Transforming Europe into a Special Economic Zone

The EU's Services Directive

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Berlin Working Group on Environment and Development - BLUE 21

July 2004

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1. Introduction: Touring Europe with a wrecking ball

With the publication in January 2004 of its proposal for a directive on services in the internal market, the European Commission launched its most radical and most comprehensive attack to date on welfare states within the European Union[1]. The proposal is the brainchild of DG Internal Market headed by Commissioner Frits Bolkestein, and essentially covers all services. The only services excluded from its scope are those provided by the State in fulfilment of its social, cultural, educational and judicial obligations where the "characteristic of remuneration is absent" (European Commission 2004: 31). However, since access to a large number of public services requires the payment of fees, the bulk of theses activities fall within the scope of the Directive.

The Directive pursues its aim of deregulation by gradually eliminating national restrictions and by systematically undermining national law through the so-called "country-of-origin" principle. Once the Directive has been adopted, service businesses in the EU will have to comply solely with the requirements of their country of origin. The other member states in which they trade or provide services will not be permitted to impose any restrictions or controls whatsoever. The Commission even wants to prohibit mandatory registration when a company opens for business in another member state. That being the case, the country-of-origin principle actually abolishes any effective supervision of entrepreneurial activity in the European Union. In future, any undertaking will be able to avoid tiresome national restrictions by relocating its registered office or by simply establishing a shell company in another Member State. Local collective wage agreements, requirements relating to qualifications, and environmental or consumer protection standards may be circumvented simply and cheaply.

And, as the crowning glory of its proposal for a directive, the Commission places the Member States under its tutelage. Not only must they abolish numerous requirements, they must also secure the assent of the Eurocrats before they take any new measures. Any legal or administrative measures that they would like to take must be submitted to Brussels: "Within a period of 3 months from the date of notification, the Commission shall examine the compatibility of any new requirements with Community law and, as the case may be, shall adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them" (European Commission 2004: 54). The bans laid down in the Directive apply to every administrative level and, consequently, breach the principle of subsidiarity enshrined in Community law. In this way, Commissioner Bolkestein is not only completing the internal market, he is also completing the dismantling of democracy.

Nonetheless, even the Commission cannot act on its own without the blessing of the Member State governments. The driving forces behind this and other directives are the governments in Berlin, London and Paris. They are supporting an EU establishment whose task it is to turn their neo-liberal policy into European law. They are establishing the dismantling of the welfare state as an EU-wide norm. They are converting their privatisation policy into Brussels Directives. And they have even managed to have their neo-liberal course officially enshrined in the EU Constitution now up for ratification. The Constitution reveals the destination to which the tax revenue recouped from services of general interest will, in future, be diverted: obligatory military armament monitored by a European Armaments Agency.

[1] The proposal for a directive may be found on the European Commission website at http://www.europa.eu.int/comm/internal_market/en/services/services/index.htm

However, the Bolkestein Directive has not yet been adopted. Belgian trade unions are in the vanguard in the fight against it. They published critical commentaries and took to the streets. In other countries, too, indignation is growing at this gigantic deregulation project. Even some government representatives are getting cold feet and would like to exclude individual sectors. However, they are not challenging the Directive as such. Instead, they, too, mindlessly chant the mantra of the Lisbon Summit that the European Union must become the "most competitive and dynamic knowledge-based economy in the world by 2010". Nobody mentions the price to be paid for the achievement of that goal: total deregulation. The Bolkestein Directive must be consigned to the waste bin. And that can be done! The following pages provide an overview of the central elements and possible impact of this deeply anti-democratic project.

2. Scope of the Directive

For the Commission, the liberalisation of the services sector represents the most significant hurdle to be cleared in its efforts to achieve the completion of the single market. Since the services sector now accounts for some 70% of gross domestic product and employment in most EU Member States, the abolition of legal obstacles to freedom of establishment and to free movement of services between Member States forms the core of the proposal. As Internal Market Commissioner Bolkestein said: "Some of the national restrictions are archaic, overly burdensome and break EU law. Those have simply got to go."[2]

In order to achieve that aim, the Commission has selected as the appropriate instrument a framework directive which – apart from a few exceptions – covers all service activities. In terms of the political procedure involved, it is important to note that the Commission has opted for a directive which, if it is to acquire the force of law, has to be adopted jointly by the European Parliament and the Council under what is known as the codecision procedure (Article 251 of the EC Treaty). That being the case, a critical public may exert pressure on MEPs and on their national representatives in the Council of Ministers. However, at its Spring Summit, the European Council confirmed its intention to ascribe high priority to ensuring that the proposal is adopted. As a result, it will constitute one of the key elements of the next three Council Presidencies (headed by the Netherlands, Luxembourg and the United Kingdom), all three of which support the Directive. It is also alarming that, in the Permanent Representatives Committee in Brussels, the Irish Council Presidency accelerated the speed, although no single Member State has yet completed its internal consultation procedures (see COREPER 2004). It is also alarming that, in the Federal Republic of Germany, as is so often the case, those consultation procedures are being held behind closed doors.

