

**LEGISLATING AMIDST PUBLIC CONTROVERSY:
THE SERVICES DIRECTIVE**

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PETER TIMMERMAN



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Table of Contents

Introduction	3
1. Need for reform: Lisbon Strategy	5
2. Internal market rules on the provision of services.	7
2.1. Treaty provisions	7
2.2. Mutual recognition and the country of origin principle	8
3. Initial Commission proposal	11
3.1. Analysis of the proposed Services Directive.	11
3.2. Economic impact of the proposed Services Directive.	20
4. Extensive criticism	23
4.1. Opinions of the European consultative bodies	23
4.2. Scrutiny by the European Parliament	24
5. Modified Commission proposal	31
6. Moving towards consensus	33
7. Critical appraisal of the Services Directive	35
7.1. What is left of initial proposal?	36
7.2. Only a limited number of new elements	40
7.3. Difficult relationship between Treaty provisions, case law and the directive.	41
7.4. More restrictive national measures?	42
7.5. What is the added value of the Services Directive?	43
8. Role of the Institutions.	47
8.1. European Commission	47
8.2. European Parliament	48
8.3. Council of the European Union	49
Conclusion	51

Introduction

The adoption of the Services Directive in 2006 constituted the final act of one of the most controversial pieces of European legislation adopted in recent years. The highly ambitious proposal quickly met resistance in the public opinion, since the proposal was feared to clear the way for social dumping and was believed to lead to a race to the bottom regarding worker's rights. The 'Bolkestein Directive', named after the Commissioner for Internal Market who launched the proposal, thus quickly became a highly controversial document. From the outset, its importance for the single market in services made the proposed directive a high profile issue. For the Barroso Commission, it was one of its principal dossiers, although it was initially put on the table by the Prodi Commission in the beginning of 2004.

Charlie Mc Creevy, the new Commissioner for the Internal Market, found himself thus confronted with a highly controversial matter. Although he initially defended the proposal, the co-decision procedure forced him to give in to the fierce opposition of the European Parliament, which reflected the growing dislike in the public opinion. The controversy surrounding the directive is even believed to be one the reasons for the rejection of the European Constitution in the French and Dutch referenda in 2005.

The purpose of this paper is to analyse the decision-making process the Services Directive has gone through. The first part contains a brief overview of the rationale behind the proposal (1), after which the situation of the internal market in services will be analysed (2). The next parts describe the Commission's initial proposal (3), the way in which it was amended by the European Parliament (4), the modified Commission text (5) and its final adoption (6). The seventh part contains a critical appraisal of the Services Directive (7). Finally, the role of the Institutions is being looked at (8).

Peter TIMMERMAN
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1. Need for reform: Lisbon Strategy

In the 2000 European Council in Lisbon, the European Heads of State and Government agreed that the EU's strategic goal for the next decade was “*to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion*”¹. This so-called Lisbon Strategy required, *inter alia*, a reinvigorated push towards the completion of the internal market. In particular the remaining barriers to the single market in services had to be removed, because services had become the principal driver of the EU economy representing around 70% of the EU GDP and 55% of total employment².

A 2002 report on the state of the internal market for services revealed over ninety obstacles to the internal market in services, resulting in considerable costs for companies, particularly small and medium-sized enterprises (SMEs) engaged in cross-border service activities. Service users, in specific consumers, were also found to be affected by the internal market barriers, because these barriers lead to higher prices and prevent recipients to benefit from a greater variety or better quality of services³.

1. Presidency Conclusions. Lisbon European Council of 23 and 24 March 2000. Council of the European Union, Brussels. Accessed, 16 September 2008, http://europa.eu/european_council/conclusions/index_en.htm.

2. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. The competitiveness of business-related services and their contribution to the performance of European enterprises, European Commission, 4 December 2003, COM(2003)747 final.

3. *Ibid.*, pp. 5-9. (COM(2002)441 final).

2. Internal market rules on the provision of services

2.1. Treaty provisions

In principle, the free movement of services was already a part of the Treaty of Rome in 1957, which stated that the Community shall work towards “*the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital*”⁴.

In the EC Treaty, the prohibition of regulatory restrictions on the provision of services is spelled out in three articles. The Articles 49 EC on the freedom to provide services, 43 EC on the freedom of establishment, and 56 EC on the free movement of capital ban all restrictions which might affect the freedom of services. However, Article 46 EC provides the possibility for derogations to the freedoms of establishment and of services on grounds of public policy, public security and public health. Following Article 86 EC, undertakings entrusted with the operation of services of general economic interest shall be subject to the rules of the EC Treaty, in particular to the rules on competition⁵.

According to Article 50 EC, “[s]ervices shall be considered to be ‘services’ within the meaning of this Treaty where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”⁶. In its case law, the European Court of Justice clarified that an activity can be qualified as a service if (1) the activity is of an economic nature⁷, including activities of a special nature, such as health services⁸, and (2) that the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service, and is normally agreed upon between the provider and the recipient⁹. This does not necessarily mean that the service must be paid by those for whom it is performed¹⁰, or that the remuneration should correspond to the real cost of the service rendered¹¹.

4. Art. 3 of the Consolidated Versions of the Treaty establishing the European Economic Community (OJ 2006 C321E/1-331).

5. Art. 43, 46, 49, 50, 56 and 86 of the Consolidated Versions of the Treaty Establishing the European Union Community (OJ 2006 C321 E/1-331).

6. Art. 50 of the Consolidated Versions of the Treaty Establishing the European Union Community (OJ 2006 C321 E/1-331).

7. Joined Cases C-51/96 and C-191/97, *Deliège*, par. 49.

8. Case C-8/02, *Leichtle*, par. 28.

9. Case C-355/00, *Freskot AE v Elliniko Dimosio*, par. 55.

10. Case C-157/99, *BSM Geraerts-Smits v Stichting Ziekenfonds VGZ and HTM Peerbooms v Stichting CZ Groep Zorgverzekeringen*, par. 57.

11. *Ibid*, o.c., par. 58.

2.2. Mutual recognition and the country of origin principle

The case law of the European Court of Justice related to the free movement of services is based on principles that were first developed in the area of the free movement of goods.

A key case dealing with obstacles to the free movement of goods was the *Cassis de Dijon* case. The Court ruled against the German prohibition to import Cassis de Dijon, a French liquor, on the grounds that it failed to meet German alcohol-content standards. The European Court of Justice ruled that since Cassis met French standards and it did not pose health risks, its sale could not be prohibited on the German market¹².

This judgement was very important, because it constituted the base for the doctrine of mutual recognition, which guarantees the free movement of goods without the need to harmonise member states' national legislation. The principle was later extended to cover services as well¹³. Mutual recognition implies that legislation of one member state, the county of origin of a good or service, is also valid in any other member state. However, under the principle of mutual recognition, the goods or services remain under scrutiny of the member state where the good is sold or the service is provided.

The county of origin principle is thus not a new concept, since it has its origins in the *Cassis de Dijon* case. Among scholars, a discussion has erupted on whether or not the county of origin principle has its legal base in the Treaty. Some consider it to be inherent to Article 49 EC on services, read in conjunction with Article 10 EC which obliges member states to cooperate for the fulfilment of obligations arising from the Treaty¹⁴. This view is opposed by those who argue that the county of origin principle has no legal base in the Treaty and must thus be explicitly provided for in secondary legislation¹⁵.

12. Case 120/78, *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein*, par. 14. However, it should be noted that the Court also stated that obstacles to the free movement of goods must be accepted if they are the consequence of mandatory requirements relating to fiscal supervision, the protection of public health, the fairness of commercial transactions and the defence of the consumer. (*Ibid.*, par. 8).

13. Case C-76/90, *Manfred Säger v Dennemeyer & Co. Ltd.*, par. 12.

14. See GARABIOL-FURET, Marie-Dominique, La directive Bolkestein, bouc émissaire d'une Europe incertaine. In: *Revue du Marché commun et de l'Union européenne*, 488, mai 2005, p. 295 and PELLEGRINO, Patrice, Directive sur les services dans le marché intérieur: un accouchement dans la douleur. In: *Revue du Marché commun et de l'Union européenne*, 504, janvier 2007, p. 17.

15. See DE SCHUTTER, Olivier, FRANCO, Stéphanie, La proposition de directive relative aux services dans le marché intérieur: reconnaissance mutuelle, harmonisation et conflits de lois dans l'Europe élargie. In: *Cahiers de Droit Européen*, 41, 5/6, 2005, p. 606; MICOSSI, Stefano, Fixing the Services Directive, CEPS Policy Brief, 20 June 2006, No. 100. Accessed, 22 September 2008, http://shop.ceps.eu/BookDetail.php?item_id=1327 and HATZOPOULOS, Vassilis, Que reste-t-il de la directive sur les services? College of Europe, Research Paper in Law, 5, 2007, p. 12. Accessed, 15 October 2008, <http://www.coleurop.be/template.asp?page=lawpapers>.

In the past, the county of origin principle has been used in several sector-specific pieces of legislation. The way in which the principle was introduced in the legislative practice in the EU has gone through two stages.

The first generation of the county of origin principle was included in a group of directives on insurance, banking and financial services¹⁶. According to these directives, the country of origin established the authorisation requirements, whereas the operation remained subjected to the conditions of the member state of destination. This first generation of the county of origin principle thus only concerned the access to, but not the exercise of service activities. Moreover, the directives also contained substantial harmonising measures¹⁷.

The second generation of the county of origin principle was more far-reaching, as it did apply to both the access to, and the exercise of services, while at the same time imposing only limited harmonisation¹⁸. This was the case in the Television without Frontiers Directive¹⁹, the Electronic Signature Directive²⁰, the E-commerce Directive²¹ and the Directive on data protection in the field of electronic communications²².

