THE IMPACT OF THE PROPOSED EU DIRECTIVE ON SERVICES ON THE INTERNAL MARKET

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ABSTRACT

The proposed Services Directive has been long awaited throughout the European Union. It has come to the fore at a time when the EU is demonstrating a determination to develop not only in numbers but also in the fruitful implementation of the original freedoms that its founders set out create half a decade ago.

This Directive goes to the very heart of the EU's existence and has been applauded in most quarters within and without the EU. In this dissertation an attempt has been made not only to review in some depth the ambit of this Directive but also to consider the reactions it has provoked and more specifically, the impact it is bound to have on various sectors of the EU's economy. It is these repercussions, in particular, that have caught the attention of the writer and is the main brunt that forms this dissertation.

Sarah Vassallo

To my parents

and

to my sister Eleanor

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Sarah Vassallo.

INTRODUCTION

Services are crucial to the European Internal Market. Indeed, as early as 1957, the six founding countries of the European Economic Community undertook to create an important market in which persons, goods, capital and services would circulate freely. Yet, forty-five years later, of the four freedoms inscribed in the Treaty of Rome, that covering services was deemed as not functioning as well as it ought to.[1]

Notwithstanding that the principle of free movement of services has been clarified and developed through the case law of the European Court of Justice (ECJ) over the years, and that, specific legislation in fields such as financial services, telecommunications, broadcasting and the recognition of professional qualifications, led to important developments and progress in the field of services, it was felt that a serious effort needed to be made in order to improve the functioning of the Inernal Market in the field of services.

Most notably, in a communication published in 2000, the Commission wrote: (...) *'a decade after the envisaged completion of the internal market, there is a huge gap between the vision of an integrated EU economy and the reality as experienced by European citizens and European service providers.'*

Hence, at the Lisbon Summit, EU leaders agreed a strategic goal of making Europe by 2010 *"the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth and more and better jobs and greater social cohesion"*. As part of the programme of actions designed to achieve this, the Council concluded that there should be *"by the end of 2000 a strategy for the removal of barriers to services"*.[2]

In response to the Council's request, the Commission, analysed legal and economic issues in order to shed light on the reasons why services are rarely traded between Member States.[3] Delving into this study was very complex and Member States, other

[1] http://www.europarl.eu.int/news/public/documents_par_theme/909/default_en.htm
[2] Presidency Conclusions, Lisbon European Council, 24.3.2000, paragraph 17.
[3] COM(2000) 888 final, *An Internal Market Strategy for Services.*

European institutions as well as stakeholders were consulted and in the process. Eventually a Report on the State of the Internal Market for Services was published in July 2002 which gave an in depth overview of the legal, administrative and practical obstacles to the free movement of services across borders in the EU.[4] Its ultimate consideration is that the reality, as experienced by European citizens and European service providers, is a far cry from the vision of an integrated EU economy.

In January 2004, following the report, the reactions of the stakeholders to it, and further legal analysis, the Commission, then led by the Italian Romano Prodi, made a proposal for a Directive on services in the Internal Market with the aim of eliminating obstacles to services and allowing the development of cross-boarder operations. Responsible for the drafting of this proposal is Frits Bolkestein, Dutch Commissioner responsible for Internal Market, Taxation and Customs Union issues, hence the name 'Bolkestein Directive'.

In Chapter I of my thesis I shall therefore analyse in detail the objective and the scope of the proposed Directive. It is necessary to outline the ambit of this directive before divulging into a deeper study of the impact this will have on the relevant sectors. This will entail a thorough interpretation of Article 2 of the Directive. I will outline which services are covered by the directive and which are excluded from its application. As regards some of these service sectors, I will also try to outline to what extent such services are covered/excluded.

In Chapter II I shall study give an overview of the main features of the proposed Directive and the impact this will generally have on those services which fall within its scope. Hence, I will subdivide this chapter into various categories, namely, eliminating obstacles to the freedom of establishment, abolishing barriers to the free movement of services and establishing mutual trust between the Member States. Although this Chapter will be generic, I will give specific examples in order to explain these principles of general applicability. These examples will range over the spectrum of policy areas outlined in Chapter I.

[4] COM(2002) 441 final, *Report from the Commission to the Council and the European Parliament on the State of the Internal Market for Services presented under the first stage of the Internal Market Strategy for Services.*

The possible consequences of the Services Directive, both from a socio-economical and from a legal perspective, in relation to the specific area of employment, is the subject matter tackled in Chapter III.

In my conclusion I aim to criticise whether this proposed Directive succeeds in achieving the goals it was meant to accomplish. Hence, I will on the one hand outline its favourable effects, whereas, on the other, I will delineate other areas which remain uncatered for or are controversial.

CHAPTER 1

THE OBJECTIVE AND SCOPE OF THE PROPOSED DIRECTIVE ON SERVICES IN THE INTERNAL MARKET

1. 1. Objective

The objective of the proposed Directive on services in the internal market is intended to attain a genuine Internal Market in services by abolishing legal and administrative barriers to the development of services between Member States. In the explanatory memorandum of the Directive, it is stated that about two thirds of GNP and employment within the EU is generated by services. The growth potential of services production is being hampered by obstacles working against free movement of services and freedom of establishment within Member States.[1] Until this proposal very little has been done to liberalise the market for services and only very specific fields have been harmonised.

Two situations are envisaged in the Proposed Services Directive: either when service providers would like to establish themselves in another Member State by setting up their permanent residence in the latter; or when service providers wish to provide a service from their Member State of origin into another Member State. In both cases, the services Directive would guarantee service providers more legal certainty if they want to exercise two fundamental freedoms enshrined in the EC Treaty, namely, the freedom of establishment and the freedom to provide services.

The Directive establishes a general legal framework. This is applicable, subject to specific exception, to all economic activities involving services. The Presidency's

[1] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina 3.

conclusions[2] justify this horizontal approach in view of the fact that *"the legal obstacles to the achievement of a genuine internal market in services are often common to a large number of different activities and have many features in common."*

Being a framework Directive, its objective is neither to lay down detailed rules, nor to harmonise all the rules in the Member States applicable to service activities, but to deal with questions that are vital for the smooth functioning of the Internal Market in services. In doing so it gives priority to targeted harmonisation of specific points, to the imposition of obligations to achieve clear results without prejudicing the legal techniques by which they will be brought about, and to the clarification of the respective roles of the Member States of destination of a service.

Moreover, it is important to emphasise that other Community instruments relating to services remain in force, as for example, the Directives for the recognition of professional qualifications. In this context the Services Directive refers to the Directive that is yet to be formulated in this respect and which will consolidate fifteen existing Directives for the recognition of professional qualifications. Neither is the Services Directive about issues such as liberalisation of services of general economic interest, privatisation of public service providers or the abolishment of public monopolies.[3]

Both the CPB[4] and Copenhagen Economics[5] recently prepared estimates of the economic effects of the introduction of the Services Directive. The Copenhagen Economics study shows the level of obstacles to the provision of services in the internal market in the form of tariff equivalents for three main branches of the service sector: regulated professions (especially accountancy), business services (IT services) and trade (see table below). A distinction is always made between:

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[2] Presidency Conclusions, Brussels European Council, 16-17.10.2003, para 16.
[3] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 55.
[4] Henk Kox, Arjan Lejour, Raymond Montizaan, *The free movement of services within the EU*, CPB document no. 69, October 2004.
[5] Copenhagen Economics, *Economic Assessment of the Obstacles to the Internal Market for Services – Final report*, Copenhagen, January 2005.

- national and foreign service providers;
- obstacles the effect of which is felt further down the chain (to sales and marketing for instance ('rent creating')) and obstacles that result in higher costs for, for instance, establishment ('cost creating').[6]

The study shows up strong market protection for regulated professions. Especially in this branch of the service sector, it has been observed that the Services Directive will considerably reduce both the 'rent creating' and the 'cost creating' obstacles.

Average tariff equivalents in the EU, before and after the introduction of the Services Directive (in percentages)

Obstacles:	rent-creating		cost-creating	
sector	before	after	before	after
Regulated professions				
– national	5.5	0.2	9.3	3.0
– foreign	11.0	5.6	11.8	2.5
Business services (II)				
– national	0.2	0.0	1.3	1.2
– foreign	0.9	0.5	0.7	0.4
Retail and wholesale				
– national	2.4	0.5	0.9	0.3
– foreign	3.1	1.0	1.2	0.5

Source: Copenhagen Economics, Economic Assessment of the Barriers to the Internal Market for Services, Copenhagen, January 2005, p. 18.

1. 2. Scope

The proposed Directive covers a wide range of different services provided to consumers and to businesses. Since the application of the Directive is very broad, covering every service, a clear definition of service becomes very important. *Article 2* defines the scope of the Directive as "services supplied by providers established in a Member State". It has been observed that it is this definition that will ultimately limit the scope of the Directive.[7]

Based on the case law of the Court of Justice, according to which "services" denotes any self-employed economic activity normally performed for remuneration – which need not, however, be paid by those for whom the service is performed – a "service"

[6] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 37.
[7] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".

has been defined in the Article 4(1) of the Directive as being "any self-employed economic activity, as provided for by Article 50 of the Treaty, consisting of the provision of a service against consideration".[8] Accordingly, a service is any activity through which a provider participates in the economy, irrespective of his legal status or aims, or the field of action concerned."[9]

The abovementioned definition has can be split into three components:

1. services provided to consumers, to businesses or both;
2. services provided by an operator established, either permanently or temporarily, in the Member State of the recipient; services provided at a distance from his country of establishment, for example over the internet, by phone, or through direct marketing; services provided in the country of origin to a customer who has travelled from another Member State (such as hotels, theme parks or other tourist attractions, as well as health services); or services provided in another Member State to which both the provider and the recipient have travelled (as in the case of tourist guides); and
3. services for which a fee is charged or which are free to the final recipient, excluding non-economic activities, that is, those activities provided by the State in fulfilment of its public mission without any economic consideration, such as public administration or public education activities.

Trying to establish a precise list of services covered by the Proposal would be practically impossible as well as counterproductive given that the services economy is subject to constant evolution and development. An indicative range of activities covered by such definition is given in recital 14 of the proposed Directive and includes: business services, for instance, management consultancy, certification and testing, facilities management (including office maintenance and security), advertising, recruitment services, and the services of commercial agents; services provided both to businesses and to consumers including legal or fiscal advice, real estate services such as

[8] Casc 352/85, *Judgment of 26/04/1988, Bond van Adverteerders / Netherlands State (Rec.1988,p.2085) (SVIX/00449 FIIX/00455)*, point 16; Case 263/86, *Judgment of 27/09/1988, Belgian State / Humbel (Rec.1988,p.5365)*, point 17, C-51/96 and C-191/97, *Judgment of 11/04/2000, Deliège (Rec.2000,p.I-2549)*, point 56; C-157/99, *Judgment of 12/07/2001, Smits and Peerbooms (Rec.2001,p.I-5473).*, point 57.

