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The Services Directive Revisited

Report with Evidence

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NOTE: References in the text of the report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of written evidence.

FOREWORD—What this Report is about

In 2004, the European Commission published a draft Services Directive aimed at creating a single market in services industries. We reported on the proposal in 2005, when we concluded that the Directive was essential to the removal of unnecessary and unjustified obstacles to trade and to flexible markets thereby making the EU more competitive in a global economy.

The original draft Directive provoked vocal opposition in a number of Member States. In some countries with higher per capita incomes, concerns about the impact of liberalising services were encapsulated in the phrase “a race to the bottom”, implying concerns that in some important senses, liberalisation would lead to a lowering of standards. This opposition struck a chord in the European Parliament, where the text of the Directive was extensively revised, and the Commission’s revised draft Directive appears to accept the bulk of these changes.

This follow-up report compares the Commission’s revised draft Services Directive to the original Directive in the light of the findings of our previous report. The Committee heard evidence from a number of key stakeholders, who also contributed to our original inquiry, on how they viewed the revised Directive.

Our report focuses largely on those parts of the revised Directive that deal with the provision of services on a “temporary basis.” We are pleased that the Directive remains horizontal in nature, covering a wide range of service sectors although there remain too many derogations and exclusions from the scope of the Directive.

The basis on which services may be provided temporarily or occasionally without establishment in another Member State has changed from a Country of Origin Principle, in the original draft, to a Country of Destination Principle, in the revised draft. We regret this change which is a backward step, but understand the reasons behind it.

The new basis of the freedom to provide services is accompanied by a framework that aims to set limits to host country regulatory requirements. There is a risk that this may still provide barriers to small and medium size firms wanting to enter new markets across the EU for the first time.

Much emphasis is placed upon the provision of single points of contact in each Member State to help ease the way for businesses entering new markets. Much depends upon the effectiveness of such a service in all 25 Member States. Finally, as in all single market regulation, implementation lies at the heart of success. The Commission must be supported in its efforts to ensure a robust implementation of the directive, leading to a vigorous and competitive market in services across the EU.

Overall, we believe that the revised draft Directive should be supported. We regret some of the changes but we also recognise that many of them have helped to meet real concerns about issues wider than the single market and helped to achieve what is a workable compromise for all parties.

The Services Directive Revisited

CHAPTER 1: BACKGROUND

The original draft Directive

1. In January 2004, the European Commission published a draft Services Directive aimed at creating a single market in service industries. The Committee reported on the proposal in July 2005¹, when we concluded that the Directive was essential to the removal of unnecessary and unjustified obstacles to trade and to flexible markets thereby making the European Union more competitive in a global economy. However, the draft Directive provoked vocal opposition in a number of Member States, opposition that struck a chord in the European Parliament.
2. Service industries, including construction, electricity, gas and water services in addition to more traditionally defined services, account for over 70% of the Gross Domestic Product of EU Member States. However as we set out below, some services are excluded from this Directive and others are derogated from that part of the Directive which deals with temporary service provision.
3. The purpose of the Services Directive is to facilitate the free movement of services between Member States. Although in principle there is free movement, existing barriers protect incumbent domestic operators, reducing competition and inflating prices; these barriers create or preserve existing returns to incumbents. There is also often excessive paperwork, which erects cost-creating barriers to new operators.
4. Many services by their nature are best provided by relatively small firms. The often considerable and confusing bureaucracy required before provision of a service is legally allowed creates a difficulty in entering overseas markets, where a firm may wish to test the market by operating temporarily whilst it gauges the demand for its services.
5. The overriding aim of the original draft Directive was to reduce barriers to the operation of a single market in the provision and purchase of services. It sought to do this by reducing restrictions on the establishment of services in another Member State and reducing restrictions on the provision of services on a temporary or occasional basis in another Member State. Our original inquiry and subsequent consideration of the revised draft Directive have largely concentrated on the latter as this is the area which has generated the most controversy.
6. Proponents of both drafts of the Services Directive argue that reducing these restrictions will have the range of benefits typically associated with the greater liberalisation of the EC Internal Market, namely: the intensification of competition; increased pressure on underperforming firms to improve; and as a result an improvement in productivity and innovation to the benefit of consumers.
7. As with any process of liberalising the Internal Market where previously restrictions were in place there will be winners and losers, even though the

¹ 'Completing the Internal Market in Services' EU Committee, 6th Report 2005–6, HL 23

forecast outcome is a substantial overall benefit. It was to be expected therefore that opposition might come from those who felt threatened by liberalising measures, whether they be individual Member States or the interests of business and organised labour.

8. In some countries with higher per capita incomes, concerns about the impact of liberalising services were encapsulated in the phrase “a race to the bottom”, implying concerns that in some important senses, liberalisation would lead to a lowering of standards. These concerns found expression in the European Parliament.
9. In February 2006, the European Parliament suggested a series of amendments to meet such concerns, and the Commission has largely accepted those amendments in its revised draft Directive. The Competitiveness Council reached political agreement on the revised draft on 29 May. The text will now go back to the European Parliament for a Second Reading.
10. On 25 May, we wrote to Lord Sainsbury ahead of the Council meeting detailing our emerging conclusions from this inquiry (letter in Appendix 2) and were content for the United Kingdom to agree to the draft Directive as it stood. This report formally lifts the scrutiny reserve on the Directive.

Our previous recommendations

11. In our 2005 report, we strongly endorsed the previous version of the Directive. We believed it “important for the European Union to be bold and resolute in its embrace of the single market” (para 180) and we reached the conclusion that, for the most part, the Directive provided the mechanism through which this could be achieved. We also found most of the concerns expressed by others to be unfounded.
12. We endorsed the horizontal nature of the Directive, by which services were not defined exhaustively nor categorised but rather the same framework should apply in an overarching manner. This approach seemed preferable because a number of factors are common to a range of services. It may be contrasted with sectoral harmonisation: we saw “a clear danger in the sector-by-sector harmonisation of regulations route [in] that negotiations will become bogged down for many years”. (para 182) We endorsed mutual acceptance (of national standards), rather than mutual recognition, so that for example if a plumber is viewed as qualified in Poland, he is qualified to work in the United Kingdom, subject to some safeguards.
13. We viewed the ability to provide services on a temporary basis as an important freedom, and therefore asserted that “Nothing should be done through the Directive ... that diminishes in any way the existing legal freedom to provide services. Rather, the aim should be to simplify and strengthen that freedom.” (para 186) We called for a clear set of guidelines regarding the nature of “temporary” in order to provide legal certainty. Some witnesses to our original inquiry were concerned that “temporary” was only defined as the alternative to established provision, without explicit criteria which make an enterprise established. (para 60)
14. We strongly supported the Country of Origin Principle (CoOP) as the underlying basis for the operation of a business in another Member State. This is the principle that if an enterprise complies with the rules applicable in its country of origin, then it qualifies to provide services on a temporary basis in another Member State, despite the differences there may have been between the regimes. The alternative is a country of destination principle,

under which an enterprise is not allowed to provide a service unless the legal and regulatory requirements of the destination or host country are complied with. We felt that the latter would put substantial demands upon the information that businesses, especially SMEs, would require whenever they wished to do business in another Member State on a temporary basis.

15. We were also of the view that certain health and safety concerns had been exaggerated and doubted the need for extensive derogations in this respect. Here it was clear that some comfort should be offered to consumers as to the minimum quality of service they should expect; indeed if none were offered consumers might become reluctant to purchase the service. However, the danger was that “health and safety” could provide a back door through which onerous requirements could be placed on providers from another Member State. (paras 196–200)
16. We took the view that many of the concerns expressed about a “race to the bottom” in terms of employment conditions would be met by the overriding application of the Posting of Workers Directive (Directive 96/71/EC) to employees posted to work in another Member State. The effect of this would be that such employees would be covered by the laws and regulations relating to employment in the host country.
17. We called for the Commission to rule out “blanket derogation for all services of general economic interest,” (para 208) as distinct from services of general non-economic interest. All services of general interest are provided at low cost or free on demand, but those of general economic interest are typically produced by private or public enterprise in return for payment from the public purse.
18. Nevertheless, although we provided a strong endorsement for the approach adopted by the Commission’s drafters, we acknowledged that the path to adoption of the Services Directive was not smooth.
19. In particular, we were “doubtful that the changes the United Kingdom may need to make in registering or providing information on service businesses that wish to trade in other Member States have been fully grasped” (para 206). This was because the United Kingdom takes a rather relaxed approach to the provision of many services. No registration process is required in order to set up in business in many service occupations, but this means that the first draft Directive’s proposed mechanism of home country supervision of an enterprise is more complex for the UK than for other states which have a more formal approach to many service activities. For example, a German hairdresser is registered. Hence at some level of Government, information on the enterprise is collected and can be verified. The same is not true for a British hairdresser, who might not even be registered for VAT purposes.

The Commission’s revised draft Directive

20. The initial draft Services Directive has now been revised considerably.
21. Although the word “horizontal” does not appear in the revised draft Directive, it is clear that it remains horizontal in nature. That is, although there is a list of indicative services covered (Recital 14), this is not exhaustive and unless specifically excluded or derogated, the draft Directive is intended to cover all services. However there are significant exclusions and derogations which are dealt with below.
22. The revised draft Directive retains the right to provide services in another Member State on a temporary basis and it is clearly viewed as an important

mechanism through which trade in services between Member States can develop—this is set out the second paragraph on the aims of the Directive and is discussed at several further points, for example in relation to Article 16 discussed below. The concept of temporary has been codified somewhat by reference to existing case law (Recital 36b).

23. The revised draft makes it clear in Article 3 that the Posting of Workers Directive prevails over the Services Directive, where the two conflict. This was a matter that we viewed as explicit already, but was the subject of some previous confusion by certain parties in the earlier version of the Directive. The same article also clarifies that the consumer protection law (and more generally, any contractual or non-contractual relationship resulting from the supply of services) is that of the state in which the consumer resides, rather than that of the provider.
24. However the basis on which services may be provided temporarily or occasionally without establishment in another Member State has changed from a Country of Origin Principle to a Country of Destination Principle. In the revised draft Directive both the right to provide services on a temporary basis and the legal and regulatory framework within which such operations may take place are brought together in the single phrase “the Freedom to Provide Services”.
25. While the revised draft Directive places the legal framework clearly within that of the Country of Destination, it seeks to ensure that this does not become a major constraint upon the provision of services on a temporary or occasional basis.
26. It seeks to achieve this in two ways. Firstly Article 16 (1) limits the ways in which host country requirements can be applied: “Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles: (a) non-discrimination ... (b) necessity ... (c) proportionality.”

Article 16 (1)

Freedom to Provide Services

Member States shall respect the right of service providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

- (a) **non discrimination**: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established,
- (b) **necessity**: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment,
- (c) **proportionality**: the requirement must be suitable for securing the attainment of the objective pursued, and must not go beyond what is necessary to attain that objective.

27. Secondly under Article 16 (2), there is a list of things, such as authorization requirements to register and obligations to possess identity documents relating to the activity, that cannot be imposed upon service providers from another Member State.

Article 16 (2)

Freedom to Provide Services

Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

- (a) an obligation on the provider to have an establishment in their territory;
- (b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;
- (c) a ban on the provider setting up a certain infrastructure in their territory, including an office or chambers, which the provider needs to supply the services in question;
- (d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed;
- (e) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity;
- (f) requirements, unless those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;
- (g) restrictions on freedom to provide the services referred to in Article 20.

28. Notwithstanding the above limitations imposed upon the application of host country laws and regulations, the revised draft Directive provides something of a loophole under 16 (3), which states that “Member States will not be prevented from imposing requirements on the service provider where such requirements can be justified” for the reasons set out below.

Article 16 (3)

Freedom to Provide Services

The Member State to which the service provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment, and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in conformity with Community law, its rules on employment conditions, including those laid down in collective agreements.

29. There are a number of exclusions and derogations which were not in the original draft Directive. Exclusions apply where services are entirely excluded from the scope of the Directive, whether those services are provided on a

temporary or an established basis. Derogations exempt certain service areas from those parts of the draft Directive relating to the provision of services on a temporary or occasional basis, for example Article 16. It follows therefore that some service industries are not covered at all by the Directive, while others are covered only when operating on an established basis, and other services are covered entirely.

30. The exclusions are set out in Article 2; amongst other things, the Directive excludes all of healthcare, most social services, gambling, services of temporary work agencies, private security services audio-visual services and some official services of professions. “Services of general non-economic interest”, which include things such as defence and social services provided without specific charge, are also excluded from the scope of the Directive (Recital 7a). Some services are excluded because they are the subject of other directives such as the Financial Services Directive.
31. Turning to the derogations, services of general economic interest, for example water supply, are derogated from Article 16 by Article 17. Thus they will not benefit from the freedom to provide services on a temporary basis, but are subject to the other provisions of the Directive. Also derogated by Article 17 are specific services reserved within a country to the activities of a particular profession in some Member States; this could be a potential cause of difficulty for entrants from other Member States, where they may be able to operate.

Implementation

32. The timetable for implementation of the Directive is as follows. A period of two years is proposed for implementation of laws, regulations and administrative provisions necessary to comply with the Directive. A period of a further year is allowed for the Commission’s evaluation of reports on the implementation coming from Member States. The Commission will then present a summary report to the European Parliament and to the Council, accompanied where appropriate by proposals for additional initiatives.
33. Implementation requires a series of actions, in terms of registration/authorisation of enterprises that may mean both implementing new legislation or procedures and abolishing existing legislation or requirements.
34. We note for example, that Article 33a places an obligation on Member States to provide certain information on providers established in their territory to other Member States on request. In particular, this includes that the provider is not exercising its activities in an unlawful manner; results of checks may be required of the Member State of establishment.
35. It will also require a thorough investigation of a diverse set of existing regulation that have grown up over many years for many different purposes, but which may now have outlived their usefulness (or where usefulness cannot be demonstrated in terms of the principles of Article 16). This is likely to be a significant activity.
36. In addition, within three years of the Directive entering into force, Single Points of Contact must have been established (see Articles 6 and 22). These are to allow potential service providers to complete any procedures and formalities required in order to provide services on a temporary or established basis.

37. We discuss the nature of such points of contact together with the evidence received from our other witnesses, below in Chapter 2. The Committee's recommendations can be found in Chapter 3.
38. We make this report for the information of the House.

CHAPTER 2: THE EVIDENCE

Introduction

39. Our follow-up inquiry focuses largely on those parts of the revised Directive that deal with the provision of services on a “temporary basis”. We recognise the importance of the measure relating to businesses operating on an established basis but the main controversies have concentrated upon temporary service provision. We have divided the evidence from Witnesses below into seven central issues: a horizontal Directive; the freedom to provide services on a temporary basis; the basis of the freedom to provide services on a temporary basis; derogations and exclusions; the points of single contact; implementation; and overall assessments of the Directive.

A horizontal approach

40. Throughout our inquiries, we have been concerned to ensure that the approach to liberalisation in service markets is one largely based on a horizontal principle, that is an approach setting out general principles that will apply to all services covered rather than a large number of individual Directives setting out a legislative framework for liberalisation in a multitude of individual services. The latter approach, “a vertical approach”, would take a very long time to secure legislative approvals and would risk considerable inconsistencies between service sectors.
41. As noted above, the revised draft Directive does not use the word “horizontal” at any point, but it is clear that it remains fundamentally horizontal in spirit. This is important. However, there are a large number of exclusions of individual service areas. Those excluded services are largely either already dealt with or will be dealt with through specific legislation, for example the Directives on Gas and Electricity liberalisation.
42. Ian McCartney MP, Minister of State for Trade, Investment and Foreign Affairs, told us that he agreed with the importance of the Directive remaining horizontal in concept and that he felt “we have succeeded, along with other like-minded States, in ensuring that this horizontal Directive is still sufficiently broad in scope” (Q 84). Malcolm Harbour MEP described the text as an “ambitious, horizontal Directive operating across a whole range of sectors and dealing at one go with a range of barriers that companies were experiencing in 25 Member States.” (Q 197)
43. **We welcome the fact that this Directive remains overwhelmingly horizontal in approach. We have concerns over the extent of the derogations and exclusions, which are discussed below but we believe nonetheless that the horizontal approach should greatly assist the path of legislative process and implementation.**

The freedom to provide services on a temporary or occasional basis

44. We were concerned that a large part of the opposition to the original Directive appeared to be a fundamental opposition to the provision of services in another Member State on a temporary basis. The Committee remains of the view that such a provision is an essential part of any service provision and is of particular importance to SMEs.

45. The provision of services on a temporary basis also helps market flexibility in often fast moving service sectors and where business opportunities are occasional in nature rather than based on long term contracts of supply.
46. The first draft Directive offered considerable comfort to this need for flexibility by setting out a “Country of Origin Principle” (CoOP) under which a firm could operate temporarily in another member state under rules applicable in its country of origin.
47. That principle has been replaced in the new draft by a switch to country of destination or host country basis of operations, a change which is discussed in the following section. At the same time, the revised Directive seeks to set clearer limits to the regulations host countries can impose on businesses operating there on a temporary basis. This combined package of host country rules with clearer limits on constraints to doing business is the basis of a Freedom to Provide Services.
48. As the Commission notes on page two of its Explanatory Memorandum, this package is designed to facilitate service providers in “moving to the other Member State on a temporary basis.” And further “seeks to facilitate the exercise of these two fundamental freedoms enshrined in the EC Treaty—the freedom of establishment and the freedom to provide services—and to give service providers greater legal certainty.”
49. The Minister considered the Freedom to Provide Services to be “different” to the CoOP but that “it still maximises what the intention was behind the original proposal ... both in economic terms and in political terms”. (Q 88)
50. **We welcome the fact that the revised draft Directive firmly entrenches the right to provide services on a temporary or occasional basis in another Member State. This is a very significant outcome, even though the right to provide services on this basis has already been endorsed by the European Court of Justice.²**

The basis of the freedom to provide services on a temporary or occasional basis

51. In our previous inquiry we felt it important that where businesses operate in another Member State on a temporary basis, they are able to do so in a way which reduced the informational and regulatory requirements placed upon them by up to 24 other Member States. In our follow up inquiry we were keen to assess whether the basis for temporary or occasional operation in another Member State had changed, and if so whether this change was positive or negative.
52. In our first Report we saw the CoOP as “an essential part of enabling SME service providers to break into the markets of other Member States”. We

² See, for example, Joined Cases C-369/96 and C-376/96 *Arblade and Leloup* [1999] ECR I-8453. The Court stated (at para 33): “It is settled case-law that Article 59 of the Treaty requires not only the elimination of all discrimination on grounds of nationality against providers of services who are established in another Member State but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services”. The Court applied this principle to Belgian rules relating to minimum wages and the recording of social and employment data in the case of two French firms carrying out works, on a temporary basis, in connection with the construction of a complex of silos, with a capacity of 40 000 tonnes, for the storage of white crystallised sugar on a site belonging to Sucrerie Tirlemontoise at Wanze in Belgium.

have considered whether or not the change in the underlying basis for temporary provision of services in other Member States from the CoOP principle to a Freedom to Provide Services on the basis of destination country rules is a change of substance and whether it will change the effectiveness of the draft Directive in ensuring an effective single internal market in services.

53. The Minister assured us that “In practice, the conditions under which a host country may regulate are limited and the derogations are likely to be interpreted very narrowly” (Q 84).
54. He went on to tell us that “Existing ECJ case law means that where someone already possesses an equivalent authorisation from a Member State, where they establish or fulfil the requirement, the host Member State must accept it. The authorities would then use the mutual assessment provisions to make checks and transfer the necessary information about the provider” (Q 89).
55. The Government’s Revised Partial Regulatory Impact Assessment concludes that the loss of economic benefits by moving from a CoOP to the Freedom to Provide Services is in the order of 10–20% of potential benefit to the GDP. The Assessment also concludes that the effects of the negative change away from the CoOP probably outweigh the positive effects of deleting some general derogations and clearer limits on what host Member States may impose.
56. Arlene McCarthy MEP told us that in her view “the country of origin principle does not exist *per se* in European primary law, and where it has been laid down in technical legislation there have been tendencies ... to narrow down the scope of application or confine it to a means of avoiding duplication or administrative controls”. She added that she believed that in the revised draft Directive, the CoOP had been “amended” rather than “deleted”. (Q 150)
57. Oliver Bretz from Clifford Chance took issue with the view that the CoOP did not exist in European primary law and told us that the change of emphasis from the CoOP to the Freedom to Provide Services within the revised draft had no effect upon the existing rights of businesses under the EC Treaty as upheld by the Court of Justice, and that “the country of origin principle in relation to services was already enshrined in the case law of the European Court”. (Q 164)
58. Mr Bretz told us that as the Treaty is supreme over any secondary legislation, such as this Directive, it is impossible for a Directive to remove the CoOP. The ECJ interprets all Directives through the filter of the Treaty and of existing case law, leaving the Directive “just a more specific statement of the obligations of the Member States in allowing service providers to provide services and allowing recipients of those services to receive those services” (Q 164–5)
59. Since the EC Treaty contains a freedom, reinforced by court decisions, to provide services on a temporary basis, the role of the Directive is arguably to reiterate that freedom, to provide a more explicit framework within which that freedom can be exercised and to provide a convenient source to which a service provider operating outside its home base can point if challenged. Mr Bretz suggested that there may be “a dynamic effect of getting this Directive approved on top of the legal basis itself” (Q 200)

60. On the other hand, there may be a gap between perceptions and legal rights, acting as a brake on service provision. A business may understand its obligations in its home country but be wary of legal requirements and nuances in up to 24 other Member States. Thus witness views differed on the practical extent of the freedom.
61. The Federation of Small Business (FSB) considered that the ease and benefits of temporary operations had largely been lost in the new draft Freedom to Provide Services that although it would “make [the provision of services across Member State borders] easier” it would not “entice people to do it, that would have been a major bonus from a small business point of view. That is not the case any more.” (Q 6)
62. The Confederation of British Industry (CBI) expressed the concern that these restrictions left something of a “grey area” where “Member States could argue that they have directed a specific kind of requirement which is, in essence a barrier” and that this barrier “still exists even though perhaps it has been reduced.” (Q 4)
63. In practice SMEs may feel that the emphasis will still, as now, be upon understanding and meeting all the rules and regulations of up to 24 other Member States before testing out markets elsewhere in the EU, notwithstanding that the revised draft seeks in Article 16 to limit the restrictions that can be imposed upon them.
64. It may be that the appetite of small business for testing particular local restrictions on service activity through the courts is not strong. Mr Harbour told us that businesses will as a result of the Directive have the new right to sue for damages against a Member State which infringes these rules, once transposed, in Member States courts. (Q 215)
65. This right to seek damages will require confidence on the part of SMEs throughout the EU for it to be properly exercised. Both Mr Harbour and Ms McCarthy emphasised the positive role which EU SOLVIT offices have already begun to play in troubleshooting for small businesses and were keen for the scope of such schemes to be expanded. (Q 156 & Q 215)
66. Ms McCarthy told us that any shift in emphasis towards a host country basis for regulation must be taken in the context of the Mutual Recognition of Professional Qualifications Directive. Under this separate Directive, someone seeking to set up a business in another Member State would “simply have to demonstrate if [they] are that person that [they] have a level of proficiency which again the host Member State would be obliged to acknowledge”. She added that the original draft of the Services Directive would have required consumers seeking redress for unsatisfactory service provision to go to the provider’s home country, which would have raised many practical difficulties. The revised Services Directive allows consumers to seek redress in their own Member State. (Q 153)
67. Janet Williamson from the Trade Union Congress (TUC) was of the view that “we do see a major shift here” with the dropping of the CoOP and that “the revised Article 16 does address the issue on justified barriers but without causing the problems that we had with the previous drafting.” (Q 51)
68. **The emphasis in the draft Directive for the freedom to provide services on a temporary basis has clearly changed. We regret this change. We understand some of the reasons why this has happened**

although we continue to believe that many of the concerns expressed over the original draft Directive could have been met without abandoning the CoOP.

69. We also note the view expressed to us by Clifford Chance that notwithstanding the revisions in the draft Directive, the ECJ may effectively uphold the right to provide services on a temporary basis within a CoOP framework.
70. On a more positive note, the sets of reasons why temporary provision of a service may or may not be permitted has been clearly set out and might be regarded as quite rigorously drawn. These are set out in Article 16 of the revised draft Directive. It includes directly only issues of public policy, public security, public health and the protection of the environment, and these must be proportionate and must not be discriminatory.
71. There is a “blacklist” of illegitimate reasons for restricting the freedom to provide services; for example a service provider need not hold an identity document specific to a particular service activity. The Minister told us that there was now “absolute clarity about what the intention is behind the Article and there is also a clarity of outcome, and as a consequence of that there is now a buy-in by all the stakeholders.” (Q 86)
72. **We consider the new basis to provide a framework which provides sensible limits on host country regulatory requirements. This constitutes a first step in liberalising service provision, albeit under a host country approach.**

Derogations and Exclusions

73. The list of exclusions and derogations in the Commission’s revised draft is longer than the list contained in the original draft. Exclusions are those sectors which are entirely removed from the provisions of the Directive. Derogations are sectors to which the Freedom to Provide Services does not apply.
74. In the revised draft Directive, services that are generally publicly provided across all EU countries (services of general interest, in the language of the Directive) are excluded altogether. Services of general economic interest are now derogated from the freedom to provide services. We were opposed to this in our original report and we regret that change.
75. Several of the significant newly excluded sectors, for example Financial Services, Legal Services Transport and Electronic Communications Services, and Health are the subject of other Directives relating to free movement. There are significant derogations from the key Article 16 (the Freedom to Provide Services) listed in Article 17. The main elements here are Gas, Electricity, Water and Postal Services, which have their own Directives.
76. Mr Bretz viewed the new exclusions and derogations, together with the revised definitions contained in the text, as an attempt “to address or at least pay lip service to the many, many concerns that were expressed especially by the environment around social protections, labour laws and those sorts of things”, but that they had fundamentally changed nothing. (Q 193)
77. Hannah Reed from the TUC told us that they held reservations over the exclusions relating to labour law. In her view, the text sought “to limit the scope of the labour law exemption to only employment laws derived from

Europe”. The TUC supported the “direction of the amendments” but felt that the exemption should be redrafted to additionally cover domestic labour law. (Q 52)

78. On the contrary, the FSB told us that they considered the list of exclusions to be “too extensive” but reported that the Commission had informed them of its intention to pursue the excluded areas with specific sector-by-sector legislation. (Q 43)
79. Because services in total are conceived very broadly in the Directive, to include both Construction and Energy (hence excluding only manufacturing and agricultural sectors), the potential coverage before exclusions and derogations is of the order of 82% of UK GDP. After exclusions, the DTI estimate that approximately 49% of UK GDP (and a similar proportion of UK employment) is covered by improvements in the freedom to establish a business across the EU. After allowing for Derogations (largely related to the energy sector) in respect of Article 16, around 44% of UK GDP, and also of employment, is covered by the freedom to provide services in the revised Directive. These figures are set out in the table below:

TABLE 1
UK Activity covered by the Services Directive

	Gross Value Added (£m)	% UK GDP	% Employment
Total economy	1,082,649	100	100
Total service sector*	888,855	82.1	
Covered by Freedom of Establishment	523,366	49	49
Covered by Freedom to Provide Services	454,606	44	44

Source: DTI from Eurostat data

* Construction and Electricity, Gas and Water service sectors are covered, in addition to services as traditionally defined.

80. **We are persuaded that the lists of exclusions and derogations are less daunting than they might seem and that the revised draft Directive covers a substantial part of the services sector such that it can make a useful contribution to the growth of cross-border services provision within the EU.**

Single Points of Contact

81. The draft Directive provides (Article 6) that Member States shall ensure that it is possible for service providers to complete appropriate procedures and formalities at contact points known as single points of contact. Articles 7 and 22 state that Member States shall ensure that specified information is easily

accessible to providers and recipients of services via the single points of contact. A fee may be payable for the services at or by the point of contact.

82. Given the new framework of the Directive, under which a good knowledge by a business of its home country requirements is insufficient to enable it to carry out the activity in another Member State, the Point of Single Contact assumes considerable significance in facilitating cross-border trade across the EU. It will also be helpful to recipients of services provided across borders.
83. In its Explanatory Memorandum and Revised Partial Regulatory Impact Assessment (RPRIA)³, the Government makes a distinction between a point of information and a point of completion. Article 6 of the revised Directive refers to possible completion of procedure and formalities. The point of single contact should be provided by each Member State by three years after the Directive enters into force.
84. The DTI favours the point of information approach. The RPRIA calculates that providing the facility to complete necessary processes through a point of single contact rather than information about requirements and where to complete them would cost UK government some £90mn per annum but would add service benefits to business of more than £200mn per annum.
85. The Government has indicated that it would seek to ensure that the single points of contact are points of information, not of completion. In oral evidence, Pat Sellers from the DTI indicated that a single point of information was “a sensible starting point” which could lead to a single point of completion at a later date. She told us that the main argument for the point of information was not one of costs but of the risk of failure to deliver, within the timetable set out, a working point of single contact with the capacity to deliver completion of requirements and processes for businesses. Thus the benefits to the business community might be felt as soon as possible. (Q 93)
86. The Minister agreed that a point of information “lowers significantly any implementation risk” associated with the delivery of such a large scale project, providing greater certainty to business as well as being more “cost-effective”. (Q 90)
87. Mr Harbour agreed that “the Directive will put a floor in place from which we should now be building and extending the internal market and getting more small firms to participate in it” and called for the Government, along with all other Member State Governments to give the construction of the Single Point of Contact “proactive attention” (Q 208)
88. Businesses, particularly small businesses, would benefit from the more comprehensive approach of a point of completion. The Government’s own RPRIA puts a value of over £200mn per annum for business, mainly for SMEs. It must be noted that the beneficiaries of the point of completion will be largely based in other countries, so the benefits for UK SMEs would flow from the single points of contact set up in the other 24 Member States.
89. **If a full single point of completion is created in all Member States, there will be far greater benefits to the Community as a whole than if each Member State provides a more modest single point of**

³ The Government's Explanatory Memorandum can be found on page 17 of the Evidence section; the RPRIA is available at <http://www.dti.gov.uk/files/file31758.doc>

information. We call for the Commission to press Member States to introduce single points of completion.

90. In some Member States, a single point of information may not provide incoming businesses with a great deal of help in completing necessary formalities. If each Member State decides what kind of service it will provide there could be a bewildering variety of contact points, negating the objective of providing ease and simplicity in doing business across the EU. As Ms Sommer from the FSB described it, it would be “to distort a level playing field, which never existed anyway, but we are turning it into the Himalayas.” (Q 32) Mr Cave from the FSB added that whilst the “UK Government is significantly advanced in the process of trying to find out what these single points of contact will do. We are not aware that other Member States are in a similar stage, which is quite worrying.” (Q 48)
91. Businesses in individual Member States will most feel the benefit from the quality of the service provided by points of contact in other Member States, rather than in their own. Therefore there is a danger of incentives to Member States setting up inferior points of contact, or delaying setting them up, thus saving resources and reaping the benefits from other Member States. **It is important that Member States which are comparatively slow in establishing single points of contact are not rewarded, and we urge the Commission to oversee vigorously their establishment and operation.** Broader issues of implementation will be further discussed below.
92. **We understand the reluctance of the Government to take unnecessary risks with public money. However, this could be mitigated if a phased approach were adopted with points of information provided not later than three years and points of completion no later than five years after the Directive enters into force.**

Implementation

93. We are keen that the implementation of the Services Directive across 25 (and soon 27) Member States be as speedy and as even as possible in the interests of SMEs. We note the timetables proposed by the Commission, that the Directive come into force within two years (rather than the three years suggested by the European Parliament) and that points of single contact be in place within a maximum of three years of the Directive’s possible adoption in 2006.
94. Implementation of the Service Directive will require a thorough review by each Member State of existing relevant law and actions taken to ensure compliance with the Services Directive. This is potentially a significant amount of work. The Minister told us that “On legislation, the powers set out in the European Communities Act 1972 are broad and may be sufficient to implement the majority of the Directive. However, ... there may currently be in force in the UK requirements which are subject to an absolute prohibition in the proposed Directive ... and a parliamentary bill may therefore be necessary” “... it is possible that there will be some (albeit limited) impact on UK law” (Q 138).
95. In the context of Points of Contact, he said that “We anticipate the training of authorities to use the [Internal Market Information] system will be resource-intensive” (these “authorities” are bodies relating to particular

service activities, to which enquiries about those activities would be forwarded, for example enquiries from another Member State about a particular firm). And moreover “There is no obligation to register a certain proportion of authorities by the implementation date, so we intend to do this on a step by step basis ...” (Q 135)

96. To us, these responses seem somewhat tentative and indicate that the work required has not yet been fully comprehended. As we said in our previous report, the UK’s somewhat relaxed stance on registration of trades in many areas means it may be starting from a relatively low base of knowledge in particular areas, particularly those where value added is typically insufficient to attract VAT registration. **Therefore we express a continued concern that the DTI may be underestimating the potential problems in implementing the legislative and registrative changes in the UK.**
97. Articles 15 of the draft Directive requires Member States to assess requirements imposed on access to and exercise of service activities and to make a report to the Commission on the results of that assessment under Article 41. That report must be completed within two years from adoption of the Directive and must specify which requirements the Member States plan to retain and their justifications and also those that have been abolished by that date.
98. The Minister told us that “there is an obligation on Member States to report to the Commission on the implementation of the Directive in their market place, and of course that will also lead to the three yearly review”. (Q 144) He also told us that, in his understanding, the Commission would be prepared to use infractions. (Q 142)
99. Mr Harbour promised us that the European Parliament would “keep a very close eye on this process” and that he expected the Directive’s “operating guidelines and procedures” to “evolve”. He also said that the Parliament would encourage the Commission “to use as appropriate” “its normal legal instruments.” (QQ 213–214)
100. **The Commission’s timetables are ambitious. We hope they can be met. It is important for UK service businesses, especially SMEs, that these timetables are met in other Member States as well as in the UK. Thus in the UK we have a specific interest in how the implementation timetables are meet throughout the EU.**
101. The slow pace and patchiness of implementation of Directives such as those on the liberalisation of Gas and Electricity markets demonstrates the possible gulf between agreement of legislative proposals and their implementation.
102. **We note that the political will must be coupled with a strong programme of staged implementation across all Member States, in order that the Directive does not lose impetus. It must be hoped now that a strong consensus has truly been reached not only to agree the draft Directive but also to ensure its speedy and full implementation.**

Overall Assessment

103. From the witnesses we took evidence from, it is significant that none of the parties questioned was now opposed to the Directive in its current draft.
104. Mr Platt from the CBI viewed the revised draft as “the best we could possibly hope for, but we are a little sad that the EU was not able to be as

good as it was optimistic with the Commission's original proposal." (Q 1)
When asked whether it would provide businesses with any greater certainty than the recourse currently available to the ECJ he told us that "We will have to wait and see that until it is in effect." (Q 2)

105. The FSB agreed with this assessment, Ms Sommer considering it "a shame it has been watered down" but "better than having nothing." She further commented that "there are points in the Directive which I think will make life a lot easier, like the single point of contact and the very right that you can go and complain if somebody puts barriers up".(Q 5)
106. Ms McCarthy told us that the new draft better reflected the concerns of the European Parliament Internal Market Committee when compared to the original and that the Committee's concerns over the CoOP and Article 16 had been "rebalanced". (Q 146)
107. She told us that the revised draft created "a legal framework which we have to try and make work in the Member States and I think that the new draft text, the compromise that we have on the table, gives us that legal framework and is infinitely better than the existing circumstances that we had" (Q 148)
108. Ms Williamson from the TUC agreed that "it is in everyone's interest in a way to recognise that a step forward has been taken and the poison has been drawn to some extent and we should try to go forward on this basis rather than unpicking too many areas again." (Q 81)
109. Mr Harbour called the Directive "a step forward" and considered that "part of the problem we have had at the moment in terms of positioning it is that we have spent too much time picking over some of the entrails of the individual pieces of the mechanism without looking at how the whole thing fits together. And I think we have also reflected perhaps with too much idealism about something that might have been but was never practical" (Q 201)
110. The DTI told us that there are important non-economic benefits in meeting concerns in the social and environmental areas and securing agreement on a draft Directive to free up trade in services.
111. The Government's assessment in their RPRIA is that the overall net annual benefit of the revised proposal compared with no Directive will be in the range of £7.7bn to £8.6bn. 44% of the UK GDP and of UK employment is in services industries covered by the freedom to provide services in the revised Directive, while 49% of GDP and employment is covered by improvements in the freedom to establish a business across the EU.
112. The Minister told us further that "the Commission's revised proposals continue to represent a genuine market-opening opportunity. It remains a bold and necessary piece of legislation." (Q 84)
113. **We share the consensus view of our witnesses that the revised draft Directive still constitutes a significant step forward. Given the nature of the opposition to the original draft, a compromise was clearly necessary. The revised draft Directive should be supported. We regret some of the changes but we also recognise that many of them have helped to meet real concerns about issues wider than the single market and helped achieve what is a workable compromise for all parties.**

114. **We regret the move away from trade in services as set out in the original Directive on a Country of Origin Principle to a Country of Destination Principle in the current text. We believe that this will limit the benefits of this Directive for SMEs, even if, as we were told by Clifford Chance, the ECJ will effectively enforce the CoOP. We believe that this is a backward step from the original draft, but we recognise that the alternative to the revised draft Directive would have been no agreement on the way forward and continued barriers to trade in services across borders within the EU.**
115. **The revised draft Directive is by no means the end of the process of liberalising the services market within the EU but it represents a significant step forward. We urge the Government to make it clear that they will champion further liberalisation in services in the coming years.**

CHAPTER 3: RECOMMENDATIONS AND CONCLUSIONS

116. In this Chapter we draw broad conclusions from the evidence that we received and draw together the specific conclusions and recommendations from the previous Chapter of this Report.

