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ON THE PROPOSAL FOR A DIRECTIVE ON SERVICES IN THE INTERNAL MARKET

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2. Treaty provisions

A central feature of the freedom to provide services in the internal market is that the provision of services usually involves *employees* of the service provider crossing borders to perform the services. *In practice*, therefore, the free movement of *services* shares many characteristics with the free movement of *workers*.

A starting point of principle in this respect is Article 50(3) of the EC Treaty : "…the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*."

A second point of principle concerns the rules that Member States are *permitted* to apply to restrict the cross-border provision of services. Justifications for a restriction of the freedom to provide services may include consideration of fundamental rights or freedoms.

The principles of the proposed directive on the free movement of services might clash with the principles governing the free movement of workers. A primary principle governing the free movement of workers is equal treatment and non-discrimination on grounds of nationality. The principle of equal treatment is extended to nationals of third countries by the EU Charter of Fundamental Rights 2000, Article 15(3).

The proposed Services Directive asserts, instead, the "country of origin" principle (Article 16). In practice this might frequently result in situations similar to discrimination. The "country of origin" principle is premised on unequal treatment of workers on grounds of nationality and thereby conflicts with the principles enshrined in Article 39(2 and 3)(c) EC and Article 7 of Regulation 1612/68. The proposed Services Directive should respect the fundamental principle of equal treatment in the *acquis communautaire* as regards conditions of work applicable to migrant workers, posted workers (Directive 96/71/EC), and (under a proposed Directive) agency workers. All identify the applicable conditions of work as those in the host country. The proposed Services Directive's insistence on conditions of work in the country of origin is at odds with this *acquis*.

3. The present legal situation

Firstly, Directive 96/71/EC specifies minimum terms and conditions of employment which must apply to workers posted to the host country.

Secondly, according to the Rome Convention on the law applicable to contractual obligations (Rome I), if the posted worker is temporarily working in the host country and habitually carries out work in that Member State, the rules of that host State apply to regulate the individual employment relationship. Again, if the employee does *not* have any country where he habitually works, the rules of the host country may still apply if he is still more closely connected with that country.

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4.1 The "country of origin" principle and labour law

The proposed Services Directive restricts Member States' labour law where the employee does not habitually work in his country of origin: Rome I allows for host country labour law to apply; the "country of origin" principle dictates the opposite conclusion.

The "country of origin" principle completely alters the underlying assumption of Directive 96/71/EC. It transforms it from a Directive providing a *minimum* of employment protection in the host Member State to one specifying the *maximum* protection available to employees.

4.2 The "country of origin" principle and the *acquis communautaire*

The "country of origin" principle in the proposed Services Directive brings it into direct conflict with important parts of the *acquis communautaire* of EU labour law and raises difficult problems of interpretation: Directive 91/383 on health and safety, Directive 80/987/EEC on protection against insolvency, labour standards allowed by directives on public procurement and the directives on recognition of professional qualifications. It threatens to come into conflict or, at least, create considerable difficulties for EU recognition of collective agreements, rules on transfer of undertakings (privatisation and outsourcing of services), fixed-term workers and the fundamental collective rights guaranteed by the EU Charter.

It is recommended that Article 17(5) be deleted and replaced by a provision stating that the law applicable to employees of service providers is Directive 96/71/EC, the Rome Convention and relevant Community and national labour law.

4.3 Problems of surveillance and control of labour standards

The proposed Services Directive assumes that implementation and enforcement of the law can be completely separated from its material content. The Commission claims that its intention is to improve administrative cooperation in order to facilitate enforcement. There would be serious grounds for doubting that this will be the effect of the proposed changes. This is because *national* machinery of enforcement is being required to control the application to employees on its territory of *non-national*

("country of origin") labour law standards governing employment. The problems inherent in this proposal include increased complexity, reduced transparency, confused application of EU labour law and conflicts with the *acquis comunautaire*. There are very strong arguments for close scrutiny of any attempts to deprive Member States of the necessary tools of implementation and enforcement of labour law rules and employment standards, as proposed by the Directive.

4.3.1 Prior Declarations

Prior declarations by service providers are simply a basic mechanism for any effective control of employment standards. Abolishing prior declarations only serves those seeking to avoid any controls. Contrary to the proposal, an obligation to make prior declarations should be imposed particularly on sensitive sectors, such as construction, the cleaning industry and transport.

4.3.2 Employment Documents

The Commission proposes to restrict control mechanisms by providing that Member States are no longer entitled to require employment documentation to be held in their territory and retained in accordance with the conditions applicable there. Yet reliable and effective control of labour standards requires that documents showing at least the working conditions applicable, hours worked and wages paid are immediately, without the need for requests via authorities in the country of origin, available on the spot. A requirement that Member States must obtain documents from the authorities of the country of origin simply weakens controls.

4.3.3 Representatives

The proposed Service Directive introduces a prohibition for the Member States to require that a foreign service provider must have a representative in its territory (Article 24 (1) c).

There are however in many cases good reasons to request the presence of a representative. The Swedish-Danish model, in particular, requires the practical possibility of a real representative. Such an obligation is, moreover, perfectly natural in other Member States as well. It does not require a full time person on the spot, only that there is a responsible person appointed to undertake the responsibilities of the service provider as the employer.

Article 24 of the proposed Services Directive ("specific provisions on the posting of workers") undermines the effectiveness of essential mechanisms foreseen in Directive 96/71/EC that are needed to secure the implementation and enforcement of obligations relating to employment and working conditions. It should be deleted.

To the extent that greater specification of the obligations of the State of origin of the service provider is needed in the context of posting, this can be achieved by introducing any such specifications into the Posting Directive 96/71/EC.

The proposed Services Directive should include an explicit clause stating that it does not in any way restrict the fundamental rights of freedom of association, freedom of negotiation, to take industrial action and to conclude collective agreements.

6. The regulatory environment for the free movement of services: labour and social aspects

The background of greater diversity in wage levels and income within a European Union comprising 25 Member States makes it important to assess the rules of the proposed Service Directive against the background of the far-reaching freedom of establishment in EC law, evident in the *Centros* case.

In order to sustain a Social Europe, it is essential that social and labour law aspects are taken into account in a realistic way in the proposed Services Directive which introduces regulation that has an indirect but strong impact on employees. The current proposal lacks such a realistic approach. It should be amended to reflect the requirements of national labour law systems and the *acquis communautaire*, and the exigencies of social and labour protection in the internal market.

