The draft Services Directive: a visionary instrument enhancing competitiveness or a Trojan horse threatening the European social model?

Introduction

At the time when talks with the World Trade Organisation (WTO) were underway with a view to a new round of negotiations on services, and immediately after the mid-term review of the Lisbon Strategy, of which the draft ‘Services’ Directive is a cornerstone, many questions concerning the scope of such a framework instrument remained unanswered. Should the country of origin principle (COP), which lies at the heart of the Commission proposal, be seen as a “visionary” principle contributing to the abolition of regulatory barriers and pointless administrative charges and, hence, leading to higher growth and more jobs? Or does it, on the contrary, apply the brakes to European integration based on minimum harmonisation? We shall show that, although the COP does not constitute a ‘first’, it is not a general principle of Community law recognised by the treaties and the case law of the Court of Justice of the European Communities (CJEC). This is probably what led the President of the Commission, José Manuel Barroso, to take a step backwards – a rather unusual decision for a Commission President – under pressure from the European Parliament and certain Member States. The Internal Market Commissioner, the Irishman Charlie McCreevy, was essentially saying the same thing to the European Parliament when he asserted: “Since my very first meeting with the Parliament before my appointment, it has been crystal clear to me that there are real problems with the Services Directive brought forward by the previous Commission. As drafted, it simply was not going to fly. […] We
need [...] to address concerns about the operation of the country of origin principle: giving greater confidence and certainty to businesses and consumers on what law will apply to cross-border transactions; building the trust and confidence between Member States necessary for it to operate effectively; and ensuring that it cannot lead to a lowering in standards in any way” (1).

In the first part of this contribution, we shall examine the role of the services sector in the economy. We shall see that a new international division of labour is in the making and that the competitiveness of the European Union (EU), which justifies the proposed Directive in the eyes of its backers, will be determined by the services sector. We shall attempt to give a general overview of the way the proposal is organised.

In the second part, we shall attempt to shed light on the numerous issues raised by the Directive with respect to its impact, in particular on services of general interest (2) and on the posting of workers.

Finally, we shall attempt to draw lessons from this draft Directive with regard to the building of Europe.

1. A visionary proposal?

1.1 Background

1.1.1 Importance of the services sector

Services play a significant role in industrialised economies. In 2003, the services sector (3) accounted for nearly 62.4% of the GDP of the 25 Member States, or about 120 million jobs – direct and indirect – within the EU, but only 20% of intracommunity trade. The growth rate of the services sector between 2000 and 2003 was 1.7% (4). Out of a total of $ 560 billion, services accounted for 60% of all cross-border


2 This article does not cover the proposal’s effect on health care, which is discussed separately by Rita Baeten in this volume.

3 By comparison, manufacturing industry accounted for 17.7% of EU employment, or 34.1 million jobs.

4 L’Écho, 21 September 2004.
investments in 2003. The fact that it is increasingly possible for services such as accountancy, invoicing, computer development, industrial design and so on to be produced in one place and consumed in another disrupts businesses’ investment policy and long-term strategy. For the United Nations Conference on Trade and Development (UNCTAD) (United Nations, 2004), this phenomenon is giving rise to a ‘new international division of labour’. For example, an assessment carried out in 2003 and quoted by UNCTAD (Bardhan and Kroll) estimates that 3.4 million jobs could leave the United States for developing countries between now and 2015. 14 million Americans could “potentially” be affected by relocations. Even though for the time being this is essentially a North-North phenomenon (5), it is clear that developing countries will attempt to position themselves so as to attract these high added-value services. Mutatis mutandis, this phenomenon will have a lasting influence on the European Union due to relocation/outsourcing moves not only within the EU area but also outside it.

1.1.2 A priority of the Lisbon Agenda

In March 2000, the European Council meeting in Lisbon invited the Commission and the Member States to implement a strategy aimed at removing obstacles to the free movement of services, in order to contribute to making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. This strategy was aimed at bringing about economic and social renewal in the EU. A year after its launch, it was furnished with a third pillar: the Göteborg European Council of 15-16 June 2001 added an environmental dimension to the Lisbon strategy. The stated aim was to use economic reforms as a springboard for the creation of employment and social cohesion, and to promote sustainable development in Europe by beginning to take account of environmental considerations.

5 54% of relocation projects during the period 2002-2003 were to developed countries such as Canada, Israel or Ireland.
The Kok Report (Kok et al., 2004) threw light on the fact that the EU is lagging behind the United States in a number of areas (productivity, growth, business start-ups, the export of advanced technology, etc.). Moreover, it emphasised the rise of India in the services sector, and that of China in the manufacturing sector. The Kok Report points out: “(…) Europe has no option but radically to improve its knowledge economy and underlying economic performance if it is to respond to the challenges of Asia and the US” (Kok et al., 2004: 12). Amongst the key recommendations made by the former Netherlands Prime Minister were the elimination of obstacles to the free movement of services and the creation of a single market for services. Nonetheless, the report clarifies two important points: “(1) it would be inconsistent with the Lisbon model to achieve competitiveness gains at the price of social dumping. (2) It must be ensured that removing obstacles for the free movement of services serves the interest of consumers” (Kok et al., 2004: 25).

1.2 The draft Services Directive: a guide for the uninitiated

In December 2000, the Commission submitted its ‘strategy for the internal market in services’ (6). The Commission officially adopted its draft Directive on 13 January 2004 (CEC, 2004a). The Council began its work on the Directive in February 2004, first under the Irish and Netherlands presidencies, and then from 1 January 2005 onwards under the Luxembourg presidency. A Council working group, created for the purpose and comprising representatives of the 25 Member States, has been given the task of scrutinising and amending the Directive. The intention of the future UK Presidency was to complete the first reading in November 2005, with the European Parliament giving its opinion during the month of June 2005. The transposition deadline for the Directive was established at two years after its adoption, that is, in 2008 at the earliest.

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6 In 1990, the Commission had already tried to submit a draft Directive on the responsibility of service providers (COM (1990) 482, OJ C 12 of 18 January 1991, page 8), which was rejected by the Council.
1.2.1 Content of the Directive

Objectives and justification

The Directive has been designed as a general and horizontal legal framework. The proposal is intended to complete the *acquis communautaire* and not to act as a substitute for existing Directives. The new provisions are to be added to those provided for in other Community instruments, which, in the Commission’s view, justifies a system of derogations to avoid any incompatibilities and ensure overall consistency.

The Commission points to the numerous complaints received from economic operators and the settled case law of the Court of Justice in order to justify this initiative. According to the Commission, the direct application of Articles 43 and 49 of the Treaty in infringement procedures against Member States would require a case-by-case approach, which would be both lengthy and tiresome to implement.