A horizontal approach

117. We welcome the fact that this Directive remains overwhelmingly horizontal in approach. We have concerns over the extent of the derogations and exclusions, which are discussed below but we believe nonetheless that the horizontal approach should greatly assist the path of legislative process and implementation. (para 43)

The freedom to provide services on a temporary or occasional basis

118. We welcome the fact that the revised draft Directive firmly entrenches the right to provide services on a temporary or occasional basis in another Member State. This is a very significant outcome, even though the right to provide services on this basis has already been endorsed by the ECJ. (para 50)

The basis of the freedom to provide services on a temporary or occasional basis

119. The emphasis in the draft Directive for the freedom to provide services on a temporary basis has clearly changed. We regret this change. We understand some of the reasons why this has happened although we continue to believe that many of the concerns expressed over the original draft Directive could have been met without abandoning the CoOP. (para 68)
120. We consider the new basis to provide a framework which provides sensible limits on host country regulatory requirements. This constitutes a first step in liberalising service provision, albeit under a host country approach. (para 72)

Derogations and Exclusions

121. We are persuaded that the lists of exclusions and derogations are less daunting than they might seem and that the revised draft Directive covers a substantial part of the services sector such that it can make a useful contribution to the growth of cross-border services provision within the EU. (para 80)

Single Points of Contact

122. If a full “single point of completion” is created in all Member States, there will be far greater benefits to the Community as a whole than if each Member State provides a more modest single point of information. We call for the Commission to press Member States to introduce single points of completion. (para 89)
123. It is important that Member States which are comparatively slow in establishing single points of contact are not rewarded, and we urge the Commission to oversee vigorously their establishment and operation. (para 91)

124. We understand the reluctance of the Government to take unnecessary risks with public money. However, this could be mitigated if a phased approach were adopted with points of information provided not later than three years and points of completion no later than five years after the Directive enters into force. (para 92)

Implementation

125. We express a continued concern that the DTI may be underestimating the potential problems in implementing the legislative and registrative changes in the UK. (para 96)
126. The Commission's timetables are ambitious. We hope they can be met. It is important for UK service businesses, especially SMEs, that these timetables are met in other Member States as well as in the UK. Thus in the UK we have a specific interest in how the implementation timetables are met throughout the EU. (para 97)
127. We note that the political will must be coupled with a strong programme of staged implementation across all Member States, in order that the Directive does not lose impetus. It must be hoped now that a strong consensus has truly been reached not only to agree the draft Directive but also to ensure its speedy and full implementation. (para 102)

Overall Assessment

128. We share the consensus view of our witnesses that the revised draft Directive still constitutes a significant step forward. Given the nature of the opposition to the original draft, a compromise was clearly necessary. The revised draft Directive should be supported. We regret some of the changes but we also recognise that many of them have helped to meet real concerns about issues wider than the single market and helped achieve what is a workable compromise for all parties. (para 113)
129. We regret the move away from trade in services on a Country of Origin Principle to a Country of Destination Principle, which we believe will limit the benefits of this Directive for SMEs, even if, as we were told by Clifford Chance, the ECJ will effectively enforce the CoOP. We believe that this is a backward step from the original draft, but we recognise that the alternative to the revised draft Directive would have been no agreement on the way forward and continued barriers to trade in services across borders within the EU. (para 114)
130. The revised draft Directive is by no means the end of the process of liberalising the services market within the EU but it represents a significant step forward. We urge the Government to make it clear that they will champion further liberalisation in services in the coming years. (para 115)

APPENDIX 1: MEMBERSHIP OF SUB-COMMITTEE B

The Members of the Sub-Committee which conducted this inquiry were:

Baroness Eccles of Moulton
Lord Fearn
Lord Fyfe of Fairfield
Lord Geddes
Lord Haskel
Lord Roper
Lord St John of Bletso
Lord Swinfen
Lord Walpole
Lord Woolmer of Leeds (Chairman)

Declarations of Interests:

A full list of Members' interests can be found in the Register of Lords Interests:

<http://www.publications.parliament.uk/pa/ld/ldreg.htm>

Members declared no interests relevant to this inquiry.

APPENDIX 2: CORRESPONDENCE WITH MINISTERS

Letter from the Lord Sainsbury of Turville, Parliamentary Under-Secretary of State for Science and Innovation, Department of Trade and Industry to the Lord Grenfell, Chairman of the Select Committee on the European Union

8413/06—AMENDED PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON SERVICES IN THE INTERNAL MARKET—POLITICAL AGREEMENT

Thank you for your letter of 25 May on EM 8413/06. I am writing to update your Committee that political agreement was reached on the Services Directive at the Competitiveness Council on Monday 29 May. I am grateful to note that your Committee will not record this as an override of the scrutiny reserve, in spite of the reserve not having been lifted. I await the publication of your full report.

As you are aware, this is an important step towards achieving a truly open market for services in the European Union and will provide a major boost to Europe's economy. It is an example of an enlarged Europe delivering major economic reform. Due to the nature of our economy, the UK is likely to be one of the biggest beneficiaries, to the tune of £5 billion per year. Businesses, consumers and jobseekers will all benefit.

As I explained to the Committee on 17 May, I am keen to ensure that the Directive delivers for UK business and protects UK interests in sensitive areas. In short, that it achieves a balance between opening up markets and upholding standards.

The Government promised to ensure that standards in sensitive areas such as health and safety are not disturbed, that the vulnerable such as children and the elderly are protected and that the procedures for establishing in another Member State work well, add real value and are not needlessly costly.

I am sure your Committee will agree that political agreement reached at the Council is an excellent result for the UK and achieves our negotiating objectives. Whilst the text of the Directive remains broadly unchanged, amendments on our key remaining issues were secured. Pressures to further reduce the scope of the Directive and the impact of some of the deregulatory measures were largely resisted.

In particular, existing wording for certain important areas, such as in the field of labour law, was maintained, and clarifications on health and safety and other matters were secured. Further exemptions from the Directive were successfully resisted, with one exception, that of notaries. Significantly, the screening provisions which require Member States to review their legislation and remove barriers to trade have been strengthened. I have supplied a copy of the revised Directive to the Committee Clerk.

The draft Directive will now be considered again by the European Parliament, possibly before the end of the Austrian Presidency. Although it is hoped that the text agreed at the Council will largely be retained, the Parliament may propose amendments and we will need to ensure that the Directive continues to protect the UK's sensitive policy areas and that the market opening provisions are not diluted.

I am grateful to the Committee for the attachment outlining emerging conclusions on the revised draft Services Directive and for their ongoing thorough examination

of the draft Directive. I will of course inform you and the Committee members of the outcome of the Parliament's second reading.

I am writing in similar terms to Jimmy Hood. I am sending copies of this letter to Lord Woolmer, Members of the Select Committee on the European Union, to Jimmy Hood MP, the Clerk to your Committee, Les Saunders in the European Secretariat and to Alison Bailey, DTI scrutiny co-ordinator.

Copies of this letter will also be placed in the Libraries of the House.

7 June 2006

Letter from the Rt. Hon. Ian McCartney MP, Minister of State for Trade, Investment and Foreign Affairs, Department of Trade and Industry/Foreign & Commonwealth Office to the Lord Grenfell

8413/06—AMENDED PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON SERVICES IN THE INTERNAL MARKET—POLITICAL AGREEMENT

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In particular, existing wording for certain important areas, such as in the field of labour law, was maintained, and clarifications on health and safety and other matters were secured. Further exemptions from the Directive were successfully resisted, with one exception, that of notaries. Significantly, the screening provisions which require Member States to review their legislation and remove barriers to trade have been strengthened. I have supplied a copy of the revised Directive to the Committee Clerk.

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Copies of this letter will also be placed in the Libraries of the House.

6 June 2006

Letter from the Lord Grenfell to the Lord Sainsbury of Turville

AMENDED PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON SERVICES IN THE INTERNAL MARKET

As you will be aware, Sub-Committee B has been conducting a short follow up Inquiry into the Commission's Revised draft Directive on Services in the Internal Market. We were grateful to your colleague Ian McCartney MP for the oral evidence which he gave to us on 17 May 2006. We have revisited our inquiry of last summer, *Completing the Internal Market in Services*, and sought the views of some key contributors to that inquiry on how they view the revised draft. I enclose a short document that summarises the views received, and provides the Committee's emerging conclusions on the revised draft Directive, ahead of the Competitiveness Council on 29–30 May. A full report will be published in due course.

While the Committee is not prepared to release the proposal from scrutiny at this point, we would, on the basis of the assurances and information received from you, be content to the UK agreeing to the text of the Directive in its current form, or if amended to meet the UK's priorities. We would not consider such an agreement to constitute an override of scrutiny, and ask that you provide the Committee with a full report following the Council.

I am copying this letter and accompanying document to Ian McCartney MP, Jimmy Hood MP, Simon Patrick, Clerk to the Commons Committee, Michael Carpenter, Legal Adviser to the Commons Committee, Les Saunders (Cabinet Office) and to Alison Bailey, Departmental Scrutiny Co-ordinator at the DTI.

25 May 2006

Emerging Conclusions on the revised draft Services Directive

Introductory Remarks

The European Union Treaty sets out the free movement of goods, persons, services and capital as a central principle governing the internal market. Service industries account for approximately two thirds of the GDP of EU Member States

and a similar proportion of the labour force. In the European Council in February 2005, the European Commission identified the creation of a better functioning internal market for services in the EU as key to making progress on the Lisbon Agenda and called for urgent action to achieve it. We were supportive of the first draft Services Directive and its attempt at legislation to speed up the liberalisation of services provision. We recognise the considerable differences of view engendered by that first draft, not least those concerned with ensuring a balance between social, environmental and labour market issues on the one hand and the drive to complete the internal market in this important area on the other. The current revised draft Directive from the Commission appears to have broader political support across the EU, not least following extensive discussions in the European Parliament. The new draft has, of course, yet to be finally considered by the Council of Ministers. Whilst we welcome this broader consensus, we have felt it important for us to examine how this revised version differs from the original and to comment on any significant issues arising.

Our latest inquiry and these emerging conclusions relate largely, but not entirely, to those parts of the revised Directive that deal with the provision of services on a “temporary basis” as opposed to on an established business basis. We recognise the importance of the measure relating to the latter but the main controversies have concentrated upon the former. We comment below on five issues; a horizontal Directive; the basis of the freedom to provide services; derogations and exclusions; the points of single contact; and implementation. We end with some concluding remarks.

A horizontal Directive

We warmly welcome the fact that the Directive remains horizontal in conception and application. This should greatly assist ease the path of legislative process and implementation.

The Freedom to Provide Services

We continue to recognise the considerable importance that provision of services on a temporary basis has particularly for small and medium sized firms wishing to “test the water” of market entry into another Member State in the EU without becoming formally established there. It also helps market flexibility in often fast moving service sectors and where business opportunities are occasional in nature rather than based on long term contracts of supply.

The first draft Directive offered considerable comfort to this need for flexibility by setting out a “Country of Origin Principle” (CoOP) under which a firm could operate temporarily in another member state under rules applicable in its country of origin. That principle has been replaced in the new draft by a switch to country of destination or host country basis of operations. At the same time, the revised Directive seeks to set clearer limits to what host countries can impose on businesses operating there on a temporary basis. This combined package of host country rules with clearer limits on constraints to doing business is the basis of a Freedom to Provide Services.

In our first Report we saw the CoOP as “an essential part of enabling SME service providers to break into the markets of other Member States”. We have considered whether or not the change in the underlying basis for temporary provision of services in other Members States from the CoOP principle to the Freedom to Provide Services is a change of substance and whether it will change

the effectiveness of the draft Directive in ensuring an effective single internal market in services.

We welcome the fact that the temporary [non-established] basis of provision of services across borders of Member States remains fully supported. One view expressed to us is that not a lot of substance is changed by the revised draft Directive. Since the EU Treaty contains a freedom, reinforced by court decisions, to provide services on a temporary basis, the role of the Directive is arguably to reiterate that freedom, to provide a more explicit framework within which that freedom can be exercised and to provide a convenient source to which a service provider operating outside its home base can point if challenged.

On the other hand, there may be a gap between perceptions and legal rights, acting as a brake on service provision. A business may understand its obligations in its home country but be wary of legal requirements and nuances in up to 24 other Member States. Thus witness views differed on the practical extent of the freedom. The Federation of Small Business considered that the ease and benefits of temporary operations had largely been lost in the new draft, whereas the law firm Clifford Chance told us that the change of emphasis from the CoOP to the Freedom to Provide Services within the revised draft had no effect upon the existing rights of businesses under the EU Treaty as upheld in the European Court of Justice.

In practice, however, SMEs may feel that the emphasis will still, as now, be upon understanding and meeting all the rules and regulations of up to 24 other Member States before testing out markets elsewhere in the EU, notwithstanding that the revised draft seeks in Article 16 to limit the restrictions that can be imposed upon them. It may be that the appetite of small business for testing particular local restrictions on service activity through the courts is not strong. Businesses will as a result of the Directive have the new right to sue for damages against a Member State which infringes these rules, once transposed, in Member States courts.

On a more positive note, the sets of reasons why temporary provision of a service may or may not be permitted has been clearly set out and might be regarded as quite rigorously drawn. These are set out in Article 16 of the revised draft Directive. It includes directly only issues of public policy, public security, public health and the protection of the environment, and these must be proportionate and must not be discriminatory. There is a “blacklist” of illegitimate reasons for restricting the freedom to provide services; for example a service provider need not hold an identity document specific to a particular service activity. We consider this framework a good first step in liberalising service provision under a host country approach.

The Government’s Revised Partial Regulatory Impact Assessment concludes that the loss of economic benefits by moving from a CoOP to the Freedom to Provide Services is in the order of 10–20% of potential benefit to the GDP. The Assessment also concludes that the effects of the negative change away from the CoOP probably outweighs the positive effects of deleting some general derogations and clearer limits on what host Member States may impose. There are, however, important non-economic benefits in meeting concerns in the social and environmental areas and securing agreement on a draft Directive to free up trade in services. Overall, the Government’s assessment is that the net annual benefit of the revised proposal compared with no Directive will be in the range of £7.7 and £8.6bn. 44% of the UK GDP and of UK employment is in services industries covered by the freedom to provide services in revised Directive, while 49% of GDP

and employment is covered by improvements in the freedom to establish a business across the EU [Tables 2, 3, pages 24, 25]

Exclusions and Derogations

Some changes have been made between the revised version of the draft Directive and the original draft in the list of exclusions and derogations. Exclusions are those sectors which are entirely removed from the provisions of the Directive. Derogations are sectors to which the Freedom to Provide Services does not apply. Services that are generally publicly provided across all EU countries (services of general interest, in the language of the Directive) are excluded. Several of the significant excluded sectors, for example Financial Services, Transport and Electronic Communications Services, and Health are the subject of other Directives relating to free movement. There are significant derogations from the key Article 16 (the Freedom to Provide Services) listed in Article 17. The main elements here are Gas, Electricity, Water and Postal Services, which have their own Directives.

Nevertheless, as noted above 44% of the UK GDP and of UK employment is in services industries covered by the freedom to provide services in revised Directive, while 49% of GDP and employment is covered by improvements in the freedom to establish a business across the EU. We are persuaded that the lists of exclusions and derogations are less daunting than they might seem and that the revised draft Directive covers a substantial part of the services sector such that it can make a major contribution to the growth of cross-border services provision within the EU.

Points of Single Contact

The draft Directive provides [Article 6] that Member States shall ensure that it is possible for service providers to complete appropriate procedures and formalities at contact points known as points of single contact. Articles 7 and 22 state that Member States shall ensure that specified information is easily accessible to providers and recipients of services via the points of single contact. A fee may be payable for the services at or by the point of contact.

Given the new framework of the Directive, under which a good knowledge by a business of its home country requirements is insufficient to enable it to carry out the activity in another Member State, the Point of Single Contact assumes considerable significance in facilitating cross-border trade across the EU. It will also be helpful to recipients of services provided across borders.

In its EM and Revised Partial RIA [RPRIA], the Government makes a distinction between a point of information and a point of completion. Article 6 of the revised Directive refers to possible completion of procedure and formalities. The point of single contact should be provided by each Member State by three years after the Directive enters into force.

The DTI favours the point of information approach. The RPRIA calculates that providing the facility to complete necessary processes through a point of single contact rather than information about requirements and where to complete them would cost UK government some £90mn per annum but would add service benefits to business of more than £200mn per annum. The Government has indicated that it would seek to ensure that the single points of contact are points of information, not of completion. In oral evidence, the Minister told us that the main issue was not that of cost but the risk of failure to deliver within the timetable

set out a working point of single contact with the capacity to deliver completion of requirements and processes for businesses.

Businesses, particularly small businesses, would benefit from the more comprehensive approach of a point of completion. The government's own RPRIA put a value of over £200mn per annum for business, mainly for SMEs. However the difficulty is that the beneficiaries of the point of completion are largely based in other countries, so the benefits for UK SMEs would flow from the single points of contact set up in the other 24 Member States. If a full single point of completion is created in all Member States, there will be far greater benefits to the Community as a whole than if each Member State provides a more modest single point of information.

In some Member States, a single point of information may not provide incoming businesses with a great deal of help in completing necessary formalities etc. If each Member State decides what kind of service it will provide there could be a bewildering variety of contact points, negating the objective of providing ease and simplicity in doing business across the EU. We understand the reluctance of the government to take unnecessary risks with public money. However, this could be mitigated if a phased approach were adopted with points of information provided not later than three years and points of completion no later than five years after the Directive enters into force.

Implementation

We note the timetables proposed by the Commission, that the Directive come into force within two years and that points of single contact be in place within a maximum of three years of possible adoption in 2006 proposed for the introduction of this measure. This will require a thorough review by each Member State of existing relevant law and actions to repeal or amend that law as appropriate. Article 15 of the draft Directive requires Member States to assess requirements imposed on access to and exercise of service activities and to make a report to the Commission on the results of that assessment under Article 41. That report must be completed within two years from adoption of the Directive and must specify which requirements the Member States plan to retain and their justifications and also those that have been abolished by that date. These are ambitious timetables. We hope they can be met. It is important for UK service businesses, especially SMEs, that these timetables are met in other Member States as well as in the UK. Thus in the UK we have a specific interest in how the implementation timetables are met throughout the EU.

We note that the political will must be coupled with a strong programme of staged implementation across all MS, in order that the Directive does not lose impetus. It must be hoped now that a strong consensus has truly been reached not only to agree the draft Directive but also to ensure its speedy and full implementation. The pace and patchiness of implementation of Directives such as those on the liberalisation of Gas and Electricity markets demonstrates the possible gulf between agreement of legislative proposals and their implementation.

Concluding Remarks

In the time available, we have interviewed witnesses representing a broad spectrum of both political and economic interests including MEPs, business organisations and the TUC as well as a leading law firm. Whilst there may be voices we have not heard, it is notable that none of the parties questioned was now opposed to the Directive in its current draft. Several would have preferred to see changes, but all could live with it in the current form. We share that view.

The move away from trade in services on a Country of Origin Principle to a Country of Destination Principle is a matter of regret. It is a backward step from the original draft, but we recognise that the alternative to the revised draft Directive would have been no agreement on the way forward and continued barriers to trade in services across borders within the EU. The revised draft Directive should be supported. Whilst we regret some of the changes, we also recognise that many changes helped meet real concerns about issues wider than the single market and helped achieve a workable compromise. The draft Directive is not the end of the process of liberalising the services market within the EU but it is a significant step forward.

Letter from the Rt. Hon. Ian McCartney MP to the Lord Grenfell

Thank you for your letter of 24 April 2006 to Barry Gardiner concerning the expected date for political agreement on the Services Directive. I am replying as the Minister with responsibility for this dossier.

The Austrian Presidency is pressing ahead with the aim of reaching a common position by the end of their Presidency in June. All member States have accepted the Commission's revised proposal of 4 April (largely based on the European Parliament's text) as a basis for going forward. The Services Directive is now on the draft agenda for political agreement at the 29 May Competitiveness Council, but it is possible that due to the number of outstanding issues between all Member States this could be moved to the June Council. The UK supports an agreement during the Austrian Presidency.

I am sure you will already be aware that the Commission's revised proposal was debated in the European Standing Committee on 16 May, and before Sub-Committee B on 17 May.

24 May 2006

Letter from the Rt. Hon. Ian McCartney MP to the Lord Grenfell

HOUSE OF LORDS SCRUTINY—DRAFT EU SERVICES DIRECTIVE
(EXPLANATORY MEMORANDUM NUMBER 8413/06)—HEARING ON 17
MAY 2006

May I begin by extending my thanks to the Committee on what was a very constructive debate on the Government's approach to final negotiations on the draft Services Directive.

At the hearing, I promised to provide further information on a number of issues in order to assist the Committee with their deliberations.

Firstly, the Committee was interested in how the Government had consulted with business and business representatives in relation to aspects of the amended proposal, and in particular, on the UK position on single points of contact.

The Government launched its major statutory consultation on 29 March 2004, with a launch event to which 2,000 business organisations and individual businesses, representing every sector covered by the original proposal, were invited. This was followed up by presentations to stakeholder groups and five regional events. The consultation document also included a partial Regulatory Impact Assessment (RIA) and the consultation ran until 30 June 2004 and received a total of 116 responses. Since then the DTI has held a general meeting every six months, to which those 2,000 contacts have been invited and the

attendance has been high (around 150 attendees per meeting). In addition, there are monthly core group meetings of key contacts (including the CBI, FSB, IoD, BRC, BCC and TUC) and regular phone and email contact as needed.

At the last core group meeting there was a detailed discussion with business representatives about the UK view of the provisions for a single point of contact, in particular feedback was sought on the consultants' recommendations for UK implementation. A detailed note of that meeting was copied to all interested stakeholders, including those who were unable to attend, in order that they might have knowledge of the discussion.

I hope this information gives you the details you need about the way in which we consulted. Once the Directive has been agreed, the Government will invite UK and European Business organisations to form a steering group to scope out the business requirements for, and oversee the implementation of, the UK single point of contact.

Can I also take advantage of this opportunity to provide complete information on the list of new exclusions from the scope of the draft Services Directive, which I detailed to the Committee. When speaking about the new exclusions I did not draw your attention to the new exclusions for gambling and audio-visual services. However, the figures I gave for the effect on Gross Domestic Product of new, and for total, exclusions were correct and related to the complete list as given in the explanatory memorandum 8413/06.

I also promised to explain why private security services and private international law have been excluded. Private security services were a sensitive sector for the European Parliament and a number of Member States. The Government has accepted the exclusion of private international law because this will not affect the status quo, in particular regarding consumer protection. This preserves the ability of the parties to a contract to specify the applicable law in the contract and, where no law is specified, sets out some presumptions for the court to apply as to which law applies.

Finally, if I might clarify the position on childcare as requested by Lord Roper. Services of general interest and social services are excluded from the scope of the Directive. Most childcare in the UK is offered privately and would not be considered a "social service" and therefore would be covered by the Services Directive.

For example the Directive will cover the Extended Schools Scheme, which is where Local Authorities coordinate the provision of after school care, but the parents, except in special circumstances, pay for the childcare, which is offered by either the Local Authority, voluntary or private providers. It is important that these services are carefully regulated to improve quality and maintain the safety of the child.

If the Committee would like any additional information please do not hesitate to contact my officials Ruth Hampton or Nicola O'Connor.

I am sending copies of this letter to Members of the EU Internal Market Sub-Committee B and placing copies in the Libraries of the House.

23 May 2006

Letter from the Lord Grenfell to Mr Ian Pearson MP, Minister of State for Trade, Investment and Foreign Affairs, Department of Trade and Industry/Foreign & Commonwealth Office

COM (2006) 160: AMENDED PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON SERVICES IN THE INTERNAL MARKET

Sub-Committee B considered this document, and your Explanatory Memorandum, at its meeting on 3 May 2006.

As we have just commenced an inquiry into the draft Services Directive, we will maintain scrutiny on this proposal at this stage, and look forward to hearing your views on 17 May.

I am copying this letter to Jimmy Hood MP, Chairman of the Commons European Scrutiny Committee, Simon Patrick, Clerk to the Commons Committee, Michael Carpenter, Legal Adviser to the Commons Committee, Les Saunders (Cabinet Office) and Margaret Browne, Department for Transport's Scrutiny Co-ordinator.

4 May 2006

Letter from the Lord Grenfell to Mr Ian Pearson MP

SERVICES DIRECTIVE

P6_TA-PROV(2006)0061 EUROPEAN PARLIAMENT'S PROVISIONAL LEGISLATIVE RESOLUTION ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON SERVICES IN THE INTERNAL MARKET COM(2004) 2 FINAL/3

Thank you for your letter of 10 March 2006, which Sub-Committee B considered at its meeting on 19 April 2006.

We have been following the progress of the Services Directive with great interest and it was the subject of our report, *Completing the Internal Market in Services*, published in 2005. We intend to conduct a follow up inquiry into the revised draft Directive. Now that this has been published, can you give an indication as to when we can expect the Explanatory Memorandum which you mention?

We would be grateful if you would keep us informed of any developments.

I am copying this letter to Jimmy Hood MP, Chairman of the Commons European Scrutiny Committee, Simon Patrick, Clerk to the Commons Committee, Michael Carpenter, Legal Adviser to the Commons Committee, Les Saunders (Cabinet Office) and to Alison Bailey, Departmental Scrutiny Co-ordinator.

24 April 2006

Letter from Mr Ian Pearson MP to the Lord Grenfell

P6_TA-PROV(2006)0061 EUROPEAN PARLIAMENT'S PROVISIONAL LEGISLATIVE RESOLUTION ON THE PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON SERVICES IN THE INTERNAL MARKET COM(2004) 2 FINAL/3

I am writing to update your Committee on progress on this dossier in the light of the European Parliament's First Reading, which took place on 16 February 2006. The adopted position of the European Parliament (EP) diverges in many significant respects from the position that had been reached in Council under the

UK Presidency. The EP amendments exclude a number of sectors from the Scope of the Directive, whilst offering a new approach to facilitating the free movement of services in Article 16 and deleting articles 24 and 25, on reducing administrative burdens for the posting of workers.

The full effect of these amendments is still being analysed. The EP excluded several large service sectors, essentially on the basis of concerns over the country of origin principle. Given the new approach to Article 16 adopted by the EP, there no longer appears to be a case to exclude such a wide number of sectors. In particular, I believe that two of the economically significant sectors excluded from scope by the EP, namely all legal services and privately funded healthcare, would benefit from, and should remain covered by, the Directive.

The new article 26 is unclear and possibly internally inconsistent so requires clarification. It is also important that its provisions are robust and make a genuine difference to temporary service providers.

The EP excluded all labour law from the scope of the Directive and removed Articles 24 & 25. Like many supporters of the Directive, the UK would have preferred to retain key administrative simplification measures relating to the 'posting of workers' (Art 24). However, labour law is problematic for a significant number of Member States and the Commission are likely to accept that agreement will not be possible unless they follow an approach similar to that of the EP.

The Commission have indicated that whilst the EP text will form the basis for their revised proposal, expected on or after 4 April, they will resist accepting all the EP amendments en bloc. There will not be any working groups until after the Commission has produced its revised proposal. There is a Competitiveness Council 29–30 May, and a further provisional date for one on 29 June. The majority of Member States do not want to rush into agreement without having time to work on improving the text. It is possible, however, that the Austrians may attempt to push through political agreement during their Presidency.

I will of course submit a new explanatory memorandum on the revised Commission proposal as soon as the text is available.

I am writing in similar terms to Jimmy Hood MP, Chairman of the House of Commons European Scrutiny Committee, and am copying this letter to the Clerk of your Committee, and to Les Saunders, Cabinet Office European Secretariat, and Alison Bailey, DTI Scrutiny Co-ordinator.

10 March 2006

APPENDIX 3: LIST OF WITNESSES

The following witnesses gave evidence. Those marked * gave oral evidence.

- * Clifford Chance
- * Confederation of Business Industry
- * Department of Trade and Industry
- * Federation of Small Businesses
- * Mr Malcolm Harbour, Member of the European Parliament
- * Miss Arlene McCarthy Member of the European Parliament
- * Trades Union Congress

APPENDIX 4: RECENT REPORTS

Recent Reports from the Select Committee

Session 2005–06

EU Legislation—Public Awareness of the Scrutiny Role of the House of Lords (32nd Report, HL Paper 179)

Ensuring Effective Regulation in the EU: Follow-up Report (31st Report, HL Paper 157)

Annual Report 2005 (25th Report, HL Paper 123)

The Work of the European Ombudsman (22nd Report, HL Paper 117)

Scrutiny of Subsidiarity: Follow up Report (15th Report, HL Paper 66)

Evidence from the Minister for Europe—the European Council and the UK Presidency (10th Report, HL Paper 34)

Ensuring Effective Regulation in the EU (9th Report, HL Paper 33)

Evidence by Commissioner Franco Frattini, Commissioner for Justice, Freedom and Security on Justice and Home Affairs Matters (1st Report, HL Paper 5)

Reports prepared by Sub-Committee B (Internal Market)

Session 2005–2006

Seventh Framework Programme for Research (33rd Report, HL Paper 182)

Including the Aviation Sector in the European Union Emissions Trading Scheme (21st Report, HL Paper 107)

Completing the Internal Market in Services (6th Report, HL Paper 23)

Session 2004–2005

Liberalising Rail Freight Movement in the EU (4th Report, HL Paper 52)

Session 2003–2004

Packaging and Packaging Waste: An Update Report (33rd Report, HL Paper 198)

Services of General Interest (29th Report, HL Paper 178)

Gas: Liberalised Markets and Security of Supply (17th Report, HL Paper 105)

Directors' and Auditors' Liability (15th Report, HL Paper 89)

Minutes of Evidence

TAKEN BEFORE THE EUROPEAN UNION (SUB-COMMITTEE B)

MONDAY 15 MAY 2006

Present	Eccles of Moulton, B	Roper, L
	Fearn, L	St John of Bletso, L
	Fyfe of Fairfield, L	Swinfen, L
	Geddes, L	Walpole, L
	Haskel, L	Woolmer of Leeds, L (Chairman)

Examination of Witnesses

Witnesses: MR ANDREW CAVE, Senior Adviser, EU and International Affairs, and Ms TINA SOMMER, Chairman, Federation of Small Businesses; and MR MARK PLATT, Senior Policy Adviser, EU Affairs, Confederation of Business Industry, examined.

Chairman: Good afternoon, everyone. Could I welcome Mark Platt from the CBI, and Ms Sommer and Mr Cave on behalf of the Federation of Small Businesses. I apologise for starting late; we had to clear another draft report before this and one or two additions arose with it. We are going to ask you one or two fairly broad questions to start with and I hope you will find that they will enable you to say anything you might want to say by way of introductory remarks and start the ball rolling with that.

Q1 Lord Fearn: The first one is really directed to the CBI: what is your general view of the revised Directive?

Mr Platt: My Lord Chairman, I think with the current fiscal climate and the ferocious battles that took place from the beginnings of this Directive text, the Commission's proposal is probably the best that we can hope for. It is not as strong as the original text, although we did critique the original text in some ways at certain points, which we gave in evidence before you. I think we are not going to get anything stronger. There is political agreement in the Parliament. There seems to be political agreement in the Council too. The text, at least, has some positive provisions regarding establishment and making it easier for businesses to operate across borders. I think it is the best we could possibly hope for, but we are a little sad that the EU was not able to be as good as it was optimistic with the Commission's original proposal.

Q2 Lord Fearn: You said "operate across borders". What do you mean by that?

Mr Platt: Just to make it easier for companies to provide services across international borders within the EU.

Q3 Lord Roper: Some people have suggested, given this text, it would be better not to have a text at all and rely upon subsequent judgments of the Court. Do you think this is better than nothing?

Mr Platt: In your list of questions, the second question you posed was the most difficult question for me, which is about the country of origin principle. We appreciate at the CBI that the Single Market is the bedrock of the operation of the European Union; politically, it is important to have the European Union, but the function of the Single Market is what makes us all happy, prosperous and, we hope, peaceful. This Directive was launched on a basis that the Commission had said there were a whole list of possible infringements, which can take huge amounts of time and possibly also money, and the intention of this Directive was to do away with these. I think what we have now is a text which will provide some certainty, although not total certainty, especially with the new freedom to provide services, backed up by the possibility of infringement proceedings, so we seem to have a bit of a mix, and the question, as with all things new, is: how will it work and how will it run? We will have to wait and see that until it is in effect. It will very much depend as well on how individual Member States operate and how willing they are to analyse their own systems to make sure they fit within the requirements of this text.

Chairman: We are going to invite the Federation in in a moment, but I would like to stick to general appraisals as opposed to specifics.

Q4 Lord Haskel: Just to follow up your point, obviously you were dealing with this matter of harmonisation and the way that various Member States carry out their qualifications for people who give services. Do you think that the way the revised Directive is worded will enable countries to use harmonisation as an excuse to put problems in the

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Mr Andrew Cave, Ms Tina Sommer and Mr Mark Platt

way of the Single Market, or do you think they will be able to get over this?

Mr Platt: I think the key thing with the text, as it stands, is that there is a grey area where under the full requirements—forgive me, I forget exactly where—in terms of public security and safety, et cetera, Member States could argue that they have directed a specific kind of requirement which is, in reality, a barrier under these requirements. Now, there is then a possibility of it being taken up by the Commission as opposed to other Member States, but there is still a hurdle there; it still exists even though perhaps it has been reduced. Also with the single points of contact, the ability for companies to get involved in that debate is made much easier, much simpler to do, but it is still there. In terms of harmonisation, the point of the Directive is very much around not forcing countries, Member States, to all be the same, but to make sure the objectives they are seeking are the same. Different regulatory frameworks and different legal systems require different solutions, but as long as the solution is aimed at having the same general rules of play, that would make sense.

Q5 Chairman: Ms Sommer, would you like to respond to Lord Fearn's general question: what is your general view of the revised Directive?

Ms Sommer: As you know, I am from the Federation of Small Businesses. Just to clarify, I am a business person. I do have a totally different approach to it; I am very practically orientated. In general, I think the Services Directive is a good thing. We have always supported it, I have always supported it. It is a shame it has been watered down, but I think it is better than having nothing. From a more global point of view, I believe that we have treaties to supply services, capital, people and goods freely within the internal market. The very fact that we need a Services Directive to enforce that is very sad because I think we should have that right in the first place and we do. It does not obviously quite work because Member States do put up barriers for various reasons. The Services Directive is trying to address that. It has now taken out a number of services because it seems to have transpired that it is very difficult to have one Directive for all kinds of services, and I accept that. From a business point of view, there are points in the Directive which I think will make life a lot easier, like the single point of contact and the very right that you can go and complain if somebody puts barriers up. From a small business point of view, that could prove maybe not quite as simple as it seems in theory, but that has to be seen, we do not know that yet. In essence, yes, I do welcome it. I would not dismiss it, that is for sure. It is a shame it had to be watered down again, but I also understand the political reasons. We just have to try and improve it as much as we still can.

Q6 Chairman: Can I ask both of you—and, Mr Cave, of course, if you want to come in, please, by all means do—in different ways, you have said it is not as strong as it was, that it has been watered down. Can you please be more specific? In what way is it not as strong as it was? In what way has it been watered down?

Ms Sommer: From my point of view, it has excluded several services now, which are either dealt with by other individual Directives or taken out completely. The other main reason, from my point of view, is the country of origin principle, and I might have to explain that because we had this debate before. The country of origin principle, in my mind, was connected to the provision of temporary services in another Member State. If you have the host country's law applying to this, it makes it very easy for a small business to know your national law, go somewhere, do a temporary service and go out again. It gives you the opportunity to test the market, to have a go, see how it goes and if you like it, if it works out, you can then establish in the host country and so on. That has all gone out, it has gone out from the country of origin principle and it has gone out of the temporary service principle. I always thought the internal market was there to encourage people, businesses, to increase their trading. That is what the Lisbon Agenda is all about. This is not the case any more. It will still help people to trade internally and people who always wanted to trade internally will do that, frankly, with or without the Services Directive. It will make it easier, but to entice people to do it, that would have been a major bonus from a small business point of view. That is not the case any more, therefore, I am disappointed.