2.1 Covering all services

The scope of the Bolkestein Directive covers all services deemed to be "economic activities". Accordingly, it refers to the operational concept of "undertaking" as developed in the case-law of the European Court of Justice, whereby any unit which performs an economic activity is regarded as an "undertaking", irrespective of its legal form, the manner in which it is financed or any profit-making objective. The essential criterion for an economic activity is that it is "normally provided for remuneration", although such remuneration must not necessarily be paid by the recipient of the service. The State may pay it, for example in the

[2] Press release IP/04/37 dated 13 January 2004.

form of subsidies. Since the services sector is also "constantly evolving", the Commission contents itself with a non-exhaustive list of the activities involved (see European Commission 2004: 30-31).

Examples referred to in the Services Directive	
▪ management consultancy ▪ IT services ▪ certification, maintenance and testing ▪ facilities management ▪ advertising services ▪ recruitment services, including those of temporary employment agencies ▪ services provided by commercial agents ▪ legal or tax consultancy ▪ services provided by estate agents ▪ construction and architectural services ▪ distributive trades	▪ organisation of trade fairs and exhibitions ▪ vehicle hire ▪ travel agencies ▪ tourist services ▪ security services ▪ audiovisual services ▪ leisure services (sports centres and amusement parks) ▪ health and care services ▪ personal and domestic services ▪ regulated professions (medicine and legal or tax consultancy) ▪ distance selling

However, because of its horizontal approach, the proposal covers far more than simply the activities listed here. Pursuant to Article 2, only individual activities in the field of financial services, electronic communications and transport services are explicitly excluded because they have already been deregulated on the basis of other EU instruments. In addition, the proposal does not apply to the field of taxation, with two exceptions[3]. Indeed, a multitude of other provisions already exists which apply to the services sector in Community law, such as the "Television Without Frontiers" Directive, which applies to public broadcasting, and the liberalisation Directives, which apply to postal services, telecommunications, energy supplies and transport, provisions relating to State aids, tender procedures for public procurement contracts, mutual recognition of professional qualifications, and consumer and environmental protection. But the Bolkestein Directive seeks to extend its influence well beyond the areas covered by current EU law. The recitals clearly indicate the relationship: "Where a service activity is already covered by one or more Community instruments, this Directive and those instruments will all apply, the requirements laid down by one adding to those laid down by the others" (European Commission 2004: 30). The explanatory memorandum spells out even more clearly that "the Directive and these instruments will apply cumulatively", i.e. the "requirements of the one applying in addition to those of the others" (ibid: 13). Consequently, Commissioner Bolkestein will be able to force through more stringent provisions even in those areas which are already subject to internal market legislation.

Nor do services of general interest and other sovereign functions escape either, even if the criterion of provision of a service for "remuneration" laid down in the recitals might suggest otherwise: "The characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State in fulfilment of its social, cultural, educational and legal obligations. These activities ... do not therefore fall within the scope of this Directive" (ibid: 31). However, access to a large number of public services requires the payment of a consideration or fees, for example in the case of public broadcasting facilities, transport undertakings, libraries, public swimming pools, supply and waste disposal services, theatres, museums, day nurseries, adult education centres, colleges of higher education, universities, hospitals and cemeteries. The same applies to institutions working for the public good, from

[3] Nevertheless, the provisions of the Directive are such as to add fuel to the accelerating downward spiral in the field of business taxation (see below).

the providers of voluntary welfare services to technical inspection agencies. Since, according to the remuneration criterion, the bulk of their activities must be regarded as economic activities, they, too, fall within the scope of the Directive. The only activities which may be excluded with any degree of certainty are those which are provided totally without remuneration (for example, services provided free of charge by associations which are financed by members' subscriptions or donations).

The German Bundesrat (the representative chamber of the German Länder) has criticised this extensive scope in a surprisingly forthright manner. It emphasised that the provision of services of general interest was essentially a matter for the Member States and that it would oppose any attempt to call into question the basic responsibility of the Member States for services of general interest (Bundesrat 2004: 4). Furthermore, the Bundesrat felt it necessary to spell out that the existing possibilities for municipal authorities to provide services through their own organisations and national providers of welfare services must not be affected by the Directive (ibid).

2.2 Cancelling the debate about services of general interest

To the annoyance of many observers, the Commission is ignoring the debate being held in parallel about services of general interest in the European Union which it initiated itself with its Green Paper and which is a long way from being completed. In its recently published White Paper on services of general interest, the Commission assured its readers that it "did not intend to conclude the debate that had developed at European level" (European Commission 2004a: 4). One bone of contention in this debate is, for example, the call for the adoption of a framework law to cover services of general interest. Some trade unions[4] and the European Economic and Social Committee (EESC 2003) have been calling for a framework arrangement of this nature which might possibly exclude certain services of general interest from EU competition law. However, in its White Paper, the Commission says that it wants to hold over a decision on this central issue until after the entry into force of the EU Constitution (European Commission 2004a: 12).

