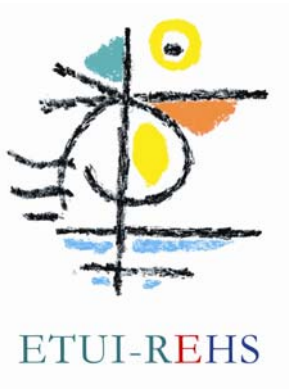

The European Commission's Services Directive: criticisms, myths and prospects

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Wolfgang Kowalsky[1]

1. Introduction

On 13 January 2004 the European Commission published a Framework Directive for Services on the Internal Market – hereafter referred to as the 'Services Directive' or 'SD' – that quickly became known as the 'Bolkestein Directive' – called after Frits Bolkestein, the Internal Market Commissioner at the time[2]. The proposal proved controversial – reaping praised from its proponents as a breakthrough for the Internal Market and sharply criticised by opponents as being a neo-liberal abandonment of the Community approach that would merely encourage social and ecological dumping.

Before we analyse certain central aspects of the SD, it is interesting to look at the underlying philosophy of European integration as set out by Bolkestein on 18 October 2002 in a speech at the Humboldt University in Berlin. He identified three 'core tasks' for the EU, namely 'removing obstacles' to economic activity, 'solving cross-border problems' and 'utilising economies of scale'. He regarded the social dimension as superfluous, explicitly considering the possibility of 'renationalising' the social sector, including the Cohesion and Structural Funds. His view of Europe was exclusively based on the 'Internal Market project' and 'competition policy'.

2. Problems related to the Directive

As justification for its proposed Directive, the Commission focused on the potential impact on employment. Services make up 70% of GDP and employment within the EU, and the Directive, it claimed, would affect services that accounted for 50% of GDP and 63% of employment (European Commission 2004: 36). It was necessary to draw on untapped potential – a 'considerable growth and employment potential' – that would guarantee a 'better quality of life' (European Commission 2004: 3, 5, 12). If the Internal Market could be made to function better, this would 'significantly' increase the prospects for employment in the EU (p. 36). No specific evidence was offered, and the accuracy of this statement by the Commission has been the subject of criticism[3].

Given the unreliability of such estimates in the past, such an approach raises a large number of questions. Back in 1985, with the publication of Delors' 'White paper on Completion of the Internal Market', which marked the start of a process of realising the Internal Market that lasted till 1992, a number of studies were commissioned, including a report by Paolo Cecchini 1988, which predicted the creation of 4.4 to 5.7 million jobs (cf. Kowalsky 1999: 106). But even in those days the model used by Cecchini was based on realisation of economies of scale and underestimated the number of jobs that would be lost as a result of increased productivity and rationalisation. It therefore only partially reflected the reality of the situation.

In its 'Second Report on Implementation of the Internal Market Strategy 2003-2006' the Commission predicted an 'increase in employment of 0.3%' as a result of the removal of barriers within an EU of 20 states. On 2nd September 2005, Commission President José Manuel Barroso informed the European Parliament (EP) that it would not be 'unrealistic'

1 Adviser, ETUC, (wkowalsk@etuc.org)

2 http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:52004PC0002:EN:HTML

3 E.g. TUC, *Economics of the Services Directive. A TUC Assessment*; London November 2005, http://www.tuc.org.uk/extras/besidethepoint.pdf

to expect an increase in employment of 3% as a result of implementation of the entire Lisbon agenda – in other words 6 million new jobs (European Commission 2005, p. 31). Barroso told the EP that he estimated the increase in jobs as a result of the Services Directive to be 600,000 – a relatively low figure given the increase in the employment rate to 70% by 2010 envisaged by the Lisbon Strategy (Barroso 2005).

2.1. Definition and scope

In its first chapter, the SD defines general provisions, in the second it deals with procedures to ensure freedom of establishment for service providers, in the third it lays down the requirements for free movement of services, in the fourth it deals with quality of services, in the fifth with supervision, in the sixth with a convergence programme, while the seventh contains final provisions.

Article 2 defines the scope of the Directive and details the services affected in a lengthy and varied list ranging from management consultancy to assistance for old people.

In addition to the question of the scope of the Directive, definition of obstacles to the Internal Market forms a central element. The Commission takes an all-embracing view: in its report of 30.07.2002 on 'The State of the Internal Market of Services Presented under the First Stage of the Internal Market Strategy of Services', the Commission explicitly established in the chapter on rules of non-state organisations that 'collective agreements' by the social partners could represent obstacles to realisation of the Internal Market[4]. Article 4 (7) therefore includes 'collective rules of professional associations' under the heading 'Requirements' – in other words they are regarded as 'obstacles' for the Internal Market that have to be eliminated. The Internal Market is explicitly given priority over autonomous agreements between the social partners.