Q7 Chairman: We are going to come back in more detail on the country of origin principle.

Mr Cave: My Lord Chairman, just on specifics, I would make the point that the Services Directive was initially intended to remove the need to go to the European Court of Justice on a regular basis. Specifically on Article 16, the revised Directive's definition of overriding reasons relating to public interest place a huge amount of responsibility back on the ECJ and that is where we have specific concerns.

Mr Platt: I would, of course, echo those previous comments and also say that one of our other concerns is the exclusion of temporary work agencies, which we touched on in our previous evidence as well, as we see them as engines of growth in that they allow people into the labour market on part-time or flexible contracts. Also I have with me, if I may, some copies of submissions made by UNICE to the recent (EU) Competitiveness Council and a more general copy which carries details and also some comments about the country of origin

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principle and on people providing services with suggestions for amendments.

Chairman: Thank you, that would be helpful. There is a lot to talk about and we will come to several of these themes, I am sure, time and again.

Q8 Lord Geddes: Can I start by saying how grateful we are to both organisations for coming back again and giving evidence in front of us. The plus, I suppose, from your point of view of doing that is you get your views on the record. The minus is you allow them to be quoted back at you. Principally, it is at this stage on the country of origin principle that I want to ask you some questions and, if I may, I will do two quotes simultaneously and then ask for your views. The Federation of Small Businesses, you made the comment last time you came before us that you regarded the country of origin principle, “as an essential part of enabling SME providers to break into markets”, and to an extent you have just repeated that. What I find slightly surprising is that you were sufficiently strong last time round, but you are prepared—these are my words not yours—to shrug your shoulders slightly now, and say “Oh, we did not get it, it is sad. It is a pity”, and I think you used the expression, “it has been watered down, but we will just have to live with it”. If I can group these two together, the CBI went even further last time round in saying that you would not be willing to support the Directive without the country of origin principle. That was pretty strong. From what you have said already this afternoon, you do seem to be supporting it, albeit not quite as strongly as before. Could you both comment on those?

Ms Sommer: With pleasure. If you are telling me we can get the country of origin principle back in, I am behind you all the way, but is it realistic?

Q9 Lord Geddes: No, I do not mean it is realistic, but you said it was an essential part.

Ms Sommer: It is essential, but what can I do about it if Parliament will not accept it? What can I do about it? It is essential, yes, I agree with you.

Q10 Lord Geddes: By definition, if it is essential, my interpretation of that means that it cannot work without it, but I do not think that is what you are saying.

Ms Sommer: We did say last time that there are other good points. We never dismissed the Services Directive completely or said “Without that, we will not have it”, unless you want to correct me. The single point of contact we have always regarded as a major bonus and I would not take that away, but the facts are in business we have to live with facts. The political will is obviously not there to bring the country of origin principle back. You then have a choice: you either support it—and we have been

lobbied, I have even been lobbied by MEPs, “Are you going to support this, despite this, or not”, for the very reason that there are still good things in there—or “Are you going to chuck that away as well?” A lot of work has gone into this. If I see a chance to get it back, yes, I will do so, but I am a realist and I do not think the political will is there.

Q11 Lord Geddes: Do you support the revised Directive?

Mr Platt: The difficulty arises when one looks at the freedom to provide services whether or not it is close enough to the country of origin provision to make a degree of ambiguity possible. The difficulty is that, as we see the ‘Freedom to Provide Services Article’, it does still leave open the need to reference the ECJ, but it may possibly provide a small opening, however, not as wide as the country of origin principle did. You must also forgive us for the fact that when we had our previous meeting with you, we were very much campaigning for the Directive as was, and to say at that time that we would accept a much watered-down Directive would not have been in our favour, the Government was also pushing very hard for this Directive. As with the FSB, we are pragmatic. We have lobbied heavily with other Member States, with federations in UNICE, also with MEPs, with our own MEPs as well as MEPs from other more favourable Member States, for example the Nordic states and new Member States, Poland and the Czech Republic. What we have achieved is a political compromise. I would cite Malcolm Harbour; I think he has done a lot of hard work: This is the best we can get, but as a change in opinion as to the balance between social Europe and economic Europe and getting that balance right for everyone, this is probably a very good step forward. I think within any—I would hate to say conflict—disagreement, one has to know where one’s ground is as much as possible and allow one’s opponent enough ground to maintain a head held high. I think we now have got something where we have the Parliament agreeing with the Commission and hopefully agreeing with the Council. To get those three things onside in a single text at this early stage I think is very good news and I think this provides the basis for work on this Directive’s principle’s. I think that once Member States that feel uncomfortable with, for example, the country of origin principle can see that this text provides all the benefits and none of the downsides that they thought the original text would provide, they might feel a little bit more comfortable. I think I referred to this in the previous evidence about, for example, the opening of the labour markets to people from eastern Member States. There is a general climate, or there had been at the time of this Directive being first publishing, across the European Union, of worries about what

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the EU is for, about the new members, and I think this Directive got buried in that debate, and it was very easy then to just see it as a problem. What has come out from the European Parliament debate, from debates with the Council, is something that we could live with and build on.

Q12 Lord Geddes: Can either of you see the country of origin principle coming in as it was within the next five years?

Ms Sommer: I did attend some of the debates in Parliament in February and according to what I heard there, no.

Mr Platt: I try not to make long scale predictions. Politics, as I am sure you know, is a very dangerous game in terms of making predictions. If this works, the appetite for something like the country of origin principle might be wetted. That is as far as I would go.

Q13 Lord Roper: People get frustrated by the fact that there are still really significant barriers. Do you see a group of countries, including the ones you referred to, the Nordic States, the new Member States, the UK and Ireland, might see this as an area for reinforced cooperation whereby a limited group of Member States were brought to the country of origin principle. I would be grateful for your reaction Ms Sommer.

Ms Sommer: Yes, I think that is possible. As I understand it the UK is very much in favour of it as far as I know but I am only a businessperson. That is a possibility, yes. It seems that it is quite country specific who is for and against, to me.

Chairman: That was a googly on China. I do not know how England are getting on, but that was off the cricket field but, nevertheless, an interesting question.

Q14 Lord Haskel: Mr Platt, you said that you would be happy with this if this works. How would you recognise it working? Would you recognise it in the fact that innovation of the service industries improves and costs go down? How would you recognise it as working?

Mr Platt: I suppose the most obvious example would be that economic reviews of the growth of services in the Eurozone saw an increase but on the ground, and someone may want to add some more details on this. It would be evidence that where there are problems, companies have a quicker route to solving them or finding out what to do to solve them; that the single point of contact work and work well and the administrative cooperation between Member States bears fruit in greater cross-border provision of services, and perhaps we can start to see the rise of European services champions who can then stop facing inwards and face outwards. I think the UK is

in good shape to do that, for them to grow here. It is an aggregate of all those things that would demonstrate that for us. The problem, again with punditry, is how long a time span do you give it? For example, the new Member States especially during the accession, some were very concerned that they would not see great benefits. The Poles, who thought it was going to be a horrible time for them, within I think about six months, saw their GDP increase. It is impossible to make these kinds of predictions and to make those long-term forecasts, but I think if we were looking at economic indicators you would be looking at an increase in activity, perhaps an increase in profit, perhaps an increase in employment, and then the subsidiary indicators would come from reports, anecdotal comments about the single points of contact being used, that would show that the Directive was working and that they were able to do something, for example, like a 'Solivit' system for services. What we are looking for is a European observatory of the services sector.

Q15 Chairman: Ms Sommer, do you want to add to that?

Ms Sommer: First of all, the way I would find out whether it works or not is feedback from members who have tried to get information, tried to set it up and what buyers they have. That is the obvious one. That could take some time because information for it is done very, very slowly in small business unfortunately; it is extremely painful so that could take quite some time. I would expect an increase in employment because it is a small business. When they expand the first thing they need is new employees and that is really where I think this importance comes in. It is about the Lisbon Agenda, it is about getting rid of horrendous unemployment in Europe and if small business is overlooked or it is made difficult then it is not going to happen. I am hoping that even though it is watered down—and I am not happy about it—the single point of contact and information is absolutely crucial and hopefully that will create jobs. I think that is the whole purpose of it.

Q16 Lord Walpole: What I am concerned about, and perhaps you are not the people to answer but you must have an opinion about it, is what about those professionals who have been excluded?

Ms Sommer: Good question. What about them?

Q17 Lord Walpole: What is going to happen to them? Will they try and get into Europe and have cases each time they attempt to do something as before?

Ms Sommer: I think they will carry on just as they do now without the Services Directive. They will do what they did before. Nobody stops you now to provide services in the internal market. It may

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be more difficult, they will just have to work on the problems as they have done before, but it will not be encouraging.

Q18 Lord Walpole: I thought that under this Directive, I cannot remember, particularly perhaps banking, insurance and that sort of thing were quite interested to get into Europe. It would have been easier under a country of origin principle rather than under this Directive, would it not?

Ms Sommer: I think that is probably more a question for you because our members are not really involved there.

Mr Platt: The financial services action plan, and the possible proposed financial services action plan, cover the creation of the single market in terms of financial services. There is also talk of a single payment area, too which is why they were excluded from this Directive. In terms of professions that are excluded by virtue of being lawyers or notaries et cetera, mutual recognition is covered by the recognition of Professional Qualifications Directive, which I am not quite sure at what stage of its life it is. That is about ensuring that you have mutuality between professions operating in different Member States and the battle is being fought there. There was a thought that these two would run tangentially, that you would have the two going through at same pace, and I think the slowness of this Directive—I may be incorrect on this, I might need to correct my detail, but I think that is going a little bit faster. That Directive is about making sure that professionals can move from one country to another within the European Union and have their qualifications respected, as long as they meet certain criteria.

Mr Cave: I would make the quick point that we have looked at our membership base and we estimate that approximately 60 per cent of our members who provide services will be covered by the Directive. It is not helpful to the 40 per cent.

Q19 Lord Roper: What are the principle services covered by that 40 per cent of your members?

Mr Cave: They are excluded. Obviously we are looking at health care which is a large group; temporary agency workers, companies like that, private security firms as well, and those people involved in the gambling sector.

Q20 Chairman: They would not be included?

Mr Cave: No, they would not be.

Q21 Lord St. John of Bletso: Ms Sommer, you have mentioned rightly so, that it is better to have a Services Directive than nothing at all. You have also commented on the extent of red tape and protectionism for small businesses. My question is how do you view the mechanisms proposed in the

revised Directive for facilitating the freedom of service providers to provide on a temporary basis. As a businesswoman logistically, how much easier would it be for the firms to exercise freedoms?

Ms Sommer: That is a tricky question because as far as I understand this Directive now, there is no distinction any more between temporary and established service, which means everything applies the same. That is how I understand it, I hope I am correct here. If that is the case then we are all dependent on this single point of contact, getting the information there, possibly even completing it on time and, from a red tape point of view, there are various issues I would have. One is, how accurate is the information provided? Is the information provided the same in every Member State, or do we have inequalities here? How easy is it to understand it, because small businesses are not always that straightforward; it can be quite tricky to understand bureaucratic forms. That is coming back to the country of origin, but for me country of origin and temporary service was the ultimate deregulation, you just cut the whole lot out, but that is not going to happen. In the end, I do not see any distinction between temporary and established any more, you go through the same channel, you do exactly the same thing, whether you do it for a month or for five years. The only difference may be if you still have to register in another country because you are there for a permanent purpose and that may be more complicated. Otherwise, I do not see any distinction between the two, which means it does not make much difference whether you do it temporarily or not.

Q22 Chairman: In Article 16 of the revised draft Directive where it deals fundamentally with this freedom to provide services it says, “Member States shall respect the right of service providers to provide services in a Member State other than that in which they are established”. That is, you can provide services without being established. You do not think that is any different to a business being established in another Member State?

Ms Sommer: The way you say that it sounds different, but it depends on the practicalities in the end.

Q23 Chairman: We are seeking simply to understand both the text and the interpretation of how business, and, of course, the trade union would see these things. This is in no way seeking to, as it were, raise a problem but simply how you understand it. The view that you expressed was really quite important, that that is your perception.

Ms Sommer: I was just thinking this is what you are going to get, unfortunately.

Q24 Chairman: Your perception is that, effectively—

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Ms Sommer: If you refer to it, it says “You have the freedom to provide a service whether it is temporary or not”.

Q25 Chairman: Without being established in a Member State?

Ms Sommer: Yes, without being established. However, there are three caveats to this as far as I know: it is necessity, proportionality and a third one. A Member State cannot block you if they can prove either of these. That is how I understand it. If a Member State says, “This is the reason you cannot do that, because it falls into one of these”, it would then, as I understand, be down to the business to prove it does not fall under either of those.

Q26 Chairman: This is quite important for the Committee when we come to consider our report. I quoted Article 16, section 1, “Member States shall respect the rights of service providers to provide services in a Member State other than in which it is established”. It goes on in section 2, to say that Member States may not restrict the freedom to provide services, in the case of providers establishing relevancy, by imposing any of the following requirements, the first of which is that it cannot impose an obligation on a provider to establish their territory. On the face of it, that appears to be saying—

Ms Sommer: You can do what you want.

Q27 Chairman: — that you can provide services into another country without being established in that country. It does of course say that any attempts to restrict that must meet various criteria. Your view, in advice to the Committee, Ms Sommer, was that your initial reaction is there is not a lot of difference between providing services on a temporary basis—which is what it is, a non-established basis—and an established basis. That, on the face of it, seems positive.

Ms Sommer: Yes, it is positive on the face of it, I agree with you. However, there are three very vague caveats and that is what I am worried about. Any kind of vagueness to a small business is a nightmare because you instantly do not know if it is going to work and or if it is not going to work, you have to test it. Testing means time, money and resources which are extremely limited.

Q28 Chairman: I think this goes to the level of Lord St. John’s question. We will come back to Lord St. John because he may want to probe you on this. Mr Platt, did you want to come back? This is very important.

Mr Platt: The issue at the heart of the matter is that without the country of origin providing certainty in terms of what law was applicable, despite the fact

that you have got this freedom to provide a service, you still have to go and check somewhere as to what laws operate in the country you want to provide the services in. That adds an extra impediment, an extra cost, which the country of origin principle took away. On top of that, we then require that the cooperation between the Member States is good, that the Single Points of Contact work and they are well funded and they are easy to find. At each stage, a little bit has been added on and, as Ms Sommer says, if you are a business, a small business especially, what that means is that you are going to incur some costs and some time in finding out the information that could mean that you do or do not. In many small businesses there is not time to run the business and do all of this as well, and there certainly is not often money to pay for a solicitor to do this. The vagueness is there because everything is contingent on something else, whereas with country of origin you knew that “I simply operate, bearing in mind the few derogations and processes of work, et cetera, on the principle that I can do my business over there as I do here, and I will be meeting my legal obligations”.

Ms Sommer: Could I just add one little thing. For me as a business, I was always under the impression that legally I already had the right to provide a service in the internal market by being a member of the EU. On the face of it, that seems to be the case. As we have found out the hard way, this is not the case in practice. On the face of it here again, yes, it looks very good and let us hope it is going to be that way, but until I see it, I will not believe it.

Q29 Lord St John of Bletso: Your last comment really hits another head because you mentioned uncertainty. Whether it is a small business or a medium-sized business, uncertainty is the worst for any business; they have to have certainty. Do you view the proposed mechanisms as workable, and not just that but I would really would like to dig more into what areas of difficulty do you see for small and medium-sized businesses?

Ms Sommer: A single point of contact is important, there is no doubt about that. That is where you get your information. I am not entirely clear yet: do you get that in every country, is it centralised, is it in the UK for incoming or is it in the UK for outgoing? I am not clear on this at all. The next question is: how is it going to be funded? Do you pay a fee for it? I am not saying we should not be paying any fees because if you want some information, everything costs a little bit of money, you have to invest a little bit. The next thing is: what is the quality of the information? If you get the wrong information, you start investing in something, you go down one road and if it was misinformation you got, who is liable for this, because you have not actually retrieved it yourself, you have gone somewhere to get it. These are lots of

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little details a small business thinks of when it wants to do something. The next question, and it is a major one, is, is it going to be the same quality everywhere in every Member State? Is it going to be available at the same time everywhere in every Member State, or does it mean because we are very well organised in the UK, and we are very good at this sort of thing compared with other countries, is it going to be much easier for other Member State businesses to come in here because they get the information fairly quickly and efficiently whereas if I want to go to Greece, it is going to take me ages to get it? Then we are starting to distort the level playing field, which never existed anyway, but we are turning that into the Himalayas; that is the problem. The next thing is: what is the timeframe of all this? How long do I have to wait for an answer? When is it going to come and where from? None of this is defined, hence I will wait until I see it.

Q30 Lord St John of Bletso: Sorry, just to press you on this issue, what guidelines would you be producing for your members on how workable these proposed mechanisms would be for them? As is so often the case in business, very few of them read the small print and I suppose that is what I am getting at.
Ms Sommer: We do not give guidelines on services provided. We do not go and say, “The DTI has provided a survey”, and whether they like it or not, we do not do that. We just give them where they need to go, it is their own judgment to say whether that is good or bad. We would not go and do that, that would not be fair because it could be quite different and for one it would be good, and for another one it would be bad. We have members in our survey and the members who use our business advice are very happy with it. You hear a lot of members saying it is no good, but when you start digging, they have not actually used it. We would not give guidelines, we just tell them where to go.

Q31 Chairman: A part of the guidance to the Sub-Committee as well as coming to yourselves, in relation to your concern about certainty, which is obviously an important issue, Article 16 appears to try to deal with that in part by saying that: “Member States may not restrict the freedom to provide services by imposing a requirement”. In other words, as a business, you know that you cannot be asked to do certain things, for example you do not have to be established in a Member State, you do not have to have an office or chambers in any of the Member States and so on, so the Article appears to seek to set out certain things that Member States cannot do. In other words, from a business point of view, they know with certainty they cannot be asked to establish or they cannot be asked to have offices before they can provide services. On the face of it, Article 16 appears to seek to deal with some of these issues. It

would be helpful if you could reflect on this and give us your thoughts on it. My question today is: do Article 16 and associated Articles of the Directive reasonably meet the desire of your members for certainty? At the root of your answer to Lord Swinfen was, “It all looks okay but our members want certainty. They do not want to find when they go into a situation they are suddenly asked to do something that they never expected”. My question to you, which I would be grateful for a note afterwards rather than make you feel unhappy with that, is does Article 16 not provide key elements of certainty, and where it does not provide sufficient certainty, where would you like to see the Government pressing for amendments because that is the stage we are at?

Mr Platt: If I may, the extra evidence I brought here will answer that question. The CBI supporting a UNICE position on an amendment to Article 16, which we think will make for a degree of more certainty. It is around the provisions that the Member States can bring in in terms of overriding public interest and such. We have to admit that it does make it easy to establish, but there are still esoteric things that Member States can bring in on the guise of “we think public safety is threatened” or whatever. I reflect on the fact that the French beef ban was in contravention of the ECJ but continued for quite some time.

Chairman: This is Article 16, section 1(b): . . . they must be justified by reasons of public policy, public security”. Clearly, when we have the minister before us we will, on your behalf, seek clarity on these points. Your answer will be helpful to us to know where your members and yourselves are concerned.

Q32 Lord Swinfen: I think, Chairman, in many respects, the question I was going to ask has, in fact, already been answered because I was going to ask, if you recall, is there now much difference between operating on an established basis or operating on a temporary basis? Ms Sommer said that she thinks it is exactly the same, that there is no difference.

Ms Sommer: I cannot see if there is one. It may well be, but I cannot see it.

Q33 Lord Swinfen: Mr Platt, can you find a difference?

Mr Platt: Other than the obvious that being established means you have to pay for accommodation for offices, all of those things and all the registration stuff. It is a fine difference, but, just to switch it around a little bit, what the country of origin principle did that we liked was it meant that a company could try a cross-border provision of services with very little cost to see if what they were going to provide had a market, without having to do very much. Now there is a degree of requirement to check what the legislation in the host Member State

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is and how they have to meet it, and now we have also got these extra provisions, so each time they do that in a different Member State, there will be a little bit more work they have to do. The original Directive, if you remember, did not prohibit setting up a distribution centre, a small office; that was still able to be done under the original Directive. The fine distinction is the fact that we felt the country of origin principle would excite people to try testing the water. We do not think this will get them quite so whipped up. There may be some business in there for some members who are lawyers, advisers or whatever, but generally in terms of big bang for the European Union, this is not quite a damn squib, but it is not quite that loud. I think that is a very fine distinction, it is a very fine one, but it will probably put off a bigger number of likely entrants to the market of cross-border services than the country of origin principle does.

Q34 Lord Swinfen: I get the impression that you are saying that it is not quite such a Single Market as it originally was going to be.

Mr Platt: By virtue of the fact that, as it has always been referenced, the original treaties guarantee goods, people, services and capital. It is there, it should already be there, but we know from the evidence collected in the two Commission reports, as well as the reports done by the Copenhagen and Dutch organisations, that there are barriers, they do exist. Some of them are based on vested interests either within Member States or by Member State governments which are themselves beholden to certain interest groups to prevent competition within their internal markets. That means there is not a Single Market across the European Union. This is why this Directive was put forward; the Commission recognised that, as did many people in the services sector. The thing is, as I think we quoted in our written evidence, we do not represent as many of the smaller companies as the FSB do, but what the bigger companies do is they either go in and buy an existing operator, which requires money, time and legal advice, or they set up a separate company with all the things that that requires.

Q35 Lord Swinfen: They could do that worldwide, small businesses have to?

Mr Platt: Yes, my point is at either end of the spectrum, there are bigger cost requirements for big companies and it is prohibitive for smaller companies. I think that is the key thing, wherever you are, there is a cost involved.

Q36 Baroness Eccles of Moulton: The next question is to do with health and safety which I am sure obviously does directly affect small businesses but no doubt the CBI would have views on it as well. Has the

amended Directive had any effect on the concerns which you had previously on health and safety?

Ms Sommer: Health and safety, in my mind, was never an issue, personally, because it was excluded from the Directive, as I understood it originally. However, from our members' point of view, that was quite a different matter. They did not see that as such, because again what is in the text and what people perceive to be in the text are two completely different things. We had concerns on health and safety from our members, and we did point out that health and safety is excluded. It is very difficult to convince them once they get something in their minds. Personally, I do not have any problem with health and safety. I think it is well taken care of.

Q37 Baroness Eccles of Moulton: By being excluded?

Ms Sommer: Yes.

Q38 Baroness Eccles of Moulton: CBI?

Mr Platt: We made the point originally that we wanted to make sure that there was respect for health and safety across work sites, and I think the basis of this concern was raised by construction sites and large projects. The evidence we gave before was that where these contracts are written for big sites and big projects, health and safety is both local, ie on the ground, and also the individual worker. We did not feel the Directive, as it was and as it is now, poses any threats to health and safety. I think it was one of those things that was over-egged slightly as a concern. Again, you can see some Member States where health and safety requirements are made in such a way that they are prohibitive to new entrants because they prevent them even getting a leg in. I would not want to name any particular Member States, but there are some Member States where the legislation is so rigorous and so complicated and detailed, whereas we said in our written submission, all of the European Union Members, in signing up to the acquis, signed up to minimum standards of health and safety. It is a European Framework Directive. We are all doing good stuff, it is just that some of us are doing it slightly differently and some of us are doing a little bit extra. We had no problems, and I think with this text we have no problems that health and safety will be a concern.

Q39 Chairman: The Government does because the Government says this is one of the areas where they would like to see further amendments, in their words, to uphold UK standards in health and safety. Have the Government consulted the CBI in relation to small businesses on their remaining concerns? Do you know what the CBI want to further amend, because the United Kingdom is trying to secure further amendments? Why? I am sure every other of the 25 Member States will. That implies there is

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something not right here. What has the Government got in mind? Are they consulting?

Mr Cave: I am not aware that they have consulted us, I do not know about the CBI but from other sources I have heard, they do have concerns about laws surrounding gangmasters. As I understand it, this is much more likely to be put in the area and the sphere of labour law. Labour law will cover their concerns, so it should not be a big problem if that is what they are referring to. My only information is they are seeking more legal certainty and clarity rather than seeking changes. If you recall, at the beginning of its Directive life, the Health and Safety Commission raised serious doubts about that but I think they were fairly well calmed after consultation with Government. We have not been directly consulted or asked but on the basis that we are part of an advisory group to the DTI, it has never been raised as a major issue and I think it is more a question of clarification.

Q40 Lord Fyfe of Fairfield: I am surprised that the organisations have not been consulted by the Government on this, quite frankly; it is an extremely important issue. We have all these other countries having entered Europe, we are now 25 strong, and I would doubt, as an interested observer, that some of the standards of health and safety in countries I have visited, and the matching legislation which is intended to deal with that, come anything close to equalling the standards in the UK. Should that not be of real concern to us?

Ms Sommer: The understanding I was given by the Commissioner asking my question is that the host country law applies, whether you come in temporarily or established. For somebody coming into the UK, it is UK health and safety law. There is no doubt about that, that is what I was told, that is why I dismissed it as a problem.

Q41 Chairman: That is Article 16, section 3 which says, “Member States shall not be prevented from imposing requirements *inter alia* for reasons of public policy, public security, public health and protection of the environment”, and so on. This is why we are all slightly puzzled. We are looking forward to hearing from the Government quite what it is on the face of it. We also think the law applies in the UK. So at the moment you are not sure but you think it might be gangmasters.

Mr Platt: For clarity, we have also in Article 16, 2(f) that “Requirements unless . . . health and safety at work were contracted efficiently”. As far as I am concerned, from what I have heard, it is simply a matter of clarification.

Chairman: We will pursue that but that is very helpful to us.

Q42 Lord Haskel: Can we come back to this matter of exclusions. Mr Cave, you told us that of your members, 60 per cent would be included and 40 per cent would be excluded. That strikes me as being quite a high number of exclusions. Do you feel that these exclusions are overregulated or do you feel that with the 40 per cent excluded the Lisbon Agenda is going to be sufficiently revised?

Mr Cave: I think the exclusions are too extensive, certainly in the area of private health care. That is a particular issue for us. I would also point out that the Commission has come forward and said that it will deal with these areas in sector specific legislation. To answer your final point about the implications this has for the Lisbon Agenda, there was the Copenhagen study that was done recently on the financial benefits of the previous country of origin principle, opposite what we have now in draft text, and there is a difference of 10 per cent less in benefits. It is obviously not ideal but I think, at this stage, we have to move ahead and make it work as best we can.

Q43 Lord Roper: As a supplementary to that, you do see the revised Directive, like its predecessor, as positive overall for your members in spite of it not being as positive as the other one would be. Among the various other changes, are there any helpful changes? Are there any changes in this form of Directive which, in spite of it not going backwards on the country of origin principle, you see an improvement?

Mr Cave: As opposed to the original, probably not. Previously they tried to seep through the country of origin principle, but the new Article 16 tries to achieve that by alternative means. Where it does that, we are obviously welcoming it but we are concerned that there are too many vague areas within that.

Mr Platt: In terms of the text, I would agree with Mr Cave. In terms of the process, I think the Commission has learned that they need to prepare the way before bringing out proposals of this nature. They need to make sure people are aware, they need to make sure people have got enough information to understand why the process was there. In a recent presentation made at UNICE, one of the points that the representative from the Commission made was that they learned a lot from this process. When taken in combination with their experience on REACH and also combined with the approach of better regulation (and this perhaps it does not really pass the better regulation test—I think it just misses it because there is still a little bit of confusion) taken together it is. As I said before, despite the triumvirate of having the Commission, the Parliament, and hopefully the Council in agreement, we do not have the big step forward that we wanted when we came here before; we do not have the giant leap towards Lisbon 2010, but what we do have is a big step, and everyone

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recognises that. We have even had opponents to the text who said, "It is not that we disagree with the need for something; we are not sure if this is it". I think they have now decided that there is a need for something and what we have got here is the likeliest vehicle to run.

Chairman: It is a large step for the Commission but a small step for mankind to reverse the old saying.

Q44 Lord Fyfe of Fairfield: The Government talks about single points of contact and single points of information, and I would like to think about the costs of this. Apparently, the additional costs of the point of contact could run to several hundreds of millions of pounds. Do you agree with that estimate and, if so, does it matter? The second most important point is what do we do about it?

Ms Sommer: I would have no idea how much it costs to run a single point of contact to be honest. I certainly know if it has not got funding it is not going to happen because everything costs money. There are obviously networks available already and the question is whether they can be integrated like other places you can go. They have it integrated on a Member State basis, they are on networks already, we have the business links which have been suggested by the DTI. The biggest cost is not so much having them and establishing them but in getting down to the businesses and saying: "Look, we are here, we can help you". That is the most costly enterprise of the lot. I keep thinking about the United States now because I was so impressed: when they want something from you they put it on television, and that usually works quite well. The advertising cost, to get down to the business, is the biggest cost, not so much the people running it. How much? I have no idea. If that money is not available then it is not going to happen.

Mr Platt: If I may, we have not done any cost estimates and I do not think anyone has. I am not sure where you have taken that from.

Q45 Lord Roper: It is taken from here.

Mr Platt: I do not have that document. The key thing will be, as was identified before, if charging applies, it pays into that system and if we can link it with any other European programmes, for example, the research and development programmes, this can be seen as part of that process. We had the recent wrangling over the European Union budget. If this is designed to be part of Lisbon, and there is money now available for Lisbon projects, they can also be used as well but, at the moment, there has been no specific allocation. On something along the lines of putting out something to tender which allows people to be able to say you can see different ways of providing this service, it does not have to be a Government provided service, it has to link in. At the

CBI, we maintain that Government is not always the best agency to provide such services, sometimes business in conjunction with Government can do things better. Any figures at the moment are estimated costs and it could well come in less if it was a contract well negotiated and well run.

Lord Roper: Can I ask a process question. We are referring, when we are talking about this, to the revised regulatory impact assessment which the Government submitted as an addendum to the explanatory memorandum on the European Community document which they sent us on 21 April 2006. I assume that is a public document and, therefore, something which you ought to have access to. Maybe by asking you these questions, it will give you something that you have not had access to.

Q46 Chairman: The Government say that the cost of business will be, on a single point of contact, an estimated £210 million a year and to the public purse £102 million a year. They compare that to a single point of information and they make quite a major distinction between the point of contact and the point of information saying that the latter would save something in the order of £300 million a year. Have they consulted you on this point and were you consulted on estimates of the cost? It helps us understand how Government works on these things.
Mr Cave: It is not something that we have been consulted on.

Mr Platt: To my knowledge no, certainly not in terms of providing any estimates or costs or anything of that nature. We have rather left that to later on down the line, once we know what the Directive text will be. It is news that there is a figure.

Q47 Chairman: The Government say that is one of the areas they are seeking amendments, and I would suggest if you have not already done, you look at these things and you ask the kind of questions, like how do you get these estimates and who is going to pay? It will probably be rather useful to know what the Government tells you and we will certainly ask the Minister.

Mr Cave: I think it is important for the Services Directive to work that we do not just focus on the single point of contact and the network that will be built up in the United Kingdom, we also have to look at it across the European Union. The UK Government is significantly advanced in the process of trying to find out what these single points of contact will do. We are not aware that other Member States are in a similar stage, which is quite worrying.

Q48 Lord Roper: The distinction which the Government is trying to make is between a single point of information on which you will be able to get the information on relevant regulations and

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signposts to online processes managed elsewhere and a single point of completion where you would be able to do all the things you had to do in order to register your business and fill in all the necessary controls. Obviously the second one, which will be grouping together all the bits of Government, is a great deal more expensive but I do feel it would be useful if you had a chance to look at this and then express your views to Government. In a sense, although the UK Government might find it a good idea for you to do something less expensive here, as far as you are

concerned, having got a single point of completion in the other Member States where you are going to work might be very useful.

Chairman: Thank you very much indeed. Could I say how helpful you have been yet again. We have asked you questions, some of which you had no notice of at all and which were very detailed. If you feel we have missed anything or you would like to add anything by way of a note, we would welcome it but we need anything by Friday at close of play. Thank you very much on behalf of the Committee for coming to see us today.

Examination of Witnesses

Witnesses: Ms JANET WILLIAMSON, Policy Officer, MR OWEN TUDOR, Head of European Union and International Relations Department, Ms HANNAH REED, Senior Employment Rights Officer, and MR IAN BRINKLEY, Head of Economic and Social Affairs, Trades Union Congress, examined.

Q49 Chairman: A very warm welcome again, Mr Tudor, and to your colleagues. Who is in charge?

Mr Tudor: I will play the role.

Chairman: You will obviously pass these on as you wish. Again, a warm welcome. The TUC was extremely helpful when we conducted our original inquiry, and we are looking forward to hearing your views today as things have moved on. If it is agreeable to you, we have got one or two very general questions not because, as you will gather, we will not throw tiers of detail in the ones that follow them, but it does mean it gives you a lot of licence to cover almost anything you want as you answer the generic ones. Could we go straight into questions and, if that is agreeable, then feel free to use your usual skills to answer the questions we should have asked you! Lord Geddes?

Q50 Lord Geddes: It is very nice to see all four of you again. When you did give evidence to us, the impression I think we all got was that you accepted the principle of the previous draft Directive, but then you were agin it on a number of specific points not least—and this will not surprise you at all—on the country of origin principle. Now that has been dropped, are you happy bunnies?

Ms Williamson: We are much happier bunnies certainly than before. As you say, last time we had a number of concerns, one of which was the country of origin principle. It was not the only one, we were also concerned about the implications for labour law, and perhaps we could come back to that a little bit later on. We were concerned about the country of origin principle and its potential to cause confusion about applicable law and also to undercut democratically agreed local standards. Now with the revised proposal, the revised Article 16, we do see a major shift I think what we have seen is the development of a consensus at European level, particularly in the

European Parliament, a new consensus of how to tackle the promotion of the internal market. We welcome that consensus and also the fact that the Commission has in its new text tried on the big issues to stick fairly closely to the consensus that was formed in the European Parliament. We do see that a step forward has been taken. We believe that the revised Article 16 does address the issue of unjustified barriers but without causing the problems that we had with the previous drafting.

Q51 Lord Geddes: Do you remain unhappy about any other bits of the present draft?

Ms Reed: The point which may be most helpful for me to address and is one of the key issues for the TUC in terms of the latest draft from the Commission relates to the issue of labour law. I should say by way of introduction that the TUC very much welcomes the direction of the amendments relating to labour law and the growing consensus that was certainly within the Parliament and also reflected in the Commission's text, that labour law should be excluded from the scope of the Directive. Therefore, our issues are not with the point of principle but with the actual drafting of the proposed exclusion of labour law, as found within the Commission's text at the present time. The TUC position, and indeed that of the ETUC, has always been that there should be a full and effective exclusion of all aspects of labour law from the scope of the Services Directive. That includes legal rights which derive not only from contract but also from statute and legislation which derives not simply from EU law but also from the laws of domestic Member States. We also take the view that the exemption should be broad enough to cover all aspects of equality legislation, the relationship between trade unions and employers, the relationship between trade unions and members, and the protection for fundamental freedoms including

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the rights to collectively bargain, to enter into collective agreements and also to take industrial action. The current Commission's text touches upon most of these issues. However, we have some concerns that the latest draft appears to limit the scope of the labour law exemption to only employment laws derived from Europe, ie those elements of EU employment law including issues such as working time, discrimination law, health and safety, and other issues. The TUC position consistently has been that the exemption should cover both EU labour law and also domestic labour law on the basic principle that the TUC and ETUC are very firmly committed to free movement of workers, and indeed we welcome migrant workers from across Europe. However, we believe that they should have the rights to fair treatment as determined within each Member State and not simply to certain minimum standards agreed centrally at a European level.

Q52 Lord Geddes: Going back, if I may, though they are all linked, to the present draft Directive which effectively substitutes the freedom to provide services under the country of origin principle, you are happy with that, as I understand it. I am not trying to put words into your mouth; I am trying to understand your position. You are happy with that, but you are not very keen that it does not include the labour laws of the host country. Is that right?

Ms Reed: We are seeking a full and wide exemption of labour law which would cover both EU labour law and labour laws derived from domestic legislation. For example, within the UK we believe that workers from other Member States, if they meet the qualifying criteria, should benefit from unfair dismissal protection, redundancy laws, also family friendly rights and any other employment laws which are distinct to the UK.