1. Introduction

This paper[1] analyses the labour and social law implications of the proposed Services Directive[2]. In particular, it addresses the compatibility of the proposed Services Directive with EU legislation including the Posting of Workers Directive,[3] the Directives on Public Procurement,[4] Regulation 1408/71 and pending proposals for Directives on the Recognition of Professional Qualifications[5] and on Temporary Agency Work.[6]

2. Treaty provisions

The proposed Directive aims to enhance and guarantee the freedom to provide services in the internal market in accordance with the EC Treaty. Its underlying assumption is that barriers at the national level cannot be removed solely by relying on the direct application of Articles 43 and 49 of the Treaty. Comprehensive secondary legislation is needed.

A central feature of the freedom to provide services in the internal market is that the provision of services, in contrast to free movement of goods, usually involves *employees* of the service provider crossing borders to perform the services. *In practice*, therefore, the free movement of *services* shares many characteristics with the free movement of *workers*. Whatever the parallels in practice, from the *formal legal* viewpoint, as confirmed by the European Court of Justice (ECJ), the freedoms affecting services and workers are analytically quite distinct:[7]

> "The Court has held that workers employed by a business established in one Member State who are temporarily sent to another Member State to provide services do not, in any way, seek access to the labour market in that second state, if they return to their country of origin or residence after completion of their work".

[1] I thank Professor *Brian Bercusson* for valuable help in preparing this paper. *Lena Maier,* LLD and the researchers *Jari Hellsten, Claes-Mikael Jonsson and Maija Sakslin* have also contributed considerably. The usual disclaimer, of course, applies.
[2] COM (2004) 2/3 final.
[3] Directive 96/71/EC.
[4] Directives 2004/17/EC and 2004/18/EC.
[5] COM (2002) 119 final.
[6] Amended proposal, COM (2002) 701 final.
[7] *Finalarte*, Cases C-49-50/98, C-52/98, C-54/98, C-68/98 and C-71/98 p. 22.

It is essential, however, whatever the *formal legal* analytical distinction, to take into account the fact that, *in practice*, the movement of *workers* is a feature of cross-border *service* provision in the internal market even if not the central one. A starting point of principle in this respect is Article 50(3) of the EC Treaty (italics added):

> "…the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions as are imposed by that State on its own nationals*."

A second point of principle concerns the rules that Member States are *permitted* to apply to restrict cross-border provision of services:[8]

> "[The freedom to provide services]… as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements related to the public interest and applicable to all persons and undertakings operating in the territory of the 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".

Justifications for a restriction of the freedom to provide services may include consideration of fundamental rights or freedoms.[9] This is noted in the Preamble to the proposed Services Directive:[10]

> "In addition, any restriction of the freedom to provide services should be permitted, by way of exception, only if it is consistent with fundamental rights which, as the Court of Justice has consistently held, form an integral part of the general principles of law enshrined in the Community legal order."

An assessment of the proposed directive on the free movement of services in light of the fundamental principles of EC law is rather complicated. It classifies the subject matter in the formal sense as the free movement of services, not workers. Yet services are mostly provided by workers and this cannot be overlooked when analysing the concrete interpretation of the Treaty as a whole, a Treaty for the Union that shall "promote economic and social progress and a high level of employment and

[8] *Arblade*, Case C-369/96, para. 34,
[9] Case C-36/02, *Omega*.
[10] Recital 40.

achieve balanced and sustainable development" through amongst other things "the strengthening of economic and social cohesion".[11]

The principles of the proposed directive on the free movement of services might conflict with the principles governing the free movement of workers. A primary principle governing the free movement of workers is equal treatment and non-discrimination on the grounds of nationality. The principle of equal treatment is extended to nationals of third countries by the EU Charter of Fundamental Rights 2000, Article 15(3).

The proposed Services Directive asserts instead, as a main rule, the "country of origin principle" (Article 16). In practice, this might frequently result in situations similar to discrimination, direct and indirect, based on the nationality of the employees. The country of origin principle is premised on unequal treatment of workers on the grounds of nationality and thereby conflicts with the principles enshrined in Article 39(2 and 3)(c) EC and Article 7 of Regulation 1612/68. The proposal also seems to conflict with other initiatives being considered at the EU level which reflect fundamental principles, including equal treatment. The proposed Services Directive should respect the fundamental principle of equal treatment in the *acquis communautaire*.

Workers moving from one Member State to another encounter different working conditions, laid down in legislation, collective agreements and other legal sources. The fundamental principle of equal treatment regardless of nationality means that workers are entitled to the same terms and conditions regardless of nationality. Workers are entitled to equal treatment under the laws of the host Member State.

The proposed Services Directive seems to prescribe the reverse of equal treatment: employees of service providers moving to another Member State are *not* entitled to equal treatment, but are subject to the principle that they are governed by the rules of their country of origin.

The anomaly is evident when comparing migrant workers with those migrating under the shadow of a service provider. The former are entitled to equal treatment, the latter are not.

The principle of equal treatment, non-discrimination, is rooted in the *acquis* of EU labour law. It is manifest in numerous directives on sex discrimination, on discrimination on other grounds, and in the case of

[11] Treaty on the European Union, Article 2.

different categories of workers (part-time workers, fixed-term workers and tele-workers).

The proposed Services Directive proposes a shift in principle with this established *acquis* by explicitly allowing different conditions to apply to workers doing the same work - on the grounds that they are employed by service providers subject to the law of their country of origin.

3. The present legal situation

The potential impact of the proposed Services Directive may be appreciated by comparing it with existing principles established in EU law.

Firstly, Directive 96/71/EC applies a specific social policy to workers posted within the framework of free movement of services. Directive 96/71/EC specifies minimum terms and conditions of employment, which must apply to workers posted to the host country. Further, the employer is obliged in general to observe the host country's labour law provisions having a public policy character[12] and that Member State's public law regulations.

The limit to application of the labour law of the host Member State is that it cannot require service providers to pay "double":[13]

> "National rules which require a service provider… to pay employers' contributions to the host Member State's fund, in addition to those he has already paid to the fund of the Member State where he is established, constitute a restriction on freedom to provide services".

Secondly, the Rome Convention on the law applicable to contractual obligations (Rome I) provides that the contract of employment is governed:[14]

> "(a) by the law of the country in which the employee habitually carries out his work in performance of the

[12] Article 3(10) gives the Member States an option to apply such provisions.
[13] Case C-369/96, *Arblade*. See also, however, Declaration No. 7 attached to the Council minutes when the Directive was adopted 20.9.1996, file No 00/0346 SYN, ADD 1.
[14] Article 6(2).

contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country in which case the contract shall be governed by the law of that country".

