

Institutionalization of Market Access

From the Board

Market integration within the European Union is moving beyond ‘traditional’ negative and positive integration. Reliance on directly effective Treaty prohibitions complemented by harmonization measures that address remaining legal obstacles are the two basic instruments to establish the single European market. Nowadays, instruments of positive integration show a shifting approach towards market management. It is not so much the establishment of the single market, but its functioning that gets one’s attention: raising the awareness of market participants to the full potential of the single European market.

The Services Directive is just such a horizontal instrument that is used to stimulate market participants to take full advantage of the internal market. The process of implementing the Services Directive in the Member States of the European Union had barely begun when the Commission proposed another legislative instrument to give full effect to the EC Treaty free movement provisions.¹ It proposed a Regulation that applies to decisions regulating market access of ‘any industrially manufactured product or agricultural product, including fish products, lawfully marketed in another Member State’.² The main objective of the proposed Regulation is to ensure free movement of goods in the non-harmonized area. It does so by prescribing the procedure national authorities have to follow whenever they intend to impose national technical rules on products lawfully marketed in other states and by providing for the establishment of Product Contact Points. The proposal aims at setting out one harmonized method of applying mutual recognition and can therefore be called a draft Mutual Recognition Regulation.

Both the Services Directive and the draft Mutual Recognition Regulation can be seen as codifying principles that the European Court of Justice has either explicitly or implicitly developed on the basis of the application of the free movement provisions, but of course there are major differences between the two instruments. In general, one can say that the Services Directive is more detailed in prescribing what conditions in authorization schemes and what requirements national authorities can impose on service providers who want to establish themselves or who want to provide services on their territory. It

1. Directive 2005/123/EC of the European Parliament and of the Council of 12 December 2006 on Services in the Internal Market, OJ L 376/36 of 27 December 2006; Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision 3052/95/EC, COM (2007) 0036 final – COD 2007/0028, of 22 February 2007.
2. Article 2 of the proposed Regulation.

even goes beyond codification of existing case law at certain points.³ Indeed, the Services Directive narrows down the possibility of Member States imposing national requirements on service provision activities to reasons of public policy, public security, public health or the protection of the environment,⁴ whereas the proposed Regulation on mutual recognition sticks to the possibility of derogation from free movement of goods 'on one of the grounds of public interest listed in Article 30 of the Treaty or by reference to another overriding requirement in the public interest'.⁵ An interesting similarity in both acts is that they contain provisions which are not immediately directed at approximation of legal provisions, but which aim at a better *practical* functioning of the internal market.

Free movement is often hindered by the fact that enterprises, especially the small and medium ones, are unaware of the scope of the Treaty prohibitions as interpreted by the Court of Justice. Very often, national (technical) requirements and authorization procedures are taken for granted. National administrators are reluctant to recognize the equivalence of foreign products or qualifications. Moreover, market access can be hindered by practical difficulties such as complexity, length and legal uncertainty of administrative procedures and formalities. To remediate these problems, the legislative acts facilitate access to (information on) the procedures. The Services Directive obliges Member States to set up Points of Single Contact for service providers where all necessary procedures and formalities can be completed. Besides, these Points of Single Contact have to provide information on applicable requirements, contact details of relevant authorities, available remedies in case of dispute, and organizations providing practical assistance. The proposed Regulation on mutual recognition also provides in creation, by the Member States, of Product Contact Points for economic operators who want to bring their product on the market of the host state. The information these contact points have to provide is similar to the information the Single Points of Contact have to provide regarding services. The aim is clear: these provisions set out to remedy the fact that economic operators often refrain from using their free movement rights because of practical hurdles.

Creation of contact points for EU market management seems to be in fashion. Contact points used to be created for the exchange of information between Member States or between Member States and the Commission.⁶

3. See also G. Davies, 'The Services Directive: Extending the Country of Origin Principle, and Reforming Public Administration', in. 2007, 32 (2), p. 232–245.

4. Article 16, para. 3 of the Services Directive.

5. Article 4 of the proposed Regulation.

6. See for instance Commission Decision 81/437/EEC of 11 May 1981 laying down the criteria in accordance with which information relating to the inventory of chemical substances is supplied by the Member States to the Commission, OJ L167/31 of 24 June 1981, or the annex of Council Directive 92/59/EEC of 29 June 1992 on general product safety, OJ L228/24 of 11 August 1992.

A second step in the use of contact points for market management is made where those contact points have to provide information to market participants. This function is given to them for instance in the EU policy in favour of Small and Medium Enterprises.⁷ In EU consumer policy, the same development from exchange of information between Member States and Commission towards provision of information and assistance to market participants, *in casu* consumers, can be detected. The Consumer Policy Strategy 2002–2006⁸ mentions the desire to set up in every Member State a European Consumers Centre (also named *Euroguichets*) that would give advice and assistance to other authorities, and help the Commission to better identify consumer needs. The Centres together form a *network*. In the Consumer Policy Strategy of the EU (2007–2013),⁹ the Council calls upon the Commission and the Member States to ensure contact points in all Member States to assist consumers in effective cross-border dispute resolution. It presents a shift in function for the contact points, from assisting other authorities to assisting consumers.