16. Directive 85/611/EEC (OJ 1985 L375/3-18), Directive 89/646/EEC (OJ 1989 L386/1-13), Directive 92/49/EEC (OJ 1992 L228/1-23), Directive 92/96/EEC (OJ 1992 L360/1-27), Directive 93/22/EEC (OJ 1993 L141/27-46), Directive 94/19/EC (OJ 1994 L135/5-14), Directive 97/9/EC (OJ 1997 L84/22-31).

17. HATZOPOULOS, Vassilis, o.c., pp. 4-5.

18. *Ibid.*, p. 5.

19. Directive 97/36/EC (OJ 1997 L202/60-70).

20. Directive 1999/93/EC (OJ 2000 L13/12-20).

21. Directive 2000/31/EC (OJ 2000 L178/1-16).

22. Directive 2002/58/EC (OJ 2002 L201/37-47).

3. Initial Commission proposal

The Commission adopted in 2004 the proposal for a directive on the internal market in services²³. The directive was designed to set out a legal framework that would eliminate the obstacles to the freedom of establishment for service providers, remove the barriers to temporary service provision in other member states and fix detailed rules on mutual assistance and evaluation between member states²⁴.

3.1. Analysis of the proposed Services Directive

3.1.1. *Scope of the directive*

The Commission proposed to establish a general legal framework for all economic activities involving services, albeit with exceptions. It advocated a horizontal approach, rather than laying down detailed rules or harmonising the rules across member states, in order to avoid overregulation²⁵. Critics of a horizontal design advocated a sector-by-sector approach, arguing that it would be inappropriate to try to regulate some many different sectors in one and the same time. Nevertheless, a sector-specific approach would have proven very complex, time consuming and unnecessarily overlapping, because many of the barriers identified were common to the 83 service sectors concerned²⁶.

The proposal applied to “*services supplied by providers established in a Member State*”²⁷. A ‘service’ was defined in the directive as “*any self-employed economic activity, as provided for by Article 50 of the Treaty, consisting of the provision of a service against consideration*”²⁸. This definition of a service is based on the EC Treaty and on case law of the European Court of Justice. The Commission argued that trying to establish a new definition would have created legal uncertainty and complexity, whereas the establishment of an exhaustive list of services covered by the directive seemed impractical due to the constant evolution within the services economy²⁹. However, the proposal did provide, by way of

23. Proposal for a Directive of the European Parliament and of the Council on services in the internal market, European Commission, 5 March 2004, COM(2004)2 final/3. (Hereinafter: ‘Initial Proposal’).

24. *Ibid.*, pp. 3-4 (COM(2004)2 final/3).

25. *Ibid.*, p. 8 (COM(2004)2 final/3).

26. Extended Impact Assessment of proposal for a directive on services in the internal market. European Commission, 13 January 2004, pp. 27, 45-46. (SEC(2004)21).

27. ‘Initial Proposal’, art. 2 (COM(2004)2 final/3).

28. *Ibid.*, art. 4 (COM(2004)2 final/3).

29. Interinstitutional File 2004/0001(COD): Explanatory note on the activities covered by the proposal, European Commission, 25 June 2004, (10865/04).

example, a non-exhaustive list of services falling within the scope of the directive³⁰.

Notwithstanding the Commission's objective to create a horizontal legal framework, the proposed directive did not apply completely or in part to a number of service activities. A number of exclusions and derogations limited its scope. The former applies to services which are entirely excluded from the scope of the directive, irrespective of the fact of whether these service activities are provided on an established or a temporary basis. The latter exempts certain service areas from parts of the draft directive relating to the provision of services on a temporary basis.

The exclusions from the directive's scope concern financial services, electronic communications services and networks and transport services³¹, because these services are already covered by other directives. Furthermore, the proposed directive does not apply in the field of taxation³² and non-economic services of general interest³³ are also excluded because they are not provided for remuneration³⁴. Finally, the non-economic nature of the services falling within the scope of the directive, also implied that member states would not be obliged to abolish existing monopolies or to privatise certain sectors³⁵.

The derogations provided for in the directive apply to the country of origin principle (cfr. *infra*).

30. The concept of service covers a wide variety of ever-changing activities, including business services such as management consultancy, certification and testing; facilities management, including office maintenance and security; advertising; recruitment services, including employment agencies; and the services of commercial agents. That concept also covers services provided both to businesses and to consumers, such as legal or fiscal advice; real estate services such as estate agencies; construction, including the services of architects; transport; distributive trades; the organisation of trade fairs; car rental; travel agencies; and security services. It also covers consumer services, such as those in the field of tourism, including tour guides; audio-visual services; leisure services, sports centres and amusement parks; health and health care services; and household support services, such as help for the elderly. Those activities may involve services requiring the proximity of provider and recipient, services requiring travel by the recipient or the provider and services which may be provided at a distance, including via the Internet. ('Initial Proposal', rec. 14 (COM(2004)2 final/3)).

31. 'Initial Proposal', art. 2 (COM(2004)2 final/3).

32. *Ibid.*, art. 2 (COM(2004)2 final/3).

33. Two sets of services of general interest are distinguished in the EU: non-economic services of general interest (such as public administration, police, justice and statutory social security schemes) and services of general economic interest (such as telecommunications, electricity, gas, transport and postal services). The former group of services are not subject to specific EU legislation, nor are they covered by the internal market and competition rules of the Treaty. The latter are subject to internal market and competition rules of the EC Treaty and specific EU legislative frameworks. (Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Accompanying the Communication on "A single market for 21st century Europe". Services of general interest, including social services of general interest: a new European commitment. European Commission, 20 November 2007, COM(2007)725 final).

34. 'Initial Proposal', pp. 14-15. (COM(2004)2 final/3).

35. *Ibid.*, rec. 35. (COM(2004)2 final/3).

Regarding the relationship with other provisions of Community law, the directive stated that application of more specific regulations on services in other Community instruments would predominate over this general directive on services³⁶.

3.1.2. *Freedom of establishment*

The proposed directive contained provisions aimed at eliminating the obstacles to the freedom of establishment. These provisions concerned (1) administrative simplification measures, (2) the streamlining of authorisation procedures of service activities, and (3) regulatory restrictions to which services can be subjected.

Firstly, certain measures were aimed at administrative simplification of the procedures and formalities applicable to the access to, and the exercise of service activities. The principal provision regards the establishment of ‘single points of contact’, where service providers should be able to complete all their administrative procedures relevant to their activities. Moreover, member states have to provide the possibility to complete these procedures on-line. Furthermore, the single point of contact should ensure that all relevant information is easily accessible to service providers in their territory³⁷.

The provision of a single point of contact does not oblige member states to set up a single, centralised agency tasked with handling all procedures and formalities on its territory. The point of contact should be ‘single’ only as far as the individual service provider is concerned, meaning the service provider must be able to complete all the formalities and procedures required for the exercise of service activities through one and the same body³⁸.

Secondly, the freedom of establishment was to be improved by streamlining authorisation procedures of service activities. In order to counter the obstacle posed by of complicated and non-transparent authorisation procedures, the directive required that authorisation schemes should be non-discriminatory and objectively justified by an overriding reason relating to the public interest³⁹.

The concept of ‘overriding reason relating to the public interest’ has been introduced by the European Court of Justice, thus allowing national restrictions to

36. *Ibid.*, art. 3. (COM(2004)2 final/3).

37. *Ibid.*, art. 6-8 (COM(2004)2 final/3).

38. *Ibid.*, p. 21 (COM(2004)2 final/3).

39. *Ibid.*, art. 9 (COM(2004)2 final/3).

the right of establishment if it considered that there were reasons to do so. In accordance to European Court of Justice case law, the draft directive contained a provision which stated that the overriding reasons relating to the public interest to which was referred, “*are those recognised by the Court of Justice in relation to Articles 43 and 49 of the Treaty, notably the protection of consumers, recipients of services, workers and the urban environment*”⁴⁰.

As a third way to improve the freedom of establishment, the Commission proposed to prohibit certain restrictive legal requirements⁴¹ imposed by member states (‘black list’) and to require member states to assess the compatibility of certain other legal requirements (‘grey list’).

The black list of requirements to which the exercise of a service activity cannot be made compliant include, among others: discriminatory requirements based directly or indirectly on nationality, restrictions on the freedom of a provider to choose between a principal or a secondary establishment, making the authorisation subject to a case-by-case proof of the existence of an economic need or a market demand and the involvement of competitors in the procedure for authorisation to enter a market⁴².

The grey list is constituted of potentially restrictive rules which should be eliminated by the member states unless they can be proven to be 1) non-discriminatory, 2) necessary and objectively justified in the public interest and 3) proportionate. These requirements include: among others, quantitative or territorial restrictions of service providers, the obligation to take a specific legal form, requirements on the shareholding of a company, fixed minimum or maximum tariffs and requirements regarding a minimum level of employees⁴³.

3.1.3. *Free movement of services*

In the proposal, the country of origin principle was central for the freedom to provide services across borders. According to the country of origin principle, a service provider is subject only to the law of the member state in which it is

40. Ibid., rec. 29 (COM(2004)2 final/3).

41. A requirement was broadly defined, constituting: “any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice or the rules of professional bodies, or the collective rules of professional associations or other professional organisations, adopted in the exercise of their legal autonomy. (Ibid., art. 4 (COM(2004)2 final/3)).

42. Ibid., art. 14 (COM(2004)2 final/3).

43. Ibid., art. 15 (COM(2004)2 final/3).

established. Although it may be operating on a temporary basis⁴⁴ in one or more other member states, it would only be bound by the rules of its member state of origin⁴⁵.

Services provided in another member state would be covered by national provisions of the member state of origin relating to access to, and the exercise of a service activity, in particular those requirements governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider's liability⁴⁶.

The member state of origin would be responsible to supervise the service providers established on its territory and the services provided, including services provided in other member states⁴⁷.

As a general rule, member states would not be allowed to restrict services from a provider established in another member state. A specific list of prohibited requirements, which could restrict the freedom to provide services, was included⁴⁸.

However, the proposed directive contained a list of derogations to the country of origin principle. These were grouped in derogations of general or temporary nature, or on a case-by-case basis.