Legal Basis

The draft Directive is based on Article 47(2), sentences 1 and 3, on Article 55 and on Articles 71 and 80(2) of the EC Treaty. Article 47(2) of the Treaty permits the Council to issue directives under the co-decision procedure with a view to coordinating provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons. Article 55 makes some of the rules relating to establishment applicable to services and refers back to Articles 45 to 48 of the Treaty. Articles 71 and 80(2) are provisions relating to the principles governing the transport regime, which is, moreover, completely excluded from the scope of the Directive.

Scope

Under its own Article 2(1), the proposal applies to all services provided by service providers established in a Member State. Nevertheless, under Article 2(2), the Directive does not apply to three particular types of business:

- financial services;
- electronic communication services and networks;
- transport services.
The scope of the Directive is extremely broad: it covers the full range of services of general economic interest (SGEI) apart from transport and electronic networks and communications. All other SGEIs are covered by the Directive. The derogation referred to in Article 17 only concerns postal services and water and energy distribution networks. Moreover, this derogation only affects the COP and not the other provisions of the Directive (inter alia the authorisation scheme and prohibited requirements).

Definition

The notion of a service is defined in Article 50 of the Treaty as covering in particular activities of an industrial character, activities of a commercial character, activities of craftsmen and activities of the liberal professions. These include services to businesses such as management consultancy, office maintenance and security services, publicity and recruitment services, but also audiovisual services and home help services such as help for the elderly.

It is important to point out that such services may at the same time involve services:
- requiring proximity between service provider and recipient;
- necessitating movement on the part of either recipient or service provider;
- which may be provided at a distance, including over the internet.

In accordance with the Court’s case law, the notion of a service covers any economic activity normally provided against remuneration without this meaning that the service must be paid for by those benefiting from it, and irrespective of how the consideration constituting the remuneration is funded.

Nevertheless, the remuneration aspect is missing from activities carried out by the State in the absence of consideration in the fulfilment of its social, cultural, educational and legal roles. Such activities are not covered by the definition set out in Article 50 of the Treaty and are not included in the scope of the Directive.
1.2.2 **Mechanism of the Directive**

With a view to removing barriers to **freedom of establishment** (7), the proposal provides for:

- administrative simplifications, such as the creation of *single points of contact* (Article 6), from which businesses will be able to obtain all the necessary information and where they can complete all the formalities required for establishment. Provision is also made for completing these formalities by *electronic means*. All of these procedures will have to be based on objective criteria, of which businesses will be informed in advance;

- reducing to a strict minimum any *authorisation schemes* (Articles 9 to 13) applicable to service activities, in particular the conditions for granting such authorisation. The imposition of residence or nationality conditions will be prohibited, for example;

- the *prohibition of certain particularly restrictive legal requirements* (Articles 14 and 15), such as quotas or the number of undertakings required.

With a view to promoting **freedom of movement for services**, the proposal provides for:

- the *right of recipients to use services from other Member States* without being prevented from so doing by restrictive measures or by discriminatory behaviour on the part of the public authorities or private operators;

- the introduction of a *mechanism to provide assistance to recipients* who use a service provided by a service provider in another Member State. The recipient must be able to obtain in his country of residence information on requirements applicable in other Member States and on possible methods of appeal;

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7 The concepts of freedom of establishment and freedom to provide services are closely linked and sometimes lead to confusion. The definition of establishment included in Article 4(5) “means the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, through a fixed establishment of the provider for an indefinite period” (CEC, 2004a: 45).
- the removal of a series of requirements made by the country of destination with regard to the posting of workers to provide a service.

In order to create mutual trust between Member States, the proposal provides for:

- possible further harmonisation of legislation on essential matters such as consumer protection, dispute settlement and professional insurance;

- reinforced cooperation between national authorities, involving a clear allocation of tasks between Member States. A system for peer review and information exchange between the national authorities will be progressively set in place;

- measures for promoting the quality of services, such as voluntary certification of activities and the drawing up of quality charters;

- promotion of voluntary codes of conduct at Community level.

1.2.3 The country of origin principle (COP)

Chapter III is devoted to the free movement of services. In Section 1, Article 16, it sets out the ‘country of origin principle’ in accordance with which: “The Member States shall ensure that providers are subject only to the national provisions of their Member States of origin which fall within their coordinated field” (8).

As well as this cardinal principle, there is the further principle according to which Member States may not restrict services from another Member State. However, three types of derogation are possible:

- general derogations from the COP (Article 17): there are 23 possible derogations;

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(8) This reference to the coordinated field in Recital 21 should be understood as “all requirements applicable to access to service activities and to the exercise thereof, in particular those laid down by the laws, regulations and administrative provisions of each Member State, whether or not they fall within an area harmonised at Community level or are general or specific in nature and regardless of the legal field to which they belong under national law” (CEG, 2004a: 32).
The law applying to the provision of a service is thus no longer that of the Member State in which this service is delivered but rather that of the country of origin.

1.2.4 Does the proposal respect the notion of public service?

As well as services offered on a commercial basis, the proposal also covers services of general economic interest (SGEI), that is, services which correspond to an economic activity within the meaning of the Court’s case law and Article 49 of the Treaty. It does not cover services which form part of State prerogative (9) (such as, for example, internal and external security, the administration of justice, the conduct of foreign relations and other areas in which the public authority exercises its authority) (10) and services of general non-economic interest (SGNEI), such as education.

Two types of provision specific to SGEIs are, however, provided for:

- an overall exemption from the Directive for certain SGEIs regulated by Community law (electronic communications networks and services, transport services);

9 For example, the Court has ruled that public education services were non-economic in nature (they do not fall under the Services Directive). On the other hand, certain types of higher education (such as MBAs, etc.) could be considered to be economic in nature.

10 The Court thus considered that bodies responsible for social security schemes such as compulsory sickness insurance were not an economic activity. Similarly, a body monitoring airspace or a private law body conducting antipollution monitoring in a sea port are characteristic of the public authorities and are not economic in nature.
- a derogation from the country of origin principle in the case of the freedom to provide postal services, as well as the distribution – and not the generation – of electricity, gas and water (Article 17(1-4)).

In respect of the distinction between SGEI and SGNEI, the Commission offers the following comments:

- the service must be provided against consideration in the form of remuneration;

- this remuneration does not necessarily have to be paid by the recipient of the service. The Commission gives the example of health care, which is characterised as economic, but which is not paid for in its entirety by recipients;

- the economic or non-economic status of the service is independent of the legal status of the service provider: public or private undertaking, non-profit making association, etc.;

- the notion of a service cannot be determined definitively, inter alia because the circumstances in which the service is provided must always be taken into account. Where certain ‘grey areas’ arise, matters will have to be referred to the Court.

