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### **Legal Aspects in Establishing the Internal Market for services**

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## Legal Aspects in Establishing the Internal Market for services

Vassilis Hatzopoulos

The internal market for services is one of the objectives set by the founding fathers of the EC back in 1957. It is only in the last ten-fifteen years, however, that this aspect of the internal market has seriously attracted the attention of the EC legislature and judiciary.<sup>1</sup> With the exception of some sector-specific directives dating back in the late '80s, it is only with the deregulation of network industries, the development of electronic communications and the spread of financial services, in the '90s that substantial bits of legislation got adopted in the field of services. Similarly, the European Court of Justice (ECJ, the Court) left the principles established in *Van Binsbergen* back in 1973, hibernate for a long time before fully applying them in *Säger* and constantly thereafter.<sup>2</sup> Ever since, the Court's case law in this field has grown so important that it has become the compulsory starting point for any study concerning the (horizontal) regulation of the internal market in services. The limits inherent to negative integration and to the casuistic approach pursued by judiciary decisions have prompted the need for a general legislative text to be adopted for services in the internal market. This text, however, hotly debated both at the political and at the legal level, has ended up in *little more* than a complex restatement of the Court's case law. It may be, however, that this 'little more' is not that little.

In view of the ever expanding application of the Treaty rules on services, promoted by the ECJ (para. 1),<sup>3</sup> the Directive certainly appears to be a limited regulatory attempt (para. 2). This, however, does not mean that the Directive is a toothless, or useless regulatory instrument (conclusion: para. 3).

### 1. An ever expanding application of the Treaty rules: the case law of the ECJ

#### 1.1. A large definition of the concept

In the EC Treaty (Article 50) services are defined in a negative manner, as being all 'services [...] 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.' This is an empirical definition given at a time when services only played a residual economic role. However, the subsequent development of the service economy, the diversification of existing services and, most importantly, the creation of new ones – enhanced by new technologies –, have radically changed the economic reality from the one prevailing in 1957.

This 'service revolution' needed be reflected in the way the Treaty rules are applied. This task has been taken up by the Court which, in its recent case law, has revolutionised all three elements of the definition given in Article 50 of the EC Treaty: the concept of services itself (1.1.1), the existence of remuneration (1.1.2) and the 'residual' relationship with the other Treaty freedoms (1.1.3).

##### 1.1.1. The concept of services: a conceptual stretch

The Court has considerably stretched the concept of services, in three ways: it has recognised that future or even virtual services may benefit from the Treaty rules (1.1.1.1), it has increasingly applied the Treaty rules to services which have hereto been excluded from their scope (1.1.1.2) and it has extended the application of the Treaty rules in cases where there is no clear extraterritorial element (1.1.1.3).

##### 1.1.1.1. Virtual – Future services

<sup>1</sup> It is telling, in this respect, that the first ever edited volume on services in the internal market only appeared in 2001, see M. Andenas and W.-H. Roth (Eds.), *Services and Free Movement in EU Law* (2001) OUP, Oxford.

<sup>2</sup> Case C-76/90 *Säger* [1991] ECR I-4221.

<sup>3</sup> For a more extensive and systematic presentation of the same case law see V. Hatzopoulos and U. Do, 'The Case Law of the ECJ Concerning the Free Provision of Services: 2000-2005' (2006) *CMLRev* 923-991; the analysis here follows to some extent the structure of this earlier article, but is far more condensed.

When the Court decided, in *Alpine Investments*,<sup>4</sup> that the mere existence of *virtual* cross border recipients of services, was enough for Article 49 EC to apply, many writers were dismayed.<sup>5</sup> However, seven years later, in the *Carpenter* case,<sup>6</sup> the Court took a much bolder step in this respect. It held that Mr. Carpenter, whose profession entailed 'selling advertising space in medical and scientific journals and offering various administrative and publishing services to the editors of those journals' was a service provider in the Art 50 EC sense of the term, since many of his clients were established in other Member States. The Court was satisfied that this was so a) despite the fact that the bulk of Mr. Carpenter's services were provided to his overseas clients without him having to move there and b) without the Court identifying any specific cross-border service actually provided by Mr. Carpenter. This preliminary finding of the Court seems to confirm that the existence of virtual service recipients in other Member States is enough for Article 49 EC to come into play.

This point was taken further in *Omega*.<sup>7</sup> The referring Court acknowledged that the prohibition of the 'play to kill' game could frustrate the leasing contracts for machinery, that Omega had concluded with an undertaking established in the UK, thus limiting its freedom to receive services (and possibly goods). The Court was not impressed by the fact that, at the date of the adoption of the contested measure, no contract had been concluded between the parties, since the contested 'order is capable of restricting the *future development* of contractual relations between the two parties'.<sup>8</sup> Therefore, not only *virtual* but also *future* services fall into the ambit of Article 49 EC, provided that, in view of the specific facts of each case, they are likely to materialize.

### 1.1.1.2. Bringing 'excluded' services under Article 49 EC

#### *Transport services*

Transport services are subject to the specific Treaty rules (Articles 70-80 EC) and to secondary legislation adopted for their application. Hence, they evade the application of Article 49 EC. The ensuing Regulations 4055/86<sup>9</sup> and 2408/92<sup>10</sup> have been held by the Court to fully transpose the free movement principles to maritime and air-transport services, respectively.<sup>11</sup> It is, therefore, striking that in the last five years only the Court had to deal with no less than six cases, involving four Member States, where it applied Article 49 EC next to the sector specific rules. Hence, in *Commission v. Italy, embarkation tax*<sup>12</sup> the Italian republic was condemned, under both Regulation 4055/86 and Article 49, for applying differential taxes to passengers travelling between domestic ports, and those travelling to a non Italian destination. In *Sea Land*,<sup>13</sup> the Court accepted that, in a similar vein to Article 49 EC, the Regulation provisions could be invoked by an undertaking against its own State of origin.<sup>14</sup> In *Geha*,<sup>15</sup> concerning vessels voyaging to Turkey, the Court combined the material rule of Article 49 EC (prohibition of any measure rendering more difficult the provision of services between Member States) with the territorial scope of the Regulation (covering traffic between Member States and third countries) with the effect of applying Article 49 to a situation where no trade between Member States was at stake.

<sup>4</sup> Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, annotated by Hatzopoulos in CML Rev. (1995), 1427-1445.

<sup>5</sup> Coppenhole and Devroe, (1995) *JTDC*, 13; also Devroe and Wouters, (1996) *JTDC*, 60. See however our annotation in this Review for a refutation of the critical position expressed by these authors.

<sup>6</sup> Case C-60/00, *Carpenter*, [2002] ECR I-6279.

<sup>7</sup> Case C-36/02, *Omega*, [2004] ECR I-9609. See also the annotation by Ackermann, CML Rev. (2005), 1107-1120.

<sup>8</sup> *Omega* rec. 21, emphasis added.

<sup>9</sup> Council Regulation (EEC) No 4055/86 of 22 December 1986, applying the principle of freedom to provide services to maritime transport between Member States and between Member States and third countries, (1986) OJ L 378, p. 1.

<sup>10</sup> Council Regulation (EEC) No 2408/92 of 23 July 1992 on access for Community air carriers to intra-Community air routes, (1992) OJ L 15, p.33.

<sup>11</sup> For Regulation 4055/86 on maritime services, see Case C-381/93 *Commission v. France, transport services* [1994] ECR I-5145; for Regulation 2408/92 on air-transport, see Case C-70/99, *Commission v. Portugal, Airport Taxes*, [2001] ECR I-4845.

<sup>12</sup> Case 295/00, *Commission v. Italy, Embarkation Tax*, [2002] ECR I-1737.

<sup>13</sup> Case C-430/99, *Sea-Land*, [2002] ECR I-5235.

<sup>14</sup> The same conclusion had already been reached in *Commission v. France*, [1994] ECR I-5145.

<sup>15</sup> Case C-435/00, *Geha Naftiliaki*, [2002] ECR I-10615.

Similarly, the Court has condemned discriminatory national taxes on air transport, on the basis of both the sector specific secondary legislation and of Article 49.<sup>16</sup>

### **Procurement – concession contracts**

More striking is the case-law of the Court concerning public procurement. In this field we can distinguish two parallel trends. First, the Court simultaneously applies Article 49 EC and the sector specific Directives in order to complete possible lacunae contained in the latter. This tendency is illustrated by reference to case *Commission v. France, Nord Pas de Calais*,<sup>17</sup> where the Court held that, on top of the technical rules contained in the Works Directive 93/37/EC, a general requirement of non-discrimination also applied. This judgment paved the way for the *second* and most important trend in the Court's case-law, namely the application of Article 49 EC (and the public procurement Directives) to concession contracts, which are not covered by any text of secondary legislation. In a series of judgments starting with *Telaustria*,<sup>18</sup> a case concerning a concession in the field of telecommunications, the Court held that the principle of non-discrimination also applies to concession contracts (and presumably any other type of contract which involves public funding and is not covered by the Procurement Directives). *Coname*<sup>19</sup> concerned the direct award, in Italy, of a contract for the service covering the maintenance, operation and monitoring of the methane gas network. In its judgment the Court further explained that the above requirement of non-discrimination carries with it a further requirement of transparency, satisfied by adequate publicity. This trend was further pursued some months later in *Parking Brixen*,<sup>20</sup> another Italian case concerning the construction and management of a public swimming-pool. The Court found that 'a complete lack of any call for competition in the case of the award of a public service concession does not comply with the requirements of Articles 43 EC and 49 EC *any more than with the principles of equal treatment, non-discrimination and transparency*'.<sup>21</sup> The same was confirmed some days later in *Contse*,<sup>22</sup> concerning the award of a contract for the supply of home oxygen equipment in Spain.

### **Health and social security**

Even more important than the application of Article 49 EC to transport, public procurement and concession contracts is the extension of the scope of that same provision to embrace social security and health services.

### **Social Security**

In *Duphar*<sup>23</sup> in the field of goods, *Poucet and Pistre*<sup>24</sup> in the field of services and constantly thereafter, the Court has held that 'Community law does not detract from the powers of the Member States to organize their social security systems'. However, the Court has subsequently qualified this general statement. In a series of judgments concerning the applicability of the competition rules, the Court has gradually drawn a dividing line between funds (and other entities involved in social security and health care) which operate within the market and those which are outside (the market) and are governed by solidarity. The former should fully abide by all the competition rules, subject to Article 86(2), while the latter are exempted altogether from the application of the said rules.<sup>25</sup> There is no hard and fast rule for

<sup>16</sup> Case C-70/99, *Commission v. Portugal, Airport Taxes*, [2001] ECR I-4845; Case C-447/99, *Commission v. Italy, Air Departure Tax*, [2001] ECR I-5203; Case C-92/01, *Stylianakis*, [2003] ECR I-1291.

<sup>17</sup> Case C-225/98, *Commission v. France, Nord Pas de Calais*, [2000] ECR I-7445.

<sup>18</sup> Case C-324/98 *Telaustria* [2000] ECR I-745.

<sup>19</sup> Case C-231/03, *Coname*, [2005] ECR I-7287.

<sup>20</sup> Case C-458/03, *Parking Brixen*, [2005] ECR I-8612.

<sup>21</sup> *Id.* para 48.

<sup>22</sup> Case 234/03, *Contse*, [2005] ECR I-9315.

<sup>23</sup> Case 238/82, *Duphar and Others v. Netherlands State*, [1984] ECR 523, para 16.

<sup>24</sup> Joined Cases C-159/91 and C-160/91, *Poucet and Pistre*, [1993] ECR I-637, para 6.

<sup>25</sup> See Case C-238/94, *FFSA*, [1995] ECR I-4013; Case C-70/905, *Sodemare*, [1997] ECR I-3395; Case C-67/96, *Albany*, [1999] ECR I-5751; Joint Cases C-155/97 and C-157/97, *Brentjens*, [1999] ECR I-6025; and Case C-219/97, *Drijvende*, [1999] ECR I-6121, respectively. On these three cases, see Idot, "Droit Social et droit de la concurrence: confrontation ou cohabitation (A propos de quelques développements récents)", (1999) *Europe*, chron. 11; Case C-218/00, *Batistello*, [2002] ECR I-691; Case T-319/99, *FENIN v. Commission*, [2003] ECR II-357; Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *AOK Bundesverband*, [2004] I-2493.

the above distinction, rather the Court refers to a set of criteria. Elements which would point to a non-market entity, include: a) the social objective pursued, b) the compulsory nature of the scheme, c) contributions paid being related to the income of the insured person, not to the nature of the risk covered, d) benefits accruing to insured persons not being directly linked to contributions paid by them, e) benefits and contributions being determined under the control or the supervision of the state, f) strong overall state control, g) the fact that funds collected are not capitalized and/or invested, but merely redistributed among participants in the scheme, i) cross-subsidization between different schemes and j) the nonexistence of competitive schemes offered by private operators.<sup>26</sup>

It would be reasonable to assume that the same criteria also help determine the scope of application of Article 49 EC. Indeed, this was confirmed, in *Freskot*,<sup>27</sup> concerning a public body set up by the Greek legislation for the prevention of, and compensation for, damage caused to agricultural holdings by natural disasters. Therefore, it should come as no surprise that in recent cases concerning the taxation of contributions paid to, and the benefits received from, insurance funds established in other Member States, the Court engaged into a fully fledged application of Article 49 EC. *Danner*<sup>28</sup> and *Skandia*<sup>29</sup> concerned tax arrangements regarding a voluntary (third pillar) and an occupational (second pillar) pension schemes, respectively. It remains that first pillar compulsory pension schemes do not qualify as services under the Treaty.<sup>30</sup>

## Health

Even more spectacular has been the development of the Court's case law in relation to health services. The importance of the relevant judgments may be appreciated by the fact that all the (old) Member States have occasionally intervened in the proceedings before the Court in this field, essentially with positions opposed to the ones finally adopted by the Court. This case law, lengthy, highly technical and politically controversial, has been presented in detail by several authors and does not find its place here.<sup>31</sup> It is reminded, however, that a patient from any Member State moving abroad, may, next to urgent treatment provided by virtue of the European Insurance Card (ex document E 111):

- a) receive outpatient treatment<sup>32</sup> in any other Member State and obtain refund from their home State, at the tariffs applicable in this latter State; no prior authorisation is necessary for such a refund to be obtained, since the relevant right stems directly from Article 49 EC;
- b) receive any kind of treatment in other Member States in the same conditions (tariffs, refund, indemnity etc – but for the duration) as patients of the host State, provided they have obtained prior authorisation (document E 112) by their home institution, according to Article 22 of Regulation 1408/71;
- c) force the delivery of the above authorisation (for receiving treatment abroad) whenever the treatment objectively necessary for their medical condition<sup>33</sup> is not available in their home State or is not available within a reasonable waiting time, taking into consideration the specific needs of each particular patient;<sup>34</sup> this is also a right directly stemming from Article 49 EC.

