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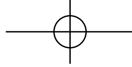

Analysis and Reflections

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The· Services Directive: extending the country of origin principle, and reforming public administration

Gareth Davies*

[keywords to follow]

Despite a limited scope, the Services Directive contains some powerful provisions, extending the scope of Art.49 by abolishing mandatory requirements, and calling for significant harmonisation of public administration. Its relationship to the Treaty Articles on free movement, whether it only applies to out-of-state service providers, or some of its provisions can be relied on by those established in-state, and whether it has an adequate legal basis are among the more important questions it raises.

Introduction

The Services Directive raises so many questions it is difficult to know where to start.[1] This article will highlight what are felt to be the major ones, but cannot pretend to be exhaustive. They are these: does the Directive change the substantive law on free movement of services and establishment? How does it relate to the existing case law of the Court of Justice? Regarding the provisions on administrative simplification: are they feasible, practical, or within the bounds of EU competence? And perhaps most importantly of all: does the Directive only apply to cross-border situations, or can it be relied on by domestic providers?

The answers are sometimes surprising. There has seemed to be a public consensus that after compromise in the legislative process a once radical and important document is now a tame and even regressive one. On the contrary, there appear upon closer examination to be quite a few teeth left on this beast. It extends the concept of free movement beyond what the Treaty itself calls for, or even perhaps authorises, challenging conventional understandings of legislative competence; its country of origin principle allocates competitors on a single market different rights according to their state of establishment, creating what Community lawyers (although not economists) might call distortions of competition and violations of non-discrimination; its provisions for

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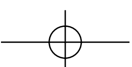
[1] Directive 2006/123 on services in the internal market, [2006] O.J. L376/36. The Directive must be implemented by December 28, 2009.



simplifying formalities can be seen plausibly, and even probably, as a programme for the harmonisation of public administration; and finally, the Directive appears to abolish the internal exception with respect to establishment, extending to domestic establishees the legal rights previously only granted to migrants. This is more than enough to keep lawyers happy for a while. The developments are, however, almost entirely to be regretted, the Directive apparently having been written without any thought for its incidental effects on non-trade matters or for the proper division of powers between the EU and states.

After a lengthy Preamble, which given the ambiguities found in the Directive may be or more than usual importance, the Directive is divided into eight chapters, of which the first six deal with substance. These address the Directive's scope, administrative simplification, establishment, then services, consumer protection for recipients of services, and obligations of co-operation on national authorities.

The scope of application of the Directive

The Directive applies to all services provided normally for remuneration, and provided by a provider established in the EU,[2] except for a fairly long and important list. These exceptions include financial services, electronic communications services, transport, temporary work agencies, and healthcare, gambling, audiovisual, private security and social services.[3] The Directive is also (superfluously, since they are non-economic) stated not to apply to non-economic services of general interest.[4] However, economic services of general interest are not, as such, excluded. Thus in so far as education is provided for remuneration it is covered.[5]

It is also stated that the Directive "does not affect" labour law or criminal law.[6] This wording suggests the provision is descriptive rather than prescriptive, in which case its accuracy may be doubted—there are later Articles which clearly could be interpreted to affect these areas. However, as a guide to interpretation it may well assume a de facto prescriptive function and become a self-fulfilling prophecy. Similar remarks could be made about the provision that the Directive "does not concern" private international law, and "does not deal with" the liberalisation of services of general economic interest.[7] It is however possible not to be concerned with something, and even not to deal with something, while nevertheless having a considerable effect on it.[8]

Further, the Directive takes second place to other Community legislation.[9] Thus where a matter is elsewhere regulated this takes priority over the Directive, meaning that many other issues of great relevance are in fact also excluded, such as qualifications, posted workers, and social security.

It has been argued that the scope of all these exceptions and limitations is such that the Directive no longer matters very much. However, the Directive continues to apply to

[2] Art.2(1).
[3] Art.2.
[4] Art.2(2)(a).
[5] Art.19(b) in particular may be relevant to study financing.
[6] Art.1(5) and 1(6).
[7] Art.3(2); Art.1(3).
[8] This is the insight behind regulatory competition.
[9] Art.3(1).

many of the professional and consumer services typically provided by relatively small organisations, and since these are the ones who may be most deterred by legal and bureaucratic obstacles from foreign expansion it may not be inappropriate to focus this general legislation on them and leave big industries to enjoy their own sectoral laws. A list of examples is provided in the Preamble. It includes management consultancy, certification and testing, facilities management including office maintenance, advertising, recruitment services, commercial agents, legal and fiscal advice, real estate services, construction, the services of architects, the distributive trades, the organisation of trade fairs, car rental, travel agents, tour guides, tourism and leisure services, sports centres and amusement parks, and, to the extent that they are not excluded as part of healthcare, household services such as support for the elderly.[10] Except in so far as other secondary legislation is relevant and takes precedence, all these fall within.