Accordingly, while the dispute about services of general interest is still a long way from being resolved, the Commission is attempting on a parallel track to have the Bolkestein Directive adopted. It is totally misleading for the Commission to claim that services of general interest are not the subject of the proposal and that it is not seeking to open them up to competition (see European Commission 2004: 14). On the basis of the remuneration criterion, all services of general interest may well be dragged into the ambit of the internal market. The reference to exclusions from the country-of-origin principle for individual sectors which have already been deregulated under single market legislation (postal services, electricity, gas, transport, etc.) is equally unconvincing, since the other provisions in the Directive would continue to apply in those sectors, including a ban on national restrictions on freedom of establishment. What is more, the application cumulatively with current EU law extends the remit of competition law to cover more and more public services. Further competences of the Union would stealthily be created in the fields of radio broadcasting, sickness insurance or social services. Finally, the Bolkestein proposal extends to areas where liberalisation is still being negotiated or where it has actually foundered in the teeth of determined opposition. That applies, for example, to the tough negotiations about local and regional public transport,

[4] For example, in its memorandum to the Irish Council Presidency, the European Trade Union Confederation criticises the Commission's refusal to submit a proposal for a directive on services of general interest. Until the Commission is in a position to do so, ETUC feels that it would be logical to declare a moratorium on any further liberalisations (see ETUC 2004).

where the Commission is trying to push through a tendering requirement in the procedure for the awarding of contracts. The liberalisation of port services might also resurface through the back door opened by the Bolkestein Directive. That would constitute a major affront to port workers and their trade unions, whose concentrated EU-wide opposition ensured that what is known as the "port package" came to grief last November in the European Parliament. Finally, even the highly controversial issue of water supplies would come within the range of the Bolkestein Directive. On that issue, the Directive provides solely for a derogation from the country-of-origin principle and does not exclude it entirely from the scope of the Directive. As a result, waterworks and other utilities would be affected by the numerous bans on national requirements with regard to freedom of establishment.

A totally realistic view of the potential scope of the Bolkestein Directive is given by the following overview of the sectors which the Member States – meeting in the Committee of Permanent Representatives (see COREPER 2004, meeting of 26 May 2004) – wished to have excluded from the scope of the Directive:

Services which the Member States wish to have excluded from the scope of the Directive	
▪ health (A, EE, CZ) ▪ public health services (HU, F, I, UK) ▪ social security (A, SI) ▪ gambling (HU, F, A, CZ, PL, LV, I, S, NL) ▪ transport (D, I, S, F) ▪ tourism (EL) ▪ taxation (EL, LI, UK, E) ▪ press (F) ▪ audiovisual services (F, A, LV, I, P, ES) ▪ regulated professions (F, I) ▪ matters covered by Article 45 of the EC Treaty ("activities connected with the exercise of official authority") (F, L) ▪ "tasks for which the State is responsible" (D) ▪ weapons and pyrotechnics (D) ▪ animal experimentation (D)	▪ treatment of waste water (A) (S and EL want supply and treatment to be subject to the same system) ▪ state-funded activities in research, education and (further) training (D) ▪ state-funded research and (further) training establishments (A) ▪ temporary work agencies (CZ) ▪ law consultancy (L) ▪ postal services (I, P) ▪ energy services and nuclear energy supplies (E) ▪ security and protection services (I) ▪ aerial surveillance (I) ▪ marriage bureaux (I) ▪ medical and ethical issues (NL)

In addition, Member State representatives also indicated areas where they had doubts and required clarification from the Commission or where their internal consultation procedures had not yet been completed. The plethora of exceptions requested demonstrates the extent to which Commissioner Bolkestein is trying to muscle in on the economic and welfare systems of the nation states. It also demonstrates why, to date, the proposal for a directive has been discussed only by bureaucrats behind closed doors. If it were to become the subject of a wide-ranging public debate, it would probably be doomed to failure simply because of the large number of groups affected.

3. Freedom of establishment

The Bolkestein Directive will abolish obstacles which principally affect two fundamental freedoms: freedom of establishment and the free movement of services. It has the following basic structure:

Structure of the Bolkestein Directive						
Chap. I General provs.	**Chap. II** Freedom of establishment	**Chap. III** Free movement of services	**Chap. IV** Quality of services	**Chap. V** Super-vision	**Chap. VI** Convergence programme	**Chap. VII** Final provisions
(Articles 1-4) Art. 2: Scope	(Articles 5-8) Procedures Art. 6: Single points of contact	(Articles 16-19) Country-of-origin principle and derogations Art. 16: Country-of-origin principle Art. 17: General derogations	(Articles 26-33)	(Articles 34-38)	(Art. 39-44) Art. 39: Codes of conduct at Community level Art. 41: Mutual evaluation	(Articles 45-47)
	(Articles 9-13) Authorisations	(Articles 20-23) Rights of recipients of services Art. 23: Assumption of heath care costs				
	(Art. 14-15) Requirements prohibited or subject to evaluation	(Articles 24-25) Posting of workers				

In accordance with the aim of deregulation, the most significant provisions are set out in Chapter II (Freedom of establishment) and in Chapter III (Free movement of services).