44. In order to distinguish between the freedom of establishment and the free movement of services, the temporary nature of services provided in another member state then where the service provider is established, is clarified on the basis of case law of the European Court of Justice. The Court argued that the temporary nature of the service activities is not only determined by the duration of the provision of the service, but also by its regularity, periodical nature and continuity. Moreover, the temporary nature of the activity does not mean that the service provider may not acquire some form of infrastructure in the host member state, in so far as such infrastructure is necessary for the purposes of providing the service in question. (Case C-55/94, Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, par. 27).

45. 'Initial Proposal', art. 16 (COM(2004)2 final/3).

46. *Ibid.*, art. 16 (COM(2004)2 final/3).

47. *Ibid.*, art. 16 (COM(2004)2 final/3).

48. (1) An obligation on the provider to have an establishment in their territory, (2) an obligation on the provider to make a declaration or notification to, or to obtain an authorisation from, their competent authorities, including entry in a register or registration with a professional body or association in their territory, (3) an obligation on the provider to have an address or representative in their territory or to have an address for service at the address of a person authorised in that territory, (4) 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, (5) an obligation on the provider to comply with requirements, relating to the exercise of a service activity, applicable in their territory, (6) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed, (7) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity, (8) requirements which affect the use of equipment which is an integral part of the service provided, (9) restrictions on the freedom to provide the services referred to in Article 20, the first subparagraph of Article 23(1) or Article 25(1). the recipient which prevent or restrict service provision by the self-employed. (*Ibid.*, art. 16 (COM(2004)2 final/3)).

The general derogations would apply, among others, to postal services and the distribution of electricity, gas and water⁴⁹.

Furthermore, the proposal contained a derogation for contracts for the provision of services concluded by consumers to the extent that the provisions governing them are not completely harmonised at Community level⁵⁰. This implies that the country of origin principle would only apply to business-to-business transactions, while national rules on consumer protection would still apply to contracts signed by them.

Moreover, other derogations concerned the recognition of professional qualifications, the rules on the posting of foreign workers, all acts involving a notary and regarding specific requirements directly linked to the particular characteristics of the place where the service is provided and with which compliance is indispensable for reasons of public policy or public security or for the protection of public health or the environment⁵¹.

Given the combination of the service activities subjected to derogations from the country of origin principle and the activities which were explicitly excluded from the scope of the directive (financial services, electronic communications services and networks and transport services), this would effectively mean that the country of origin principle would not apply to most services of general economic interest. This would be an affirmation of the implicit principle of article 86 of the EC Treaty, which gives member states the freedom to define what they consider services of general economic interest and how they should operate⁵².

3.1.4. *Mutual trust*

The Commission also envisaged to enhance mutual trust between member states, in order to complement the provisions on the freedom of establishment and the freedom to provide services. Therefore, the proposal contained provisions regarding targeted harmonisation, codes of conduct and administrative cooperation.

Firstly, the proposal introduced a certain level of targeted harmonisation in the field of consumer protection and for administrative simplification regarding the freedom of establishment and the posting of workers in another member state.

49. *Ibid.*, art. 17 (COM(2004)2 final/3).

50. *Ibid.*, art. 17 (COM(2004)2 final/3).

51. *Ibid.*, art. 17 (COM(2004)2 final/3).

52. MICOSSI, Stefano, o.c.

Secondly, member states would be encouraged to draw up codes of conduct at Community level on issues, such as commercial communications to regulated professions and professional ethics⁵³.

Thirdly, the proposed directive required member states to give each other mutual assistance for effective supervision of service providers and the services provided⁵⁴. Besides, every member state would be required to present a report to the Commission on its authorisation systems, regulatory requirements included in the grey list and multidisciplinary activities. These reports would be subject to mutual evaluation by other member states within six months after they have been laid down⁵⁵. Member states would also have to notify to the Commission any new grey list restrictions it wants to introduce. The final decision would rest with the member states, but the Commission could, after reviewing its compatibility with Community law within a period of three months, request the member state to refrain from introducing the new measure⁵⁶. Because the final decision would remain with the member states, provided that the conditions of non-discrimination, necessity and proportionality are taken into consideration, this would thus constitute only a partial standstill clause for grey list requirements. However, it will have an important role as *ex ante* control to the introduction of barriers to establishment⁵⁷.

3.1.5. *Posting of workers*

The provisions of the Posting of Workers Directive (96/71/EC) will continue to apply, since the proposed directive contained a derogation from the country of origin principle regarding the posting of workers. Therefore, posted workers, including temporary workers, would remain subject to the terms and conditions of employment applied in the member state where the service is provided. These relate to maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, including overtime rates, the conditions of hiring out of workers, in particular the supply of workers by temporary employment undertakings, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth and of children and young people and

53. 'Initial Proposal', art. 39 (COM(2004)2 final/3).

54. *Ibid.*, art. 34-38 (COM(2004)2 final/3).

55. *Ibid.*, art. 41 (COM(2004)2 final/3).

56. *Ibid.*, art. 15 (COM(2004)2 final/3).

57. BARNARD, Catherine, *Unravelling the Services Directive*, In: *Common Market Law Review*, 45, 2008, p. 359.

equality of treatment between men and women and other provisions on non-discrimination⁵⁸.

The proposed services directive could have far-reaching implication in the case of self-employed workers. Since self-employed workers are not covered by the Posting of Workers Directive, it would be possible for them to supply services in another member state, while not being subject to the rules on working conditions of the host member state. However, they would still have to comply with host country regulations on consumer protection and on safety and health risks, and any workers hired in the host country would be covered by local law⁵⁹.

The proposal did contain provisions for administrative simplification for service providers who post workers in another member state and for the posting of third country nationals.

The member state of posting would remain empowered to control the employment and working conditions of posted workers in its territory, but the Commission proposed to abolish the following three obligations: (1) the requirement for service providers to obtain prior authorisation from the host country, (2) having a representative in the host country and (3) holding and keeping employment documents in its territory⁶⁰.

Regarding the posting of third country nationals, the proposal would oblige a member state of origin to ensure that service providers post workers only if the national lawful requirements regarding employment and residence are met, and if it would readmit the worker to its territory afterwards. Member states of posting would not be able to require the posted worker to hold an entry, exit, residence or work permit, except when the mutual recognition regime of the Convention implementing the Schengen Agreement does not apply⁶¹.

3.1.6. Rights of recipients and quality of services

The directive would lay down obligations for both member states and service providers regarding the rights of service recipients. Firstly, member states should not restrict the use of services provided by operators established in a different member state and, unless objectively justified, member states may not discrimi-

58. Directive 96/71/EC (OJ 1997 L18/1-6).

59. VOGT, Line, *The EU's Single Market: At your Service?* OECD, Economics Department Working Paper No. 449, 7 October 2005 (ECO/WKP(2005)36). Accessed, 8 October 2008, [http://www.oalis.oecd.org/oalis/2005doc.nsf/linkto/ECO-WKP\(2005\)36](http://www.oalis.oecd.org/oalis/2005doc.nsf/linkto/ECO-WKP(2005)36).

60. 'Initial Proposal', art. 24 (COM(2004)2 final/3).

61. *Ibid.*, art. 25 (COM(2004)2 final/3).

nate against recipients on the basis of nationality or place of residence. Secondly, service providers are also prohibited to discriminate on the basis of the nationality or place of residence of the recipient⁶².

Moreover, member states would have the obligation to provide assistance to recipients, irrespective of their nationality. They would be required to ensure the provision of information about the applicable requirements in other member states, the means of redress in case of a dispute between a provider and a recipient and the contact details of associations where providers and recipients can obtain practical assistance⁶³.

Furthermore, the proposed directive contained provisions clarifying the conditions under which patients are entitled to reimbursement for medical care received in another member state. It proposed to abolish the requirement of prior authorisation for reimbursement by the social security system for non-hospital care provided in another member state⁶⁴. This is based on case law of the European Court of Justice, which found that the Treaty provisions on free movement of services apply to health care services, if they are provided for remuneration⁶⁵.

Finally, consumer rights would be strengthened by a wide range of provisions regarding the quality of services. Recipients are entitled to easily available information about service providers and their services⁶⁶. Reciprocally, service providers are given more possibilities to communicate and advertise. Total prohibitions on commercial communication by the regulated professions are to be removed, although limitations may remain in place for the public interest⁶⁷. Member states must see to it that service providers have professional indemnity insurance for services that present particular risks for recipients and ensure that service providers have after-sale guarantees⁶⁸. Member states should also take measures to facilitate the settlement of disputes and, upon request of the competent authority of another member state, exchange information on criminal

62. *Ibid.*, art. 20-21 (COM(2004)2 final/3).

63. *Ibid.*, art. 22 (COM(2004)2 final/3).

64. *Ibid.*, art. 23 (COM(2004)2 final/3).

65. Case C-158/96, Kohll, par. 29.

66. Member states have to ensure that providers make information available concerning, inter alia, name, address, contact details, registration in a trade register, general conditions and clauses and contractual clauses. Upon request, additional information concerning the main features and price of the service, the legal status of the provider and, for regulated professions, reference to the applicable professional rules have to be supplied. ('Initial Proposal', art. 26 (COM(2004)2 final/3)).

67. *Ibid.*, art. 29 (COM(2004)2 final/3).

68. *Ibid.*, art. 27-28 (COM(2004)2 final/3).

convictions, penalties, administrative or disciplinary measures and decisions concerning insolvency or bankruptcy involving fraud⁶⁹.

As consequence of these provisions on rights of recipients and on the quality of services, the proposal would have a strengthening effect on recipients rights. Even more specific, this would definitely be a positive evolution for consumer rights. As noted earlier, the country of origin principle would not apply to consumers contracts, meaning that consumer protection would remain subject to the law of the country where the consumer resides. Nevertheless, despite the fact that the country of origin principle would thus only affect business-to-business activities, it cannot be totally excluded that the final recipients of cross-border services suffer indirectly from lower protection. This could be the case in e.g. a large construction project, where although a consumer is not purchasing the service, he is the final user of the facility⁷⁰.