Nevertheless, it remains to be seen how much the distinction between within and without matters. Does it change the substance of the applicable law? This is the subject of the two sections below.

Comparison with Articles 43 and 49 EC

The chapter on establishment does not appear to add anything significant to the existing interpretations of Art.43 provided by the Court of Justice. There is barely a sentence that a lawyer could not have confidently stated to be the law on the basis of the cases alone. In general, requirements made of service providers or conditions for access to or exercise of a service activity must be non-discriminatory, necessary to meet a legitimate aim, and proportionate, reflecting the formulas found in *Säger* and *Gebhard*.[11] Fairly uncontroversial examples are provided of prohibited requirements and those to be subject to evaluation against the criteria above.[12]

The fact that the Directive does not change things is not in itself a problem. Not all jurisdictions are equally happy with the idea that judgments represent law, so the translation of cases into legislation is far from pointless. In practice there are many bodies and individuals that will become aware of and attempt to comply with legislation but will not scrutinise and interpret judgments. Moreover, the use of examples may well provide additional useful clarity. One could interpret the uncontroversial nature of this chapter as an acknowledgment that the Court of Justice has done good interpretative work which the other institutions are now attempting to build on.

The services chapter is a little more difficult. For a start, it contains a list of extra exceptions, including services of general economic interest provided in another Member State (thus these are not excluded where it is the recipient who crosses the border),[13] matters to do with notaries, and the judicial recovery of debts.[14] However, more problematic is the substance of Art.16 itself, the article dealing with freedom to provide services, and the one which encapsulates the public debate about this Directive.

[10] Preamble, at para.33.
[11] Case C-76/90, *Säger v Dennemeyer* [1991] E.C.R. I-4221; Case C-55/94, *Gebhard* [1995] E.C.R. I-4165.
[12] Arts 14 and 15.
[13] For the rights of recipient of services see Arts 19–22.
[14] Art.17.

That article comes close to copying the one on establishment and similarly following *Gebhard*, providing as it does that access to or exercise of a service activity must not be subject to requirements unless they are non-discriminatory, justified, and proportionate. However, the sting is that whereas the establishment chapter permits justification "by an overriding reason relating to the public interest", Art.16(1)(b) says that the requirements "must be justified for reasons of public policy, public security public health or the protection of the environment". It thus excludes the possibility of justification on the basis of so-called mandatory requirements. It makes the country of origin principle, already partially reflected in the presumptive mutual recognition of *Cassis de Dijon*,[15] a step more absolute. Host states can only impose domestic laws concering access to or exercise of service activities where these fall within Treaty exceptions or are necessary for environmental reasons.

It is not clear how much this matters. The only non-environmental mandatory requirement relied on to any great extent is consumer protection.[16] Moreover the impact of removal of this exception is mitigated by several factors. First, the success rate of attempts to rely on it has not been great anyway, at least in the context of goods,[17] and there is no particular reason to expect a difference in judicial approach for non-sensitive services. Secondly, the Directive provides in Ch.V for detailed and comprehensive provision of information to consumers of services. The consumer is not therefore abandoned, and the preference for information rather than regulation of substance as a method of consumer protection is not new to Community law.[18] Thirdly, Art.16 only applies to a limited residue of services, most of which are not particularly sensitive or life-threatening, and so for which information requirements may arguably be seen as an appropriate form of protection. Finally, one should not forget that the myth of the approximate equivalence of standards in different Member States is not entirely without foundation.[19] The fact that service providers continue to be regulated by their host state should therefore provide some limited consolation.

In any case, it is not beyond argument that the Article does not have even this limited effect. Its wording is in fact very similar to that of the Treaty, which nowhere mentions mandatory requirements. The Court managed to interpret this additional class of exceptions into the concept of a restriction in Art.49.[20] There is nothing principled stopping it from doing exactly the same with the Directive. Further, it might be unprincipled not to: if a restriction justified by a mandatory requirement does not offend Art.49 then it is not obvious why it should offend an identically worded provision of secondary legislation.

[15] Case C-120/78, *Cassis de Dijon* [1979] E.C.R. 649.