The proposal does not attempt to deal either with the question of SGEIs as such, or with the opening of these services to competition (11). The Services Directive will not thus impose the privatisation or liberalisation of SGEIs on Member States (12). Moreover, the Commission takes account of national characteristics and leaves Member States considerable liberty as to the manner in which they define and organise SGEIs. However, the Member States will have to abandon certain prior authorisations and, as part of a mutual evaluation exercise, assess the compatibility of their national requirements with the Court’s case law. The Directive does not attempt to open SGEIs organised as national monopolies to competition, nor to

11 Cf. Main Features of the [Services] Directive; see also the Commission’s explanatory memorandum.

12 Recital 35 of the proposal.
The draft Services Directive

liberalise or privatisate public undertakings (cf. Recital 35). It attempts to facilitate the movement of services and the conditions required for the establishment of operators for SGEIs already open to competition (13).

2. A controversial draft Directive

2.1 Is the impact assessment biased?

It can be stated in general that few impact studies of the proposed Directive have been carried out (14). Those which do exist are either partial or insufficient, and frequently both. Until the publication of a report produced in November 2004 by the Copenhagen Economics institute, no serious study had assessed the real impact of the proposal.

2.1.1 The Commission’s first impact assessment

A Commission working document dated 13 January 2004 entitled “Extended impact assessment of proposal for a Directive on services in internal market” (CEC, 2002a: 24) initially concluded that a horizontal Directive was appropriate. However, this analysis of the proposal’s impact, though undoubtedly necessary, was to a great extent inadequate in that it did not consider any questions other than those raised as part of the Lisbon Strategy, i.e. eliminating barriers to the completion of the single market.

Firstly, the impact assessment did not take account of the possible conflicts between the objectives of the single market and the other objectives of the Union or its Member States. Thus, there is no examination as such of the compatibility between the removal of administrative barriers as a whole and the carrying out of public service obligations (Ghékière, 2002). Secondly, the choice of a horizontal Directive has not been evaluated in the light of the possible special circumstances of certain services more sensitive to the opening of

13 It is useful to clarify that, where in future an SGEI activity is opened up to competition internally (in the absence of a Community directive), the relevant provisions of the Services Directive will apply.

14 Most of the studies published in 2004 related first and foremost to the legal and administrative impact rather than a genuine economic, statistical or sociological evaluation. See in particular Gélière (2004).
markets. Finally, the most important element: the assessment concludes that the impact of the Directive is positive without considering its possible negative consequences on certain sectors or in certain cases. In fact, it really seems as though the purpose of this impact assessment was to give legitimacy to the framework Directive rather than to lay the foundations for a genuine and precise evaluation of any particularly negative effects, especially in certain sectors, on employment, social cohesion \(^{(15)}\) or the environment. During their presidency, the Netherlands often referred to the Centraal Planbureau study (Centraal Planbureau, 2004) asserting in a rather peremptory fashion that the Services Directive could lead to an increase of 15% to 30% in intracommunity trade in services and of 20% to 35% in direct foreign investment. The arguments used (a strange cross between OECD indicators and their own ‘administrative heterogeneity indicators’) – which were incidentally extremely abstruse – resembled not so much a scientific assessment and as a partial submission in defence of the Directive.

2.1.2 The economic assessment by Copenhagen Economics \(^{(16)}\)

Acceding to the justified criticism which arose in response to its first assessment of the proposal’s impact (see above), the Commission called on a respected economic institute for a more accurate account of its effects on the sectors concerned and on the Member States \(^{(17)}\). Based on a database of 275,000 European businesses, the new impact assessment concluded that there would be:

- an improvement in productivity and growth, with an increase in gross added value of 0.8% (calculated in terms of consumption);

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15 This point was emphasised by Catelene Passchier, Confederal Secretary of the European Trade Union Confederation (ETUC) during the hearing on the Services Directive organised in the European Parliament on 11 January 2004.


17 The Commission thus recognised that its impact assessment rested on both data and a methodological basis insufficient to assess the macroeconomic effect of the proposal’s implementation.
- a reduction in the cost of services;
- increased added value on production in all sectors, with additional added value of €33 billion for the services sector alone;
- a net increase in employment as high as 600,000 individual jobs or growth of 0.3%;
- wage rises;
- an intensification of trade in services.

Emphasising that these results only covered two thirds of the services concerned (18), Copenhagen Economics considered that:
- some sectors would gain more than others, above all those which are heavily regulated;
- some Member States would gain more than others, above all those countries with the most regulations.

According to Copenhagen Economics, the net gain in employment would be observed in all the Member States, with a shift in jobs from the secondary to the tertiary sector. The study gives no indication of any possible relocations occurring between Member States. The predicted results would be observed over a period of between five and eight years but might be faster or slower depending on the responsiveness of Member States. According to the study, there would be a positive long-term impact on entrepreneurship.

This new study prompts a number of criticisms. Firstly, it looks only at economic factors – in a nutshell, growth and employment – without attempting a more detailed assessment of the Directive’s likely social and environmental impacts. Secondly, a significant methodological bias distorts the results. Indeed, the authors acknowledge that they focused only on those sectors for which they had sufficient information. The conclusions drawn by Copenhagen Economics from its assessment are

18 As a result of the inadequate quality of the data, the study does not consider construction, social services or health. Similarly, the study does not provide an impact assessment regarding the competitiveness of services within the EU compared with the rest of the world.
supposed to be universal and representative, but in fact involve a very partial and mechanistic vision of things, which is somewhat worrying. Finally, the study deliberately failed to take into account the impact on services of general economic interest, adjudged ‘hard to define’, when it is precisely this issue which is giving rise to debate.

An overall and in-depth impact assessment, reflecting the impact of the three Lisbon dimensions (economic, social and environmental), is critical, especially in the opinion of the European Parliament and the Council, if the positive and negative effects of the proposal are to be evaluated.

2.2 Shaky foundations

2.2.1 Legal basis

The choice of a very restrictive legal basis (essentially Articles 47(2) and 55) is dubious. Indeed, these legal bases emphasise very clearly the primacy of one objective – freedom of establishment, free movement of economic operators and the liberalisation of services – to the detriment of other objectives of the Treaty relating inter alia to the citizen, who is also a consumer, employee and patient. Yet the horizontal nature of the Directive implies that its provisions will have direct repercussions on other Community policies: services of general economic interest (Articles 16 and 86(2)), health (Article 152) and consumer protection (Article 153) among others. Both the importance of the services sector for the economic and social life of the twenty-five Member States and the impact which it has on other Community policies really required that the legal basis should also include principles other than those exclusively selected, i.e. freedom of establishment and the freedom to provide services.