<sup>26</sup> For a more detailed analysis of those criteria, see Hatzopoulos, 'Health law and policy the impact of the EU' in De Burca (Ed.), *EU Law and the Welfare State: In Search of Solidarity*, EU/IOUP (2005), pp. 123-160.

<sup>27</sup> Case C-355/00, *Freskot v. Elliniko Dimosio*, [2003] ECR I-5263.

<sup>28</sup> Case C-136/00, *Danner*, [2002] ECR I-8147.

<sup>29</sup> Case C-422/01, *Skandia*, [2003] ECR I-6817. Further for this case see 2.2.2. below. A similar factual situation was present in the earlier case C-302/98, *Sehrer*, [2000] ECR I-4585, concerning sickness insurance contributions, but it was dealt with under the rules on establishment.

<sup>30</sup> See *Freskot*, n. 27 above, *Duphar* and *Poucet & Pistre* cited above.

<sup>31</sup> See V. Hatzopoulos, 'Killing national health and insurance systems but healing patients? The European market for health care services after the judgments of the ECJ in *Vanbraekel* and *Peerbooms*', *CML Rev.* (2002), 683-729, and more recently 'Health law and policy, the impact of the EU', n. 26 above. See also G. Davies, 'Welfare as a service', (2002) *LIEI* 27-40; P. Cabral, 'The Internal Market and the right to cross-border medical care', (2004) *ELRev*, 673-685, and A.-P. van der Mei, 'Cross-border access to health care within the EU: Some reflections on *Geraets-Smits and Peerbooms* and *Vanbraekel*', (2002) *ML*, 289-215 and 'Cross-border access to medical care: Non-hospital care and waiting lists', (2004) *LIEI*, 57-67. More recently see A. Dawes, 'Bonjour Herr Doctor: national healthcare systems, the Internal Market and cross-border medical care within the EU', (2006) *LIEI*, 167-182. For a full account of the relationships between EU and Health Law see T. Hervey and J. McHale, *Health Law and the European Union*, CUP (Cambridge, 2004).

<sup>32</sup> Inpatient treatment has been restrictively defined, see Case C-8/02 *Leichtle* [2004] ECR I- 2641.

<sup>33</sup> For the objective assessment of the necessity of the treatment, independently from national preferences, see Case C-368/98, *Vanbraekel*, [2001] ECR I-5363.

<sup>34</sup> Case C-385/99, *Müller-Fauré*, [2003] ECR I-4509 and Case C-372/04, *Watts* [2006] ECR I-4325.

These rights benefit all people insured with the competent institution of one member state, irrespectively of whether the home State<sup>35</sup> a) operates a refund system, like the one followed (principally) in France, Germany and Luxembourg,<sup>36</sup> b) operates a benefits-in-kind system by contracted in physicians and hospitals, as is the case in the Netherlands,<sup>37</sup> or c) offers benefits-in-kind by essentially public institutions, as it is the case in the UK and Italy<sup>38</sup>.

### 1.1.1.3. Application of the Treaty rules when there is no extraterritorial element

#### **General case law**

The general rule according to which the Treaty provisions on free movement only apply to interstate situations has been under fire for over ten years now.<sup>39</sup> In the field of goods, the judgments in cases *Lancry* and *Simitzi v. Kos*,<sup>40</sup> *Pistre* and *Guimont*<sup>41</sup> stand for the idea that 'Article [28] cannot be considered inapplicable simply because all the facts of the specific case before the national Court are confined to a single Member State'.<sup>42</sup> This same idea was transposed in *Reisch*,<sup>43</sup> a case concerning the free movement of capitals. Finally, in relation to workers, the Court, indirectly in *Surinder Singh*<sup>44</sup> and then, in a more direct way in *Angonese*,<sup>45</sup> has been ready to apply Articles 43 and 39 EC, respectively, to situations which only remotely presented some trans-national element.

However, it is in the field of free movement of services, with its judgment in *Carpenter*, that the Court took the boldest step away from the need to establish a trans-border element as a precondition to the application of the Treaty rules. The Court focused on the fact that Mr. Carpenter's activity consisted in the provision of advertising services and that some of these services were offered to recipients in other Member States. Thus, the Court identified the two elements upon which the application of Article 49 EC lies, that is a) some service activity b) provided temporarily over borders. However, the Court avoided examining whether the two elements merged, in other words, whether any specific trans-border service provision was at stake and how this was affected by the contested measure – if at all. Consequently, Article 49 EC was found to apply.

#### **Extra-territorial by nature?**

Further to the Court's broad approach to the existence of some trans-national element illustrated in *Carpenter*, some recent judgments seem to suggest that certain categories of services are by definition trans-national. Hence, the Court applies Article 49 EC without ever identify any specific trans-border service movement.

The *first* category of services in which this seems to hold true is transport. In all the cases discussed above (1.1.1.2), the Court took for granted that Article 49 EC applied, and only at a subsequent stage did it examine whether in fact services to and from other Member States were more severely affected. Therefore, the existence of some trans-border element did not constitute a prerequisite to the application of Article 49 EC, but one of the appreciations inherent in its application.

<sup>35</sup> The threefold classification which follows is simplistic, for the needs of demonstration, and does not account for the special characteristics of each one of the national systems.

<sup>36</sup> See Case C-158/96, *Kohll*, [1998] ECR I-1931; Case C-56/01, *Inizan*, [2003] ECR I-12403; Case C-193/03, *Bosch*, [2004] ECR I-9911.

<sup>37</sup> Case C-157/99, *Smits & Peerbooms*, [2001] ECR I-5473; *Vanbraekel and Müller-Fauré*, all cited above.

<sup>38</sup> *Watts*, above.

<sup>39</sup> See amongst others: D. Simon and F. Lagondet, 'Libre circulation des marchandises et situations purement internes: chronique d'une mort annoncée', (1997) *Europe chron.* 9; Tagaras, 'Règles communautaires de libre circulation, discriminations à rebours et situations dites « purement internes »' in *Mélanges en hommage à Michel Waëlbroeck*, vol II (Bruylant 1999), 1499; R. Papadopoulou, 'Situations purement internes et droit communautaire: un instrument jurisprudentiel à double fonction ou une arme à double tranchant?', (2001) *CDE*, 96-129; Shuibhne, 'Free movement of persons and the wholly internal rule: time to move on?', *CML Rev.* (2002), 731.

<sup>40</sup> Case C-363/93, *Lancry*, [1994] ECR I-3957 and Joined Cases C-485/93 and C-486/93, *Simitzi v. Kos*, [1995] ECR I-2665.

<sup>41</sup> Case C-448/98, *Guimont*, [2000] ECR I-10663.

<sup>42</sup> *Pistre*, n. 24 above.

<sup>43</sup> Joined Cases C-515/99, C-519/99 to C-524/99 and C-526/99 to C-540/99, *Reisch e.a. v. Salzburg*, [2002] ECR I-2157; compare paras 24-27 of this judgment with paras 21-24 of *Guimont*. See also Case C-300/01, *Salzmann*, [2003] ECR I-4899.

<sup>44</sup> Case C-370/90, *Surinder Singh*, [1992] ECR I-4265.

<sup>45</sup> Case C-281/98, *Angonese*, [2000] ECR I-4139.

A *second* category of services in which the Court applies Article 49 EC without insisting upon the existence of some trans-border element are advertising services. This may be illustrated by reference to the very judgment in *Carpenter*.<sup>46</sup> In a more explicit way, in *Gourmet*,<sup>47</sup> a case in which a Swedish undertaking was opposing the total ban imposed by Swedish law on the advertising of alcoholic beverages, the Court held that ‘even if [the prohibition] is non-discriminatory, [it] has a particular effect on the cross-border supply of advertising space, given the international nature of the advertising market in the category of products to which the prohibition relates, and thereby constitutes a restriction on the freedom to provide services within the meaning of Article 59 [now 49]’.<sup>48</sup>

The *third* category of services deemed to be transnational are TV broadcasting and telecommunications services. Hence, in *De Coster*,<sup>49</sup> which concerned a municipal tax imposed on parabolic antennae, the Court dealt dismissively with the lack of extraterritoriality, simply recalling that ‘it is settled case-law that the transmission, and broadcasting, of television signals comes within the rules of the Treaty relating to the provision of services’. In *Mobistar*,<sup>50</sup> which concerned a municipal tax imposed on GSM retransmission pylons, the Court took for granted that Article 49 EC applied to telecommunications services, but then found no violation of the aforementioned provision as there was no affectation of trans-border services.<sup>51</sup> This is yet another striking example of the Court ‘internalizing’ the existence of a trans-frontier element: it is no longer used as a precondition to the applicability of the free movement of services rules, but rather, as an appreciation ‘internal’ to the said rules, leading the Court’s assessment as to the existence of a violation.<sup>52</sup>

### **No need for extraterritoriality when EU legislation in the field?**

It has been shown above that the Court applies the Treaty rules together with, or instead of, the public procurement Directives.<sup>53</sup> Long before that, the Court had already decided that the procurement directives apply to wholly internal situations.<sup>54</sup> Henceforth, after the judgments in *Coname* and *Parking Brixen*, it is clear that in the field of public procurement and/or concession contracts, Article 49 EC shall apply without there being a need to establish a trans-border element. The reason given for this is that the detailed secondary legislation in this field is not merely aimed at the abolition of all discriminations based on nationality, but also – and essentially – at the creation of a level playing field for all European companies to compete unfettered by national regulatory regimes.<sup>55</sup> The fact that principles enshrined in secondary legislation apply irrespective of the presence of a trans-national element has been clearly confirmed, more recently, in relation to the Data Protection Directive,<sup>56</sup> in *Österreichischer Rundfunk*.<sup>57</sup> This finding could lead to a greater number of services being governed by Article 49 EC without any transnational element being necessary; in any case, it could offer a plausible explanation for some of the judgments presented above.<sup>58</sup> In fact, all transport, telecommunications and TV broadcasting, and to a lesser extent advertising, have been regulated at EU level by secondary legislation texts.

#### **1.1.2. Remuneration**

<sup>46</sup> *Carpenter*, n. 6 above, para 29. It is true that in Case C-134/03, *Viacom Outdoor*, [2005] ECR I-1167, concerning a municipal tax imposed on billboard advertising, the Court declined the application of Art. 49, but that was more because of the lack of any substantially restrictive effect the contested measure, rather than because of the lack of any trans-border element.

<sup>47</sup> Case C-405/98, *Gourmet*, [2001] ECR I-1795.

<sup>48</sup> *Ibid.*, para 39, emphasis added.

<sup>49</sup> See also the note by Wenneras, ‘The *De Coster* Case: Reflections on Tax and Proportionality’, (2002) *LIEI*, 219-230.

<sup>50</sup> Joined Cases C-544/03 and 545/03, *Mobistar & Belgacom*, judgment of 8 September 2005, nyr.

<sup>51</sup> *Id.*, paras 32 and 33.

<sup>52</sup> This seems to constitute a shift from previous case-law, in particular Case C-108/96, *Mac Quen*, [2001] ECR I-837.

<sup>53</sup> See 1.1.1.2 above.

<sup>54</sup> Case C-243/89, *Commission v. Danemark, Storbælt*, [1993] ECR I-3353.

<sup>55</sup> *Ibid.* para 33.

<sup>56</sup> Directive 95/46/EC of the Council of 24 October 1995 (1995) OJ L281/31.

<sup>57</sup> Joined Cases C-465/00, C-138/01 and C-139/01, *Österreichischer Rundfunk*, [2003] ECR I-4989, para 42. See also Keppenne and Van Raepenbusch, ‘Les principaux développements de la jurisprudence de la Cour de Justice et du Tribunal de Première Instance, Année 2003’, (2004) *CDE*, 439-513, who also make out this point.

<sup>58</sup> See 1.1.1.3.2 above.

The existence of remuneration is, according to Article 50 EC, the feature which gives any activity its economic nature, thus bringing it within the scope of the Treaty freedoms. According to the Court 'the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question and is normally agreed upon between the provider and the recipient of the service'.<sup>59</sup> This definition, however, has been considerably widened in recent cases. In *Deliège* the Court accepted that non-professional athletes could nonetheless receive remuneration for their 'services' in an indirect way, through TV broadcasting, sponsorships, participation in publicity campaigns etc. In the healthcare cases discussed above (1.1.1.2), the Court accepted that 'the payments made by the sickness insurance funds [for treatment delivered to insured patients], *albeit set at a flat rate*, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them'.<sup>60</sup> Thus, consideration was found to exist not only in triangular situations,<sup>61</sup> but, more importantly, in situations where the correlation between services received and moneys paid is only indirect if economically nonexistent. Further, in *Danner* and *Skandia*<sup>62</sup> the Court accepted that remuneration can be paid well in advance for a service which is to be delivered over 30 years later, i.e. the payment of an old-age pension. The above judgments leave us with a concept of remuneration which is extremely flexible, if not ever expandable – a serious challenge for legal certainty.

### 1.1.3. Abandoning the 'subsidiary' character of the rules on services in relation to the other fundamental freedoms

According to the black letter of Articles 49 and 50 EC, the rules on services are supposed to apply to situations where no other Treaty freedom applies; they have a subordinate character. In this respect, services (Article 49) were traditionally distinguished from establishment (Article 43) by virtue of their temporary nature. Hence, in the *German insurance* case,<sup>63</sup> the Court held that as soon as the service provider acquired some stable infrastructure in the host State, the Treaty provisions on establishment became applicable. This position was later reviewed in *Gebhard*,<sup>64</sup> where the Court recognized that a provider of services within the meaning of Article 49 EC could make use of some permanent infrastructure in the host State. Nevertheless, the Court insisted on the temporal character of the provision of services. It stated that 'not only the duration of the provision of the service, but also its regularity, periodicity or continuity'<sup>65</sup> may bring it under the rules on establishment. This made commentators conclude that service provision must be of an 'episodic' or 'irregular' nature.<sup>66</sup> In its most recent case law, however, the Court seems to be abandoning the temporal criterion in favour of a more economic one. Indeed, the Court seems ready to treat economic activities which qualify as services under Article 49 EC, irrespective of their duration. Hence, in *Schnitzer*<sup>67</sup> the Court held that a Portuguese construction company which had been on a construction site in Germany for over three years could, nevertheless, invoke the rules on services, in order to evade the full application of the German legislation. The Court acknowledged that the nature of the activity is readily ascertainable and can safely lead to legal qualifications, while its duration, periodicity, etc., are not.<sup>68</sup> Some months later, the Court judged of the compatibility with Article 49 EC of a Portuguese law which concerned undertakings offering private security services. The fact that this piece of legislation only applied to undertakings operating on the Portuguese territory for periods exceeding a calendar year, had no incidence.<sup>69</sup>

<sup>59</sup> Case 263/86, *Belgian State v. Humbel*, [1988] ECR 5365, para 17.