Q53 Lord Geddes: Presumably, you are not trying to cherry-pick what I call the "host country laws". There might be some laws in the host country that perhaps you did not like so much; you have got to have it all or you have got to have nothing.

Ms Reed: Yes, the labour law of any host country should be the labour law which applies to individual workers working within that country. For example, in Scandinavian countries they have much wider coverage for collective agreements, which operate at a sectoral national level. Our view is within those countries, workers from other Member States should be entitled to the minimum terms and conditions as negotiated in the collective agreements. Within the UK, the status of our collective agreements is slightly different and, therefore, the rights of migrant workers would be limited primarily to legislative rights.

Q54 Lord Geddes: What about the new Member States, are you still happy to pursue that principle?

Ms Reed: Absolutely, that is the point of principle the TUC have always promoted. Obviously, employers employing staff in other Member States have the freedom to offer better terms and conditions than are required by the minimums of the Member States. But we would not want to see the minimum agreed within any Member State being undercut as a result of the Services Directive.

Q55 Chairman: Before Ms Williamson comes in, can I ask you, if it is not a too detailed question, in relation to the draft Directive, where it deals with labour law, to quickly refer to it and see its distinction between European-based labour law and not including the host country labour law? Ms Williamson, you are going to save me from that, are you?

Ms Williamson: That is the point I wanted to make, that the clarifications we are seeking on labour law are in Article 1 and do not affect Article 16. I just wanted to make that clear, so in a way it is two separate points.

Q56 Chairman: It is not in Article 16?

Ms Williamson: No. Our point about labour law is not a qualification of our support of Article 16, as redrafted. It is a separate point about the exclusion.

Lord Geddes: In fairness, you were answering a separate point; at least I asked a separate point.

Q57 Chairman: This is to help the Committee when we come to consider our report. In Article 1(6): "... this Directive does not affect labour law, that is any legal contractual provision concerning employment conditions, working conditions including health and safety at work, in relation to employers and employees which Member States apply in compliance with community law". You want that to go further than that to say, effectively, it should be in compliance with the law of the Member State, the host state?

Ms Reed: We think there should be a straightforward exemption which says that the Directive does not apply to labour law, any legal or contractual rights whether they are derived from Member States' laws or indeed European law.

Q58 Chairman: Is there any distinction at all between the labour law applying to a business that is operating on an established basis or one that is operating on a temporary basis in this regard?

Ms Reed: Our understanding would be that is not the case, unless the Posting of Workers Directive applies. But that would probably be in a minority of cases.

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Chairman: We are coming to the Posting of Workers Directive, I promise you and you will not let us let it pass.

Q59 Lord Walpole: Have you found any potential problems that have been removed?

Ms Reed: There are a couple of social policy issues which we should draw to the Committee's attention. One relates to the issue of gangmasters which the Committee was considering a while ago. As the TUC, we have been pressing the Government for some time for some clarification on their views as to whether the current draft of the Services Directive would entitle the UK to retain its new legislation on gangmasters. We still wait for a formal response to those questions. Our view is that the gangmasters legislation, because it involves a degree of licensing, is not caught by a labour law exemption but would have to be caught by a public policy exemption. It is not absolutely clear because the notion of public policy is very broad and may be interpreted according to the discretion of Member States. But it also may be interpreted in accordance with certain norms within EU law. We are not 100 per cent certain whether the gangmasters legislation is currently protected within the Services Directive. One other issue that we would draw to the Committee's attention, which is an issue of concern for us, is discrimination law within the UK as far as it extends beyond the employment context. We very much welcome the fact that the Government recently extended disability discrimination law to the provision of goods and services as well as in relation to the employment context. Again, we would support any government-driven amendments to guarantee the protection of those pieces of legislation.

Ms Williamson: Are you asking us which problems previously there have been removed?

Q60 Lord Walpole: Yes.

Ms Williamson: One improvement that we welcome is the exclusion of temporary agency workers. We regard that as an improvement on the previous draft.

Mr Tudor: And also posted workers.

Chairman: We are coming to that.

Q61 Lord Haskel: On the way to posted workers, can I clarify about rates of pay. Under your general phrase of labour law, do you include things like the minimum wage, but what about rates of pay which are negotiated on individual working sites, or on individual factories, or farms or whatever, how do you view those rates of pay? Are those part of the labour law which have to be included or are those something in a grey area?

Ms Reed: The answer to the question in the UK context is that labour law would only apply to national minimum wage rates of pay and not to rates

of pay negotiated through collective agreements. The reason for that is within the UK collective agreements do not have a legal status other than as they are implied into the terms and conditions of employment of individual employees. That is dependent upon the individual employer signing up to the collective agreement. Within the UK context, when we talk about an exemption from labour law and wanting to guarantee minimum standards for workers from other Member States coming to the UK, that would not include terms and conditions of employment negotiated through collective agreements. However, the position is different in other EU Member States where there are laws which extend the scope of collective agreements to all workers employed within particular sectors and in those contexts our understanding is the exemption for labour law would protect the status of such collective agreements and those collective agreements would apply to migrant workers provided that was provided for within domestic legislation or domestic laws.

Q62 Lord Haskel: When we were previously discussing this we had a long conversation about the race to the bottom. You are happy that factor is now protected by virtue of this labour law.

Ms Reed: The TUC view is that we would like to see a full exemption, a full labour law exemption, including collective agreements. We have some question marks over the current draft from the Commission proposal for the exemption for labour law, in particular whether its application to any statutory or legislative provisions would be limited. The exemption would only apply to those rights which derive from EU law as opposed to domestic states. We would welcome some further clarification in terms of collective agreements as well, not necessarily from the UK's perspective but from our colleagues in other parts of Europe.

Q63 Lord Roper: You do not feel there is some way that you can get UK collective agreements which have previously been outside UK labour law brought in to this or do you?

Ms Reed: The Services Directive would have no implications for the status of collective agreements within the UK.

Q64 Chairman: I think even the TUC would not try to use this to achieve that. I am not saying they would not like it.

Mr Tudor: Still, it is an idea.

Chairman: That is the second googly Lord Roper has bowled.

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Q65 Lord Swinfen: I want to go back to the question of gangmasters because I want to clarify your answer Ms Reed. You said gangmasters operated under the licence, am I not right in thinking that it is a licence issued by the Secretary of State under regulations that are produced under on of our own statutes, so it is therefore operated under British labour law? I am trying to get it right for the record because you gave the impression that it was nothing to do with UK statute law.

Ms Reed: You are absolutely correct to say that gangmasters legislation derives from domestic legislation and is drawn up in UK regulations. The point which I was seeking to make is that the nature of those regulations are not labour law, they provide other forms of protection and, therefore, arguably would not fall within the scope of the labour law exemption but that may well be a moot point which the lawyers would argue over.

Q66 Lord Swinfen: Would any other regulations made under labour law not count? What you are suggesting is that the statute counts but the regulations made under various statutes do not count and therefore would be exempted.

Ms Reed: The distinction I am drawing is about the nature of the law. To the extent that gangmasters legislation protects certain minimum standards relating to pay and other conditions—and I am not I must confess an expert on the regulations—that would be captured by an exemption for labour law but licensing provisions are more in the area of competition law in a general sense as opposed to labour law and, therefore, they impose certain conditions on gangmasters' ability to operate within the UK. They do not fall within the notion of what happens in terms of the employment relationship and relations between employers and employees.

Q67 Lord Swinfen: Are the people who work for the gangmasters covered by British labour laws?

Ms Reed: Certainly in terms of their employment terms and conditions but the requirement that a gangmaster must receive a licence in order to operate within the UK, that is the not an issue of labour law, it is an issue about other aspects.

Q68 Lord Swinfen: Then you also need a licence to do various other things, driving a vehicle?

Ms Reed: Yes.

Ms Williamson: I think Article 9 on authorisation schemes also has an impact on the gangmaster's licensing scheme. Article 9 sets out criteria that allow Member States to set up authorisation schemes. As an authorisation scheme, gangmasters' legislation would fall under that Article, so the UK Government would need to use Article 9, 1(b) to justify in the

public interest the need for the gangmasters' legislation. With the previous draft of the Directive, the Government was concerned about the impact on the gangmasters' legislation. We have not had a long discussion with them since but they and we were concerned, and so it is important to make sure that the Directive does not hamper the licensing scheme which has been set up for gangmasters.

Chairman: Before Lord Walpole asks the posted workers question, can Baroness Eccles deal with her question.

Q69 Baroness Eccles of Moulton: Earlier on when you were talking about exemptions and EU labour law and domestic legislation, you did mention health and safety. Do you find the Directive's position on health and safety all right or would you like to see something different?

Mr Tudor: We think it is now absolutely clear that health and safety is excluded from the subject matter of the Directive and we are pleased that ensures the UK's high standards of health and safety will remain in place for all service providers operating in the UK. As a matter of best practice, and I know this came up in your earlier discussions, we would certainly support the idea that health and safety regulations are part of the package of information available from the single point of contact and we will be raising that through our members of the Health and Safety Commission directly with the Health and Safety Commission, urging them to liaise with the Department for Trade and Industry to ensure that service providers from other Member States operating in the UK can access information on health and safety requirements via the single UK point of contact.

Q70 Chairman: In the Government's explanatory memorandum to us they say that one of the areas where they are still looking at is to amend the text to ensure that we can uphold UK standards of health and safety. What is that all about? You are content that the Government appears to be saying something where they are still seeking amendments. Do you know what that is about?

Ms Williamson: The only conversation that we have had with them about health and safety which could be relevant is that they were concerned about a very full exclusion for health and safety, which is now in the current text. It is gone from the scope of the Directive in its entirety. That would mean that the requirement to include health and safety in single points of contact for information and administrative procedures has gone. That is the only point that they raised with us, because what they were seeking originally was a derogation from the country of

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origin principle, as it was in the previous text. The text has changed and the amendments have changed.

Q71 Chairman: It is the consequential impact of that.

Mr Tudor: That is what we understand to be the case. We are prepared to be surprised if they come up with something else.

Q72 Chairman: We will ask the minister and we may want to make the point that you are understanding that and just checking what it is.

Ms Williamson: We would obviously be very concerned if they were feeling that it was not guaranteed that the UK's higher standards of health and safety would be upheld. We would be concerned if that was the case.

Q73 Chairman: You will read with interest what the minister says?

Ms Williamson: Yes.

Q74 Lord Walpole: The Posted Worker Directive and its relationship with the Services Directive caused concerns when we last met, I seem to remember. Does the revised Directive deal with these concerns or not?

Ms Reed: Yes, the TUC welcomes the amendments within the Commission's revised text for the exclusion of the Posted Workers Directive from the scope of the Services Directive. All our concerns have been addressed in relation to the Posted Workers Directive.

Q75 Lord Walpole: You are happy bunnies?

Ms Reed: We are happy bunnies on this point.

Q76 Chairman: We ought to stop at that point.

Mr Tudor: I am not sure we are entirely familiar with what "being a happy bunny" means, it is not our normal state, and we may be misinterpreting our feelings.

Q77 Chairman: There is always a let-out clause. Is there anything that we have missed that is of concern to you. I will say again, the last time we met you were very helpful. You raised points that certainly were not raised by many of the witnesses and we are most anxious to understand you. On two themes, is there anything not in the Directive, apart from the labour law issues that you would like to see in? Is there anything in that you would like to see out that you have not touched upon?

Mr Tudor: No.

Q78 Chairman: In other words, negotiation proceedings, in broad terms, subject to what you said covered the main points.

Mr Tudor: As Janet said in her introductory remarks, we think that the consensus has emerged around the Directive and, subject to our concerns about labour law, we think it is probably more sensible to proceed with the current consensus rather than try and re-open issues about the Directive.

Q79 Lord Haskel: Are you happy with the derogations?

Ms Williamson: We are broadly happy with the exclusions. There are some things we would have liked to see more fully excluded but we recognise that there was a heated debate on both sides on the exclusions. As Owen said, we do not particularly wish to unpick what was a difficult compromise to achieve. There are areas we would like to see excluded that were not but we recognise that we have a pragmatic compromise which does take steps to open the internal market without undoing protections for workers and standards and so on and so forth. It has not given us everything we wanted.

Q80 Lord Haskel: You felt that was something you could compromise on?

Ms Williamson: Yes, the compromises took place in the European Parliament. There were compromises in the Parliament over the exclusions, and I think we made some progress. There were other areas where we did not make as much progress as we would have liked. Overall, we recognise a compromise has been drawn up and, as I think previous witnesses were implying as well, we feel that it is in everyone's interest to recognise that a step forward has been taken and that the poison has largely been drawn from the boil. We should try to go forward on this basis rather than unpicking too many areas again.

Q81 Lord Roper: Can I ask a process question. In a Directive like this of such a broad nature, is there something which the social partners discuss among themselves or is it discussed in the Economic and Social Council of the European Union or is that institution so atrophied that it does not consider it?

Mr Tudor: The Economic and Social Committee will, of course, be revived later on this year when it is reconstituted with its new membership. To be honest, one of the lessons that your earlier witnesses were referring to as having been learnt by the European Commission—I think this is one of the ones which we would draw attention to—is if you are going to have something like the Services Directive, it would be sensible to have discussed it with the social partners.

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That discussion has not taken place at a formal level as part of the social dialogue, partly because of the way that the Directive was initially handled. Whether there are further questions now to be addressed which could be dealt with through the social partners, I think remains to be seen. As I say, we think the compromise has been reached and that probably does not leave much scope for further discussion but there are a number of areas about sectoral harmonisation which are exactly the sort of things that you would expect the social partners to be engaged in discussing.

Q82 Chairman: If I could summarise, it is probably like our previous witnesses, but for different reasons in terms of the detail, the revision may not be perfect but from your point it is better than it was. Our

previous witness thought it is not as good as it was, but both of you have come to the conclusion that it is acceptable as a compromise, is that fair, subject to one or two areas where you would like to press, nevertheless, to get further changes?

Mr Tudor: Yes, I think that would be a fair assessment.

Chairman: You have both reached the same position although coming from different points of view. That is helpful to us in terms of advising the House on the views expressed to us. Could I thank you very much indeed. As before, you have been superb in your responses, to the point and very informative. Thank you very much, Mr Tudor, Ms Reed, and Ms Williamson, and, Ian, on this occasion you were quiet, but I am sure on future occasions you will give us the benefit of your advice.

WEDNESDAY 17 MAY 2006

Present	Eccles of Moulton, B Fyfe of Fairfield, L Geddes, L Haskel, L Roper, L	St John of Bletso, L Swinfen, L Walpole, L Woolmer of Leeds, L (Chairman)
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Explanatory Memorandum on a European Community Document (COM (2006) 160)

**AMENDED PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND
OF THE COUNCIL ON SERVICES IN THE INTERNAL MARKET SUBMITTED BY
THE DEPARTMENT OF TRADE AND INDUSTRY ON 21 APRIL 2006**

SUBJECT MATTER

1. This document contains an amended proposal for a framework Directive on Services in the Internal Market. The aims of the Directive are to make it easier for service providers to exercise the freedom of the establishment in Member States and to facilitate the free movement of services across the EU. This will offer service providers and recipients more legal clarity to exercise these two fundamental freedoms enshrined in Articles 43 and 49 of the EC Treaty.

BACKGROUND

2. In January 2004, the Commission submitted its original proposal in the form of a framework directive focussing on three key areas: the elimination of obstacles to freedom of establishment; the abolition of the barriers to the free movement of services; and the facilitation of mutual trust between Member States, which is necessary if the Directive is to fully realise its aims.

3. The original proposal was very ambitious in both the breadth of its scope and the depth of its provisions, which made progress in Council slow. By the end of the UK Presidency substantial progress had been made on technical issues. Since Member States remained divided on the most sensitive political issues they agreed to defer further discussion until after the European Parliament first reading (which took place on the 16 February 2006) and the production of the Commission's revised proposal (which was published on 4 April 2006, and incorporated most of the Parliament's amendments).

CONTENT OF THE PROPOSALS

Scope

4. The proposed Directive applies to providers established in a Member State¹ and covers all economic service activities, except those for which specific exclusions or derogations are provided. The revised proposal excludes the following activities: all financial services; electronic communications and networks (to the extent that they are covered by the European Community telecoms legislation package); all transport services and transport-related services falling under TEC Title V and including port services; healthcare services; services of temporary work agencies; audiovisual services; gambling activities; activities connected with the exercise of official authority; social services relating to social housing, childcare and support of families and persons in need; private security services; and all taxation. Labour law and criminal law are also excluded.

The Freedom of Establishment

5. In order to eliminate the obstacles to the freedom of establishment, the proposal provides for:

- Administrative simplification, particularly involving the establishment of "single points of contact", through which service providers can complete the administrative procedures necessary to their

¹ Article 2(1) of the proposed Directive defines it as applying to "services supplied by providers established in a Member State". Article 4 defines a service as "any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty".

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activities, and the obligation to make it possible to complete these procedures at a distance and by electronic means (Articles 5–8);

- Certain principles, notably: non-discrimination, necessity, (justified by an overriding reason of public interest), and proportionality, that authorisation schemes applicable to service activities must respect, in particular relating to the conditions and procedures for granting authorisation (Articles 9–13);
- The prohibition of certain particularly restrictive legal requirements (eg nationality or resident requirements on staff, or prohibitions on being established in more than one Member State) which may be in force in Member States (Article 14); and
- The obligation to assess the compatibility of certain specified national legal requirements with the conditions laid down in the Directive (Article 15).

The Free Movement of Services

6. In order to eliminate obstacles to the free movement of services, the proposal provides for:

- Member States being allowed to make temporary or remote service providers subject only to requirements that respect the principles of non-discrimination, necessity and proportionality, where necessity is here defined as “justified for reasons of public policy, public security, public health or the protection of the environment” (Article 16(1)).
- The prohibition of certain particularly restrictive requirements (for example the requirement to set up an office, or the requirement to register with a professional body in the host Member State (Article 16(2)).
- Derogations from the above to protect sensitive sectors or matters covered by other specific pieces of legislation (Article 17). There is also provision for case-by-case derogations, in exceptional circumstances, relating to the safety of services (Article 19).
- The right of recipients to use services from other Member States, without being hindered by restrictive measures imposed by their country or by discriminatory behaviour on the part of public authorities or private operators (Articles 20–21).
- A mechanism to provide assistance to recipients who use a service provided by an operator established in another Member State, by obliging Member States to supply information about, for example, their consumer protection law (Article 22).
- The removal of total prohibitions on commercial communications by the regulated professions, and an obligation on Member States to ensure that professional rules on commercial communications are non-discriminatory, justified by an overriding reason relating to the public interest and proportionate.

Administrative co-operation

7. With a view to establishing the mutual trust between Member States necessary for realising the aims of the Directive, the proposal provides for:

- Harmonisation of legislation, particularly as regards service providers’ obligations concerning the provision of information relating to their services and any after-sales guarantees, and as regards Member State rules covering multi-disciplinary activities and exchange of information on the quality of the service provider, and settlement of disputes (Articles 26–32).
- Measures for promoting the quality of services, such as voluntary certification of activities, quality charters or cooperation between the chambers of commerce and of crafts (Article 31).
- Stronger mutual assistance between national authorities to enable effective supervision of service activities. In support of this, the Commission are to provide an electronic cooperation system to facilitate communication between Member States’ competent authorities (Articles 33–37).
- Encouraging codes of conduct to be drawn up at Community level, particularly by professional bodies and associations, aimed at facilitating the provision of services or establishment of a provider in another Member State (Article 39).

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SCRUTINY HISTORY

8. DTI submitted EM 6174/04 + ADD 1 on 3 March 2004 and followed it up with a Minister's letter dated 15 December 2004. The Commons European Scrutiny Committee considered it politically important and recommended it for debate in European Standing Committee C (Report 3, Item 25354, Session 2004–05). Lords Select Committee on the EU sifted it to Sub-Committee B for further consideration and it was debated on 14 October 2005 (Progress of Scrutiny, 24 October 2005, Session 2005–06).

9. EM 11757/02, submitted by DTI on 24 September 2002 on a "Follow-up report from the Commission entitled: The State of the Internal Market for Services"—The Commons European Scrutiny Committee considered it not legally/politically important and cleared it (Report 38, Item 23742, Session 2001–02). The Lords Select Committee on the EU did not report on it (Progress of Scrutiny, 21 October 2002, Session 2001–02).

10. DTI submitted an EM (5224/01) on 28 February 2001 on a "Communication from the Commission to the Council and European Parliament—an Internal Market Strategy for Services". The Commons European Scrutiny Committee considered it politically important and cleared it (Report 9, Item 22045, Session 2000–01). The Lords Select Committee on the EU did not report on it (Progress of Scrutiny, 9 March 2001, Session 2000–01).

MINISTERIAL RESPONSIBILITY

11. The Secretary of State for Trade and Industry has primary responsibility for this proposal. A number of other Government Ministers and the Devolved Administrations who have policy responsibility for service activities covered by the Directive will also have an interest.

12. In Northern Ireland, matters arising from this proposal would normally be the responsibility of Northern Ireland Executive Ministers. Whilst the Northern Ireland Assembly and Executive are suspended, Northern Ireland Departments will discharge these functions, subject to the direction and control of the Secretary of State for Northern Ireland.

LEGAL AND PROCEDURAL ISSUES

Legal base

13. The proposal is based on Articles 47(2), 55, 71 and 80(2) of the EC Treaty.

Legislative procedure

14. The Co-decision procedure between the European Parliament and the Council is applicable.

Voting procedure

15. The Council will vote on the basis of qualified majority.

Impact on UK law

16. It will be necessary to conduct a thorough review of existing UK law which sets out rules on regulatory and administrative requirements concerning access to and the exercise of a service activity, to identify those provisions which would have to be repealed or amended in order to comply with the principles set out in the proposed Directive (for example those principles in Section 2 of Chapter II). Such a review will also be necessary for the purpose of determining those specific requirements that are subject to an absolute prohibition in the proposed Directive (for example under Articles 14, 20) and those which are subject to evaluation (for example under Article 15). It may be necessary as a result of this process to amend or repeal provisions of UK law.

17. Article 16 will impact on UK law in that it will require the UK to remove any requirements on the access to and exercise of a service activity for service providers operating in the UK but established in another Member State, except where those requirements are justified by the exceptions or derogations set out in Article 16.

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18. Other obligations contained in the Directive, which directly affect service providers (for example Articles 26 to 32), will require implementation and enforcement. It will also be necessary to ensure that UK regulators have the powers to, and do, monitor and supervise the provision of services, by UK established providers, in other Member States as laid out in Article 34.

19. It is considered that the functioning of single points of contact (Article 6) and other provisions in Section 1 of Chapter II will require predominantly administrative changes. Due, however, to the broad scope of the Directive, it is possible that there will be some limited impact on UK law. The potential extent of such impact remains to be determined.

20. The proposed Directive (Article 40) also identifies the possibility of future harmonisation in respect of access to the activity of judicial recovery of debts; security services; and transport of cash and valuables.

21. There are other areas where the potential effect of the proposed Directive has yet to be fully determined including issues identified below under Policy Implications, which require further consideration.

Gibraltar

22. As the proposal covers services it will apply to Gibraltar.

EUROPEAN ECONOMIC AREA

23. This proposal is potentially applicable to the EEA.

SUBSIDIARITY

24. The Commission considers that Community action is justified because its purpose is to create an Internal Market for services, which cannot be achieved by unilateral action on the part of the Member States or by case-by-case action by the Commission. In accordance with the case law of the ECJ and in the absence of harmonising legislation, some barriers to cross border trade in services may be justified. However, if barriers are to be eliminated, the prior co-ordination of national schemes is required. The Commission also states that the characteristics of the legislative choices keep interference in national regimes to a minimum. For instance:

- (a) The Proposal does not result in detailed and systematic harmonisation of all the national rules applicable to services;
- (b) The proposal avoids interference with the institutional organisation of the regulation of services in the Member States. For example it only specifies the functions of the single points of contact without imposing any institutional characteristics.

POLICY IMPLICATIONS

25. Successful liberalisation of this sector is likely to be of significant benefit to UK businesses and consumers and would make a major contribution to the Lisbon targets for EC growth, competitiveness and employment. In addition, the removal of red tape, which would follow from implementation of the Directive, is in keeping with the Government's support for the principles of Better Regulation. The UK, therefore, strongly supports the objective of opening up the market for services in Europe.

26. Whilst many of the UK's negotiating lines have been met by the revised proposal, there are some further changes that the UK needs to see to the text in order to ensure that we can uphold UK standards in health and safety and sensitive policy areas.

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CONSULTATION

27. The DTI carried out its consultation with business and consumer organisations and Government Departments during March–June 2004. The consultation paper is available on the DTI’s website.

REGULATORY IMPACT ASSESSMENT

28. A revised partial regulatory impact assessment is attached.

FINANCIAL IMPLICATIONS

29. The costs to service providers are expected to be negligible because the proposals mainly provide for removing red tape and lowering the costs to business of complying with regulation. The more significant costs are expected to fall on Government (and by extension regulators) due, for example, to: the need to set up “single points of contact” for service providers to facilitate their establishment in the UK; the simplification of administrative requirements; the screening of existing legislation for prohibited requirements; and the increased levels of mutual assistance and co-operation with competent authorities in other Member States. Service recipients are expected to benefit from more choice and lower prices.

Overall, the costs are expected to be of a lower order of magnitude than the benefits. However, given the inherent uncertainties in this area, we recommend that the Commission review this policy in three years, in line with the Government’s commitment to review all major regulations within three years.

TIMETABLE

30. The Commission have indicated they would like the Directive to come into force within two years from the possible adoption in 2006 (ie 2008 as currently scheduled). This would be a major task for such a wide-ranging Directive, which explains why certain technical provisions, for example the setting up of single points of contact, are given three years for implementation.

Ian Pearson

Minister for Trade,
Department of Trade and Industry

Examination of Witnesses

Witnesses: RT HON IAN MCCARTNEY, a Member of the House of Commons, Minister of State for Trade, Investment and Foreign Affairs, Ms PAT SELLERS, Director, MR HEINZ KESSEL, Assistant Director—Services Directive, and Ms KRISTEN TILEY, Economist, Department of Trade and Industry, examined.

Q84 Chairman: Good afternoon to you, Minister, and to your colleagues. First of all, could I extend the appreciation of the Sub-Committee for the fact that you have been able to fit in the hearing today early on in your new post. It is greatly appreciated. We have a range of questions we want to ask. We will vary the order in which they are put on the piece of paper, but the substance will not change. I wonder, Minister, if you would like to say anything by way of introduction and if you would care to introduce the civil servants you have with you?

Mr McCartney: Yes, thank you, my Lord Chairman. I would like to make a short opening statement, which will not be a repeat of what you have done in your previous reports but what has happened since, the responsibility of my colleagues. Secondly, when it comes to the questions, I will also, because they are prepared questions, give prepared answers, and of course then supplementaries. I will do my best on the generalities, but on the specifics—and I will introduce my colleagues just now—my colleagues have been the

chief negotiators and architects of the Government’s strategy. So I want to make sure at the end of this sitting that there is an absolute clarity and a maximisation of the information which is available to the Committee, because I note that you have taken as a Committee—and I have got to be careful here—a lot more interest in this subject so far than the House of Commons has given time to. So the statement I am making today is, I hope, taking on from where it left off. Thank you for inviting me and it is dependent upon how you deal with me whether I will thank you at the end, but we will see how it goes! As I say, I am aware the Committee conducted a careful and thorough examination of the Commission’s proposals for the Directive on services and the internal market in March of last year. At that time my colleague, Douglas Alexander, gave evidence on behalf of the Government, when this was also presented to you. Your Lordships will therefore be well apprised of the issues surrounding the proposed legislation. You will be aware the European

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Commission recently issued an amended draft of the Directive and with your permission, my Lord Chairman, I would like to take the opportunity to make a short opening statement on this amended proposal. Before doing so, I will introduce my colleagues, Pat Sellers, Heinz Kessel and Kristen Tiley, and hopefully they will assist the Committee as much as they will assist me during this hearing. There will be a number of technical issues we will raise today and I will seek their advice and support to ensure, as I said earlier, that I maximise the opportunity for yourselves at the end of this hearing to be fully abreast of what has gone on and what is likely to happen between now and the end of the Austrian Presidency. In addition, I would be happy to write to the Committee on particulars which may arise from today's discussion, and indeed if there is anything which arises at the next meeting at the end of this month, again, without prompting, I will write to the Committee and give you a read out of the discussions which took place. Hopefully, they will be complete, but if not you can expect them by the end of the presidency, but I will keep you abreast of what happens in those discussions as they take place. You are aware that the Services Directive aims to bring about an efficient and effective internal market for the services sector. When reporting last year this Committee stated, that the Directive is a "bold attempt to make a reality of a freely accessible single market in services," and that the European Union should continue to be bold and resolute in its embrace of the single market. The aims should be to simplify and strengthen the freedom to provide services. In the Government's response in October 2005, my predecessor, Ian Pearson, responded to the Committee's report, reiterating his support for the Directive's market opening objectives and expressed a goal of maximising the benefits of the Directive during negotiations whilst ensuring essential protections are not compromised. He agreed with the Committee that a horizontal rather than a sectoral approach should be pursued. He also set out why it was important that exclusions were sought for certain public services, for example publicly funded health care. He noted the liberalisation potential offered by the "country of origin" principle, but also shared some of the concerns of the Committee that by providing greater legal certainty on when the principle applied, its effects may be watered down. There is a fine balance to be struck. He promised to ensure that UK standards of health and safety were upheld and acknowledged that the proper working of the mutual assistance and supervision mechanisms would be critical. He stated he would work with the national stakeholders and seek to ensure that the benefits of this mechanism were not outweighed by the costs. Since the Committee last reported, the

Commission issued its revised proposals on 4 April 2006. As the Committee is aware, the original proposal met with considerable opposition and there were serious concerns about the scope, the inclusion of labour law and the "country of origin" principle. In preparing its revised text, the Commission has the benefit of the detailed deliberations of the European Parliament, which has found ways to minimise these concerns. I consider the Commission's revised proposals continue to represent a genuine market-opening opportunity. It remains a bold and necessary piece of legislation. On analysing the revised proposals, we estimate that it is worth approximately £5 billion a year to our economy, in particular boosting business services such as management consultancies, advertising, estate agents and leisure services. If I may briefly explain the main changes to the Directive and the scope. The original proposal which this Committee considered was very ambitious in scope. Member States (including the UK) have, during negotiations, sought to exclude and protect certain sensitive policy areas like health care, audio-visual services and gambling, which have now been excluded. However, the Directive continues to cover a wide range of business and consumer services representing an economic value of around 45 to 50 per cent of the total UK GDP and employment. Freedom to provide services: you will be aware that the "country of origin" principle has been replaced with a new mechanism which aims to facilitate the free movement of services. The new Article 16 seeks to achieve a balance between removing the barriers to the temporary provision of services across borders, whilst also permitting the country of destination to impose certain restrictions, provided they are non-discriminatory, necessary provisions of public policy, public security, public health or the protection of the environment and are proportionate. Whilst the UK supported the "country of origin" principle, the free movement of services chapter is still very strong. When analysing its new construction, we have concluded that at least 80 per cent of the benefits to the UK originally ensuing from the Directive still remain and the business sector, management consultancy, advertising and accountancy will be major beneficiaries. In practice, the conditions under which a host country may regulate are limited and the derogations are likely to be interpreted very narrowly. In fact, there are now fewer derogations than under the "country of origin" principle, which means the new mechanism can apply to more service providers. This alternative approach is different, no better or worse, though it has got the benefit that it looks like all stakeholders are signed up to it. I believe it is equally stringent in providing a robust mechanism for service providers to operate and is considered by all Member States to form a sound

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basis for future negotiations. On the posting of workers, the provisions relating to the posting of workers from Articles 24 and 25 have been removed. Instead, the Commission has published guidance on the implementation of a posting workers directive with the purpose of providing clarity on the prevailing law and control measures Member States may impose. My officials are currently analysing this guidance and will enter into discussions with stakeholders shortly. I will correspond further with you both on the discussions and on what our views are on them. I would also like to bring to the Committee's attention the new labour law exclusion. Concerns were expressed that the Directive could lead to a reduction of workers' rights if business sought to establish in countries with less regulated regimes. Effectively, it was quoted as a race to the bottom. I must stress here that the business case for this Directive remains very strong indeed, rather than this is about a race to the top, about ensuring that we can compete with the best in the world. The caveat will ensure that the Directive is labour law neutral and that existing standards are indeed maintained. So what have we achieved? Some commentators have suggested the loss of the "country of origin" principle and means the Directive is worthless. This is simply not the case. We have been trying since 1992 to get implementation in this very, very important area and as it stands at the moment we get, as I said, for the purpose of our GDP employment 45 to 50 per cent, whereas without this we will have zero. And 80 per cent of original benefits in these areas are in fact still protected. Again, if we do not have this agreement it will be zero. We must bear in mind the latest proposal is the result of negotiations between 25 States and the deliberations of the European Parliament. I think we have succeeded, along with other like-minded States, in ensuring that this horizontal Directive is still sufficiently broad in scope and retains robust provisions to open up the market to temporary service providers. The approach taken is preferable to an overall sector by sector approach, which would be complex, time-consuming and may lead to undesirable upward harmonisation. I think you will see that a lot has gone on and a lot of it has been around your recommendations. You have been very successful and persuasive in those matters. The UK is keen to see this Directive agreed. However, there are some important remaining issues, namely to continue to ensure that UK standards in health and safety are maintained, that national legislation is not undermined, that the vulnerable are protected (for example, the protection of children), that the procedural requirements for establishing another Member State work well, add real value and are not needlessly costly (for example, we need to ensure that the IT work associated with the implementation of

single points of contact is carried out in a practical and incremental way), and I am prepared to say more about this in questioning. We will also continue to ensure the Directive does not become diluted and we therefore focus our efforts in avoiding additional exclusions and derogations when we next meet to discuss this matter.

Chairman: Minister, thank you very much indeed. I have to say that is extremely helpful. It is wide-ranging and helpful to us. As you rightly say, we will be pressing on a number of points, but perhaps I could also set it in context. We well understand that politics is the art of the possible. I well understand that, and the fact that we will be pressing you on certain matters does not mean that we are not sympathetic to that matter. Nevertheless, there are some areas where we do want to press for clarification, and also to ensure that we do understand what is being proposed. I also want to say by way of introduction that I would like to again thank your officials, who over the months have been extremely helpful in giving us advice and background information and are a model, if I may say so, for the way in which Select Committees in this House might work with government departments. Could we then fire away and then, as you said, Minister, if you want to deal with them yourself or ask your officials.

Q85 Lord Geddes: Minister, in that *tour de force* of an overview you touched on all the really significant parts of the previous Directive and to the extent to which the revised Directive has changed. One of them, as again you have reiterated, was the "country of origin" principle. When we took evidence from your predecessor, the Government saw the then "country of origin" principle as "a realistic starting point," which certainly to me means just that, it is a starting point from which it could be grown or it could be enlarged. My first question is a simple one, but then I will have some supplementaries, if my Lord Chairman will allow me. The first question is, could you explain a bit more how the freedom to provide services (which is included in the revised draft) differs from a practical point of view with the previous "country of origin" principle?

Mr McCartney: This is where the real politics come in. The realistic starting point was exactly that. The background to this is that of course since 1992 for all sorts of reasons in the labour markets across the European Union, many of them very large economies indeed, there has been a complete reluctance to open up cross-border trade in the service sector, which of course in itself is 70 per cent of the total European Union's GDP. So what the starting point did was to politically open up a discussion which since 1992 nobody would have, and once you open up the discussion the issue then is to try and get on the table

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both the concept in principle, which was behind the starting point, and then to tease out in discussions not just with our fellow governments across Europe but the major stakeholders. From our perspective—reading the papers rather than the brief, and the notes I will give to you and I will call on my colleague on this in a minute—from the political perspective (and this is not a simple one but a complex one) it was clear that we should have the capacity to be innovative and take the point of contact, the point of discussion, as exactly that and be able to then move in two ways: one to be able to get people into what I would call a comfortable position where there was a clear understanding of what the outline objectives were of opening up the market, but at the same time being able to deal with people's sometimes genuine, sometimes perceived, fears. At the end of this process, as I said in my statement, I think we have now got a stronger position and there is absolute clarity about what this Article means. It has got improvements which were never in what was already a complex argument to put in the country of origin in any event, and even though people had agreement about it in principle there was not clarity even between those of us who agreed on it just exactly what the outcome should be in technical terms. The other big advantage is that you have seen since the statements have been announced since this proposal was agreed that the stakeholders are those countries where, whether they are employers or whether they are trades unions, they have all actually moved to the position where they accept the concept of this. That is a big, big gain in terms of both the concept of what we are trying to do in the Directive, but also it means, I think, (i) clarity of what this means in terms of outcome, and (ii) clarity in terms of an acceptance that for an effective Directive this mechanism needs to be in place and to be realistic, and it does in fact encourage significantly large cross-border arrangements. So I think that has been the advantage of doing it in this way. Reading too literally into a realistic starting point does not mean anybody has negotiated away. What we have actually done in the discussions is to open up a discussion which nobody has wanted to have since 1992. Do my colleagues want to say anything on the technical side of it?