2.2.2 Definition

The definition of what constitutes a service (Article 4(1)) is extremely broad. It covers “any self-employed economic activity, as referred to in Article 50 of the Treaty, consisting in the provision of a service for consideration”. The Commission refuses to define what the economic nature of an activity actually is, emphasising that this would be a difficult exercise and that services tend to evolve over time. Given that Article 50, which defines those activities which are State prerogatives, is very restrictive, the
Commission (or the Court) might well consider at a given moment that any service may be destined to become an economic activity: education, personal services, cultural services, etc. Characterising an activity as economic has very profound consequences, far outstripping the scope of the draft Directive, particularly with respect to competition and State aid. This argues in favour of establishing as watertight as possible a distinction (19) between the two notions: economic and non-economic. Different criteria could be used which would make it possible to adapt the application of the Directive, especially the COP, on the basis of the service under consideration:

- is it a commercial service? Is it profit-making?
- is it a service essential to the population or to certain groups of persons? Is it a local service? Is the service social or cultural, etc., in nature?
- is an element of subsidiarity a principal factor in the service?

At the very least, it would be desirable to give special status to those activities situated in the grey area, on the border between economic and non-economic. It would be very imaginative of the Commission if it agreed to draft a communication on this specific and very sensitive point.

2.2.3 The COP, a rule concerning the conflict of laws

The draft Directive introduces two fundamental changes. First, it applies the country of origin principle to service providers in general. In this instance, the Commission applies the principle according to which the special law derogates from the general law. Second, the Commission abandons the idea of harmonising the laws and rules of the Member States. In doing so, the Commission is adopting a profound change in the traditional Community approach in force for more than forty years.

19 In the light of this debate, some consider that a positive – or negative – list of non-economic activities should be drawn up in order to be able to exclude them from the scope of the EU Treaty. Others, on the contrary, underline the difficulties involved in artificially freezing a field which by its very nature evolves over time.
The simultaneous application of several national laws competing with one another in the same country raises a number of questions of principle. Certain fundamental constitutional principles such as, for example, national sovereignty, equality before the law and the lawfulness of offences and penalties are called into question.

*A principle with a past …*


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<tr>
<th>COP - Derogations Directives</th>
<th>Country of origin principle or internal market principle</th>
<th>Authorised Derogations</th>
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<td>Services Directive</td>
<td>Article 16 providers are subject only to the national provisions of their Member State of origin which fall within the coordinated field.</td>
<td>Article 17 23 general derogations Article 18 3 transitional derogations Article 19 3 case-by-case derogations</td>
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<tr>
<td>E-Commerce Directive</td>
<td>Article 3(2) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.</td>
<td>Article 3(4) Derogations concerning the protection of public policy, public health or public security, the protection of consumers, including investors Annex to Article 3(3) 8 derogations including the freedom for parties to choose their contract and the contractual obligations under contracts signed by consumers.</td>
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This Directive harmonises the provisions of the Member States required to ensure an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services in the Community.

2 derogations foreseen including the abolition of calling line identification

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.

Member States may derogate if programmes contain pornography or gratuitous violence and if programming contains incitement to racial, sexual, religious or national hatred

Member States shall ensure that electronic-signature products which comply with this Directive are permitted to circulate freely in the internal market.

No derogations foreseen

It should first be noted that the scope of the COP in the Services Directive is broader and more potent than in the four other Directives. Thus, the Directive on the Protection of Personal Data authorises the use of the COP, but on a harmonised basis. The E-Commerce
Directive contains a derogation concerning the freedom of the parties to choose their contract. As to the other Directives, they are based on the principle of mutual recognition in much more restricted areas.

A debatable principle

The extension of the COP to services which are by nature very diverse, despite the fact that they fall into the same general category of economic activities within the meaning of Community law, raises numerous points of principle beyond the fact that it takes place on an immediate basis. The difficulties posed by the COP concern (a) its legality; (b) the legal certainty of operators; (c) the impact of the absence of a minimum level of legislative harmonisation on the principle of equality before the law, as well as (d) the effective protection of recipients of services.

With regard to the lawfulness of the principle, it must be noted that the COP poses fundamental questions concerning adherence to Community law. It should be clearly stated that the COP has a taint of unlawfulness about it; it is not a general principle of Community law. Neither the Treaty nor case law recognises the COP as an autonomous legal principle. In this respect, a combined reading of Articles 49 and 50 of the Treaty is unambiguous: “[…] restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended”. Article 49 implies that the principle of mutual recognition, i.e. the prohibition of restrictions on the freedom to provide services and not the COP, is established if and only if there is equivalence. As for Article 50(3), it states that: “the person […]may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions (our emphasis – ed.) as are imposed by that State on its own nationals”. Equally, what the Treaty says here relates to the equivalence of provisions between the country of origin and the country of destination. With the COP, a “national” service provider would be treated differently from one coming from another Member State and bringing with him his own national law.

As to foreseeability and legal certainty, the apparent simplicity of setting out the principle of the country of origin of the service provider neglects the fact that there are still a number of uncertainties for service providers and recipients. The same applies with respect to the nature
and extent of the responsibilities of the national authorities in their own country. There is a significant danger of proliferating litigation pending a clear interpretation of the Directive by the Court in case law. Finally, the application of the COP to service providers does indeed make economic sense, as the Commission has repeatedly emphasised. But it constitutes a source of confusion with other rules, for example consumer law or social law, for which the legislation of the country of the recipient of the service takes precedence.

Moreover, it should be pointed out that the congruity of the draft Directive with the acquis communautaire, as covered in Article 3(2), constitutes an element of legal uncertainty. The addition of further systems of rules appears to create a source of difficulties in interpretation, particularly in the light of other Directives implementing the principle of mutual recognition, but also in terms of transposition and implementation by the Member States.

Is the COP a flag of convenience?

The internal market was built on the progressive approximation and harmonisation of the legislation of Member States (20). In adopting the country of origin principle, the proposal freezes the differences between the Member States’ legislations. The traditional balance between the effectiveness of the freedoms guaranteed by the Treaty and the proper functioning of the internal market seems to have been called into question.

Furthermore, making the State of origin responsible for approving and monitoring the service provider for activities carried out beyond the territory of that State will have the effect of rendering it more difficult to implement those checks which are still the task of the host country. It appears that a premium is thus offered to the most free and easy Member State or the one with the least exacting legislation.

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20 Thus, Article 95(1) second sentence of the Treaty provides that: “The Council shall, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market”.

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In the absence of a serious impact assessment, the potential consequences of the proposal are incalculable but difficult to foresee. In the worst-case scenario, certain Member States could be faced, in the near future, by a danger of ‘social dumping’ and of relocation to the benefit of the least demanding countries in the Union or even third countries: after all, along with the principles contained in the proposal, there are, in some cases, very favourable conditions concerning investment and taxation for undertakings (some countries allow zero rating as long as the profits are reinvested). In this regard, we need only look at the case of the Latvian construction sites in Sweden (21) to grasp the dangers to which such a situation could lead. The risk that the proposal will lead to legal dumping (a bid for the lowest common denominator through the use of the COP) cannot be ruled out. Some even believe that that is the desired aim.