<sup>60</sup> *Smits & Peerbooms*, n. 37 above, para 58, emphasis added.

<sup>61</sup> Which has already been accepted since Case 352/85, *Bond van Adverteerders and Others*, [1988] ECR 2085, para 16.

<sup>62</sup> Both cited above n. 28 and 29.

<sup>63</sup> Case 205/84, *Commission v. Germany, Insurance*, [1986] ECR 3755.

<sup>64</sup> Case C-55/94, *Gebhard*, [1995] ECR I-4165.

<sup>65</sup> *Gebhard* para 21.

<sup>66</sup> See V. Hatzopoulos, Recent developments of the case law of the ECJ in the field of free of services 1994-1999', CML Rev. (2000), p. 43-82, 45, where this restrictive approach of the Court was also criticized as being inappropriate in view of the current development and sophistication of services.

<sup>67</sup> Case C-215/01, *Schnitzer*, [2003] ECR I-14847.

<sup>68</sup> *Schnitzer*, para 39.

<sup>69</sup> Case C-171/02, *Commission v. Portugal, Private Security Firms*, [2004] I-5645.



These judgments further confirm and justify earlier cases a) where the long duration of an activity had not precluded the application of the rules on services<sup>70</sup> and b) concerning 'naturally' trans-border services,<sup>71</sup> such as TV broadcasting, telecommunications or transport,<sup>72</sup> where the Court applied Article 49 EC without taking into account any temporal consideration.

Not only does this recent case law make clear that it is the economic nature – and not the duration – of the activity that constitutes the main criterion for its legal classification, but also, it creates a presumption in favour of the application of Article 49 EC in all service situations. At the same time, it does away, once and for all, with the myth of services being a subsidiary category.

#### 1.1.4. Outer limits: non-economic services (of general interest)

The rules on services apply to a great many activities, but leave intact services of general interest with no economic character. From an economic viewpoint, services with no economic character are those from which it makes no sense to exclude 'free-riders', who are not ready to pay for them. More precisely, three conditions should be met for a service linked to the general interest to qualify as non economic: a) an objective necessity for such a service to be provided, b) important fixed but nearly non-existent variable costs, linked to the number of beneficiaries and c) (some) people unwilling to pay for such a service, if they had to. Hence, services like police, the army, garbage collection, funeral services do not, in principle, fall within the ambit of Article 49 EC. Such services may be classified into two broad categories: a) 'social' services which are essentially unmarketable, precisely because they do not embody market values and b) 'strategic' services which the State would hardly trust any other entity to pursue.<sup>73</sup> In the former category the Court has held i.a. that the organization of primary pension schemes,<sup>74</sup> the setting up of a mandatory indemnity system for farmers,<sup>75</sup> the running of old-age houses,<sup>76</sup> all fall outside the scope of Article 49 EC. In the latter category, the Court has held i.a. the coordination of air-traffic control,<sup>77</sup> the operation of a body entrusted with preventive anti-pollution surveillance<sup>78</sup> and the organization of communal funeral services<sup>79</sup> not to come within the Treaty rules.

However, despite their social character, complementary and voluntary (second and third pillar) pension schemes come within the Treaty rules,<sup>80</sup> just like healthcare services.<sup>81</sup> Likewise, public security and public order, are not fields exclusively reserved to the State police, but may be partly secured by market forces, i.e. private security companies.<sup>82</sup> The distinction between services which do and those which do not have an economic nature is not an easy one to draw, at the first place, as it depends on basic political and social choices concerning the role of the State. It is dynamic too, depending both on the way the State accomplishes its missions and on market forces and private entrepreneurship. One thing is beyond doubt, however: whenever remuneration may be shown to exist for any given service, this service will be treated as having a commercial nature. Therefore, the extremely flexible and ever expanding concept of remuneration used by the Court,<sup>83</sup> may only lead to the correlative restriction of the number and scope of services excluded from the Treaty rules.

#### 1.2. A set of rules (violation/exceptions) closely comparable with that on the other freedoms:

<sup>70</sup> See e.g. Joined Cases C-369/96 and C-376/96, *Arblade and Leloup*, [1999] ECR I-8453.

<sup>71</sup> For which see 1.1.1.3, above.

<sup>72</sup> Case C-17/00, *De Coster*, [2001] ECR I-9445; Joined Cases C-544/03 and C-545/03, *Mobistar and Belgacom*, judgment of 8 September 2005, nyr.; and Case C-92/01, *Stylianakis*, [2003] ECR I-1291, respectively.

<sup>73</sup> See C. Scott, 'Services of General Interest in EC Law: Matching Values to Regulatory Technique in the Public and Private Sectors' (2000) ELJ 310-325, 313.

<sup>74</sup> Joined Cases C-159 & 160/91 *Poucet & Pistre* [1993] ECR I-637.

<sup>75</sup> Case C-355/00 *Freskot v. Elliniko Dimosio* [2003] ECR I-5263.

<sup>76</sup> Case C-70/95 *Sodemare* [1997] ECR I-3395. In the meantime some uncertainty had been created by the judgment of the Court in Case C-238/94 *FFSA* [1995] ECR I-4013.

<sup>77</sup> Case C-364/92 *Eurocontrol* [1994] ECR I-43.

<sup>78</sup> Case C-343/95 *Calì e Figli* [1997] ECR I-1547.

<sup>79</sup> Case 30/87 *Bodson* [1988] ECR 2479.

<sup>80</sup> See *Danner and Skandia*, above n. 28 and 29.

<sup>81</sup> See above 1.1.1.2.

<sup>82</sup> See above n. 69.

<sup>83</sup> Discussed above at 1.1.2.

Concerning the material scope of Article 49 EC, three remarks need to be made. First, concerning the way the rules on services are held to be violated (1.2.1); second, concerning justifications to such violations (1.2.2); and, third, concerning the provision of services of general interest (1.2.3).

### 1.2.1. Violation of Article 49 EC

The case law of the Court in the field of services during these last years has increased exponentially.<sup>84</sup> The substantive analysis of the relevant judgments does not find its place here. If we were to sum up the bulk of the Court's case law, the concept of convergence between the fundamental Treaty freedoms would emerge.<sup>85</sup> This general statement should, nevertheless, be qualified by two further remarks.

First, the Court has consistently refused to transpose on services the *Keck* dichotomy, between selling arrangements, on the one hand, and product characteristics, on the other.<sup>86</sup> Nevertheless, second, after a period of seemingly limitless expansion of the material ambit of Article 49 EC,<sup>87</sup> the Court in its recent case law has introduced some kind of a 'rule of law' to its application. The most striking illustration is offered by the judgment of the Court in *Mobistar*,<sup>88</sup> where the Court after repeating the mantra that every measure 'which is liable to prohibit or further impede the activities of a provider of services established in another Member State' is contrary to Article 49 EC, made the following remarkable statement: 'measures, the only effect of which is to create additional costs in respect of the service in question and which affect in the same way the provision of services between Member States and that within one Member State, do not fall within the scope of Article 59 [now 49] of the Treaty.'<sup>89</sup> In this way it introduced in the field of services, a dichotomy between expenses/other hindrances whereby the scope of Article 49 EC is to be limited. It is submitted that this distinction is the transformation of the *Keck* dichotomy in the field of services and, indeed, the real rationale of the *Keck* dichotomy itself.<sup>90</sup> The practical result is that Member States are free to maintain regulations of a purely economic nature, to the extent that they are non-discriminatory, but are under strict scrutiny concerning the administrative and other requirements imposed on service providers.

### 1.2.2. Justifications to restrictions

Convergence is also the first word to describe the case law of the Court concerning justifications admitted to restrictions of Article 49 EC. Convergence, in this respect is to be observed at two levels. First, between the various fundamental freedoms.<sup>91</sup> Second, and

<sup>84</sup> The ECJ has gone from deciding 40 cases in the five year period between 1995-1999 to deciding over 140 cases based on Art 49 EC between 2000-2005; see V. Hatzopoulos and U. Do, 'The Case Law of the ECJ Concerning the Free Provision of Services: 2000-2005' (2006) *CMLRev* 923-991.

<sup>85</sup> For the 'bringing together' of the four freedoms see, among many: P. Oliver and W. Roth, 'The internal market and the four freedoms' *CML Rev.* (2004), 407-441, 430 et seq., and V. Hatzopoulos, 'Trente ans après les arrêts fondamentaux de 1974, les quatre libertés: quatre?' in Demaret, Govaere, Hanf (Eds.), *30 Years of European Legal Studies at the College of Europe - 30 ans d'études juridiques européennes au Collège d'Europe: Liber Professorum 1973/74-2003/04*, P.I.E.-Peter Lang (Bruxelles, 2005), pp. 185-201. See also Caputi Jambrenghi, & Pullen, 'The use of Articles 30 and 52 to attack barriers to market access: an overview of the ECJ's case law', (1996) *ECLR*, 388; Bernard, 'La libre circulation des marchandises, des personnes et des services dans le traité CE sous l'angle de la compétence', (1998) *CDE*, 11-45; Oliver, 'Goods and services: two freedoms compared', in *Mélanges en hommage à Michel Waelboreck*, vol II (Bruylant 1999), pp. 1377-1405; O'Leary, 'The free movement of persons and services' in Craig and de Búrca, *The Evolution of EU Law* (Oxford 1999), pp. 377-416; see also in Andenas and Roth (Eds.), *Services and Free Movement in EU Law* (Oxford 2001) the extremely interesting contributions by Poiares Maduro, pp. 41-68, Snell and Andenas, pp. 69-140, Jarass, pp. 141-163, and Hansen, pp. 197-210.

<sup>86</sup> See, among many cases, Case C-384/93, *Alpine Investments*, [1995] ECR I-1141, annotated by V. Hatzopoulos in *CML Rev.* (1995), 1427-1445; and Case C-405/98, *Gourmet*, [2001] ECR I-1795 and among the many commentators, A. Biondi, 'Advertising alcohol and the free movement principle: the *Gourmet* decision', (2001) *ELRev*, 616-622; Kaczorowska, 'Gourmet can have his Keck and eat it!', (2004) *ELJ*, 479-494; and J. Stuyck, 'Gourmet: une nouvelle brèche dans la jurisprudence « Keck »?', (2001) *CDE*, 683-706.

<sup>87</sup> See e.g. Case C-17/00, *De Coster*, [2001] ECR I-9445 and Wenneras, 'The *De Coster* Case: Reflections on Tax and Proportionality', (2002) *LIEI*, 219-230.

<sup>88</sup> Joined Cases C-544/03 and C-545/03, *Mobistar and Belgacom*, judgment of 8 September 2005, nyr.

<sup>89</sup> *Mobitel*, para 31.

<sup>90</sup> For a brief comment of this distinction see our comment on *Alpine Investments* in (1995) *CMLRev* 1427-1445.

<sup>91</sup> See already V. Hatzopoulos, n. 66 above, p. 72. See also Hatzopoulos, 'Exigences essentielles, impératives ou impérieuses: une théorie, des théories ou pas de théorie du tout?', (1998) *RTDE* 2, 191-236; O'Leary and

more interestingly for the purposes of the present study, convergence is also increasingly observed between express and judge-made justifications. Hence in *Gambelli* the Court indistinctively 'considered whether such restrictions *are acceptable* as exceptional measures expressly provided for in Articles 45 and 46 EC, or *justified*, in accordance with the case-law of the Court, for reasons of overriding general interest'; it answered this question based only on a classical 'mandatory requirements' analysis.<sup>92</sup> More strikingly still, in *Commission v France, Loi Evin* the Court openly held that 'the freedom to provide services may [...] be limited by national rules justified by the reasons mentioned in Article 56(1) of the EC Treaty, read together with Article 66, or for overriding requirements of the general interest'.<sup>93</sup> The *second* main characteristic of the Court's case law on justifications, is the use of a stringent necessity/ proportionality test of the contested national measures. Examples may be drawn i.a. from the judgments in *Gambelli*<sup>94</sup> and *Placanica*, in the field gambling.<sup>95</sup> The Court recognised that the protection of consumers and other reasons of general interest could justify restrictions to betting activities. However, such restrictions would only be admissible if the invoked objectives are pursued by the State in 'a consistent and systematic manner'; this cannot hold true where the Member State in question also adopts/maintains measures which favour gambling. A similar logic prevailed in *Finalarte*, concerning posted workers. The Court found that the host Member State could extend its restrictive legislation to posted workers, provided that 'those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection'.<sup>96</sup> The national Court was left to verify whether this condition was met, according to the grid of analysis provided by the Luxembourg Court itself.<sup>97</sup>

### 1.2.3. Respect for public service: financial setup is free but not extra administrative burdens

In the cases in which the free movement of services could be held to enter directly into conflict with the provision of some service of general economic interest, the Court gave clear prevalence to the latter over the former. In the early *Corbeau* and *Almelo* judgments the Court had developed the concept of 'severability', whereby profitable activities should remain subject to the Treaty rules, while non-profitable ones would evade them.<sup>98</sup> In the most recent case law, however, this idea is being severely limited, if not altogether abandoned. In *Deutsche Post* the Court was really fast in admitting that Article 86(2) EC could justify exceptions to the Treaty rules, to the extent that such exceptions were indispensable for the pursuit of activities of general economic interest.<sup>99</sup> More importantly, in *Glöckner*<sup>100</sup> which concerned emergency and other ambulance services, the Court held the two to be inseparable and altogether outside the scope of the competition rules: monies generated by the latter services could enable the operators concerned to discharge their general-interest task in conditions of 'economic equilibrium'. For one thing, the test of 'economic equilibrium' is different from the previous logic of 'severability', based on the criterion of mere viability of services of general interest. Moreover, the readiness with which the Court accepted in *Deutsche Post* that the fees charged by the monopolist were necessary for the discharge of its general interest obligations, without examining in any detail the accuracy of such a statement, takes *Glöckner* a step further, as it shows the Court's increasingly hands-off approach towards the financing of activities of general interest. Further, the Court has

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Fernandez-Martin, 'Judicially created exceptions to the free provision of services', Andenas and Roth (Eds.), n. 148 above, pp. 163-196.

<sup>92</sup> Case C-243/01, *Gambelli*, [2003] ECR I-13031, para 60, emphasis added.

<sup>93</sup> Case C-262/02, *Commission v. France, Loi Evin*, [2004] ECR I-6569, para 23.

<sup>94</sup> Cited above n. 92.

<sup>95</sup> Joined Cases C-338/04, 359/04 et 360/04, *Placanica*, judgment of March 6, 2007, nyr.

<sup>96</sup> Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte*, [2001] ECR I-7831, para 42.

<sup>97</sup> More on this case and in general on the topic of posted workers see below, at 2.2.2.3.