3.1.7. Phased implementation

The Commission proposed to implement the directive in a phased manner between 2005 and 2010. The possibility for additional harmonisation or new initiatives was made dependent on progress in achieving the internal market.

3.2. Economic impact of the proposed Services Directive

Apparently, the Commission made no projections of the potential economic gains of the proposal in its impact assessment. Without giving specific forecasts, it concluded that the directive could result in major economic benefits to the economy as a whole, indicating particularly the expected increase in cross-border trade and investment, increased productivity and new employment opportunities⁷¹.

There have been other independent studies on the original proposal that did make projections regarding the expected economic impact of the proposal.

A study, executed by Copenhagen Economics, stated that the Commission's proposal could bring significant economic benefits, particularly to SMEs. The principal elements found were that the directive could create a welfare increase

69. Ibid., art. 32-33 (COM(2004)2 final/3).

70. MICOSSI, Stefano, o.c.

71. Extended impact assessment, o.c., p. 36.

worth €37 billion, employment would increase across the EU with up to 600,000 jobs, wages would increase and consumers would benefit from lower prices⁷².

The Dutch Bureau for Economic Policy Analysis projected an increase of intra European trade in commercial services ranging between 30 and 60% and substantial increases in GDP (0.3 to 0.7%) and consumption (0.5 to 1.2%) in the EU. However, these projections were based on the presumption that the proposed services directive would be fully implemented, including the country of origin principle. If this were not to be the case, trade would increase only by 20 to 40%, while GDP would rise by 0.2 to 0.4% and consumption by 0.3 to 0.7%⁷³.

72. Copenhagen Economics, *Economic Assessment of the Barriers to the Internal Market for Services. Final Report*. Copenhagen, January 2005, pp. 7-8. Accessed, 20 October 2008, http://ec.europa.eu/internal_market/services/docs/services-dir/studies/2005-01-cph-study_en.pdf.

73. DE BRUIJN, Roland, KOX, Henk, LEJOUR, Arjan, *The trade-induced effects of the Services Directive and the country of origin principle*. CPB Netherlands Bureau for Economic Policy Analysis, CPB Document No. 108, February 2006, p. 47. Accessed, 20 October 2008, www.cpb.nl.

4. Extensive criticism

The services directive was subject to the co-decision procedure, by which the European Parliament had the power to veto the proposal, meaning that its amendments have to be taken into consideration in order to compromise. Before looking into the proceedings of the European Parliament, the analyses made by the European Economic and Social Committee and the Committee of the Regions are considered.

4.1. Opinions of the European consultative bodies

4.1.1. *European Economic and Social Committee*

In its opinion on the proposed directive, the Economic and Social Committee has endorsed the objective of eliminating the obstacles to the freedom of establishment for service providers and the freedom to provide services cross-border. However, the overall analysis of the proposal is fairly critical and a number of unsatisfactory provisions are highlighted.

The principal objection to the Commission proposal concerns the country of origin principle. The Committee expressed fears that the harmonisation of legislation has not progressed sufficiently in the EU, so that a universal application of the country of origin principle could become cause for distortions of competition, social dumping and lack of consumer confidence. It argued that the needs of the single market could be best met by harmonisation on a sector-by-sector basis. Moreover, it was strongly emphasised that the directive should not affect trade union rights, the right for workers to organise themselves and of collective bargaining. Furthermore, the European Economic and Social Committee was of the opinion that the directive should not include social and health services, economic and non-economic services of general interest and audio-visual services. The Committee also raised the point that the directive failed to take into account that in some EU Member States, collective agreements have the same legally binding effects as conventional legislation⁷⁴.

The elements of the proposal that were positively received concern the single points of contact, the provisions for closer administrative cooperation between

74. Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on services in the internal market, 10 February 2005. (2005/C221/20) (OJ 2005 C221/113-125).

member states, the improvement of consumer protection and the introduction of codes of conduct⁷⁵.

4.1.2. *Committee of the Regions*

The opinion of the Committee of the Regions reflects similar reservations on the proposed directive. However, in contrast to the Economic and Social Committee, the Committee of the Regions did approve the application of the country of origin principle to attain the objective of the directive. Nevertheless, it went on stating that neither its content nor scope of application were clearly defined and asked that social and health services and services of general interest would be left out of the scope of the directive⁷⁶.

4.2. Scrutiny by the European Parliament

The proposed services directive was amended substantially in the European Parliament. Although the parliamentary report⁷⁷ was authored by German MEP Gebhardt of the Committee on Internal Market and Consumer Protection, nine other committees⁷⁸ of the European Parliament were involved in the first reading of the proposal, with often diverging opinions on specific topics.

The amendments after the first reading of the European Parliament related predominantly to the country of origin principle, the scope of the directive, the protection of labour laws, national restrictions to the right of establishment and the mutual evaluation and notification of restrictions.

4.2.1. *Reduction of scope*

The European Parliament extended the provisions regarding the excluded service activities and the derogations from the country of origin principle.

75. Ibid.

76. Opinion of the Committee of the Regions on the Proposal for a Directive of the European Parliament and of the Council on services in the internal market, 30 September 2004. (2005/C43/06) (OJ 2005 C43/18-22).

77. European Parliament legislative resolution on the proposal for a directive of the European Parliament and of the Council on services in the internal market (P6_TA(2006)0061). (Hereinafter: 'EP Resolution').

78. The Committee on Budgetary Control, the Committee on Economic and Monetary Affairs, the Committee on Employment and Social Affairs, the Committee on the Environment, Public Health and Food Safety, the Committee on Industry, Research and Energy, the Committee on Culture and Education, the Committee on Legal Affairs, Committee on Women's Rights and Gender Equality and the Committee on Petitions.

Regarding the exclusion of services from the scope of the directive, the European Parliament listed an extensive number of activities: services of general interest as defined by member states, urban transport, taxis and ambulances, port services, legal services, public and private healthcare services, social services, audiovisual services, temporary work agencies, security services, gambling activities and activities that are permanently or temporarily connected with the exercise of an official authority in a member state⁷⁹.

Parliament explicitly explained why the services of general interest should not fall within the scope of the proposed directive: *“Services of general interest [...] are provided and defined by the Member States under their obligations to protect the public interest. These activities are not covered by the definition in Article 50 of the Treaty and do not therefore fall within the scope of this Directive. The provisions of this Directive apply only insofar as the activities in question are open to competition, and do not require the Member States to liberalise services of general interest, privatise existing public bodies or abolish existing monopolies, such as lotteries or certain distribution services. As regards services of general interest, this Directive covers only services of general economic interest, i.e. services that correspond to an economic activity and are open to competition”*⁸⁰.

Services of general economic interest would thus be still covered by the directive, but the European Parliament stressed explicitly that the directive does not force member states to liberalise or privatise such services⁸¹.

Regarding the derogations provided in the directive, Parliament specified that all services of general economic interest provided in another member state are excluded from the application of the rules on freedom to provide services on a temporary base⁸². All services of general economic interest would also be exempted from the evaluation of the requirements listed in the ‘grey list’⁸³.

On the relationship with other Community legislation, the parliamentary amendments explicitly clarified that Community rules dealing with specific sectors would prevail over the proposed directive. Furthermore, it specifically mentioned the Posting of Workers Directive, Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and members of their families moving within the Community, Directive (89/552/EEC) concerning the pursuit of television broadcasting activities and

79. ‘EP Resolution’, art. 2 (P6_TA(2006)0061).

80. Ibid., rec. 21 (P6_TA(2006)0061).

81. Ibid., art. 1 (P6_TA(2006)0061).

82. Ibid., art. 22 (P6_TA(2006)0061).

83. Ibid., art. 15 (P6_TA(2006)0061).

the Directive (2005/36/EC) on the recognition of professional qualifications. Finally, it elucidated that consumer protection would be subject to the legislation in force in the member state where the consumer resides⁸⁴.

4.2.2. *'Overriding reasons relating to the public interest'*

The European Parliament has elaborated the notion of 'overriding reasons relating to the public interest', which allows for more restrictive national rules. In its amendments it came up with a description of 'overriding reasons relating to the public interest' by providing a long list of public policy concerns⁸⁵.

4.2.3. *Freedom to provide services*

The European Parliament removed the country of origin principle from the proposal and replaced it by the freedom to provide services, which is derived from the principle of mutual recognition. It requires member states to respect the right of a service provider to supply services in another member state than where it is established and to ensure free access to, and free exercise of a service activity within their territory⁸⁶. Member states thus have the obligation to ensure the freedom to provide services in another member state on a temporary basis.

Parliament specified that a member state cannot make the access to, or exercise of a service activity in their territory subject to discriminatory, unnecessary or disproportionate requirements. Moreover, the provisions on the freedom to provide services contained a specific list of requirements which member states cannot impose upon a service provider established in another member state⁸⁷. Not-

84. *Ibid.*, art. 3 (P6_TA(2006)0061).

85. The protection of public policy, public security, public safety, public health, preserving the financial equilibrium of the social security system, including maintaining balanced medical care available to all, the protection of consumers, recipients of services and workers, fairness of trade transactions, combating fraud, the protection of the environment including the urban environment, the health of animals, intellectual property, the conservation of the national historic and artistic heritage or social policy objectives and cultural policy objectives. (*Ibid.*, art. 4 (P6_TA(2006)0061)).

86. *Ibid.*, art. 21 (P6_TA(2006)0061).

87. This list, highly similar to the one in the original proposal contained: (1) An obligation on the provider to have an establishment in their territory, (2) 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, (3) 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, (4) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed, (5) an obligation on the provider to possess an identity document issued by its competent authorities specific to the exercise of a service activity, (6) requirements, other than 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, (7) restrictions on the freedom to provide services referred to in Article 24. (*Ibid.*, art. 21 (P6_TA(2006)0061)).

withstanding this, member states would be allowed to impose requirements on the provision of a service activity, if justified for reasons of public policy, public security, environmental protection and public health, or in relation to the application of employment conditions, including those laid down in collective agreements⁸⁸.