[16] Cases on healthcare have relied importantly on others, but healthcare is excluded from the Directive. See Davies, "The Process and Side-effects of the Harmonisation of European Welfare States" Jean Monnet Working Paper 02/06 *www.jeanmonneprogram.org* for details.

[17] See Weatherill, "Recent Case Law Concerning the Free Movement of Goods: Mapping the Frontiers of Market Deregulation" (1999) 36 C.M.L. Rev. 51.

[18] R. Fair, *Trading in EC Law: Information and Consumer Choice in the Internal Market* (Europa, 2005).

[19] See Weiler, "The Constitution of the Common Market Place: Text and Context in the Evolution of the Free Movement of Goods" in *The Evolution of EU Law* (Craig and de Burca eds, OUP, 1999).

[20] Davies, "Can Selling Arrangements be Harmonised?" (2005) 30 E.L. Rev. 370 at pp.376–377.

Against this is the fact that mandatory requirements are specifically mentioned in the establishment chapter.[21] It is thus the clear intention that the scope of exceptions to free movement of services is to be narrower than the scope of those applying to establishment, and moreover that restrictions merely in the "public interest" but not within "public policy, public security, public health or the protection of the environment" are not to apply to services. In substance this too is a continuation of the Court's case law. While in principle allowing mandatory requirements to apply to services it has also emphasised that it is disproportionate to apply national law to foreign service providers to the same extent as it would be to apply to those establishing.[22] The Directive, using different language, reflects this observation.

A contrast with the Treaty Articles is to be found in the description of the type of measures to which the Directive applies. Both establishment and service chapters are concerned with measures which restrict "access to" or "exercise of" a service activity. The Treaty however refers to "restrictions on freedom" to provide services or establish, a more open phrase. Indeed, it has been generously read by the Court to encompass any measure liable to "hinder or make less attractive" the exercise of the freedoms.[23] The Directive therefore arguably incorporates a requirement of directness which the Treaty does not.[24] It is possible to imagine a measure which certainly makes service provision or establishment less attractive—for example planning restrictions, the cost of buying a house, or even advertising rules—yet does not seem to be concerned with access or exercise as such. On the other hand, in practice the Court has been suspicious of challenges to such indirect hindrances, tending to find that their lack of unequal effect places them outside the Treaty.[25] Nevertheless, it is notable that the Directive chose to adopt a less general wording than the Treaty.

The relationship with Articles 43 and 49

In general the Treaty Articles and the Directive provide for such similar degrees of freedom that it will not matter which applies to a situation. This is a fortiori so because where the Directive provides lists of prohibited and suspicious requirements these are likely to be useful interpretative tools for the Court, and national courts, even in situations to which the Directive does not apply. It would be surprising if the concepts of discriminatory and unjustifiable restrictions diverged significantly in the two contexts. However, if there is divergence, which takes precedence?

The specific statements that the Directive does not affect labour or criminal law might mean that a service provider (or recipient) could challenge a national measure under

[21] Art.15(3).

[22] Case C-76/90, *Säger v Dennemeyer* [1991] E.C.R. I-4221; Case C-58/98, *Corsten* [2000] E.C.R. I-7919.

[23] Case C-55/94, *Gebhard* [1995] E.C.R. I-4165.

[24] Preamble, at para.9.

[25] See Joined Cases C 544/03 & 545/03, *Mobistar v Commune de Fléron* and *Belgacom Mobile v Gemeente Schaarbeek* [2005] E.C.R. I-7723; Case C-134/03, *Viacom Outdoor* [2005] E.C.R. I-1167; Meulman and de Waele, "A Retreat from Sager? Servicing or Fine Tuning the Application of Article 49 EC" (2006) 33 L.I.E.I. 207 at pp.223–226; Hatzopoulos and Do, "The Case Law of the ECJ Concerning the Free Provision of Services: 2000–2005" (2006) 43 C.M.L. Rev. 923 at pp.959–960. See also (written prior to these cases, but invaluable for context) Woods, *Free Movement of Goods and Services within the European Community* (Ashgate, 2004), pp.209–218.

the Treaty, which has no such limitation,[26] but not under the Directive, even though it applies to the service in question. Should the limits of the Directive be transposed to the Treaty? Not to do so undermines these expressed limits. However the better argument is that to do so is to confuse the hierarchy of secondary and primary law. The Directive cannot detract from a fundamental freedom. Its express limitations are comments on its scope, not that of the directly effective Treaty freedom as such.[27] The effect is that these limitations in the Directive lose a great deal of force, although they may still have some purpose in the context of the administrative provisions and information exchange between states.