<sup>98</sup> Case C-320/91, *Corbeau*, [1993] ECR I-2562 and Case C-393/92, *Almelo*, [1994] ECR I-1477. See for these judgments Wachsmann and Berrod, 'Les critères de justification des monopoles: un premier bilan après l'affaire *Corbeau*', (1994) *RTDE*, 39. See also Baquero Cruz, 'Beyond competition: services of general economic interest and EC law' in De Burca (Ed.), n. 26 above, pp. 169-212.

<sup>99</sup> Case C-147/97, *Deutsche Post*, [2000] ECR I-825.

<sup>100</sup> Case C-475/99, *Glöckner*, [2001] ECR I-8089.

undertaken to set the conditions under which public funds given to an entity entrusted with the provision of some service of general interest, do not qualify as state aids.<sup>101</sup> However, if *financing* the services of general interest is increasingly left to the discretion of the States, the same is not true with other, *administrative restrictions*, such a prior authorisation requirement.<sup>102</sup>

### 1.3. From mutual recognition to a near home country control (HCC) principle

Since the judgment in *Säger* the Court invariably holds that 'a Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment'.<sup>103</sup> Moreover, the principle of mutual recognition has occupied an ever increasing role in the Court's case law in relation to services. Through a series of judgments, the Court transforms this functional general principle of EC law,<sup>104</sup> into two more specific but far-fetched principles, the furtherance of which should only be achieved through legislative means. First the Court pushes mutual recognition towards some kind of 'home state' control (1.3.1) which, in turn, creates the need for close cooperation between Member States' authorities (1.3.2).

#### 1.3.1. Towards a general application of an imperfect home State control?

On many occasions the legislation of Member States has been condemned for failing to take into account conditions fulfilled or guarantees offered by service providers in their home State. Hence, in *Commission v. Italy, transport consultants*<sup>105</sup> the Italian legislation required transport consultants, among other things, to have a security lodged with the provincial administration. This requirement was found to be illegal to the extent that it made it 'impossible for account to be taken of obligations to which the person providing the service is already subject in the Member State in which he is established'.<sup>106</sup> The very same requirements were also struck down by the Court for exactly the same reasons in relation to the activities of temporary labour agencies operating in Italy, in *Commission v. Italy, temporary labour agencies*.<sup>107</sup>

Similarly, in *Commission v Italy, sanitation services*<sup>108</sup> a registration requirement was held to violate Article 49 EC to the extent that it did 'not exclude from its scope a provider of services who is established in a Member State other than the Italian Republic and who, under the legislation of its Member State of establishment, *already satisfies* formal requirements equivalent to those under the Italian Law'.<sup>109</sup> Although this judgment predates the two mentioned above, it is more earth-shattering, insofar as it does not concern a mere financial guarantee, but the very authorization itself delivered by the host State authorities.

In *Commission v. The Netherlands, private security firms*<sup>110</sup> the Court held Article 49 EC to be breached both by a prior authorisation requirement and by a system of special ID cards for security personnel 'in so far as it [did] not take account of the controls or verifications already

<sup>101</sup> Case 280/00 *Altmark Trans* [2003] ECR I-7747; see also O. Dupéron 'Le régime des services publics en droit communautaire: des précisions apportées par la Cour de justice des Communautés européennes', (2003) *Petites affiches* n° 229 p.6-12; J.-L. Clergérie, 'La légalité d'une contrepartie d'obligation de service public' (2003) *Dalloz Jur.* p. 2814-2817; M. Merola & C. Medina, 'De l'arrêt *Ferring* à l'arrêt *Altmark*: continuité ou revirement dans l'approche du financement des services publics' (2003) *CDE*, p. 639-694. On the basis of this judgment the Commission has issued the so called 'Altmark Package', also known as the 'Monti-Kroes Package', consisting of three texts: Directive 2005/81/EC modifying Directive 80/723/EEC on the transparency of financial relations between Member States and public undertakings OJ [2005] L 312/47; Decision 2005/842/EC, on the application of Article 86(2) of the EC Treaty to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest, OJ [2005] L 312/67; and the 'Community Framework for State aid in the form of public service compensation' 2005/C OJ [2005] C 297/4.

<sup>102</sup> Case C-205/99, *Analir*, [2001] ECR I-1271. See Slot, *CML Rev.* (2003), 159-168.

<sup>103</sup> Above n. 2, para 13.

<sup>104</sup> See Hatzopoulos, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services*, Sakkoulas/Bruylant (1999), pp. 73-100. For a different account see "Mutual Recognition" in Barnard and Scott (Eds.), *The Law of the Single European Market, Unpacking the Premises*, Hart (Oxford, 2002), pp. 225-267.

<sup>105</sup> Case C-263/99, *Commission v. Italy, Transport Consultants*, [2001] ECR I-4195.

<sup>106</sup> *Ibid*, para 24.

<sup>107</sup> Case C-279/00, *Commission v. Italy, Temporary Labour Agencies*, [2002] ECR I-1425.

<sup>108</sup> Case C-358/98, *Commission v. Italy, Sanitation Services*, [2000] ECR I-1255.

<sup>109</sup> *Ibid*, para 13, emphasis added.

<sup>110</sup> Case C-189/03, *Commission v. The Netherlands, Private Security Firms*, [2004] ECR I-9289.

carried out in the Member State of origin'.<sup>111</sup> The Court further held that the identity of the individuals concerned could be proven by the valid passport or ID card delivered by their home state authorities.<sup>112</sup>

The above judgments stand, *first*, for the idea that all controls and checks carried out by the home State should be taken into account by the authorities of the host State, irrespective of whether they refer to purely formal guarantees, such as the deposit of some financial security, or to substantial qualifications, such as the competence and integrity of service providers. What is more, this obligation of the host State authorities covers not only checks that have been made by the home State in view of the exercise of the specific service activity, but also of those aimed at different purposes (such as the issuance of the passports in the Dutch case). *Second*, these judgments stand for the idea that the application of some variety of the home State principle comes as an integral component of the proportionality test of national measures. Hence, although the Court is not in a position to implement a fully fledged home State control whereby the host State authorities would be devoid of any competence over service providers from other Member States, it does nonetheless introduce such a principle through the back door, by way of the strengthened control of the proportionality of national measures.

### 1.3.2. Duty of cooperation between national authorities

A corollary to the above imperfect home State principle and a technical condition for its application is the duty of Member States' authorities to cooperate with one another. Such cooperation may take two forms.

First, it may require the authorities of the host state to fully take into account and/or make full use of all the information, documents, certification etc provided by the home state authorities'. The case law discussed above, concerning authorizations, notifications, the deposit of some form of guarantee or the issuance of duplicate (host) identification documents etc illustrates this.<sup>113</sup> It constitutes a typical application of the principle of mutual recognition.

Second, the duty to cooperate may demand that the authorities of the Member States concerned work actively together, in order to positively promote the pursuance of the Treaty fundamental freedoms. This is a much more delicate path to venture upon and the Court has displayed both caution and firmness. In a first series of cases the Court has built upon the specific cooperation obligations imposed by texts of secondary legislation. In *IKA v Ioannidis*,<sup>114</sup> where the right of a Greek pensioner to claim a refund from his fund for treatment received in Germany under the terms of Regulation 1408/71<sup>115</sup> was at stake. The Court held that the authorities involved could not restrict themselves to a mechanic application of their obligations under Regulation 1408/71. Rather, they should '*in accordance with Article 10 EC [...] cooperate* in order to ensure that those provisions are applied correctly [...] with a view to facilitating the freedom of movement of those insured persons are fully respected'.<sup>116</sup>

In *Kapper*,<sup>117</sup> a case where the German authorities were contesting the validity of a driving license delivered by the Dutch, the Court found a violation of Directive 92/439/EC<sup>118</sup> and of Articles 39, 43 and 49 EC. Not only did the Court completely rule out the possibility that a license issued by the authorities of one member be invalidated by those of another Member

<sup>111</sup> Ibid., para 30.

<sup>112</sup> This judgment is just one, albeit the most concise and clear, of a series of infringement cases concerning private security firms and decided by the Court upon quasi-identical facts: Case C-355/98, *Commission v. Belgium, Private Security Firms*, [2000] ECR I-1221; Case C-283/99, *Commission v. Italy*, [2001] ECR I-4363; Case C-165/98, *Mazzoleni*, [2001] ECR I-2189; Case C-171/02 *Commission v. Portugal* [2004] ECR I-5645.

<sup>113</sup> See 1.3.1 above.

<sup>114</sup> C-326/00, *Ioannidis v. IKA*, [2003] ECR I-1703, and for a thorough presentation of this case the comment by Hatzopoulos in CML Rev. (2003), 1251-1268.

<sup>115</sup> Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. This Regulation has been modified at least thirty times, the last important modification extending its personal scope to cover nationals of non Member States legally residing within the EU, see Council Regulation (EC) 859/2003 of 14 May 2003, OJ L 124/1. It has recently been codified and repealed by Regulation (EC) 883/2004 of 29 April 2004, OJ L 166/1.

<sup>116</sup> *Ioannidis v. IKA*, above, para 51, emphasis added.

<sup>117</sup> Case C-476/01, *Kapper*, [2004] ECR I-5205.

<sup>118</sup> Council Directive 91/439/EEC of 29 July 1991 on driving licenses (OJ 1991 L 237, p. 1), as amended by Council Directive 97/26/EC of 2 June 1997, OJ 1997 L 150, p. 41.

State, but it also recognized the possibility of initiating infringement proceedings against States, the authorities of which fail to cooperate effectively.

A step further was taken in *Danner*,<sup>119</sup> where the Court rejected the Danish governments' argument that the effectiveness of fiscal controls justified that pensions paid to residents by foreign funds did not qualify for a deduction from taxable income. The Court held that even where the secondary legislation in place (Directive 77/799<sup>120</sup>) does not effectively meet the legitimate objectives pursued by the host State's authorities, the latter are required to look into and to accept further evidence provided by the interested party, before imposing a restrictive measure.

Such an obligation may also be imposed upon Member States' authorities even in the absence of any specific text of secondary legislation. In *Oulane* the Court held that the requirement that all Member States' nationals should possess a valid passport or ID card while in another Member State, could not be imposed in an absolute way, if the person concerned were able to provide unequivocal proof of their nationality by other means. This implies that the authorities in question may not rely only on the official documents they are familiar with, but may further be required to adduce evidence, concerning the person's identity, by other means, probably in collaboration with the authorities of the Member State of origin of the person concerned.

Through these cases it may be said that the Court, within the material limits of its capacity as an actor of negative integration, is, in some indirect and imperfect way, trying to foster positive cooperation obligations between Member States' authorities. This does not (and may not) go as far as a proper 'home state control', since the home State authorities maintain the last word on the operation of foreign service providers in their territory. It would be technically impossible and politically undesirable for the Court to substitute the will of the legislature and to impose a fully fledged home State control. What the Court does, however, is that it stresses the cooperation duty between the Member States' authorities, in order to ensure an enhanced application of the principle of mutual recognition.

This last development, together with all the others presented above, substantiated by hundreds of judgments of the ECJ, underpin the desirability some general legislative text in the field of services. Further, the pursuance of the Lisbon Agenda, expressly requires action in this same field. These factors put together explain the initiative of the Commission which eventually led to the adoption of Directive 2006/123/EC on services in the internal market (hereinforth: 'the services Directive' or 'the Directive').<sup>121</sup>

## **2. A modest but not insignificant regulatory attempt: the services directive 2006/123**

### **2.1. Introduction**

The services Directive is the text of secondary legislation the most widely and most passionately discussed in the history of the EU. It has been adopted after two years of fierce negotiations between the three poles of the EU legislature, animated by massive demonstrations in Brussels, Strasbourg, Paris and elsewhere and relayed by hundreds of news articles. Further, the negotiations for its adoption have (wrongly) been associated to the failed Constitutional Treaty. The text finally adopted marks a neat retreat compared to the (over-)ambitious proposal of the Commission.<sup>122</sup> The Commission intended to regulate with one single horizontal text all services not covered by sector-specific legislation. The way to do that would be through the implementation of the country of origin principle (CoOP), by virtue of which service providers would offer their services in all member states, according to the rules applicable in their own. Both the above ambitions (universality of the text, CoOP) have 'hit the rock' of the European Parliament and have been partly or wholly abandoned. The fact that the Directive has indeed a modest regulatory content (2.2.) should not mask, nonetheless, that it offers precious new instruments for the governance of the service economy (2.3).

<sup>119</sup> This case contains the bolder statement of the duty of cooperation between Member States fiscal authorities, but almost all recent tax cases follow the same logic.

<sup>120</sup> Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation, OJ 1977 L 336, p. 15.

<sup>121</sup> Directive 2006/123, of the EP and the Council, of 12 December 2006, OJ [2006] L 376/36.

<sup>122</sup> COM (2004) 2 final, of 13 January 2004.

## 2.2. A modest regulatory content – in retreat from the case law?

From the more-than-a-hundred modifications forced by the European Parliament on the Commission's draft, the single most important one is the abandonment of the country of origin principle (CoOP) in favour of the imprecise 'free provision of services' principle (2.2.1). The important increase of the activities which are excluded from the scope of the Directive is the second most striking feature (2.2.2).

### 2.2.1. Free movement of services v CoOP

The CoOP has received a lot of, often misplaced, attention. Not only have politicians and journalists used the concept according to their respective agendas, but also legal writers are in pains finding some common ground concerning this principle.

*First*, the role of the CoOP as a rule of conflict of laws is highly controversial: some qualify the CoOP as a brand new rule of conflicts specific to the provision of services;<sup>123</sup> others see it as a mere exception to traditional conflict of law rules, applicable only when these rules end up in seriously obstructing the free movement of services;<sup>124</sup> others, finally, only identify a substantive rule, completely foreign to private international law.<sup>125</sup>

*Second*, the grounding of the CoOP in the Treaty is also disputed: some writers think that it is inherent in Article 49 (together with Article 10) EC;<sup>126</sup> on the opposite side are those who think that the CoOP is not to be found into the Treaty, but need to be specifically provided for by some text of secondary legislation,<sup>127</sup> which need be adequately motivated and have limited scope.<sup>128</sup>

A *third* disputed issue is whether the Directive in its current version has completely dropped the CoOP,<sup>129</sup> or whether to the contrary, it has just dissimulated it under less shocking terms.<sup>130</sup>

*Fourth*, and most importantly, the very content of the CoOP is unclear. It is this last uncertainty which explains, to our eyes, all the previous ones. This is why some further developments on the origins and the content of the CoOP follow.