[4] ((COM(2002) 441 final, page 55 and footnote 174; http://europa.eu.int/eur-lex/en/com/rpt/2002/com2002_0441en01.pdf)

2.1.1. 'Country of origin principle' instead of harmonisation and minimum standards

Article 16 (4e) of the SD requires member states not to impose an 'obligation' on the provider to comply with requirements relating to the exercise of a service activity applicable in their territory. It is unclear whether this passage also applies to labour law and collective agreements. The host member state is not allowed to take any steps to create a level playing field and protect national service providers against unfair competition from providers from other member states who have to fulfil less strict requirements. The 'country of origin' principle thus distorts competition, as it is likely to lead to discrimination against national providers. This new situation would create a not inconsiderable incentive for service providers to select the most liberal member state as their country of origin in order to give themselves a competitive edge, effectively creating an incentive for dumping. In order to avoid a massive transfer of places of establishment, Community standards would have to be laid down at the very least. Simple competition between systems will *de facto* convert European *minimum standards* into *maximum standards* without any further political intervention being necessary

Article 17 details general derogations from the 'country of origin' principle and identifies excluded sectors, which include postal services, electricity, gas and water distribution services, acts requiring by law the involvement of a notary etc., but also services related to public policy or public security and the protection of public health or the environment.

The 'country of origin' principle as laid down in Article 16 would result in the parallel coexistence of 25 or 28 legal systems in a single country. The consequences would be far-reaching: service providers would then only be subject to the requirements of the country of origin, which alone would be responsible for supervising the services provided. The 'country of origin' principle removes all compulsory requirements related to establishment, approval and registration ' in the

case of cross-border activities and therefore represents an incentive for service providers to change their place of establishment in order to evade collective agreements, environmental, labour and health standards and qualification requirements. It is to be feared that this would result in a downward spiral of standards, in particular where social and environmental regulations were concerned. It does not leave national practices unaffected but rather sets them in competition with each other, worsening the rivalry between national systems, with the result that there is no longer any uniform system of law in a member state.

It should be critically noted that Article 3 of the EC Treaty is concerned with 'approximation' of legal regulations, i.e. harmonisation of rules or creating of European standards, and not juxtaposition of 25 country of origin rules. The Commission implies that the 'country of origin' principle is an instrument that is constantly used, but this is not the case. It was used in the e-commerce Directive and the Television Directive, for example, but in combination with the principle of minimum standards. The 'country of origin' principle is based on case law – an extrapolation of individual decisions by the European Court to create a principle. It represents a clear abandonment of the 'Community method' on which Delors Internal Market project was based.

The Commission, may claim that it is concerned to avoid interference in the institutional organisation of member states, but the result of implementation of the Directive could be a considerable social restructuring triggered by the free play of market forces. Application of the 'country of origin' principle would mean that service providers were only subject to the national legal requirements of their country of origin and this would mean, in turn, that in areas not harmonised at European level there would be a danger of unfair competition, with the sort of negative economic and social consequences that already exist in the merchant shipping sector as a result of the use of 'flags of convenience'. Such regulations would encourage service providers to transfer their place of establishment to member states in which the tax, social and environmental regulations were easier to adhere to. Conversely, it would create an incentive for governments of countries with stricter regulations to water these down. The impact on quality of services would be considerable.

2.1.2. Posting of workers

Articles 24 and 25 of the SD deal with the posting of workers and the question of third-country nationals. While Directive 96/71/EC on the posting of workers provides for the application of certain regulations of the host country, the Services Directive forbids member states from creating any obligations regarding the activities of workers (work or residence permits etc) which could conflict with the 'country of origin' principle. The obligation to make a declaration to the authorities of the Member State of posting is also prohibited (Recital No. 59 in the SD), even though it is possible to maintain such an obligation until the end of December 2008 (Article 24, 1b). Only for the field of building work is it stated explicitly that the obligation may be maintained until the end of 2008 (Recital 59) and will lapse in 2009.

Article 24.1.b explicitly forbids member states from requiring service providers or posted workers to make a declaration. This provision curtails Directive 96/71 and could make it impossible for efficient supervision to take place. It is not clear how a service provider informing the host country about workers posted, time of posting and employment and working conditions could represent an obstacle to the Internal Market.

