Common Market Law Review **43:** 307–311, 2006.

EDITORIAL COMMENTS

The services directive proposal: Striking a balance between the promotion of the internal market and preserving the European social model?

The European Council at its meeting of 23–24 March 2006 reached the following conclusion on the pending – and controversial – proposal for a directive regarding services within the internal market:

> "Recalling its conclusions of March 2005 and the conclusions of the Competitiveness Council of 13 March 2006, the European Council stresses that the internal market for services must be made fully operational, while preserving the European social model, by securing a broad consensus on the Services Directive. The European Council welcomes the European Parliament's vote and looks forward to the Commission's modified proposal. The European Council takes good note of the Commission's intention to base the amending proposal largely on the outcome of the European Parliament's first reading and expresses the hope that the institutions will be able to swiftly conclude the legislative process."[1]

At first sight this statement of the European Council may seem to provide a nicely balanced summary of the diverse interests involved in the legislative process of this high profile directive. Upon closer inspection, this anodyne conclusion is yet another example of the perfect double speak with which the members of the highest institution of the EU try to suggest that adherence to conflicting goals in the Community is perfectly possible without sacrificing in any way the focus of the objectives.

How different is the political reality in the face of the difficult policy choices that need to be made in the context of the cumbersome gestation process of what came to be known as the Bolkestein directive.[2]

It was always clear that the Commission's proposal – which was after all designed to crown its efforts to give a boost to the development of the internal market – was not going to be a political walkover. Yet not even Mr

1. Presidency conclusions para 57.
2. Named after the Commissioner in office in charge of Internal Market affairs when the Commission's original proposal was presented, and who was an avid supporter of the thrust of the proposal.

Bolkestein in his darkest moments may have envisaged such fierce resistance to his namesake legislative proposal.

The proposal and its main thrust – the country of origin principle – quickly became the focus of the ire of all those on several sides of the political spectrum denouncing its anti-social market nature. The proposal became one of the main symbols for the "non" and "nee" voters in the French and Dutch referenda last year.

Stimulated by this intense political attention, the European Parliament has engaged in an intensive debate demonstrating its capability to fully assume its democratic role in the EU. That in itself is good news for the Union and its people. On 16 February this year, the European Parliament adopted its first reading of the proposal. This first reading is based on a compromise between the largest political parties in the European Parliament, the Christian democrats and the Social democrats. Not all the news from the Parliament is good however. Its intensive debates have resulted in numerous amendments several of which have resulted in a lethal attack on the legal consistency of the proposal.

As the above quoted summary of the European Council's conclusions shows, both the Commission and Council suggest that they will accommodate the views of the Parliament in an effort to get this politically awkward dossier out of the way as soon as possible. While the political institutions are pondering over their new texts a few critical comments may not be amiss.

The European Parliament has eliminated the essential element from the original proposal: the country of origin principle – in its place MEPs have put a clause with the title "freedom to provide services". It is obvious that this amendment severely weakens the proposal. The elimination of the country of origin principle from Chapter III, on the Freedom to Provide Services, reduces its impact on the development of the internal market to practically zero, if not even to a negative effect. Several economic studies have produced estimates of the economic effects of the introduction of the directive in its original form.[3] One such study – the Copenhagen study – expected a welfare growth of Euro 37 billion for the EU as well as an increase in employment of 600 000 jobs.[4]

It is unfortunate that the EU's political institutions cannot bring themselves to deliver these economic goods, especially against the background of

3. Copenhagen Economics, *Economic Assessment of the Barriers to the Internal Market for Services – Final Report,* Copenhagen 2005; Henk Kox, Arjen Lejour, Raymond Montizaan, *The free movement of services within the EU*, CPB Document no. 69, The Hague October 2004.

4. These estimates are minimum estimates excluding dynamic long term effects. Similar effects were calculated by the Kox c.s. study.

their much acclaimed Lisbon strategy.[5] It seems that every serious obstacle on the way to implement the Lisbon strategy is tackled by publicly announcing new instruments such as the National Reform Programmes.[6] In the face of such ethereal politics, we lawyers have to continue our job which is to help the politicians to produce the best possible drafts within the prevailing political constraints.

The Parliament's proposed restrictions are based on the fear of a "race to the bottom" and social dumping because rules governing the service sector differ from country to country; there is a worry that companies will automatically opt to be based in the country with the fewest regulations and standards of safety and environmental protection. Parliament also voted to limit the scope of the directive so that it covers fewer services than the original text. MEPs expanded the list of reasons which allow Member States to restrict the freedom of a service provider from another Member State to provide services on their territory.

Even if one accepts the political arguments of the European Parliament, fundamental legal concerns arise. The European Parliament amendments have turned the original directive proposal into a Swiss Emmenthaler cheese – with more holes than substance.