Therefore, if the posted worker is temporarily working in the host country and habitually carries out work in that Member State, the rules of that host State apply to regulate the individual employment relationship. Again, if the employee does *not* have any country where he habitually works, the rules of the host country may still apply if he is still more closely connected with that country. However, in certain cases, the applicable law may instead be that of the country where the place of business of the employer is situated.

Finally, as regards social security, there are different rules. The starting principle of the coordination of social security systems is that only the rules of one specific Member State apply.

To summarise: first, in general, the labour law of the *host country* applies, with possible exceptions according to the Rome Convention. Secondly, labour law requirements which restrict the free movement of services may be justified on public policy grounds, but only where they satisfy the "proportionality" principle: the labour law rules must be necessary to protect the interests they are intended to guarantee, and only in so far as those objectives cannot be attained by less restrictive measures.

4. The labour law aspects of the proposed Services Directive

4.1 The "country of origin" principle and labour law

The proposed Services Directive and Member States' labour law

The proposed Directive purports not to "address labour law as such". It asserts that it is only "abolishing certain disproportionate administrative procedures, while also improving the monitoring of compliance with employment and working conditions in accordance with Directive 96/71/EC".[15] However, the very next recital of the Preamble to the proposed Directive states (italics added):[16]

> "In order to avoid discriminatory or disproportionate administrative formalities, which would be a disincentive to SMEs in particular, it is necessary to preclude the Member State of posting from making postings subject to compliance with requirements such as an obligation to request authorisation from the authorities. The obligation to make a declaration to the authorities of the Member State of posting should also be prohibited. However, it should be possible to maintain such an obligation until 31 December 2008 in the field of building work in accordance with the Annex to Directive 96/71/EC. In that connection, a group of Member State experts on the application of that Directive are studying ways to improve administrative cooperation between Member States in order to facilitate supervision. Furthermore, as regards *employment and working conditions other than those laid down in Directive 96/71/EC, it should not be possible for the Member State of posting to take restrictive measures against a provider established in another Member State."* (ital. NB)

In this connection it is also worth noting that the proposed Directive contains an Article 19, which states that a Member State can take case-by-case derogatory measures in exceptional circumstances only. The list of grounds included in the proposal are:

- safety of services, including aspects related to public health (a);
- the exercise of a health profession (b); and
- the protection of public policy, notably aspects related to the protection of minors.

[15] Preamble, indent 58.
[16] Preamble, indent 59.

This list of grounds included in Article 19 (1) is far more restrictive than the ´rule of reason` grounds recognised by the ECJ.[17] In that respect it can even be argued that the Directive transforms the present "proportionality" justification test for a host Member State restriction into a proper rule of conflict of law. It sets aside the regulation in the host Member State also when it is compatible with the Treaty.

The proposed Services Directive and EU labour law

The intention stated in this Preamble text is implemented by Article 17 (General derogations from the country of origin principle) which states that Article 16 (the "country of origin" principle) shall not apply to "matters covered by Directive 96/71/EC".

This is a radical change in EU labour law. It seems to be based on a fundamental misapprehension that the "country of origin" principle is consistent with existing labour law, and that it is sufficient if some limited derogation can be made to this principle to accommodate Directive 96/71/EC.

As a matter of policy, the proposed change is striking in seeking to apply the "country of origin" principle to labour law. For example a corresponding clause was recently rejected by the Council as regards consumer protection in relation to the adoption of a common position on the proposal for a Directive concerning unfair business-to-consumer commercial practices in the Internal Market.[18]

Council Documents on labour law

Two explanatory documents prepared by the Commission for the Council highlight the problems created by the application of the "country of origin" principle to labour law in the proposed Services Directive. The first Council Document concerns the relationship between the proposal and the Rome I and draft Rome II Conventions;[19] the second concerns the relationship between the proposed Directive and the rules on posting of workers.[20]

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[17] See Gekiere, Wouter, Towards a European Directive on Services in the Internal Market: Analysing the Legal repercussions of the Draft Services Directive and Its Impact on National Services Regulations. 24.9.2004 (manuscript p. 11).
[18] COM (2003) 356 final.
[19] Council Document 2004/0001 COD, 25.6.2004.
[20] Council Document 2004/0001 COD, 5.7.2004.

Member State labour law: conflicts with Rome I

The first explanatory document is explicitly said to be limited to private law issues.[21] It states that the country of origin principle appears to create a choice of law rule, and that this has implications for the existing Rome I and the solutions envisaged by Rome II.[22] It is argued that, in principle, employment relationships are excluded from the scope of the proposed Directive.[23] However, no real analysis is provided of the relationship between the labour law aspects of Rome I and II and the "country of origin" principle. Yet there appears to be a clear conflict between them in situations where the employee does not habitually work in his country of origin: Rome I allows for host country labour law to apply; the "country of origin" principle dictates the opposite conclusion.

EU labour law (1): transforming Directive 96/71/EC from a minimum to a maximum standard

The proposal completely alters the underlying general assumption of Directive 96/71/EC. It transforms it, in principle, from a Directive[24] providing a *minimum* of employment protection in the host Member State to one specifying the *maximum* protection available to employees. This is clearly stated in the recital of the proposed Services Directive claiming that "it should not be possible for the Member State of posting to take restrictive measures against a provider established in another Member State".

EU labour law (2): terms of employment of posted workers safeguarded

The second document stresses that the proposed Services Directive exempts all matters covered by Directive 96/71/EC from the "country of origin" principle. In particular, the "country of origin" principle is not to affect the application of terms and conditions of employment in matters covered by Directive 96/71/EC and the application of "universally applicable" collective agreements in these areas. The host Member State

[21] Council Document 2004/0001 COD, 25.6.2004, page 6.
[22] *Ibid.,* page 13.
[23] *Ibid.,* page 29.
[24] The view that Directive 96/71/EC is a minimum Directive is also stated in the Preamble (p. 34) to Directive 2004/18/EC (public procurement).

is to continue to be responsible for the necessary controls on all these matters. Specifically, the document stresses that terms and conditions applicable to temporary workers are covered by Directive 96/71/EC and thus exempt from the application of the "country of origin" principle.

EU labour law (3): the problem of self-employed posted workers

Similarly, the "country of origin" principle is not to affect the definition of who is a "worker". Self-employment, therefore, appears to be a matter covered indirectly by the Posting Directive. Article 2(2) confirms that the law of the host country defines the notion of "worker". The intention appears to be to combat the posting of "bogus" self-employed workers. However, there is a problem in that, by definition, if there is objectively *no* natural or legal person posting the (bogus) *self*-employed person to work in the host country, such a self-employed person is not covered by the Posting Directive.