2.1.3. Services of general interest and further requirements of the SD

As all services of general *economic* interest are affected by the Directive, except when they are provided free of charge and directly by public institutions, it is likely that services of general interest will also be endangered. It can also be expected that there will be considerable pressure for privatisation/liberalisation

of public services (Kowalsky 2002). High-quality services of general interest are a constituent element of the European social model.

In contrast to previous directives, no provisions have been made to guarantee a level playing field, which means that services of general interest could be put under pressure by commercial services. Article 2.2 states that the Directive does not apply to the field of taxation, but even if taxation matters are not supposed to be affected, it could result in pressure on taxation systems.

Article 37 deals with closer collaboration and mutual support by national administrations – in other words, co-operation between authorities. In the view of the Commission, the authorities of the country of origin are 'best placed to ensure the effectiveness and continuity of supervision' (European Commission 2004: 25, Recital 38). It is of the opinion that it is necessary to carry out supervision 'at source' (ibid p. 35, Recital 38). This new division of labour could turn out to be both inefficient and impracticable. The obligation to provide mutual support may, in itself, be acceptable and a step in the right direction, but the suggested method infringes the principle of subsidiarity, according to which supervisory tasks should be carried out as close as possible to the place of provision of the service.

2.2. Reaction of the European Institutions: European Parliament

In February 2004 the European Parliament (EP) nominated Evelyne Gebhardt (PES) as rapporteur for the Legal Affairs und Internal Market Committee, the committee primarily responsible, and Anne van Lancker (PES) for the Employment Committee. however, the European Parliament elections of June 2004 resulted in a conservative-liberal majority in the EP and following the elections, responsibility for the Services Directive was put in the hands of the newly created Committee on Internal Market and Consumer Protection .

On 11 November 2004, both committees organised a joint hearing with experts and representatives of the social partners (EP Hearing 2004): On behalf of the ETUC, Catelene Passchier thanked the EP for consulting the social partners (unlike the Commission) and voiced the concerns of the ETUC with regard to labour law[5]. Lawyer Berend Jan Drijber came to the conclusion that the SD would not achieve harmonisation[6]: the member states would have to relinquish their regulations without any Community regulations being introduced to replace them. Since the 1990s, the DG Internal Market, together with certain groups from industry, had been pressing for the 'country of origin' principle to be extended – claiming that the European Court had been applying the 'mutual recognition principle' for the past 25 years. This statement is misleading, as the European Court examines whether certain regulations are justified (whether they are disproportionate, discriminatory etc). The obligation for recognition is thus dependent on clearly defined conditions and not a general key to abolishing the principles of country of destination or place of work. With regard to the Internal Market for goods, the Commission has never suggested general application of the 'country of origin' principle without harmonisation. The argument used by the Commission that the 'country of origin' principle creates a 'level playing field' is not convincing – indeed it encourages the very opposite, namely a greater degree of heterogeneity.

Concerned by the virtually unanimous criticism of the Services Directive voiced by experts, the conservatives (EPP) organised their own hearing on 9th December 2004. However, as employment and labour law issues were regarded as marginal, no trade unionists were invited to speak.

5 http://www.europarl.eu.int/hearings/20041111/imco/passchier_en.pdf

6 http://www.europarl.eu.int/hearings/20041111/imco/drijber_en.pdf

In January 2005, Evelyne Gebhardt presented her working document to the committee[7]. In it she reported that, during the hearing organised by the EP, the Commission was called upon by various parties to withdraw the SD. The removal of obstacles to the Internal Market was desirable, but the scope of application remained unclear and there was insufficient demarcation from services of general interest. The 'country of origin' principle created incentives for service providers to transfer to member states with low standards of protection. Gebhardt questioned the transfer of supervisory powers to the member state of origin: what interest would a member state have in extending its supervisory activities to cover the entire Union? She considered 'country of origin' principle inapplicable in practice.

In her working document published in mid-January,, Anne van Lancker stated that the 'country of origin' principle could only be applied on the basis of a high degree of harmonisation[8]. E. Gebhardt suggested the method of 'mutual recognition', but neither idea found sufficient political support. Finally, Gebhardt suggested differentiation between access to a market, in which case the 'country of origin' principle should apply, and exercise of an activity, which should be according to the rules of the country of delivery, In other words, as in the case of a driving licence, the document issued in the country of origin would be valid but the regulations of the host country would have to be respected. Her proposal was not, however, passed by the Committee.