An alternative situation is that a requirement is prohibited by Art.16, but would be permitted under Art.49 EC because it serves a mandatory requirement. Here the Directive provides more liberty to service providers, and one might expect it to have precedence. It is however odd that a piece of secondary legislation should be subordinate to all other secondary legislation and yet superior to the Treaty itself. This is a feat of hierarchical gymnastics reminiscent of Art.18 EC.[28] Put another way, if the Court finds that Art.49 EC does not remove the competence of states to enforce a type of measure, then it is not obvious that secondary legislation aimed at implementing Art.49 EC can do so. Were the Directive to be based on Arts 94, 95 or 308 EC one might perhaps argue that the scope of the internal market, as understood in those Articles, is broader than the four freedoms.[29] However this Directive is based on Arts 47 and 52 EC, which permit only Directives to achieve the free movement of services and establishment. It seems that if Art.16 is to have a sufficient legal base it must be the case that Art.49 EC is not fully directly effective: the concept which it defines, and which can be legislated upon, is therefore broader than the use to which it can be put by courts.[30]

This is perhaps not so odd. Direct effect is essentially a requirement of justiciability. Assessing the legitimacy of different mandatory requirements involves precisely the sorts of political judgments that one might expect courts to be restrained about and that are appropriately left to the legislator. By contrast, if a mandatory requirement is accepted in principle then the more technocratic question of whether a measure actually serves it in a proportional manner is perhaps one that courts can attempt, and of course do.

A third, but related, situation, concerns those services excluded from the Directive, notably healthcare. Many MEPs who supported this exclusion were under the impression that they were protecting health services from the requirements of free movement, and the political argument will certainly be made that this should be its result—it is apparently, at least possibly, what was intended. However, it is difficult to see any way in which the Directive can prevent or diminish the (long-established) application of Arts 43 and

[26] e.g. Case C-274/96, *Bickel and Franz* [1996] E.C.R. I-763; Case 36/74, *Walrave and Koch* [1974] E.C.R. 1405.

[27] See also Art.3(3): "Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services". This is not quite the point, which is whether a difference between Treaty and Directive is necessarily a lack of compliance.

[28] Art.18 provides "Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect".

[29] See Davies, "Can Selling Arrangements be Harmonised?", cited above, at p.374.

[30] *ibid.*

49. The most that can happen is that the Court can take a hint as to the political mood from the healthcare exclusion and be more sympathetic to Member State objections to free movement in this sphere.

Abuse and the country of origin principle

It is increasingly common for states to argue that a particular use of free movement is "abusive".[31] This is often when companies migrate to lightly regulated jurisdictions while continuing to do most or all of their business in more heavily regulated ones, making this move in order to avoid the burden of the more regulated state. They are simply making a strategic choice as to the most advantageous place of establishment, and decoupling this choice from the location of their customers. They are able to do so because the free movement of services entitles them to act throughout the EU from any state.[32] In general the Court has therefore found that such behaviour, being simply a reliance on a Treaty right, cannot be seen as abuse.[33] However this finding is mitigated by the possibility for states to rely on mandatory requirements to impose at least some of their more important standards and regulatory requirements on service providers. That possibility is now removed, within its scope, by Art.16.

One the one hand this makes the need for a doctrine of abuse perhaps more urgent. The attractions of jurisdiction shopping have become greater, and one might think that the Court needs to establish the legitimate limits to this.[34] On the other hand, the philosophy embedded in Art.16 is that such jurisdiction shopping is legitimate. Support for a minimally-limited country of origin principle, which the Article displays, must rationally entail a belief that companies should be able to choose which country it will be.[35] Otherwise companies doing business in state A are all subject to different regulatory requirements according to where they are located, and there is nothing any of them can do about it; migration in order to minimise the disadvantages they suffer relative to their competitors would be abusive! Such an approach would be legislating for distorted competition, and also for discrimination on the basis of nationality.[36]

Even if establishment is free, Art.16 remains problematic. One of the justifications for a country of origin rule is that if service providers are subject to both home and host state regulation they will bear a double regulatory burden which will disadvantage them relative to domestic providers. In a broad sense therefore it is an equalising rule. However, as the Court has recognised, matters are not so black and white and one relevant consideration in deciding whether host state law may be applied is whether there is in fact

[31] See E. Sørensen, "Abuse of Rights in Community Law: A Principle of Substance or Merely Rhetoric?" (2006) 43 C.M.L. Rev. 423; Kjellgren, "On the Border of Abuse—the Jurisprudence of the European Court of Justice on Cirvumvention, Fraud and other Misuses of Community Law" [2000] E.B.L. Rev. 179.