The Services Directive and the Mutual Recognition Regulation take this development one step further. Again, contact points are set up to inform market participants and these contact points may form a *network*. However, the market participants that are informed here derive directly rights from the Treaty provisions whose application the contact points have to guarantee and facilitate. Part of the information that the contact points are supposed to provide is related to these direct rights. Besides, both the Services Directive and the proposed Mutual Recognition Regulation impose procedural obligations

As to Contact points for the management of the internal market, see Council Resolution of 16 June 1994 on the development of administrative cooperation in the implementation and enforcement of Community legislation in the internal market, OJ C 179/1 of 1 July 1994, according to which contact points must be set up for better cooperation between the administrations of the Member States and the Member States and the Commission. The general belief in contact points for Europe can be deduced from the Communication from the Commission – A Europe of Results – Applying Community Law, COM (2007)502 final of 5 September 2007, where it is stated that the ‘Commission will systematically request the nomination of a contact point and provide details of the network(s) established to exchange information following the adoption of each new measure’.

7. See for instance Council Resolution of 10 October 1994 on giving full scope to the dynamism and innovatory potential of small and medium-sized enterprises, including the craft sector and micro-enterprises, in a competitive economy OJ C 294/6 of 22 October 1994, and more recently Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Small, clean and competitive - A programme to help small and medium-sized enterprises comply with environmental legislation {SEC(2007)}906 {SEC(2007)}907 {SEC(2007)908}{COM/2007/0379 final}.
8. See Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions – Consumer Policy Strategy 2002–2006 COM(2002)208 final, OJ C137/2 of 8 June 2002.
9. See Council Resolution of 31 May 2007 on the Consumer Policy Strategy of the EU (2007–2013), OJ C 166/1 of 20 July 2007.

for these contact points. For instance, contact points are under an obligation to follow principles of sound administration, such as the obligation to respond quickly to requests for information.¹⁰ The proposed Mutual Recognition Regulation is very precise here: Product Contact Points shall respond within 20 working days of receipt of any request.¹¹ It makes the contact points more than just (electronic) information desks.

The function of the Single Contact Points goes still further in the case of the Service Directive. Here, a fourth step is added: all Single Contact Points must make it possible for service providers to complete relevant procedures and formalities through their contact point. Thus, the contact points become a one-stop shop or, in the words of the Commission, 'single institutional interlocutors from the perspective of the service provider'.¹²

One can certainly have sympathy for the way market participants are supported and market access is facilitated. However, the way of institutionalizing market access through the creation of (a network of) contact points is not entirely unproblematic. Some of the problems already have been signalled during the adoption process of the Services Directive. In its Opinion on the Draft Services Directive,¹³ the European Economic and Social Committee raises the issue of liability:

'Moreover, the question of the liability of single points of contact if they provide incomplete or even false information needs to be clarified. In such cases, service providers may suffer if they have neglected to obtain a given permit and are therefore in breach of the law.'

Another issue raised during the adoption process of the Services Directive is whether institutionalizing market access through contact points does respect the constitutional structure of the Member States. The principle of national institutional autonomy that governs the relationship between the Community and the Member States, and according to which, in the absence of applicable Community rules, the responsibility for the implementation, application and enforcement of Community rules falls upon the Member States in accordance with their national legal systems, is not absolute. Though the Community does not normally concern itself with the internal structure of the state, it seems to be possible for directives to limit the Member States' freedom of choice

10. Article 7, para. 4 of the Services Directive.

11. Article 8 of the proposed Regulation.

12. See Commission of the European Communities, *Handbook on implementation of the Services Directive*, 2007, available at <http://ec.europa.eu/internal_market/services/services-dir/index_en.htm>.

13. Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM (2004) 2 final — 2004/0001 (COD)) OJ C221/113 of 8 September 2005.

to designate the competent authorities.¹⁴ With respect to the Draft Services Directive, the Committee of the Regions remarked:

‘Rules such as (...) the establishment of single points of contact for handling all the procedures and formalities needed for access to service activities (Article 6) are, for example, in conflict with federal states’ constitutional foundations. The Committee would point out that under the constitutional Treaty the Union has to respect the national identities of the Member States inherent in their fundamental political and constitutional structures;’¹⁵

Though both the Services Directive and the proposed Regulation on Mutual Recognition explicitly recognize that the creation of Contact Points should not interfere with the allocation of functions and powers among the authorities within national systems,¹⁶ worries in this respect are expressed in doctrine.¹⁷

Another problem with (electronic) contact points and networks needs to be raised: what if information is incorrect and spread through the network? How would one stop the system if it sends out wrong signals? A recent study on another electronic network for the exchange of information, the SIS, shows that it is not uncommon that wrongful information is spread.¹⁸ Therefore, we must think about effective remedies whenever these types of networks are set up.

Institutionalization of market access brings us to another stage of market integration, the level of ‘integrated’ administration of the market. While this may mean a boost to the functioning of the market, it also brings a lot of problems that cannot be ignored. If the European Union does not address them correctly, they can damage the quality of market integration.

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14. See J.H. Jans a.o., *Europeanisation of Public Law* (Europa Law Publishing, 2007), p. 18 and further. They point at Case C-359/88 *Zanetti and others* [1990] ECR-I-1509, where the Court seems to accept that directives can interfere with the internal structure of the Member States.
15. Opinion of the Committee of the Regions on the Proposal for a Directive of the European Parliament and the Council on services in the internal market, (2005/C 43/06), OJ C43/18 of 18 February 2005, point 2.29.
16. Article 6, para. 2 of the Services Directive and the Preamble of the proposed Regulation on Mutual Recognition, point 32 of the proposal.
17. See for instance G. Davies, as cited (footnote 3), who asks the question whether the directive can be used ‘to reform and harmonise the state’.
18. E. Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System*, PhD defended at the University at Nijmegen, October 2007.