[9] Proposal for a Direcive of the European Parliament and of the Council, Brussels, 5.3.2004, COM(2004) 2 final/3, 20.

estate agencies, construction (including the services of architects), distributive trades, the organisation of trade fairs, car rental, travel agencies, and security services; and finally consumer services including health care services, household support services, such as help for the elderly, tourism, audio-visual services, leisure services, sports centres and amusement parks.[10]

The scope of the Directive is, thus, very broad and covers a wide array of services. A number of such services, if not all, are offered also in Malta and these will include: professional services, such as consulting architecture, engineering or legal advice; business services, for instance employment and advertising agencies, technical testing consumer base management, data processing and trade affairs; and retail services, for example grocers, travel agencies, hotels, restaurants and entertainment; and security services, environmental services such as waste management and health services, and the services of craftspeople such as carpenters and plumbers.[11]

Doubt will arise as to whether a given activity may be considered as a service, in which case the natural point of reference will be the case law of the Court of Justice of the European Communities which provides adequate guidance. To take an example to illustrate this point, in *Deliège*[12] the Court held that "*it is important to verify whether an activity of the kind engaged in by Ms Deliège is capable of constituting an economic activity within the meaning of Article 2 of the Treaty and more particularly, the provision of services within the meaning of Article 59 of that Treaty*". In assessing the economic nature of an activity, the Court has outlined two principles, namely, that the scope of Articles 43 and 49 must not be interpreted restrictively,[13] and that the economic nature of the activity does not depend on the legal status at national level of the provider or the service concerned. In the *Steymann* case[14] the Court held as follows: "*It must be observed in limine that, in view of the objectives of the European Economic Community, participation in a community based on religion or another form of philosophy falls within the field of application of Community law only in so far as it*

[10] Proposal for a Direcive of the European Parliament and of the Council, Brussels, 5.3.2004, COM(2004) 2 final/3, 19.
[11] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina, 3.
[12] C-51/96 and C-191/97, Deliege, point 49.
[13] *Ibid.* 52.
[14] C-196/87, *Judgment of 05/10/1988, Steymann / Staatssecretaris van Justitie (Rec. 1988,p.6159) (SVIX/00751 FIIX/00771)*, point 9.

can be regarded as an economic activity within the meaning of Article 2 of the Treaty." Hence, even activities performed by members of a religious or philosophic community be deemed economic activities. Moreover, in *Deliège* the Court held that *"it is important to note that the mere fact that a sports association or federation unilaterally classifies its members as amateur athletes does not in itself mean that those members do not engage in economic activities within the meaning of Article 2 of the Treaty".*[15] Consequently, even a sports association may be may qualify as an economic activity.[16] *Schindler* also points out that the element of chance inherent in a lottery does not prevent the transaction having an economic nature.[17]

The second important element, outlined by the Court for determining whether a given activity qualifies as a service, is when the latter is provided for a consideration. Article 50 EC provides that services shall be considered to be 'services' within the meaning of the Treaty where they are normally provided for remuneration. According to the case law of the Court *"the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question",*[18] which means that there must be an economic counterpart.

It is interesting to note that the service must not necessarily be paid by those for whom it is performed. It is well established case law, in particular in the field of health services, audiovisual services and sport services, that *"Article 60 of the Treaty does not require that the service be paid for by those for whom it is performed".*[19] In other words, remuneration constitutes consideration for the service in question irrespective of how and by whom this consideration is financed.

Thirdly, the Court has held that the special nature of certain activities, such as health services, does not prevent them from being of an economic nature within the meaning of the Treaty. The Court has consequently held that Article 49 EC applies whatever the

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[15] C-51/96 and C-191/97, Deliege, point 46.
[16] L Woods, Free Movement of Goods and Services within the European Community, Ashgate, 2004.
[17] Case Case C-275/92, *Judgment of 24/03/1994, H.M. Customs and Excise / Schindler (Rec.1994,p.I-1039) (SVTillägg/00119 FIXV/I-79)*, para 33. In fact, Article 40 of the proposed Directive specifically includes games of chance in that the Commission shall assess further harmonisation in the field of gambling one year after adoption of the proposal.
[18] Case C-422/01, *Judgment of 26/06/2003 , Skandia and Ramstedt (Rec.2003,p.I-6817),* paragraph 23. See also Cases C-263/86, *Humbel,* paragraph 17, C-157/99; *Smits and Peerbooms,* paragraph 58; C-136/00, *Judgment of 03/10/2002 , Danner (Rec.2002,p.I-8147)*, paragraph 26; C-355/00, *Judgment of 22/05/2003 , Freskot (Rec.2003,p.I-5263)*, paragraph 55.
[19] *Smits and Peerbooms Case* point 57; see also cases C-352/85, *Bond van Adverteerders and Others,* point 16; *Deliège,* point 56; *Ramsted,* point 24.

field or the branch of law concerned: "*the effectiveness of Community law cannot vary according to the various branches of national law which it may affect*".[20]

Ultimately, the approach adopted by the Court, which consists of examining the actual characteristics of the activity concerned that the qualification of an activity as a 'service', requires a case by case assessment in the light of all the circumstances of the case, in particular the way the service is provided, organised and financed in the Member State concerned.

1. 3. Specific examples of 'services' within the scope of the Directive

Generally, the qualification of a given activity as a 'service' will cause no difficulty, especially when a service is provided by a private operator. Yet, some specific activities, in lieu of their particular characteristics, may require a more in depth assessment on a case by case basis. Hence, following examples as to certain specific activities merely attempt to offer some general clarification.

1. 3. 1 Social security services

The ECJ has had occasion to examine the activity of management of a social security scheme. Specifically, it has been considered whether the provision of benefits by a public body under a compulsory insurance scheme against natural risks fall within the scope of Article 49 EC.[21] The Court held that "[*i*]*n the present case, it is clear that the payment of the contribution by the Greek farmers does not constitute economic consideration for the benefits provided by ELGA under the compulsory insurance scheme.*"[22] Similarly, in other cases concerning the application of Community competition rules the Court stated that, "*in the field of social security, the Court has held that certain bodies entrusted with the management of statutory health insurance and old-age insurance schemes pursue an exclusively social objective and do not*

[20] Case C-20/92, *Judgment of 01/07/1993, Hubbard / Hamburger (Rec. 1993,p.I-3777) (SVXIV/I-265 FIXIV/I-299)*, point 19.
[21] Case C-355/00, *Freskot.*
[22] Paragraph 56. The Court pursues by arguing that "*57. The contribution is essentially in the nature of a charge imposed by the legislature and it is levied by the tax authority. The characteristics of that charge, including its rate, are also determined by the legislature. It is for the competent ministers to decide any variation of the rate. 58. Similarly, the rate and detailed rules governing the benefits provided by ELGA under the compulsory insurance scheme are framed by the national legislature in such a way as to apply equally to all operators*".

engage in economic activity. The Court has found that to be so in the case of sickness funds which merely apply the law and cannot influence the amount of the contributions, the use of assets and the fixing of the level of benefits. Their activity, based on the principle of national solidarity, is entirely non-profit-making and the benefits paid are statutory benefits bearing no relation to the amount of the contributions".[23] However, as affirmed by the Court, the possibility remains that, besides their function of an exclusively social nature within the framework of management of a social security system, the sickness funds and the entities that represent them engage in operations which have a purpose that is not social and is economic in nature.[24] Furthermore, as regards voluntary pension insurance[25] or occupational endowment pensions[26] the Court clearly deems that these activities are covered by Article 49 EC. This notwithstanding, it is important to keep in mind that insurance services are not covered by the Proposal since financial services are excluded from its scope of application.[27]

1. 3. 2. Educational services

Education systems have been the subject of numerous lawsuits relating to Articles 43 and 49 EC.[28] In two of those cases, *Humble*[29] and *Writh*,[30] the Court concluded that Article 49 EC did not apply. The former involved a technical institute forming part of the secondary education provided under the national education system, whereas the latter concerned courses given in an establishment of higher education which were financed essentially out of the public purse. In *Writh*, the Court stated:

> *"As the Court has already emphasized in Case 263/86 Belgian State v Humbel [1988] ECR 5365, at paragraphs 17, 18 and 19, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question, and is normally agreed upon*

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[23] Joined Cases C-264/01, C-306/01, C-354/01 and C-355/01, *Judgment of 16/03/2004, AOK-Bundesverband and others (Rec.2004,p.I-2493)*, paragraphs 47; see also joined Cases C-159/91 and C-160/91 *Poucet and Pistre,* paragraphs 15 and 18; case C-218/00, *Judgment of 22/01/2002, Cisal (Rec.2002,p.I-691),* paragraphs 43 to 46.

[24] Council of the European Union, 10865/04, 25th June 2004, Working Party on Competitiveness and Growth, COMPET 106, ETS 45, SOC 323, JUSTCIV 94, CODEC 850, 5.

[25] Case C-136/00 *Danner.*

[26] Case C-422/01 *Ramstedt.*

[27] Council of the European Union, 10865/04, 25th June 2004, Working Party on Competitiveness and Growth, COMPET 106, ETS 45, SOC 323, JUSTCIV 94, CODEC 850, 5.

[28] *Ibid*, 4.