[32] All the more so since even a structural and regular provision of services does not necessarily fall within establishment. See Case C-215/01, *Schnitzer* [2003] E.C.R. I-14847; Hatzopoulos and Do, "The Case Law of the ECJ Concerning the Free Provision of Services: 2000–2005" (2006) 43 C.M.L. Rev. 923 at pp.927–930.

[33] Case C-212/97, *Centros* [1999] E.C.R. I-1459; Case C-147/03, *Commission v Austria* [2005] E.C.R. I-5969; E. Sørensen, cited above, at pp.444–445.

[34] See Preamble, at para.79.

[35] See Woods, *Free Movement of Goods and Services within the European Community* (Ashgate, 2004), pp.178–179.

[36] See A.G. Lenz in Case C-56/96, *VT4* [1997] E.C.R. I-3143 (discussed in Woods, *ibid*).

similar or equivalent protection of the relevant interest in the home state laws.[37] In simply abolishing mandatory requirements the Directive goes beyond this. It creates a situation in which providers located in a light regulation state but doing business in a high regulation state will have a significant competitive advantage over domestic producers. Nor can this fact be taken account of or mitigated by use of mandatory requirements. One may therefore say that the Directive entrenches and extends the situations in which service providers will be advantaged or disadvantaged on a given market according to their state of establishment. Alas, this latter phrase is a reasonably accurate description not only of the legal concept of a distortion of the conditions of competition but also of discrimination on grounds of nationality. Thus Art.16 appears to violate Art.12 EC, the prohibition on nationality discrimination, and to conflict with the Art.3(g) EC requirement that the internal market be a place of undistorted competition. One must query whether there is competence to legislate to *increase* distortions of competition, let alone discrimination.[38]

The arguments above could also be made about some of the Court's case law.[39] However, courts are limited in what they can do. They cannot write law, but must choose least bad options. The function, one might think, of legislative competence is to deal with situations where none of the judicial options is ideal. For example where creating free movement results in distorted competition one might seek harmonising legislation which allows the movement while removing the distortion. By contrast, this Directive appears to embrace the problems of negative harmonisation and copy them onto the page. Instead of compensating for the limitations of the judicial method it adopts them. Why legislate then?

The feasability and impact of the administrative requirements

The answer may lie in the administrative provisions. While the establishment and services chapters provide much doctrinal food for thought, the real importance of the Directive is elsewhere. Its proper title should perhaps be "the Directive on harmonisation and modernisation of public administration".

The first point is the scope and imprecision of the demands made. Article 5:

> "Member States shall examine the procedures and formalities applicable to access to a service activity and to the exercise thereof. Where procedures and formalities examined under this paragraph are not sufficiently simple, Member States shall simplify them."

Some Member States have in fact been engaging in a systematic review of all relevant national law.[40]

[37] See Case 279/80, *Webb* [1981] E.C.R. I-3305; O'Leary and Fernandez-Martin, "Judicially Created Exceptions to Free Provision of Services" in *Services and Free Movement in EC Law* (Andenas and Roth eds., OUP, 2002), pp.168–170.

[38] See Davies, "Services, Citizenship and the Country of Origin Principle" a Europa Institute Online Working Paper at *www.law.ed.ac.uk/europa*.

[39] See von Heydebrand u.d. Lasa, "Free Movement of Foodstuffs, Consumer Protection, and Food Standards in the European Community: has the Court of Justice got it Wrong?" (1991) 16 E.L. Rev. 391.

[40] e.g. the Netherlands.

Additionally the Directive provides for single points of contact, through which providers of services must be able to complete all the necessary procedures and formalities necessary for them to engage in their activities.[41] Here they, and service recipients, must be able to access information about all the requirements applicable to providers established in their territory, means of redress in the event of disputes, contact details for authorities, and other useful things.[42] Finally, it must be possible for all the procedures and formalities relating to service activities to be completed electronically at a distance via this single point of contact, thus via email or internet.[43]

The chapter also contains provision for harmonisation. The Commission, following the comitology procedures, may introduce harmonised forms for the formalities and procedures applicable to service provision, and it shall adopt "detailed rules" for the implementation of the electronic interface requirement, "with a view to facilitating the interoperability of information systems".[44]

The scope of the e-government provisions is imprecise. Which formalities "relate" to service activities? Does this include the renting of residential or commercial premises? Or the employing of staff? The registering of the service provider's children for childcare? There will be many difficult lines to draw. One could argue, following the case law, that if the formalities hinder the activity, they relate to it, but this would then lead to a very broad interpretation, potentially including any measure applying to a migrant or a business person.[45]