Article 9 lays down that authorisations may be demanded only in certain circumstances. The authorisation scheme must not be discriminatory, it must be objectively justified, and it must be proportionate. No authorisation may be demanded if the objective pursued may be attained by means of a "less restrictive measure".

3.1 Rat race to the bottom

In the Chapter on freedom of establishment, Article 14 ("Prohibited requirements") specifies the national requirements which, according to Commissioner Bolkestein, "simply have to go". Accordingly, Member States will, in future, not be entitled to prescribe the legal form of the establishment. Article 14(3) prohibits them from requiring a principal establishment rather than a subsidiary or branch in their territory, while Article 14(8) prohibits them from requiring service providers to have exercised their activity for a minimum period in their territory or to have been entered in their business registers. Finally, Article 14(2) requires them not to prohibit service providers from having an establishment or, frequently on purely formal grounds, being registered in more than one Member State.

These provisions alone are likely to give rise to an avalanche of relocations inside the European Union. Small and medium-sized undertakings will join in the mass exodus being led by big companies towards the most favourable locations with the least demanding

requirements. Even today, it is neither excessively complicated nor particularly expensive to set up a shell company in another EU Member State. Although, hitherto, tax evasion constituted the major reason for such a move, the Bolkestein Directive creates a whole raft of further incentives, such as the circumvention of environmental, labour, health and safety standards, requirements relating to qualifications, and collective wage agreements. Even today, various EU Member States offer the most diverse company structures, principally with a view to assisting cross-border tax evasion, either in the form of coordination centres (Belgium, Luxembourg, Spain and Germany), holding companies (Netherlands, Luxembourg, Austria and Denmark) or various financial services, administrative or logistics centres (Ireland, France and Italy)[5].

If the Bolkestein Directive were to be adopted, it would simply be a matter of time before specific company structures were devised so as to exploit the varying levels of regulation in the EU Member States. Hordes of middlemen, managers and trustees would be on hand to design, apply for authorisation for and manage such structures. Since individual Member States could not prohibit service providers from multiple registering, a German company would then be able formally to exercise its activities throughout the EU (i.e. including in Germany), with one branch operating from the Netherlands and another one from Belgium – depending on where the conditions for the business activity in question were the most favourable. Accordingly, the German IG BAU (the trade union covering Construction, Agriculture and Environment) expects a tidal wave of relocations by service providers to countries which impose the lowest legal requirements and level of supervision for their business activities (IG BAU 2004).

Article 14(7) also prohibits an obligation "to provide or participate in a financial guarantee" or to take out insurance from a service-provider or body established in the territory in question. This provision may refer to various forms of public or private agreements, for example the obligation to deduct contributions to accident insurance schemes, compulsory participation in branch-specific social funds or contributions to sector-specific insurance, default or guarantee funds.

3.2 Cutting requirements - mutual evaluation

In addition to the list of prohibitions laid down in Article 14, Article 15 sets out a further raft of extremely sensitive measures which the Member States must submit to rigid mutual evaluation and, if deemed inappropriate, they have to be changed or abolished. Those measures include: quantitative or territorial restrictions; an obligation on a provider "to take a specific legal form"; an obligation to hold "a minimum amount of capital for certain service activities" or for management staff to "have a specific professional qualification"; a ban on having "more than one establishment in the territory of the same State"; "requirements fixing a minimum number of employees"; "fixed minimum and/or maximum tariffs" with which the provider must comply; prohibitions and obligations "with regard to selling below cost and to sales"; requirements that an intermediary provider must allow access to certain specific services provided by other service-providers, as well as an obligation on the provider "to supply other specific services jointly with his service".

[5] This also illustrates the lack of political will to establish an EU-wide uniform business taxation scheme. When it adopted the tax package last year, the European Council even extended authorisation for certain tax-evasion structures until the end of 2010, although the EU itself had qualified them as "harmful" (including coordination centres in Belgium and holding companies in Luxembourg) (see European Council 2003).

The Member States must cover all these measures in an evaluation report and verify that they satisfy three conditions: (a) non-discrimination (on grounds of nationality or of the location of the company's registered office); (b) necessity ("objectively justified by an overriding reason relating to the public interest"); and (c) proportionality ("it must not be possible to replace those requirements with other, less restrictive measures which attain the same result"). The Commission will forward the reports to the other Member States, who will then have six months in which to express their views.

Which restrictions geared to the general interest will survive such mutual evaluation may be the subject of much speculation, as will be the exorbitant cost of this procedure. Other critical questions arise, too. Who will determine which measures must be notified in a procedure of this nature? What will happen to measures in respect of which responsibility lies with regional or municipal authorities? What would happen if one region in a specific country wanted to submit, for example, training standards to mutual evaluation while another region did not wish to do so?