Mr Kessel: Yes, perhaps on Article 16. We still believe that Article 16 is extremely robust, as the Minister has said. It is a different approach from the “country of origin” principle, but that does not mean that it is any weaker as a result; in fact in some respects it is even stronger than the current position. If you consider, for example, that under Article 16, paragraph 1, Member States can now only put in place restrictions to a temporary service provision on four grounds: public policy, public health, public security and the protection of the environment. At

the moment the ECJ actually allows a much longer list of so-called overriding reasons relating to the public interest which would allow it to impose legitimate restrictions to provisions in the internal market. In that sense, Article 16 is much more robust. We also have in Article 16 now fewer derogations than there used to be in the original proposal. Again, I think this makes it more robust.

Q86 Lord Geddes: Is that, Minister, what you meant when you used the word “improvements”?

Mr McCartney: Yes, it is improvements in two senses. I do not want it to be said that I have been too clever in this. There is an absolute clarity about what the intention is behind the Article and there is also a clarity of the outcome, and as a consequence of that there is now a buy-in by all the stakeholders.

Q87 Chairman: I am still not entirely sure, on behalf of the Committee, how in practical terms the freedom to provide services differs from the “country of origin” principle. The “country of origin” principle was supposed to say to businesses, “If you want to go and operate on a temporary basis in another Member State to open up a new market, to respond in flexible business conditions to business opportunities, as long as you meet all the necessary conditions, regulations and laws of your own country you are fit to operate in another Member State.” That was the principle. You do not have to learn and know all about all these other regulations, all the other laws. Does the new concept of freedom to provide services lose that apparent benefit to business? It is different to us. We hear all the things about derogations, conditions, and so on, but that basic principle appears to have been lost. Is that right?

Mr McCartney: No. I will explain why I do not think it is, and this may be a politician's answer and when you get a technical answer it may be slightly different. What was going to be lost was the opportunity to open up the whole of the sector, and if that had been lost, again I do not know when that would have been brought back. So the political reality was that in the discussions which took place there was insufficient support from the people who needed to support it to move forward on that basis. So people have been innovative and they have now moved forward on a different basis. However, in moving forward, as I said, we have still got this huge substantive gain, not just for ourselves but for the market as a whole. An important aspect is not to take it on its own, because Articles 6 and 8 on the single point of contact have now been extended to temporary service providers, and a combination of this, and of course the other issues which Heinz has set out, seem to create a framework which maximises the potential of doing business but minimises the opportunity for the state

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to put up barriers. So you maximise opportunity. The one bit which is not in the answer and which you need to consider, of course, is that three years on from the operational date of the start of the Directive that review will look to how we implemented it. So it is like a train leaving the station (as I put it yesterday) and around 2011, which is how I think the timescale works, there will be a review. Then this is robust enough to start adding other sectors. So that is the critical factor. Do you leave the train in the station and keep this concept, or do you take the train out of the station and add carriages? That is why I think it is the best way and the best way forward.

Q88 Chairman: Minister, I said at the start that we well understand that having 80 per cent of the cake is better than having no cake at all. The secret is simply to try and establish factually whether the freedom to provide services is different as a basis of operation for a business from the “country of origin” principle. You could either say it is actually the same thing in a different name, or it is not the same thing but it is still worth having, and it is that point which I am simply trying to establish.

Mr McCartney: It is different. It is a different way of approaching it, but it still maximises what the intention was behind the original proposal. It maximises it both in economic terms and in political terms. I would rather come here and say, “We have done it this way,” than come here and say, “Well, it is 100 per cent failure. Sorry about that. I don’t know when we can come back to it.” So it is about the realities, but it is a reality done not on a squalid deal. The new approach is, as I have said, an innovative way of getting us to the same destination but in a way which is acceptable to all the people who so far, since 1992, have not found an acceptable way even to discuss it.

Ms Sellers: If we can go back to the old terminology which was being used in the Directive, there was a very polarised discussion about whether the law was “country of origin” or “country of destination” and I am sure that is what your Lordships are interested in here. As the Minister said, this is an innovative approach which has been put forward by the European Parliament. It is neither “country of origin” nor “country of destination,” but it is about restricting the requirement that the host country can impose to an absolute minimum. As the Minister has said, it is about opening up the market in a novel way.

Mr McCartney: There is a point which my Lord Chairman made which deserves an answer, when you said that someone has got a legal basis in their own country, which I think is the type of way we are putting it.

Q89 Chairman: There is a vote in the other place, as we say.

Mr McCartney: Could I just continue and use you as my excuse to get battered by the Whips, because I think this is really important! I know your Lordships, like myself, have got very busy lives, so I would prefer to continue and take the consequences. I am a non-conformist. Existing ECJ case law means that where someone already possesses an equivalent authorisation from a Member State, where they establish or fulfil the requirement, the host Member State must accept it. The authorities would then use the mutual assistance provisions to make checks and transfer the necessary information about the provider. So I think that offers another explanation for the route forward.

Q90 Lord Geddes: Just one more, if I may, on this. Like my Lord Chairman, and I am sure the whole of the Committee, I totally understand political realism. That is not in dispute. It may well be that what has now been negotiated is an awful lot better than nothing at all, in fact I would go so far personally as to say it is a great deal better than nothing at all, but we have had evidence given to us vis-à-vis the revised Directive from the business community that previously the draft enabled, particularly, the small and medium sized enterprises to “put a toe in the water” just to see whether they like it or do not like it without any of the hassle (if I can use that word) of establishing themselves, obeying the laws of the host country, et cetera. I am not saying they would be illegal, but subject to the “country of origin” principle, and indeed one set of witnesses went so far as to say, which I think surprised a lot of us, that despite Article 16, which you quoted, they could see effectively no change whatsoever between temporary and permanent operations. Could you comment on that?

Mr McCartney: I do not know who they were, but I think they are wrong, although I can understand some people’s disappointment at a theoretical major change in cross-border services. That is all it was and it will remain theoretical, the “country of origin”, because it would not be agreed. We have moved from the theoretical to the practical. The big point here, of course, is the single point of contact. This is really the important robust part of the answer. There are six objectives to this. Having looked at all the briefs, I have written down in my own handwriting before I came here about the six objectives to this. If you have got any more, I will gladly have them. One is the current infrastructure. It builds on the already huge amount of capital investment and points of information and access. Because of that, it does two other things: it saves huge amounts of capital resources which are not there in any event to build

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from new and it lowers significantly any implementation risk. All of you here who work in the public or private sector know the huge risk of the implementation of significantly big projects, and this would be a huge project. The third thing is that it can be done within the three years of implementation, which the Directive will require us to do. It does not follow developments, and this is particularly important to the principle about right to the review in 2011. So those are the objectives behind the single point of contact and I am as absolutely certain as I can be at this stage that this is the most cost-effective way of doing it. It is the most effective way in terms of risk in doing it, and it has got a certainty about the outcome in terms of UK business being able to take advantage of the arrangements which hopefully will be agreed.

Chairman: You have very neatly, Minister, brought us to Lord Roper, who is going to discuss with you the whole issue of the points of information in front of him.

Q91 Lord Roper: I am extremely grateful, Minister, that you have begun by setting out those points on the single point of contact, which are, as you rightly say, very important. In the Regulatory Impact Assessment the Government makes an interesting and important distinction between a single point of information and a single point of completion. I wonder whether you could spell out the way you see this and the benefits, as one would read from the Government's paper, of going for the single point of information rather than the single point of completion? This is the question which begins, "The DTI RIA comes down in favour of a single point of information approach, rather than a single point of completion."

Mr McCartney: In reality the completion of the necessary procedure would not take place at the single point of contact; rather the places where the completion happens will be authority websites where the on-line forms are submitted. The final notification will be provided directly from the individual regulator completing the process. The current text implies an overly bureaucratic system in which the administrator handling the information at the point of single contact would have the specialist knowledge to respond directly to the service provider concerning his or her notification. We have been advised that we can see no added value for the service provider in receiving his or her notification or licence from one website instead of directly from the regulator. Additionally, this kind of point of single contact will require a €600 million IT project to connect all of the 750 authorities' website transaction capabilities, which goes back to the point I made earlier.

Q92 Lord Roper: I can see why, Minister, it is obviously more economic for the United Kingdom Government to only set up a single point of information rather than a single point of completion, and indeed in table 1 of the RIA you suggest there might be a saving of something like £90 million per annum by going for the single point of information rather than the single point of completion, but is it not the case that so far as business is concerned they see a considerable advantage in only having to deal with one place, and in particular when we are thinking of British companies overseas, which is what we want to encourage, we were told by the Federation of Small Businesses that they would very much wish to see the single point of contact being the single point of completion?

Mr McCartney: The study of administrative costs and benefits was done independently by consultants. You have got the report, so I do not need to make that point, you already know that. Could I ask my officials to come in here and answer the point you are trying to get behind in terms of why we have decided to do it in this way?

Q93 Lord Roper: Minister, the point I am trying to make is that yes, there would be a saving to Government, obviously, in doing it this way, but we also have to think about the net savings to the UK because it may be greatly to the advantage of UK business to have a single point of completion, for example, only for work done in the UK. There seems to be a gain of something like £210 million as distinct from the cost of £92 million, but in addition to that there would be very considerable benefit to UK business in having a single point of completion in the other Member States when they are trying to operate abroad.

Mr McCartney: I will bring Pat in on this in a minute, but there is no such thing as a nil cost to business because it is the public purse which pays for it and it is business and business taxes which also pay for it. We have already spent huge sums of money on what is known and acknowledged as a robust infrastructure for information and access to information and it is an infrastructure which is recognisable and used every day by business and other providers now. The business link we have got, which we are building on, deals with about 75 per cent of the types of inquiries which will come through the Directive in any event, and it would seem sensible that the resources we save in this capital expenditure are either not spent at all or invested in other aspects of ensuring support for UK business. I will bring Pat in to deal with the other technical points.

Ms Sellers: I think the Minister made a very important point in his opening remarks about this and that was to say that if you start with the single

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point of information, you can move on to a single point of completion here, so it does not preclude this being developed into a single point of completion. But what we do know is that within this Directive there will be a very tight timetable for implementing this single point of contact and we want to make sure that the benefits start to flow through to the business community as soon as possible, so our consultants have advised that the single point of information is a sensible starting point for this in that it minimises the risks which are likely to be associated with this project, but it does not close off the options.

Chairman: Lord Haskel on this point.

Q94 Lord Haskel: Could you just clarify whether you see the single point of information being for the benefit of overseas companies who want to come and offer their services here in Britain, or whether it is for British companies who want to enquire how they can offer their services in other European Member States?

Mr McCartney: It is for both and it will be a requirement for both. It would be a very restrictive practice if it was only for UK business, it may be noted, so it is both.

Ms Sellers: I think the businesses who would make the enquiries would receive information from the UK single point of contact about UK practices and rules and regulations and UK businesses seeking to set up, let us say, in France would go through to the French single point of contact to receive the information there, but there would still be information on the UK single point of contact which would tell our companies how to approach other single points of contact.

Q95 Lord Haskel: So really from the point of view of British business our main concern is that the other European nations should set up a single point of contact that we can contact?

Mr McCartney: One of the things we will have to turn our minds to, is it not, if this agreement is reached and the timetable is agreed, is for the Government to then consider what other things we need to do to try and help maximise UK businesses' opportunities in this? In the same way, when the original market was established there was a lot of activity around it. Without committing myself in terms of resources, I see this as such a huge change and opportunity that we need to be able to assess how best we can assist business in maximising opportunities in this regard.

Q96 Chairman: Following on from that, before Baroness Eccles comes in on a different point, could I try to summarise a position and ask if it fairly represents the situation. In your own table 1 on p.19 of your RIA you make it clear that if there was a

single point of completion that would bring over £200 million a year benefit to business but it would cost Government over £90 million a year. If you have a single point of information, you would lose those benefits to business but you would save the Government £90 million. I am not passing a judgment on that, that is factually what table 1 on p.19 says. First of all, Minister, am I correct in what that table says?

Mr McCartney: Yes, I think you are.

Q97 Chairman: What I understand you to say, Minister, and your advice to us—and I well understand this—is that taking a risk-based view of taking decisions, the costs of setting that up are added to by the fact that it would have to be set up over a short period of time, there is no guarantee it would actually work within that timeframe, and that it would be safer to proceed, hopefully, in stages, first through a point of information which might lose benefits in the short-term to business but would avoid the risk of failure. Is that a reasonable assessment of the position?

Mr McCartney: That is a very fair assessment of the objectives, yes, absolutely, with the added point, of course, that you can then build on the system.

Q98 Chairman: Finally—and this is to help guide the Committee when we come to our report—the point of contact (information or completion) is an important matter relating to businesses operating on a temporary basis now as well as established. It is an important area because this helps overcome the loss of the “country of origin” principle, because businesses now do have to understand the rules and regulations and laws of other countries, whereas they did not so much before. They will now have a single point of contact. So the single point of contact, whatever it is, is actually a very important part of the package?

Mr McCartney: Yes, indeed.

Q99 Chairman: It is the Government's judgment that the best way forward initially, although it does lose some of the benefits that business would have got—and that is not a criticism—is that on a risk-based view of these things it is best to proceed in stages?

Mr McCartney: Yes.

Chairman: That would be our understanding of the Government's position. Lord Roper, do you want to add to that?

Lord Roper: I am very glad you say that one would be able to move on, but as I understand it, if you do follow the position of having a single point of information obviously the European legislation will be drafted in those terms. If that was the case, it

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would only be, presumably, after this review in three years' time that it would be possible to modify the legislation and go on to turn it into a single point of completion? So the moving on presumably would not be able to occur until 2011?

Q100 Chairman: Minister, to move on would it require another directive or a change?

Mr Kessel: I think this is a technical matter of drafting. We have been referring here to what the UK position is in terms of a single point of information. It is fair to say that it is actually a little bit more than just a single point of information. What we are proposing with a slight drafting change is that incoming foreign service providers can go to a single point of contact, and it is not just for information purposes; they can there access through this single point of information and through deep links leading them directly to all the points where they can obtain authorisation and licensing requirements. So in that sense it is much more than just a single point of information.

Mr McCartney: This is important and I can separate out two things, if I can. If I had been the Minister at the time I read the papers, I would have made the same recommendation from my years of working in the Cabinet Office doing reviews on big IT projects. There is a risk in every project. This is not risk-averse, it just does not take stupid risks, and the reason for that is that we have got something some of our competitors do not have. We have already got the system, UK websites which have already got deep links and which work. Many of our competitors in this new environment, hopefully, have not got that level of infrastructure, and we can at any stage, if we feel confident in the system, move to the position of opening it up in the way Lord Roper would like us to do. The second point is that the negotiations in relation to the review of the Directive are separate from this in any event. What the review would do, if it took place in 2011, would be to give the capacity to add other sectors to the overall capacity. I would be confident in doing it this way. If that is what happens, and I could not see any reason why it should not happen, then we would have a robust system in place which is more effective, not just cost-effective but in the practical use of the system, which is so important, particularly for small and medium sized enterprises which use the system. It is effective, it is robust and they can use it from day one and not have to wait for three years to have it up and running effectively.

Q101 Chairman: We must move on. Mr Kessel, through you, was convincing to me in his explanation that the point of information was actually more than that in the UK sense. Am I right in saying that that may not be the case in the other 24 Member States?

It is possible to have a point of information which effectively says, "If you want to find that out, go somewhere else." Through you, Minister, are we being told that the UK review of the point of information, rather than the point of completion, is capable of being embodied in the agreement and documentation in a way in which other countries are consistent, because it is not entirely impossible, is it, that some countries might make it pretty difficult to get from the point of information to the point of completion? You understand my point?

Mr McCartney: Yes. The answer to your question is, yes. Secondly, the Commission will be very keen, and we will be making sure that they are very keen, in overseeing the implementation of this.

Chairman: I remember years ago the French were sending you to somewhere in the depths of France in order to get a licence, a permit. Thank you, that is very helpful.

Q102 Lord Fyfe of Fairfield: Minister, the explanatory memorandum on paragraph 25 raises concerns about health and safety in respect of the new drafts. Would you care to outline the nature of this concern?

Mr McCartney: I think this is a question which was raised with me yesterday. We have got to ensure that in the two areas this covers there is clarity about the public in general and about the self-employed, which is vitally important. In particular, I hope the self-employed will be a beneficiary in relation to the outcome of the Directive. So I think those are the two areas where we want to see clarification in terms of the final outcome of the discussions and that is why the question has been raised with me, I think in [the House of Commons] committee yesterday by a colleague. We have been very robust, as you know, from the outset on health and safety; indeed it has been a major factor in the discussions which have taken place in giving security and certainty to our stakeholders. I think those are the two areas where we want to be absolutely certain in terms of the final discussions which take place.

Q103 Chairman: The self-employed and certain issues in relation to the self-employed. What was the other one? I do apologise.

Mr McCartney: The public in general.

Q104 Lord Fyfe of Fairfield: Are there any other sensitive areas where, for example, it would be helpful to apply UK standards overall?

Mr McCartney: Yes. Childcare, for example, is vitally important, care of the elderly, vulnerable groups and childcare, particularly in areas where there will be opportunities for people to arrange services, new services for children, so it is really

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important in this regard that the standards which we have are maintained, and of course those who apply for cross-border trade will understand and acknowledge that that is the level of standards which will have to be provided. We are being really robust about that.

Q105 Chairman: I appreciate, Minister, you would not wish in this kind of meeting to go into too much detail about the objectives there, but the explanatory memorandum in paragraph 25 does talk about these areas where the UK HMG wishes to see certain safeguards.

Mr McCartney: Yes, indeed. I do not want you to think that I am hiding anything, because I am not.

Q106 Chairman: No, no.

Mr McCartney: I know you do not think that, but others outside may. Some people are very sensitive about these things. All I am saying is that I have not participated in any of the discussions so far. That is why I have never mentioned the name of any country. I am trying to be able to, as it were, go there untainted in terms of my attitude towards the negotiating tactics. All I am trying to indicate to you is that these are the areas where we want to be able to have some clarity and certainty. If there is any other difficulty in relation to this, I give you a personal assurance I will make immediate contact with you personally, my Lord Chairman, and advise you if there is any difficulty or if anything I have said today is not a complete answer. I can give you that assurance. In terms of the proposals, the bottom line is upholding your standards, and that has been the overriding umbrella of approach to the negotiations and if I am involved in the end game that is where I will continue to be, and if there is a problem that is where we will be.

Q107 Chairman: On the detail, childcare is actually a derogation, is it not, I think I am right in saying?

Mr McCartney: Yes.

Chairman: Does anybody else want to come in on this point?

Q108 Lord Roper: The Minister might want to let us have a correction on it, because our reading of Article 2, subsection 2(c)(g) excludes childcare.

Mr McCartney: I will give you a personal view. There are some aspects of childcare which in my view at this stage will be covered. I will give you an example. I may get my knuckles wrapped on this, but I am being frank with you. For example, there is some childcare provision which is not provided directly by a public authority but is provided on behalf of or through a service provider, but these are areas where I believe it will be covered. But if they are covered, they will also

be covered in respect of a regulatory regime in all aspects.

Q109 Chairman: We will come more generally to issues of derogations and exclusions, if we may, Minister. That is helpful and we will come back to that. Before I ask Lord Swinfen to go on to a slightly different matter, again we understand the point you are making that small and medium sized enterprises wanting to do business in other countries through the point of contact will have to find out and operate under 25 different Member States' views of what are the standards which they want to uphold. We understand that the UK wants to uphold its standards and every Member State will take the same view. I think you would reasonably say that is an inevitable cost which is worth having in order to make progress?

Mr McCartney: If they had been able to go with the country of origin and the train had left the station with it, that itself had 23 derogations, which meant that small and medium enterprises would have had to have known about them as well. I do understand that some people feel disappointed, but actually if they read in the cold light of day what has happened this will disproportionately help small and medium size enterprises, in my view, because there is such a large number of effective operators who, because of disproportionate cost and barriers to them, are almost completely left out of the market place. That is why I think disproportionately they will benefit from these new proposals.

Chairman: Thank you.

Q110 Lord Swinfen: Mr McCartney, I want to stay with paragraph 25 of the explanatory memorandum, but I want to turn the coin over and look at the other side of it. If you have already covered this in some degree, my apologies, but I am rather deaf and find you somewhat difficult to hear. It is not your fault, it is mine, but there is not much I can do about it. Which of the Government's negotiating lines have been secured?

Mr McCartney: I think on the negotiating lines, one was to manage the negotiations to get a proposal which maximised the coverage, and I think we have achieved that significantly. Not just ourselves. I can just claim credit for the UK. Secondly, in terms of the proposals on health and safety, security, the environment, a regulatory regime in terms of vulnerable people, we have done this. In general terms in the memorandum, I think the original note put down by Douglas Alexander and then expanded on by Ian Pearson, I cannot off the top of my head think of anything in that which has not either been agreed or is still in the table waiting to be covered. So I think in terms of a negotiating stance we have been

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quite successful, because the negotiating stance we have had was also the negotiating stance of, I think, a large number of countries. So we were not standing alone on this in terms that the measures which we were producing were also the measures for most people, and that is why we got so far. So I cannot see any disappointment with anything significant.

Q111 Lord Swinfen: Are there any points which you still feel need to be improved?

Mr McCartney: Yes, some of the standards in some sensitive areas which I tried to outline a few minutes ago, and I have tried to be as helpful as I can there at this stage. What I do not want to do is anything where we end up at the lip on the cup and it slips, so I will come back to yourselves and stand the test of whether what I have said is going to operate or not.

Lord Swinfen: Thank you

Q112 Baroness Eccles of Moulton: Minister, the questions to be asked here are about exclusions and derogations. This subject has already been touched upon, but I have got two quite straightforward questions. The first one is, are there now too many exclusions and derogations from the revised Directive, and if so, where do you see the main issues?

Mr McCartney: Can I set out for you what the exclusions are? We have got all healthcare. My memory of my brief is that originally there was a discussion and an attempt to exclude public healthcare but to give opportunities to private healthcare. Again, it is my understanding—and I will stand corrected if the officials want to step in here—that these will form part of a future discussion with the Commission about healthcare. So although it is excluded from this Directive, it is part of the ongoing discussions, social services linking to social housing, childcare and support of families and persons in need. Again, I made the point, I think, about how I interpreted that in terms of childcare services. If I am wrong, I will come back to the Committee, but that is my reckoning of that, just looking at the brief. Some business activities such as the service of temporary working agencies—again I will ask my colleagues to come in, but I am assuming this is also part of a wider picture of discussions around other directives which have been kicked into the long grass for some considerable time and will remain there because there is no appetite to move forward, mainly because of, of course, agency working. The United Kingdom is a significant leader in the Community on the use of agency workers and if that wasn't out I am assuming it could have been part of a potential show-stopper. Private security services, that is also excluded. The reasons why I do not know at the moment and I have got no idea at this stage whether this will form part of a further Commission work programme, but I will

come back to you. Private international law, I have a brief on that, why that is the case, which I will provide to the Committee. Activities connected with the exercise of official authority, for example notaries, this is a big issue for some of our colleagues close to Calais and there are some activities being carried out by notaries which have been subject to some notaries in the UK making challenges. That is currently, as I understand it, with the Commission on the issues of notaries, but there is a big, big resistance to opening up this sector at this stage. How that list will conclude, I do not know. Whether the Commission is going to take this matter up further or whether it is going to lie in the long grass, I am uncertain. That, from my perspective, is where we are in terms of the derogations and exclusions. Given there is going to be quite a lot of work in these areas, continuing work, adding to the training, whatever you call it, I do think that it is worthwhile to have given here all that we are going to gain, hopefully, in the next few weeks or so. I hope that is an appropriate explanation for you and I will come back to you at a later date about progress in these other areas.

Q113 Chairman: There is a division called. I am advised that people might find it not too inconvenient if they do not go to vote. People are entirely free to have a different view, but well-informed sources near me from different parties tell me to be relaxed about it, as the Minister has done us the courtesy of staying.
Mr McCartney: So we are all in trouble then!

Q114 Chairman: I often tell the Minister that I shall blame him when the Whips ask me where I was!

Mr McCartney: If I could just make a point which I should have made. The exclusions account for between 12 and 14 per cent of the UK GDP, these exclusions which are set out. In proportionate terms it is between 12 and 14 per cent of the UK GDP.

Q115 Chairman: Are these additional to the initial Directive?

Mr McCartney: Yes, but we get at least 80 per cent.

Baroness Eccles of Moulton: That has actually finished my question.

Q116 Lord Haskel: Maybe this is unfair, Minister, but when we saw the Federation of Small Businesses earlier this week we asked them what percentage of their members would be included and what percentage would be excluded by means of these derogations and they said that 60 per cent of their members would be included and 40 per cent would be excluded. I just wondered what you felt about that.

Mr McCartney: I will ask Kristen to give a proper answer, but off the top of my head that would seem to me better than the average, given it was 50 per cent

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of GDP, which I think adds to the point I made earlier that small businesses will disproportionately benefit from this proposal. I hope that is not too much of a clever Dick answer. I will ask Kristen if she wants to make a comment.

Ms Tiley: Yes, just to say that basically we are saying about 45 to 50 per cent of UK GDP is covered, so you cannot know how many firms out of that will be included or excluded.

Mr McCartney: It is not an unfair question, but it depends on the profile of the membership as well and what their issues are really, but if it is 60 per cent I think that is—

Q117 Lord Roper: Minister, I think they were referring to their members who were operating within the services, but the 40 per cent is really not comparable to the 14 per cent you referred to, because it also includes those members who are already excluded by the derogations which were in the original Directive.

Mr McCartney: That is a very fair point to make.

Chairman: The other point they made, Minister, on several occasions is that there is still a lot of benefit to a lot of businesses, even in the revised draft.

Q118 Lord St John of Bletso: Minister, can you elaborate on the consultation process which the DTI has had over the revised draft Services Directive, but more specifically what consultations have there been with the CBI, the Federation of Small Businesses and the TUC on this revised draft?

Mr McCartney: 2004 was the statutory consultation and that went on for three months. Then there are, of course, the usual channels in the sense that there is a good working relationship between the Department's officials and the social partners and it has been in our interests to ensure that we are as open as we possibly can be. I know from my previous incarnation as a minister without portfolio that there has been a great deal of discussion and debate, which was reflected by both Ian Pearson and Douglas Alexander, and as part of the discussions which took place we took our views in terms of health and safety and other issues, so they have been influential and will continue to be influential. The discussions we have had with stakeholders, including the Institute directors, the CBI, the FSB, the British Chamber of Commerce and the TUC, it is through them, for example, I am assuming that the Engineering Employers Federation and other bodies which have a general interest in the area of influence would have also made contributions. There has also been, I think, if not consultation then quite a bit of correspondence from individual trades unions as well as the collective trades unions, and of course organisations in the business sector.

Ms Sellers: Perhaps I could just add to what the Minister has said. We have held large meetings with stakeholders at six monthly intervals, at which we have had probably as many as 150 or more representatives of different organisations. So they have all had an opportunity to raise comments and points with us. In addition to that, every month I see representatives of the FSB, the IOD, the CBI and the TUC to talk to them about their concerns and any points on the Directive. So I think that we have had ongoing consultation throughout all of this period as well as the formal consultation document which the Minister has described.

Mr McCartney: Also, we have in the European Parliament a good working relationship which has been across all the parties and there have been MEPs who have been very, very helpful indeed from the three main parties in this discussion and debate. We have got good close working relationships with them and we will continue to have quite open and transparent arrangements. They have been critical in the strategy of ensuring where we have got to, and I would like to pay credit to them as well.

Q119 Lord St John of Bletso: Could I just elaborate on this? The Federation of Small Businesses claim that they have had limited consultation. I am not taking issue here, but could you perhaps elaborate on those areas of difficulty from those consultations with the various stakeholders? What were the major issues?

Mr McCartney: If you do not mind, I will ask Heinz and his colleagues to answer that, because I was not privy to those meetings.

Mr Kessel: I think, just to go through some of them, with the TUC, as you can imagine, it was all matters related to labour law and employment issues, protection of workers, health and safety issues, and so on. With business in general, it was of course a robust Directive which would achieve an opening up of markets both for companies which wanted to establish and provide services on a temporary basis and also to keep costs down for businesses. Over the two years that we have now been negotiating on the Directive, I think we have taken very cautious and comprehensive note of all stakeholders' problems, concerns and issues which they have with the Directive.

Mr McCartney: I think the specific point is the nature of the discussions with the Federation of Small Businesses. If they cannot remember, can I write to you on that?

Q120 Chairman: That would be helpful.

Mr McCartney: I would not want those colleagues who have worked hard on this to think that we have got a stakeholder who has been unhappy with the discussions.

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Chairman: In a moment I will mention one, but before I invite Lord Geddes to ask a supplementary, could I, as you gave me the unintended invitation to do so, tell you that we, too, have found Members of the European Parliament from the UK helpful in our discussions and we are delighted today to see Malcolm Harbour, who is sitting at the back, who is one of those who have been helpful. We are taking oral evidence from Mr Harbour and also from Eileen McCarthy tomorrow and, like you, we have found them extremely helpful.

Q121 Lord Geddes: Just simply as a matter of clarification, whether I heard correctly or not, Ms Sellers I think you said a couple of minutes ago that you have regular—and the next words are mine, not yours—sort of off the record, unofficial meetings with the TUC, the CBI, or whatever, on a monthly basis, is that correct?

Ms Sellers: Yes.

Q122 Lord Geddes: Has that been ongoing? Those meetings have continued since the production of the revised Directive?

Ms Sellers: Yes. We have meetings with a small group of core stakeholders on a regular basis approximately monthly and I have not ceased those meetings. Sometimes stakeholders do not attend those meetings, but those meetings are on offer to those who wish to attend.

Q123 Lord Geddes: And they continue, so different people turn up at them?

Ms Sellers: Yes.

Lord Geddes: That is fine. Thank you.

Q124 Chairman: On the specific point, what I think we are working towards is that when we met the Federation of Small Businesses they appeared not to have been really aware of the apparent benefit of having a single point of completion and the loss of that degree of benefit is estimated by yourselves at £200 million plus in you went for a single point of information. I wondered if, Minister, the Federation of Small Businesses expressed any view to you as to whether they are aware that the UK's negotiating position is option three, which is indeed a single point of information, and whether they have expressed a view about the agreed loss of benefit on that? As I think we have understood, the Government's view on a risk-based assessment is that that is, as it were, a cost worth bearing?

Mr McCartney: It would be unwise and, I think, cause some difficulties to try and interpret what may have been said in a meeting. One thing is certain, I give a commitment that I will go back and check these notes.

Q125 Chairman: That would be helpful.

Mr McCartney: It may well have been in discussions and clearly they have got to protect their position today and they will prosecute it, and it is their job to prosecute it, and there may well have been discussions at the end of it. They have still not yet seen the advantages and maybe I will have to be a bit more persuasive.

Q126 Chairman: I have to say, Minister, not being critical, to our surprise they seemed simply not to be aware of that which is set out in the impact assessment, that particular point.

Mr McCartney: That is true, but I have got colleagues in the Parliamentary Labour Party who are not aware of the Manifesto yet!

Chairman: Touché!

Q127 Lord Roper: Just purely a procedural point. They did not seem to be aware of the explanatory memorandum which had been sent to our Committee and the draft regulatory impact assessment which accompanied it, which of course goes into some detail dealing with the points in the Detica report, are those explanatory memorandum and the draft RIAs made available to principal stakeholders, or is it only if they were to actually access it in some way through the parliamentary system?

Mr McCartney: I am being prompted that I have actually signed a letter, either last night or this morning, which I have got to send to the Prime Minister for his agreement on the publication. It is all part of the machinery of government and it goes to this committee which all ministers then have to put their proposals through. I am making an assumption again, but I am certain that once that has been agreed and approved that becomes a public document.

Q128 Lord Roper: I think that is a slightly different point. Well, maybe it is the same point, but what I am saying is that when an explanatory memorandum is sent to Parliament about a piece of EU legislation, that is presumably then in the public domain and therefore stakeholders ought to be able to have access to it?

Mr McCartney: All documents which are published in Parliament are in the public domain and they are contained on websites, or wherever. I will again commit myself. I will go back and look to see if there has been a problem, not caused by ourselves because you can see from us that we are very open and transparent about this. We will speak to the Federation and ask them, "Has there been a problem, and can we resolve it with them?"

Lord Roper: Thank you very much.

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Q129 Chairman: That is very helpful.

Ms Sellers: If I might add, my Lord Chairman, the Federation should have seen the study prepared by our consultants Detica, which gave all the different costs and options for the single point of contact, because that was done some months ago and I know that is on our website and is available. The RIA only uses the figures from the Detica study.

Q130 Chairman: The answer will be very helpful to us. Could I move on, because, Minister, you have been very generous with your time but we do not want to keep you.

Mr McCartney: I am moving house today, by the way.

Q131 Chairman: You do not mean you are coming into this Chamber?

Mr McCartney: No. You have been extremely helpful. You have my absolute cast iron guarantee of not having to get divorced like some other McCartney may be getting!

Chairman: Lord Swinfen wants a quick supplementary before I go to Lord Walpole.

Q132 Lord Swinfen: Thank you, my Lord Chairman. It is a very quick point. With your large consultative meetings, how did you recruit the people who attended?

Mr McCartney: There is a huge guest list of the known suspects, organisations, and then they submit who they wish to send to the meetings. Sometimes it is consistent, sometimes it is not. Sometimes the meetings are at official level, researchers, and at other levels the senior management come, but it is their choice who to send. For example, not on this issue but on another issue like the review of the Sunday trading legislation, my first ministerial duty was to go to a stakeholders' function and go through with them what we intended to put in the consultation document. That then, when I left, broke into various groups which they controlled under their own management about how they were going to work with stakeholders during this period with the Government. So we have got, if I may say so, quite sophisticated means of communicating in the sense of maximising those who want to participate. Sometimes you get an organisation which writes in and we will add them to the list, as it were. So there is no kind of magic group of people and then underneath nobody else can have access to it. I think that is a fair way of putting it, Heinz, is it not?

Mr Kessel: Yes, and I think on top of that, if I may just come back to how we conducted the statutory three monthly consultation period in 2004, for which we actually selected 2,000 addressees, predominantly trade bodies in the UK but also individual businesses,

and we draw from that list of 2,000 addressees each time we invite people for one of the three major stakeholder events which we have been talking about. May I just, by way of apology, apologise to my Lord Chairman and to Lord St John of Bletso. I might have appeared as wanting to dissemble on the question of the Federation of Small Businesses, but in that context I am a little bit shocked to hear that the perception of FSB should be that we have not consulted them properly. That should not be the case. We certainly need to work on the perception, but I do distinctly remember we did have a core stakeholder group meeting in April, which was after the Commission's revised proposal, and the Federation of Small Businesses would have been invited, as usual.

Chairman: We must not put words in their mouth. They did not express dissatisfaction, and indeed you will be delighted to know that the Federation of Small Businesses was glowing in its praise of Government and the bodies' work for small businesses compared with elsewhere in other Member States. The Minister might like to look at our oral evidence on that and no doubt use it occasionally.

Q133 Lord Swinfen: My Lord Chairman, the Minister in his reply to me said "the usual suspects". What I would like to know is, was there any sort of general advertising so that the usual suspects or people who were not the usual suspects could just turn up and take part in the consultation?

Mr McCartney: These are organised events. I am sorry about the phrase. It seems as though it is something untoward. What I meant was the established partnerships which are recognised by the European Parliament and the Commission who are there always in all circumstances. In a situation like this where you have got such a complexity of interests, all you can do is to get a cross-section of interests and where somebody has specifically asked to be involved, they can be involved also. Also, in all these consultations the public consultation has been advertised. We have actively promoted it on the website and other places.

Q134 Lord Swinfen: That is what I wanted to know, that you had actually advertised it.

Mr McCartney: Yes.

Lord Swinfen: That is what I was after. Thank you very much.

Q135 Lord Walpole: Minister, turning to the timetable, will the UK be ready for the Directive within two years, and what more do you need to do?