EU labour law (4): conditions for hiring-out of workers

The Directive covers "the conditions of hiring-out of workers including the conditions regarding the supply of workers by temporary employment agencies".[25] A careful reading of the explanatory document of 5 July 2004 indicates that the aim is not to apply the "country of origin" principle to conditions for the hiring-out of workers. It states that this could be explained in a recital. However, the conclusions of the explanatory document, where a draft text for new recitals is presented, do not cover this point. Minimum clarity of this crucial issue requires an unambiguous text, at least in a recital. That text should reflect the case law of the European Court of Justice, which has handed down three important decisions on cross-border temporary work.

> In *Webb*, the Court acknowledged the social sensitivity of the issue of temporary agency businesses. It recognised the right of Member States to restrict temporary agency work or even to ban it. But it was necessary to take account of the evidence and guarantees already provided by the business in the Member State of its establishment.[26]

In 1999, the judgment in *Webb* shaped the substantive content of a unanimous Council Resolution on the transnational hiring-out of

[25] Council Document 2004/0001 COD, 5.7.2004, page 5.
[26] Case 279/80, paragraphs 17-20.

workers.[27] Licensing was accepted and it included also a Code of Conduct for administrative co-operation.

> In *Commission v. Germany*, the Court accepted in principle restrictions on the hiring-out of manpower in the construction industry in Germany.[28] However, the Court outlawed the practical application of the restrictions requiring a company to be established in Germany (the host Member State) and to be bound by a collective agreement, either as a member of the employers' organisation or by signing a company level collective agreement in the construction sector, in order to be able send or use temporary workers.
>
> In *Commission v. Italy*, the Court did not outlaw in principle a requirement to establish a financial guarantee in temporary work; but it outlawed a national scheme that did not take into account the guarantee established in another Member State.[29]

In sum, the conclusion to be drawn from the case law is that that the conditions for the hiring-out of manpower do not fall within the "country of origin" principle**.**

4.2 The "country of origin" principle and the *acquis communautaire*

The "country of origin" principle in the proposed Services Directive brings it into direct conflict with some important parts of the *acquis communautaire* of EU labour law and raises difficult problems of interpretation.

Directive 91/383: health and safety

Directive 91/383/EEC supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed-duration employment relationship or a temporary employment relationship imposes duties on the user undertaking; for example, to inform the temporary employment business of the occupational qualifications required and specific features of the job.[30] The Member State in which the user undertaking operates is responsible for fulfilment

[27] Officially headed: Fight Against Social Security Fraud And Undeclared Work. See the Resolution of the Social Council of 9 March 1999/ 6491/99 SOC 80,
[28] Case C-493/99, judgment of 25 October 2001.
[29] Case C- 279/00, judgment of 3 February 2002. Italy at that time required a minimum share capital of 1 bn. ITL for running a temporary work agency.
[30] Council Directive 91/383 of 25 June 1991, OJ 1991 L206/19.

of this obligation. This conflicts with the application of country of origin rules to service providers who are temporary agency businesses.

The matter is further complicated by the derogation in the proposed Services Directive that the "country of origin" principle does not apply to "the non-contractual liability of a provider in the case of an accident involving a person and occurring as a consequence of the service provider's activities in the Member State into which he has moved temporarily" (Article 17(23)).

Directive 80/987/EEC: insolvency protection

According to Directive 80/987/EEC, the host Member State may become responsible for claims for lost wages in situations of insolvency on the part of the service provider.[31] Article 8a provides that the state where the employees habitually work or worked is responsible for the wage guarantee in the situations of insolvency. When the employees have been hired especially for foreign projects, only the host state can bear that responsibility. Again, this conflicts with the "country of origin" principle in the proposed Services Directive.

Public procurement rules

Within the framework of public procurement the control of matters related to employment conditions is clearly a matter for the contracting authorities:[32]

> "If national law contains provisions to this effect, non-compliance… with laws, regulations and collective agreements on both national and Community level… may be considered to be grave misconduct or an offence concerning the professional conduct of the economic operator concerned, liable to lead to the exclusion of that economic operator from the procedure for the award of a public contract".

[31] Council Directive 80/987/EEC on the approximation of he laws of the Member States relating to the protection of employees in the event of the insolvency of their employer; OJ 1980 L283/23.
[32] Directive 2004/18/EC, Recital 34.

Again, the application of "country of origin" rules on public procurement raises questions. The control related to labour law is usually best as near as possible to the work place.

In general, the new EU Directives on public procurement replicate the earlier law. As applied by the European Court of Justice, this arguably allows public authorities to stipulate some labour standards and conditions. These labour standards would bind contractors to the conditions prevailing in the host Member State, or region, or laid down in collective agreements. Contractors from other Member States would be bound to observe those standards. It is not clear how this can be reconciled with the proposed Services Directive mandating country of origin rules to apply to service providers from another Member State.

Arguably, there may be no conflict if the labour standards permitted by the public procurement rules are presumed not to be discriminatory (this is a condition of their validity) and are based on a contractual obligation undertaken by the service provider. As such, they do not obstruct the free movement of services, and the proposed Services Directive does not operate to apply the country of origin principle.

Posted workers: Directive 96/71/EC

What the draft directive calls a "general derogation" (Article 17(5)) is rather a recognition that its principles conflict with the Posting Directive (Directive 96/71/EC).[33]

The proposed Services Directive creates a separate category of employees of service providers subject to special rules. The Posting Directive provides some protection to temporary posted workers by host country provisions. This protection is extended to full equal treatment when these workers are migrant workers. But the country of origin principle in the proposed Services Directive denies protection when the workers are employees of service providers.

[33] Council Directive 96/71/EEC concerning the posting of workers in the framework of the provision of services was based on the Commission's view that: "National differences as to the material content of working conditions and the criteria inspiring the conflict of law rules may lead to situations where posted workers are applied lower wages and other working conditions than those in force in the place where the work is temporarily carried out. This situation would certainly affect fair competition between undertakings and equality of treatment between foreign and national undertakings; it would from the social point of view be completely unacceptable". COM(91) 230 final, SYN 346, Brussels, 1 August 1991, paragraph 9 bis.

The new legal classification of employees of service providers has in fact the consequence of undermining the principle of equal treatment guaranteed by the *acquis communautaire* on the free movement of workers.