A majority of the Social Democrats/Socialists – and also the United Left and Greens – in the EP are critical of the 'country of origin' principle. Within the EPP it is possible to identify a number of different positions[9], but the majority supports the shadow rapporteur Malcolm Harbour. When it came to a vote in the Internal Market Committee on 21 November, the EPP-ALDE-UEN prevailed and established the 'country of origin' principle firmly in the Directive, even if it underwent a cosmetic change of name.

3. Myths associated with the Directive

The controversy over the SD is being used by confirmed opponents of the internal market and protectionists to attempt to completely torpedo what is, in fact, an important project. The frequently raised question of whether or not the SD represents a massive 'deregulation project' misses the point, as realisation of the Internal Market is only possible through the removal of anachronistic national obstacles and regulations and their replacement – using the community method – with common European regulations that create a new balance. There are undeniably still many national requirements that cannot be permitted from the point of view of the Internal Market. The essential question is, however, whether all regulation is superfluous or whether there has to be precise screening to separate legitimate regulations from obstacles to the Internal Market.

The disagreement is not least one of method: proponents of the SD in its present form are trying to achieve regulation via the market, whereas opponents of the Internal Market, such as Attac, wish to defend the status quo and are warning against the creation of a 'special economic zone'. Most critics wish to provide a framework for market regulation in the form of political regulation as envisaged in the Delors project. Regulation via market mechanisms sets various national legal systems in

7 http://www.europarl.eu.int/meetdocs/2004_2009/documents/dt/551/551156/551156en.pdf

8 http://www.europarl.eu.int/meetdocs/2004_2009/documents/dt/552/552592/552592en.pdf

9 During the second reading of the Unfair Commercial Practices Directive, the EP decided to remove the 'country of origin' principle from the Directive (on 24th February 2005). Whereas the employers' association UNICE came out in favour of this principle, the conservative MEP Klaus-Heiner Lehne, for example, submitted amendment proposals that would drop the principle. Industry was disappointed that the 'country of origin' principle was not enshrined in the Unfair Commercial Practices Directive.

competition with one another instead of replacing these with a uniform Community system or at least creating minimum Community standards.

In the German press, the example of the meat processing sector was used to show that the 'country of origin' principle can rapidly convert an entire industry into a 'low-wage sector'. Within a few months, it was claimed, 'a market worth billions' was created, 'with Mafia-like structures, wage dumping and working conditions akin to modern slavery', according to food, drink and catering union NGG. Freedom of movement, it was claimed, had already cost 26,000 German jobs in slaughterhouses. A similarly explosive atmosphere could also be found in many parts of the construction industry as a result of a fear that supervision would be carried out by the authorities in the country of origin rather than by those in the host country.

It should be pointed out that what was happening here was a mixture of myth-creation (apparent 'pre-emption' of the SD), inadequate translation of the Posting Directive into national law and a lack of minimum wage legislation – an explosive mixture that in some cases resulted in the spread of xenophobic propaganda. Especially in France, in the context of the campaign against the European Constitution in the spring of 2005, this played into the hands of those who were anxious to stir up feelings against foreigners, painting lurid pictures of the menace represented by 'Polish plumbers'.[10]

In the context of the referenda on ratification of the European Constitution the 'Bolkestein-Directive' was used as a bogey by many opponents of the Constitution to argue for a 'No' vote. In particular Laurent Fabius, the former French Prime Minister, put forward reasons for voting against the constitution that had nothing to do with the Constitution itself – namely the 'Bolkestein-Directive' and 'delocalisation'. The Directive was regarded by many opponents of the Constitution as a welcome opportunity to denounce the (apparent or actual) neo-liberal tendencies of the Commission and to torpedo the Constitution. In this context it was not surprising that supporters of the European Constitution – the French Socialist Party and the French President and government – saw themselves forced to argue for rejection of the Directive in its present form.

4. Trade union positions

The removal of obstacles to the creation of a single Internal Market for services is a goal that is generally supported in principle by the ETUC. However, the ETUC would have preferred the Commission to identify the obstacles, in a so-called 'screening' process, before approving the Directive. It is regrettable that the Commission – in contravention of the clear requirements of the Treaties (Article 138 EG-Treaty) – failed to consult the social partners in advance. The proposal was tabled without previous publication of any Green or White Papers.

The ETUC's basic position is that any progress with the Internal Market must be linked to progress in the fields of social protection, workers rights and working conditions. It is, in principle, in favour of the creation of a single Internal Market for services in the European Union.