The consequences which mutual evaluation might have cannot be identified until account has been taken of the specific societal purpose fulfilled by the restrictions to be verified and possibly abolished. Quantitative or territorial restrictions affect the maximum amount of licences which may be issued in a region, thus regulating the number of service providers in a lot of sectors – ranging from taxi firms to doctor's surgeries. They may serve to prevent excessive numbers in individual areas and, in so doing, actually to ensure the economic viability of the service providers active on the market. Vice versa, they may prevent a shortfall in supply in less-favoured areas. In the field of health care, controlled authorisation of providers of medical services, the cost of which is reimbursed by social security schemes, helps in keeping cost trends in check. A changeover from current quantitative and territorial control mechanisms to purely market forces would result in unforeseeable social costs. By itself, accelerated predatory competition, together with an increase in the number of company bankruptcies, would mean that the public purse would have to bear the cost of the requisite welfare payments.

Nevertheless, the Commission welcomes even the most excessive forms of competition. This is particularly true regarding its plan to abolish fixed minimum prices and prohibitions of sales below cost (Article 15(2)(g) and (h)). That would result in pressure being exerted not only on fee scales but also on bans of dumping prices laid down under competition law. That would throw the door to predatory competition from transnational companies wide open. In future, they would be able to conquer new markets in an aggressive manner by delivering supplies in the short term at prices below cost, that strategy being funded by internal company cross-subsidies. The reverse of the coin in such radicalised price wars is increasing pressure on working conditions, wages and product quality.

3.3 Non-profit-making undertakings under fire

The intention of Commissioner Bolkestein and DG Internal Market to make societal requirements relating to the selection of the legal form a competence of the Union undermines every kind of supervision of service activities. Article 15(2) homes in on the "obligation on a provider to take a specific legal form, in particular to be a legal person, to be a company with individual ownership, to be a non-profit-making organisation or a company owned exclusively by natural persons". This clause illustrates the accelerated attack on working conditions and the privatisation of public services. By abandoning the requirement that certain economic activities may be carried out only by "legal persons", i.e. that an undertaking must

have been established in accordance with certain regulations, the Directive is reacting to the tendency towards forcing the employed and the unemployed into mini-self-employment forms which are barely economically viable. The legalisation of precarious and fake "self-employment" currently pushed through by German labour-market reform (so called "Hartz"-package, "Ich-AG") is now continued in the internal market context by the Bolkestein Directive.

The inclusion of non-profit-making organisations entails the evaluation of all other measures which earmark certain public services exclusively or preferentially for public-interest, non-profit-making undertakings. In so doing, the Directive targets, on the one hand, any kind of public provision of services in the general interest and, on the other, the entire non-profit-making sector. The barriers set up against private business interests in areas hitherto immune to market forces are to fall. That would affect, for example, public-interest privileges of voluntary welfare associations providing social services in Germany. Although German welfare legislation in recent years has already weakened the traditional leading role played by voluntary welfare associations, they still enjoy a privileged tax status as being "in the public interest". They and they alone may receive subsidies and are exempt, inter alia, from income tax, while donations are deductible (see Boetticher/Münder 2003). However, the privileges currently enjoyed by non-profit-making undertakings constitute discrimination against commercial providers. The latter would be able to base future court actions for equal treatment on the provisions of the Bolkestein Directive.

Not least, the abolition of provisions relating to admissible legal company forms restricts opportunities for the selection of those organisational forms for public services which guarantee the requisite degree of democratic control. At the same time, that narrows the leeway for influencing investment decisions, taxation and liability. Since Article 15(2)(c) also attacks minimum requirements relating to capital contributions, we may legitimately fear that the guarantee requirements for certain public services will be threatened. The possible admission of providers with little capital cover will undoubtedly undermine the requisite continuity in the provision of services.

However, in Germany, Article 28(2) of the German Constitution ("Grundgesetz") guarantees that municipalities have the right to regulate local affairs on their own responsibility. Because of this right, municipalities may not materially privatise those public services which belong to the absolutely protected core area of local self government. Nor may they divest themselves of their own political influence on the performance of public services by extensive organisational privatisations (Kempen 2002: 56). Accordingly, the organisational form must guarantee the performance of public services and the municipal influence – and that undoubtedly clashes with the objectives of Commissioner Bolkestein's proposal for a directive.

Finally, we may query whether the Directive is not in breach of Article 295 of the EC Treaty which reads: "This Treaty shall in no way prejudice the rules in Member States governing property ownership." However, since Commissioner Bolkestein wishes to simplify not only provisions relating to the choice of the legal form but also "requirements which relate to the shareholding of a company" (Article 15(2)(c)), it is highly likely that he is tampering here with ownership issues. He is restricting the leeway in decisions as to whether private shareholding is allowed and, if so, in what form and for what amount. In so doing, he is interfering in the widespread dispute about the privatisation of public property. To that extent, we may doubt whether the Bolkestein proposal maintains the neutrality with regard to property ownership that is required by the EC Treaty.