[29] Case C-263/86, *Humble.*

[30] Case C-109/92, *Judgment of 07/12/1993, Wirth / Landeshauptstadt Hannover (Rec. 1993,p.I-6447).*

between the provider and the recipient of the service. In the same judgment the Court considered that such a characteristic is absent in the case of courses provided under the national education system. First of all, the State, in establishing and maintaining such a system, is not seeking to engage in gainful activity, but is fulfilling its duties towards its own population in the social, cultural and educational fields. Secondly, the system in question is, as a general rule, funded from the public purse and not by pupils or their parents. The Court added that the nature of the activity is not affected by the fact that pupils or their parents must sometimes pay teaching or enrolment fees in order to make a certain contribution to the operating expenses of the system".[31]

Conversely, in a case concerning a company organising university courses for students against remuneration, the Court stated that "[t]*he organisation for remuneration of university courses is an economic activity falling within the chapter of the Treaty dealing with the right of establishment when that activity is carried on by a national of one Member State in another Member State on a stable and continuous basis from a principal or secondary establishment in the latter Member State*".[32]

It is certain that the prospective Services Directive will only have meaning for specific aspects of education, namely those aspects that are partly opened up to competition by institutes that are mainly financed from private funds. An open system cannot close its borders to competition from other Member States in the EU. However, an education system that is to a great extent financed by the Government is, in accordance with the

[31] *Wirth*, Paragraph 15. The Court added :" *16 Those considerations are equally applicable to courses given in an institute of higher education which is financed, essentially, out of public funds. 17 However, as the United Kingdom has observed, whilst most establishments of higher education are financed in this way, some are nevertheless financed essentially out of private funds, in particular by students or their parents, and which seek to make an economic profit. When courses are given in such establishments, they become services within the meaning of Article 60 of the Treaty. Their aim is to offer a service for remuneration. 18 However, the wording of the question submitted by the national court refers solely to the case where an educational institution is financed out of public funds and only receives tuition fees (Gebuehren) from the students".*

[32] Case C-153/02, *Judgment of 13/11/2003, Neri (Rec.2003,p.I-13555)*, paragraph 39. This case concerns the compatibility with Article 43 EC of an administrative practice under which university degrees awarded by a university of one Member State are not recognised by another Member State when the courses of preparation for those degrees were provided in the latter Member State by another educational establishment in accordance with an agreement made between the two establishments.

body of jurisprudence of the European Court of Justice, not classed as a service and does, therefore, not come under the scope of the Services Directive.[33]

1. 3. 3. Health services

The inclusion of health care in the Services Directive has been and continues to remain a politically and socially sensitive issue. In view of this European Commissioner McCreevy declared himself prepared, on 8 and 9 March 2005, to exclude health care and the publicly financed services of general interest from the scope of application of the framework Directive in the context of the co-decision procedure, in response to the European Parliament's standpoint determination in its first reading.[34] Notwithstanding, the decisions of the Court of Justice confirm that health care services fall within the meaning of services of Article 49 EC. The main gist of these decisions is that, as recipients of services, patients must be able to avail themselves of the freedom of service provision.[35]

Decisions of the Court with respect to medical activities is clear: "*according to settled case-law, medical activities fall within the scope of Article 50 EC, there being no need to distinguish in that regard between care provided in a hospital environment and care provided outside such an environment.*[36] In its case law, the Court replied to a number of arguments brought forward by some Member States in order to exclude health services from the scope of the freedom to provide services in Article 50 EC:[37]

1. First, it was argued that certain medical services would not constitute a service within the meaning of the Treaty, given that they are not paid for by the patient himself. The Court's position is clear: "*the fact that hospital medical treatment is financed directly by the sickness insurance funds on the basis of agreements and pre-set scales of fees is not in any event such as to remove such treatment from the sphere of services*

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[33] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 80.
[34] Charlie McCreevy, European Commissioner for Internal Market and Services, Statement to the European Parliament, 8 March 2005.
[35] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 72.
[36] Case C-8/02, *Judgment of 18/03/2004, Leichtle (Rec.2004,p.I-2641)*, paragraph 28; see, among others, *Case C-368/98, Judgment of 12/07/2001 , Vanbraekel and others (Rec.2001,p.I-5363)*, paragraph 41; *Smits and Peerbooms,* paragraph 53; *C-385/99, Judgment of 13/05/2003 , Müller-Fauré and van Riet (Rec.2003,p.I-4509),* paragraph 38.
[37] Council of the European Union, 10865/04, 25th June 2004, Working Party on Competitiveness and Growth, COMPET 106, ETS 45, SOC 323, JUSTCIV 94, CODEC 850, 5.

within the meaning of Article 60 of the Treaty".[38] More precisely, the Court affirmed that "*a medical service does not cease to be a provision of services because it is paid for by a national health service or by a system providing benefits in kind*"[39] and that "*[t]here is thus no need, from the perspective of freedom to provide services, to draw a distinction by reference to whether the patient pays the costs incurred and subsequently applies for reimbursement thereof or whether the sickness fund or the national budget pays the provider directly.*"[40]

2. Another argument, relating to the special nature of these services, was dealt with by the Court as follows: "*It is also settled case-law that the special nature of certain services does not remove them from the ambit of the fundamental principle of freedom of movement (Case 279/80 Webb [1981] ECR 3305, paragraph 10, and Kohll, paragraph 20), so that the fact that the national rules at issue in the main proceedings are social security rules cannot exclude application of Articles 59 and 60 of the Treaty*".[41]

3. The Court, with reference to the argument that organisation of social security systems is a matter of Member State competence, held that "*although it is not disputed that Community law does not detract from the power of the Member States to organise their social security systems and that, in the absence of harmonisation at Community level, it is for the legislation of each Member State to determine the conditions on which social security benefits are granted, it is nevertheless the case that, when exercising that power, the Member States must comply with Community law*".[42]

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[38] *Smits and Peerbooms*, paragraph 56. The Court added "*57. First, it should be borne in mind that Article 60 of the Treaty does not require that the service be paid for by those for whom it is performed [...] 58. Second, Article 60 of the Treaty states that it applies to services normally provided for remuneration and it has been held that, for the purposes of that provision, the essential characteristic of remuneration lies in the fact that it constitutes consideration for the service in question (Humbel, paragraph 17). In the present cases, the payments made by the sickness insurance funds under the contractual arrangements provided for by the ZFW, albeit set at a flat rate, are indeed the consideration for the hospital services and unquestionably represent remuneration for the hospital which receives them and which is engaged in an activity of an economic character.*"

[39] *Smits and Peerbooms,* paragraph 54.

[40] Case C-158/96, *Judgment of 28/04/1998, Kohll / Union des caisses de maladie (Rec.1998,p.I-1931)*, paragraphs 35 and 36, *Smits and Peerbooms*, paragraphs 69 to 75; *Müller-Fauré*, paragraphs 44, 67 and 68.

[41] *Smits and Peerbooms,* paragraph 54.

[42] Case C-158/96 *Kohll*, paragraphs 35 and 36, *Smits and Peerbooms*, paragraphs 69 to 75; *Müller-Fauré*, paragraphs 44, 67 and 68.

In examining the impact the Services Directive can have on cross-border forms of service provision in healthcare (and in the social services), a distinction has to be made between the freedom of establishment, the free provision of services and the right to reimbursement, in the case of patients who receive care in another Member State. It has been held that an effective opening of care markets can broaden the provision of care services and so help reduce the cost development in the care sector and the problems with regard to waiting lists. Naturally, the Member States must remain able to guarantee quality and consistent accessibility.[43]

1. 3. 4. Other services activities in the social domain

The ECJ has also assessed the compatibility, with Article 43 EC, of national legislation making the admission of private operators of homes for the elderly to a social welfare system provided that the relevant operators were non-profit making. The Court considered that this activity constitutes an economic activity within the meaning of the Treaty. However, the Court also held that the condition in question is compatible with Article 43 EC.[44] The Court, moreover, stated that the provision of emergency transport services and patient transport services by entities such as medical aid organisations constitutes an economic activity for the purposes of application of the competition rules.[45] Yet, it should be noted that these services are excluded from the scope of application of the Proposal because of the exclusion of transport services.[46]

1. 3. 5. Services of general economic interest

Questions have also been raised by several lobby groups relating to how far the Proposal concerns and has implications for services of general interest. In that respect, it is important to remember that the Proposal covers only services of general *economic* interest, that is, services that correspond to an economic activity.

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[43] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 77.

[44] Case C-70/95, *Judgment of 17/06/1997 , Sodemare and others / Regione Lombardia (Rec.1997,p.I-3395).*

[45] Case C-475/99, *Judgment of 25/10/2001 , Ambulanz Glöckner (Rec.2001,p.I-8089),* paragraphs 19 to 22.

[46] Council of the European Union, 10865/04, 25th June 2004, Working Party on Competitiveness and Growth, COMPET 106, ETS 45, SOC 323, JUSTCIV 94, CODEC 850.

With regard to those services of general economic interest that are not excluded by the Proposal,[47] the Proposal does not affect the freedom of the Member States to define what they consider to be services of general economic interest, how those services should be organised and financed and what specific obligations they should be subject to. It has been remarked that the Proposal does not require Member States to liberalise or to privatise those activities which are considered as services of general economic interest, nor to open them up to competition, and does not require the abolition of monopolies.[48]

The intention of the proposal is to be fully in line with the recently adopted White Paper on Services of General Interest[49] which highlights that work at Community level will continue to be based on the recognition of the crucial importance of well-functioning, accessible, affordable and high-quality services of general interest for the quality of life of European citizens, the environment and the competitiveness of European enterprises.[50]

The intention is, however, is not fully reflected in the Directive itself which makes no reference to the privilege of the Member States to define services of general economic interest, its organisation or financing, and the obligations it's subject to. With regards to the freedom of establishment, the preamble nonetheless states that:

> *"[i]t is appropriate that the provisions of this Directive concerning freedom of establishment should apply only to the extent that the activities in question are open to competition, so that they do not oblige Member States to abolish existing monopolies, notably those of lotteries, or to privatise certain sectors."*[51]

This, however, is not reflected in the Directive itself. The mutual evaluation process[52] contains a well-defined list of requirements that have to be examined, but does not

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[47] For example, transport is excluded and electronic communications services with respect to certain matters.
[48] Council of the European Union, 10865/04, 25th June 2004, Working Party on Competitiveness and Growth, COMPET 106, ETS 45, SOC 323, JUSTCIV 94, CODEC 850.
[49] Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions. COM 2004 (374).
[50] Council of the European Union, 10865/04, 25th June 2004, Working Party on Competitiveness and Growth, COMPET 106, ETS 45, SOC 323, JUSTCIV 94, CODEC 850.
[51] Recital (35) Preamble Draft Services Directive.
[52] Art 15 Draft Services Directive.

contain an explicit exclusion on opening of competition or abolishing of monopolies. The evaluation process is not intended to compel Member States to appraise services of general economic interest to that end. Services of general economic interest that have been opened to competition will, nonetheless, fall entirely within the scope of this Directive.[53]

In respect of the freedom to provide services, it is the country of origin principle that will restrict Member States to regulate all services of general economic interest on its territory. Member States will only retain that privilege insofar as there is a derogation for those particular services. Regrettably these reflect only the *acquis communautaire* and the divergence between national approaches. There are no general derogations on services of general economic interest. Only insofar public policy, public security and public health coincide with services of general economic interest will there be a general derogation for these services, as those are a general derogation to the country of origin principle.[54] Notably, this is contrary to the aim of improving legal certainty for SME's.[55]

1. 4. Areas excluded from the ambit of the proposed Directive

Article 2 of the Directive explicitly excludes from its scope :

> *"(a) financial services as defined in Article 2(b) of Directive 2002/65/EC;*
>
> *(b) electronic communications services and networks, and associated facilities and services, with respect to matters covered by Directives 2002/19/EC29, 2002/20/EC30, 2002/21/EC31, 2002/22/EC32 and 2002/58/EC33 of the European Parliament and of the Council;*
>
> *(c) transport services to the extent that they are governed by other Community instruments the legal basis of which is Article 71 or Article 80(2) of the Treaty."*

[53] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[54] Article 17(16) and (17) Draft Services Directive.
[55] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".