#### 2.2.1.1. The genesis of the CoOP

A point in which all writers do agree is that the CoOP finds its source of inspiration in the case law of the Court in *Van Binsbergen* and *Cassis de Dijon*. In these two judgments, and the following Commission Communication,<sup>131</sup> the idea was clearly put forward, that services or goods which are lawfully provided or marketed in their home country should be free to cross the borders of the EU. Since then, however, much more has happened. For one thing, the Court has recognised to the principle of mutual trust<sup>132</sup> and to that of mutual recognition,<sup>133</sup> the status of a general principles of EC law. Moreover, the EC Institutions have had recourse to the 'new approach', followed by the 'global approach' of legislation, in order to regulate the internal market; in both approaches the home state regulation of the producer/provider occupies a pivotal role. Thirdly, several sector-specific pieces of legislation have put to work variants of the CoOP. However, the version of the CoOP put forward by the Directive was

<sup>123</sup> See O. de Schutter and St. Francq, 'La proposition de directive relative aux services dans le marché intérieur : reconnaissance mutuelle, harmonisation et conflits des lois dans l'Europe élargie', (2005) CDE 603-660 ; p. 640.

<sup>124</sup> See M. Audit, 'Régulation du marché intérieur et libre circulation des lois' (2006) *JTDI* p. 1333-1363.

<sup>125</sup> See for a brief presentation of this idea, with further bibliographic references, M. Wilderspin, 'Que reste-t-il du principe du pays d'origine ? Le regard des internationalistes' (6/2007) *Europe* p. 26-28.

<sup>126</sup> See M.-D. Garabiol-Furet, 'La directive Bolkenstein, bouc émissaire d'une Europe incertaine' (2005) *RMUE* p. 295-302, 295 ; see also P. Pellegrino, 'Directive sur les services dans le marché intérieur, Un accouchement dans la douleur' (2007) *RMUE* 14-21, p. 17.

<sup>127</sup> See O. de Schutter et St. Francq, above n. 123, p. 606 ; S. Micossi, 'Fixing the Services Directive' *CEPS Policy Brief* 100/2006, p. 7.

<sup>128</sup> B. de Witte, *Setting the Scene : How did Services get to Bolkenstein and Why ?*, EUI working papers, Law 2007/70, at [http://cadmus.iue.it/dspace/bitstream/1814/6929/1/LAW\\_2007\\_20.pdf](http://cadmus.iue.it/dspace/bitstream/1814/6929/1/LAW_2007_20.pdf).

<sup>129</sup> See M. Wilderspin, above n. 125, Micossi above, the House of Lords, *Completing the Internal Market in Services, Report with Evidence*, 6th Report of Session 2005-6, p. 63-74.

<sup>130</sup> See P. Pellegrino above n. 126, p. 18 ; see also C. Kleiner, 'La conception des règles de droit international privé dans la directive services' in (6/2007) *Europe* 48-54.

<sup>131</sup> OJ (1980) C 256/2.

<sup>132</sup> Ever since Case 25/88 *Bouchara*, [1989] ECR 1105.

<sup>133</sup> This has been a more complicated process, for which see V. Hatzopoulos above n. 104 p. 116 et seq.

indeed different from all the previous ones. If we try to systematise the above, we can distinguish three generations of the CoOP in the legislative practice of the EC.

The first generation is constituted by the so called 'passport' directives in the field of insurance, banking and financial services. These are based on a clear distinction between, on the one hand, authorisation requirements and, on the other hand, operation conditions.<sup>134</sup> The former are put under the 'home country control', and any authorisation delivered by the home State is a valid 'passport' for entering the market in any other State. The operation conditions, however, remain subject to control of the host State, where the operator has to respect all applicable regulations. Moreover, in order to foster mutual trust on the authorisations thus delivered, the directives proceed to some substantial harmonisation, at two levels. Are harmonised not only the minimal levels of liquidity and of solvability of the undertakings, but also the rules concerning the keeping and publishing of accounts.<sup>135</sup> Therefore, this first generation of the CoOP, based on the home country control, was restricted in two ways: first, it only concerned the access to – not the exercise of – any given activity; second it presupposed substantial harmonisation.

The second generation of CoOP was clearly more ambitious. First and foremost, it was not restricted to the authorisation but also concerned the operation of service providers in other Member States. What is more, it only imposed minimal harmonisation. This second generation of CoOP has been put to work for the first time in the 1997 modification of the 'TV without frontiers' Directive.<sup>136</sup> The 'electronic signature'<sup>137</sup> and the 'e-commerce'<sup>138</sup> Directives have followed suite, followed themselves by the recent Directive on data protection in the field of electronic communications.<sup>139</sup> All these directives contain an 'internal market' clause whereby 'Member States shall ensure freedom of reception and shall not restrict retransmissions on their territory of television broadcasts from other Member States for reasons which fall within the fields coordinated by this Directive'<sup>140</sup>. An 'internal market clause' is also to be found in the draft Directive on credit agreements for consumers.<sup>141</sup>

Besides the 'internal market clause' all these directives share some important common features: a) they do suppose some prior harmonisation; b) they all contain detailed rules allowing to determine the country of establishment of any given operator, in order to avoid settings which would amount to an abuse of rights; c) their scope is precisely defined and filled with permanent exceptions or temporal derogations and, more important of all, d) they all concern services which are provided at a distance, without the provider physically moving to any other Member State. Therefore, the powers the directives confer to the home state authorities, both to deliver the authorisation and to control the operation of undertakings concerned, come as no surprise.

Compared to the above two generations of CoOP, the one put forward by the draft Directive clearly constituted a third generation, in at least three respects. First and foremost, because it was deemed to govern not only the authorisation and operation conditions of the service activity, but also because it would also determine the applicable law, in case of dispute. Hence the totality of the service provision (authorisation, operation, conflict resolution) was to be covered by it. This difference also justifies the evolution of terminology from 'home country control' mainly used in the field of passport directives to the more far-reaching 'country of origin principle'. Second, the draft Directive had an extremely large scope of application, by no means restricted to services offered at a distance. Third, the level of harmonisation put forward by the draft Directive was so elementary, that one could legitimately question whether

<sup>134</sup> It is true that in practice such a distinction is not always easy to draw, see e.g. Case C-347/02, *Commission v. France, Insurance*, [2004] ECR I-7557.

<sup>135</sup> For a more detailed account of the 'passport' system see E. Lomnicka, 'The Home Country Control Principle in the Financial Services Directives and the Case Law' (2000) *EBLRev*, p. 324-336 and V. Hatzopoulos, above n. 104 p. 413-450.

<sup>136</sup> Directive 97/36/EC of the EP and the Council of 30 June 1997 modifying Directive 89/552/CEE on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities, 'Directive TV without frontiers', (1997) OJ L 202/60.

<sup>137</sup> Directive 1999/93/EC of the EP and the Council of 13 December 1999, on a Community framework for electronic signatures, (2000) OJ L 13/12.

<sup>138</sup> Directive 2000/31/EC of the EP and the Council of 8 June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), (2000) OJ L 178/1.

<sup>139</sup> Directive 2002/58/EC of the EP and the Council of 12 July 2002, for data protection in electronic communications (2002) OJ L 201/37; this Directive replaces Directive 97/66/EC.

<sup>140</sup> Directive 'TV without frontiers', art. 2a para. 1.

<sup>141</sup> COM (2005) 483 final/2, of 23.11.2005, Art. 21(2).



the very term of harmonisation is appropriate.<sup>142</sup> These three differences have stood on the way of this third generation of CoOP to flourish.

### **2.2.1.2. Abandonment of the HCC principle**

The CoOP put forward by the draft Directive, without being entirely new, constituted a clear departure from previous regulatory methods used for the internal market. This is the reason why its promoters had devised various means to ensure its smooth application (2.2.1.2.1). Nevertheless, in view of the real or imaginary dangers it presented for the European social model, the CoOP had to be dropped altogether (2.2.1.2.2).

#### ***How it should function***

Three series of provisions, within the draft Directive, should help fine-tune the CoOP's innovative character.

a) First, there were important exceptions to the CoOP's application, both of a permanent and of a transitional nature (proposal, Articles 17 and 18, respectively), as well as of an individual character for activities related to public order and public health (proposal, Article 19).

Concerning permanent exceptions two remarks should be made. First, most services of general economic interest now enumerated in article 17(1) were also excluded in the draft. However in the draft were excluded the individual services listed, and not all services of general economic interest as a comprehensive category. Second, and more interestingly, the draft provided for three extremely important exceptions from the CoOP: were excluded all consumer contracts (Article 17(21)), the cases where the parties in any given contract had expressly chosen the applicable rules (Article 17(20)) and the extra-contractual (tort) liability of the service provider in case of accident (Article 17(23)). Therefore, at the horizontal level (i.e. in the relationships between private parties), the CoOP, would only apply to business to business (B2B) relationships and only to the extent that the parties involved had not expressed their will to the contrary. Therefore, all the 'pain and suffering' that the CoOP was supposed to deliver to weak and helpless consumers had nothing to do with the text of the Directive – except for problems arising in sub contracting situations. Third, the CoOP would not apply to posted workers (proposal, Articles 24-25). These are few clarifications which show how much the public debate has been misleading.

b) Moreover, the draft Directive foresaw minimal harmonization of several aspects of service provision. Hence, in the Chapter 'quality of services' minimal requirements of information, publicity etc were imposed on service providers by their home States. In the same vein, the Chapter 'convergence programme' put forward some soft harmonization, in the form of community codes of conduct, while further harmonization was foreseen in identified activities.

c) Last but not least, the draft Directive put into place quite elaborate mechanisms for administrative cooperation between national authorities, in order to ensure the effective application of the CoOP.<sup>143</sup>

#### ***Where it could fail***

Despite the above precautions, the CoOP was not risk-free in, at least, three ways.

a) First, because the CoOPs application requires close cooperation between the authorities of the home and host States. Indeed, since the supervision of the service provider lies with the home State authorities, these have to work closely together with their counterparts in the host State, not only for the exchange of information, but also in order to secure operational cooperation. However, experience shows that such cooperation is not always an easy task, despite the parties' 'best intentions'. Hence, cooperation procedures provided for in texts as fundamental as Regulation 1408/71 on the coordination of social security systems, or as specific as Directive 77/799<sup>144</sup> on the cooperation in fiscal matters, still prove to be

<sup>142</sup> For the harmonisation put forward by the Directive see below 2.3.1.2.

<sup>143</sup> For these see below at 2.3.

<sup>144</sup> Directive 77/799/EEC of the Council of 19 December 1977, concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (1977) OJ L 336/15.

problematic and call for the Court's interpretative intervention.<sup>145</sup> Therefore, the application of the CoOP could be source of tensions between the Member States' authorities and of inefficiencies detrimental to consumers.

b) Second, the application of the CoOP as a rule of conflict of laws concerning the provider's liability may also be detrimental to consumers. Traditional conflict of laws rules are conceived to protect the weaker party. To this effect they contain basic rules (such as the application of the law of the country where the service is provided, typically the consumer's state<sup>146</sup> - and the competence of the jurisdictions of this same State).<sup>147</sup> Extensive exceptions further refine these basic rules in order to account for the different factual situations, but (almost) always with the aim of protecting the weak. The CoOP, on the contrary, would be a monolithic rule which would suffer no exceptions other than the ones specifically provided for in the proposal. What is more, it would reverse the traditional weighing of interests: prevalence is given to the service providers who can henceforth, deploy their activities without bothering to adapt their services and/or methods to the host State legislation. This has considerable economic advantages for providers as they save both on information and on adaptation costs. Further, it may also benefit the economy as a whole.<sup>148</sup> However, this is a 'zero sum operation' whereby the providers' gains are consumers' losses, since the latter will have to defend their interests, in case of dispute, before the jurisdictions and according to the laws of another Member State.<sup>149</sup> Such a transfer of risks is not necessarily inadmissible.<sup>150</sup> However, it corresponds to a purely political choice and may not come about as a mere 'collateral damage' to a technical rule for services in the internal market. This last point hides an extra difficulty : since the CoOP would only apply to services, what would happen to 'mixed' contracts where goods and services are intertwined and how would cross-provision of services be regulated?

c) Third, the application of the CoOP would lead to regulatory competition between the Member States,<sup>151</sup> and could end up in race to the bottom and social dumping. This risk is now more present than in the past, for at least three reasons.

Firstly, economic reasons. Member States participating in (or getting ready for) the EURO have lost command of both their monetary policies and of demand side policies, since spending is contained by the Stability and Growth Pact. Therefore, the only means to face negative economic conjecture is through demand side policies, i.e. increasing production and/or decreasing costs. Cutting down on social protection costs is the easiest way to cut down total cost. If one Member State engages aggressively in such direction other States will have to follow.

Secondly, political reasons. In a Union of numerous and highly heterogeneous member States, sharing few points in common it pays up to cheat on ones' partners, be it for a limited period.<sup>152</sup> Member States are tempted to maintain what they consider to be their 'competitive advantage' for as long as possible, at the cost of ignoring common policies. The derogations negotiated and the violations inflicted to the common rules opening up the utilities markets, offer a good illustration of the above point. The persistence of several states in violating the Stability and Growth pact, offers yet another very strong illustration.

Thirdly, reasons more directly linked to the enlargement of the EU. The recent enlargements have conferred European citizenship to some millions of low-wage and low social protection workers – subject to an optional transitional period of seven years at most. Therefore, rhetoric

<sup>145</sup> See cases *IKA c Ioannidis* and *Danner*, both cited above n. 114 and 28 respectively.

<sup>146</sup> Rome Convention of 1980, OJ [1998] 27/34, Art. 4.

<sup>147</sup> Regulation (EC) 44/2001 of the Council of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, (2001) OJ L 12/1, Art. 5(1)b.

<sup>148</sup> See House of Lords n. 129 above.

<sup>149</sup> For this idea of 'passing the bucket' see among many, M. Audit, above. n. 124, p. 1353 et seq., and O. de Schutter and S. Francq, above n. 123, p. 640 et seq.

<sup>150</sup> See e.g. the British House of Lords, in the report cited above n. 129, which clearly values the development of commercial transactions, in particular by small and medium enterprises, while it passes under silence the negative consequences for consumers.

<sup>151</sup> Concerning the issue of regulatory competition see, among many, M. Audit, above n. 124; V. Mayer-Schönberger and A. Somek, 'Introduction : Governing Regulatory Interaction : the Normative Question' (2006) *ELJ* 431-439 ; P. Zumbansen, 'Spaces and Places : A Systems Theory Approach to Regulatory Competition in European Company Law' (2006) *ELJ* 534-556; and in a more general way, C. Barnard and S. Deakin, 'Market Access and Regulatory Competition' Jean Monnet Working Paper n. 9/2001 available <http://www.jeanmonnetprogram.org/papers/01/012701.html> ainsi que F. Scharpf, « Introduction : The Problem Solving Capacity of Multi-level Governance » (1997) *JEPP* 520-538.

<sup>152</sup> In this sense S. Collignon, in his oral presentation in the CEPS commemorative conference for the 50 years of the Treaty of Rome, 'From Rome to Berlin', Madrid, 19-20 juin 2007.

trickeries like that of the 'polish plumber' menacing local service providers easily hit the bull's eye.