In any case, the electronic interaction which the Directive demands is likely to spread into other areas. Having created this infrastructure it would be inefficient and even strange not to use it for a wider range of formalities and interactions, even if not strictly to do with services. The fixed cost of the system is likely to be more important than the marginal cost of each new procedure brought within it. We may expect the Directive to therefore contribute to a broader change in the way authorities interact with citizens. Most importantly, it would be bizarre to create such a system and restrict its use to foreign supplicants, while their domestic peers are required to use old-fashioned methods. In fact, as the next section suggests, the chapter may apply internally anyway. But even if not, the systems it calls for are likely to be applied within the state as a matter of fact.

Thus the final consequence of the chapter approaches the revolutionary. It is likely to result in citizens all over the EU interacting with their governments electronically, through very similar portals and software. This raises the question of competence. Can the free movement of services be used to reform and harmonise the state? On the one hand, the measures certainly may promote the free movement of services and establishment. However, subsidiarity may be an issue. It is reasonable to demand that Member States make their formalities simple and accessible, but demanding that they do it electronically via single points of contact is arguably taking away more discretion than necessary. One

[41] Art.6.
[42] Art.7.
[43] Art.8. Also Art.7(3).
[44] Art.5; Art.8.
[45] *Gebhard*, cited above; Spaventa, "From Gebhard to Carpenter. Towards a (Non)economic European Constitution" (2004) 41 C.M.L. Rev. 743.

can imagine a reasonably simple and accessible system which nevertheless requires the use of paper and contact with more than one office.

Proportionality may be the greater problem. As ever, this is a matter of balancing.[46] Is the benefit here proportional to the cost? Government is not just red tape, it is also culture. Ways of ruling and interacting with citizens reflect images of the state, as does the way authority is allocated to sub-state units, and the freedom they are given in how to use this. One hesitates to defend bureaucracy, but there is a social and political cost in rendering the administration faceless, uniform and unified, even if it is efficient, just as there is an economic and social cost in taking away Member State freedom to experiment with different forms of interaction and administration. It is hard to believe, looking at the casual brevity of the administrative chapter, that these costs were fully weighed before deciding to proceed with this EU wide harmonisation and modernisation of public administration.

Does the Directive apply to situations internal to one state?

Perhaps the most important practical question about this Directive is whether it applies to service providers in their home state. If so, this makes it more radical than would otherwise be the case. Yet the logic and wording of some of the Articles make a denial of such internal effect problematic.

For some chapters this is a non-issue. The services chapter refers throughout to the imposition of obligations on providers established in another state. Moreover, the only sense to having a chapter on establishment and a chapter on services is if the latter deals with cross-border provision. Yet the chapters on establishment and on administrative simplification have another logic.

As a matter of wording, both appear to be general. Consider: "Member States shall examine the procedure and formalities applicable to access to a service activity and the exercise thereof" (Art.5(1)); "Member States shall ensure that it is possible for providers to complete the following procedures and formalities through points of single contact (...)" (Art.6(1)); "Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme (...)" (Art.9(1)). Other Articles in the chapters use similar formulas. Moreover, the Directive is expressed to apply to "services supplied by providers established in a Member State" with a notable absence of reference to any cross-border element. Similarly, a provider is defined as a person "established in a Member States, who offers or provides a service", again with a notable absence of any cross-border requirement.[47]

In short the natural reading of the chapters is general. They would seem to apply to persons already within their borders, residents or companies, who wish to set up a new economic entity or provide new services, or to those coming from abroad. Moreover, it

[46] See Davies, "Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time" (2006) 43 C.M.L. Rev. 63 at pp.81–83.

[47] Nor does the title of the chapter "freedom of establishment" provide against a case against. While that title clearly refers to a cross-border concept, it leaves open whether this is to be achieved by harmonisation or not.

would be truly strange if this were not the case. If two individuals both wish to open a travel agency, would it be rational to have different tests of legality for the formalities and substantive requirements involved, according to whether the individual proposing to start the business is currently resident domestically or abroad? This is even more true since the prohibition on discrimination means that they will be subject to the same procedures and rules. It is not even clear how such a distinction would work. Should the domestic resident move abroad for a few months in order to be able to use the simplified internet procedures and to be able to hold the authorities and their regulation to standards of proportionality? Perhaps a market for foreign "sleeping partners" will come into being.