Financial services are excluded in view of the fact that they are already comprehensively covered in the Financial Services Action Plan.[56] For the same reasons, the Directive does not apply to electronic communications services and networks in so far as the questions regulated by the Directives in the "telecom package" adopted in 2002 are concerned.[57]

Furthermore, transport services, to the extent that they are regulated by other Community instruments based on Articles 71 and 80(2) of the Treaty, including urban transport and port services, are expressly excluded from the ambit applicability of the Directive in view of the fact that they are already covered by a set of Community instruments dealing with specific issues in this field. The proposed Directive, therefore, aims to cover only two transport services, namely, cash-in-transit, that is, transport of cash by security companies and transport of deceased persons. In either case, obstacles to the free movement of services have been identified, neither of which is specific to transport policy. In the latter scenario, for example, there have been an increasing number of complaints from citizens who have suffered from difficulties concerning the repatriation of a deceased member of the family. Such a problem would be addressed by the proposed Directive.

Moreover, Article 2 (3) states that the Directive *"does not apply to the field of taxation, with the exception of Articles 14 and 16 to the extent that the restrictions identified therein are not covered by a Community instrument on tax harmonisation."* Generally speaking, this Directive does not apply in the field of taxation. Yet, although taxation has its own legal base, certain tax measures that aren't covered by a Community instrument may constitute restrictions contrary to Articles 43[58] (freedom of establishment) and Article 49[59] of the Treaty (free movement of services), in particular when they have a discriminatory effect. The former justifies the applicability of Articles 14 and 16 of the proposed Directive, namely, prohibited requirements in connection with freedom of establishment and the principle of country of origin in

[56] "Implementing the Framework for financial markets: action plan", COM(1999) 232, 11.5.1999.
[57] Directives 2002/19/EC29, 2002/20/EC30, 2002/21/EC31, 2002/22/EC32 and 2002/58/EC33 of the European Parliament and of the Council.
[58] Case C-1/93, *Judgment of 12/04/1994, Halliburton Services / Staatssecretaris van Financiën (Rec. 1994,p.I-1137) (SVXV/I-71 FIXV/I-101).*
[59] Case C-17/00, de Coster, 29 November 2001.

connection with free movement of services respectively, to tax measures that are not covered by a Community instrument.

Finally, the Directive is also inapplicable to activities encompassed in Article 45 of the Treaty which provides expressly that the chapter on the freedom of establishment and the chapter on the freedom of services, by virtue of Article 55 of the Treaty, do not apply to those activities which are directly and specifically connected with the exercise of official authority.[60] The Court has held that "*as a derogation from the fundamental rule of freedom of establishment, it* [Art. 45 EC] *must be interpreted in a manner which limits its scope to what is strictly necessary for safeguarding the interests which that provision allows the Member States to protect*".[61]

A number of activities have already been brought before the Court in order to assess whether they fall within the scope of Article 45 EC, such as, the activity of 'avocat'; those of a security undertaking;[62] those of approved commissioner in insurance undertakings; design, programming and operation of data-processing systems;[63] premises, supplies, installations, maintenance, operation and transmission of data necessary for the conduct of lottery.[64] In all these cases the Court has stated that these activities do not fall within the scope of the derogation at Article 45 EC.

[60] Proposal for a Direcive of the European Parliament and of the Council, Brussels, 5.3.2004, COM(2004) 2 final/3, 21.
[61] Case 147/86, *Judgment of 15/03/1988, Commission / Greece (Rec.1988,p.1637)*, point 7.
[62] Case C-283/99, *Judgment of 31/05/2001 , Commission / Italy (Rec.2001,p.I-4363)*.
[63] Case C-3/88, *Judgment of 05/12/1989, Commission / Italy (Rec.1989,p.4035) (SVX/00269 FIX/00285)*.
[64] Case C-272/91, *Judgment of 26/04/1994, Commission / Italy (Rec.1994,p.I-1409)*.

CHAPTER II

THE MAIN FEATURES OF THE PROPOSED SERVICES DIRECTIVE AND ITS POTENTIAL IMPACT ON INTERNAL MARKET

The Directive may be considered as having three pillars, namely:

- eliminating obstacles which hinder freedom of establishment;
- abolishing barriers to free movement of services; and
- safeguarding confidence in the quality of services offered in Member States.

In this Chapter each of these pillars will be analysed and the impact each is likely to have on the internal market.

2. 1. Eliminating Obstacles to the Freedom of Establishment

Chapter 2 of the proposed Directive aims at facilitating the establishment of service providers across borders. This Chapter is, therefore, particularly relevant in the case of services the provision of which requires the permanent physical presence of the provider and which cannot be easily sold across borders without direct personal contact. Examples would include various forms of personal services, ranging from hairdressing to dentistry to catering, to services requiring the permanent physical presence of the provider such as retailing. The establishment of a permanent business presence in a host country is the essential defining characteristic of the nature of business covered herein.[1]

The Directive aims to commit Member States to reduce red tape which hinders European companies in setting up subsidiaries in other EU countries. In so far as there are regulations for firms engaged in cross border trade, this part of the directive is also

[1] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina, 5.

relevant for this mode of provision. Summarily, it tries to eliminate obstacles to freedom of establishment through:

- the simplification of administrative procedures;
- the simplification of authorisation procedures;
- the prohibition of restrictive legal requirements; and
- the assessment of certain other legal requirements.

2. 1. 1. Administrative Simplification

Section 1 of Chapter II of the proposed Directive deals with 'Administrative Simplification'. Hereunder are its salient features, namely simplification procedures and single points of contact.

2. 1. 1. 1. Simplification of procedures

The first measure involved in promoting the establishment for service providers is the simplification of procedures.[2] Some commentators comment that this is the "only truly innovative point of the Directive, though it can be argued that its innovation is rather obvious".[3]

Article 5 of the proposed Directive requires that where it is necessary by the law of the member state of establishment to provide a certificate of any form, that an equivalent document from the original member state must be accepted as an alternative. Moreover, it must not be a requirement that the document be provided in its original form, unless for reasons of overriding public interest.

This will have a very positive impact on SME's when providing their services cross-border, in that the administrative threshold is the most detrimental for SME's to offer services abroad.[4]

Yet, this Article is yet to be clarified. The standard set within is extremely vague. Many questions remain to be answered: What is to be considered simple and informal

[2] Article 5 Draft Services Directive
[3] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[4] *Ibid.*

enough, and who will evaluate this? According to Article 45 of the Draft Services Directive the administrative simplification as envisaged by Article 5 will only be evaluated by means of a three yearly report of the Commission to the European Parliament and to the Council on the application of the Directive.[5]

It has been observed that while this measure is intended to simplify establishment procedures, it may compromise consumer safety and security in instances where regulatory requirements for the issuing of documents are different in the various Member States. It may also give rise to unfair competition against the countries with stricter procedures for issuing documents, and a consequent move towards more laxity in this respect. In this respect it has therefore been concluded that this measure would make more sense in a regulatory environment which is homogenous across the European Union. It is to be further stated that certain documentary evidence which is intrinsically linked to the physical provision of the service must be issued in the country where the service is being provided. Typical examples would comprise health and safety records in business establishments and hygiene standards in personal services such as beauticians.[6]

2. 1. 1. 2. Single Point of Contact

The directive proposes[7] the establishment of a single point of contact for each industry, whereby a firm wishing to establish in a country can do all the necessary paper work through one contact point.[8] More specifically, this means that the service provider will have the faculty of completing all procedures and formalities needed for access to his service activities at the point of contact. This also means that the recipient, as well as the service provider, will also be able to access the information at the single point of contact on the provision of services in the country of destination. The implication here is that every procedure and formality that the service provider ought to comply with,

[5] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[6] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina, 6.
[7] Article 6 Draft Services Directive
[8] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.

must be capable of being completed at a distance and by electronic means at the relevant single point of contact.[9]

It must be further specified that, although the single point of contact abolishes the need of the service provider to contact the competent authority directly, the latter must nonetheless be able of being contacted at a distance and by electronic means.[10]

Each country will be required to provide all relevant information regarding procedures and formalities in a clear and unambiguous way through this single point of contact, and this will be required to be fully accessible by electronic means. This single point of contact need not actually be involved in all or any of the actual authorisation procedures – they are merely an interface through which application procedures can be completed from start to finish.[11] In this sense, a single point of contact is single insofar as the provider is concerned, in that from beginning to end he only needs to see that particular point of contact, however complicated internal competency within the Member State might be.[12]

2. 1. 2. Authorisations

Authorisations, to be found in Section 2 of the Chapter on the freedom of establishment for service providers, are another way in which the Directive facilitates the establishment of service providers abroad. In general, authorisation schemes should not discriminate on the basis of nationality, must be justifiable, timely, precise and the conditions for the granting of authorisations must be made public in advance.[13] In this respect, it will be important for the Directive to clarify whether requirements regarding knowledge of the local language of the country where the service is provided, in cases where proper verbal communication with the customers is essential, would not be construed as discriminating on the basis of nationality. A case in point is the licensing of electricians in Malta, where foreign providers would have to undergo an interview in spite of possessing relevant qualifications. This practice may not be acceptable under

[9] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[10] *Ibid.*
[11] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.
[12] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[13] Articles 9 and 10 Draft Services Directive

the Directive. One may also find illustrations of restrictions in educational services and in certain transport services.[14]

It ought to be accentuated that the conditions and criteria for authorisation schemes have all been previously established by the ECJ. As to the conditions of justification by public interest, non-discrimination against service providers and prohibition of duplication of equivalent measures in the Member State of establishment, the ECJ stated in one paragraph:

> *"The freedom to provide services, being one of the fundamental principles of the Treaty, may be restricted only by rules justified by the public interest and applicable to all persons and undertakings operating in the territory of the Member State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established."*[15]