Therefore, the applicable standard remains the Court's imperfect country of origin principle, with all its shortcomings and limitations.<sup>153</sup>

## 2.2.2. Exclusions

The conciliation procedure has left its traces both on the length and on the clarity of the Directive. The European Parliament's main additions, both at the recital and at the substantive level, all tend to limit the Directive's scope of application. The end result is a text which is quite clear on what it does NOT regulate, but quite ambiguous as to what it does regulate. This general negativism which has led some authors to treat the text of 'anti-legislation',<sup>154</sup> impregnates the very structure of the Directive (2.2.2.1). Some exclusions merit special attention (2.2.2.2).

### 2.2.2.1. Anti-legislation ?

The Directive contains long series of exceptions, both to its general scope (2.2.2.1.1) and to some of the specific rules it establishes (2.2.2.1.2).

#### *Exceptions to the scope of the Directive*

The very first Article of the Directive which is supposed to describe its 'object' (a single phrase of 28 words in the draft proposal) is a long list of seven paragraphs (423 words) in which we are told of things the Directive 'does not deal with', 'does not affect' etc.<sup>155</sup> liberalisation of services of general economic interest, b) abolition of service monopolies, c) protection of cultural and linguistic diversity, d) penal law, e) labour law, f) fundamental rights.

Article two, describing the 'scope' of the Directive contains a further list of activities (not entire sectors, like in the previous article) which are excluded from the Directive's scope.<sup>156</sup> These activities range from services of general non economic interest, social and healthcare services to transport and financial services and to gambling and private security activities. There is no apparent logical link underpinning the various excluded activities, other than that they were the ones best represented in Brussels...<sup>157</sup>

Article three of the Directive further limits its scope of application, this time in a very understandable way. It is foreseen that other sector-specific legislative texts, such as the posted workers Directive,<sup>158</sup> the TV without frontiers Directive,<sup>159</sup> the recent professional qualifications Directive<sup>160</sup> or Regulation 1408/71 on the coordination of social security systems,<sup>161</sup> are not affected by the Directive. And the list is not exhaustive.

Only after this prelude of exclusions, non affectations etc, does Article four of the Directive give the definitions to be followed in the Directive.

#### *Exceptions to the free provision of services principle*

Article 16 of the Directive were to be the core Directive provision, as it introduced the ambitious CoOP. This has now been replaced by the modest principle of 'freedom to provide

<sup>153</sup> See above 1.3.

<sup>154</sup> Ph. Manin, 'Conclusions' on Directive 2006/123/EC, (6/2007) Europe, p. 29-30, 29.

<sup>155</sup> It is worth noting that in the French version of the text, para. 6 of the said provision introduces a third variation, according to which the Directive 'does not apply' to labour law etc, while the English version sticks to the terms 'does not affect'.

<sup>156</sup> Taxation, an entire sector (which should have been moved to Article 1 after its modification by the EP) is also excluded from the scope of the Directive by virtue of Art. 2.

<sup>157</sup> This view seems to be confirmed if we compare the text finally adopted with the one proposed, which only contained three exceptions.

<sup>158</sup> Directive 96/71/EC of the EP and the Council, of 16 December 1996, concerning the posting of workers in the framework of the provision of services (1997) OJ L 18/1.

<sup>159</sup> Directive 89/552/EEC of the Council of 3 October 1989, on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities (1989) OJ L 298/23.

<sup>160</sup> Directive 2005/36/EC of the EP and the Council of 7 September 2005, on the recognition of professional qualifications (2005) OJ L 255/22.

<sup>161</sup> Regulation 1408/71/EEC of the Council of 14 June 1971, on the application of social security schemes to employed persons and their families moving within the Community (1971) OJ L 149/2.

services'. This unclear principle has been further limited in scope by the adjunction of three paragraphs to Article 16. Therefore, paragraph 1 poses the principle that 'Member States shall respect the right of providers to provide services in a Member State other than that in which they are established'. Immediately thereafter in the same paragraph, however, it is stated that the above principle does not rule out restrictive measures which are non-discriminatory, necessary and proportional for the attainment of some objective of public policy, public security, public health or the protection of the environment.<sup>162</sup> If this were not clear enough, paragraph 3 of this same provision reiterates that these same reasons may justify the adoption of restrictive measures by the host State.<sup>163</sup> Therefore, Article 16 of the Directive is nothing more than a codification of the Court's jurisprudence on Article 49 EC.<sup>164</sup> Article 17 of the Directive has the suggestive title '*Additional* derogations from the freedom to provide services'. This provision is difficult to understand after the abandonment of the CoOP. Article 17 made sense when it served to exclude from the far-reaching CoOP some activities judged sensible or inappropriate for that type of regulation. Now that Article 16 is restricted to codifying the Court's case law – subject to express exceptions – it is legally unclear what does Article 17 stand for.

Article 18 of the Directive foresees the possibility of 'case-by-case derogations' by measures relating to the safety of services. According to this provision, Member States may adopt restrictive measures following the mutual assistance procedure foreseen in Article 35 of the Directive. Such measures may only be adopted provided that there is no EC harmonisation in the field concerned and that they have some added value in relation to the rules applicable in provider's the home State. This provision also made sense in the original draft of the Directive, but much less now: since Member States are authorised by Article 16 (1<sup>st</sup> and 3d paras) to introduce restrictions for the protection of public policy, security, health and the environment, it is difficult to see why they would have recourse to the more restrictive and technical rule of Article 18.

Last but not least, the fact that the Directive expressly provides for exceptions to the free provision of services for the four reasons mentioned above (public policy, order, health and the environment) raises two issues. First, the Directive uses the three Treaty-based grounds for exceptions together with one which is judge-made. This is not only a conceptual shift (already identified several years ago in the Court's case law),<sup>165</sup> but has also substantial implications. According to the Court's case law Treaty-based exceptions may justify both discriminatory and non-discriminatory measures. Article 16 of the Directive, nonetheless, may serve to uphold only non-discriminatory measures. Second, and more importantly, the four reasons listed in Article 16 as justifying restrictions to the free provision of services are different from the more inclusive category of 'overriding reasons relating to the public interest' defined in Article 4(8) of the Directive and used in other parts of it (especially concerning establishment of service providers). Should this mean that within the scope of the Directive, Member States may only invoke these four grounds to justify restrictions of a non-discriminatory nature, while the other judge-made 'overriding reasons' become inapplicable? Such an interpretation could be valid only if we admitted that the Directive fully harmonises the free provision of services – a claim which is certainly not true.<sup>166</sup>

### 2.2.2.2. Activity-specific exclusions and derogations

#### *Services of general interest*

Following the 2004 White Paper 'On Services of General Interest'<sup>167</sup> the Directive makes clear that this general category may be broken into two: services of general (non-economic) interest, on the one hand and services of general economic interest, on the other.<sup>168</sup>

<sup>162</sup> It is worth noting that the 'public policy' ground seems much more comprehensive in the English text than in the French where reference is made to '*ordre public*'

<sup>163</sup> It is difficult to understand why the EP insisted on both provisions being inserted to Article 16, since they seem to set the same rule and create confusion.

<sup>164</sup> Subject to one eventual and unclear difference concerning exceptions, for which see above 1.2.

<sup>165</sup> On the relationship between Treaty-based and judge-made exceptions see V. Hatzopoulos, 'Exigences essentielles, impératives ou impérieuses: une théorie, des théories ou pas de théorie du tout?' (1998) *RTDEur*, p. 191-236.

<sup>166</sup> See also Ch. Lemaire, 'La directive, la liberté d'établissement et la libre prestation de services. Confirmations, innovations' (2/2007) *Europe*, p. 15-26, 21.

<sup>167</sup> COM (2004) 374 final, du 12 mai 2004.

The former completely evade the application of the Directive, according to article 2(2)a. This is yet another provision added during the political negotiation leading to the adoption of the Directive, another senseless provision. Following the terms of article 50, the Treaty rules only apply to commercial services, offered for remuneration. The Court's case law is fixed on this point.<sup>169</sup> It has been observed above that the court uses imprecise criteria and a very large concept of remuneration in order to ascertain the commercial nature of any given service.<sup>170</sup>

One may criticize the Court for its laxist attitude in this respect.<sup>171</sup> However, this does not justify the inclusion in the Directive of a provision stating the obvious.<sup>172</sup>

The added value of the Directive is also unclear in relation to services of general economic interest. Some, such as telecommunications, transport and healthcare are altogether excluded from the Directive's scope (Article 2(2)). Those which do come within the Directives scope are, nonetheless, altogether excluded from the free provision of services provided for in article 16 (see Article 17(1)).<sup>173</sup> Therefore, the only way in which the Directive may affect the provision of services of general economic interest is through enhanced administrative cooperation and procedural simplification.<sup>174</sup> This end result corresponds to a great extent to the Court's preexisting case law, but for the underlying logic. It is reminded that the Court does respect the Member States' choices for financing services of general economic interest, subject to a loose proportionality control – not in the blanket way suggested by the exclusion of such services from Article 17(1) of the Directive.<sup>175</sup> Here again, the tension between general principles recognized by the ECJ, such as proportionality and non-discrimination and the simplistic solutions adopted by the Directive becomes apparent.

### **Healthcare**

The way the Court has stretched Article 49 EC in order to include healthcare services has been discussed above. Under these circumstances, the exclusion of healthcare services from the scope of the Directive does not seem to matter much. From a normative point of view, the only added value of the proposed Article 23 of the draft Directive would be to introduce the criterion of overnight stay as a means of distinguishing between outpatient/hospital treatments.

However, because of the peculiar nature of healthcare, its exclusion from the Directive may adversely affect patients rights. First, while administrative cooperation is crucial in this field,<sup>176</sup> national authorities miss the opportunity to closely cooperate within the Directive framework. Second, patients miss all the very precious information which would be made available to them through the single points of contact, the electronic information systems etc. Third, patients cannot benefit from the warranties the Directive offers to service recipients.<sup>177</sup> Fourth, national insurance funds and hospitals will find it easier to ignore previous judgments of the ECJ delivered in other cases, rather than a text of national law transposing the Directive.<sup>178</sup> All the above factors are likely to adversely affect patient mobility. The above explain why the European Parliament, after having insisted for the removal of healthcare from the Directive,<sup>179</sup>

<sup>168</sup> See in an exhaustive manner on this topic, M. Dony, 'Les notions de service d'intérêt général et service d'intérêt économique général' in J.V. Louis & St. Rodriguez, *Les services d'intérêt économique général et l'UE*, (2006) Bruylant, p. 3-38.

<sup>169</sup> *Humbel*, above n. 59; Case C-109/92 *Wirth* [1993] ECR I-6447; and more recently, *Freskot*, above n. 27. See also the analysis above 1.1.2.

<sup>170</sup> See above 1.1.2.

<sup>171</sup> For an overview of the relevant case law see V. Hatzopoulos and U. Do, above n. 84 p. 934-937.

<sup>172</sup> B.J. Drijber in 'Les services d'intérêt économique général et la libre prestation des services' in J.V. Louis & St. Rodriguez, *Les services d'intérêt économique général et l'UE*, (2006) Bruylant, p. 65-97, 89 rightly observes that the Court's case law is not always clear on qualifying whether any given service of general interest is economic in nature. Therefore, the clear distinction drawn by the Directive may, in practice, be blurred and services of general non-economic interest may also be affected by the Directive rules, despite their formal exclusion from its scope.

<sup>173</sup> This is also a modification wanted by the EP: while the initial version of Art. 17 only excluded from the CoOP an exhaustive list of five services of general economic interest, in the current version all such services are excluded and the list contained in Art. & has only indicative value.

<sup>174</sup> For which see below 2.3.

<sup>175</sup> See above 1.2.3.

<sup>176</sup> The Court itself has stressed how important cooperation is in the field of healthcare, see e.g. *IKA v Ioannidis*, above n. 114.

<sup>177</sup> For which see below 2.3.1.1.2.

<sup>178</sup> See e.g. Case C-444/05 *Stamatelaki* [2007] nyr, which concerned an absolute prohibition of receiving healthcare services in another Member State, clearly contrary to the well-established case law of the Court.

<sup>179</sup> For the reasons which motivated the EP's position see one of the reports submitted to it, by R. Baeten, 'The Proposal for a Directive on Services in the Internal Market applied to Healthcare Services' presented at the EP's

in a report of May 10th, 2007 'invites the Commission to submit, to Parliament, a proposal to reintroduce health services into Directive 2006/123/EC, and a proposal to codify European Court of Justice rulings on European patients' rights'.<sup>180</sup> The ensuing Resolution, however, only took up the need for codification.<sup>181</sup>

**Other excluded activities : playing with legal certainty?**

The fact that many economic activities are outside the scope of the Directive raises two series of questions. First, the horizontal and general character of the Directive may appear to be more of a legal fiction, in view of the number and the economic importance of the excluded services: financial services, telecommunications, energy, transport, TV services, health care, gambling and gaming etc. Therefore, the Directive's impact in relaunching the internal market and in promoting the Lisbon objectives, may not be as important as it was thought of by its promoters. Second, in view of the fact that the Directive essentially codifies the Court's case law in the field of services, any exclusion from the scope of the Directive may be source of legal uncertainty. This may be illustrated by reference to two activities which have been recurring before the Court in these recent years.

a) Gambling and gaming

In *Schindler, Zenatti, Läära and Anomar*,<sup>182</sup> the Court has recognised that gambling is a service falling under Article 49 EC, but has shown extreme tolerance towards national restrictions thereto. The Court's 'self-restraint' takes the form of restricted proportionality control of the measures at stake<sup>183</sup> and is explained by the idea that 'moral, religious and cultural factors, and the morally and financially harmful consequences for the individual and society associated with gaming and betting, could serve to justify the existence on the part of the national authorities of a margin of appreciation'.<sup>184</sup> However, two recent cases concerning the Italian gambling market, mark a clear evolution of the Court's attitude. In *Gambelli* the Court held a concession system which restricted access to the gambling market to violate Article 49. Such a restriction could not be upheld, unless it could be shown to contribute in a 'coherent and systematic'<sup>185</sup> way with the rest of the applicable legislation, to the attainment of the set objectives of general interest (consumer protection, fraud prevention, limitation of spending propensity). This was an issue for the referring jurisdiction to decide. A couple of years later, in *Placanica* the Court really took the situation in its hand. It held that a system of limited concessions could be justified in view of the above-mentioned grounds of general interest. It went on to state, however, that concessions should be given out following a tender procedure, having 'detailed procedural rules to ensure the protection of the rights which those operators derive by direct effect of Community law'.<sup>186</sup> Making a step further the Court even held that 'appropriate courses of action could be the revocation and redistribution of the old licences or the award by public tender of an adequate number of new licences'.<sup>187</sup> In the same logic, in *Lindman*,<sup>188</sup> the Court had no hesitations in condemning the Finnish taxation scheme, which discriminated among proceedings of luck-games, on the basis of the place the game was organized.<sup>189</sup>

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public audience of November 11, 2004, available at [http://www.europarl.europa.eu/hearings/20041111/imco/baeten\\_en.pdf](http://www.europarl.europa.eu/hearings/20041111/imco/baeten_en.pdf).