3.4 Regulation under tutelage

Any restriction on the choice of the legal company form would probably also cause problems in the future. It would considerably hamper the incipient process noticeable in various countries where failed privatisations are being rolled back and new cooperative and non-profit-making forms of undertakings devised. For example, a movement is beginning in Great Britain against the hitherto dominant privatisation of public services. In a number of municipalities, local welfare companies have taken over areas of public infrastructure, ranging from health care to passenger transport. At the same time, the UK Department of Trade and Industry is developing a new legal form known as the Community Interest Company[6]. If negative experiences with privatisation increase in Germany, too, and if the initial financial benefit becomes a financial burden in the long term, more intensive experiments with such forms will have to be carried out in this country as well, although, in that case, perhaps, against the background of a more restrictive European legal framework.

Such re-regulation would be brought to a standstill not least by the de facto moratorium laid down in the Directive. Article 15(5) provides that new requirements may be introduced only if they are non-discriminatory, necessary, proportionate and if "the need for it arises from new circumstances". In addition, any new laws or administrative provisions must be notified to the Commission which, according to Article 15(6), subsequently communicates those provisions to the other Member States. The second subparagraph of Article 15(6) states: "Within a period of 3 months from the date of notification, the Commission shall examine the compatibility of any new requirements with Community law and, as the case may be, shall adopt a decision requesting the Member State in question to refrain from adopting them or to abolish them." Accordingly, any new law, at whatever administrative level it has been devised, must clear an enormous hurdle if it is to be deemed compatible with EU law. With regard to the impact of these rules on health care, the European umbrella organisation of national social security federations, AIM, hit the nail on the head when it said that the moratorium set out in Article 15(5) and the prior notification requirement laid down in Article 15(6) could be considered as "putting in ward national health systems" (AIM 2004: 3). Such tutelage would, in principle, apply to all services falling within the scope of the Bolkestein Directive.

4. Free movement of services

4.1 Country-of-origin principle - causing chaos among legal systems

The "country-of-origin principle" laid down in Chapter III, Article 16, radicalises the provisions relating to freedom of establishment set out in Chapter II. While Articles 14 and 15 reduce a large number of regulatory possibilities and create attractive incentives for relocation of service providers' registered offices, the country-of-origin principle brings a new quality of deregulation into the game. Pursuant to Article 16(1), Member States must ensure that "providers are subject only to the national provisions of their Member State of origin". Accordingly, the authorities in the country where services are provided may not carry out any supervision whatsoever: only the country of origin may do so. Article 16(2) lays down that the "Member State of origin shall be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State".

[6] For more information about this topic, visit the DTI website at www.dti.gov.uk.

But why should the country of origin have even the faintest interest in supervising the foreign business activities of companies registered in that country? Why should it hamper their business opportunities when those activities will improve its foreign trade balance? Do the authorities actually have available the financial and human resources required to carry out such additional tasks? And, last but not least, how can supervision be carried out efficiently if the country of origin has no power to carry out on-the-spot controls in the country where services are provided? The Services Directive gives no answer to these most immediate objections to the country-of-origin principle. Instead, in Articles 35 to 37, it merely lays down splendidly-phrased measures for mutual assistance and administrative cooperation.

Commissioner Bolkestein issues several prohibitions to the countries of destination (i.e. the Member States to whose territory services are sold or where activities are exercised by a service provider from a different Member State). Article 16(3)(e) bans them from requiring service providers "to comply with requirements, relating to the exercise of a service activity, applicable in their territory". Pursuant to Article 16(1), those requirements cover all the requirements "governing the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider's liability". Accordingly, the standards of the country where the activities are exercised would apply only to domestic undertakings and no longer to all those which have their registered offices in other EU Member States or relocate there in order to circumvent more stringent domestic requirements. As the German Bundesrat so perceptively notes, the result would be that the uniformity of law would no longer prevail in the Member State concerned (Bundesrat 2004: 19). Instead, the law would vary from person to person or from company to company, depending on which country the service provider came from. The national legal systems of each Member State would therefore enter into direct competition with each other. As a result, domestic businesses, subject to perhaps stricter requirements, would bring actions before the courts in order to secure equal treatment with foreign competitors. In this way, the country-of-origin principle would fuel a relentless downward spiral with regard to standards and norms.

While the Commission is, on the one hand, contributing to the erosion of *binding* quality standards, it is, on the other, promoting *voluntary* procedures. Pursuant to Article 31, it wants to encourage service providers to "take action on a voluntary basis to ensure the quality of service provision". In Articles 31 and 39, its range includes certification, quality labels, voluntary obligations and voluntary standards and codes of conduct at Community level. Commissioner Bolkestein is therefore doing everything in his power to scrap binding quality criteria and to give corporations the right to devise their own standards.

4.2 Wage dumping and social security fraud

The further prohibitions issued in accordance with the country-of-origin principle render the identification of the service providers actually operating in any given country virtually impossible. It is not only the requirement to maintain an establishment which is prohibited, Article 16(a)-(d) and (g) similarly prohibits an obligation to make a declaration or notification, to apply for authorisation, to register, to have an address or to have an authorised representative. As a result, all undertakings which officially have their registered office outside the country of destination may provide services, largely without any supervision whatsoever. They are not required to comply with any legal provisions in the country where services are provided, not even with those relating to employment. Pursuant to Articles 24 and 25 on the posting of workers, that freedom applies to both the recruitment of staff from the country concerned and to posted workers from other EU Member States or third countries. Temporary work agencies, many of which already operate on a cross-border basis, are likely

to profit in particular from the country-of-origin principle.