**Consistency with the stipulations of international private law**

The application of the COP is not without effect on the existing stipulations of international private law. Indeed, the draft Directive affects two areas of judicial cooperation in the civil sphere. First, it affects some of the rules which govern the applicable law on contractual obligations, covered by the Convention on the law applicable to contractual obligations, signed in Rome on 19 June 1980 (22) (hereafter “Rome I”) which it is planned to transform into a Regulation (CEC, 2002b). Next, it affects the rules governing the law applicable to non-contractual obligations, which are subject to a draft

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21 This concerns the dispute between Sweden and Latvia over the renovation of a local school: the Latvian workers are paid € 1533 gross per month whilst the gross monthly wage of a Swedish construction worker is € 2680. The Swedish unions maintain that the collective agreements negotiated between the employers and the union establish a principle governing the entire local labour market whilst the Latvians maintain, on the contrary, that the freedom to provide services and free competition must be allowed to prevail in the Community. (See on this point *Libération*, 7 December 2004 and *Le Monde*, 15 December 2004, page 3).

The draft Services Directive Regulation (hereinafter “Rome II”) (23). There are likely to be compatibility problems with ‘Community’ international private law both in force and in preparation. Indeed, in that the COP clearly favours service providers to the detriment of other participants in the service relationship, in particular the recipient, it undermines the traditional rules binding the two parties, and overturns the currently-existing legal balance. In other words, the implementation of the COP would lead to the probable application to the same legal situation of two or more different legal systems. This would constitute a source of legal uncertainty concerning the respective scopes of the applicable rules.

The opinion of the Committee on Civil Law…

In its opinion of 24 September 2004 (2004/001 (COD) 12655/04), the Committee on Civil Law Matters proposed doing away with any mention of contractual and non-contractual obligations in Article 16 (defining the COP) and adding to Article 17 a general derogation relating to the rules concerning the legislation applicable to contractual and non-contractual obligations in the area of judicial cooperation in civil matters. In comprehensible language, this means including solely in Rome I and Rome II the rules concerning the legislation applicable in contractual and extra-contractual matters; in other words, ensuring that the rules of international private law (IPL) prevail over the application of the COP, for reasons as much of legal clarity as for the consistency of Community law. Of course, the underlying issue is that of the law applicable (country of origin or country of destination). Article 3 of the Rome Convention is very clear in this regard. It stipulates that “the contract is governed by the law chosen by the parties”.

… and the reaction of the Council Legal Service

However, in its comments on the opinion of the Committee on Civil Law, on 22 October 2004, the Council Legal Service (2004/001 (COD) 13858/04) took the opposite view, that is to say it preferred the COP, pointing out that IPL did not provide better protection for the consumer and that it was better to think more in terms of the two working together rather than in terms of a conflict between them.

23 Doc 12746/04 justciv 130, codec 1046 in its 27 September 2004 version.
2.3 Effect of the proposal on certain sectors of activity

2.3.1 Consistency with SGEIs

Differential treatment

Somewhat paradoxically, local social services and SGEIs are included in the scope of the Directive with two exceptions: social services are covered under freedom of establishment and not under the freedom to provide services. On the other hand, the provisions concerning the freedom to provide services, and in particular the application of the principle of the law of the country of origin, do not apply to services provided for consumers where the subject of the service is not harmonised under Community law (social services of general interest, for example).

It is true that the new Recital 7(a) (former Recital 35) of the consolidated version of the draft Directive does not oblige the Member States either to liberalise SGEIs, or to privatise the public bodies providing these services, or to abolish existing monopolies. However, the proposal neglects to mention the fact that, in the name of the freedom to provide services and freedom of establishment, operators from other Member States will be able to compete directly with SGEIs organised as national monopolies.

Interaction between the proposal and the Public Service Obligation (PSO)

A) Freedom of establishment (Articles 9 to 15)

SGEIs and social or local services of general economic interest must fulfil the public service obligations (PSO) defined in European law and by national, regional or local ruling, decree or order.

The provisions of the Directive apply to SGEIs. The Commission has clearly confirmed this. The modes of sectoral regulation of certain SGEIs based on the prior monitoring of operators according to an approval system will be affected by the draft Directive. Will this be taken so far as to assess the forms of organisation of SGEIs in the light of the prohibited requirements (Article 14) or those to be evaluated (Article 15)?

Whilst the existence of compulsory minimum or maximum tariffs does not appear to be called into question, is it not the case that other
obligations will constitute interference in Member States’ freedom to organise SGEIs, for example, the obligation to notify any new provision? Should authorisation schemes not be considered as forming a fully-fledged part of the organisation and regulation of SGEIs by the Member States? Answering this question in the negative could in the long-term lead to the dismantling of the very notion of SGEIs and to a weakening of the European social model.

In order to clear up any uncertainty, it is felt by some that a particular status should be reserved for SGEIs, which would not be excluded from the scope of the Directive in respect of Articles 9 to 15, perhaps in the form of an exception or a derogation.

B) Freedom to provide services (Articles 16 to 25)

The impact of the country of origin principle on SGEIs appears less dangerous for several reasons:

a. first, due to the derogations applicable to certain SGEIs (postal services; distribution of electricity, gas and water);

b. second, due to the derogations applicable to SGEIs provided exclusively for consumers, the subject of which has not been harmonised; a significant number of those SGEIs not covered by sectoral Directives (for example, social services of general interest and especially health care) are excluded;

c. third, because the freedom to provide services is based on the temporary nature of the activity, (duration, frequency, regularity and continuity) and is, a priori, not compatible with the carrying out of service obligations.