By replacing the country of origin principle by the freedom to provide services, the proposal became effectively based on a country of destination principle. The access to, and the exercise of service activities would become subject to the regulations of the member state in which the service is provided. However, any restriction imposed on foreign service providers should be justified, meaning that the burden of proof would be shifted: a service provider or recipient should no longer have to prove that he is entitled to move across borders, the national authorities have to provide reasoned evidence if restrictions are imposed on cross-border services.

The parliamentary report provided the following four main reasons as justification for its withdrawal of the country of origin principle.

Firstly, the country of origin principle was attacked by putting into question its legality, because the European Parliament considered that there exists no legal base for it in the Treaty⁸⁹. It was argued that the country of origin principle would allow service providers from other member states to operate under other conditions as national providers, which was found contradictory to Article 50 EC⁹⁰, which states that “[w]ithout prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals”⁹¹.

Secondly, it was argued that “[i]n the absence of a minimum level of harmonisation at EU level or, at least, of mutual recognition on the basis of comparable rules within the Member States, the country of origin principle cannot be the basic principle governing temporary cross-border provision of services”⁹². This

88. *Ibid.*, art. 21 (P6_TA(2006)0061)

89. Working document on the proposal for a Directive of the European Parliament and of the Council on services in the internal market. European Parliament, Committee on the Internal Market and Consumer Protection, 21 December 2004, p. 3. (PE 353.297v01-00). (Hereinafter: ‘EP Working document’).

90. Report on the proposal for a directive of the European Parliament and of the Council on services in the internal market. European Parliament, Committee on the Internal Market and Consumer Protection, 15 December 2005, pp. 129, 206. (PE 355.744v05-00). (Hereinafter: ‘EP Report’).

91. Art. 50 of the Consolidated Versions of the Treaty establishing the European Economic Community (OJ 2006 C321E/1-331).

92. ‘EP Report’, o.c., p. 126. (PE 355.744v05-00).

rationale reflected the view that further integration in the services sector should be pursued by coordination and harmonisation, rather than by the horizontal application of the country of origin principle. Again, the importance of this criticism rests in the fact that was directly based on the EC Treaty, because Gebhardt argued that “[i]ntroducing the country of origin principle would even endanger progress towards harmonising European legislation, as it departs from the originally planned harmonisation of Articles 55 and 47(2), first sentence, of the EC Treaty”⁹³.

Thirdly, the MEPs argued that the scope of the country of origin principle should be limited to the fields actually coordinated by this proposed directive and other Community instruments. In the proposed directive, the country of origin principle would cover any requirement applicable to the access to, and the exercise of a service activity, while its provisions only relate to the coordination of information on service providers, provisions on professional insurance and information of recipients on the existence of after-sale guarantees and the settlement of disputes⁹⁴.

Fourthly, fears existed that the application of the country of origin principle would create downward pressure on, or even a race to the bottom regarding social and environmental standards⁹⁵. Linked to this fear, the fact that the member state of origin would be responsible for the supervision of the service activities instead of the member state where the service is provided, was unacceptable. In Parliament’s view, “[t]he competent authorities of the Member State in which the service is provided are best placed to ensure the effectiveness and the continuity of supervision and to provide protection for recipients”⁹⁶. The report did stress the need for an effective system of administrative cooperation between member states, in addition to the supervision of the host member state.

4.2.4. *Administrative cooperation*

The European Parliament amended the proposed provisions regarding the mutual evaluation and notification of restrictions. It proposed to eliminate the obligation to notify any new requirements included in the grey list to the Commission⁹⁷. Moreover, it reduced the scope of the mutual evaluation procedure even further by deleting the requirement for member states to present a report

93. ‘EP Working document’, o.c., p. 4. (PE 353.297v01-00).

94. ‘EP Report’, o.c., pp. 126-127. (PE 355.744v05-00).

95. Ibid., p. 205. (PE 355.744v05-00).

96. Ibid., p.127. (PE 355.744v05-00).

97. ‘EP Resolution’, o.c., art. 15 (P6_TA(2006)0061)).

containing information on authorisation schemes and on multidisciplinary activities⁹⁸.

The European Parliament gave two justifying reasons to delete these provisions on mutual evaluation. First, it argued that this obligation would create immense bureaucratic burdens for the member states, calling it unrealistic to think that all member states would evaluate all other national reports⁹⁹. Secondly, MEPs found that the proposal ran counter to the principles of subsidiarity and proportionality¹⁰⁰. By obliging member states to give reasons why certain requirements would be imposed or forcing them to notify any new laws, regulations or administrative provisions, the Commission could be given “*a right to systematically monitor national regulation, which would constitute a disproportionate interference with national regulatory competences*”¹⁰¹.

4.2.5. *Strengthened protection of posted workers*

The European Parliament inserted several amendments with a view to guaranteeing workers’ social rights. It made specific legislation, such as the Posting of Workers Directive or the Regulation on social security, prevail more explicitly over the Services Directive¹⁰² and inserted a clause affirming that the directive would affect neither labour law nor fundamental rights¹⁰³. This meant that service providers would still have to comply with terms and conditions of employment applied in the member state where the service is provided. Moreover, member states retained the discretion to apply other terms and conditions of employment than those listed in the Posting of Workers Directive¹⁰⁴.

Furthermore, the Parliament clarified the distribution of supervisory tasks between the member state of establishment and member states where the service is provided. The member state of establishment would be responsible for the supervision of the service providers established in its territory, even if it operates in another member state¹⁰⁵. The member state of destination would be responsible for the supervision of the activity of the service provider in its territory for matters where it may impose regulatory requirements. It also would have the ability to carry out checks, inspections and investigations on the spot, provided

98. Ibid., art. 38 (P6_TA(2006)0061).

99. ‘EP Report’, o.c., p. 91 (PE 355.744v05-00).

100. Ibid., pp. 91, 183 (PE 355.744v05-00).

101. Ibid., p. 183 (PE 355.744v05-00).

102. ‘EP Resolution’, o.c., art. 3 (P6_TA(2006)0061).

103. Ibid., art. 1 (P6_TA(2006)0061).

104. Ibid., rec. 72 (P6_TA(2006)0061).

105. Ibid., art. 16 (P6_TA(2006)0061).

that these are objectively justified and non-discriminatory, or when it has been requested by the member state of establishment¹⁰⁶.

Finally, the specific provisions on the posting of workers and the posting of third country nationals aimed at achieving administrative simplification had been deleted. The European Parliament justified this deletion on the following grounds: (1) in order to ensure legal certainty and consistency, any clarification in the field of posting of workers should be made under the Posting of Workers Directive. (2) The provisions were also deemed counterproductive, because the effectiveness of labour inspections conducted by the member state where the service is provided would be substantially reduced by the prohibition to impose certain obligations on a service provider or posted worker¹⁰⁷.

4.2.6. *Rights of recipients*

The European Parliament endorsed the provisions regarding the rights of recipients and the quality of services. It even strengthened the provisions for cooperation between member states by laying down an alert mechanism to prevent damage to the health or safety of persons¹⁰⁸.

The clauses on the reimbursement of healthcare costs received in another member state were deleted. The justification provided stated that the issue of health services should be dealt with in separate and more appropriate secondary legislation, based on the outcome of the high level reflection process on patient mobility and health care developments in the European Union¹⁰⁹. Surprisingly, the European Parliament adopted a report in 2007 in which it requested that health services would be reintroduced into the Services Directive¹¹⁰.

106. *Ibid.*, art. 16-17 (P6_TA(2006)0061).

107. 'EP Report', o.c., pp. 85-88 (PE 355.744v05-00).

108. 'EP Resolution', o.c., art. 19 (P6_TA(2006)0061).

109. 'EP Report', o.c., p. 85 (PE 355.744v05-00).

110. Report on the impact and consequences of the exclusion of health services from the Directive on services in the internal market. European Parliament, Committee on the Internal Market and Consumer Protection, 10 May 2007, p. 12. (PE 386.390v02-00).

5. Modified Commission proposal

In response to the heavy criticism on the initial proposal, the Commission adopted an amended proposal for a directive in 2006¹¹¹. Since the Commission to a large extent endorsed the amendments adopted by the European Parliament, the revised directive considerably deviates from the original proposal.

The Commission incorporated the fundamental changes requested by the European Parliament, notably regarding the reduction of the scope of the directive, the replacement of the country of origin principle by the right of a service provider to provide services in a member state other than that in which it is established, the explicit clarification on the relation with other Community legislation and the deletion of the provisions on the reimbursement of healthcare costs in another member state¹¹² and of the specific provisions on the posting of workers¹¹³.

However, there are some elements where the Commission did not follow the view of the European Parliament. There are three areas of importance in which parliamentary amendments were discarded.

Firstly, the obligation to evaluate the requirements of the grey list for services of general economic interest was maintained, in so far as the application of such rules do not obstruct the performance of the particular task assigned to these services¹¹⁴.

Secondly, the Commission changed the definition inserted by the European Parliament of what overriding reasons relating to the public interest are. The list of grounds which are considered as ‘overriding reasons relating to the public interest’ was retained, but the Commission clarified that the concept of overriding

111. Amended proposal for a Directive of the European Parliament and of the Council on services in the internal market, European Commission, 4 April 2006, COM(2006)160 final. (Hereinafter: ‘Amended Proposal’).

112. The Commission did announce it would come forward with a specific initiative on health services. (Ibid., p. 13 (COM(2006)160 final)). In the second part of 2006, it launched a public consultation on the subject, which resulted in a legislative proposal adopted by the Commission in 2008. (Proposal for a Directive of the European Parliament and of the Council on the application of patients’ rights in cross-border healthcare, European Commission, 2 July 2008, (COM(2008)414 final)).