With reference to *Svensson*,[16] and *ERT*,[17] on justification by public interest; and , *Commission v. Spain*,[18] and *Halliburton*,[19] on discrimination and *Commission v. France*,[20] and, *Patrick*,[21] on the duplication of equivalent measures, these conditions can be deemed established case law of the European Court of Justice. The same holds true for the condition that the same purpose cannot be attained by less restrictive means, on the basis of *Commission v. France*,[22] and *Ramrath*,[23] and about the condition of procedural clarity, with reference to *Kraus*.[24]

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[14] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina,7.
[15] Case C-355/98, *Judgment of 09/03/2000 , Commission / Belgium (Rec.2000,p.I-1221)*, para 37.
[16] Case C-484/93, *Judgment of 14/11/1995, Svensson and Gustavsson / Ministre du Logement and de l'Urbanisme (Rec.1995,p.I-3955)*, para 15.
[17] Case C-260/89, *Judgment of 18/06/1991, ERT / DEP (Rec.1991,p.I-2925) (SVXI/I-209 FIXI/I-221)*, para 24.
[18] Case C-114/97, *Judgment of 29/10/1998, Commission / Spain (Rec.1998,p.I-6717)*, para 31.
[19] Case C-1/93, *Halliburton,* ECJ 12 April 1994, para 15.
[20] Case C-496/01, *Judgment of 11/03/2004, Commission / France (Rec.2004,p.I-2351)*, para 71.
[21] C-11/77, *Judgment of 28/06/1977, Patrick / Ministre des affaires culturelles (Rec.1977,p.1199).*
[22] Case C-496/01, *Commission v. France*, ECJ 11 March 2004, para 34.
[23] Case C-106/91, *Judgment of 20/05/1992, Ramrath / Ministre de la Justice (Rec.1992,p.I-3351) (SVXII/I-101 FIXII/I-145)*, para 31.
[24] Case C-19/92, *Judgment of 31/03/1993, Kraus / Land Baden-Württemberg (Rec.1993,p.I-1663) (SVXIV/I-167 FIXIV/I-177)*, para 39-40.

This leads to the repetition of the previous observation, namely, this Directive merely codifies existing case law of the ECJ.[25]

2. 1. 3. Requirements Prohibited or Subject to Evaluation

The proposed Services Directive contains two lists of requirements that restrict the freedom of establishment and that must consequently be abolished.[26] It has been observed that all these requirements have already been identified as being restrictive by the ECJ. Moreover, the two lists do not contain all restrictions incompatible with the article 43 EC Treaty. Therefore private persons still can lodge complaints against Member States failing to comply to article 43 EC Treaty, as can the commission still open infringement procedures.[27]

Article 14 lists a number of authorisation requirements which are specifically banned since they are manifestly incompatible with the freedom of establishment. This is referred to as the *Black List*. There will be a requirement on the authorities for each Member State to screen their current legislation to see if these requirements are contained in existing legislation and if so, to delete them. Some of the elements included in the black list are nationality requirements,[28] requirements of proof of an economic need,[29] the practice of competing operators having a say in the granting of an authorisation and an obligation to source financial guarantees in the host country.[30]

Article 15, on the other hand, contains a list of requirements that are restrictive to the freedom of establishment, but may be justified on the ground that they are non-discriminatory, necessary and proportional. It is the duty of the Member States to identify such requirements and then evaluate them. If the former do not comply to the conditions laid out in the Directive, it is their obligation to abolish them.[31] This is referred to as the *Grey List*, and it includes quantitative or territorial restrictions,

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[25] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[26] Art. 14 and 15 Draft Services Directive.
[27] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[28] Already identified as a prohibited requirement in Case C-114/97, *Commission v. Spain*, ECJ 29 October 1998, para 31; and in Case C-62/96, *Commission v. Greece*, ECJ 27 November 1997, para 18.
[29] This means that a business can only enter the enter the market if there is a demand for the service provided, and this demand cannot be satisfied by existing providers.
[30] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.
[31] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".

requirements which restrict access to particular types of providers, fixed minimum or maximum tariffs or prohibitions with regard to below cost selling.[32]

A number of *de facto* restrictions on the number of providers subsist in Malta, particularly in areas such as education provision, wholesale and retail of fuels, beach concessions, transport services, open markets, amongst others. Decisions to grant licenses are often made in a non-transparent manner, because no formal policy has yet been developed. It is foreseen that such quantitative restrictions may not be easily justifiable in terms of the grey list of the Directive.[33]

It's worth noting that in spite of the black list not allowing the imposition of proof of economic need on a service provider, the grey list allows restriction of business authorization on the basis of quantitative and territorial limitations. This would be of special importance to Malta, which can make strong arguments in this regard in view of the very small size of its market. Then again, quantitative and territorial restriction on the number of service providers cannot make any discrimination on the basis of nationality, nor on any of the items on the black list. Moreover, they would have to be shown to be necessary and proportional, in terms of not being substitutable by less stringent measures.[34]

As regards the likely impact that these provisions could have in Malta, with reference to its particular economic features, two scenarios are envisaged. One arises out of the opportunity for business providers from other EU Member States setting up a permanent presence in Malta. The other concerns the possibility of Maltese service providers setting up business in other EU Member States. The former may bring a challenge to quantitative restrictions in some sectors, ranging from the wholesale and retail of fuel to the opening of catering establishments to the operation of funeral services, which cannot be easily justifiable in terms of necessity and proportionality in a straightforward manner. This would be more likely to offer a venue for new business registration to local operators rather than to foreign ones. As regards the latter likely impact, the opening of services business by Maltese nationals in other EU Member

[32] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.
[33] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina, 12.
[34] *Ibid*, 10.

States is expected to have a minor impact, although it may, to some extent, be abetted by the provisions of the Directive which allow for a simplification of business procedures and the elimination of discrimination on a nationality basis.[35]

Another issue which arises when assessing the impact that the Proposed Directive is likely to have on the Internal Market generally, and also specifically in Malta, is the effectiveness and desirability of the imposition of authorization requirements on firms establishing a permanent presence in Malta. Since the former could be competing with firms selling the same services across national borders and registered under a less strict regime, firms established in Malta could be placed at a competitive disadvantage, both in the local market as well as in their attempts to sell across borders. It has therefore been remarked that it would make sense to limit strict authorization requirements to those firms which, by the nature of their business, must establish a permanent physical presence in Malta. *"Such requirements can be easily by-passed and would indeed introduce market distortions in the case of services which can be easily sold across borders."*[36]

2. 2. Abolishing Barriers to the Free Movement of Services

Chapter 3, entitled 'Free Movement of Services' is the second major arm of the proposed Services Directive. In many services, pure 'cross border' provision is impossible, and some temporary movement of staff is necessary, though a company may not wish to establish in that country.[37] The provisions in this chapter aim at eliminating obstacles to the cross border provision of services by establishing:

- the country of origin principle;
- rights of recipients of services;
- assistance for recipients;
- assumption of healthcare costs; and
- specific provisions on the posting of workers.

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[35] *Ibid*, 13.
[36] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina, 13.
[37] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.

2. 2. 1. Country of Origin Principle and Derogations

The central principle behind the directives' efforts to facilitate the cross-border trade in services is recognition of the *country of origin principle*. This principle, which has existed for some time for goods, means that Member States would be required to respect only the rules and regulations of their country of establishment without being subject to other Member States' rules each time they crossed a border. The same will now be true for services. The hope is that this will allow companies to provide services to consumers/businesses in numerous countries without having to know the detailed regulatory requirements of each country.[38] It has been commented that this is "by far the most controversial" feature of the Directive "certainly in the areas of health care and service of general economic interest".[39]

It is important to note that this provision is only applicable to the cross-border supply of services without establishment in the country of destination. Providers are only those who provide a service as referred to in Article 50 EC Treaty, while establishment as referred to in Article 43 EC Treaty is covered by a different chapter under the Directive.[40]

The principle has an exhaustive list of derogations that are generally based on two considerations, the *acquis communautaire* and the disparity between national regimes. The first consideration is a logical consequence to attain coherence with the existing *acquis*, such as existing regulations on posting of workers[41] and transport of waste.[42] For the other consideration, too wide a divergence in national approaches or insufficient Community integration prevents proper application of the country of origin principle. This concerns, *inter alia*, water distribution services, postal services, electricity and gas. This also concerns a general derogation based on public policy, public security or public health.[43]

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[38] *Ibid.*
[39] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[40] *Ibid.*
[41] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, *O.J.* 1997, L 018.
[42] Regulation (EEC) No 259/93 of 1 February 1993 on the supervision and control of shipments of waste within, into and out of the European Community, *O.J.* 1993, L 030.
[43] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".

It is hereby useful to observe that there a number of industries/activities which do not have derogations to the directive in its totality, but which do have derogations to the country of origin principle. These are network type industries, the temporary posting of workers, lawyers' freedom to provide services and the recognition of professional qualifications.[44]

Notwithstanding the controversiality of this principle, the ECJ has already ruled in its favour. In *Webb*[45] the ECJ ruled that a license acquired in the country of origin to provide manpower cannot be required again by the country of destination. On a more general note the Court held that:

> *"[i]n the absence of harmonization of the rules applicable to services, or even of a system of equivalence, restrictions on the freedom guaranteed by the Treaty in this field may arise in the second place as a result of the application of national rules which affect any person established in the national territory to persons providing services established in the territory of another Member State who already have to satisfy the requirements of that State's legislation."*[46]

Yet, it has been observed that this is not yet fully the country of origin principle, as the country of destination can still impose requirements in so far as the public interest safeguarded by that requirement is not safeguarded by the rules to which the service provider has to comply in the Member State in which he is established.[47] Two remarks have been made. Firstly, the ECJ deems the requirement only justified on basis of the public interest, which also constitutes a derogation on the country of origin principle. Consequently, the exception that the ECJ makes on its country of origin principle is the same as the derogation on the country of origin principle of the Directive. Secondly, even if the ECJ allows additional requirements on the service provider in the country of destination, the country of origin principle in the Directive is barely a matter of trust between Member States. It is a matter of trust in the legislation of the Member State of

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[44] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.
[45] C-279/80, *Judgment of 17/12/1981, Webb (Rec.1981,p.3305) (SVVI/00265 FIVI/00275 ES1981/00913).*
[46] Case C-288/89, *Judgment of 25/07/1991, Stichting Collectieve Antennevoorziening Gouda / Commissariaat voor de Media (Rec.1991,p.I-4007) (SVXI/I-331 FIXI/I-343)*, para 12.
[47] Case C-355/98, *Commission v. Belgium,* ECJ 9 March 2000, para 37.