C) The use of voluntary codes of conduct (Article 39)

By favouring the use of voluntary codes of conduct, the proposal contributes to the replacement of a public method of regulation by a private and professional method of regulating services. This will not be without effect on SGEIs.
Table 2: SGIs and the Services Directive: scope

<table>
<thead>
<tr>
<th>Freedom of establishment</th>
<th>Free movement</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Non-economic SGIs</strong></td>
<td>Not covered</td>
</tr>
<tr>
<td>Education Services</td>
<td>If a general education system and in the absence of remuneration</td>
</tr>
<tr>
<td>Social security services</td>
<td>If a general compulsory scheme</td>
</tr>
<tr>
<td><strong>SGEIs</strong></td>
<td>Covered by exemption and sectoral derogations, + role of the recipient (B to B or B to C)</td>
</tr>
<tr>
<td><strong>SGEIs regulated under Community law</strong></td>
<td>Exemptions and derogation</td>
</tr>
<tr>
<td>Transport</td>
<td>Overall exemption</td>
</tr>
<tr>
<td>Postal services</td>
<td>Covered</td>
</tr>
<tr>
<td>Electricity (distribution)</td>
<td>Covered</td>
</tr>
<tr>
<td>Gas (distribution)</td>
<td>Covered</td>
</tr>
<tr>
<td>Public television</td>
<td>Non-interference with Treaty protocol</td>
</tr>
<tr>
<td>Electronic communications</td>
<td>Exemption</td>
</tr>
<tr>
<td><strong>Social SGEIs</strong></td>
<td>Covered</td>
</tr>
<tr>
<td>Health (exercise of a profession)</td>
<td>Covered</td>
</tr>
<tr>
<td><strong>Local SGEIs</strong></td>
<td></td>
</tr>
<tr>
<td>Treatment of waste water</td>
<td>Not covered if not open to competition</td>
</tr>
<tr>
<td>Water distribution</td>
<td>Covered</td>
</tr>
<tr>
<td>Treatment of waste</td>
<td></td>
</tr>
<tr>
<td><strong>Others</strong></td>
<td></td>
</tr>
<tr>
<td>Lottery</td>
<td></td>
</tr>
</tbody>
</table>

*Source: Ghékière (2002).*
How SGEIs and the overriding reason relating to the general interest (ORRGI) fit together

The notion of an ORRGI found in Articles 5, 9, 10 and 15 is both developmental and restrictive. The Court requires that, in order for a national provision validly to obstruct or limit the exercise of the right of establishment and the freedom to provide services, it must pursue a general interest objective. The Court adds that this general interest objective should not be safeguarded by rules to which the service provider is already subject in the Member State in which he is established. Other cumulative requirements must be satisfied:

- being non-discriminatory;
- being objectively necessary;
- being proportionate to the desired objective.

Most of the requirements linked to SGEIs are justifiable in terms of an overriding reason relating to the general interest (for example: the requirement in Belgium that retirement homes may only be set up in the form of non-profit-making associations – ASBL). Nevertheless, the relationship between public service obligations and the notion of ORRGI is in danger of giving rise to assessment and even implementation problems in the Member States.

Bringing European law in line with SGI (24)

The Services Directive does not in any way pre-empt the deliberations carried out in the framework of the White Paper on SGI (CEC, 2004b). Nothing could be further from the truth, as SGEIs will from

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24 Article III-122 of the European Constitution provides that: “Without prejudice to Articles I-5, III-166, III-167 and III-238, and given the place occupied by services of general economic interest as services to which all in the Union attribute value as well as their role in promoting its social and territorial cohesion, the Union and the Member States, each within their respective competences and within the scope of application of the Constitution, shall take care that such services operate on the basis of principles and conditions, in particular economic and financial conditions, which enable them to fulfil their missions. European laws shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Constitution, to provide, to commission and to fund such services.”
now on be ‘broken down’ into three separate blocks: they are partially dealt with in sectoral Directives (this is the case for transport and electronic communications); in some cases there will be derogations from the COP (postal services; distribution of gas, electricity and water); all the other SGEIs are subject to the Directive as a whole with absurd consequences: the rules will be stricter for social services of general interest than for the Telecoms package. It would have been better to include all of the relevant provisions for SGEIs under a single legal heading (a European law on SGEIs) and to make of it a new legal instrument, rather than differentiating between the situations and mixing the categories as does the draft Directive.

Towards the exclusion of SGEIs from the scope of the Directive?

The arguments in favour of excluding electronic communications and transport from the scope of the Directive should apply for the postal sector, the energy sector (gas and electricity) and water. The first two sectors have recently been subject to modernisation (including in the framework of public service obligations) and liberalisation is under way. As for the postal sector, currently being liberalised (cf. Third Railway Package which is still being negotiated), the Commission will submit its evaluation report on the possible liberalisation of all postal services by 31 December 2006. Finally, for water, the special characteristics of the sector argue in favour of a specific approach.

It would be logical to exclude all regulated SGEIs on the grounds that the detailed sectoral legislation already in existence or currently being drafted will regulate the functioning of these sectors.

Social and local services of general interest should also be excluded from the scope of the Directive due to their intrinsic nature (a force for social cohesion and inclusion; a force for citizenship and personal emancipation; a generator of fundamental rights, etc.). To this should be added the subsidiarity aspect in an area very close to citizens/consumers. By their very nature, social and local services of general interest do not constitute economic activities in the same manner as a commercial service. It is to be expected that the deliberations leading to the ‘communication on social services of general interest’ will be accompanied by arguments to this effect.
3.3.2 Impact on the posting of workers

The provisions of the draft Services Directive

The draft Directive recognises the full application of Directive 96/71 (25) on the posting of workers. This area has the benefit of a derogation to the COP in Article 17(5). This means that any enterprise which posts workers to another Member State must abide by all the working and employment conditions in force, all the legal, regulatory and administrative provisions, collective agreements, working/rest times and periods for the protection of pregnant workers, paid leave, minimum wage, health and safety rules, etc. The proposal does not call these principles into question. However, it gives rise to three types of problem:

a) effective implementation of monitoring;
b) danger of dumping in respect of temporary employment;
c) determining the law applicable to cross-border employment relationships (compatibility with Rome I and Rome II).

A) Monitoring System

The proposal does not alter the fact that, as is the case at present, it is the responsibility of the Member State of posting (and not the Member State of destination) to monitor the posting. However, the proposal provides for additional monitoring methods. This includes inter alia the obligation for undertakings posting workers to Belgium to:

- make a prior declaration stipulating the names of the workers to be posted, their nationality, date and place of birth, marital status, occupation, qualifications, domicile, residence permit, social security affiliation, copy of the contracts, work permit, place and duration of the work, etc.;
- designate a representative who is resident in Belgium and is tasked with keeping social documents.

These provisions of the Belgian law have been called into question by the Commission (as an unjustified barrier to the freedom to provide services which discriminates against undertakings not established in Belgium) under a different procedure. They are also called into question by the draft Directive.

25 Transposition into Belgian law goes beyond the minimum required by Directive 96/71. It provides for additional monitoring methods. This includes inter alia the obligation for undertakings posting workers to Belgium to:
State of origin) to carry out “in its territory the checks, inspections and investigations necessary to ensure compliance with the employment and working conditions applicable under Directive 96/71/EC” and to take “measures in respect of a service provider who fails to comply with those conditions” (Article 24(1) of the proposal).

Although it does not directly affect the substance of Directive 96/71, the draft Services Directive would nonetheless make it necessary to change the system in place. Indeed, Article 24(1) of the proposal on Services provides *inter alia* for a prohibition on the requirement for a prior declaration, on the obligation for foreign undertakings to have a representative in the Member State’s territory and on the requirement to have social documents in the Member State (obligations considered by the Commission to be disproportionate) (26).