113. Nevertheless, the Commission remained convinced of the importance of reducing administrative burdens and promoting administrative cooperation to combat black labour and social dumping. Therefore, it adopted a notice, reflecting the same rationale as the deleted articles in the proposed services directive. The notice had to provide guidance on the issue in order to reduce undue administrative burdens and establish a better system of administrative cooperation (Communication from the Commission. Guidance on the posting of workers in the framework of the provision of services, European Commission, 4 April 2006, (COM(2006) 159 final)).

114. ‘Amended Proposal’, o.c., art. 15 (COM(2006)160 final).

reasons is evolutionary by stating that it concerns those recognised in the case law of the European Court of Justice¹¹⁵.

Thirdly, the Commission rejected two parliamentary amendments regarding administrative cooperation, notably on the mutual evaluation procedure. Both the obligation for member states to report which service providers are subject to requirements obliging them to exercise a service activity exclusively or which restrict the exercise of joint supply of services and, the obligation for member states to notify any new laws, regulations or administrative provisions belonging to the grey list were maintained. Be reinstating these provisions, the Commission wanted to prevent a serious downscaling of the evaluation process¹¹⁶.

115. *Ibid.*, art. 4 (COM(2006)160 final).

116. *Ibid.*, pp. 10, 14 (COM(2006)160 final).

6. Moving towards consensus

The Council endorsed to a large extent the changes introduced by the European Parliament and the Commission into the revised directive. Only a few additional adaptations were introduced by the Council, among others regarding the freedom of establishment. Member States will be allowed to extend the deadline to reply in the authorisation procedure when this is justified by the complexity of the issue and provided that the applicant is duly informed of the extension and the reasons thereof¹¹⁷. The Council also included additional clarification on so-called tacit authorisation and rejection by allowing exceptions to the tacit authorisation rule where justified by overriding reasons relating to the public interest¹¹⁸.

The second reading in the European Parliament did not alter the substance of the directive and the Services Directive was finally adopted at the end of 2006¹¹⁹.

117. Common Position adopted by the Council with a view to the adoption of a Directive of the European Parliament and of the Council on services in the internal market, Council of the European Union, 17 July 2006, art. 13 (10003/06).

118. *Ibid.*, rec. 63 (10003/06).

119. Directive 2006/123/EC. (OJ 2006 L376/36-68).

7. Critical appraisal of the Services Directive

The long list of amendments finally led to a document that diverged substantially from the initial proposal. The final text reflects the delicacy of the political compromise, which is illustrated by the length of the Preamble (118 recitals compared to 46 articles).

Furthermore, the political sensitivity of the subject led to several problematic issues, which could become a cause of legal uncertainty. There is obscurity about the way some of the excluding provisions are formulated. Exclusions to the scope of the directive are phrased in three different ways: the directive “*does not deal with the liberalisation of services of general economic interest*”, “*does not affect labour law*” or “*does not concern rules of private international law*”¹²⁰. The legal significance of these various phrases is far from evident¹²¹.

Moreover, the European Parliament seems to have been overly zealous in amending the proposal, leading to internally inconsistent provisions. The principle of necessity as a justification for requirements that limit the freedom of establishment or the freedom to provide services is described differently in the directive. Regarding the freedom to provide services, necessity justifies limitations “*for reasons of public policy, public security, public health or protection of the environment*”¹²², whereas in the article on freedom of establishment, it justifies limitations for “*an overriding reason related to the public interest*”¹²³, which is a much wider formulation.

Finally, certain provisions are strictly speaking unnecessary because they overlap existing legislation. The provision stating that the directive does not apply to non-economic services of general interest is inserted superfluously. The definition of services provided and its reference to Article 50 EC already excluded non-economic services of general interest from the scope of the directive, because the Treaty and the case law concerned have been uniform in confirming the economic nature of services. The same can be said about the exclusion of activities connected with the exercise of official authority, because this is already excluded by Article 45 EC¹²⁴. The inclusion of a number of non-exhaustive lists is another proof of the parliamentary zeal which did not have an essential contribution to the substance of the directive.

120. *Ibid.*, art. 1, 3 (OJ 2006 L376/36-68).

121. BARNARD, Catherine, *o.c.*, pp. 344-347.

122. Directive 2006/123/EC, art. 16. (OJ 2006 L376/36-68).

123. Directive 2006/123/EC, art. 15. (OJ 2006 L376/36-68).

124. *Ibid.*, p. 342.

7.1. What is left of initial proposal?

Since the difference between the initial Commission proposal and the finally adopted directive is so large, questions can be raised of what is actually left of the original. The two most significant changes concern the scope of the directive and the chapter on free movement of services, where the country of origin principle was replaced by the freedom to provide services.

7.1.1. *Scope*

The European Parliament added a number of extra exclusions and derogations, which seem to have substantially reduced the impact of the Services Directive, at least in two cases.

First, the exclusion of a wide range of service activities, such as gambling activities, transport services and port services, raises questions. Because of their considerable economic value, excluding all these sectors seems not only to affect the horizontal character of the directive, but could also have a large impact on the initial objective: the reinvigoration of the European services economy¹²⁵.

Second, all services of general economic interest are exempted from the application of the freedom to provide services. This reduced the contribution of the Services Directive for these services to zero. The only real added value regarding services of general economic interest seems to be the improvement of administrative cooperation and the simplification of procedures¹²⁶.

7.1.2. *Country of origin principle*

The provision which caught the most attention and criticism was undoubtedly the country of origin principle. On the one side, the principle was perceived as too radical and ultra-liberal by those fearing it would spark social dumping and a race to the bottom. On the other side, proponents of the directive stressed its necessity for the European economy and the built-in safeguards, which would guarantee the European social model at the same time.

125. HATZOPOULOS, Vassilis, o.c., p. 19.

126. Ibid., p. 16.

a) *Not all that revolutionary*

As set out earlier, the application of the country of origin principle was not completely new, since it had previously been used in specific directives. For the Commission, the proposed services directive was a logical extension of these directives¹²⁷. Nevertheless, in the proposal the country of origin principle found its most far-reaching application so far, because of the large number of services touched by the services directive and the limited harmonisation accompanying it.

However, the Commission included three types of measures to counterbalance the potential negative effects of the country of origin principle. First, a number of important exemptions were made. Second, limited harmonisation of several aspects of service provision was foreseen. Third, provisions for enhanced administrative cooperation between member states was provided, which was a necessity for the creation of mutual trust.

b) *Insurmountable resistance*

Despite the earlier application of the country of origin principle and the built-in guarantees, it met too much opposition leading to its replacement by the freedom to provide services. Particularly in conjunction with the provisions on the posting of workers, the country of origin principle proved to be a bridge too far.

Under the proposed country of origin principle, it would have been impossible to impose on a service provider established in another member state any one of a long list of requirements, such as the obligation to be established in its territory or to obtain an authorisation. The foreign service provider would thus be operating in one member state, while being subject to the legislation of another. Additionally, the proposed provisions on the posting of workers shifted the supervisory responsibility of a number of administrative obligations to be fulfilled by service providers from the member state of posting to the member state of origin.

Exactly these two factors, the country of origin principle and the host member state's perceived loss in power to monitor compliance with the conditions for posted workers and to police illegal labour, created the fear that social protection would be undermined and social dumping would occur. It was dreaded that companies would chose the go to the most advantageous place of establishment

127. BARNARD, Catherine, o.c., p. 361.

to avoid heavy regulatory burdens. This so-called jurisdiction shopping by migrating to member states with more lax regulations, while at the same time continuing to do business in more heavily regulated member states, would create a competitive advantage for the service provider established in the less regulated member states compared to the domestic service provider¹²⁸.

This anxiety was further exacerbated by the enlargement of the EU to Central and Eastern Europe, arousing suspicion of the emblematic ‘Polish plumber’, who was imagined working in one of the EU-15 member state, disrespectful of minimal labour standards and well below minimal wage¹²⁹.

Although exaggerated, the fears were not groundless. One must take the following factors into consideration.

Firstly, for the country of origin principle to work effectively, there should be an effective administrative cooperation between member states. However, this had been problematic in the past. A 2003 evaluation report by the Commission on the system of administrative cooperation and information sharing imposed by the Posting of Workers Directive revealed several difficulties in monitoring compliance with the legislation, especially regarding cross-border exchange of information¹³⁰.

Secondly, the application of the country of origin principle could spur national regulatory competition between member states, which in turn might lead to social dumping. This is particularly the case concerning member states of the euro area, because they can no longer autonomously decide on their monetary policy and find themselves budgetary straight jacketed by the terms of the Stability and Growth Pact. When confronted with an economic downturn, they will be more easily inclined to reduce costs. Often the easiest way to do so is by reducing social protection costs¹³¹.

Thirdly, it has been argued that a strict application of the country of origin principle would create irremediable discrimination against domestic service providers. They would be subject to reverse discrimination, because jurisdiction shopping would lead to a situation whereby a domestic provider is discrimi-

128. The European Court of Justice found that this so-called jurisdiction shopping cannot be seen as an abuse, since it is simply a reliance on the Treaty. (Case C-212/97, *Centros*, par. 27; Case C-147/03, *Commission v. Austria*, par. 70)

129. BARNARD, Catherine, o.c., pp. 328-329.

130. Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. The implementation of Directive 96/71/EC in the Member States, European Commission, 25 July 2003, COM(2003)458 final.

131. HATZOPOULOS, Vassilis, o.c., p. 8.

nated against compared to a foreign provider, because the latter is subject to less stringent rules. However, the European Court of Justice has consistently held that Community law cannot be relied on to challenge domestic rules¹³², meaning that it is impossible for a domestic service provider to challenge this reverse discrimination on the basis of Article 12 EC, which prohibits discrimination on the basis of nationality. Therefore, the country of origin principle would create an irremediable discrimination¹³³.