origin, and as there is a derogation on public policy, security and health, little has to be feared that service providers may be subject to 'rogue' legislation.[48]

Many lobby groups have reacted rather strongly against the country of origin principle, specifically as regards its application on health services due to its potential to affect Member States' control of health and social services, responsibilities that are currently largely outside EU competence.[49]

An example of the effects in Malta of the concept of the country of origin comes from architectural services, where Maltese regulations imply the highest period of responsibility for the work of an architect among the EU Member States. While this may imply a competitive advantage for Maltese architects which would be providing the longest period of "guarantee" for their work, it may also put them at a disadvantage in terms of their work liabilities when competing in the EU Single Market. Another impact this principle would have in Malta is that tax provisions for schooling and similar measures, including stipends paid to Maltese nationals, which may be contemplated will have to be extended to services providers in other EU member States.[50]

2. 2. 2. Rights of Recipients of Services

All of the measures described this far relate to service providers. Yet, it is also many services recipients – consumers or businesses – that face restrictions in their ability to access services, and a rightly tackled by the Directive. Often these assume the form of blanket bans on access to a service based on a consumer's nationality.[51]

The proposed Directive deals with these failings by banning restrictions on access to a service based on a person's nationality or place of residence. It also bans the requirement to get authorisation from a national body to access the services and outlaws discriminatory provisions for tax deductions/financial assistance on the basis of

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[48] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[49] www.thelancet.com Vol 364 October 2, 2004.
[50] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina, 16.
[51] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.

the nationality of the service providers. While different prices can be applied to different nationalities, this must be done for objective economic reasons. The directive also requires member states to provide information to their own citizens who are buying services abroad on various aspects of consumer rights in other EU countries.[52]

The specific issue of health care is also dealt with in the directive. A patient should be allowed to access non-hospital care and be reimbursed by the social security system of their home country at the same price as existed in the home country. Authorisation will not be required for non-hospital care. While authorisation may be required for hospital care, it cannot be refused if the procedure would have been supplied in the home country, and if it is medically justifiable given the delay in accessing treatment in the home country.[53]

2. 2. 3. Posting of Workers

The directive stipulates that workers who are posted to another member state for a period will be employed under the employment law of the country in which they are posted. It will be up to the government of that country to enforce employment law with respect to that worker. Further, the member state in which the worker is posted will not be allowed to seek prior authorisation or declarations for the posting of workers, nor will they be allowed to insist on an obligation for the company posting the worker to have a representative in the Member State, or to hold any relevant employment documents in the country of posting.[54]

There will be an obligation on the member state of origin to ensure that the service provider furnishes all necessary information on the worker to the relevant authorities in the country where she is posted on request. It also calls for Member States to co-operate to ensure that relevant employment law is adhered to.[55]

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[52] *Ibid.*
[53] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.
[54] *Ibid.*
[55] *Ibid.*

The rules of free movement also extend to non-EU workers, allowing workers who are legally employed in one member state to be posted to another member state without having to obtain further authorisations such as a work visa.[56]

In the case of the Maltese market which is already relatively saturated and somewhat insular, it is unlikely that cross-border flow of services would increase in any substantial manner in view of these provisions. It is to be further borne in mind that business flows which would be enabled could flow both ways, resulting in more service imports but also service exports.[57]

2. 3. Establishing Mutual Trust between the Member States

This third pillar of the proposed Directive demarks the venues through which mutual trust between Member States may be established. These can be summarised as follows:

- harmonisation of legislation;
- stronger mutual assistance;
- promoting the quality of services; and
- codes of conduct at community level.

2. 3. 1. Protecting the Quality of Services

Provided that companies will be allowed to supply services on a cross border 'country of origin' basis, it is important that trust is built up regarding the adequacy of each country's protection for consumer's rights on alien service providers. The Directive therefore proposes a number of ways that confidence in the quality of cross-border services could be enhanced. Particularly, the Directive supports the concept of independent certification bodies and quality charters to improve certainty for customers as to service quality. Thus, the Directive sets out the goal of co-operation between Member States and the Commission is drawing up community wide codes of conduct.[58]

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[56] *Ibid.*

[57] Malta Ministry for Competitiveness and Communications, Consultation Document, 'The Impact of the Proposed EU Directive On Services In the Internal Market On Malta', Lino Brigulio and Gordon Cordina, 16.

[58] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.

The Directive stipulates that service providers must freely provide a wide range of information to their consumers, relating to a range of issues from price, nature of the service, applicable laws, after sale service, the nature of any relevant authorisation scheme, professional regulations and means of legal redress. Further, Member States have a responsibility to ensure that this information is provided in a clear way.[59]

If a service poses a safety or financial risk to customers, a service provider must be covered by appropriate insurance, as dictated by the service users' national laws.[60] Any total prohibition on advertising in the regulated professions is banned, though regulation is allowed if it relates to the independence, dignity and integrity of the profession as well as professional secrecy. The Directive also sets out in detail the requirements of Member States to assist each other in ensuring that service providers are adequately supervised and that information on service providers is available in a timely manner.[61]

It has been commented that *Article 31* of the proposed Directive is "*fatally flawed*" in that Member States only have to *encourage* their providers, and the providers should act on a *voluntary* basis. Moreover, the Directive fails to contain provisions relating to the norm of quality that is left over to independent bodies or to the service providers collectively. On the other hand, *Article 33* of the Directive, obliging Member States to supply, upon request, all information on criminal convictions and decisions concerning insolvency or bankruptcy involving fraud of the service provider, has been viewed favourably. [62]

Further criticism lies in that all the provisions hereunder are rather vague. Minimum quality norms and minimum qualification requirements are left out. In this regard it has been remarked that "*in practice Member States will be forced to cooperate more closely, and this Directive can be used as a legal basis for that, but the Directive itself does not really entice Member States to do so. It can be asked whether these provisions suffice to enhance the mutual trust between Member States*".[63]

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[59] *Ibid.*
[60] Art 27 Draft Services Directive.
[61] Ronnie O'Toole, The Services Directive, An initial Estimate of the economic Impact on Ireland. 28th Feb 2005.
[62] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[63] *Ibid.*

2. 3. 2. Codes of Conduct at Community level

Member States are required to ensure that monitoring and supervision provided for in national law are also exercised on its service providers in another Member State where provision of services is concerned.[64] This does not mean that Member State has to effectuate a factual control, this will be performed by the local authorities where the service provider is operating. This obligation of supervision has his greatest importance in the country of origin principle, as this concerns the freedom of services. A Member State shall after all remain competent to control establishments on its territory, as service providers that establish themselves still have to comply to the national legislation on establishment.[65]

In order to attain effective control on service providers abroad, mutual assistance between Member States is of the utmost importance. Information on service providers must be exchanged quickly and efficiently. Also Member States should carry out investigations on request of another Member State, to check out rogue service providers, or check whether the provider really has an establishment, or only has a letter box firm. To that end an extensive electronic network must be created, that not only can be accessed by the Commission and the Member States, but also by the competent authorities of the Member States.[66]

In the case of a lawless establishment the host Member State is allowed to take counter measures, but has to inform the other Member State of the action taken. In the case of a service provider moving temporarily to another Member State, that Member State is allowed to conduct checks and inspections if those are not discriminatory and objectively justified. Should that Member State have the opinion that the behaviour of the service provider falls under a derogation of the country of origin principle, then it should first notify the Commission and the Member State of origin before taking any measures against the service provider. Unless in urgent cases, there has to be a gap of fifteen working days between the notification and the measure taken.[67]

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[64] Art. 34 Draft Services Directive.
[65] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".
[66] Art. 35 and 36 Draft Services Directive.
[67] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".

The Member States are also under the obligation to draw up codes of conduct at Community level. The purpose is that the rules relating to regulated professions and the rules of ethics and conduct of those regulated professions converge, as should the rules relating to the activities of estate agents.[68] The Commission for her part has the obligation to assess further harmonisation, in particular for cash-in-transit, gambling and judicial recovery of debts. In addition the need for further harmonisation in the field of consumer protection should be assessed.[69]

[68] Art. 35 and 36 Draft Services Directive.
[69] Batist Paklons, "The Proposal for a Directive on Services in the Internal Market".

CHAPTER III

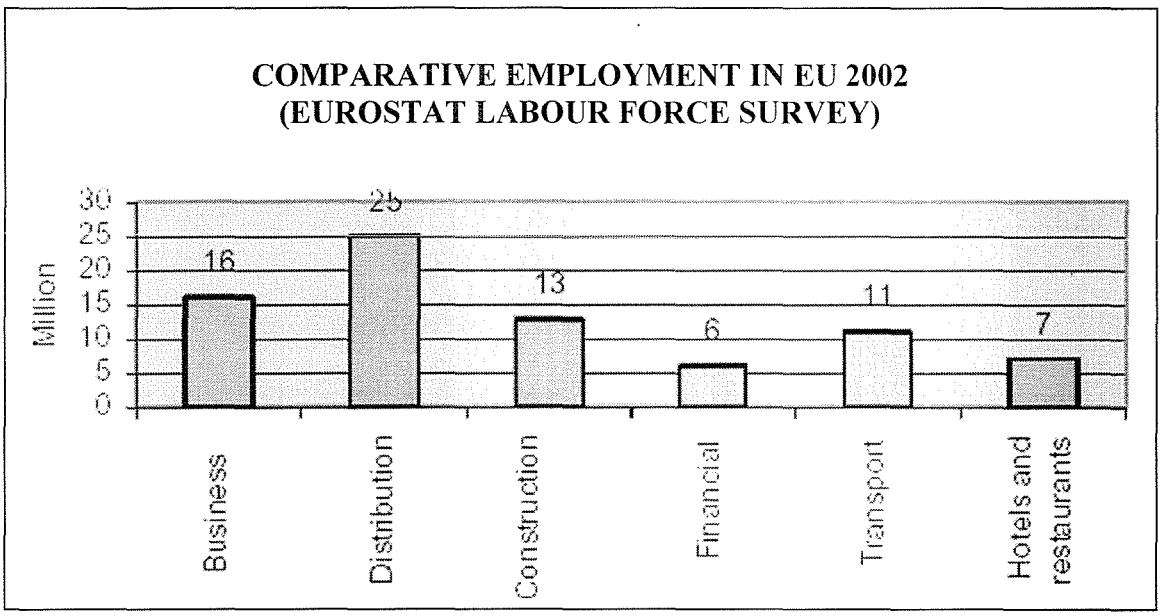
THE IMPACT OF THE PROPOSED SERVICES DIRECTIVE ON EMPLOYMENT

In this Chapter the reverberations of the Proposed Services Directive on employment will be examined. In the first part of this Chapter the economic and social implications of the Services Directive will be analysed. This will be followed by a legal critique of the Services Directive that will evaluate the impact of the Directive on employment law and in cross-border service provision.