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Mr McCartney: The short answer is, yes, such is my confidence! There are three main parts of the implementation of the Directive which relate to the screening and alteration of UK legislation, the setting up of the single points of contact and the adoption of the mutual assistance system. On legislation, the powers set out in the European Communities Act 1972 are broad and may be sufficient to implement the majority of the Directive. However, we are still investigating whether or not there will be a need for primary legislation to implement some parts of this, and I will come back to you at the earliest opportunity. In the first instance, it will be necessary to conduct a further review of existing UK law to identify those provisions which have to be repealed or amended in order to comply with the principles set out in the proposed Directive. This, in any event, is compatible with a commitment to better regulation, and again we will keep you fully abreast of developments. For example, there may be currently in force in the UK requirements which are subject to an absolute prohibition in the proposed Directive (for example under Articles 14 and 20) and those which are subject to evaluation (for example under Article 13) and a review may have been quoted as necessary to amend or repeal certain provisions of UK law and that a parliamentary bill therefore may be necessary. The function of single points of contact, Article 6, and other provisions in s.1 of chapter 11 will require predominantly administrative changes. Due, however, to the broad scope of the Directive, it is possible that there will be some (albeit limited) impact on UK law. The potential extent of such impact remains to be determined. We and other departments will be looking at this as a matter of urgency once the final test of the objective has been cleared. On the single point of contact, on the basis of advice from a consultancy I expect it to be possible to implement a single point of contact in the form that we envisage which is based on the deep links between existing services within the three years given. UKTI and the Small Business Service are positive about the feasibility of a portal from the UK and their site into the business link site and deep links to authority websites. What we need to do next is to scope the user requirement in consultation with business organisations and develop a project plan to implement the single point of contact in the time given. This would include awareness regime initiatives, and again I will come back to the Committee on how we propose to do this. Mutual assistance: the mutual assistance provisions will be assisted electronically by a system known as the Internal Market Information System (IMI), which will be provided by the Commission as per Article 36(b). This is currently being developed by the Commission as intended to support many directives,

in particular the Mutual Recognition of Professional Qualifications Directive, the eCommerce Directive and, of course, the new Services Directive. Since the Commission's Internal Market Information System has already entered its development phase and will shortly be trialled for doctors and pharmacies under the Mutual Recognition of Professional Qualifications Directive, we are confident that it will be ready in time for the Services Directive. We see no difficulty in using that system and establishing the necessary national contact point in the United Kingdom. Finally, there will not be any need for additional infrastructure since anyone registered in the system can use it by simply opening it into a standard web browser via the internet. I am sure this is all technical knowledge that you all understand better than I do! We anticipate the training of authorities to use the system will be resource-intensive. There is no obligation to register on a certain proportion of authorities by the implementation date, so we intend to do this on a step by step basis, and again I will come back and report back to you on this matter. So although it is a long and detailed answer, I hope it will be helpful to you.

Q136 Lord Walpole: I think that was a very helpful answer, thank you. The only thing is, did you in fact say that everything will be perfect within three years rather than two?

Mr McCartney: Having been in the Cabinet Office over these matters I would never use the word "perfect", but it is as perfect as we possibly can make it and it will certainly be more perfect than if we went down the road of creating an all-singing, all-dancing, new structure. I hope that is helpful.

Q137 Chairman: It is. I have to say it is an extremely comprehensive and helpful answer. Because there is so much of importance in it and we have a crucial meeting next Monday because of the fact that these matters are being considered at the Council very shortly, it would be extremely helpful, Minister, if you had notes there on that particular answer because the transcript may not be available to us in time.

Mr McCartney: I will provide you with the notes to all the questions I thought were given, including ones which you may not have had time to ask!

Q138 Chairman: The ones we ought to have asked you!

Mr McCartney: I cannot be any fairer than that.

Q139 Chairman: On the particular answer you gave—for which thank you, again—you said, helpfully, that in setting up the single point of contact idea and the other issues you would be consulting

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with the business community, and so on. Because, of course, that single point of contact, for example, is really aimed at the UK—it is really aimed at businesses in other Member States who might want to do business here, as I understand it—what is the mechanism by which you or your officials envisage consulting businesses in other Member States, and of course put the other way, UK businesses here would no doubt like to be consulted by the French, for example, on how the French system is being set up? Do you see the point I am making? On these issues the consultation, in a sense, is not the UK consulting UK business, or the French themselves, but really this multi-Member State context?

Mr McCartney: We will have a project implementation study and include it in that, and obviously also we will have active discussions with our fellow Member States to absolutely ensure that the advantages we can get for British businesses are not deteriorated by a failure to implement in an effective way such as we will do.

Q140 Chairman: Similarly, Minister, hopefully it will be possible for yourself and your officials to seek to keep an eye as well on how other Member States are delivering their systems to ensure that UK business is getting a service which those other Member States feel is helpful to them?

Mr McCartney: Absolutely, and this is also a role which I believe the Commission will play very vigorously. As I said, on a number of occasions when I read the answers out to the questions I said that I will come back to you and I am going to give you a commitment on this that I will come back to you with the detail of it.

Chairman: That is extremely helpful. We have only one more short question from Baroness Eccles on this point.

Q141 Baroness Eccles of Moulton: Just one very quick point, Minister. It would seem that if you are a small or medium sized business and you wanted to set up a temporary arrangement in another country and under the “country of origin” principle you would take, as it were, the law of your own country with you while you were doing that. That would give you a degree of certainty, whereas under the arrangement where you are going to be dependent upon the quality of the point of contact in one of the remaining 24 countries, surely you would see yourself as being much more vulnerable to the quality of that point of contact, certainly in the initial stages? Therefore, is it not very important that the questions about to be asked should be really taken extremely seriously?

Mr McCartney: Yes, and I will give you an absolute commitment. This is a critical factor in the implementation of this Directive and given that so

much has gone on between 1992 and now, indeed so much in the last year in particular of non-activity, this is one of the critical pillars of making it an effective Directive or of it not being effective. Given that small companies, as I have said, disproportionately have an advantage in this system, in my view, I think we have got a responsibility to ensure that is exactly what happens in the outcome. This is not a theoretical issue now. If the Directive takes place, this becomes a practical business matter in the market place and it is important that the market place operates effectively and that there is not, either directly or indirectly, something which is done in the system which creates a new barrier or makes it difficult, unintentionally or otherwise. That is why the discussions between ourselves, the Member States and the Commission are so important to make that effective.

Ms Sellers: I think, also, we would consult our core stakeholders about that because they have links to sister European bodies, so they will be able to swap information about how things are being implemented in other Member States. So we will use that as a route to making sure we get this right.

Chairman: You have moved us to the last question.

Q142 Lord Haskel: Minister, I hear what you say about the importance of establishing this from the point of view of British business and European business, but unfortunately there is a number of directives which are not being implemented and our experience on this is not all that good. For instance, there has been a directive for years about the liberalisation of gas and electricity, but that just has not happened. Have you any idea how the compliance mechanisms for Member States which are slow to implement the Directive can be speeded up if other Member States do drag their feet?

Mr McCartney: My understanding is that the infraction proceedings will be used. I am hoping that this does not happen. The infraction proceedings is a very serious thing; indeed, when Lord Haskel and I were ministers together in the first few days of that incoming Labour Government I was having to take infraction proceedings because of the previous ministers who got booted out. So I am very aware of the consequences of infraction proceedings, but the important thing is the machinery of ensuring this market works effectively, fairly and transparently. You cannot overstate it. It is better for me not to comment on other markets at this stage. I understand fully your frustrations and I think your frustrations are equally shared in government circles about that, but in respect of this particular Directive, given that it is opening up such a significant part of the single market for the first time, if it is to work then it has to be robust. For it to be a fair and effective market,

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there has to be an underpinning of it. That is critically important, and again I give you that assurance on that. The road of travel is one down which it is not just ourselves who want to go but of course the Commission itself, and I think the Commission has said, although I have not been at the meetings, quite clearly that the process of implementation will be effectively monitored.

Q143 Lord Haskel: Thank you. I hope that that message will also be put across to the service providers, because again in our discussions with them they were a little bit unsure.

Mr McCartney: Indeed.

Q144 Chairman: Finally, a supplementary on that. The individual companies, businesses, seeking to take advantage of the Directive when in place will expect to be able to exercise their freedom to provide services subject only to certain Articles in the Directive, of course. If an individual business feels that an Article is not being abided by, I think I am right in saying that the course for the business is ultimately, I suppose, through the European Court of Justice? Am I right? So from the point of view of small businesses—and obviously, like you, I hope we are optimistic about the way things are going, but in the past this has come about because although in the Community it has always in principle been possible for a business to provide services in the single market, in theory what this Directive is doing is helping to codify and make sure it happens? In the past businesses have had to go through the European Court of Justice. Am I right that that procedure will still be in place? What I am getting at finally is that from the point of view of businesses it is very important that this system does work better. The Directive is putting in place certain limitations on what Member States can do to restrict things, but ultimately the implementation from the business point of view is that their safeguard is, presumably, they will have to go to law? Am I right?

Mr McCartney: Could I answer this in two parts? There is the informal process, the solve it process, and I think that is the process which is currently being applied in relation to the notaries issue. If that fails or there is no engagement in it—this is a non-lawyer's

answer—then there is an obligation here in respect of our national courts having to apply the Directive. Following that, it will then go to the ECJ. The second part of the answer I can give you is this, again on my understanding, there are two very important things: there is an obligation on Member States to report to the Commission on the implementation of the Directive in their market place, and of course that will also lead to the three yearly review. So from the moment the Directive has to be implemented there is a formal process where countries will be required to indicate the level and quality of its implementation. I hope that two part answer, in theory at least, gives you some security about what we want to do.

Q145 Chairman: Minister, I am sure I speak on behalf of the Select Committee when I extend to you the very warmest of thanks for your time and, as we expected, the frankness of your answers, and again through you to your officials also. Could I thank you very warmly. Is there anything you would like to add before we conclude?

Mr McCartney: Just to say I am relieved! I have enjoyed the discussion and I hope that from that I have actually increased my knowledge, but also, I hope, established a good working relationship on this and other issues. The one thing a minister should always have is ambition, not for himself but for the organisation he gives leadership to, and that is what I want to do, but to do that I need to be able to work in a non-partisan way on many issues with you and I am looking forward to doing that. Your work programme affects my portfolio. You need to know from the absolute outset you will get nothing but cooperation from me for you to do your job of scrutiny, which is important. I notice it has been more on scrutiny, has it not, and it has been very important? The advice and knowledge which has been given through your reports has not only been taken on board, but I hope you will see that in practice it has been implemented, and that is not always the case, I can say, as a person who used to serve on Select Committees in another place! So thank you very much for the opportunity and I look forward to working with you all.

Chairman: Minister, thank you. I declare the meeting closed.

THURSDAY 18 MAY 2006

Present

Swinfen, L
Walpole, L

Woolmer of Leeds, L (Chairman)

Examination of Witness

Witness: MISS ARLENE MCCARTHY, a Member of the European Parliament, Chair of the Committee on the Internal Market and Consumer Protection, examined.

Chairman: Good afternoon, Miss McCarthy. First of all can I extend to you our usual warm thanks for agreeing to give oral evidence at such short notice. It is extremely kind of you to do this by audio conference. I think you know that we are also taking oral evidence from Malcolm Harbour on Monday. We have already taken evidence from the Small Business Service, from the CBI, from the TUC and yesterday from the minister. If we can go straight to questions I will ask Lord Swinfen to start.

Q146 Lord Swinfen: Miss McCarthy, good afternoon to you. I would be grateful if you would let us know what your overall view is of the revised draft Services Directive. Do you see this as an improvement on the previous draft and, if so, how? If you do not see it as an improvement in what way does it fall short?

Miss McCarthy: I presume we are now talking about the latest Commission text which is being discussed in Council. We had the original Commission text, the Bolkestein Directive. We then had a Parliament text and we now have a Commission text. From my perspective the new text reflects much more some of the issues that we had some concerns over in the Internal Market Committee, and has probably rebalanced some of the concerns we had in particular around the original Article 16 and the country of origin principle. I think it is fair to say that this was always going to be an extremely difficult and controversial piece of legislation. To get 25 Member States to agree on this piece of legislation in the sense that we could move forward and have a law that was workable was never going to be an easy process. What we now have is a compromise. The Commission's modified proposal represents to a large extent the outcome of the vote in the European Parliament but it has brought in some legal and technical clarifications which I think will make the directive more workable. Nonetheless, I think that the Council still has some more work to do on clarifying and cleaning up the new Commission text to ensure what is for me the key objective, which is to make this piece of legislation work for businesses who want to get a foothold in another EU country. In terms of the politics of it, people have said to me that it would have been easier to have achieved a piece of legislation before enlargement and that the

existing 15 Member States would probably have been able to agree to it in a more consensual fashion. As regards the perspective of the UK, having the new Member States in there has probably supported more the line that we had, that we want to see a market that is opened up and we want to see opportunities for UK businesses to get into other markets while, of course, respecting the right of consumers to have information and quality services and a right of remedy if that service delivery is not up to standard or goes wrong.

Q147 Lord Swinfen: That is a long answer which properly to understand I think I shall have to read in the report.

Miss McCarthy: If you want to ask me any follow-up specific questions I am happy to answer them.

Q148 Lord Swinfen: I am wondering if you think it will mean that more rather than fewer businesses will try to work in other states.

Miss McCarthy: Again, is this not the issue of the glass being half empty or the glass being half full? The problem I have encountered, certainly with businesses in my own constituency, when asking them why they would not for practical reasons get involved in other EU markets is that they said it was simply too difficult. I have an example of one company which tried to get into the market in Poland and they said that they were sent from one department to another and there was no clarity about what they needed to do to fulfil any formal requirements to set up a business. I had another case of a business which said that when they went to Italy they were being asked to set up four different regional offices and they were being asked for a bank guarantee of several hundred thousand euros, which of course is completely discriminatory because this is not required of Italian businesses, so it is discriminatory in terms of the internal market. The situation that we had was very unsatisfactory and could only be remedied by businesses taking their cases to the European Court. That, of course, is a long process and it is very difficult for businesses to get any satisfaction from court cases that take a long time based on the treaty obligation, which many Member States did not see the need necessarily to fulfil, particularly those Member States that are more

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protectionist. What we now have is a legal framework which we have to try and make work in the Member States and I think that the new draft text, the compromise that we have on the table, gives us that legal framework and is infinitely better than the existing circumstances that we had. However, as I said, we have to see how it is going to work in practice and that is why the Parliament was very keen to put in a review clause which will allow us to come back and revisit whether there is still protectionism, whether businesses, particularly small businesses, are not getting fair access to other markets, whether it is difficult for them, whether it is costly. In a sense the proof of whether this legislation will work is in the practical implementation of it, but that is why I believe also that the Council still has some work to do on this in terms of technical and legal clarification because, as we are currently now assessing what went wrong with the public procurement legislation in my committee, we are discovering that some of the big problems with that were to do with transposition and implementation and with unclear drafting of legislative text and therefore the ability of Member States to interpret that in a way that they saw fit, and therefore you had an uneven playing field again. It is important to try as far as possible to get clear legal language, clear definitions, clear guidance from Member States so that we do not end up in a situation that even with a good piece of legislation businesses will still have to go to the European Court of Justice to get an interpretation of this law. That is a job I think the Commission and Council still need to do some work on.

Q149 Chairman: That is very helpful, Miss McCarthy. We will return to the question of implementation if we may a little later on and we will bear in mind those very helpful remarks. Can I pick up where Lord Swinfen was at? If I could put it very simply, the original draft directive said to businesses that wanted to do business on what called a temporary basis, in other words, a non-established basis, "It will make a big difference to you because you can operate in any Member State based upon the rules and regulations of your own country, and as long as you are legitimate and properly qualified and you do things right in your own country you can operate anywhere in Europe". That has now gone. I am not commenting on whether that is for good or for bad but that has now gone, so businesses in the new draft directive do not have that basis. They will therefore in what is now called Freedom to Provide Services have to find out and operate under all the rules and regulations and laws of the other Member State they will operate in. That means that if you want to do business across Europe you are looking at 24 countries. That may or may not be a compromise that is worth doing but that is the case, is it not?

Miss McCarthy: I do not entirely agree with you because there would not be any point in having this piece of legislation if nothing were any different from the current situation and if businesses had to comply with 25 Member States' different laws and regulations.

Q150 Chairman: That is what we are trying to establish.

Miss McCarthy: That is the reason we wanted this legislation and it would defeat the whole purpose if that was what we ended up with. I do not believe that is what we have ended up with. We have not ended up with the freedom to come in and provide your service under your own legislation regardless of legislation in the country where you are providing that service. I think it is important to say that, as regards Freedom to Provide Services, the country of origin principle does not exist *per se* in European primary law, and where it has been laid down in technical legislation there have been tendencies, and that is worth looking at in the case law of the European Court of Justice, to narrow down the scope of application or confine it to a means of avoiding duplication or administrative controls. What we did in the Legal Affairs Committee originally was to try and say that you can still use the country of origin principle although essentially now it is the freedom to provide services, but that must be in line with ECJ law in terms of saying you can add Member States to that. I think it is important to get the text right on that because it does say that Member States may not restrict the freedom to provide services in the case of a provider. Another issue that is very important here, which of course is a point of discussion in Council, is how you are going to screen to ensure that that does not happen? Of course, with regard to this idea that Member States can add obligations, they can only add those in the sense that it is to do with public policy, public health, public security and protection of the environment, and in that sense, as I said, we would want to see screening procedures to see that they were genuinely public protection as opposed to protectionism. It is quite clear that they would have to fit in with the principle that has already been established in the European Court on that, and that means that they must be necessary and proportional; other than that it would not be acceptable for Member States to impose legal obligations. They must be also non-discriminatory, of course. That would mean that a business would have a case against a Member State if they were adding in obligations that went beyond current ECJ rulings or were being used as forms of protectionism to stop a business setting up. There are some obligations which are limited and those obligations I would say certainly have to be screened to make sure that they are in line with the ECJ principles of how they have applied the country of origin or mutual

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recognition principle. There is a more important issue for your committee which you may want to reflect on in the longer term, and I had some discussions in Strasbourg this week about this. Certainly some of us are concerned at the trend to weaken the mutual recognition or country of origin principle in successive pieces of legislation by saying that we should really only now look at where we can genuinely harmonise areas where we should open up the market. Of course, that was a line that was taken when we had discussions about the services. People only wanted to include those services where you had genuine harmonisation. Those of us who wanted a more open market said that if we did it that way we would have to wait 20 years because we would not have harmonisation quickly and it would undermine the fundamental basis of the internal market, that of mutual recognition and the country of origin principle. Here I think the country of origin principle has been amended; it has not been deleted, but again it is an important issue for us to scrutinise how it has been operated in the context of the Services Directive. If I can be so bold as to make the suggestion, it would be very useful to have a good piece of work done and evidence taken on what is happening with the country of origin principle and mutual recognition in the EU25. My view is that it is being weakened in favour of the harmonisation approach which I think will take it backwards.

Q151 Chairman: You will not be surprised to know that we are greatly relieved to hear that the Services Directive has not gone down the harmonisation route. We totally agree with you on that. That would have been an enormous step backwards.

Miss McCarthy: Can I also add, and I am sure you have already looked at this in taking your evidence and in your papers, that I do not think we should get too hung up on the issue of the cross-border element of businesses really not being able to provide services in other EU countries. The UK commissioned a study from the Copenhagen Institute of Economics on the economic impact of the provisions in the Services Directive, particularly looking at the country of origin principle, and that study concluded that the removal of the country of origin principle would only reduce by around 10 per cent, approximately 24 billion per annum of euros across the EU, the total gain from the Services Directive, so it was not seen to be by the Copenhagen study that significant in terms of the cross-border element. Nonetheless, I think there is a fundamental principle about maintaining the country of origin principle. What you will find in terms of the political debate and the divisions between Member States, as you will find divisions between different delegations and members of the European Parliament, is that the freedom to provide services for some is the end of the country of

origin principle whereas freedom to provide services for others is the country of origin principle by another name. I am sure Mr Harbour will tell you that when he comes to give you evidence but there are some people that believe that we do not have a country of origin principle because that is what they want: they do not want to have a country of origin principle. It is our duty, I think, to make this work in a way that the obligations that Member States can impose are limited in their scope and are fully justified, proportional and non-discriminatory.

Q152 Chairman: In regard to Article 16, the very first sentence, which you implicitly were quoting in terms of Member States having to respect the right of service providers to provide services in a Member State in which they are established, do you take that to mean that the presumption is that you can offer services in a Member State and supply them unless exceptions apply and that those exceptions that then follow must be non-discriminatory, must be necessary, must be proportional? Do you interpret that to mean implicitly that the country of origin principle actually applies unless (a), (b) and (c) in clause 1 of Article 16 are prayed in aid? I am trying to understand from a business point of view that wants to look at exploring markets across 24 Member States whether it can presume that it can offer services unless certain limited objections are raised under 1(a), (b) and (c) but 1(a), (b) and (c) appear to be intended to ensure that any restrictions that are put in place are non-discriminatory, are judged necessary and are proportional; in other words, subject to that, the country of origin principle would apply, that is, if you do business in one place you can do business in another place.

Miss McCarthy: That would certainly be my interpretation of it as I see it, it having been redrafted. As with all of these issues, it really comes down to the concrete operation of it. If I can try to give an example where, as you rightly said, I can provide a service in another Member State, and without being flippant I think it is quite a good example, if I want to provide a party service in somewhere like Finland, where it is very clear they have strict alcohol laws related to public health, what is quite clear is that I can come in and provide that kind of service, provide food and entertainment with alcohol included in that, and I can operate that service across the country. However, what I will have to do is fulfil the public health and public policy obligations that the Finns set down in terms of the sale of alcohol, the use of alcohol, et cetera, but that will not be any different for me than for a Finnish service provider doing that. That is where it has to be non-discriminatory, but, of course, I would recognise that they have different alcohol rules than we have in the UK. If I can give you another example, which I think the UK has

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sought to raise also in Council meetings, we also have a very good anti-discrimination disability act, so if I were a service provider coming in here they would have to take account of the fact that that is a law here in terms of non-discrimination against people with disabilities. They may not have to comply with those rules in their own Member State but that is part of the public policy, public interest rule. Of course, it also applies to UK service providers. It is the non-discriminatory fact that is going to be important here in that if you are applying those kinds of rules to your own service providers it seems to me to be legitimate, but if you are providing something entirely different to stop other providers throughout EU Member States from coming into the market then it clearly is discriminatory and is not in line with the ECJ principles that are contained within Article 16 or new Article 21. I hope that once we have more case law and more cases of this happening we will be able to read out what is very clearly the kind of practice that we do not want to have and which will encourage businesses to get a foothold. In some ways we have got very hung up on the issue of Article 16 and, of course, it is important and it is fundamental to the text, but I have always said that, given the experiences that small businesses have had, and I think small businesses need to be reflected in this debate, the key thing for small businesses is that when they try to get into a market they do not have the resources, the staff, the back-up that large multinational companies have. Most multinational companies have said to us that they do not have a problem setting up in another Member State. Small to medium sized businesses do have difficulties. For them this single point of contact is going to be fundamental in assisting them in terms of access to information and what requirements they will have to comply with, and how they can access all the information they need to be able to set up a business as another provider in the Member State where they are based. They should have no differences. They should be able to have the same access to information and the same rights as businesses in the country of destination even if they are coming from another country.

Chairman: In that article there are three criteria—non-discrimination, necessity and proportionality, and I assume the intention is that all criteria have to be met. Lord Walpole wants to raise a practical example where necessity could be called in aid but how it would work.

Q153 Lord Walpole: This is a case which in fact we picked up when we were doing the previous report on the directive. If you are a hairdresser in Germany you are expected to be of a certain standard. If you are a hairdresser in this country—well, the Chairman has had his hair cut recently and he has discovered a wide

range of qualifications of people cutting hair. We understand that it would be difficult for English people to go into Germany and cut hair unless they were really at the top of their tree. Is this true?

Miss McCarthy: One has to bring into play here a separate piece of legislation which we have, which is about mutual recognition of professional qualifications. Mutual recognition of professional qualifications means you have to acknowledge the qualifications that that person has in that country, and you simply have to demonstrate if you are that person that you have a level of proficiency which again the host Member State would be obliged to acknowledge in terms of how we have drafted that legislation, which means that you would not be prohibited from setting up a hairdressing business in Germany. A hairdresser is a good example because it is an example that was used for one of the reasons why we did not like the original Commission proposal. The original Commission proposal meant that, for example, if I went and set up a hairdressing salon somewhere else and I caused severe damage to a client or consumer in Germany, that consumer in Germany, let us say from Berlin, would have to go to court to get a remedy in the UK where I have an original base. That was an issue that we sought to redraft to the benefit of the consumer because the fundamental issue for me is in terms of thinking about my constituents as recipients, not just as businesses providing into other countries. I will give you an example, and again I do not wish to be flippant. I have recently had building work done on my home. We have a shortage of electricians and plumbers in the UK. During the building work that was being undertaken our electrician, who was contracted through the building manager, absconded with a lap dancer to Australia and left us therefore with no electrician to complete the work. We then had a four-week stoppage until he found an electrician because there were not enough business people around to do that job. If I try to translate that into this, if I had a choice of service providers providing electricians, plumbers, those kinds of services here in the UK, provided mainly by Polish companies, Portuguese, Greek companies, I would be happy to access any of those services as a consumer as long as I knew that they were of a high standard. The reason why the labour law initially came in was that we have to acknowledge that some consumers may want to know how much the person is being paid for that job and whether they are undercutting labour that is being employed by UK companies, so is that an unfair advantage. Of course, my argument would be that there will always be competitive differences but we are talking about wages that are perhaps below poverty wages, which is why it is important to emphasise—and we have emphasised that to trade unions—that the minimum

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wage will apply to anyone coming in to work for a provider from another country (Estonia and Latvia being used frequently) into the UK. I also want to know as a consumer that if that electrician does not wire my house properly and it burns down and my neighbour's house burns down what legal rights I have. I do not want to have to go to court in Warsaw or Berlin. These are issues of consumer confidence. The consumer has to know that this service, in terms of being accessed from any EU country being based here, is a service that they have the confidence to use because otherwise the Services Directive will not work. Particularly in the case of the more protectionist countries they will look for reasons why not to use other providers and we have to be able to give them the guarantees that they are going to get a high quality, good service and one that can compete in any way fairly or at a quality level on a par with service providers in their own country.

Q154 Chairman: I will not pursue that because of the time.

Miss McCarthy: Can I just say that it is not just Article 16. Do not forget that in Article 14, which is very long; I think there are six, seven or eight paragraphs, we have laid down a list of prohibited requirements which very clearly state to the Member States which requirements they are not allowed to impose because we would see them as discriminatory. We have tried to build in as many safeguards as we can. One of those issues, to give an example again, is having an establishment in one Member State. That means that as a UK business they cannot stop me providing a service in Italy by saying, "You also have to have three or four businesses in other EU Member States". That would be entirely discriminatory. We have set out some of those issues in terms of whether they should have to have an office base or an infrastructure there. We think that that is not necessary and it is particularly not necessary in a world with the internet where we are seeing service provision already happening across the internet without having to have a legislative framework for it.

Q155 Lord Walpole: Do you envisage Member States providing single points of information or single points of completion in respect of points of contact for firms from other Member States, and which in your view would be more appropriate?

Miss McCarthy: I was quite bemused when this whole debate came up and I do not really understand where it came from in the first place. What is the objective of a single point of contact, which was the original proposal? It is in a sense to speed up authorisation and reduce costs and allow businesses to have access to information and, if you like, complete any formalities that are required as quickly as possible. The idea was to stop multiple visits to Member States

to have to do that. It was to stop having more restrictive authorisation schemes. I rather have the feeling that too much has been made of this issue about whether it is completion or access. From my perspective I think you can have access to all the information you need and you may even be able, if we are creative and innovative, to complete a lot of those requirements in terms of form-filling and depositing registration on-line, so I do not really see where these wildly differing costs have come from and why we have to see this as an issue in terms of access or completion. I think you should be able to do both. You should be able to access all the information you need to set up a business and you should be able to complete that. The question is, do you need a massively funded office to be able to do that? We have certainly tried to give the Member States some ideas around how the single point of contact should work. I have to say that they have not accepted a lot of our views in the current debate and the Commission has made it very clear to us that the Member States themselves reserve the right to determine how those single points of contact would be set up. We accept that because it may be in the case of the UK that we decide to put that into the DTI and that there would be a hot line or web information available. I think there needs to be a discussion, and I have said this to both the Commission and the Austrian Presidency, about how you have a common approach in this area to make sure that businesses have a similar standard of information when they go to individual Member States. We have set up a Rolls-Royce service in the UK to make sure that businesses have all the information they need to be able to get up and running, whereas if someone goes to Poland or Germany they find that they are back to the similar problems they had before where they cannot access the right information to make the registration or look at the public requirements that they have to fulfil, and that therefore again they are disadvantaged or discriminated against. I just think that one should not make too much out of this issue in the sense that we should apply the principle that it should be as affordable and as cheap as possible. We should not make it into a massive administrative task. Nonetheless, it has to function and my point to the Member States was to say, "Put your heads together and think about creative ways to do this". We also have Euro Information points in Member States that we have set up recently. Rather than the job just being to provide information on the EU or on how legislation works or what are your rights, there is no reason why you could not put one of these points of contact on a Euro Information site where businesses could go round and say, "What do I have to do in this country to set up a business?".

Q156 Lord Walpole: I think that is true of the larger businesses. We were particularly thinking of the problem with small businesses whose time is spent

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managing the business and running it rather than having to find out lots of information from lots of different places.

Miss McCarthy: That is why there should be a single point of contact that brings together all that information for a business to be able to have that easily. I would also argue that a lot of small businesses do not have the time to go and have face-to-face meetings with people because they are busy running a business, so why can they not access all that information on the internet, do a lot of the form-filling they need to do in advance and then have that signed off? We have a very interesting development that we have pushed very hard in the EU, which is this new system called "SOLVIT". We have SOLVIT offices right across the EU which are there to solve the problems where there can sometimes be misadministration of legislation or failure to implement legislation. That business goes to the SOLVIT office in a Member State and says, "I have a problem here. I have not been able to get my—". I had an example of a dentist who was not able to practise elsewhere. The SOLVIT office told him what his rights were, what the legislation was, what information he needed and they also informed the Commission that the Member State was in breach of the legislation that they had implemented. There are lots of possibilities around how we can make life easier for SMEs. I have also proposed to members of our committee that we may want to look at this issue within the committee to see how we are going to set up these single points of contact to ensure that businesses have easy and rapid access and a common system across the EU where, as I said, you do not feel that one Member State is not providing the kind of service we would like to see and another Member State is providing a good service. There needs to be some quality standard of service given to businesses who want to set up in another Member State. Again, I think the problem we have here is that the Member States reserve their right to determine where they will set it up, so in the case of Germany they might argue that they will have federal offices or they may just have one national office in Berlin. As I said, I think there needs to be some more thinking done in this area and we need to use all the electronic information possibilities that we have to make life easier for businesses.

Q157 Chairman: Before we move on to the final theme of implementation, on the single point of contact has the UK Government, through the DTI presumably, briefed or discussed with you their specific concern about the single point of contact and information rather than completion? I think you said you were a bit puzzled by that.

Miss McCarthy: No, I have been briefed. I have been briefed on it in terms of the better regulation standards. I think it is a bit of a misunderstanding. Forgive me, those of you who are lawyers, but I have spent 10 years on the Legal Affairs Committee and I sometimes feel that lawyers spend their time finding problems that perhaps do not exist. Nonetheless, of course, we have to be careful of not encountering problems when we set up a system that does run into a serious issue of administrative burden and cost, but what we need to do is get the experts to sit together and find a way to set this up so that it is not an administrative burden on the state, because that clearly is not the objective, and also that it is affordable and easy for businesses to access. I have now received the document that was drawn up from the DTI looking at what the problems were in this area. I am making my way through that but I am not sure whether it is a problem of anticipation or other potential problem, and obviously we have to have the rules.

Q158 Lord Swinfen: Miss McCarthy, what do you think is the likely timetable for implementing the directive?

Miss McCarthy: First of all, of course, we have to see if the Austrian Presidency can take this through. We have left a gap in our committee for 29 and 30 May because they were of the opinion that they may be able to get a political agreement then but I think that is unlikely. I think it is optimistic. I think the best chance we have is to try and get an agreement in the June Competitive Council meeting. We have had a meeting with the Finnish Presidency who are also preparing for whether it slides into the first month or two of their Presidency. Obviously, the first issue is that we have to get a political agreement. It will have to come back to the Parliament for us to ratify that. There is a will, I think, in the Parliament to try and reach a second reading deal on this provided that the Parliament has the view that it is a directive that we could accept and how much of the Parliament's amendments are reflected in that. At the moment, of course, there is a substantial element of Parliament's amendments in there, and I think that the Commission and the Council are trying to respect Parliament's wishes in this area but obviously we are seeking to get more clarification, particularly around the technical and legal amendments. All things being equal, we probably would be looking to sign it off in September or October. The Parliament's amendments provided for a three-year transposition period but the revised Commission text establishes the shorter period of transposition of two years. Of course, also you will have noticed that the single point of contact has a longer transposition period in the Commission's text. My view, and I have said this also to ministers at the offices, "You should have the

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single point of contact up and running in advance of the transposition so that businesses get advance notice of access and what they need to do when the directive comes into force". Obviously, this is a question of how much time we need to set up a single point of contact and that comes back to your point: what will be the job of the single point of contact? If it is a relatively easy job to do and if we can do that from a UK perspective in bringing together already existing information in the DTI then it may not take us very long to do that. In some other Member States it may be a brand new issue and it may well take them three years to do that, but, as I said, the Services Directive itself comes into place in two years' time. Also, we have a longer period, of course, to give Member States time to get electronic means of access up and running. The Services Directive will also be accompanied by additional harmonisation measures which are already envisaged in the revised text and, of course, the Commission has to assess whether any additional measures are needed and whether Article 2 on the scope and Article 16 (which is now 21) Freedom to Provide Services, would require any more amendment once the directive came into force. There is still some work to be done in this area but we want to make sure that the provisions of the Commission would guarantee proper monitoring of its implementation and impact on the Member States and that we do end up with a situation where service providers who are complaining to the Commission and asking for investigation will be able to go to national courts to apply the conditions of the directive and, of course, we need to make sure that Member States which are not in compliance with the obligations of the directive will also then be taken for infringement proceedings before the ECJ for failure to implement. In a sense we have to get it right to make sure that all this is in place but we are talking about two or three years down the line. What I do not want to see is that Member States then argue that it takes them a much longer time to get these single points of contact up and running and that therefore that would give them, if you like, the potential to say, "We need an extra two or three years" and then we end up with another 10 years before we see this directive having any impact at all or businesses having any access to other markets. That is something that I am concerned about and would want to watch. If I look at the Public Procurement Directive provisions, which we are now scrutinising in terms of implementation and transposition, and I think they were introduced in 1999, there are still some Member States who have not implemented. These are issues that are fundamentally important in terms of foot-dragging on this issue and making sure that we do not allow some Member States to use any complexity around the legislation (which again is why we need good, clear legislation) to argue that it

is going to take them much longer to implement it and we then do not see any results before 2010 or 2015.

Q159 Lord Swinfen: Thank you for that answer. I think within it you have answered the next question that I was going to ask on how you envisage the movement towards implementation being monitored, so we will leave that. What recourse will aggrieved or discouraged businesses have if they find that implementation has not taken place and they are unable to set up on a temporary basis in another state?

Miss McCarthy: I think I did try to answer that when I talked about the implementation process going forward. As I said before, the reason why I think this is an improvement is that it is much easier to monitor and give businesses remedies when the Freedom to Provide Services is not working in other Member States if you have a piece of legislation. With the treaty obligation that is not working at the moment. We know that Member States are not compliant with that and there is a lot of discrimination and businesses are being prevented from getting a foothold in the area of services. The issue is that they would then have taken their case to the European Court of Justice; that is why we have got some ECJ case law which has actually interpreted the treaty. We will now have a piece of legislation. The first point is that they do not have to complain to the Commission on that, although from our perspective it would be useful for us to gather any complaints via the Commission so that we can identify where there may be potential problems in implementation, but they can actually complain before a national court to apply the conditions of the directive as they would be applied to a service provider in the Member State where the business has sought to set up. Of course, if we were to find that a Member State were then not in compliance with the directive the Commission would take them for infringement proceedings before the European Court of Justice. I have to say that, having just completed a report myself on better regulation in the internal market, we have argued for fast-track procedures for the European Court of Justice for cases other than lengthy ones. We have argued for stronger sanctions for Member States that are not complying. All of this, of course, has been reflected in terms of the Commission's response to our better regulation proposals and requests. There are now better routes for businesses and, as I said to you before, I hope that they will use the solvers' offices, for which I really have an extremely high regard because I have had businesses come to me and I have passed them on to the solvers' offices and they have found a resolution to the problem. Not only have they found a resolution, but they have also informed the Commission that a Member State was not in

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compliance. They contacted the local authority in one case, in Germany, and told them that they were violating a piece of European law and the local authority fixed it. We need to use all the armoury of weapons that we have at our disposal and there is no reason why small businesses cannot go to a solvers' office, let us say in France or Germany, and say, "I am trying to set up a business here. We have the Services Directive. This regional authority [or local authority or Member State] is not allowing me to set up a business", and the solvers' system will pick that up very quickly. It will tell them what their rights are, it will inform the Member State that they are not implementing the directive and, of course, this will go back into the system that we have of monitoring in terms of seeing where the problems are and I think we will very quickly read out the Member States that are not complying with legislation as per the letter on which they signed it off, mainly that we want to see a single market in services.