The argument against this may be based on competence. This Directive implements Arts 43 EC and 49 EC, and is therefore limited to achieving free movement of services and freedom of establishment. It cannot apply beyond those Articles, and they do not apply to internal situations. As the Court has said, if Member States wish to impose unreasonably burdensome regulation on those establishing at home instead of abroad, that is their business.[48] However, this is not a good argument. The internal situation is a phenomenon of case law. Courts can only apply the Treaty Articles to those engaged in cross-border activities because the Treaty Articles are expressed only to apply to these. That is not the same as saying that harmonisation to achieve free movement across borders must be so narrow. Indeed, the opposite is the norm. Harmonisation of standards of products and services, aimed at achieving free movement of these, usually applies throughout the EU, without distinction between exported and domestically sold products or services.

Thus both a purely cross-border application of the establishment and administrative simplification chapters and a general one are sufficient to achieve the ends of free movement. Yet the cross-border limitation means that these chapters would allocate rights according to origin, that the individuals wishing to open their travel agency would find that the efficiency, proportionality and reasonableness that they could demand of the law and authorities would depend upon their passport or where they had previously been resident. One meets here the same problem as with Art.16; this would be legislation entrenching nationality discrimination and distortions of competition.[49] As such it would be invalid.

Thus a reading of the chapters which is consistent with their wording and with any notion of equality or fair competition finds them to be imposing general requirements of proportionality and simplicity and accessiblity on all national law and authorities concerned with service activities, requirements which can be enforced by those affected irrespective of their origins. That is not to say that the results will always be the same for domestic and non-domestic providers. What is proportionate may depend upon the individual context, such as whether the individual is also subject to the jurisdiction of another state which also supervises or checks. However, the principles of law to be applied are now uniform for those of all origins and nationalities, domestic or foreign.

This is truly an attempt to redesign and control national regulation of economic activities. Given the similarity between the wording of the establishment chapter and the Treaty it is

[48] e.g. Case C-64/96, *Uecker and Jacquet* [1997] E.C.R. I-3171; Case C-108/98, *RI-SAN* [1999] E.C.R. I-5219; Case 98/86, *Mathot* [1987] E.C.R. 809.

[49] See above.

in substance a legislative abolition of the internal exception. Regarding the administrative simplification chapter it is substantive administrative law harmonisation on an impressive scale. For these reasons there is a good chance that the Court will not find the chapters to apply internally. It is possible to muster superficially acceptable arguments against such application. These do not, however, stand up to principled scrutiny.

The fundamental problem is this: a country of origin principle is only sustainable in a Community that does not mind about competitive advantages gained through regulatory difference, that is relaxed about the regulatory bumps in the playing field, and is not sensitive to advantage or disadvantage based on origin.[50] For better or worse, that is not the EU today. In the case law a form of country of origin rule may be seen as a least bad option, a way of creating a market using the limited scope of judicial powers. However, to consciously harmonise for it is to reject the principles of Arts 12 and 3(g) of the Treaty.

The information and co-operation chapters

Member States are required to ensure that service providers make information available to recipients, concerning, among other things, their official address, contact details, law governing the contract, insurance, regulatory authorities and the content and price of the service they are offering.[51] There is a discretion as to how this information is provided but the emphasis is on clarity and accessibility. At the request of the recipient they must also supply information on codes of conduct for their profession and professional rules.[52] Member States may in addition take measures to ensure that service providers are adequately insured.[53] These provisions may therefore be seen as the consumer protection section of the Directive, with the principle being that a well-informed and insured consumer is a protected one.

As a corollary of this approach, service providers are given some rights to communicate and inform—that is to say to advertise. Total prohibitions on commercial communication by the regulated professions are to be removed, although limitations may be necessary for the public interest to remain.[54] Thus it is not necessarily the case that doctors and barristers must be allowed to advertise directly to the public. It will be up to Member States to interpret the fairly imprecise Art.24.

Further, there are provisions concerning multi-disciplinary partnerships, prohibiting prohibitions of these, except where necessary to comply with professional ethics and conduct.[55] Once again, this is a clause whose meaning is open and disputable. In any case, where such partnerships occur, Member States acquire a Community law responsibility to ensure conflicts of interest are prevented and impartiality is secured.

[50] Davies, "Is mutual Recognition an Alternative to Harmonisation? Lessons on Trade and Tolerance of Diversity from the EU" in *Regional Trade Agreements and the WTO Legal System* (Bartels and Ortino eds., OUP, 2006), p.265; Davies, "Services, Citizenship and the Country of Origin Principle", cited above.

[51] Art.22.

[52] *ibid.*

[53] Art.23.

[54] Art.24. See also Preamble, at para.100.

[55] Art.25.