3. 1. Economic and Social Impact

Ostensibly, Europe has moved away from the industrial era and, it is fair to say that it is the services 'industry' that now dominates this part of the world. The proliferating manufacturing plants that characterized that era are long gone in the modern economy of the EU. It is no understatement to say that in the Europe of today it is the services industry that is omnipresent. Figures speak for themselves. In terms of employment, services accounted for 116 million jobs in the EU in 2002, representing 68.1% of the active workforce, with wholesale and retail distribution registering 25 million jobs (14.6%; see Graph below).[1] Nevertheless, there is a telling divergence amongst the various member states of the degree of dominance that the services industry has within each of the members' workforce.

[1] COM(2004)2 final, Extended Impact assessment of proposal for a directive on Services in the Internal Market, 7.



Source: Commission of the European Communities[2]

It has resulted, following a thorough extended impact assessment carried out by the Commission, for the accession countries, the services sector accounts for a lower proportion of employment of the working age population compared to the EU, at less than 60% for the majority of these countries. Yet, it has also come to the fore that Malta and Cyprus stand out as having as high a proportion of their economy devoted to services as existing EU members.[3]

The Commission came to the final observation that *"despite the current dynamism of the services sector, it is clear that there is considerable untapped potential for growth in services, allowing for considerable further leverage in terms of employment and competitiveness."*[4] The economic evidence, resulting from the extended impact analysis it carried out, shows that the current state of fragmentation of the Internal Market has adverse effects on trade and investment flows, on innovation and productivity and on consumer prices.[5]

In view of the above, the improvement of the Internal Market in services has been recognized as a key element of the programme to develop a sustainable and inclusive

[2] *Ibid*, 7.
[3] *Ibid*, 8.
[4] *Ibid.*
[5] *Ibid.*

economy.[6] In furtherance of the latter, the Proposed Directive on Services was drafted with the intention of creating a well-functioning Internal Market for a range of services accounting for almost 50% of EU GDP[7] and 63% of employment.[8] Hence, the Services Directive was envisaged as resulting in major benefits to the economy as a whole through removal of barriers to cross-border trade and investment and consequential improvements in innovation and productivity and increased competition.[9] Further, in view of the fact that services are relatively labour intensive and since service activities are the central source of job creation in the EU, it seemed likely that the resulting better functioning of the Internal Market for services would in turn give rise to significant new employment opportunities in the EU.[10]

In service enterprises that are suffering from low levels of productivity and are vulnerable to the pressures of cross-border competition: there is concern here that a better functioning Internal Market for services would lead to the loss of jobs. However, enterprises that are only surviving by passing on their relatively high costs to consumers in the form of higher prices are fuelling inflationary pressures that dampen GDP and adversely affect the employment market in general. The current legal and administrative complexity both restricts cross-border demand and prevents firms from responding quickly and in an innovative manner to new opportunities. Thus, the removal of these barriers should result in the growth of a new more dynamic and innovative EU service economy. This is the view supported by the author.

SMEs should benefit in particular, improving their survival rate and, therefore, the durability and sustainability of employment. At the same time, a more predictable and transparent legal framework resulting from administrative simplification will reduce the attraction of the undeclared economy and, consequently, lead to improvements in employment quality.[11] The Commission claimed that there is no evidence to suggest that the increased opportunities for posting of workers would give rise to net decreases

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[6] *Vide* European Commission: Annual Policy Strategy for 2003, SEC(2002) 217/9, Brussels, 27/02/02.
[7] *Vide* section 7.1.1 on the scope of the Directive.
[8] Calculations by Commission services from Eurostat and business data for GDP (2000).
[9] Overcoming low geographic mobility is one of the three main challenges identified in the Commission's Action Plan for skills and mobility, 13.2.2002, COM(2002)72 final. Improving the Internal Market in services is one of the 25 key actions in the Plan.
[10] COM(2004)2 final, Extended Impact assessment of proposal for a directive on Services in the Internal Market, 36.
[11] *Vide* the Commission Communication on The future of the European Employment Strategy (EES), op cit. "Undeclared work affects all Member States in variable degrees and is usually connected with low quality jobs with little or almost no security to the job holders."

in levels of employment in host Member States. The reason being given for the former proposition is that the existing Community *acquis* prevents social dumping since it ensures that the minimum working conditions, including minimum salaries of the country to which the workers are posted, have to be respected.[12] Moreover, the Commission is of the view that *"the posting of skilled or white collar workers would help the process of job creation through the transfer of know-how into local markets which in turn is likely to raise productivity and investment levels. The promotion of innovation in services as well as other sectors is an important driver for improving competitiveness and standards of living."*[13]

In its final observation on the impact of the Proposed Services Directive, the Commission held that *"the change towards a system of authorisation and licensing based on objective and transparent criteria, and limiting the opportunity for incumbent operators to influence decisions, is in line with efforts to improve standards of governance and should widen the access of entrepreneurs from all backgrounds to the services economy."*[14]

3. 2. Legal Implications

Employment law in cross-border situations is presently regulated by different European regulations, namely:

- the Rome Convention which determines the law that applies to contractual obligations arising in cross-border situations and which contains a number of specific stipulations with regard to individual employment contracts;
- the Posting of Workers Directive which further defines Article 7 of the Rome Convention in respect of the applicability of certain particularly binding stipulations in the employment law of the host country; and

[12] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.
[13] COM(2004)2 final, Extended Impact assessment of proposal for a directive on Services in the Internal Market, 36.
[14] *Ibid.*

- Regulation 1408/71 in respect of the coordination of social security systems. This Regulation is also relevant in that it contains a number of stipulations in respect of the allocation of the statutory social security in cases of posting.[15]

It is hereby important to specify that it is imperative for the Services Directive to be neutral in respect of areas that are covered by European legislation and regulations, in view of the following:

- any changes in these areas must be assessed on their own merits and be the subject of an independent balancing of interests;
- the complexity of the decision-making process about the liberalisation of service transactions would be increased enormously if an attempt were made to use the Services Directive to regulate objectives other than the freedom of establishment and the freedom of service provision and the associated framework;
- the transparency of European legislation and regulations would be jeopardised if European rules inadvertently interfered with each other.[16]

In the light of the above, it is intended, in this section of the Chapter, to look at how the Services Directive takes these current regulations into account and whether the desired impartiality of the Services Directive in respect of these regulations is sufficiently assured.

As indicated by *Recital 58* of the Services Directive, the Directive *"does not aim to address issues of labour law as such."*[17] Moreover, in respect of employment law, *Article 17* of the Services Directive contains the following derogations from the country of origin principle:

1. the freedom of the parties to choose the law that applies to their contract (Article 17(20));

[15] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 118.
[16] *Ibid*, 48.
[17] Recital 58 Draft Services Directive.

2. aspects that are regulated in the Posting of Workers Directive[18] (Article 17(5)). The European Commission has explained that this concerns all matters that come under the Posting of Workers Directive. Hence, it does not only include the hard core of employment terms, but it also encapsules: the definition of the term 'worker' in the law of the host country; the conditions subject to which temporary employment agencies can hire out workers; and, in so far as Member States have expanded the scope of the Posting of Workers Directive to sectors other than the construction sector, also to the stipulations regarding the hard core of employment terms in generally binding stipulations in respect of these other sectors;[19]
3. the stipulation of Regulation 1408/71 regarding the applicable law (Article 17(9)).

The issue whether the neutrality of the Services Directive is sufficiently guaranteed by the clarification in recital 58 and the aforementioned derogations from the country of origin principle in *Article 17* of the Services Directive concern mainly *Article 6* of the Rome Convention in respect of the allocation of employment law in cross-border situations.[20]

The core stipulation of the Rome Convention is the fact that a contract is governed by the law the parties have selected.[21] Where no such choice has been made, *Article 6.2* of the Rome Convention devises a number of criteria for the allocation of the law that applies to the employment contract.[22] Yet, the parties' choice of law is curtailed by *Article 6.1* of the Rome Convention. This Article stipulates that the choice of law of the parties cannot result in the worker losing the protection he enjoys pursuant to the

[18] Directive 96/71/EC.
[19] Council document 11153/04, *Clarification of the services of the Commission regarding the specific interests in respect of making workers available, with special emphasis on Article 24,* Brussels, 5 July 2004, pages 3-6. The consolidated version of the Luxembourg Presidency proposes these matters be clarified in a number of additional recitals. See: Council document 5161/05, Brussels, 10 January 2005, p. 44 (recital 41b and 41c).
[20] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 124.
[21] *Convention on the law applicable to contractual obligations (consolidated version)*, *Official Journal,* C37, 26.1.1998, pp. 36-49.
[22] The first aspect to look at is the country where the worker usually performs his work activities, even if he has temporarily been posted to another country. If this cannot be established, the law of the country where the service provider is established applies, unless the combined circumstances show that the employment contract is linked more closely to another country, in which case the law of that country applies.

binding stipulations of the law that would apply to him according to the aforementioned criteria of *Article 6.2* of the Rome Convention.[23]

It can be inferred from *Article 7* of the Rome Convention that the host country can apply certain binding employment law stipulations to the employment contract, regardless of the law the employment contract is governed by, however it is not further specified what these binding stipulations may be. Partly to put an end to the legal uncertainty, the Posting of Workers Directive establishes a hard core of employment terms and conditions as mandatory law. The Posting of Workers Directive, with specific reference to *Recital 10* can therefore be regarded as the concretisation of *Article 7* of the Rome Convention.