<sup>180</sup> Report A6-0173/2007 FINAL, of May 10, 2007, on the impact and consequences of the exclusion of health services from the Directive on services in the internal market, Rapporteur B. Vergnaud, para. 71.

<sup>181</sup> Résolution 2006/2275 (INI), of May, 2007.

<sup>182</sup> Case C-275/92, *Schindler*, [1994] ECR I-1039, *Läära and Others*, [1999] ECR I-6067 and Case C-67/98, *Zenatti*, [1999] ECR I-7289, Case C-6/01, *Anomar*, [2003] ECR I-8621; see for these cases Allen, 'Ladies and Gentlemen, no more bets please', (2000) *LIEI*, p. 201-206.

<sup>183</sup> See the comment on *Schindler* by V. Hatzopoulos, (1995) *CMLRev.*, p. 841-855 and on *Zenatti and Läära*, by Straetmans in (2000) *CMLRev.*, p. 991-1005. In general for the restricted control exercised by the Court in fields touching on public morality, see P. Hetsch, 'Émergence de valeurs morales dans la jurisprudence de la CJCE', (1982) *RTDEur.*, p. 511.

<sup>184</sup> *Gambelli* above n. 92, para. 63 and *Placanica* above n. 95 para. 47.

<sup>185</sup> *Gambelli*, para. 67.

<sup>186</sup> *Placanica* para. 63

<sup>187</sup> *Ibid.*

<sup>188</sup> Case C-42/02, *Lindman*, [2003] ECR I-13519.

<sup>189</sup> This case law should be seen in parallel with the WTO Appellate Body Report in United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services ('*US-Gambling*'), WT/DS285/AB/R, 7 April 2005, para 373. See also Ortino, "Treaty interpretation and the WTO Appellate Body Report in *US-Gambling*: A critique", (2006) *JIEL*, 117-148.

Under these circumstances, the exclusion of gambling from the Directive's scope does not entail freedom of action for Member States.<sup>190</sup> It is true that Member States are not under the cooperation and transparency obligations foreseen by the Directive. They need, however, to comply with the much stricter conditions of the judgment in *Placanica*: if they restrict the number of market participants, they need to put into place a tendering system respectful of the general procurement principles: transparency, non discrimination, proportionality and mutual recognition.<sup>191</sup> Therefore, the judgment in *Placanica*, through its radical content and the timing of its publication clearly constitutes a judicial revision of the unsatisfactory text of the Directive.

b) Private security services

The same may be said in relation to private security services, also excluded from the Directive's scope by Article 2(2)k. In a series of recent judgments<sup>192</sup> the Court has held private security activities to fall under Article 49 EC and not to be exempt by virtue of Article 45, on the exercise of public authority.<sup>193</sup> Hence, the Court has held Article 49 EC to be violated by a) requirements concerning the legal form of security undertakings, b) special qualifications required by their directors, c) the requirement of a permanent presence within the national territory, d) the need for special (identity) documents and even e) the conditions for issuing the authorisation necessary for their operation, if such conditions are already satisfied by the undertaking under the home State regulation.<sup>194</sup>

In this way the Court does more than just 'opening up' the market. It requires national administrations to cooperate closely and to fully embrace the principle of mutual recognition. Therefore, once again, the Court makes it up for the legislator's hesitancy.

### 2.2.2.3. Posted workers: another false dilemma

The treatment of posted workers under the Directive has been an even deadlier battlefield than the CoOP, where the opponents of the draft Directive won yet another victory over its promoters. Since the judgments of the Court in *Evi c/ Seco, Van der Elst et Rush Portuguesa*<sup>195</sup>, it is established case law that a service provider may move to another Member State with his personnel. Three principles stem from the above cases: a) the service provider may move to any Member State with his own personnel, irrespectively of their nationality, without having to comply with all the requirements of the host State concerning the entry and working conditions of foreign workers; b) the service provider may, nevertheless, be required to conform himself with the labour law rules applicable in the host State (concerning working time, paid leaves, minimal salaries,<sup>196</sup> health and security regulations, pregnant workers etc – but not hiring/firing conditions and not social security and complementary pension schemes);<sup>197</sup> c) this notwithstanding, the service provider may not be required to comply with all the labour law formalities of the host State in respect of his own workers, unless such formalities substantially add up to the protection of workers. Directive 96/71 takes up and builds upon these through a system of 'cooperation on information' between the competent authorities (Article 4). This system, however, has proven moderately effective<sup>198</sup> and the draft Directive was intended to push further in the direction of free movement.

<sup>190</sup> Directive 2006/123, Art. 2(2)h.

<sup>191</sup> See, among others, Case C-225/98, *Commission v. France, Nord Pas de Calais*, [2000] ECR I-7445 ; and in a more explicit way Case C-231/03, *Coname*, [2005] ECR I-7287 and Case C-458/03, *Parking Brixen*, [2005] ECR I-8612.

<sup>192</sup> Case C-355/98, *Commission v. Belgium, Private Security Firms*, [2000] ECR I-1221; Case C-283/99, *Commission v. Italy*, [2001] ECR I-4363; Case C-165/98, *Mazzoleni*, [2001] ECR I-2189; Case C-171/02 *Commission v. Portugal* [2004] nyr.; Case C-189/03 *Commission v Netherlands* [2004] nyr.

<sup>193</sup> *Commission v Italy*, above.

<sup>194</sup> The same requirements are to be found in almost all the cases; see in particular *Commission v. Portugal, Commission v. The Netherlands and Mazzoleni*, all cited above.

<sup>195</sup> Joined Cases 62/81 and 63/81, *Seco v. Evi*, [1982] ECR 223; Case C-113/89, *Rush Portuguesa*, [1990] ECR I-1417; Case C-43/93, *Vander Elst*, [1994] ECR I-3803.

<sup>196</sup> For the importance of agreements on minimum wages as a means to combat poverty see Funk and Lesch, 'Minimum Wage Regulations in Selected European Countries', (2006) *Intereconomics*, p. 89.

<sup>197</sup> S. Micossi in 'Fixing the Services Directive' above n. 127 p. 6 identifies these two fields where the host State rules do not apply. Both exclusions are, however, understandable. Hiring conditions are those applicable in the home State – this could not be differently. Concerning social security, Article 13 of Regulation 1408/71 already foresees that all activities the duration of which exceeds twelve months are fully subject to the host State rules.

<sup>198</sup> Commission Report on the application of Directive 96/71/EC, January 2003 and Communication The application of Directive 96/71/EC in the Member States, COM (2003) 458 final, 25 July 2003.

Contrary to the understanding misleadingly spread by the media, the draft Directive did not apply the CoOP to posted workers. On the contrary, it expressly stated that the CoOP did not affect neither Directive 96/71 nor Regulation 1408/71 on social security. What the Directive did is that in a Section named 'posted workers' it contained two Articles: Article 24 intended to strengthen the administrative cooperation between the competent national authorities, while Article 25 was intended to tame national immigration rules in relation to posted workers.<sup>199</sup> The logic underlying both provisions was to transfer some competences from the host to the home authorities, while building up confidence between the two.<sup>200</sup> These have been abandoned and the Directive has been altogether declared inapplicable to posted workers (in at least three points in the text: Article 1(6), 3(1)b and 17!).

Therefore, posted workers continue to be governed by (the relatively ineffective) Directive 96/71 and by the case law of the Court. If we give a closer look to the Court's case law as it currently stands we shall realise that the situation is equally unsatisfactory for 'nationalistic trade-unionists' and for 'globalised neo-liberals' alike.

In its more recent case law the Court has been more accommodating of economic imperatives and of the desire of service providers to move around with their own personnel. Therefore, in a first series of judgments the Court has applied its own jurisprudence and the principles of Directive 96/71 in an energetic, and yet contained, way. Without putting at stake the principle that the host State legislation should apply, the Court has held contrary to Article 49 EC and/or the Directive the obligation imposed by the host State to a service provider a) to keep all the documents required by the host's State labour legislation,<sup>201</sup> b) to pay social security contributions in the host State on behalf of workers who are already insured in the home State,<sup>202</sup> c) to obtain individual working permits for every posted worker,<sup>203</sup> and d) to have working visas delivered under technical conditions difficult to fulfill.<sup>204</sup>

In a second series of cases, however, the Court has openly questioned the full application of the host State legislation, at three levels.

a) At the administrative level, the Court has held that where the service provider is subject to a prior authorisation requirement such authorisation 'should neither delay nor complicate the exercise of the right of persons established in another Member State to provide their services'.<sup>205</sup> Concerning a registration requirement, the Court held that 'the authorisation procedure instituted by the host Member State should neither delay nor complicate the exercise of the right of persons established in another Member State to provide their services on the territory of the first State where examination of the conditions governing access to the activities concerned has been carried out and it has been established that those conditions are satisfied'.<sup>206</sup> The above findings imply that the host State may be required to put into place simpler procedures and formalities compared to the ones concerning their own nationals.

b) Concerning minimal pay, the Court has also shown clear signs of departure from the full and automatic application of the host State legislation. In *Mazzoleni*<sup>207</sup> the question arose whether the personnel of a French security company occasionally deployed in sites in Belgium should be paid at the higher tariffs applicable in Belgium. The Court held that application of the host country legislation may become, under certain circumstances, neither *necessary* nor *proportional*.<sup>208</sup> The necessity test requires the host State authorities to verify whether their national legislation is needed to ensure an 'equivalent' level of remuneration for workers, taking into account fiscal and social charges applicable in the States concerned.<sup>209</sup> Even if the necessity test is satisfied, the application of the host State legislation may still be

<sup>199</sup> This second provision was directly inspired from the abandoned draft Directive extending the freedom to provide cross-border services to third-country nationals established within the Community, COM (2000) 271 final, 8 May 2000, finally withdrawn by COM (2004) 542 final, 1 October 2004.

<sup>200</sup> It would seem exaggerated, however, to follow the idea of L. Driguez, 'Le détachement des travailleurs après la directive sur les services', (6/2007) Europe 35-39, p. 36 *in fine* who believes that 'the Commission introduces the CoOP in the administrative modalities for controlling the application of labour law' (translated from the French by the present author)

<sup>201</sup> Joined Cases C-369/96 and 376/96, *Arblade and Leloup*, [1999] ECR I-8453.

<sup>202</sup> *Ibid.*

<sup>203</sup> Case C-445/03, *Commission v. Luxembourg*, ECR [2004] I-10191, paras 20-21.

<sup>204</sup> Case 244/04 *Commission v. Germany* [2006] ECR I-885.

<sup>205</sup> Case C-58/98 *Corsten*, [2000] ECR I-7919, para. 47 and Case C-215/01, *Schnitzer*, [2003] ECR I-14847, para 37.

<sup>206</sup> *Ibid* para 37.

<sup>207</sup> *Mazzoleni*, above n. 112.

<sup>208</sup> *Ibid.*, para 30, emphasis added.

<sup>209</sup> *Ibid.*, para 35.



countered if it entails disproportionate administrative burdens for the service provider or inequalities between its employees (proportionality test).<sup>210</sup> Few months later in *Portugaia Construcoes*<sup>211</sup> the Court held that the host State's collective agreement on salaries could be applied only if it contributed in a 'significant way' to the employees' social protection.<sup>212</sup> Therefore the sacrosanct principle of the respect of host State minimal pay requirements becomes conditional upon a) significantly adding up to the employees' revenue and b) not measurably burdening the employer (!).<sup>213</sup>

c) Broadly the same principles above apply in relation to social security contributions in the host State, following the Court's judgment in *Finalarte*.<sup>214</sup>

From the above it becomes clear that if a risk of social dumping in relation to posted workers does exist, such risk is unrelated to the (draft) Directive. It is true that in some respects the Directive pushed further than the case law, e.g. by abolishing any authorisation, registration etc obligation. Closer administrative cooperation, however, foreseen by the Directive, could help ensure the full respect of rules of social protection for workers. The very day of the publication, by the Commission, of the amended draft Directive, whereby the 'posted workers' Section had been dropped, the Commission published a COM document together with a report by its services, pursuing broadly the same objectives,<sup>215</sup> through soft law.

In view of all the above, it would seem that the exclusion of 'posted workers' from the Directive is yet another victory of misinformed political will over economic necessities and legal certainty.

### **2.3. But a significant step forward for the governance of the service economy**

Despite all its shortcomings, the Directive does, nevertheless, serve the free provision of services, both on substantive (2.3.1) and on procedural (2.3.2) grounds.

#### **2.3.1. Substantive amelioration**

##### **2.3.1.1. Addressing mainstream restrictions**

###### ***Simplified procedures for the establishment of service providers***

One of the main inputs of the Directive – and the one least discussed by legal writers – is the extent to which it simplifies the establishment of service providers. Chapter III of the Directive (Articles 9 to 15) constitutes the first piece of legislation of a horizontal nature (i.e. not sector-specific, such as e.g. the TV without frontiers Directive) to align the economic with the legal concept of services, setting aside the unhappy 'duration criterion' contained in Article 50 EC. In this it follows the Court's case law described above in 1.1.3. Hence, it regulates situations which under the traditional establishment/services dichotomy fall in the former, to the extent that they concern service activities. This is why the Directive's legal base is to be found not only in Article 55 EC on services, but also in Article 47 EC on establishment.<sup>216</sup>

Service providers wishing to establish themselves in another Member State, have, in principle, to comply with the host State legislation. This requirement has been tempered, by the Court, through the imposition of the general principles of non-discrimination, necessity, proportionality and mutual recognition. Chapter III of the Directive codifies the relevant case law of the Court in two Sections, one concerning authorisation procedures and the other all other measures restricting establishment.

Such codification does offer some clear added value. First, the codification of the case law into the text of a Directive – and its transcription into national law – does away with the casuistic character of the above-mentioned principles and brings them closer to both service providers and to Member States' administrations. Second, these principles from *ex post* remedies for service providers transform themselves into *ex ante* obligations for national administrations. Third, the Directive goes beyond mere principles and offers practical details

<sup>210</sup> *Ibid.*, para 36.

<sup>211</sup> Case C-164/99, *Portugaia Construções*, [2002] ECR I-787.

<sup>212</sup> *Ibid.*, para 29.

<sup>213</sup> This is a peculiar proportionality test: usually the restrictive measure is appraised as against a less restrictive one, while here the competing interests themselves are being compared.

<sup>214</sup> *Finalarte*, above n. 96.

<sup>215</sup> COM (2006) 159 final, 4 April 2006 and, of the same date, SEC (2006) 439.