Fourthly, the country of origin principle would not apply to the labour provisions included in the Posting of Workers Directive, meaning that rules on working conditions (e.g. minimum wage, working time, minimum rest periods, health, hygiene and safety standards, etc.) of the host state would continue to apply. However, hiring and firing conditions, social security and complementary pension schemes are not covered by the Posting of Workers Directive, which raised fears that some potential would be left for competitive advantage due to lower social protection of workers¹³⁴. Nevertheless, these exclusions seem logic. Firstly, because it concerns only temporary work, recruitment conditions should be logically subject to the rules applied in the country of origin¹³⁵. Secondly, as long as the duration of the work does not exceed twelve months, the social security regime is subject to the rules applied in the country of destination¹³⁶.

c) *What is the impact of replacing the country of origin principle with the freedom to provide services?*

Opinions diverged on the impact of the replacement of the country of origin principle by the freedom to provide services. Has the European Parliament watered down the directive excessively, or are the fundamentals preserved, albeit with better guarantees for the existing social protection in member states?

One view holds that nothing really changed, because the country of origin principle was always there as part of the Treaty provisions. The explicit reference to the country of origin principle has merely been removed from the initial proposal. Since it is enshrined in case law of the European Court of Justice, which prevails over secondary legislation, it continues to apply¹³⁷.

132. Joined Cases C-64/96 and C-65/96, *Land Nordrhein-Westfalen v Kari Uecker and Vera Jacquet v Land Nordrhein-Westfalen*, par. 19, 22-23.

133. DAVIES, Gareth, *Services, Citizenship and the Country of Origin Principle*. Mitchell Working Paper Series, 3/2007, pp. 17-18. Accessed, 10 October 2008, <http://www.law.ed.ac.uk/mitchellworkingpapers/papers.aspx>.

134. MICOSSI, Stefano, o.c.

135. *Ibid.*

136. Regulation (EEC) 1408/71. (OJ 1971 L149/2-50).

137. *The Services Directive Revisited*. House of Lords, European Union Committee, HL Paper 215, 24 July 2006, pp. 45, 47.

A second opinion argues that the difference is only limited and that no substantive changes were made, because the starting point of the freedom to provide services is the presumption that the country of origin still determines the rules governing access to and the exercise of services¹³⁸.

Another interpretation is very negative and considers the final version of the directive severely weakened opposed to the initial proposal. By eliminating the country of origin principle, the impact on the development of the internal market was found to be reduced “*to practically zero, if not to a negative effect*”¹³⁹. Foreign service providers will have to keep operating conform legislation of the country of destination, which will induce costs in order to get acquainted to the legal and administrative system¹⁴⁰. The potential economies that would accrue from the application of the country of origin principle were thus lost.

7.2. Only a limited number of new elements

Upon analysis of what provisions in the Services Directive are really new, it becomes clear that only a limited number of items actually are. The lion’s share of rules laid down in the directive was already, to more or lesser extent, established in case law of the European Court of Justice¹⁴¹.

The directive essentially introduces new rules on the following four points. Firstly, all authorities are required to establish single points of contact, where applicants can turn to for all procedure and formalities. Secondly, member states have to ensure that all the procedures and formalities can be completed electronically¹⁴². Thirdly, member states have the obligation to provide information to recipients, domestic and foreign alike, about applicable requirements in other member states and the means of redress in case of a dispute. Fourthly, the directive provides for the removal of the absolute prohibition of advertising by the regulated professions.

138. CRAUFURD SMITH, Rachael, *Old Wine in New Bottles? From the Country of Origin Principle to Freedom to Provide Services in the European Community Directive on Services on the Internal Market*. Mitchell Working Paper Series, 6/2007, p. 21. Accessed, 10 October 2008, <http://www.law.ed.ac.uk/mitchellworkingpapers/papers.aspx>.

139. *The services directive proposal: striking a balance between the promotion of the internal market and preserving the European social model?* In: *Common Market Law Review*, 43, 4, April 2006, p. 308.

140. HATZOPOULOS, Vassilis, o.c., p. 11.

141. RENTROP, Timm, *The Services Directive: What is actually new?* In: *Eipascopie*, Maastricht, The European Institute of Public Administration, 2007, 2, pp. 17-22.

142. *The ruling of the European Court of Justice on the appropriateness of the applied professional work methods with respect to the advances in technology could indirectly be invoked for the directive’s provision requiring the facility for service providers to use on line applications.* (Case 107/83, *Ordre des avocats au Barreau de Paris v Onno Klopp*, par. 21).

A number of other provisions in the directive that have not been established in case law do have precedents in other fields of legislation. This is the case for the introduction of a maximum duration of the procedure and formalities for authorisation and the introduction of an alert mechanism to guarantee health or safety of persons. The former has previously been introduced for diploma recognition¹⁴³, whereas the latter has precedents for dangerous products (RAPEX system)¹⁴⁴ and regarding food safety (RASFF system)¹⁴⁵.

The Services Directive thus introduces only a limited number of really new provisions, none of which were subject to large controversy. It constitutes to a large extent a mere codification of case law, without introducing new fundamental principles or provisions. On the one hand, sceptics raised questions about the gains brought to enterprises of such a codification in the Services Directive, because its wording is as abstract as case law and the principles can easily be paid lip service to by local governments¹⁴⁶. On the other hand, this codification is not totally without value, since the horizontal nature of the Services Directive give the principles incorporated in it a systematic and generalised character. In comparison to rulings of the European Court of Justice, a directive and its transposed national legislation are more visible and accessible. Moreover, codification gives the principles a proactive, rather than a reactive nature, because member states have to conform themselves to the directive and actively remove certain barriers to the freedom of establishment and the provision of services¹⁴⁷.

7.3. Difficult relationship between Treaty provisions, case law and the directive

In the original version, the country of origin principle was accompanied by general, transitional and case-by-case derogations, some of which were specifically designed to counterbalance it. Despite the replacement of the country of origin principle by the freedom to provide services, these derogations stayed largely in place. These exemptions no longer make any sense and can even be interpreted as derogations to the principle of free movement itself. The way the European

143. Directive 89/48/EEC (OJ 1989 L19/16-23).

144. Directive 2007/95/EC (OJ 2002 L11/4-17).

145. Regulation (EC) 178/2002 (OJ 2002 L31/1-24).

146. WEATHERILL, Stephen, Promoting the Consumer Interest in an Integrated Services Market.. Mitchell Working Paper Series, 1/2007, pp. 13. Accessed, 10 October 2008, <http://www.law.ed.ac.uk/mitchellworkingpapers/papers.aspx>.

147. RENTROP, Timm, o.c., p. 27.

Parliament amended the proposal seems thus to limit a basic freedom provided in the Treaty itself¹⁴⁸.

Another problem has arisen concerning the added exclusions, such as the specific clause stating that the Services Directive does not affect labour law. As a consequence, any service provider or recipient will be able to challenge a national measure under the Treaty, which has no such limitation, but not under the Services Directive, even though it might apply to the service in question¹⁴⁹.

Lastly, it is difficult to see how the parliamentary amendments excluding health services from the directive's scope could alter the way in which the European Court of Justice has interpreted Article 49 EC to include health services, despite the fact that those amendments were motivated by the desire to protect health services from the requirements of free service¹⁵⁰. The direct effect of this clause in the Services Directive will thus be void.

In general, these examples demonstrate that the final version of the Services Directive confirms the European Court of Justice as the principal institutional actor in this field. It will be providing the ultimate interpretation on a number of issues, such as the distinction between services of general interest and services of general economic interest, or the concept of 'overriding reasons relating to the public interest'. Balancing national social concerns and internal market considerations remains the responsibility of the European Court of Justice¹⁵¹.

7.4. More restrictive national measures?

The European Parliament adopted a broad approach to what 'overriding reasons relating to the public interest' are, by including a long, non-exhaustive list of grounds justifying restrictions. Although the grounds listed in the directive are based on case law of the European Court of Justice, questions arose whether this definition of 'overriding reasons relating to the public interest' could give way to a number of restrictive measures to the freedom of establishment that are currently forbidden¹⁵².

148. The services directive proposal: striking a balance between the promotion of the internal market and preserving the European social model? o.c., p. 310.

149. DAVIES, Gareth, *The Services Directive: extending the country of origin principle and reforming public administration*. In: *European Law Review*, 32, 2, April 2007, pp. 236-237.

150. *Ibid.*, pp. 237-238.

151. SNELL, Jukka, *Freedom to provide services in the case law and in the Services Directive: Problems, Solutions and Institutions*, pp. 171-197. In: *The Services Directive: Consequences for the welfare state and the European Social Model*, NEERGAARD, Ulla, NIELSEN, Ruth, ROSEBERRY, Lynn (eds.). Copenhagen, DJOF Publishing, 2008.

152. MICOSSI, Stefano, o.c.

In the past, the European Court of Justice has allowed national restrictions only if it considered that there were ‘overriding reasons relating to the public interest’ to do so. Therefore, the Court always based its judgement on the concrete circumstances of the specific case. Thus, although every public interest is legitimate, the fact that it may serve as a justification for a restriction of Treaty freedoms is subject to a case-by-case assessment. Providing a long list with different justifiable reasons, as is the case in the Services Directive, seems to run counter to the need to assess the public policy concern case by case and risks making the public policy concerns figuring in the list to be perceived as unquestionable justifications for restrictions. Consequently, restrictions based on such reasons would become unchallengeable, because they are explicitly mentioned¹⁵³.

A similar situation exists where imposed requirements to the free provision of services would be justified for reasons of public policy, public security, public health or the protection of the environment, as mentioned in the directive.

However, although the fear of more restrictions due to the broadening of the justifications of restrictions to the freedom of establishment and the free provision of services is not unfounded, national rules remain subject to scrutiny. The European Court of Justice can look into the way these measures are applied. If it finds that this is not compatible with the proportionality principle, which is one of the general principles of the EU law, it will condemn the member state for applying it, despite the fact that the measure was based on a provision of the Services Directive, since this is only a piece of secondary legislation¹⁵⁴.