Later in the chapter, Member States are encouraged to stimulate, in co-operation with the Commission, quality certification and assessment schemes, including the development of European standards.[56]

This chapter also appears to apply to all service providers, not just those engaged in cross-border activity.

The next chapter concerns administrative co-operation between Member States, and requires them to provide information on service providers to each other, quickly and sometimes electronically.[57] This concerns, for example, whether a service provider is responsible and lawful in his home state, which is of course relevant to those receiving services from him elsewhere. This information is to be exchanged via contact points and networks of national authorities, which will be created and promoted with the active involvement of the Commission, which will also, in the case of health, safety and environment related information, lay down "and regularly update" "detailed rules" concerning the management of the network.[58]

One of the risks of this is of unjustified blacklisting. If a single Member State posts the information that a service provider is untrustworthy, in violation of local law, or bankrupt, this will be transmitted throughout the EU and may have devastating effects. However, such assessments can of course arise in error, and may even arise because of delay; because a state fails to receive confirmation on time that these things are not the case. The potential impact of such an information network should go hand in hand with measures to ensure those affected can protect their rights. While of course national public law remains available, no doubt now filled out by EU rights—since arguably a challenge to a national authority's assessment is now within the scope of EU law[59]—the Directive does not address the issue. In particular, there is no provision for the withdrawal of alerts or warnings or erroneous information. This is regrettable, because it cannot be assumed that information that an accusation was wrong will spread as quickly and effectively through the EU-wide system as the original accusation did. Mud sticks, and there ought to have been a provision for cleaning it off.

Importantly, Member States also have an obligation to supervise service providers established in their territory and enforce the relevant laws. In particular, the fact that a service was provided in another state shall not be a reason for them not to take relevant supervisory or enforcement action.[60] One of the great risks of country of origin regulation—perhaps of any international service market—is that states will have no interest in regulating providers who primarily do business abroad, and will even have a positive interest in laxity, as this may be appreciated by the providers. Thus there is a real risk of quality of supervision diminishing however splendid the written law. To a lesser extent states may also not be interested in supervising foreign providers active on their territory, and may concentrate their efforts on domestic operators; it is easier to supervise them. Article 31 deals with this. Thus these provisions address the problems of

[56] Art.26.
[57] Arts 28, 29, 32–35.
[58] Art.32.
[59] See Case 5/88, *Wachauf* [1989] E.C.R. 2609.
[60] Art.30.

enforcement, although of course they cannot remove the structural conflicts of interest, and will not be sufficient alone to change administrative cultures.

These chapters are about the harmonisation and integration of national authorities. They are not only to communicate but to be brought within networks and shared structures and rules. This is to occur under the leadership of the Commission. A vision of a European wide regulatory sector, with functional decentralisation to the Member States, but a centralised framework and mission, is quite clear. This will surprise those who thought of supervisory and administrative authority as a Member State matter, but fits with the rest of the Directive.

Implementation

It is difficult to assess what implementation this Directive requires. Much of it is not legislative, but consists of reviewing national rules and systems, to ensure that they function sufficiently quickly and simply and comply with the substantive chapters. How much legal change is necessary will vary from state to state. There may be equal variation in how prepared states are to credit that change to the Directive. Many states are already busy with developing e-government, and simplifying bureaucracy, for example, and increasing the accessibility and speed of authority can reasonably be seen as an ongoing process. Must legal changes in these areas now permanently carry the stamp of the Directive? This is a subtle form of ideological colonialism, to anticipate and appropriate developments that would largely have happened anyway.

Conclusion

The Directive is economically liberal but politically illiberal. It centralises. The country of origin principle and the administrative provisions are both highly intrusive rules which take away national autonomy to a significant extent. Social, cultural and political freedom is removed in the name of economic freedom. The Directive is disproportionate.

More relevantly, it is economically dubious. Increased services trade will bring benefits, but a loss of innovation and creativity in the governmental sphere will bring costs which in the long term are probably higher. Anyone believing in the stimulating effects of decentralisation, competition, and markets ought also to realise that it is important for Europe's vitality that these principles are applied widely, and Member States retain freedom to develop their legal and governmental systems.

One wonders if those involved in this Directive appreciated its potential effects and understood the importance and uniqueness of the structures of authority in a state. The Directive may be the result of narrow thinking and departmentalised government. The economic models which predict it will bring benefits do not consider the economic price of its political, social and cultural effects. Such assessments are too difficult to make in the quantitative language of economics. The answer to this is not to ignore the non-economic factors. It is not to allow Directives about government to be written by those thinking only about trade.

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