Agency workers

The draft Directive on agency workers proposes that agency employees in the user enterprise can claim equal treatment with comparators in the user enterprise.[34] This applies also to workers sent by agencies to provide services in other countries: the applicable provisions will *not* be those in the home country, but those applied to the comparator in the host country.

Recognition of professional qualifications

In the area of recognition of professional qualifications, the main principle in EU law is mutual recognition and improved transparency of qualifications. Again, there is no straightforward "country of origin" principle. The proposal for a Directive on the Directive on the recognition of professional qualifications instead promotes cross-border services in Europe in a balanced manner.[35]

Collective agreements

Conditions of work in some Member States are often governed by collective agreements, including those extended by ministerial decree to bind all employers and workers. In the case of provision of cross-border services, some collective agreements may be covered by the Posting Directive and be exempt from the "country of origin" principle. However, as in the case of the Nordic countries, but also elsewhere, collective agreements may not satisfy the requirements of the Posting Directive ("universally applicable" agreements) and come into conflict with the "country of origin" principle.

The European Court of Justice has made it clear that collective agreements are protected by EU law. For example, in a case where collective agreements made compulsory the affiliation by employers to pension funds for the workers in the industry, the value attributed to

[34] Proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers, 20 March 2002. Amended proposal, 28 November 2002.
[35] COM (2002) 119 final, 7.3.2002.

collective agreements by the Treaties and the EU legal order meant that they prevailed in relationship to competing EU principles such as competition law (*Albany*).[36]

The proposed Services Directive does not recognise the protection granted collective agreements by the *acquis*. It is not at all evident that the European Court of Justice would subordinate collective agreements to the country of origin principle based on the free movement of services.

Privatisation and outsourcing of services

Service providers may operate in other Member States following privatisation of public services or outsourcing from private enterprises. EU rules in the Transfer of Undertakings Directive[37] apply to determine conditions of employment for employees transferred from the public service or outsourcing enterprise to the service provider. The Directive guarantees continuity of terms of employment. The terms of employment will therefore be those of the transferor employer, subject to the laws of the host Member State, not those of the transferee service provider ("country of origin" principle).

The same result may ensue where the country of origin of the service provider has incorporated the Transfer of Undertakings Directive, so that the host country conditions of employment apply to workers transferred to the service provider. But again, there appears to be a conflict between host country labour laws and the "country of origin" principle.

Collective rights under the EU Charter

The "country of origin" principle poses a threat for industrial relations regulations in certain Member State (e.g. collective agreements in the Nordic countries), which are not covered by the Posting Directive (because not "universally applicable"). Attempts by trade unions to enforce these agreements, perhaps through industrial action, may be regarded as creating obstacles to the free movement of services, and could be the subject of litigation For this reason and for clarification it is

[36] *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie*, Case C-67/96; with Joined Cases C-115/97, C-116/97 and C-117/97; [1999] ECR I-5751.

[37] Council Directive 77/187 of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses, OJ L 61/26, as amended by Directive 98/50/EC of 29 June 1998, OJ L 201/88. Consolidated in Directive 2001/23 of 12 March 2001, OJ L/82/16

vital that the Directive affirms, like the "Monti" Regulation,[38] that fundamental rights of collective action are protected.

Summary

To sum up: the "country of origin" principle within social and labour law:

1. increases legal complexity and reduces transparency by introducing a new principle in a field already regulated by *lex specialis*;

2. creates ambiguities and consequent confusion concerning the extent to which the proposed Services Directive intervenes in labour regulation;

3. produces no real advantages, but rather many disadvantages from the social point of view.

Recommendation

I recommend deletion of Article 17(5) and its replacement by a provision stating that the law applicable to employees of service providers is Directive 96/71/EC, the Rome Convention and relevant Community and national labour law.

4.3 Problems of surveillance and control of labour standards

The thinking behind the proposed Services Directive assumes that implementation and enforcement of the law can be completely separated from its material content.

The Commission's position is that it does not intend to change "labour law as such", only some enforcement mechanisms. However, although the Commission claims that its intention is to improve administrative cooperation in order to facilitate enforcement, there are serious grounds for doubting that this will be the effect of the proposed changes.

[38] Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States. OJ L337/8 of 12.12.98.

Three kinds of labour and social law rules should be distinguished in the context of a discussion of enforcement mechanisms:

a) substantive labour law rules and employment standards;

b) rules aiming to guarantee the effective implementation and enforcement of these rules (inspections, obligation to provide information and documentation, prior declarations of compliance, sanctions, etc);

c) rules creating administrative mechanisms to control sensitive activities in the employment field (authorisation of temporary employment agencies, etc).

The rules in category (a) are central to the debate over the proposed Services Directive because of the introduction of the "country of origin" principle. They are of crucial importance because *national* machinery of enforcement is being required to control the application to employees on its territory of *non-national* ("country of origin") labour law standards governing employment. The problems inherent in this proposal (increased complexity, reduced transparency, confused application of EU labour law, contradiction with the *acquis comunautaire*) were elaborated above.

Understandably, in the context of free movement of services, there is also a debate on control mechanisms related to category (c). The issues raised by category c) should be dealt with in a balanced manner in connection with separate harmonisation measures, such as the proposal for a Directive on working conditions for temporary workers.[39]

> It may be noted here, however, that the proposed Services Directive proposes to abolish the possibilities for Member States to uphold a system where they require that temporary work agencies have authorisation. This is a radical change in the overall regulatory situation in Europe. Many Member States have regarded control necessary on grounds of general interest in order to ensure that the labour market functions properly and abuses are prevented.
>
> Also recent regulation as that in Italy (2003), Hungary (2003), Poland (2004), Slovenia (2003) and the Czech Republic (2004), require authorisation and in Sweden a system for voluntary authorisation for temporary work agencies have been established this year based on a collective agreement. Also these facts show that the preconditions for

[39] Amended proposal for a Directive of the European Parliament and the Council on working conditions for temporary workers COM (2002) 701 final, 2002/0072 (COD).

deregulation must be thoroughly investigated before radical changes are undertaken.

However, the rules in category (b) are vital to respect the principle of effectiveness of EU law and to satisfy the need for its effective enforcement. There is a very strong argument for close scrutiny of any proposals to deprive Member States of the necessary tools of implementation and enforcement provided by rules in category (b). I will concentrate on issues raised by the proposed Services Directive in relation to rules in category (b).