7.5. What is the added value of the Services Directive?

7.5.1. *Substantial contributions*

The chapter on the right of establishment constitutes probably the biggest achievement of the directive. Although it generally codifies existing case law¹⁵⁵, it does contain some important steps forward. Not only does the directive contain provisions which can be of practical use for the implementation, the power

153. Ibid.

154. RENTROP, Timm, o.c., p. 20.

155. BERGAMINI, Elisabetta, Freedom of establishment under the Services Directive, pp. 149-169. In: The Services Directive: Consequences for the welfare state and the European Social Model, NEERGAARD, Ulla, NIELSEN, Ruth, ROSEBERRY, Lynn (eds.). Copenhagen, DJOF Publishing, 2008.

of member states to impose new restrictions to the freedom of establishment is also bound by the provision requiring their notification and justification¹⁵⁶.

The provisions on the rights of recipients, which largely codify the principles laid down by the European Court of Justice, constitute another improvement to the previous situation. The fact that services of general economic interest are not expressly excluded could become of particular importance¹⁵⁷, as is also the clause ensuring the provision of adequate information to recipients.

The Services Directive contains also a harmonising dimension, although relatively limited, notably in the chapter on quality of services and in the soft law provision stimulating self-regulation by means of a code of conduct. The importance of these provisions should not be neglected, either because they provide a response to one of the principal obstacles to the development of the internal market in services, notably the lack of information and subsequently the lack of confidence in cross-border services¹⁵⁸. Future harmonisation is also facilitated because the Commission has the power to amend the directive “*with a view to completing the Internal Market for services*”¹⁵⁹.

7.5.2. *Procedural matters*

The Services Directive provides an important contribution to administrative simplification, of which services providers will benefit. In particular, the role of the single points of contact is important. This is even more so since the replacement of the country of origin principle by the freedom to provide services, which means that service providers will still have to inform themselves on the requirements applied in the country of destination¹⁶⁰.

Another aspect of administrative simplification relates to the requirement that member states examine and simplify their procedures and formalities applicable to the access to, and exercise of service activities. When read in conjunction with specific screening obligations¹⁶¹, this means that member states will have to embark on a large-scale scrutiny of national laws to comply with the Services

156. RENTROP, Timm, o.c., p. 27.

157. *Ibid.*, p. 29.

158. *Ibid.*, pp. 29-31.

159. Directive 2006/123/EC, art. 39 (OJ 2006 L376/36-68).

160. HATZOPOULOS, Vassilis, o.c., p. 33.

161. These specific screening obligations consist of a review of authorisation schemes, an evaluation of black and grey list requirements, a review of the restrictions to the freedom to provide services, the screening of restrictive national requirements imposed on a recipient, an evaluation of national rules regarding commercial communications by regulated professions and a review of the restrictions on multidisciplinary activities. Directive 2006/123/EC, art. 9, 14-16, 19, 24, 25 (OJ 2006 L376/36-68).

Directive¹⁶². This fits well in the Commission's Better Regulation agenda and its objective of cutting red tape¹⁶³.

A final positive element is the chapter on administrative cooperation between member states. Despite the fact that it has lost most of its value after the country of origin principle has been deleted, it could still contribute to enhancement of mutual trust between member states.

162. BARNARD, Catherine, *o.c.*, p. 386.

163. Interinstitutional Agreement on Better Lawmaking, (OJ 2003 C321/1-5).

8. Role of the Institutions

8.1. European Commission

Although the Commission's proposal was not as ground breaking as some critics wanted to make us believe, it was a very ambitious one. The wide scope of the directive, the generalised application of the country of origin principle and the limited harmonisation that accompanied it, apparently constituted a too radical step.

Besides the content, the way in which the Commission presented its proposal has been criticised as well. This key proposal was forwarded in the beginning of 2004, which was only eight months before the end of term of the Prodi Commission. This meant that the next Commission would have to deal with the wrapping up of the issue. As the Barroso Commission took office at the end of 2004, it found itself inheriting a high profile dossier that evoked heavy controversy. Initially, Commission President Barroso and Commissioner McCreevy tried to salvage as much as possible from the original proposal, while trying to assuage public fears. However, this stance softened under the public pressure. The attempts to salvage the country of origin principle were abandoned and the Commission decided to follow the way chosen by the European Parliament¹⁶⁴.

Furthermore, the Commission seems to have rushed the initial proposal without adequately preparing it. According to some critics, the Commission should have presented a Green Paper prior to the proposal for a directive, in order to agree on the basic principles¹⁶⁵. Others stressed that a more extended impact assessment should have been made¹⁶⁶. The poor quality of the final text, certainly in terms of its legal quality, is partly attributable to the way the Commission handled the preparatory phase¹⁶⁷.

During the negotiations in the Council, the Commission played a pivotal role in brokering the compromise. It had a strong idea of what it wanted to achieve and was very active to advance the negotiations. In order to be able to find a compromise in the end, the Commission made it clear that it did not want to see the

164. JENNAR, Raoul Marc, La proposition de directive Bolkestein. Centre de Recherche et d'Information Socio-politiques, Courriers Hebdomadaire, 1890-1891, 2005, pp. 64-67.

165. Completing the Internal Market in Services. House of Lords, European Union Committee, HL Paper 23, 21 July 2005, p. 109 (Minutes of evidence).

166. *Ibid.*, p. 50 (Minutes of evidence).

167. DE WITTE, Bruno, Setting the Scene. How did Services get to Bolkestein and Why? European University Institute, EUI Working Paper 2007/20, p. 11.

final text deviate much from fundamentals as defined by the European Parliament. For some of the more country-specific topics of controversy, the Commission engaged in bilateral tasks directly with individual member states¹⁶⁸.

8.2. European Parliament

The role of the European Parliament has been very important, which is proven by the adopted text after the first reading, which was a strongly amended version of the initial text. Surprisingly, the Parliament found itself playing a rather unusual role, because the Commission basically left it to the Parliament to work out a compromise text¹⁶⁹.

The way in which the European Parliament has fulfilled this task has been criticised, both regarding the changes in the substance of the directive, as regards the form.

The major changes on substance were the replacement of the country of origin principle by the freedom to provide services and the reduction of the scope of the directive. The zealous attitude the European Parliament displayed, in order to be certain that no detrimental effects would occur in matters of social protection, lead to a final text that is generally very negative of tone. The Services Directive finally defined clearer what it did not do, than what it did do¹⁷⁰.

Regarding the form, the final version has been criticised as being poorly drafted, because the overall structure does not sit easily, it contains a number of overlaps and contradictory elements, etc. One critic even stated that “*the amendments have turned the original directive into a Swiss Emmenthaler cheese – with more holes than substance*”¹⁷¹.

Nevertheless, it should also be stressed that the task assumed by the European Parliament was enormous. A large number of stakeholders, representing a wide range of different interests and diverging ideological views had to be taken into consideration to find a compromise.

168. FLOWER, Joanna, Negotiating European Legislation: the Services Directive. In: Cambridge year-book of European legal studies 2006/2007, 9, 2007, p. 229.

169. The Services Directive Revisited, p. 56 (Minutes of evidence).

170. HATZOPOULOS, Vassilis, o.c., p. 12.

171. The services directive proposal: striking a balance between the promotion of the internal market and preserving the European social model? o.c., p. 309.

From a democratic point of view, one has to conclude that the European Parliament assumed the role and powers it was given. In response to the public outcry, it flexed its muscles and was finally capable to push through what it considered to be of fundamental importance for the protection of social rights. This effective response allowed the European Parliament to affirm its legitimacy¹⁷².

8.3. Council of the European Union

Initially, the Council endorsed the proposal and gave it high priority due to its high importance for the competitiveness of the European services industry¹⁷³.

As the public opinion turned more and more against the proposed directive, the Council became increasingly divided. On the one hand, wealthier member states such as France, Belgium, Germany and Sweden were reluctant towards the proposal. These countries wanted to keep their social model protected. On the other hand, Central and Eastern European countries, backed by the United Kingdom, argued in favour of proposal on the basis of the economic benefits that would accrue from it¹⁷⁴.

Finally, it was the 2005 European Council of Heads of State and Government that decided to revise the initially proposed services directive in favour of what was indicated by the European Parliament¹⁷⁵.

172. SNELL Jukka, o.c., pp. 171-197.

173. Press release of the 2570th Internal Market, Industry and Research Council Meeting, Brussels, 11 March 2004, p. 13. (6648/04).

174. FLOWER, Joanna, o.c., pp. 224-225.

175. Presidency Conclusions. European Council of 22 and 23 March 2005. Council of the European Union, Brussels, p. 7. Accessed, 14 November 2008, http://europa.eu/european-council/index_en.htm.

Conclusion

The proposal for a Services Directive as initially tabled was a very ambitious one, which would have had consequences for the provision of a wide range of cross-border service activities. The idea of achieving freedom of almost all services by means of one single directive proved unrealistic. The amplifying controversy surrounding it, led to substantial changes during the legislative procedure.

The final text has less far-reaching consequences, particularly because of the reduction of scope it underwent by introducing additional exclusions and derogations in it. These amendments gave it a considerably negative tendency, since more attention seems to be devoted to what is not regulated by it, than to what actually is. This is to a large extent the consequence of the zealous efforts of the European Parliament. Furthermore, it inhibits a number of legal uncertainties, due to careless redrafting of the directive.

On a positive note, the Services Directive does contain a number of good elements. The codification of existing case-law in it is important, particularly concerning the right of establishment and the rights of recipients. The provisions introducing limited harmonisation (quality of services) and administrative simplification (points of single contact, applications via internet, the screening provisions of national legislation) will also be to the benefit of consumers and cross-border service providers.

Regarding institutional matters, the European Parliament played a central role during the co-decision procedure, which is positive from a democratic point of view. Questions can be raised about the way the European Commission initially handled the issue. The Prodi Commission adopted this high profile proposal only months before the end of its term and seemingly had not adequately prepared the ground for it. Finally, the Barosso Commission was wise to follow the European Parliament in most of its objections, after initially defending the proposal.