In exchange for the disappearance of these obligations, the Services Directive makes the Member State of origin responsible and grants it a role with respect to the conservation (two years after the end of the posting) and transmission of documents, and reinforces administrative cooperation between the Member State of origin and the Member State of posting (Article 24(2)). The proposal thus grants a new role to the Member State of origin (cf. Article 24(2) *in fine*), which must “assist the Member State of posting to ensure compliance with the employment and working conditions applicable under Directive 96/71/EC and shall, on its own initiative, communicate to the Member State of posting the information specified in the first subparagraph”, particularly if it becomes aware of any irregularities. According to the Commission, the reduction of the bureaucratic burden weighing on businesses in maintaining the monitoring options of the country of posting and in strengthening administrative cooperation, coupled with an extension of the responsibility of the Member State of origin, constitutes significant added value in terms of both monitoring and the functioning of the internal market.

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26 The Commission does however single out the construction sector because it provides that systems allowing for a prior declaration will be permitted to continue for this sector until 31 December 2008 (cf. Article 24(1)(b) of the proposal), the date by which the new administrative cooperation system should be working effectively.
B) The temporary employment and construction sectors

B.1 The temporary employment sector is particularly affected by the problem of worker safety. Monitoring is made possible through an approval procedure (27). Certain EU countries have abolished this prior approval of job placement services. The future Directive will force people to accept that businesses need not adhere to the regulatory framework when employing or posting temporary workers, not least in Belgium.

The principle of non-discrimination (Article 9a) will have the effect of prohibiting all discrimination within the authorisation schemes, and therefore also for businesses established in the host country, which will lead in practice to the abrogation of any prior approval scheme (28).

There is a significant risk of social dumping. The draft Directive will render monitoring and inspection very difficult or practically impossible (the requirement for a posting declaration cannot be imposed, other than in the construction sector; the requirement for a representative on the territory of the Member State cannot be imposed; the requirement to hold and conserve social documents in the Member State cannot be imposed). The major risk is that companies providing workers or temporary workers will set themselves up in the State with the least stringent regulations. This would have a serious impact on the number of jobs available to national workers and place strains on the labour market in respect of working conditions and pay.

27 Cf. ILO Convention No.181 adopted on 19 June 1997 revising the Fee-Charging Employment Agencies Convention of 1949. It allows the member to define the legal status of the private employment agency as well as the conditions for operating such an agency through an approval scheme.

28 The aim of the prior authorisation scheme is to ensure that the applicant has adhered to a series of rules (social regulations, absence of debt or convictions on the part of the administrators or managers, transparency of financial arrangements and shareholdings, information to workers: model employment contract and employment regulations, etc.) which it will no longer be possible to verify.
Monitoring will become ineffective. Major difficulties are foreseeable in the transmission and obtaining of data needed by the inspection services. As a result, the Directive could have serious repercussions on the viability of social security systems.

B. 2 With regard to the construction sector, particular attention will have to be given to the special characteristics of this sector. As the Belgian Conseil national du travail (CNT) emphasised in an opinion, “regulations concerning inter alia working conditions, health and safety which have been established with the social partners should not be destabilised (...). If we wish for instance to take account of safety at work issues, it must be possible for solidarity initiatives to continue to exist. If foreign undertakings do not participate (cannot participate) in sectoral initiatives on safety, this will have a negative effect on the competitiveness of Belgian undertakings, on safety and also on the quality of services”.

C) Determination of the law applicable to cross-border employment relationships (compatibility with Rome I and Rome II)

The principle of applying the law of the country of origin foreseen by the draft Directive seems to call into question the current system for determining the law applicable to cross-border employment relationships. In the case of posting, a hard core of essential rules of the host country is applied in conformity with Directive 96/71/EC on the posting of workers. For cross-border employment situations other than posting, the principles in the 1980 Rome Convention on the law applicable to contractual obligations apply. In many cases, the law of the place where the service is provided, i.e. of the host country, will apply.

Directive 96/71/EC concerns posting, i.e., a temporary situation in which a worker habitually working in one Member State is sent to another Member State to work. On the other hand, the scope of the 1980 Rome Convention is much broader: it applies to any employment relationship with a foreign dimension. On the basis of the definition of a posted worker, it can be deduced that the following are not cases of posting and fall under the scope of the Rome Convention:

- a worker who is directly posted from the country of origin to the host country (without being previously employed in the country of origin);
- a worker who is posted to the host country whose posting is extended in time and is therefore no longer considered as being a temporary worker.

**Example 1: an undertaking which posts a worker – law applicable**

If an undertaking in country A posts a worker to an undertaking in country B, the law of the host country will apply during the posting.

If the posting becomes extended in time, it will no longer be a posting within the meaning of Directive 96/71/EC (since the situation has lost its temporary character). The law of the host country will nonetheless continue to apply in accordance with the Rome Convention.

With the COP, the draft Directive foresees the principle of applying the law of the country of origin, except in cases of posting within the meaning of Directive 96/71/EC.

As a result, the law of the country of origin should be applied to cross-border employment situations which are not postings (since they are not intended to be an exception to this principle).

Then there is the question of the compatibility of the principle of the law of the country of origin in the draft Directive with the principles of the aforementioned Rome Convention, which has not been ratified by many Member States. Indeed, if the principles of the draft Directive were applied:

- the law of the host country would be applied throughout the period of the posting. On the other hand, the law of the country of origin would apply where the posting is extended (and not the law of the host country as provided by the Rome Convention);
- where the posting situation is extended, it would still appear more logical to maintain the application of the law of the host country rather than that of the country of origin.

Example 2: a foreign service provider employs local workers

A company located in the United Kingdom employs French workers to work in France (irrespective of the period for which they are employed).

Situation on the basis of the Rome Convention (Rome I):

This is not a case of a posting within the meaning of Directive 96/71 (as there was no prior employment of the workers in the country of origin and they are not being sent to a different country from the one in which they normally work).

- According to the Rome Convention, the freedom to choose the reference law applies (United Kingdom or France)
- But it will be the compulsory French provisions which will apply.

Situation on the basis of the Services Directive:

- The COP applies;
- Unless the parties have made a different choice with regard to the law applicable
- This might mean that a British undertaking employing a French worker in France would not be obliged to adhere to the essential French provisions (in respect of working time or pay, for example, by using the United Kingdom’s opt out in this sphere).


What conclusions can be drawn?

1. By disrupting the balance existing in Rome I, the draft Directive substantially changes the current system for determining the law applicable to cross-border employment relationships, by favouring the interests of service providers without taking account of the general principle of justice which consists in seeking solutions that are equitable for all the parties concerned. The application to the employment relationship of the law of the country in which the employer is established manifestly disrupts the balance between the interests of employers and those of workers, to the detriment of the latter.