4.3.1 Prior Declarations

Prior declarations by service providers are simply a basic mechanism for any effective control of employment standards. National law imposes a requirement of prior declarations on service providers posting workers in Member States such as Germany, Austria, Belgium and France. As will be shown below, there are good reasons for this. Such controls are not a problem for well-organised enterprises that comply with labour standards. Abolishing prior declarations in accordance with the proposed Service Directive Articles 16 (3) b and 24 (1) b only serves those seeking to avoid any controls.

It is of course possible to review details of certain national systems of prior declaration; for example, those requiring a separate declaration for each site and worker, or imposing a new declaration when the worker changes site temporarily. But such fine-tuning is completely different from a proposal to ban any and all prior declarations.

Contrary to the proposal, an obligation to make prior declarations should be imposed particularly on sensitive sectors, such as construction, cleaning industry and transport.

4.3.2 Employment Documents

The Commission proposes to restrict control mechanisms by providing that Member States are no longer entitled to require employment documentation to be held in their territory and retained in accordance with the conditions applicable there.[40] Article 24(2) is meant to

[40] Article 24(1)(d) of the proposed Services Directive.

compensate for this by imposing on the country of origin the obligation to guarantee the provision of documents. Yet, at the same time, Article 24(1) imposes on the host Member State the duty to carry out checks, inspections and investigations, and also to take measures in respect of a service provider**.**

In its explanatory note of 5 July 2004[41] the Commission provides further guidance. It quotes paragraphs 61 and 62 of the European Court's judgment in *Arblade*[42], and maintains that the proposed Services Directive "is perfectly in line with the rationale expressed in that judgment in that it reinforces that co-operation."[43] This reliance of the Commission on the judgment in *Arblade* deserves closer scrutiny.

It is, of course, true that the reasoning of the Court in *Arblade* reflects the provisions on co-operation between Member States required by Article 4 of the Posting Directive. But a first elementary comment is that the Court did not completely rule out the right to require documents on site, despite the cooperation anticipated under Article 4. On the contrary, in paragraph 61, the Court was cautious about abolishing such a requirement. It used the word "particularly" to insist on the pre-condition of an "organised system of cooperation" *before* abandoning the requirement "that certain documents are kept on site, or at least in an accessible and clearly identified place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks…".

Moreover, by limiting the quotation only to paragraphs 61 and 62 of *Arblade*, the Commission creates a misleading overall impression of the

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[41] Council Document 2004/0001 COD, 5.7.2004.

[42] Case C-369/96. Paragraphs 61 and 62 of *Arblade* read, as follows*:*

> "61. The effective protection of workers in the construction industry, particularly as regards health and safety matters and working hours, may require that certain documents are kept on site, or at least in an accessible and clearly identified place in the territory of the host Member State, so that they are available to the authorities of that State responsible for carrying out checks, particularly where there exists no organised system for cooperation or exchanges of information between Member States as provided for in Article 4 of Directive 96/71.
>
> 62. Furthermore, in the absence of an organised system for cooperation or exchanges of information of the kind referred to in the preceding paragraph, the obligation to draw up and keep on site, or at least in an accessible and clearly identified place in the territory of the host Member State, certain of the documents required by the rules of that State may constitute the only appropriate means of control, having regard to the objective pursued by those rules".

[43] Page 12 of the explanatory note. However, the Commission also makes the concession that, by virtue of a recital in the Preamble to the proposed Directive, the Member States could require the presence of "documents which in the normal course of work are established and kept at the work place such as time-sheets, etc." *Ibid.*, page 14.

"rationale" of that judgment. In paragraph 63, the Court continues to elaborate this rationale: (italics added)

> 63. The items of information respectively required by the rules of the Member State of establishment and by those of the host Member State concerning, in particular, the employer, the worker, working conditions and remuneration may differ to such an extent that *the monitoring required under the rules of the host Member State cannot be carried out on the basis of documents kept in accordance with the rules of the Member State of establishment*.

Hence, requiring documents to be kept in accordance with the rules in the host Member State was not outlawed. The Court went on to state: (italics added)

> 74. For the reasons set out in paragraphs 61 to 63 of this judgment, the need for *effective control* by the authorities of the host Member State *may justify* the imposition on an employer established in another Member State who provides services in the host Member State of the obligation to *keep certain documents available for inspection by the national authorities on site or, at least, in an accessible and clearly identified place in the territory of the host Member State.*
>
> 75. It is for the national court to establish, having regard to the principle of proportionality, which documents are covered by such an obligation.

The rationale is summarised in the fourth ruling of the Court, as follows:

> 4. Articles 59 and 60 of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to keep social and labour documents available, throughout the period of activity within the territory of the first Member State, on site or in an accessible and clearly identified place within the territory of that State, where such a measure is necessary in order to enable it effectively to monitor compliance with legislation of that State which is justified by the need to safeguard the social protection of workers.

It is important to point out that the reasoning and conclusion quoted from the *Arblade* case are given by the Court applying the EC Treaty. The Treaty remains unchanged and the Posting Directive is to continue to be applied in the light of Article 49 [ex 59] EC.

This is demonstrated by the recent judgment of the Court in *Wolff & Müller v. Pereira*.[44] The case concerned the German system in which the

[44] Case C-60/03, judgment of 12 October 2004.

principal contractor is the guarantor of the minimum wage. Its aim is to guarantee the remuneration owed according to the rules (laws and collective agreements) in force in the host country. In line with the statements of the Court in *Arblade*, the German system, as with any real system of control in any Member State, requires the immediate production of documents showing the amount of wages paid or due. Of course, this cannot guarantee that the worker will receive full remuneration. But it is a reasonable attempt to safeguard the worker's essential interest in receiving in any case a minimum wage.

Any other interpretation of the duty of Member States under Article 5 of the Posting Directive,[45] for example, by limiting the obligation to retaining only time sheets on site, or in the territory of the home Member State, seriously endangers effective enforcement of the rights and duties set out in the Directive. An example would be a company from Member State A, with employees from Member State B, signing contracts in Member State C and posting workers to Member State D. Wages may be paid in different Member States, and the relevant bookkeeping operations may be undertaken in a Member State other than that of origin. In this case, the Member State of origin cannot be expected to guarantee production of documents from other countries.

Reliable and effective control of labour standards requires that documents showing at least the working conditions applicable, hours worked and wages paid are immediately, without the need for requests via authorities in the country of origin, available on the spot. A vital additional advantage is that the workers at the site are in principle able to participate in the exercise of this control.

This approach is also in line with the rationale of Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship.[46] As its Article 7 shows, it is a minimum directive that does not preclude stricter national rules.