<sup>216</sup> See above 1.1.3.

for their application, something the Court may only rarely do. Fourth, Member States' discretionary powers are circumscribed, to the extent that States are subject to report obligations concerning the restrictions maintained/imposed both to one another and to the Commission (Article 39 of the Directive).

### **Supporting service recipients**

The Directive innovates by introducing rules in favour of service recipients. In a short Section consisting of three articles the Directive prohibits restrictions imposed by the home State (Article 19), condemns discriminatory measures liable to be adopted by the host State (Article 20) and offers 'assistance to recipients' (Article 21).

More in detail, the recipient's home State may neither impose any authorization or declaration requirement nor put limits to the financial aid to which the recipient is entitled, just because he/she has opted for receiving a given service in another Member State. Clearly, the principles established in *Kohll, Smits & Peerbooms* and *Vanbraekel* underpin Article 19 of the Directive. Similarly, the Court's judgments in *Trojani*, *Collins* and *Bidar*,<sup>217</sup> seem to transcend Article 20 which prevents the host State from introducing any discriminatory measure against foreign service recipients. It has to be noted that – unlike Article 16 of the Directive – the above two provisions do not exclude from their scope of application the services of general economic interest. Hence, they may be invoked by nationals of one Member State in order to secure access to services having a social character in other Member States.

The final provision on service recipients aims at making information accessible to recipients and at building up confidence for services offered in other Member States: electronic means of communication, single points of contact, simple guides etc, all available to the service recipients in their home State.

### **2.3.1.2. Harmonisation and self-regulation**

#### **Marginal Harmonisation**

The fact that the Directive only entails marginal harmonisation is no secret. If, however, direct harmonisation is indeed, very limited, the Directive sets the conditions for indirect and for future harmonisation.

In the initial draft Directive, direct harmonisation was not an aim on its own, rather than a condition indispensable to the application of the CoOP. Now, however, we are left with harmonisation which, despite being narrowly targeted and limited, may nevertheless serve consumers.

a) Direct (substantial) harmonisation, at the service of service recipients

Chapter V of the Directive named 'Quality of services' counts six long Articles, and provides for common measures, often of a voluntary nature. These foresee a) the obligation for service providers to offer extensive information both on themselves and on the service offered (inspired to a large extent by Directive 85/577/CE on contracts outside commercial premises and 97/7/CE on distant selling),<sup>218</sup> b) their liability and the need to take up professional guarantees, c) their right to use commercial communications and to set up multidisciplinary activities, subject to exceptions.<sup>219</sup> Voluntary quality policies are encouraged, with emphasis put on certification, evaluation, labels and quality charters. Finally, extra-judicial mechanisms of conflict resolution are to be set up by Member States in order to ease differences between service providers and service recipients. It is true that all these points do not go to the core and only touch the periphery of service provision; it is also true, however, that they focus on one of the main obstacles to the development of trans-border service flows: the lack of

<sup>217</sup> Case C-456/02 *Trojani* [2004] ECR I-7573; Case C-138/02 *Collins* [2004] ECR I-2703; Case C-209/03 *Bidar* [2005] ECR I-2119; See in general on the 'social sensibility' of the ECJ, V. Hatzopoulos, 'A (more) social Europe: A political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon' (2005) *CMLREV*, p. 1599-1635.

<sup>218</sup> Directive 85/577/EEC of the Council of 20 December 1985, to protect the consumer in respect of contracts negotiated away from business premises, (1985) OJ L 372/31; Directive 97/7/EC of the EP and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, (1997) OJ L 144/19, as modified by Directives 2002/65/EC and 2005/29/EC.

<sup>219</sup> Exceptions necessary to accommodate the case law of the Court in cases such as *Gebhard* and, more importantly, Case C-309/99 *Wouters*, [2002] ECR I-1577.

information and of confidence. By the same token, they add up to other more specific consumer protection rules.

b) Indirect (procedural) harmonisation, at the service of service providers

Further to the above direct harmonisation, the Directive also pushes forward indirect – but extremely important – procedural harmonisation. Chapter II of the Directive, named ‘administrative simplification’ harmonises formalities, documents, procedures etc leading up to the exercise of service activities. Points of single contact will be put into place (Article 6), harmonised forms and documents will be used (Article 5(2)), pre-determined information will be at the disposition of service providers (Article 7) etc. All these provisions end up in some procedural harmonisation, which could be codified in a kind of a *vade mecum* for the setting up of service activities in any Member State.

c) Future harmonisation

The core content of the Directive is full of measures of negative integration: abolition of unjustified restrictions, discriminations etc. These, however, also lead to positive integration and *de facto* harmonisation: Member States obliged to give up important packages of their legislation, will have to replace those with measures inspired by the Directive and the Court’s case law. Moreover, in some instances the Directive’s rules are detailed to such a point that national measures implementing them will necessarily be very similar.

Moreover, the Directive contains a couple of ‘rendez-vous (RDV) clauses’, whereby the Institutions and Member States are invited to reflect on further harmonisation. There is one sector-specific RDV clause (Article 38) of minute importance (after the European Parliament cut down on the bulk of the activities it would concern). Next to it, there is one general RDV clause, of extreme importance and sophistication, concerning the Directive as a whole (Articles 39-41). This should bear its fruits in 2011 and every three years thereafter.<sup>220</sup>

Finally, the Directive has several ‘hooks’ whereby further harmonisation measures (of secondary importance) have to (see e.g. Articles 8(3) and 21(4)) or may be (see e.g. Articles 5(2) and 23(4)) adopted by the Commission.

### **Codes of conduct and other self-regulation**

The Directive further « harmonises » through the use of European labels, norms etc (Article 26) and, more importantly, through the promotion of European codes of conduct (Article 37). It is incorrect, technically, to talk of harmonisation through measures of soft law. Such measures have no normative intensity whatsoever and hence are not binding and their normative content is freely determined by the regulatees themselves. However, it has been shown that soft law may be as binding as hard law and that, in certain circumstances, it may even ensure a higher degree of compliance.<sup>221</sup> Self-regulation has also proven quite effective both as a component of the ‘new approach’ of legislation inaugurated in 1985 and in the regulated network industries. Therefore, the limited harmonization pursued by the Directive is being completed by soft means.

### **2.3.2. Procedural improvements**

Contrary to the Directive’s poor substantive content, its procedural arrangements are both innovative and powerful. The Directive is impregnated with modern methods of governance and embodies a new drafting-style directly issued from the ‘Better Lawmaking’ Communication<sup>222</sup> and the ‘European Governance’ White Paper.<sup>223</sup> The Directive’s procedural arrangements aim both at securing the attainment of the set objectives (2.3.2.1) and at ensuring its own ‘sustainability’, through its periodic revision (2.3.2.2).

#### **2.3.2.1. Procedural arrangements for the free provision of services**

<sup>220</sup> This will be further discussed below in 2.3.2.

<sup>221</sup> See among many, F. Snyder, ‘Soft law and Institutional practice in the EC’, in S. Martin (ed) *The Construction of Europe, Essays in Honour of Emile Noel* (1994) Kluwer, Dordrecht, p. 197-225, and more recently, D. Trubek, P. Cortell & M. Nance, ‘Soft Law, Hard law and European Integration: Toward a Theory of Hybridity’, (2/05) Jean Monnet Working Paper, and in a more exhaustive way L. Senden, *Soft Law in EC Law* (2004) Hart, Oxford/Portland.

<sup>222</sup> COM 97 (626) final, of 26.11.1997; see also the Commission’s webpage on this issue at [http://ec.europa.eu/governance/better\\_regulation/impact\\_en.htm](http://ec.europa.eu/governance/better_regulation/impact_en.htm)

<sup>223</sup> COM 2001 (428) final, of 25.7.2001.

### ***Administrative simplification***

Administrative simplification is one of the Directive's main objectives. In this respect the techniques followed by the Directive are quite original for a text of hard law – but already well established as means of fostering soft cooperation among States.

For some time now, and quite intensively since the launching of the Lisbon Agenda in 2000, the Commission works on the issue of administrative simplification. Building on the experience acquired by the OECD in this field,<sup>224</sup> the Commission has fostered the exchange of best practices and benchmarking, while it has devised several indicators measuring the performance of national administrations. Up till now, however, all these have remained 'esoteric' to the Commission and have only taken the form of working documents, internal reports and recommendations.<sup>225</sup> Only in 2007 did the Commission launch action programme 'CUT 25' aimed at the reduction of national administrative burden by 25% by the year 2012.<sup>226</sup> In the framework of this action plan the Commission proposed some legislative texts, for the first time in January 2007.

Well before these texts were even proposed by the Commission, the Directive was the first text of a horizontal nature to put forward binding rules on administrative simplification. Chapter II of the Directive contains four series of rules.

Article five asks Member States to evaluate their requirements concerning access to, and exercise of, service activities. If these prove not to be 'sufficiently simple' Member States have to simplify them. The fact the 'sufficiently' criterion is a very vague one and that the only one to evaluate this is the very Member State concerned, Article 5 should be seen more as a political engagement rather than as a legal norm.

Articles six, seven and eight form a coherent set of rules having the potential to revolutionise the establishment of service providers in other Member States. The 'best practice' of one stop shops is made into a legal obligation. Hence, Member States are to put into place single points of contact, for service providers, with twofold responsibilities. First, these contact points should provide all the information foreseen in Article 7 of the Directive. Second, and more importantly, they should accomplish, on behalf of service providers, all necessary formalities and procedures giving access to the service activity concerned. This is a way around national bureaucracy, bearing its own dynamics for substantial simplification: when one bit of the national administration (the single point of contact) is to cope with the formalities of all the other administrative authorities, a strong incentive is given for the reduction of red tape. The creation of these points of single contact should considerably diminish establishment cost, both in terms of information collection and of setup fixed costs; small and medium enterprises should be the main beneficiaries. The role of points of single contact is all the more important after the abandonment of the CoOP, since service providers need, in principle, to comply with all the host State requirements. However, Member States have no real incentive to offer their best services to providers from other Member States, at considerable cost. Therefore, some monitoring system, either by the Commission or through peer-review, should secure the effective functioning of single points of contact.

The Directive also makes use of the available technology and provides that all the information provided by the single points of contact should also be available by electronic means at a distance and should be regularly updated (Article 7). What is more, all the procedures and formalities necessary for the exercise of any service activity should be made available for online completion (Article 8).

### ***Administrative cooperation between Member State authorities***

Contrary to Chapter II (above), Chapter VI on 'administrative cooperation' has clearly lost in importance from the abandonment of the CoOP, since competence sharing and mutual help between home and host State authorities are now less important. However, one cannot dismiss altogether nine (out of 45) provisions of the Directive. Hence, the creation of one or more 'liaison points' in every Member State, responsible for the exchange of information

<sup>224</sup> Several general reports, as well as national reports are available at [http://www.oecd.org/topic/0,3373,en\\_2649\\_37421\\_1\\_1\\_1\\_1\\_37421,00.html](http://www.oecd.org/topic/0,3373,en_2649_37421_1_1_1_1_37421,00.html).

<sup>225</sup> The Commission pursues administrative simplification not only at the Member States level, but also concerning its own legislative acts and proposals, see Commission Communication 'Implementing the Community Lisbon programme : A strategy for the simplification of the regulatory environment' COM (2005) 535 final and the first Report on the application of this strategy, COM (2006) 690 final .

<sup>226</sup> COM (2007) 23 final.

between national authorities will certainly help the application of the Directive (Article 28). Next to those, a 'European network of Member States' authorities' will run an alert mechanism whenever it 'becomes aware of serious specific acts or circumstances relating to a service activity that could cause serious damage to the health or safety of persons or to the environment' (Article 32). An electronic system for the exchange of information (Article 34(1)) and some rules on the respective competences of the home and host State complete the rules on cooperation.

### 2.3.2.2. Procedural arrangements for the revision of the Directive

One of the main originalities of the Directive is that it is 'self-sustainable': it provides for its own periodic evaluation and revision. Articles 39 and 41 constitute a startling example of new methods of governance being introduced into more traditional regulatory instruments, such as the Directive at hand.<sup>227</sup> These provisions put into place a system of successive reports which may eventually culminate into legislative proposals put forward by the Commission. More precisely, Member States have to report to the Commission on the use they have made a) of the discretion left to them by the Directive (articles 9§2, 15§5 et 25§3) and b) of the derogation on the free movement of services, contained in Article 16(3). These reports are circulated to other Member States for peer review. On the basis of the initial reports and the peers' comments on them, the Commission is to present a synthesis report to the European Parliament and the Council. After all these reports have been circulated and subject to evaluation, the Commission shall present in 2011, for the first time, and every three years thereafter, to the Parliament and Council a 'comprehensive report' on the application of the Directive « accompanied, where appropriate, by proposals for amendment of this Directive» (article 41).

The very fact that this complex system of cross-reporting and circular evaluation is to be found in a Chapter called 'Convergence Programme', rather than in the 'final provisions' of the Directive, talks of the Commission's intentions. Faced with the Parliament's dogged opposition and the public's reprehension for its initial proposal, the Commission has recourse to successive reports and evaluations of an imperfect legal instrument. These, orchestrated by the Commission itself, should create further dynamism, which the Commission should be able to steer in the direction it sees fit, in the future. By the same token, the future revision of the Directive is being de-politicised and transformed into a technocratic process.

### Conclusion

Out of the numerous questions which emerge from the developments above, one stands out in a most compelling way: in view of the high degree of involvement of the Court in the construction of the internal market for services (briefly presented in part 1), does the 'services Directive', as amended by the European Parliament (briefly presented in part 2), have any reason of being, does it have any added value? The answer to this question is twofold.

For one thing, the Directive will be a source of legal complication and uncertainty. Not so much because it introduces new rules of law, but precisely because it does not. Instead, it meddles in an inconsistent and haphazard way with established principles and accepted rules, while providing for an interminable list of 'exclusions', 'derogations', 'non affectations' etc. Any hope for substantial positive integration went awash with the abandonment of the CoOP. This retreat, imposed as a political necessity, is unsatisfactory both from an economic and from a legal viewpoint. The economies that would accrue to service providers from not having to investigate in, and comply with, the legal systems of other Member States are being lost. At the same time, however, host State authorities are bound by a strong principle of mutual recognition and by compelling cooperation obligations, in unclear terms. In these respects, the adoption of the services Directive has added nothing, it may even qualify as a retreat.

On the other hand, however, there are at least three ways in which the Directive may be valued positively. First, by codifying (as well as it could) the Court's case law, it vested the solutions adopted with democratic legitimacy and silenced voices complaining of judicial activism. Second, the Directive, does contain some rules (of secondary importance, it is true) leading to the simplification of procedures and to some limited harmonization. Third, the

<sup>227</sup> For the issue of hybrid formations see above n. 221.

Directive clearly sets the conditions, both procedural and substantial, for the adoption of more far reaching rules, in the future.



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