Article 16(3)(f) demonstrates that the Commission's objective is a drastic reduction in labour costs. That subparagraph prohibits provisions relating to "contractual arrangements between the service provider and the recipient of the service which prevent or restrict service provision by the self-employed". That smoothes the path for both fake forms of self-employment and price dumping when contracts are awarded. For example, a German firm might establish a shell company in another EU Member State which would recruit local engineers or architects and circumvent the relevant fee structure.

The Commission also rolls out the red carpet for employers who make money from social security fraud. Article 24(1)(d) prohibits the country of destination from holding and keeping employment documents. German social security bodies quite rightly wonder "how the applicable legal rules or social security obligation can be determined without any doubt" (Deutsche Sozialversicherung 2004: 5). Since no one may ask for the relevant documents in the country of destination, and since any supervision by the country of origin is pie in the sky, service providers might operate for lengthy periods without paying any social security contributions.

The detection and punishment of such offences is made all the more difficult by the fact that, pursuant to Bolkestein's directive, undertakings do not have to nominate a representative in the country where services are provided. That rule also hampers the collection of accident insurance contributions if, for example, a foreign employer recruits local staff in Germany who are subject to German social security legislation and for whom social security contributions should be paid (Deutsche Sozialversicherung 2004: 4). German undertakings who employ local staff in other EU Member States may, of course, exploit the same loopholes for the payment of accident insurance contributions.

The country-of-origin principle is therefore a radical liberalisation method which generalises not only the lowest wage level in the EU but also the lowest protection standards and quality norms. Although the Directive lists a series of exceptions from the country-of-origin principle, most branches of the services sector in the EU would be affected. The exceptions principally concern areas which have already been liberalised in the internal market (postal services, electricity and gas) or which are, in principle, subject to the law of the country of destination by virtue of specific legal acts[7]. Nevertheless, exempted areas may still be affected by the no less problematic prohibitions set out in the Chapter on freedom of establishment (especially Articles 9, 14 and 15).

4.3 Anti-democratic market radicalism

A comparison with other liberalisation methods clarifies the political shift which accompanies the country-of-origin principle. Harmonisation counts as the traditionally most difficult method of achieving cross-border liberalisation because it requires the countries concerned to amend their laws, regulations, standards and norms in order to bring them into line with each

[7] According to the Directive, that applies in particular to the posting of workers, social security, transport of waste, and professional qualifications (see European Commission 2004: 25). However, the posting of workers is, in practice, not excluded from the country-of-origin principle, since Article 24 (Posting of workers) prohibits the host country from carrying out the same supervisory activities as Article 16 (Country-of-origin principle), responsibility for which is to lie with the country of origin. The implementation of the 1996 EU Posting of Workers Directive, pursuant to which posted workers are to be employed on the same terms as local workers, thereby becomes a practical impossibility.

other. Harmonisations are undoubtedly tedious processes, but they may claim a certain amount of democratic legitimacy, since every legislative amendment has to follow prescribed legislative procedures. Yet as long ago as in its 1985 White Paper on the completion of the single market, the Commission was promoting a less cumbersome liberalisation method, namely mutual recognition. By granting mutual recognition, countries accepted each other's standards and norms, provided that they deemed them to be essentially equivalent[8]. That removes the need for national laws to be changed. However, the question always arises, on the one hand, as to what extent mutual recognition may be abused to undermine more stringent national standards and, on the other, to what extent democratic legitimacy is lacking.

The country-of-origin principle goes beyond mutual recognition in so far as it can take on the form of either a mutual recognition agreement or of a prohibition of certain national regulations. With its prohibitions of supervisory measures in the Member States, the Bolkestein proposal opts for the more radical alternative of the country-of-origin principle which, furthermore, may claim the least amount of democratic legitimacy. Unlike mutual recognition, which assumes a process involving negotiations and agreement on the mutual acceptance of national rules, the prohibitions laid down in the Bolkestein Directive involve the enforced acceptance of the standards of the country of origin. In principle, businesses from every EU country may exploit the varying regulation levels inside the European Union, and that is made even easier for them, since it could not be prohibited to register in several Member States.

It could be asked whether the country-of-origin principle in this radicalised form does not breach Article 50 of the EC Treaty which lays down that, while a service provider may temporarily pursue his activities in another Member State, he may do so only "under the same conditions as are imposed by that State on its own nationals". It would probably be difficult to reconcile with Article 50 of the EC Treaty the requirement sought by Commissioner Bolkestein that countries must accept the standards of the country of origin.