A further aspect supporting the requirement that all documents relevant to pay be available without any prior request via the authorities of the country of origin is in Declaration No. 7 attached to the Council Minutes when the Posting Directive was adopted.[47] It confirms that foreign

[45] Article 5, paragraph 1: "Member states shall take appropriate measures in the event of failure to comply with this Directive".
[46] Council Directive 91/533/EEC of 14 October 1991; OJ L288/32 of 18.10.1991.
[47] See European Union Council 20.9.1996, File No 00/0346 SYN, ADD 1.

companies are *a priori* required to pay, for example, holiday pay via a social fund in the host country. This obligation is, of course, not applicable if there is an equivalent fund scheme operating in the country of origin.

A requirement that Member States must obtain documents from the authorities of the country of origin simply weakens controls. Imposing obligations on the country of origin as proposed in Article 24(2) of the proposed Services Directive would be perfectly appropriate if they were complementary to the rights and obligations of the host Member State to exercise effective control. Such obligations may well be deduced from the requirements of the Posting Directive; in terms of legal technique, their correct place would be there.

To sum up, the correct starting point for assessing the rights and duties of the host Member State as regards controlling entitlements to pay is Article 5 in the Posting Directive:

> "Member States shall take appropriate measures in the event of failure to comply with this Directive.
>
> They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the Directive".

This does not require the service provider to ship all employment documents to the host country. However, a minimum effective control requires that at least work contracts and documents showing, for instance, the hours worked and wages paid (per hour) are directly available in the host Member State.

4.3.3 Representatives

In the *Arblade* case[48] the European Court of Justice did not outlaw the obligation to appoint a representative. The Court outlawed the specific provision of Belgian law requiring a representative domiciled in Belgium and keeping employment documents for five years after the work in Belgium had been carried out.[49]

[48] Case C-369/96; judgment of 23 November 1999.
[49] See the fifth ruling in the case.

Any conclusions to be drawn from the ruling in *Arblade* should be limited to the specific findings of the case. Thus, in *Arblade* the Court stated that Directive 96/71/EC would render superfluous the requirement of keeping documents in the host country *after* completion of the work.[50] The Court equally accepted the possibility that the authorities of the host Member States may show a sufficient interest in requiring the appointment of a representative.[51] Hence, in principle, requiring a representative is possible even in those legal systems (Belgium) where the implementation and execution of the Posting Directive is based upon collective agreements declared *erga omnes*.

The obligation to appoint a representative is of crucial importance in the Swedish-Danish system of regulating the labour market. Take the example of a company from Member State A, workers from Member State B, signing contracts in Member State C and posting workers to Sweden. According to the Commission's explanatory memorandum of 5 July 2004,[52] the proposed Services Directive would not prevent Member States from requiring the employer, for the duration of the work, to appoint one of the workers to represent him and "to whom requests for information, demands and correspondence can be addressed". What is more, the Commission admits: "[t]his could be *clarified* in a recital".[53] The Commission does not appear to fully understand the multitude of functions such a representative might have to perform. The Swedish-Danish system illustrates the problem.

The Posting Directive recognises[54] the Swedish-Danish model of using collective agreements to regulate the labour market and protect the rights of workers under the Directive. It also is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions.[55] The right to conduct business *without* a competent representative seriously undermines this Nordic Model. The representative of the employer is the person with whom the trade unions in Sweden and Denmark wish to (and who is the only one entitled to) conclude a binding collective agreement. It is not just for "information, demands and correspondence".

It is equally clear that the trade unions in these countries would wish to avoid any unnecessary industrial action to guarantee the application of the

[50] Paragraph 79.
[51] Paragraph 76.
[52] Page 10.
[53] Italics added.
[54] In Article 3(8).
[55] Recital 22.

rules in the Posting Directive. A foreign worker, probably unfamiliar with the Swedish or Danish law and collective bargaining systems, often not proficient in English, perhaps not knowing workmates from several different countries, would be in the impossible situation of having to negotiate and conclude an agreement with the unions. Yet it is entirely possible that the employer would order him/her to sign such an agreement, and only later consider whether to regard it as valid or not. Such a system would simply serve to multiply malpractice and give rise to serious conflicts.

This is not just a purely theoretical scenario. The explanatory memorandum states that Nordic countries may apply collective agreements to workers posted in their territories as long as they are *de facto* of universal application. The problem, especially in Denmark and Sweden, is that there are no mechanisms by which the State controls the application of these agreements. The social partners do it themselves. This means there must be someone for the employees and unions to negotiate with, and there must be some means for surveillance of the agreement. It should be noted that this is enshrined in the European Union Charter of Fundamental Rights, Article 28 on the "Right of collective bargaining and action":

> "Workers and employers, or their respective organisations, have in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action."

A prohibition of the requirement to have a representative present in the Member State might raise questions on the legality of industrial action demanding negotiations with service providers.

The Swedish-Danish model, in particular, requires the practical possibility of a real representative. Such an obligation is, moreover, perfectly natural in other Member States as well. It does not require a full time person on the spot, only that there is a responsible person appointed to undertake the responsibilities of the service provider as the employer.

In conclusion:

Article 24 of the proposed Services Directive ("specific provisions on the posting of workers") reduces the effectiveness of essential mechanisms needed to secure the implementation and enforcement of

obligations relating to employment and working conditions, and should be deleted.

To the extent that greater specification of the obligations of the State of origin of the service provider is needed in the context of posting, this can be achieved by introducing any such specifications into the Posting Directive 96/71/EC.

The proposed Services Directive should include an explicit clause stating that it in noy way restricts the fundamental rights of freedom of association, freedom of negotiation, to take industrial action and to conclude collective agreements.

4.4 The time factor

The proposed Services Directive is open-ended as to its *time scale*. There is no time limit on the expression "temporary" provision of cross-border services. This allows for the possibility that service providers can avoid the labour legislation of the host country, apart from that covered by the Posting Directive 96/71/EC, for unclear but potentially long periods.

There is not even a clear statement that after a certain period, perhaps years, of permanent activity in the host country, such a foreign service producer is to be treated as a domestic service provider. The case law of the European Court does not help. In *Schindler*, the Court stated:[56]

> "No provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty".

Even less helpfully in *Schindler* , the Court concluded:

> "The mere fact that a business established in one Member State supplies identical or similar services in a repeated or more or less regular manner in a second Member State, without having an infrastructure there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, cannot be sufficient for it to be regarded as established in the second Member State".

[56] Case C-215/01, paragraph 31.