Q160 Chairman: That is really helpful. Miss McCarthy, before we finish is there anything you think we have not touched upon that is really quite important in reflecting upon the directive as it currently stands, amended in its latest version by the Commission?

Miss McCarthy: Maybe it is worth pursuing this issue, particularly since it has been raised as a potential problem or indeed a misunderstanding: what is the role of a single point of contact? I think we had some good ideas in the Parliament on this because we certainly want to see it work well. We

wanted to look at using new technology, such as electronic pro-forma registration, and also we wanted to ensure that there was not this principle of what we call passive authorisation. There are some issues around that because these potentially could be major stumbling blocks for businesses if they cannot get access to information or they cannot get support and assistance from other Member States in trying to set up a business. It is certainly worth pursuing that angle.

Q161 Chairman: Thank you very much. You have been very kind to give us your time, Miss McCarthy. *Miss McCarthy:* I think it is very important because I think you are doing a great job. As I have said before, I think to the disappointment of my colleagues from Westminster and their parliamentary committees, I think your scrutiny is vastly superior to theirs. That is why I like to help you with these things.

Q162 Chairman: We all have different constraints but, if I may continue this mutual back-patting, everyone tells me you are doing a marvellous job as the Chairman of your committee, so congratulations on that and we look forward to continuing working with you.

Miss McCarthy: Thank you very much. It is not very easy, as my good friend and colleague, my predecessor, Mr Whitehead said, it is not easy to be a British Chairman on the Internal Market Committee.

Chairman: Thanks again, Miss McCarthy. We look forward to talking to you again before too long.

MONDAY 22 MAY 2006

Present	Fearn, L Fyfe of Fairfield, L Geddes, L Haskel, L Roper, L	St John of Bletso, L Swinfen, L Walpole, L Woolmer of Leeds, L (Chairman)
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Examination of Witnesses

Witnesses: MR OLIVER W BRETZ, Partner and MR JOHN OSBORNE, Partner, European Competition and Regulation, Clifford Chance, examined.

Q163 Chairman: Good afternoon, Mr Bretz and Mr Osborne. Welcome back, if I may say. Thank you, again, for meeting with us to discuss the now second version of the draft directive on services. The advice you gave us on the first occasion was extremely helpful and the Committee is grateful to you for sparing your time this afternoon. We confusingly sent you two lots of questions and when we ask them we are going to move between the two. I know you will be quick enough on your feet to spot where we are going and, of course, there may well be supplementaries which go beyond that. As always, if at the end of our discussions you feel that we have not covered points that you think are quite important for the House and the wider public to come to a view on these matters, perhaps you will draw them to our attention. Would it be agreeable if we go straight into the questions?

Mr Bretz: My Lord Chairman, I just wondered if it might be useful, seeing that last time we gave a very short introduction to the country of origin principle, to just recap and then perhaps concentrate on how the situation looks different today from the situation we faced last time.

Q164 Chairman: Fair enough.

Mr Bretz: I will be very brief on this point. Last time we said that the country of origin principle in relation to services was already enshrined in the case law of the European Court. At the time we were faced with a draft directive which specifically included a country of origin principle. The evidence that we gave in summary was that the principle embodied in the draft directive was not new, it was something else well known, it was something that the Court had explained in previous case law. We now have a draft directive which no longer specifically includes a country of origin principle. I am sure one of the questions that you will want to ask in due course is what is the effect of that? We thought it might just be very useful to set out, very briefly, the relationship between the Treaty and the draft directive. In European Community law you have primary sources of Community law, and that is essentially the Treaty as interpreted by the

European Court. Now that primary law is supreme, which means it effectively prevails over any secondary legislation which is implemented pursuant to the Treaty. In as far as you have a country of origin principle which is enshrined in primary European Community law, there is nothing a directive can do to remove that country of origin principle. One other point I want to make before we start is that there is a principle in European Community law which is that any secondary legislation has to be interpreted in conformity with the principles of the Treaty. In as far as the European Court of Justice has to interpret the terms of this draft directive they will do so in conformity with the primary sources of European Community law and the prior case law of the court. That is all I would say as an opening statement.

Chairman: That is extraordinarily helpful and exactly the starting point I think you will find we will be pursuing. It lies at the heart of what are the key elements of our inquiry. If we may, we will start the ball rolling but we will try to keep refining this issue in our supplementaries. Lord Geddes.

Q165 Lord Geddes: It is indeed very nice to see you back. An advantage of your opening statement is you have shot some of our initial questions firmly in the foot, which must be a good thing because it shortens everything up. Can I ask a supplementary to what you have just said, Mr Bretz. Would we be right in thinking that the freedom to provide services, which, if you like, is the new key part of the revised directive, vis-à-vis the country of origin principle, is now going to be, to an extent, a conflict with case law?

Mr Bretz: My Lord Chairman, I would answer that question with a resounding no. My view is that the freedom to provide services effectively states what the fundamental freedom is, namely that a Member State shall ensure free access and free exercise. At the end of the day it is up to the Court to interpret what that means and in doing that the Court would have regard to the established case law under sources of Community law. It is really just a more specific statement of the obligations of the Member

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States in allowing service providers to provide services and allowing recipients of those services to receive those services.

Q166 Lord Geddes: Specifically, can I ask, for a business that wants to put its toe in the water, wants to go in on a temporary basis, again coming back to what the previous directive said relative to this one, what do you think are the changes now for such a business wanting to go in on a temporary basis?

Mr Bretz: Prior to this draft there was a specific statement in the draft directive that you could access another Member State on the basis of the regulation of your home country Member State. That was the basic substance of the country of origin principle. That specific statement is no longer there, it is now replaced by the language that talks about free access and free exercise. When you look at the context of Article 16 what you see is that actually you have a very limited list of provisions which would allow a Member State to restrict that free access and free exercise.

Mr Osborne: That limited list is actually quite interesting because the language of Article 16 comes from the European Parliament amendments. That limited list says essentially the host Member State can only restrict a foreign service provider where any national restrictions can be justified on the basis of public health, public security, protection of the environment, et cetera. To that we must add consumer protection because that is already covered by Article 3(2). What that is saying is that a host Member State can justify restrictions on those very limited grounds. The case law of the Court under Article 49 is that restrictions can be imposed for a wider range of services, the so-called overriding grounds of the public interest, which include a whole range of things. What is interesting is that the European Parliament came up with this more restricted list of justifications for host Member States for restricting the operations of overseas service providers but, in fact, I think that narrow list would be expanded by the Court to cover all the wider grounds of the public interest which the Court has now recognised over the last 20 years. I think if you go to recital 20 of the Directive you will find a long list in the recital of all these public interest grounds, and new ones keep on being developed. It is recital 20(a). You have got social protection of workers, preservation of the financial balance of the social security system, prevention of unfair competition, et cetera. The other day in the *Watts* case, which the European Court decided on Tuesday last week, you had the management, et cetera, of the NHS and the hospital planning system. There is quite a wide range of overriding public interest grounds and I believe host Member States would

still be able to justify on that wider set rather than narrower sets of four set out in Article 16.

Q167 Lord Haskel: When we discussed this with you previously there were lots of discussions about qualifications. If you remember we talked about hairdressers in Germany having to be qualified before they could cut your hair whereas they did not have to be qualified here. The whole purpose of the country of origin principle was to get over this. We do not have the country of origin principle any more but we do have the previous case law which you have just told us about. Where do we stand on these trade qualifications because it seems to me that although the Directive says that there should be the freedom to provide services, each of the 24 Member States will have its own trade rules, where do they stand in law?

Mr Bretz: My Lord Chairman, last time we spoke about professional qualifications on the one hand and the country of origin principle on the other hand. One of the key differences between then and today is that we now have a directive on the recognition of professional qualifications, which is Directive 36 of 2005. The very interesting point about that directive is that it contains a mini country of origin principle in relation to professional qualifications and with your kind permission I could spend two minutes explaining how that works. Article 5 of that Directive basically has the title “The Principle of the Free Provision of Services”. In a nutshell what it says is that if you are regulated in your home Member State and you are providing services on a temporary basis in the host Member State and you are doing so under your home title—and that is an important point—on a temporary basis then the country of origin principle will apply. In addition it says, also, that if you are not regulated in your home Member State and you are provided with services on a temporary basis in the host Member State, and you have provided those services for two out of the last 10 years in your home Member State, then you can also do so under your home title and you can basically do so on the basis of a country of origin principle. We promised last time that we would not talk about construction workers again, so I will choose a different example. What we found was a very interesting German case on farriers. This is a very interesting question. Assuming for a moment that a German racehorse comes over to a race in the UK and the German racehorse comes with its own farrier, that farrier will be able to provide those services on a temporary basis in the UK under the title of the home Member State despite the fact that the shoeing of a horse without being a member of the workshop company is actually a criminal offence in the UK. Here you have someone who can come over to the UK and

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provide a service which it would be criminal for him to provide without being a member of the worshipful company. That is the basic point, you have a country of origin principle that operates within this directive.

Q168 Lord Roper: Could I clarify one point. This is a separate directive on professional services. Are the professions listed in that directive and are farriers referred to as such?

Mr Bretz: There is a long schedule of professions in the back of the directive. The interesting thing is farriers, as far as we can find, are not specifically listed and the German court said "Never mind" but Article 5, the country of origin principle, is of general application.

Mr Osborne: Under the English Act dealing with farriers it assumes the Service Qualifications Directive applies because a previous version is recommended in the draft. The actual annex is probably about a quarter of an inch thick so they cover a very wide range of occupations, all of the engineering, mining occupations, there is a vast range of occupations.

Q169 Lord Geddes: On this whole question of the country of origin principle, qualifications, et cetera, can I ask are you happy with the revised directive from a legal point of view, or any other for that matter but assuming as lawyers you will approach it from a legal point of view? Are there any changes if you were able that you would like to make to the revised directive?

Mr Osborne: The difficulty with directives like this is you are legislating at a dreadfully high level because you cannot get down into the real detail. Looking at legislation at that level, we think that it does a reasonable job. We think that, in effect, it allows for the country of origin principle to apply. It has a clear statement in there that host Member States should provide access to the foreign service provider to come and exercise that activity in their country. What it lacks is what it had from a previous version of the Directive in that there was a clear acknowledgement that the Member State responsible for the regulation of the service provider was the home Member State and, therefore, there was that responsibility. In so far as you find service providers going cross-border and encountering different restrictions of different types in different sectors, it might have been slightly better if they too could have appointed wording in the Directive saying that the sole country responsible for regulation of me was my home Member State. The case law effectively achieves exactly the same but there would have been that advantage in dealing with authorities, whether at central level government or people responsible for enforcing

regulation of an industry being able to point to the simple wording in a recent directive.

Q170 Lord Swinfen: Mr Bretz, you said that a firm could provide temporary service in another Member State under the title upon which it operates in its home state. The word "title" is an interesting one. Are you talking about his professional qualification? You mentioned a farrier, if it was a firm of farriers would they have to operate under the same firm's name? Are you talking about the firm's name or the professional qualification under which they are operating?

Mr Bretz: That is a very interesting question, my Lord Chairman. We are talking about a professional qualification under which the service is provided. Now that is the professional qualification of the individual concerned. In the German case there was an interesting comment which was that the person concerned, who was registered in France, used a German title on the side of his van. What he could have done, of course, was instead of using the title, he could have used a description, namely "I shoe horses" instead of calling himself a farrier in German. There is this distinction between the provision of a service and using a recognised title. In the UK it is slightly different because what we regulate in the UK is the actual act of shoeing horses. There is a register which is maintained by the Worshipful Company of Farriers and effectively you have to have some qualifications to get on to that register. It depends on whether this is a regulated activity or a regulated title.

Chairman: A division has been called so I will adjourn the Committee.

The Committee suspended from 4.42 pm to 4.48 pm for a division in the House.

Chairman: The Committee is sitting again. I have some supplementary questions, but Lord Roper has a question.

Q171 Lord Roper: Could you sum up what we have heard from you so far and in particular what you referred to about the other directive, that effectively the change has been moved from an explicit country of origin principle to an implicit country of origin principle? Is that a fair summary?

Mr Bretz: My Lord Chairman, I would not use the word "implicit" because the country of origin principle has always been enshrined in Community law. The Directive no longer contains an explicit country of origin principle but the country of origin principle simply has not changed; it has always been there, it will always be there, there is nothing that you can do by way of delegated legislation to change that.

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Q172 Chairman: Can I pursue that because you rightly said in your initial remarks that this goes to the heart of the major part of this assessment of the revised draft Directive? Can I try a position on you and see how you react to this? Some proposed changes might put the matter thus—and I would like your comment on it—that the freedom to provide services is confirmed but the basis of that freedom to provide services has changed from the country of origin principle to operating on host country basis, but in the host country such restrictions that that might impose are narrowly circumscribed in the Directive; that those people who would say that this is a change, but nevertheless still an acceptable change, might argue that the fundamental changes are from a home country principle to host country principle, but that the Directive, as the draft seeks to ensure, that restrictions that the host country approach might impose on the underlying freedom to provide services has to be fairly narrowly circumscribed and it has to abide by certain rules of the game, such as non-discrimination and so on. What is your view about that presentation of the position? Then I will come back with a supplementary depending on your answer?

Mr Bretz: What we are facing at the moment, my Lord Chairman, is that we have 25 Member States all of whom have different national regulations. An assertion that we have moved to a system of host country regulation would mean that you would be subject to every single type of national regulation. My view is that that assertion is not correct because every single type of national regulation would be subject to the principles set out in Article 16, specifically, and perhaps more generally the established case law of the European Court. I think what we have moved to is a position where there is no clear statement in the Directive that you could rely on your regulation of your Member State of origin when moving to your host Member State, but there is also equally no statement anywhere—and there could not be a statement—that you are subject to all the regulations of the host Member State. So I think the position that you have outlined would clearly overstate the position as set out in Article 16 and in the prior case law of the European Court.

Mr Osborne: I would agree. I think that under the old wording probably too much emphasis was actually placed on the fact that the home Member State would be the sole regulator, because just as at the moment under the latest version the only basis upon which restrictions can be imposed is limited to four grounds—and that is explained, but I think that that would not upheld by the court—equally under the old system you would still have areas where you would find that the host country would be able to impose certain restrictions on public

interest grounds by virtue of the case law of the court. So we do not think that in sum anything has actually really changed. In fact one of the dangers coming out of all of this debate is that so much has been made of the original wording and of the change which the European Parliament has actually secured that people may think that one has moved a long way, when we do not think that that is, as a matter of law, the case. Therefore, that may mean that some people who might have been wishing to provide services cross border may feel that they would be subject to greater inhibitions in the future in actually trying to do that, which is an unfortunate outcome of that fairly intense debate which has been taking place.

Mr Bretz: My Lord Chairman, if I may for a moment come back to the farriers? The Farriers Registration Act 1975 states very specifically what the objective of the Act is, namely to prevent and avoid suffering by, and cruelty to horses arising from the shoeing of horses by unskilled persons. Under the old draft and under the new draft that is a perfectly legitimate interest to pursue.

Q173 Chairman: So that the farriers now replace our German hairdresser. In the case of the farriers—and I want to come back to the fundamental point in a moment—the German farrier, who happens to be at Newmarket shoeing a German horse, by chance or otherwise, by a business opportunity, could offer his or her services to racehorses or general horses—not necessarily racehorses—while he happens to be in the country. He can say, “I am in Newmarket for the week, if anybody wants to come I will shoe the horses for them”.

Mr Osborne: Yes, and he should, if he has time, send an advance notice of declaration to the worshipful company. He would be entitled to have an automatic temporary membership of a worshipful company, which, if he got that, would mean that he would no longer be committing a criminal offence. The worshipful company would seek to charge him a fee of £57.50 but of course he would not be obliged to pay that fee because of the exercise of his freedom of movement rights. So it is actually not that strange a situation in the sense that if you have Andre Fabre bringing racehorses from France or an equivalent German trainer coming to Royal Ascot, et cetera, they quite often bring their farrier with them, and they are quite happy to provide those services.

Q174 Chairman: That example you give does fill me with concern, I have to say. So as a general proposition that means that a small business from this country who wanted to do business in another country, of 24 Member States, it could turn up and find that, yes, it could provide services, but it would be well advised to find out all kinds of information

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that would differ across 24 Member States, what the rules and regulations were, that they might not actually have to meet but they are not sure about it before they sought to buy the services. I have to say that that is rather different to saying country of origin principle, if you meet your requirements you can turn up and provide services. You are saying, if I am right, that the tenor of this Directive is that you are well advised to find out the rules of the game from each of the 24 countries you might stray into because you may find that there is something you have to abide by. Is that what you are saying?

Mr Osborne: I think we are saying that in principle you can go cross border. At the end of the day the provision of services is a temporary occasional activity; it typically would either be on very odd occasions or it might be that you are dipping your toe in the water to see if there is a business opportunity there which you could develop and in future you might do it on a greater basis and actually become established. If you look at something like the Qualifications Directive, people who are advised on that can be told, "If you have this qualification you can effectively go cross border and provide services if you have been carrying out this activity, let us say for two years in the past 10 years, or if you have a relevant professional qualification." So you can go ahead and do that. So a qualified English farrier can actually do the same when he goes to Germany with a horse that is riding in one of the German classics because there is that basic principle there, and that does not need too much to understand. But there will be under both the old version and the new version, when you go cross border, particular federal or local rules or professional rules which may impact upon you. Unfortunately, given the thousands of different service occupations and the fact that we have 25 Member States there will be a number of those that people will come across.

Q175 Lord Walpole: Chairman, can I get this absolutely clear? If a farrier from Germany comes over and only deals with German horses presumably he is not relevant, or is he relevant?

Mr Osborne: Yes, he is.

Q176 Lord Walpole: He is still relevant because he is shoeing a horse in this country?

Mr Osborne: It is not the nationality of the horse, my Lord, it is the fact he carries out an operation in this country!

Lord Walpole: The operation in this country, right.

Q177 Chairman: I want to finish off my line of questioning. In Article 16 it appears to say—and then so much depends upon its interpretation, and I would like to think of a different example than a

farrier because it will become the hairdresser of this inquiry!—that if you want to do business in a Member State on a temporary basis—and the temporary might be that now and again that is where you offer your service, that is the nature of the service business, you provide it twice a year, three times a year, two or three times in a different Member State and so on, so it might be a regular business but infrequent and occasional, and so on—first of all, under Article 16 any requirement on them must not be discriminatory. In other words, something cannot be required of a German farrier in this country that would not be required of a British farrier in this country. Fine. So you can still have a restriction as long as it is non-discriminatory. So on the face of it 16(1)(a) is not a great safeguard except that it stops blatant discrimination but you still, as the incoming business, have to understand what are the rules for 24 Member States. You cannot be discriminated against but you have to find out a lot of information. So (1)(a) on the face of it stops discrimination but it does not make it any easier, it is still a tough job to find out the rules of 24 countries. (1)(b) says that it must be necessary but necessary can include public policy. If you think of Germany, this is a matter of public policy and here are the rules of this particular German state, and they may not be your rules but this is public policy—no cruelty to horses and so on. So public policy appears to be fairly broad. Proportion—again, the farrier, for example, people say it is entirely proportionate that restrictions should require you to be qualified, and so on. So on the face of it how does (1)(a), (b) and (c) give any comfort to a business facing 24 different markets that they have not, still, to safeguard themselves, to find out a lot of information about the rules of the game in each Member State?

Mr Bretz: My Lord Chairman, I would agree with your statement. Obviously each of those points has to be read in the light of the case law of the European Court. You took the example of public policy and there is really a very narrow interpretation of the concept of public policy in the case law of the European court. So, for example, if your objective is animal welfare, and that is a public policy objective, that is your public policy objective and animal welfare has been defined by the court in quite a narrow sense, so it is on the Member State concerned to basically discharge the burden of proof. I think that is an important point. When you come to the question which goes to this issue of deregulation across Member States there are so many different restrictions. On the way here we discussed the situation in France where if you come over to France as a British qualified ski instructor you cannot use the priority access to the ski lift at the front, which is reserved to French ski schools.

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If this is a rule which is imposed by the municipality that owns the ski lift you could immediately see how that particular rule would be discriminatory because a British qualified ski instructor would spend 20 minutes teaching and the rest of the hour he would basically spend queuing, whereas his French counterpart could spend 10 minutes queuing and the rest of the time teaching. So you will never deregulate all of those rules; you have to have these basic principles, they are subject to these criteria, they are also subject to proportionality, and the point is that if such a restriction is imposed and it cannot be justified then effectively it falls away as a matter of European Community law.

Mr Osborne: I would say there, my Lord, that public policy is very narrowly construed. Each of those four grounds there are very narrowly construed, and the reason why we have this other concept of overriding reasons of public interest is because they do not come under the rubric of the public policy. So if you look at recital 20(a) and the long list of those public interest reasons the reason they have been separately defined like that is because they do not fall within the rubric of public policy. So public policy, public health, public security and protection of the environment are very narrowly construed. You cannot include any economic reason. So that does not offer much scope for a Member State in terms of justifying a particular restriction because you will not get that many nowadays directly discriminatory provisions on the basis of nationality, and you get very few of those which could actually be justified on the basis of public policy, public health and public security.

Q178 Lord Haskel: The Chairman raised the question of the small businessman who is providing a service, and according to the new document each country has to provide a point of information or a point of contact. From what you have been telling us there is not a simple yes or no. What is the legal position about the advice which comes from the single point of contact? If you break the law is that an excuse—"The point of contact said I could do this"—because it is obviously not straightforward and it is not very simple?

Mr Bretz: The role of the point of single contact is that it provides you with the basic information that you need in order to provide your service in the host country that you are going to. It does not provide legal advice; it may provide you with a step-by-step guide (whatever that is), but it would give you some very basic information on how you can effectively comply with any national requirements. The interesting question of course is what happens if a point of single contact tells you, "We have a very onerous requirement which you have to meet"? At that point you are in a difficult position because you

have effectively been told that you have to meet this particular requirement. The obvious solution at that point is to go back to the European Commission and say, "I have just been told X by the point of single contact, is that right?" But that is really your only remedy at that point. So the point of single contact is only there to help you establish what the rules are as opposed to changing the rules.

Q179 Lord Roper: Could I ask two supplementary questions to that? First of all, supposing that you were this German farrier and you came to the UK and asked the point of contact what would be the position, the point of contact would have to have under "farrier" the fact that you ought to write to the worshipful company and pay them your £57, would they? If so, given that you said this annex of the number of professions was about a quarter inch thick—and you have it here—the work that would have to be done in order to collect the comparable information under each of those professions before the point of contact could become operational seems to be rather substantial. Is that so?

Mr Osborne: We would agree, my Lord, that the point of single contact is a very good concept, but when you are dealing with services there are literally thousands of different services which are provided. In a country like the UK many of them are actually not regulated. It is very easy for the legal profession with architects, surveyors and engineers—we can all identify the relevant body there—but when you get down to all the different things, whether it is farrier, hairdressing, a whole range of different occupations, many lawyers would not have the foggiest idea of whether those professions or occupations had any degree of regulation, let alone what they are. The thing about legal training is that we are trained how to find the law. It seems to me that the UK government is assuming a fairly significant responsibility in actually setting up these points of single contact because it is going to have to provide information and direct people to the relevant authorities with information on all these different services occupations, and that seems to me to be a very extensive task to undertake and that has to be replicated in 24 other Member States, and of course in some Member States, like Belgium, it will be produced in the four different official languages in Belgium. There is an idea that some of these will be translated but of course that is some time in the future. So it is quite a staggering enterprise to consider, particularly when one goes on beyond the initial step of actually providing a step-by-step guide, providing information, pointing people to the right body, and when one gets on to monitoring, supervising and providing information on individual service providers in different occupations that is a different ballgame.

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Q180 Chairman: But the single point of contact takes on a significance in this revised draft Directive precisely because the conjointly principle has gone and the principle is essentially that you have to meet the requirements of the host country although those requirements must meet certain criteria, and hence the single point of information takes on a particular a point, particularly for small businesses. I made a statement that may or may not be true. The single point of contact appears—and it is emphasised in the document and it has been emphasised by Ministers to us—takes on a particular significance because that is the way in which small businesses wanting to do business in 24 other Member States can get through the fog of 24 different lot of regulations and so on, and that spirit of the first Directive—it may be in law you are saying that it is not a lot different, it cannot fundamentally limit the underlying freedom—the practical reality for small businesses has changed from, “You can do business in your own country, that qualifies you, do not worry about that,” to “Be careful, there are 25 other rules of the game out there,” and hence the single point of contact becomes very important. Is that an unfair statement about the new situation?

Mr Bretz: My Lord Chairman, it appears to me that in most cases the point of single contact would also be the point of first contact, so if the information that you receive from the point of single contact is either unhelpful or very onerous we could actually face the situation where many small and medium sized enterprises do not even attempt what they were going to attempt. I think your statement that the absence of a clear country of origin principle may effectively prevent some small or medium sized enterprises from going cross border may well be true, and the reason for that is not that the rules are any different, it is just the way that the rules are presented is different and that in itself may well have a deterrent effect.

Mr Osborne: My Lord, I think there that the old language of Article 16 might, let us say, have encouraged an SME entrepreneur to be bolder because he could just say, “Article 16 says I am regulated by my home country; you, the host Member State, cannot do anything about it.” The fact that has gone, that you have that lack of a specific statement may lead to greater timidity, to greater concern, “Let us try and find out what all the local rules are,” and once you go down that line you may end up, in certain occupations at least, in finding a maze. I would also add that if you can rely on the Qualifications Directive then you can rely upon Article 5 of that Directive and go ahead and provide temporary services cross border, and that Directive in different forms has been around for quite a few years now.

Q181 Chairman: A lot of service businesses are leading edge, very difficult often to define—they are shifting, moving, mobile technology-based, skill-based, knowledge-based, and they are not easily a

traditional occupation, well-defined and so on. These are precisely areas where SMEs in this country will likely want to move in. Do those not face problems here? This list of professional qualifications, does it come anywhere near to coping with that situation? It is all right for lawyers, accountants and architects and so on, but that is not what a lot of modern service is about, is it?

Mr Bretz: My Lord Chairman, I think that is true but at the same time even those businesses could take comfort from Article 5 of the Directive on Professional Qualifications, which basically says that whatever the host country qualification requirement is on a temporary basis you can provide the service, because if you have been providing that service for two of the last 10 years in your home country and you are not regulated there, then you can go and do it. I think that would certainly give an entrepreneur a sufficient degree of comfort, and a sufficient degree of comfort if there ever was a prosecution—and this is really where these cases are becoming very contentious at the point that someone was prosecuted—they could point to Article 5 of the Directive on Professional Qualifications and they could say, “Judge, surely I have a right here and the right is set out in a piece of legislation to which I can point.” We have talked about the absence of the country of origin principle and the services in the Draft Services Directive, and you have pointed out that the absence of the country of origin principle may make SMEs less bold, and I would state it the other way, that there is nothing as specific as the country of origin principle was in the Services Directive as drafted now, and that is a shame because one of the great advantages was that you had a particular provision to point to and say, “Yes, you may want to prosecute me under the Farriers Registration Act but actually I have a community right, and here it is.”

Chairman: That is very, very helpful.

Q182 Lord Geddes: What really worries me on that, if I may—still back to the medium and small enterprises—is that you, as extremely highly qualified lawyers, do not even know all the answers—and to an extent you have just said that, that there are bits and pieces of which you are unaware. A large company either has the money and/or the resources within it to enquire; the medium/small enterprise does not, it does not have the time and almost certainly does not have the money. So I think, with respect, what you said just now, Mr Bretz, must inevitably follow that this revised Directive must be a disincentive for the small to medium-sized enterprises trying out their own services. Would you agree with that?

Mr Osborne: I think, for the reasons which Oliver gave, that there is that lack of a clear statement there, and I think that does tend towards greater timidity

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and reserve about actually going cross border. But where you can come within a Qualifications directive then under Article 5 you can leap cross border, and the important thing is that if you can do that and provide services on a temporary or occasional basis then you are already providing services, you are operating in that jurisdiction, you are finding out about what the other local rules might be if you want to go further than simply providing services. So I think the Qualifications Directive is a very important right. The other point to bear in mind is that most of the restrictions that you will tend to find operating will tend to surround the older industries, the older trades. In Germany you have the Skilled Trades Register, where many people had to get a Master Craftsman qualification and then they could be on the Skilled Trades Register, and you had similar systems in other countries. In France you have the protection for the ski instructors, mountain guides, et cetera. When you get to the new white-hot technologies at the leading edge there is inevitably going to be less of that. That is no great comfort but you can say that it is far less likely, as a matter of general principle, for there to be restrictions lurking around here; but you can use the Qualifications Director and say, "I am an engineer, I have been qualified in this area, I have been working for more than two years in the last 10 years, and I can go cross border and provide services on a temporary basis, and then I will find out in more detail what possible local rules there might be."

Q183 Lord Roper: Does the revised draft Directive provide any additional safeguards for the Freedom to Provide Services over and above that which exists in the European Court of Justice law, perhaps taken together with the other Directive to which you have just referred? In other words, is there any legal benefit for businesses from the revised draft?

Mr Bretz: My Lord Chairman, I think there are two points from a legal point of view that we should and could make here. The first is the definition of establishment, and we have spoken at length about the concept of establishment. When we were last in front of this Committee we said that you have to look at it on a case by case basis, and someone said to me that that is a lawyer's answer, and I said no, it is a judge's answer. But that has always been the position of the European Court, namely that you cannot have a 16-week rule or a 40-week rule or anything like that, you have to look at it on a case by case basis. When you look at the definition of establishment—and remember that establishment is always the flipside of the services coin, when are you providing services, when are you established, whether you are providing services if you are not established—we look at the definition of establishment as it stands now and it requires a degree of infrastructure from which the

services are provided. That is quite specific as a definition and we think that that possibly goes somewhat beyond what the case law of the European Court says because the case law of the European Court always talked about looking at it on a case-by-case basis. So perhaps increased certainty as to what establishment is, but having said all that, of course, it all needs to be interpreted in the light of the case law of the European Court. So whatever it says on paper what the court will make of it is a different matter. The second point—and John has already picked up on this—is the more limited list in Article 16, which struck me does not correspond to the definition in Article 4(7a) of so-called overriding reasons related to the public interest, which is a much wider list. So I think there is probably an attempt to use a different concept in Article 16 as opposed to the wider concept and, again, I think that would need to be looked at in the case law of the European Court. So coming back to the question of additional safeguards and additional certainty, I think that the Directive clearly attempts to provide some additional certainty and some additional safeguards, but those of course are ultimately subject to the interpretation by the European Court of Justice.

Mr Osborne: My Lord, I would simply add that Article 16(2), the blacklist, is also helpful. The two classic examples given by the European Commission are that in some Member States they say that to provide services you actually have to be established in that Member State, so I think that has been a rule which some Member States operate for mountain guides and ski instructors and boot hire. Then there is another rule that some Member States have that to be an estate agent—which may or may not be a profession—they actually require you to be an individual in providing that cross border—you cannot be a legal entity. So that is naturally restrictive. So by having the blacklist which says that some of these things are clearly no noes obviously does strengthen the hand of people seeking to go cross border and hopefully will lead to Member States actually going through the restrictions which might exist within their territory of that character, and having them removed.

Q184 Lord Swinfen: Is it possible that the European Court of Justice might, upon appeal, rule that the revised Directive is contrary to the freedom to provide services under existing case law?

Mr Bretz: My Lord Chairman, I have already introduced the concept of the interpretation approach that the European Court of Justice would have to take to any delegated legislation, namely to attempt to interpret it in the light of existing case law because the case law, of course, derives from the primary sources of community law, namely the Treaty Articles. That goes very, very far and the court

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can go a long, long way in interpreting particular provisions, sometimes even contrary to the actual meaning of what it says on paper. There may come to a point, however, where the court may look at a provision and say, "That is simply incompatible with Community law and we simply cannot interpret it in the light of Community law." I would suggest that such circumstance would be extremely rare.

Q185 Lord Geddes: My Lord Chairman, when I asked that question almost exactly an hour ago you gave me a monosyllabic answer, "No", when I said were these two not going to be in conflict, the new Directive versus existing case law. You said very clearly in reply "No". I am not quite sure how to add these up now.

Mr Bretz: My Lord Chairman, I think there are two different questions here. One is, is what it says in the draft Directive incompatible with European Community law, and I would answer that question very categorically as no, it is compatible with Community law because effectively what the Directive tries to do is to incorporate the concepts that have been developed by the European Court of Justice over time. If a particular provision—and we have talked about two, namely the definition of establishment on the one hand and on the other hand the list of four points in Article 16—were to be examined by the court what I am saying is that it would be interpreted in the light of Community law and such interpretation could be wider or narrower depending on the circumstances of the case. But the first question was: is the Directive fundamentally incompatible with European Community law? And I maintain that it is not.

Lord Geddes: I think I get your difference.

Chairman: Lord Fearn.

Q186 Lord Fearn: What do you see as the essential difference between an exclusion from the provisions of the Directive and a derogation from it? Taking the set of derogations and exclusions together, has a large portion of service activity now been excluded?

Mr Osborne: My Lord, the simple difference between a derogation and an exclusion is that exclusions means that that particular activity or sector is wholly unaffected by the Directive—the Directive does not touch upon it. A derogation in this context means that a particular sector or activity is not within Article 16 of the Directive, either basic freedom of movement in terms of services, but is covered by all the other provisions of the Directive. You then ask how significant are these apparent long lists of exclusions and derogations in practice? We do not believe that they are very significant at all. They have generated a great deal of, shall we say, hot air but if you actually look at the list, for example, of exclusions and you take financial services, that is all

the subject of very detailed community regulation essentially based on the country of origin principle. If you take electronic communication services and networks, that again is subject to a very extensive range of separate regulation; again, transport largely is. Port services, the Commission has been trying to get a proposal for new legislation through to liberalise port services but that is not heading anywhere at the moment. If I could come back to healthcare services. Audio-visual services, we have a Television without Frontiers Directive, which again incorporates the country of origin principle. I will come back to gambling activities. Social services were never intended to be covered really anyway; and private security services is still a relatively limited sector. If you take healthcare services, they are all covered by freedom of movement of services. So we had the Yvonne Watts case decided last Tuesday by the European Court, when Miss Watts needed a double hip replacement and could not get it within what she regarded as a reasonable time in the NHS, so she went to Abbeville in France and paid £3900 and had the operation there. The court there clearly said in those circumstances that there is a freedom of movement for her to actually go to the French hospital and receive hospital treatment there. The debate was more about the actual reimbursement of the cost and I think now is not to get into those detailed rules about health services. Gambling activities again are all covered by the freedom of movement rules. We have had Ladbrokes conducting a campaign for nearly 20 years in the Netherlands, Belgium, France, Germany and in Sweden, and we have had Stanley in Italy. We had the famous *Gambelli* case in 2003 which said that basically that the freedom of movement for services applied to gambling. And we had the Commission only last month bring formal infringement proceedings, or the first stage of formal infringement proceedings, against some seven Member States for failure to allow freedom of movement for services in the context of sports betting. So the basic rules on freedom of movement apply to gambling. The trouble is that in many Member States like, for example, Italy, they say that a justification for limiting freedom of movement is that gambling is immoral or may lead to people becoming addicted to gambling and spending too much money. On the other hand, Italy has granted a monopoly on lotteries, et cetera, to two organisations, and the Italian Government makes a great deal of money out of gambling. So it is very difficult for a Member State on the one hand to say, "We must limit gambling," when on the other hand it is actually encouraging and promoting gambling where that produces profits for the public purse. So the European Court has said that, yes, there are a number of good grounds on which you could limit gambling but not if you are at

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the same time seeking to promote and encourage gambling. So if you want to impose systematic limits on gambling and you apply that across the board, fine, but you cannot have your cake and eat it. So that was exclusions and derogations and they are all in Article 17, essentially, and they provide a derogation from Article 16. Again, if you look at those—postal sector, electricity and gas all separately regulated and no difficult really about going cross border there. Water distribution is not something on which you typically go too much cross border on, and not enormously significant. Waste is already subject to separate regulation. Postal workers we all know about. Privacy—again, that was never terribly relevant. Lawyers—we are all covered by our own Directive, thank you very much. We have talked about professional qualifications and there is not really anything else terribly significant left.

Q187 Lord Fearn: In the actions that have already been taken, have they been successful from the point of view of Europe?