It is hereby being observed that, contrary to other sections of the Rome Convention, this Article of the Rome Convention is not mentioned expressly in the Recitals. Neither is *Article 6* of the Rome Convention expressly excluded from the country of origin principle in *Article 17* of the Directive. Article 17(20) only excludes the right of the parties to choose the law that applies to their contract, that is, Article 3 of the Rome Convention.[24]

Consequently, by not expressly excluding *Article 6* of the Rome Convention from the application of the country of origin principle, the possibility exists that the Services Directive may interfere with the functioning of the Rome Convention and, in this way, still affect employment law, as this restricts the option to select the law of the host country as the law that governs the employment terms or elements thereof in incidental cases. This is relevant in cross-border situations in which the Posting of Workers Directive is not or no longer applicable.[25]

The Rome Convention also remains relevant in situations that do come under the Posting of Workers Directive.[26] For the hard core of employment terms and conditions the Posting of Workers Directive only stipulates that the mandatory law of the host

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[23] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 118.
[24] *Ibid*, 124.
[25] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 124. See also: Batist Paklons, "The Proposal for a Directive on Services in the Internal Market", Freedom to Provide Services – Conflict with Rome I and II.
[26] *Vide*: M. Houwerzijl, The Posting of Workers Directive. About the background, content and implementation of Directive 96/71/EC, Deventer 2005, pages 163-164.

country applies. For employment terms that do not come under this mandatory law, or that go beyond it, the country of origin principle may interfere with the functioning of the Rome Convention.[27]

From the above analysis it suffices that the desired neutrality in respect of the applicable law in cross-border situations is insufficiently guaranteed in the Services Directive. Commissioner McCreevy, too, feels that the text of the Services Directive must be watertight on this point.[28] His statement relates more specifically to retaining the functioning of the Rome Convention in respect of employment law: the Rome Convention must, in the future, continue to cover its current sphere of application. It has been therefore concluded by the Dutch advisor to Government that the Proposed Services Directive must ensure that the Rome Convention continues to apply in respect of employment contracts, obviously taking into account the specific stipulations in the Posting of Workers Directive with respect to posting.[29]

3. 3. The ongoing debate amongst Trade Unions

As was expected, the proposed Directive aroused a lively debate amongst trade union organisations. One can venture to say that this debate within the trade union sphere was *expected* for a number of reasons. Granted that services are essential to the smooth functioning of the European economy and have a considerable bearing in determining the well-being of the general public, the proposed Directive will undoubtedly also be impacting, directly and indirectly, upon employment - an area of interest that falls directly within the domain of trade unions.

The European Trade Union Confederation (hereinafter referred to as *ETUC*) has publicly declared that it supports, in principle, the proposal, albeit with a number reservations.[30] Succinctly, the ETUC believes that apart from being determined by a

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[27] *Vide* also: Council document 10542/04, *The application of the provisions of the Rome I Convention and the Rome II Draft Regulation in the light of the Draft Services Directive*, Brussels, 15 June 2004, p. 7: "The rule of Rome I giving priority to the law of the country where the worker habitually carries out work, is in accordance with Directive 96/71/EC. However, for questions not harmonised by the Directive 96/71/EC, the country of origin principle will apply as a result of the Draft Services Directive".

[28] Charlie McCreevy, *Statement of the European Parliament on Services Directive*, Strassbourg, 8 March 2005, Speeech/05/149, p. 3.

[29] Sociaal-Economische Raad, Advisory Report "The Directive on Services in the Internal Market', July 2005, 125.

[30] *Vide* – Press Release The ETUC position paper: The proposal for a Directive on services in the internal market, The ETUC is concerned inter alia by the so-called country of origin principle that sets down that

high level of social security, the development of the internal market must go hand in hand with sufficiently strengthened social protection and adequate workers' rights and working conditions embraced with a view to maintain social cohesion within the EU.

On the other hand, the ETUC went on record in stating that it recognises the major growth potential in terms of employment that the proposed Directive will bring about, especially in the future Member States.[31] The ETUC believes that this could help the Union to achieve the objectives set out in the Lisbon Strategy in 2000.[32] The ETUC welcomed the measures contained in the prospective Directive. It acknowledged that the measures contained in the Directive not only promoted the free circulation of services but also had the effect of making the internal market function more efficiently; measures that are in the interest of workers, companies and consumers alike.[33]

The *Union des Industries de la Communauté européenne*, hereafter referred to as UNICE, which is the voice of business in Europe, like the ETUC, broadly welcomed the proposed Directive. The UNICE felt that the establishment of a genuine internal market in services was long overdue and is a key part of the process of economic reform launched by the Lisbon European Council.[34] The UNICE supported the view, shared by the ETUC, namely that the creation of a strong services sector in Europe is crucial to attain the Lisbon objectives of increased growth and employment and that unnecessary administrative obstacles to cross-border trade in services are a serious restriction to Europe's economic development. The unions applauded the fact that these issues were being tackled.

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providers are subject only to the national provisions of their Member State of origin, In particular, there appears to be a real risk of abuses of competition in those areas that are not harmonised Europe-wide, with negative economic and social consequences in several sectors, just as turned out to be the case in the maritime transport sector following the choices in favour of so-called 'flags of convenience'. In actual fact, these types of measures would encourage service providers to move their headquarters to the EU Member States with the lowest tax rates and social and environmental requirements. The authorities in countries with high standards would then be under pressure to lower them, with negative consequences for the environment and social cohesion. The ETUC has taken the view that additional conditions are needed to prevent abuses, such as defining the country of origin in terms of the habitual residence of the enterprise and/or the place where its central administration is established or the place where the principal place of business is situated (for a similar approach see Article 4 of the 1980 Rome Convention on the law applicable to contractual obligations).

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*

[34] *Vide* Press Release dated 11 November 2004, *Services In The Internal Market: Adopt Improved Directive Rapidly To Help Fulfil Lisbon Promises.*

Like the ETUC, the UNICE gave its support to the proposed Directive with some reservations. The UNICE was concerned (like the ETUC) with the country of origin principle dealt with above.[35] They effectively fear a race to the bottom, although they cannot give sound economic or legal proof of such race happening.

The Trade Union Congress (TUC), on the other hand, have been quite adversary to the Services Directive suggesting that the Directive would create what it termed 'flags of convenience' across the whole of Europe, in every part of the service sector. According to the TUC, the Services Directive would undermine the very point of the European social model because, while aiming to remove obstacles to the trade in services, the Directive would have the effect that companies could effectively choose which country's laws to follow and whose enforcement regime to abide by.[36]

[35] *Ibid.*
[36] TUC calls for EU to take Services Directive 'back to the drawing board', 18th March 2005, http://www.tuc.org.uk/.

CONCLUSION

The field of *services* had been neglected for too long, until a bold statement of the EU Member States, to make the EU the most competitive and dynamic knowledge-based economy of the world, placed the field of services on the map of the Commission. It has been demonstrated in this dissertation, that this proposed directive mostly codifies the case law of the European Court of Justice. Unfortunately, it so also takes the defects of that case law over. Most notably, it fails to further specify what an economic activity is, and has only included consideration as remuneration, which would probably also have been done by the ECJ.

Summarily, the proposed Directive is divided in two main features, namely, the free movement of services and the freedom of establishment. The former is to be attained by the country of origin principle, meaning that the service provider is only subject to regulations of his State of origin. Yet, we have also seen that this principle has derogations, mostly on basis of coherence with the *acquis communautaire* and the general interest. It has been envisaged that this should encourage, among others, private persons to seek health care across the border.

With the aim of enhancing the rights of service providers to establish themselves, the Directive mainly follows general principles set out in case law. Whereas, the abolishment of requirements is entirely based on settled case law of the ECJ, the proposed Directive, in order to encourage service providers to establish themselves over the border, introduces an innovative point by imposing administrative simplification. Above all a single point of contact for the service provider ought to facilitate the establishment over the border.

A decisive feature to accomplish these goals is building mutual trust between Member States. The proposed Directive has been criticised of fall short of this aim, however. It is true that mutual trust will only be gained by further harmonisation and initiatives by the Commission.

The draft 'Bolkestein Directive', although conservative in its essence, has been met with a chorus of disapproval. During the debate, especially in the European Parliament,

three camps came into being: at one end of the spectrum there are those who support the Commission's text and in particular recourse to the country of origin principle to stimulate the liberalisation of the sector, and at the other end there are those who oppose it. Amid these two tendencies, others regard the main lines of the Commission's text as acceptable, but believe it needs to be reviewed and corrected in order to allow the country of origin principle to operate in practice.

An example of the anti-"Bolkestein Directive' group is the European Federation of Public Service Unions that stated, in an emergency resolution, "[t]*he draft Services Directive is the latest, and one of the most blatant, examples of competition taking precedence over social and environmental concerns.*"

At the other extreme, among businesses the climate is welcoming, with some chambers of commerce even accepting the proposal unconditionally. This, however, is the only lobby group in favour of the proposal. Consumer lobbyists also favour the proposal, but demand more consumer protection. Although the consumer has gained considerable advantages, mainly by forbidding service providers to discriminate against nationality of the recipient, some parts of the proposed Directive are considered detrimental to consumer protection, mainly on quality norms of the service, and on the need to further harmonise on consumer protection.

It is accentuated that behind these divergences there is a fundamental political problem: finding the balance between the need to open this sector up to competition and the need to preserve the European social model. Divisions over this complex issue go beyond the usual political and national rifts.

The Commission's proposal to apply the country of origin principle to obtain liberalisation of services in the EU is the subject of intense debate. It has been questioned whether this liberalisation of the market in services should be accompanied by prior harmonisation (or approximation) of the conditions for practising a profession. Hence, a decision needs to be taken on what should be the driving force behind this liberalisation: the country of origin principle proposed by the Commission, the principle of mutual recognition advocated by the German Social Democrat Mrs. Evelyne Gebhardt, rapporteur for this issue, the 'internal market clause' or indeed the

country of destination principle. As was previously seen in Chapter 3, the lobby group most against the country of origin principle are the trade unions.

A last lobby group, with numerous advocates, is the health care sector. Writing in *The Guardian* of 20 January, David Rowland argued that the Directive posed a threat to the British health care system: *"The directive is controversial because it applies the same rules to healthcare and social services as it does to estate agents, fairground providers, advertising companies and private security firms. The commission no longer sees the services provided by doctors to patients as a special public good to be enjoyed by all citizens, but as an "economic activity", a commodity to be traded across the EU much like any other."*

Notwithstanding that many plead in favour of excluding health care altogether from the scope of the proposal, this seems useless, as the Directive does little less than codifying ECJ case law. Only in the case of reimbursement of costs does the Directive go slightly further than the ECJ, if only by extending the ECJ case law to non-hospital care.

It has been substantiated, throughout this study, that the field of services is huge and all-encompassing. Hence, the full impact of this Directive cannot be assessed but by the passing of time. It is questionable if its implications will already become apparent at the deadline for the Lisbon Declaration, being 2010. In my opinion the proposed Services Directive will have a great impact on the entire market, considering that services are most important to it. Moreover, I believe that this Directive will certainly contribute to the emergence of a common market in Europe, thus giving the European idea further form.

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