The ETUC is, however, critical of the Directive because it would constitute a massive undermining of existing industrial relations systems and collective agreements – at both sectoral and cross-sectoral level. It is in favour of the entire health sector being exempted from application of the SD, as otherwise deregulation and liberalisation of health services is to be feared without any previous policy decision having been made in this respect. In addi-

[10] The problem with the meat industry occurred in Germany, but not in Holland, Denmark or France. The reason for this was the restriction of the posting directive in Germany to the construction sector and the lack of minimum wages that would prevent undercutting.

tion, the ETUC is also of the opinion that social services, education, culture and audiovisual services as well as water distribution services should be excluded.

The many questions, problems and difficulties of definition – not just of a legal nature – that the draft Directive has thrown up have resulted in a petition against it (see: www.stopbolkestein.org) and several demonstrations, for example on the 5th June 2004 in Brussels under the motto 'No to the Bolkestein Directive – Yes to social Europe' or on 25th of November 2004, again in Brussels, in the run-up to the Council meeting on competitiveness – this time under the banner 'Bolkestein Directive = Frankenstein Directive'.

The ETUC initiated a wide-ranging public debate on the issue. In Sweden it was launched by the trade unions and resulted in the issue even playing a role in the Swedish campaign for the European elections. The demonstration with 75,000 participants to mark the employment summit in Brussels on 19th March 2005 under the motto 'More and better jobs – Defend Social Europe – Stop Bolkestein' marked a high point in the campaign against the Directive.

5. Conclusion and prospects

The Commission's original assumption was that in many service industries there were a number of obstacles that unnecessarily hindered cross-border activities or even made these impossible. It is, indeed, not difficult to find individual examples, but rather than just listing individual cases it would have been more helpful to draw up a quantitative and qualitative assessment. This has not happened to date. There has been a failure to carry out any serious assessment of the likely impact of the proposed Directive. The Commission has promised to draw up a 'ex-post' evaluation of the social impact (Commission staff..., p. 41), but is very wisely remaining silent on what it would do if such an evaluation proved to be negative. Logically enough, from the point of view of the Commission, the elimination of all rules and procedures covered by the directive is proposed (Articles 14, 21, 29) – in other words, the baby is thrown out with the bathwater. This approach seems disproportionate, short-sighted and unbalanced and contradicts the approach adopted hitherto, which was based on minimum harmonisation and complementary mutual recognition. Harmonisation and the creation of minimum standards should not be a side effect but a central pillar in the creation of the Internal Market. They should not be regarded as a 'last resort' (Commission 2004: 19) but as part of a policy mix aimed at creating an effective European market for services. With this in mind, the aim should not be full harmonisation but rather the achievement of a balanced mix of harmonisation and mutual recognition.
Even an initial examination of the draft SD reveals that there is no proper balance between the creation of an economic Internal Market and advancement of the social dimension. The 'deal' between Delors and the ETUC with the promise of a 'social dimension' (cf. Kowalsky 1999: 127).

As in the days of Delors, whose White Paper of 1992 represented an ambitious programme for the creation of the Internal Market, the Commission currently faces the challenge of how to further develop the European Internal Market. The historic compromise between Delors and the ETUC took the form of an assurance that the Internal Market would be accompanied by a raft of workplace regulations combined with a social dialogue, an ambitious programme to achieve equality of opportunity between men and women, a social policy programme, the strengthening of basic social rights and the creation of a clearly defined social dimension. Whether this deal will survive is at present unclear.

The plan is for the European Parliament to complete its first reading in plenary session in the spring of 2006, after which the Council will start its first reading and, if it reaches agreement, will refer the package back to the EP for a second reading. This, in turn, will be

followed by a second reading in the Council. If the two European legislative bodies cannot agree, the matter will be referred to arbitration.

The controversy triggered by this Directive is particularly heated as it is clearly based on differing views of what European integration is all about. Behind it lies disagreement between those who see the Internal Market as an instrument for achieving goals enshrined in the Treaty/Constitution such as full employment, a social market economy, and a high degree of social protection, and those who see the Internal Market as an end in itself. In other words, it is a question of whether there is to be an Internal Market with a social dimension or merely a glorified free-trade zone. The outcome of this disagreement is uncertain, but seldom has controversy related to a legislative proposal been so clearly linked with the struggle to shape a European social model.

This essay can only offer an interim description of the situation, as the debate is ongoing. It is still too early to draw any firm conclusions, as the legislative process proper is only now starting and the Services Directive is still likely to be subject to considerable amendment.

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For more information, please contact the editor Andrew Watt (awatt@etui-rehs.org). For previous issues of the EEE Policy Brief please visit www.etui-rehs.org/publications.

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