4.4 Attack on health care systems

The Bolkestein Directive also forms part of the European Commission's plan stealthily to extend its influence on health systems. Although Article 152(5) of the EC Treaty confirms that Community action must fully respect the competencies of the Member States for the organisation and delivery of health services, the single market freedoms and European competition law have significant side-effects. Central projects designed to implement the single market freedoms (free movement of goods and services, freedom of establishment and free movement of persons) in the public health sector consist of (a) the cross-border use of medical services, (b) the free movement of medical and paramedical personnel, and (c) the establishment of a European market for pharmaceutical products. While the last-named is already well under way with the establishment of the European Medicines Evaluation Agency (EMEA)[9], the other fields are lagging behind. Freedom of movement is hampered by problems relating to the mutual recognition of medical qualifications, although that issue has already been regulated in a Directive (see Mosebach 2003).

[8] Since 1989, mutual recognition has been granted in the single market in respect of some 150 higher education qualifications. However, automatic recognition is not all-embracing, since national requirements continue to hold sway in many professions. Accordingly, in March 2002, the Commission submitted a proposal for the consolidation of around 15 directives relating to this field. The proposal is still being debated (European Commission 2002).

[9] The EMEA is responsible for the Europe-wide authorisation of new, mainly bioengineered medicinal products.

In 1971, a Directive was adopted with a view to facilitating the reimbursement by the national social security scheme of health care costs incurred in another Member State. However, such reimbursement was contingent upon prior authorisation by the national social security scheme. In recent years, the European Court of Justice has handed down a number of rulings relating to the reimbursement of health care costs which acknowledged the need for prior authorisation by the national social security scheme in the case of in-patient care (e.g. in hospital) but rejected it in the case of non-hospital care (e.g. dental treatment). The background to that is the desire of national social security bodies to keep the high costs of hospital care under control. However, the dividing line between hospital and non-hospital care remains controversial, since it may be fluid and may vary from one country to another, a situation which opens the door to abuse. The Bolkestein Directive seeks to establish a few parameters here by defining the term "hospital care" (Article 4(10)) and laying down the conditions for the reimbursement of the costs of non-hospital and hospital care (Article 23). For example, Article 23(3) lays down that the level of assumption by the Member States of health care costs incurred in another Member State must not be lower than that provided for by the national social security scheme in respect of similar health care provided in their territory.

That gives rise to two problems. First of all, the Commission is arrogating to itself further regulatory powers in the field of social security systems. Secondly, it is establishing a system of reimbursement of costs which will strengthen the trend towards a two-tier health service. Although the organisation of the public health sector is a matter for the Member States, Commissioner Bolkestein excludes neither health care nor social security from the scope of the Directive (see Article 2). On the contrary, several provisions affect the organisation of the social security system. The restrictions on quantitative control mechanisms laid down in Article 15(2)(a) affect the maximum number of doctors' surgeries or pharmaceutical chemists which may be authorised. The restrictions on fixed minimum and/or maximum tariffs laid down in Article 15(2)(g) concern fee scales agreed between doctors and social security schemes or the pricing of pharmaceutical products. Finally, because of the weakened supervision of service activities, the country-of-origin principle laid down in Article 16 hampers any form of planning or control and the implementation of standards relating to quality and qualifications.

In addition, Article 23 promotes patient mobility solely with regard to the reimbursement of costs. But the amount of those costs and the social security implications are glossed over. The European umbrella organisation of social security federations, AIM, points out that the difference between the cost of treatment abroad and the amount refunded by the national social security scheme may be enormous (AIM 2004: 5). Only well-heeled patients are able to gamble that they will have all, and not just part of, the treatment costs refunded. Finally, they are the only people who will be able to afford such treatment by paying for it up front and then being refunded – in whatever amount – by their social security scheme. The Bolkestein Directive will continue the accelerated trend at national level towards a two-tier health system.

5. Stop the Directive!

The provisions of the Bolkestein Directive on freedom of establishment and free movement of services will set in motion a relentless downward spiral in social protection and quality standards. Provisions which cannot be reduced by mutual evaluation would be undermined by means of shell companies. The lowest standards in any field would incrementally apply throughout the EU. We all know the concept and reality of "Special economic zones", mostly from distant so called "emerging economies". By applying the services directive, the "Special economic zone" (SEZ) concept would become the generalised norm throughout the European Union. SEZ's would set the level with which the social security systems would have to compete and comply. Because of the broad scope of the Directive, scarcely a sector would be spared: the liberal professions, public services, voluntary associations and commercial providers. Predatory competition would rule virtually everywhere. Public services would come under increasing pressure to become subject to competition and to be privatised. With the involvement of social security systems, central social redistribution mechanisms would come under fire.

However, there is still time to stop this radical plan. According to the Commission's programme, the European Parliament and the Council would adopt the proposal next year. Gradual implementation would begin in 2005, and the peak of liberalisation would be reached by 2010. The most important measure required for these plans to be scuppered is the creation of transparency. The negotiations must be dragged out of the conference rooms of lobbyists and bureaucrats into the light of public debate. Those concerned in every branch – employees and consumers – must be given the opportunity to make their protests heard. The sheer number of the potential victims of this proposal should be enough to derail the negotiations. The Bolkestein Directive should suffer the same fate as the 1998 Multilateral Agreement on Investment (MAI).

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