4.5 Third country nationals

The Commission has long tried to regulate the posting of workers who are third country nationals in the context of provision of cross-border services.[57] According to the Preamble to the proposed Services Directive,[58] the free movement of services entitles a service provider to post workers, even if they are not Community citizens but third country nationals, provided that they are legally present and lawfully employed in the Member State of origin.

This is regulated in Article 25 of the proposed Services Directive. It is appropriate to place the Member State of origin under an obligation to ensure that any posted worker who is a third country national fulfils the conditions for residence and lawful employment laid down in its legislation, including with regard to social security. It is also appropriate to preclude the host Member State from imposing on the worker or the service provider any additional preventative controls, especially as regards right of entry or residence permits, except in certain cases. On the other hand the host Member State should be able to check and get guarantees that the Member State of origin has fulfilled its task of control in a correct manner.

The controls exercised in these respects are mainly administrative border controls. To that part they are not concerned with any substantial aspect of social or labour law. More questionable is the proposal that it would not be possible for the host Member State to impose any obligations, such as possession of an employment contract of indefinite duration, or a record of previous employment in the Member State of origin of the service provider.[59] There might in certain situations be good reasons to check the work experience of the posted worker and therefore there is good reason to avoid too categorical prohibitions in this respect.

[57] See COM/99/0003 final, *Proposal for a directive of the European Parliament and of the Council on the posting of workers who are third-country nationals* and amended proposal; COM/2000/0271 final.
[58] Recital 60.
[59] See recital 60.

5. Regulation 1408/1971 and the proposed Directive

The proposed Service Directive Article 17 (9) restricts the "country of origin" principle not to apply to the "provisions of Regulation (EEC) 1408/71 determining the applicable legislation". The wording of this restriction seems to imply that it is only part of the Regulation that falls outside the scope of the application of the "country of origin" principle. The rules on sickness insurance and right to health care that are establishing rights and duties, not just regulating the applicable law still remains under the regime of the proposed 16 Article?

The situation is furthermore complicated by the proposed Service Directive Article 23 "Assumption of health care costs" that is difficult to interpret in relationship to Article 22 of Regulation 1408/71. Health care is an important issue also for posted workers, but here the author limits himself to this general observation.

6. The regulatory environment for the free movement of services: labour and social aspects

The impact of the proposed Services Directive should be assessed against the background of greater diversity in wage levels and income within a European Union comprising 25 Member States, many more than before. Free movement of services offers great opportunities, but also creates the risk of abuses and exploitation of unemployment and poverty. In its most extreme form, this can appear as trafficking, child labour, etc.

The problems arising from extreme diversity of national rules need to be assessed also in light of the freedom of establishment in EC law. In general terms, this is far-reaching, as evident in the *Centros* case.[60] A Danish family business openly announced that it had no intention of conducting activities outside Denmark. Nonetheless, it proceeded to register itself in the UK, where there was in practice no obligation of nominal share capital. It thereby managed to avoid the Danish requirement of a minimum share capital of 150.000 DKK by simply establishing a branch of the UK company in Denmark. The European Court allowed this arrangement as within the Treaty. However, and now especially important, the Court affirmed the following:

[60] Case C-212/97.

> "That interpretation does not, however, prevent the authorities of the Member State concerned from adopting any appropriate measure for preventing or penalising fraud, either in relation to the company itself, if need be in cooperation with the Member State in which it was formed, or in relation to its members, where it has been established that they are in fact attempting, by means of the formation of a company, to evade their obligations towards private or public creditors established in the territory of the Member State concerned".

In formal terms, the judgment is concerned with freedom of establishment. However, there is an obvious link to cases where companies register abroad, hire personnel there and then post them back to the country where they normally work. Experience in the construction industry has demonstrated that workers from Member State A can be engaged by a temporary employment agency established in Member State B and then be posted to Member State C. This was a practice evident during the 1990s, with a traffic in construction workers from the UK, via "letterbox companies" in the Netherlands, to work in Germany.

The proposed Services Directive may confront this possibility of evasion by virtue of the definition of "establishment" in Article 4(5): (italics added)

> '"establishment" means the *actual pursuit* of an economic activity, as referred to in Article 43 of the Treaty, through a *fixed establishment* of the provider for an indefinite period;"

However, this definition is inadequate. It gives the impression that "actual pursuit" could overcome the formal registration of a (letterbox) company;[61] that a host country could, but exceptionally, treat a foreign service provider as registered on *its* territory.

Taking this idea seriously, and implementing it, would necessarily require acknowledging the corresponding powers of the "intermediary host" country. Again, the definition of "establishment" does not help in keeping such agencies in order. First, such businesses are easy to operate without any fixed establishment outside the country of origin. Secondly, as Recital 19 states:

[61] An impression evident also in the (Commission's?) table of 6.10.2004, "Practical Examples of How the Services Directive Will Make a Difference: The Situation Before and After". In Article 24 the text of the table in the column "After" states: 'They [countries of origin] will also at the request of the latter [host country] have to carry out investigations to check for example whether a company is really established where it says it is or is just a letterbox firm.'

> "In any case, the fact that the activity is temporary does not mean that the service provider may not equip himself with some forms of infrastructure in the host Member State, such as an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of providing the service in question".

Hence, even where there is only a letterbox in the country of origin, and the only office is in another Member State, the proposed Directive does not enable the other Member State (that of the "actual pursuit of activity") to impose obligations on the enterprise (other than making checks).

In short, freedom of establishment is excessive. Article 16(1) would ban restrictions on access and the exercise of a temporary agency business. Article 16(3)(b) would, in particular, ban any requirement of authorisation, whereas Article 16(3)(e) would additionally outlaw restrictions on the exercise of the temporary agency business in "a triangle". Finally, Article 36(2) would limit the powers of the intermediary host Member State to establishing facts, etc.

These factors strongly support a cautious approach to restricting the operation of labour law regimes in cross-border situations. The European internal market, for good reasons, adopts a liberal approach to the creation of new company forms, such as the European company (SE) and the guaranteed freedom of establishment. The near future will also see proposals making it easier to change the registered seat of companies in Europe.

However, in order to sustain a Social Europe, it is essential that social and labour law aspects are taken into account in a realistic manner when introducing regulation that has an indirect but strong impact on employees. The current proposal for a Services Directive lacks such a realistic approach. In accordance with the proposals above, it can relatively easily be adjusted to reflect the requirements of national labour law systems and the *acquis communautaire*, and the exigencies of social and labour protection on the internal market.