Member State's laws. The Services Directive definition of "establishment" which includes the need for the activity to be "the actual pursuit of an economic activity" means that a mere "brass plate" operation not accompanied by actual service activity which is clearly being used to avoid regulation and take advantage of the country of origin principle would not work.

5.7 Will service providers established in another Member State and providing temporary services in the UK have to respect the Disability Discrimination Act?

The general rule will be that a service provider from another member State temporarily providing his service here will be governed by his Member State's laws. However, there is the possibility that the derogation in Article 17(17) (for example in respect of access requirements "directly linked to the particular characteristics of

the place where the service is provided"), which derogation may be broadened, may cover certain obligations in this field.

5.8 Will the gas installation industry be covered by the Country of Origin Principle?

The regulation of gas fitters in the UK (the CORGI system) falls within the scope of the proposed consolidating directive on the mutual recognition of professional qualifications, hence the derogation from the country of origin principle in favour of that proposed directive, contained in Article 17(8), will apply.

5.9 Does Article 17(20) give parties to right to contract on any terms they wish?

No. Where a derogation from the country of origin principle applies, national legislation (for example the Unfair Contract Terms Act) will continue to apply, subject to general EC law. The effect of Article 17(20) is to provide that the country of origin principle will not apply, if the contracting parties choose to apply the law of another country.

5.10 Given the derogation from the Country of Origin Principle in Article 17 for the health professions why are they mentioned in article 19?

There is some overlap between the derogations in Articles 17 and 19. Part of the reason for this is that these provisions were drafted before the agreement of the consolidating directive on professional qualifications (MRPQ). The scope of the two proposals is also somewhat different in that the professional qualifications directive is predominantly about access to the professions rather than exercise of the profession hence the drafting of Article 19. Once the MRPQ directive is adopted it will then be necessary to consider the exact relationship between the two measures.

6 Next Steps

The Government response to the consultation on the Services Directive along with a revised Regulatory Impact Assessment will be published on completion of a detailed analysis of the issues that have been highlighted. We expect to be able to publish the Government response in early November.