2. It will be very much in the employer’s interest to become established in countries where social protection and employment law are least stringent. This approach will have the effect of encouraging social dumping by undermining the circumstances of national undertakings
in their own countries. The application of the general principle of the law of the country of origin risks encouraging the creation of certain deflection mechanisms in order to avoid applying the law of the Member State where the worker is working if it offers more protection than the COP. The European Trade Union Confederation goes further. It considers that the draft Directive “is an open invitation to abuse and manipulation, and a threat for the European social model. Instead of harmonizing upwards, it stimulates regime-competition between Member States, and a race to the bottom, to the detriment of workers, consumers, and the environment” (Passchier, 2004: 7).

3. Such an approach will not guarantee legal certainty. It is to be feared that in certain cases or from certain points of view, the law of two or more countries will apply to the same legal situation, which will constitute a source of legal uncertainty and instability and, therefore, of inconsistencies.

2.3.3 Interaction of the proposal with the General Agreement on Trade in Services (GATS)

An organic link

The Commission maintains that “the Directive is without effect on international negotiations (GATS…)”. In point 5 of the explanatory memorandum of the draft Directive, under the heading ‘Coherence with other Community policies’ one sub-section (page 16) is entirely devoted to the negotiations in the framework of the GATS. It is specifically indicated that “This proposal does not affect these negotiations (...) which reinforce the need for the EU swiftly to establish a genuine internal market in services to ensure the competitiveness of European businesses and strengthen Europe’s negotiating position”. It is thus clear that an organic link exists between the Services Directive and the WTO negotiations on services.

In substance, there are several similarities between the GATS and the draft Directive. Like the GATS, the draft Directive gives an extensive definition of services because it covers all services. The proposed Directive applies to the same modes of providing services as does the GATS: services provided from the country of origin (mode 1 of the GATS), services involving client mobility (mode 2), services involving a commercial presence in another country (mode 3), services involving
staff mobility (mode 4). A comparative examination of the provisions of the GATS and of the draft Directive reveals therefore that this proposal ties in very neatly with the GATS agenda. If it is adopted, the proposal will have two direct effects on the functioning of the European Union and on the negotiations for implementing the GATS:

a) the Commission will be freer to negotiate bids for the liberalisation of services since the Services Directive will be part of the *acquis communautaire*, and therefore part of the Commission’s negotiating mandate, without there being any possibility of a veto by the Member States;

b) the rebound effect of these negotiations in the area of services could lead to larger concessions and to an enhanced opening of the market in services to the outside, with all the effects of relocation of investment and employment that these are likely to induce.

It can therefore be concluded, contrary to the Commission’s assertions, that the draft Directive will strengthen the application of the GATS and vice-versa.

**Same areas covered**

During the negotiations in 1994, the Member States protected certain essential services from the application of certain provisions of the GATS by means of exemptions. These exemptions include education, health, social services and culture; precisely the sectors covered, in whole or in part, by the scope of the Services Directive. There is nothing to indicate formally that the notion of public service is protected against privatisation. Nevertheless, Paragraph 7 of the Doha Declaration stipulates “We reaffirm the right of members under the General Agreement on Trade in Services to regulate, and to introduce new regulations on, the supply of services”. This provision would permit States to protect their public services, in particular in the areas of education and health. After the 31 July 2004 agreement in the WTO, no sector and no mode of provision seems definitively protected. We can therefore expect a high level of liberalisation in a great number of new sectors. The requests which the EU is preparing to put to other members of the WTO relate to those services which fall under the scope of the draft Services
The draft Services Directive

Social developments in the European Union 2004 143

The draft Services Directive: computer services, professional services, construction and distribution services, energy and environmental services, tourism, etc.

A partially positive impact assessment (see for example Kox and Lejour, 2004).

In another point of convergence with the draft Directive, the impact scenarios on the liberalisation of services in the framework of the WTO also conclude that the liberalisation of services in OECD countries would have very favourable effects (29):

a) the studies conclude that there would be a win-win situation: developed countries and developing countries alike would gain if they undertook enhanced liberalisation under the GATS;

b) the potential results in terms of well-being would depend on the extent of the opening up of services (the broader the liberalisation, the greater the benefits).

It can thus be concluded, despite the Commission’s denials, that the two agendas are advancing shoulder to shoulder and reinforce each other. At the time of writing, three questions were in need of rapid answers:

1) will the signs of openness on the part of the President of the Commission, Mr. Barroso, in February 2005 play a positive role on the GATS negotiating mandate?

2) will public services be clearly and definitively excluded from trade negotiations?

3) will a watertight separation be made between the negotiations internal to the Union in the context of the internal market and the trade negotiations in the WTO context?

29 These estimates vary from $ 58 billion at the lowest to several hundreds of billion dollars, on the basis of figures available for the year 2002.
Conclusions

In drawing our conclusions, how can we fail to note that a change in the fundamental nature of European construction is under way? Indeed, until President Barroso recognised ‘that there was a problem’, the draft Directive promised to disrupt the traditional Community balance based on European integration through harmonisation. In the draft Directive, harmonisation measures are reduced to a minimum or even totally neglected in favour of radical liberalisation based on a system of regulatory competition. With the COP, we would be heading towards a spiral of deregulation in which Member States would seek to maximise their ‘comparative advantage’ in order to benefit from the free movement of services at the lowest cost. Ever since we learned from Lavoisier that ‘nothing is lost, nothing is created, everything is transformed,’ it was to be feared that this supposed lower cost for the economy would have a hidden social and environmental cost. In this regard, it is essential that an independent impact assessment involving open debate, and incorporating the three pillars of the European Councils of Lisbon and Göteborg, should finally be carried out.

Will the European Union – its businesses, its citizen-consumers, its workers and its employees – succeed in breaching the so-called gulf separating it from the United States? Such a thing is possible, but not certain. Is it worth chasing after this goal, and what price will have to be paid? For there is already another challenge facing the EU, and that is the emergence of a number of States, such as India, Israel and Russia, which are already positioning themselves in the new international division of labour. These countries have incalculable comparative advantages in terms of labour and start-up costs, without even mentioning their fiscal, legal and social advantages. In charging headlong into a race for competitiveness without assessing any of the other factors and their impact on the European social model, the EU runs the risk of undermining its own social model based on solidarity and social cohesion. At the time when the WTO negotiations are being resumed, such a signal does not augur well. For our part, we expect that the heads of State and government and the European Parliament will grasp what is at stake in this draft Directive and will return to the path of upwards harmonisation. And let us hope that the allusions made by
President Barroso to remedying the shortcomings of the draft Directive will lead to something specific.

References