It should be remembered that the original proposal consisted of two main elements: chapter II on establishment, and chapter III on services. Parliament's onslaught almost exclusively affects the latter chapter. Its amendments would seem to create a totally incomprehensible and inconsistent set of rules relating to the freedom to provide services. Although disturbing enough in itself, this is all the more worrying because the case law of the Court of Justice has produced a clear set of rules guaranteeing such freedom. There is a real risk that this important part of the *acquis communautaire* might actually be jeopardized if the directive goes on to incorporate the main lines of Parliament's amendments. An unintelligible set of directive provisions will certainly not stimulate the development of the internal market for services. Furthermore, as is well established, the case law of the Court of Justice takes the country of origin principle as its starting point when assessing the application of the justification for restrictions on the free movement.[7]

5. § 4 of the European Council conclusions of 23/24 March 2006 state: "Drawing on lessons learnt from five years of implementing the Lisbon Strategy, the European Council in March 2005 decided on a fundamental re-launch. It agreed to refocus priorities on jobs and growth coherent with the Sustainable Development Strategy, by mobilising to a greater degree all appropriate national and Community resources. It also agreed on a new governance cycle based on partnership and ownership."

6. See § 9 of the European Council conclusions of 23/24 March 2006.

7. The "grandfather" case was Case C-76/90, *Manfred Säger* v. *Dennemeyer*, [1991] ECR

There is thus a real danger that the proposed texts of the European Parliament will undermine the case law of the Court of Justice.

The crucial European Parliament amendment consists of deleting Article 16 of the proposal applying the country of origin principle and replacing it by a set of generally formulated rules such as non-discrimination and transparency. In the original Commission proposal, the obligation to apply the country of origin principle was accompanied by Article 17 providing for a rather lengthy list of exceptions to this principle. Parliament's amendments now lead to the perverse result that these exceptions actually apply to the watered down general principles mentioned above. These exceptions thus no longer make any sense – or, even worse, can have no other meaning than a derogation from the principle of free movement itself. Thus, it seems that the end result is that the European Parliament would propose to limit the basic freedom to provide services enshrined in the Treaty.

Parliament's text can therefore not be accepted as it stands. What should be done?

Under the present political conditions prevailing in the Union, it does not seem any kind of feasible option simply to reintroduce the country of origin principle into legislation – leaving aside the question of how the Court of Justice continues to deal with the basic Treaty provisions. We therefore have to look at second best solutions.

The first second best solution would be to change the regulatory design of the directive and follow the same approach for services as for establishment. That is to say to lay down an enumeration of prohibited requirements on the freedom to provide services. This method is followed in Article 14 of the proposal which contains a list of prohibited requirements on the freedom of establishment. This also seems to be the solution favoured by the European Parliament, because the amendments to Article 16 call for such prohibitions. This approach also consists of a streamlining, a simplification of administrative procedures, and "one window".[8] At first sight this may seem a harmless amendment.

However, this approach seems to be in conflict with the case law of the Court of Justice, because it only partially reflects this case law and leaves out the essential element of the presumption of the application of the country of origin principle, as was explained above.

Secondary legislation that truncates the case law of the Court will create confusion by suggesting that by complying with some general rules the free

I-4221 at para 15. A good recent example is Case C-429/02, *Bacardi France SAS* v. *Télévision française 1 SA (TF1)*, [2004] ECR I-6613, para 31.

8. See Art. 6 of the proposal.

movement requirements are satisfied. Just imagine the situation arising if an official in one Member State applies the new Article 16 by looking at the checklist of prohibited requirements, but totally ignores the rest of the case law and thus the obligations arising directly under the provisions on services in the EC Treaty.

A second possible solution would be to limit the rules on the freedom to provide services to a notification obligation, somewhat along the lines of the technical standards Directive.[9] Such a procedure would submit the introduction of new rules on services to prior control by the Commission. It would enable the Commission to monitor the introduction of new rules on services that would have a negative impact on the internal market. It would also allow the Commission to propose harmonization where this is necessary. This mechanism has worked fairly well in the area of free movement of goods. Article 15 of the Commission's proposal contains a similar obligation for requirements on the freedom of establishment. Unfortunately this is one of the only provisions in Chapter II that has been affected by Parliament's amendments – it was deleted. Reinstating this provision and extending it to the freedom to supply services and increasing its effectiveness would have the merit of laying down a clear set of rules. The introduction of such a mechanism could have a positive effect on the development of the internal services market. Even though this second solution would constitute only a small step forward, it would at least have the merit of not interfering with the case law of the Court of Justice. It would allow the Commission to present fresh proposals in due time under more auspicious stars than its present ones.

9. European Parliament and Council Directive 98/34 of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, O.J. 1998, L 204/37, sometimes called the Securitel directive, because of the far-reaching direct effect the Court gave to this Directive's predecessor (Directive 83/189/EEC), even in situations involving a conflict between private parties, in the *Securitel* case, Case C-194/94, *CIA Security International SA* v. *Signalson SA and Securitel SPRL*, [1996] ECR I-2201.