Mr Osborne: In electricity and gas you are not going to be terribly eager to go cross border because if you want to, let us say, do the minimum or become an electricity and gas supplier of any size at all you are going to require quite a significant capital base so you are going to need, in effect, to become established. The postal sector, we have now seen competition coming into the UK with operations backed by the Chairman of the Post Office, et cetera. And in the various exclusions certainly all the sectors are effectively reasonably active. So we do not honestly think that those provisions mean that a great deal is actually removed from the scope of the Directive and, most importantly, removed from the scope of the freedom of movement principle.

Q188 Lord Roper: If we take gambling, for example, the examples you gave were companies which were established. Supposing that you were a bookie who used to perform at the various racecourses in this country, would you be able now, because of that prohibition under Article 16, to go across to Chantilly and put up your stand?

Mr Osborne: Essentially you should be able to do so. The case in Italy was that Stanley bookmakers were seeking to attract Italian punters to bet on various sports events and they had to use various Italian agents to do so, but the Italian Government said that that was a criminal offence and brought criminal proceedings against Stanley's agents, and the *Gambelli* case effectively said that the net result should be that Stanley should be able to do that. But the Italian Government has not relented at all and I think recently it has actually required ISPs operating in Italy to refuse to allow Italian punters to bet cross border with betting operations located anywhere else

other than Italy, which is why one has seen the European Commission commence the first stage of formal infringement proceedings against various Member States, including Italy. I think the Dutch Government has taken a similar approach in relation to Ladbrokes.

Q189 Lord Swinfen: Does that affect Internet betting?

Mr Osborne: Yes, and it is particularly at times of large events like the World Cup when it becomes of particular interest.

Mr Bretz: My Lord Chairman, I know we are short of time but I wanted to add one more thing on the difference between exclusions and derogations. Obviously the derogations are contained in Article 17, they derogate from Article 16. All the rest of the draft Directive, including the point of single contact continues to apply to them.

Q190 Lord Walpole: I must say that you have done incredibly well but are there any other significant issues regarding the Commission's latest draft in itself, or in so far as there is the original draft which you think merit our attention?

Mr Osborne: I think there is one point arising from the current draft, which I think will lead to litigation, and it is a point I have touched upon before, but which I think is worth reminding oneself of, and that is that under Article 16(1) we have the very clear statement that Member States shall enjoy free access to and free exercise of services activities, and then the clear statement that Member States shall not restrict access or the exercise of any activity except on those three principles. The critical one there is (b) which is public policy, public security, public health, and the protection of the environment, to which you should also add consumer protection.

Q191 Chairman: Why should we add consumer section? It is not in Article 16(b) is it?

Mr Osborne: It is not in 16(2) but that is because if you refer to Article 3(2), my Lord, which sets out the relationship of this Directive with other Community legislative Acts, it says specifically there that consumers will benefit from consumer protection rules relating to contracts granted by their own Member State. So this drafting here—and one reminds oneself that this is drafting proposed by the European Parliament and not by the European Commission—is that Member States could only seek to restrict any overseas service provider on those very narrow grounds, and they are narrow grounds. So the question is under the Treaty a Member State can justify, or seek to justify potential restrictions on that far longer list of overriding grounds of public interest, and the list is set out in detail in recital 20. So the question really is whether this narrow list in

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Article 16(1) will actually hold if challenged, or whether if challenged the European Court will say, “Actually a host Member State could rely on this longer list of overriding grounds of public interest,” and our judgment is that the European Court would say that a Member State could rely on that longer list. The reason being that when you look at the Treaty and Article 49 in this case it is a balance of rights as between Member States and rights granted to entrepreneurs to actually perform services across border, and what the Court is trying to do in looking at the cases that actually come before it is to reach an appropriate balance of those rights. In the past it has said that whatever the Article said, which only limited its sections to public policy, public security and public health, that Member States could justify restrictions on this longer list of public interest grounds. Therefore, I think if the Commission tried to hold a Member State to this narrow list in Article 16(1) and the Member State challenged it and it went to the Court I think the Court would say, “No, you the host Member State could justify this on this longer list.” But that would be an issue which, I think if this drafting remains as is, will be raised at a later date and I am afraid that there is nothing we can do about it.

Q192 Chairman: Could I ask the last question? When we previously considered the original draft there were considerable fears expressed in many quarters about the phrase “race to the bottom”. That related to a range of concerns from environment through to labour market conditions, to health and safety, consumer protection and other matters. Is there anything in this draft that significantly changes the position to in some way safeguard those concerns that we expressed at that time?

Mr Bretz: My Lord Chairman, I previously said that I did not agree with the concept of race to the bottom. I also agree with John’s statement that there was an awful lot of hot air, I think John called it, at the time, and actually indirectly the second

draft is now benefiting from a lot of that hot air that existed at the time because a lot of the more controversial propositions have been dropped and the bottom line is it does not actually make a very big difference. Coming back very briefly to John’s more limited list in Article 16, we may now have a bit of a two-tier Europe between those Member States who know their rights because they have the experience of dealing with the European Court of Justice for many years and those Member States who do not know their rights because they may not necessarily have as much experience. So we may see very different interpretations of Article 16 emerging in different Member States.

Q193 Chairman: Can I go back to the sentence before that? You said that you think that this draft in some way strengthens—or what did you say about the position of concerns about the environment, labour market, health and safety? What does this draft Directive do—anything? You said it gets rid of a lot of hot air. How?

Mr Bretz: I think what this draft has very cleverly done is through the exclusions, derogations and definitions tried to address or at least pay lip service to the many, many concerns that were expressed especially by the environment around social protections, labour laws and those sorts of things, and it simply says, “Okay, we accept all those things and here is a new draft, which does not mention a country of origin principle, it specifically excludes labour laws, it specifically refers to private international law, it does all those things.” Has it fundamentally changed anything? My belief is that it has not and I think that reinforces the statement that we made last time, which was that a lot of these things did not exist in the first place.

Chairman: Could I thank you both enormously? You were helpful on our first occasion and you have repeated that doubly so today. Thank you very much indeed Mr Bretz and Mr Osborne and, through you, to Clifford Chance. We are most grateful. I will now ask Mr Harbour to take the chair.

Examination of Witness

Witness: MR MALCOLM HARBOUR, Member of the European Parliament, examined.

Q194 Chairman: Good afternoon, Mr Harbour.

Mr Harbour: Good afternoon, my Lord.

Q195 Chairman: Could I thank you for coming along to see the Committee. You very kindly met with my clerk and me last week but I am sure you will completely disregard those private conversations and assume that we start *de novo*.

Mr Harbour: Of course.

Chairman: At that point, you will remember, you were not sure that you would be able to give oral evidence. So thank you very much indeed for this, and we are very grateful to you. We have a series of questions to ask you and there will be a number of supplementary questions to those, as you will expect. I wonder if we could straight in and at the end, if we have missed anything, to give you the

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opportunity of filling in the gaps? I will repeat again that we are always delighted to meet with Members of the European Parliament; we know well of the important work that you have been doing, along with the Internal Market Committee and we have had the benefit of evidence, as you know, from Ian McCartney last week. Lord St John.

Q196 Lord St John of Bletso: Thank you, my Lord Chairman. Mr Harbour, what is your view overall of the revised draft Services Directive? Do you feel that there is a clear improvement on the previous draft? If it is an improvement, in what respect and if not where are its major shortcomings?

Mr Harbour: Can I first of all thank you, my Lord Chairman, for an invitation to come again. Can I in say by preface that your first report, on which I gave evidence, was very much appreciated by those of us in the European Parliament working on the Directive, setting out very clearly many of the issues, and also dispelling many of the myths to which the previous witnesses referred. I also wanted to introduce my hardworking researcher, Miss Agnieszka Matuszak, who is going to find any references in the many papers if I need them. She has been with me throughout these last few months of discussion. I think to some extent it depends on what draft you were referring to?

Q197 Chairman: The Commission's draft.

Mr Harbour: As Charlie McCreevy said on a number of occasions I think it was clear probably from the time that he started the serious work in this Parliament that the Commission's draft was not going to find favour with the Member States, and I prefer to talk in the practicalities of politics as to whether we have achieved a sensible balance in this new proposal, which I am confident now will be approved by the Member States, and I think that is an important rider to put on this. The Parliament has had an absolutely fundamental role and an unusual role in the scrutiny and amendment of this Directive in that the Commission has largely left it to us, virtually, to produce a compromise text that has also substantially found favour with the Member States. That has been a very unusual position, I think, for parliamentarians to find themselves in. The previous witnesses interestingly enough referred to some of the drafting as being Parliament's drafting rather than the Commission's drafting. Whether they implied that it was not particularly good legal drafting I was not quite sure, but nevertheless we have had to take on that responsibility. So I thinking viewing it in the round I do not regard issues about detailed improvement as being relevant; what I do regard as important is whether we will achieve some substantial improvement in the operation of the internal market

by getting a Directive approved and through the Council on a realistic timescale, and the answer is yes, this is going to fundamentally improve the operation and working of a single market. Not only that, but we have preserved—and I think this is absolutely crucial—what I think was the whole design of this Directive in having an ambitious, horizontal Directive operating across a whole range of sectors and dealing at one go with a range of barriers that companies were experiencing in 25 Member States. I regard that—assuming I am not being over optimistic—as being a fundamental political achievement for the Parliament to have done that.

Q198 Lord St John of Bletso: You say that it has achieved a sensible balance and quite clearly it will be approved, but where do you see the major shortcomings?

Mr Harbour: I think that the shortcomings of the Directive relate very much to the shortcomings of a single market as a whole in which we still have and will continue to have 25 Member States with their own body of law and, in many cases, their own past traditions—as you were talking about in some of the interesting case studies earlier—and in any piece of legislation like this one always has to make adjustments in order to get a compromise. So in that respect the shortcomings of this Directive are the shortcomings of an imperfect system where we still have a single market of 25 Member States, but that is always going to continue to be the case. So I think that on balance we have achieved a sensible package. I think there are some areas where we might have achieved, shall we say, some rather more aggressive market liberalisation, but since that was never going to find acceptance in Member States I think this is a largely theoretical concept. I would much rather be discussing with you this afternoon how we are going to make this work because essentially this is where we are, and what is done is past history. So let us look forward and see how we are going to implement this, and I think there are some important points which came out from previous witnesses about the issues that we do need to pick up, and part of those will be the way in which this text is explained and promoted to the small businesses that we want to take advantage of it. That, I think, is the most important thing we now have to address.

Q199 Lord St John of Bletso: That is exactly the point I was going to get at, which is quite clearly that as far as small and medium-sized enterprises, will the revised Directive cater for their needs specifically because clearly there have been major hurdles and bureaucratic red tape preventing

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smaller companies from operating freely within the European Union?

Mr Harbour: I think it will, and I would go further. If this Directive does not work for small and medium-sized companies it has failed because this is a piece of legislation that is primarily directed at the small and medium-sized company. I was not here when you took evidence from the CBI but certainly my concern with the CBI is they have been fairly disinterested in this proposal because most of their members being larger companies already have the structures in place, the ability to set up establishments and to employ lawyers locally, and so on. This is a Directive which is intended and targeted at the small entrepreneur and that is why it is a complex mechanism—the pieces are interrelating. You can have very interesting discussions about some aspects of freedom to provide services and so on, but on their own they are not valuable unless you look at all the pieces of the mechanism and the jigsaw together, and I think the evidence that you have just heard demonstrates how important the single points of contact and the administrative simplification are in the overall scheme of things because the freedom to provide services cross border is important, but it is of course just part of an overall approach to the market, and I would argue in response to your discussions earlier that any successful entrepreneur will go out and do his research first of all. We aim to make it much easier for him to do that research because irrespective of whether there may be traditions in terms of particular professions like the farrier—and that is an interesting example which I shall use now in some of my own cases—and there are also differences in aspects of local employment law, for example, that companies will still have to comply with. So in the round we have to deal with all of those aspects as well. Also, the freedom of establishment and the issues around authorisation are absolutely crucial. I would argue in the case of the farrier, for example, that there is a specific provision in here that says when looking at authorisations Member States have to take into account the requirements that a company has already met in its own Member State, which is essentially the country of origin principle implicitly written into that part of the Directive.

Chairman: Lord Fearn.

Q200 Lord Fearn: You have just touched on cross border trade but is it likely that the revised draft will achieve less in terms of encouraging cross border trade in services than did the previous draft? If so, what is your view on the extent to which the benefits of trade will fall short of what might otherwise have been the case?

Mr Harbour: I just want to go back to the previous answer. I think that the benefits of the original draft are essentially illusory because it was never going to get agreed. So I think comparisons are not that helpful. Let us actually look at what this one will achieve and the answer is that I think it will achieve a significant opening up of cross border markets. But on its own, if it just sits there and Member States do not actively promote it and encourage business organisations, business links and business support organisations to be aware of the provisions and actually to say to small businesses, “It is now easier for you to do business, you actually have a framework in which to do this; that if in certain Member States they try to block you doing this on these particular grounds they are now illegal under this new Directive,” that for me is the fundamental issue. The other thing I think is important, which has not received so much attention, is the fact that the Member States are accepting when they agree this Directive, as I feel sure that they will, the fact that they have an obligation to screen other elements of their existing law, to measure them against these criteria and are required to justify continued restrictions on cross border trade. In other words, this is not just a one-hit process. We have the list of banned practices in the beginning and then we have the reviews following on from that which will enable us to keep further pressure on the opening up of the internal market. So I think—if I may call it that—there will be a dynamic effect of getting this Directive approved on top of the legal basis itself. So there is a political impact and a practical impact and I think that is absolutely crucial.

Q201 Lord Fearn: So you see a bright future?

Mr Harbour: I am always a cup half full person in politics. All I can say to you, my Lord, is that I would not have worked on this in the way that I have and also been party to the package that we have put together in terms of the compromise if I did not feel that it was going to make a major improvement, otherwise I have been wasting my time. I have been working on this for three years now and I do genuinely believe that it is a step forward. I think part of the problem we have had at the moment in terms of positioning it is that we have spent too much time picking over some of the entrails of the individual pieces of the mechanism without looking at how the whole thing fits together. And I think we have also reflected perhaps with too much idealism about something that might have been but was never practical because the Member States in the end were never going to approve it in its original form, as opposed to the fact that, given the substantial political criticism of this Directive—when you first started your work and you came to

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meet us in Brussels you remember the discussions we had and that we had people on the streets and we had people at the very top of Member States criticising this Directive for being overly liberal and now I hope that by the end of June we will actually have this agreed—I think you will agree that there has been a significant change in the political climate and I remain convinced that that is due to the work we have done in the Parliament to broker this compromise.

Chairman: Lord Haskel has a supplementary on that.

Q202 Lord Haskel: Like you we hope that this law will break down barriers and will increase trade within the Community, but when we took evidence from the Federation of Small Businesses we asked them about the various derogations and they said that they estimated that that would eliminate something like 40 per cent of their members, and we thought that was rather a high figure. What do you feel about that?

Mr Harbour: I have not seen the register of small business members but I would be surprised if it was as much as that. On the other hand—and you did discuss this earlier—I would say in terms of sectoral importance—and you talked about derogation, did you mean exclusions?

Q203 Lord Haskel: Exclusions, sorry.

Mr Harbour: Because we talked about the semantics of that earlier, which is significant. The health sector is, in relative terms, much the biggest sector and it was clear from the beginning that Member States were not prepared to accept the inclusion of health with its very specific public interest issues and fundamentally different organisational models and different Member States—they were simply not going to accept it as part of the original proposal, and that was clear from the beginning. So we have not spent a great deal of time arguing about that even though I think in future the health market is going to be an important one, but it is clear now that the Commission is going to look at a separate instrument about how to deal with that, and it also has some important issues about consumer rights that we talked about. So health is a deferred piece of business, but it will come along later. Then the other sectors again do have their own peculiarities. You talked about gambling and I think 23 out of the 25 Member States did not want gambling in, but the Commission is going to have to address that because there are big issues on cross border gambling and Internet gambling that have to be dealt with. Temporary agency workers, we will do something about that and so on. So the answer is that those sectors have not gone away but they will be dealt with; but for a very, very large number of

members of the FSB this will come into play. I think the other area which I particularly want to mention is the fact that business to business services will be particular beneficiaries because business to business services have rather less bodies of regulation because they are not so entwined with issues about public policy and public security, but there are massive opportunities in the new Member States where we have a whole new generation of entrepreneurs wanting to start up new businesses, and those should be the prime customers for people in the FSB who are supplying marketing services, computer systems, et cetera et cetera.

Q204 Chairman: Can I come back to the answer you gave initially to Lord Fearn? He asked effectively whether the revised draft will achieve less than the original draft and I think it is fair to say that your answer was that that is looking backwards, that is not the important thing. Could I beg to differ a little on that and then put a proposition to you? Effectively a draft piece of legislation comes along and a lot of opposition is expressed and people say that things are going to change about that and some people see those as significant changes. Then somebody comes along as a witness and says, “Do not worry about what the effect of these changes are, let us worry about the future.” I think you would agree that if two bits of the drafts were significantly different and had a significantly different impact it would be a matter of public interest to know because government might want to recommend our country to vote against it. It must depend upon what the effect is. So I think we are on common ground on that. So we cannot ignore the question in scrutiny as to what the effect of the revised draft Directive is compared to the previous one; that is a matter of substantial public interest. There could be two answers to that. The answer I would have expected from one school of thought would be that the revisions were necessary to prevent some significant problems that had occurred with the first, for example the race to the bottom, problems of environment, problems with labour markets, problems with workers’ protection and so on, and that there may be some costs for doing this and this may discourage some of the wilder businesses’ practices, but offset against that are some benefits of preventing races to the bottom. That would be one argument, that there are some costs but there are some benefits and the benefits politically are very important. The alternative from our previous witnesses today was, “Do not worry, actually there is no real difference between the two Directives. There was not a problem before anyway about the race to the bottom and the new draft has just as much ability to provide services as before.” I have to say to you that they are two completely

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different answers. One is that there is no substantial difference in this draft compared to the previous one, and the other answer is that there is a difference and it is safeguarding interests and it is very important to get it through the European Parliament, but there are some costs but the costs are worth paying. I have to tell you that they are such different answers that as a sub-committee we have an obligation to the House to advise them what the answer is. What is your answer?

Mr Harbour: My Lord Chairman, I am happy to answer it. It will be quite a long answer because it is a complex one, so let me go through it pretty methodically. First of all, it is quite clear that the Directive now before us excludes a significant number of sectors that were in the original one, for reasons that I have set out, simply because of the sectors were included, the range of sectors that the Commission proposed was much too ambitious, and because of the peculiarities and specificities over those sectors and the fact that they are particularly sensitive with regard to public policy we have excluded them. They have not gone away but they will be dealt with separately, so that is a practical political point. The second point then relates to improvements that we have sought to make in the overall quality of the drafting of the proposal. So we sought particularly to make clear the relation of this Directive together with other instruments of Community law. Where there have been specific aspects of the administrative provisions, the single point of contact and so on, we have made quite a lot of detailed improvements, and we have also included some specific wording covering sensitive areas, which make it absolutely clear that some of the points that were raised about potential interpretations of the first draft—and I choose my words very carefully there because I think there were potential interpretations—about whether it would lead to an erosion of standards to the ability to undermine labour law, for example, or to allow people to bring, for example, lower quality standards in crucial and difficult areas of public provision, to allow those to be undermined. So we have dealt with that. In my view they were not there in the original drafting but we had to clarify the draft to include that. Finally—and I think this is crucial around the point on freedom to provide services—the area probably which we have modified as a text most of all has been around the question of the freedom of companies to provide services in other countries, where the Commission sought to, in its first draft, essentially to establish legally a country of origin principle, which is not actually a Treaty-based principle but it has been implicit in the case law of the Court of Justice. In the eyes of some people that would have actually limited the freedom of Member States to enforce the public

interest more than was currently allowed under the case law of the Court of Justice, which is why they opposed it. Therefore we sought, by a series of iterative drafts, to move away from a very explicit definition of that to a freedom of service clause which is based exactly on the same principles, which brings into play the issues that you have talked about, about proportionality and necessity, and so on, which still maintains the banned practices of Member States but does not, if you like, have the very explicit definition of country of origin principle applicable with what was in there earlier. My view is—and continues to be—that that redrafted freedom to provide services clause provides companies with the safeguards that they need to be able to go out and provide services on a temporary basis in other countries when considered in conjunction with the other elements of the proposal and that, in my view, is an indispensable core right. You cannot just cherry pick it out on its own, it has to be looked at with the other provisions. It was a rather long answer but in summary to your question, my Lord Chairman, what we have achieved is that first of all we have carved out sensitive elements and, if you like, they are in a pending tray and will come later; we have significantly improved and clarified the drafting; and we have dealt with some of the most sensitive political issues by some redrafting; but, overall, the integrity of the proposal as a series of interconnected provisions to fundamentally open service markets to small and medium-sized enterprises still remains.

Chairman: That is extremely helpful and when we come to consider the issue I posed starkly, which was for the purpose of discussion, that will be very helpful. Could I ask Lord Walpole if he would like to deal with the issue of points of contact?

Q205 Lord Walpole: Do you envisage Member States providing single points of information or single points of completion in respect of the points of contact for firms from other Member States? Which in your view would be more appropriate?

Mr Harbour: I think you have to have both. I come back to what I said earlier, that the law here is, if you like, to be considered to come into play as part of a process of evaluating and then moving into new markets, and so you need information at the first stage. But that information should lead you into the areas where you may subsequently then want to apply for authorisation if you have to apply for authorisation, or to deal with any other formalities if you have to apply for those formalities. So the first piece of information should tell you what formalities are there and so then you will make the decision about how then you next approach the next stage of the business. Of course, the crucial thing

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about the freedom to provide services cross border is that it allows you to go and offer your services, maybe on a tentative basis, undertake one or two contracts before you then decide whether you then want to become established. So I think the single points of information or contact also have to be considered as a gateway to further information through which some of those other formalities will then proceed. But as your previous witnesses were pointing out, we do not underestimate some of the complexities of this process, which is why in the timing you will notice it is proposed that there will be a three-year timescale to complete these processes, whereas in the Commission's draft, all the other provisions will come in in two years, so there will be a bit of an overlap. I do not think I was avoiding your question, I am just saying that I think we are covering a wide spread of issues here.

Q206 Lord Walpole: There is also a question of costs as well, whether the Member States are going to pay for them entirely, whether people are going to have to pay to use them or how it is going to be worked out.

Mr Harbour: Clearly the Member States themselves obviously will undertake the costs of providing that information.

Q207 Lord Walpole: Information.

Mr Harbour: Yes, and a really important part of this Directive, again which we have not made enough of, is the fact that this Directive implies a significant stepping up of the level of engagement of Member State with Member State in managing the internal market. By the way, I think that will have a spin-off on product markets as well because once you have established those processes they will work for people selling products and manufacturing as well as services because there will be plenty of cases where the boundary lines will be fairly blurred. So in that respect the Member States will be investing on behalf of all the other Member States because they will be making their information available cross border. There is provision for charges to be made—I cannot remember the exact phrase, it is on a reasonable basis or cost related—and again I think that is not unreasonable. After all, businesses who get support currently, shall we say from UK trade and investment, in some cases contribute to the cost and that is not unreasonable, that is part of the cost of market entry. In any case, businesses might well commission their own market research, their own market studies and that will all be part of the normal process of evaluating the market.

Q208 Lord Walpole: The larger firms can go further because they have more money, it is the small firms we are particularly concerned about and how much

they in fact get free from the government is highly relevant.

Mr Harbour: I agree with that entirely and I think that comes back to what I said right at the beginning. This is just the beginning and I think from our side the politics of this are that the Directive will put a floor in place from which we should now be building and extending the internal market and getting more small firms to participate in it. That will need some proactive attention by governments and in our own case in the Department of Trade & Industry we hope that they will take up that opportunity and will work with the business organisations and the Regional Development Agencies to offer information and to promote the availability of new services and encourage small businesses to start to take advantage of these provisions.

Q209 Chairman: It was our own UK government who made a distinction in their own Explanatory Memorandum in the latest draft. I do not know if they have discussed this with you? I know that you have ongoing contact in discussions with the relevant departments. The government appeared to be saying that there really is a distinction between a single point of completion and a single point of information, and that they feel that attempting to set up a single point where not only you get information but through that you can get to the point of getting decisions and approvals and so on in the timescale is either (a) both extremely risky and almost certainly will not deliver it and (b) is really quite a bit more expensive than a point of information. They made quite a bit of this in the Explanatory Memorandum, or the Minister did when he came before us. So rather than press you on something that is a point raised by the government and not by yourself, is it a point to which you are aware that the UK government is raising and have they briefed UK MEPs about this concern? I do not ask you to comment on the issue itself because it is the UK government who has raised this and not you, but it might be of interest to us to know whether you are aware of this and whether there has been any discussion with the MEPs about this.

Mr Harbour: I am well aware of it, my Lord Chairman, and we have been briefed on it and in fact I was there at the Competitiveness Council meeting to which we were invited by the Austrian Government where that was actually raised in the presence of all the other governments. I think it comes back to one of the issues that quite often arises in European legislation, that this is a piece of framework legislation and the government is arguing that just making a very simple change of wording, which I think is a change from the word

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“at” to “through”, would satisfy them in terms of their ability to provide something. The important thing is that what they provide meets the spirit of what was intended. I did ask one of the advisers of the British government and said, “If what you had in mind doing at a reasonable cost, would the Commission take out infringement proceedings against you if this is what you put in place?” And the answer was “No.” So I think one has to look at it in this context and I think it is an issue that I believe we can solve within the spirit of this, but obviously each Member State has its own internal issues to consider, its own databases, its own structures behind that, but as long as it meets the spirit of what is intended here then I think that we and the Commission will be satisfied.

Q210 Chairman: I think there are two concerns of the sub-Committee. One is that the UK Government’s position is that setting up a system where you can not only get information if you go to another Member State about what is required but you can also through that single point of contact obtain the necessary approvals and so on.

Mr Harbour: If you need them.

Q211 Chairman: If you need them. That that would cost the UK Government in UK estimates’ terms something in order of £92 million a year, but also they say that the cost is not as important as the risk that it may not be delivered; it would require a significant project to set up for the UK and no doubt for other countries. But they said that if they just went for information and not a completion point that that would lose benefits to small business. In other words, if you had everything at one point, online, as it were, virtual, then that would be very beneficial to small businesses, so if you had information only you would lose about £200 million a year benefit. So the government’s argument was that it would save them money but it would lose benefit to small businesses. My point to you as an MEP is this: if you are a small business in the UK wanting to explore the market in Italy or in France, first of all you would not want different systems in different countries. If some said that this is a point of information but then to go out and find your own information, and somebody else said, “You do everything with us, it is a one-stop shop,” as a small business you are facing different systems in different countries. So is it not worthwhile pursuing the same standard of service in 24 countries rather than saying, “This is the framework Directive, every Member State can decide what they mean by it”? That seems, on the face of it, to be not helpful to small businesses. And when you are in discussions with the government do the UK MEPs have a view, as it were, of saving money to the public purse even

if it provides an inferior service to small businesses? Where do you think the merit of the argument lies?

Mr Harbour: I think first of all on the question of the principle of this and, if you like, giving each Member State the flexibility to set up its own system within the broad guidelines of the Directive, I think that is perhaps the politics, my Lord Chairman, that is the way it will happen, but I do think that the Commission has a major responsibility, and in fact this is now enshrined if you look in their Better Regulation Procedures, to coordinate across the 25—do not forget, 27 Member States in fact—the transposition of this Directive; in other words, to get the responsible officials together. I think the point that you raised about a common face-off, a common gateway, some common descriptions is something that would be very helpful and we would definitely encourage that, but I think it needs to be done on that basis—in other words, the Member States need to have the shared interest to do that. My argument always is in those circumstances that you will get much better and more effective cooperation and action if all the Member States realise and work together to achieve it and have a sense of combined achievement rather than try to impose something from outside. Your second point about the government making an investment in the small business community and providing a service that will help them to enhance business and enhance their business prospects, I think provided that the cost benefit analysis justifies that it is certainly justified to do that and I would encourage the government to do that. Obviously we have not seen the details of it—and I know there has been quite a big study published on that, but I have to say that I did not feel it was absolutely necessary to read all of that in detail at the moment and I will wait to see what their conclusions are. But I was pleased, because I listened to some of the Ministers’ evidence, that it is something that they are clearly taking very seriously indeed, and I am also pleased that that indicates to me the point I made earlier, which is of fundamental importance, that they are determined to make this Directive work effectively for British business.

Q212 Lord Swinfen: Mr Harbour, I think you said in reply to a question from Lord Walpole that you envisaged implementation of this Directive within two years, is that right?

Mr Harbour: That is the Commission’s proposal. The Parliament amendment was three years but the Commission has proposed two years. I would be very happy with two years, but with two years for the major part of the specific provisions, if you like, for Member States to make the necessary changes to their national law, to deal with removing the prohibited practices. This is slightly unusual because

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it is such a comprehensive Directive. Some Member States may not have to do much to implement it anyway because their law is not discriminatory; other Member States will have to do a lot more. So that is the first hurdle to be overcome. Then we talked about the three years for the points of contact and then there is also the period within which they then have to screen all their existing legislation as well. So there will be a series of benchmarks and also there is the review that the Commission has committed to undertake as well after three years, looking specifically at how some of the provisions are operating to see whether further change will be needed.

Q213 Lord Swinfen: In that step you will be monitoring the individual Member States' implementation and how they are getting on?

Mr Harbour: Of course. I come back to what I said earlier. We will certainly be asking the Commission and expecting the Commission, indeed, to follow fully their own guidelines about transposition, so that the coordinating group of the 27 Member States we expect to cover all aspects of this and we hope that they will make that a powerful group and they will start work straightaway. Bearing in mind also that the screening process is going to be unusual, to see how it operates because this is new, and how the screening reports will operate because Member States will eventually be making reports to each other and they will say, "We have this provision which restricts service providers because this is the specific public interest that we want to address," or they will say, "We have looked at this and we do not believe it is any longer necessary." And there will be debate around those. So there will be an open political process and this is new and so I think that once the Directive is agreed a lot of the operating guidelines and procedures behind it will obviously evolve, and I think that we have a major responsibility as the Internal Market Committee—and I am sure that my Chairman, Arlene McCarthy will also make that clear because she sees this very much in her role as Chairman of our Committee—that we have to keep a very close eye on this process. After all, I think we probably have more ownership of this as a piece of legislation than any other recent proposal that has been passed by the Member States for the reasons that I outlined in my opening remarks, so therefore we have ownership of it and therefore politically we are extremely keen to see, first of all, that it is effective and, secondly, that any of its shortcomings are quickly addressed.

Q214 Lord Swinfen: What pressure can you put on Member States that are slow in bringing this into effect?

Mr Harbour: I think we have to use the Members from that Member State to put pressure on their governments to deal with it. You always have the process of naming and shaming, as before, giving publicity to cases, and also the Commission of course has its normal legal instruments in any case which we would encourage it to use as appropriate. So there will be a range of instruments that we can work on. I would like to see us also bring this into the scope of our increased cooperation with Member State Parliaments. You may be aware that we are having now an annual meeting with parliamentarians from all the Member States in the framework of the economic reform, Lisbon Jobs and Growth Agenda, and I think that again will provide us with a vehicle also to deal with this as a specific part of the overall Lisbon Economic Reform Agenda, so we want to make sure that national parliamentarians are also seized of the issue and are prepared to work with us to deal with any problems that may arise.

Q215 Lord Swinfen: One final question from me. What recourse will aggrieved small or medium business have if Member States have not implemented the Directive and they are unable to start up?

Mr Harbour: There will be a range of instruments but I think the most important one, in my view—and this is the importance of having a Directive as opposed to the current situation where aggrieved companies have to try to enforce their rights by taking the case law to the Court of Justice—and I say this in my political perspective—is that, for example, in the case of freedom to provide services or failure to implement that then companies can actually claim damages from Member States through their own courts under the terms of this Directive because Member States are failing to implement this Directive, a course of action that they cannot currently undertake at the moment because the case law of the Court of Justice is not codified in the way that it now is in this proposal. So they will be able to have recourse through the courts of the Member States but also we expect, and indeed we will insist, that the mutual cooperation procedures that will operate will give them a voice if they are frustrated, that they can go back to their own Member State and their own Member State will use the cooperation procedures and go to the other Member State and say, "Look, this is not good enough, you are frustrating this company, and here is the position," and hopefully deal with it through an informal mechanism. That, by the way, is already happening under the mechanism of the SOLVIT cases, which we already have the cooperation of the internal market, which is actually working remarkably well, but only dealing with a limited

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number of cases at the moment. So we want to step up that whole activity.

Q216 Lord Swinfen: I apologise because I did say that was my last question but your answer has given rise to another question in my mind. Assuming for the moment that a business wins its case against another State in a court in this country, how is that going to be enforced? Any damages?

Mr Harbour: I think the case that I was referring to would have to take place in the Member State concerned.

Q217 Lord Swinfen: You actually said that they could bring the case in the court of their own country—I am paraphrasing you but that is what I understood you to say.

Mr Harbour: I think I misled you because I think they would have to pursue the Member State in the court in the country where they were trying to provide the service, aiming to provide the service.

Q218 Lord Swinfen: But a small enterprise—they do not have the money.

Mr Harbour: I agree with you that that is a concern for small enterprises. If there are serious problems about this then I think we may have to see whether there are means that we can provide to help them with this.

Q219 Lord Swinfen: Financial means?

Mr Harbour: Maybe or legal advice, I do not know. Hopefully we will not have those sorts of problems, but I agree with you that there are issues about enforcement that we will have to pursue that we do not know about as yet, given the complex nature of this whole proposal.

Q220 Lord Swinfen: I will not take it further but I think we could have gone on quite a long way, but it is getting late.

Mr Harbour: I agree.

Q221 Chairman: I think we ought to thank you, Mr Harbour. You may want to add something before we finish in case we have missed anything, but I should say that we do fully understand and appreciate the fact that a horizontal approach to these matters has been maintained—there was an awful moment some many months ago now where voices were raised against that idea—and that itself is extremely important. I suspect that when we come to write our report that we will well understand the point you are making—and from previous witnesses indeed—that some very important progress has been made here. Finally, I should say that we also understand the need of practical politics to balance concerns that people have, however one may feel

they are justified or not, but nevertheless strongly felt, passionately felt indeed, and the need in practical politics to ensure that legislation takes people with you on those matters otherwise advance is not made at all. So all of those, I have to say, the European Parliament and yourselves have done an excellent job in facilitating that and our thanks to you all for that. Is there anything you would like to add before we conclude?

Mr Harbour: I would like to thank you, my Lord Chairman, and your Committee again for your sustained work on this Directive, which, as I say, I really want to emphasise the importance and help that that has been; and I particularly welcome the fact that you are continuing this work and will be publishing a report on this amended text, because I think that it deserves more scrutiny that it has had so far in the round, and I just emphasise that we need to look at the whole of the complex mechanisms involved. I hope—and I am sure you will, judging by the interest that you have all taken in this—that you will continue your scrutiny of the implementation work and how our own government wants to move that through, and also work with us to continue our scrutiny of other Member States because that really is the challenge that we now face. Just for the record, I would particularly like to pay tribute to the Austrian Government because the Austrian Government, from being rather lukewarm when we met them in December about this whole Directive, having seen the possibility of what they thought was a well-balanced agreement have really been extremely enthusiastic to push this through and to get other Member States behind it. As I say, we had the unusual experience, Mrs Gebhardt, the rapporteur, who you met, and myself, of going to a Council meeting and for the first time the Members of the European Parliament have been invited to participate in an informal Competitiveness Council Meeting, and subsequently we worked very closely with them and that is why I remain optimistic. In celebration of that I am wearing my special Austrian Presidency tie today, which I thought was appropriate coming here, my Lord Chairman, in recognition of the fact and to thank them for the role that they played! I should say that the British Government also were very keen to support us through its Presidency, so it has been a combined effort between the two governments.

Chairman: Could I just make a final remark on behalf of the Committee? In this area, as in others, we will be moving from scrutinising legislation through to implementation and the balance of activity, which I am sure applies to many other areas as well as this. We hope very much that at Member State level and in the European Parliament that as much enthusiasm for its practical implementation is shown as for getting the fine tuning right to getting

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the balance right because if the gas and electricity liberalisation is anything to go by that enthusiasm at Member State level is rather different from the willingness to pass legislation. That is not a cheap point; it is a point of substance. We are greatly encouraged as a sub-Committee that the Commission now appears to be more robust in its attitude and we are of a like mind, I suspect, in the

sub-committee, and at least the UK MEPs, that implementation has to be vigorous. Passing legislation in Europe is the easy part—it has been difficult to follow but it is easy compared to getting implementation—and if, Mr Harbour, you and your colleagues are able to be as vigorous in that and as successful then we wish you well. Thank you again for your assistance and to your Committee.

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