



## SUMMARY



## Summary

### Introduction

#### *The advice questions*

In January 2004 the European Commission submitted a proposal for a Directive on services in the internal market. In December 2004 the Government, also at the request of the Lower House, asked the SER (*Social and Economic Council*) to issue advice regarding this Services Directive. Three groups of questions were submitted to the SER:

- How does the Services Directive relate to the Treaty?
- Which sectors must come under the Directive?
- How should the consequences of the country of origin principle on the employment market and on control and enforcement be dealt with?

### Backgrounds to the Services Directive

#### *The Services Directive as part of the Lisbon strategy*

An important aspect of the Lisbon strategy for increased dynamics in the European economy is the realisation of the internal market. In 2000 the European Council asked the European Commission to devise a strategy aimed at eliminating obstacles to the internal market for services. To this effect the Commission first identified the existing obstacles in respect of cross-border service provision. The obstacles proved to relate to both the establishment of service providers in other Member States and the provision of services coming from another Member State. The obstacles are often created by diverse requirements with regard to authorisations, registrations and professional qualifications.

#### *Outline of the Services Directive*

The objective of the proposed Services Directive is to establish a general legal framework that will allow service providers to exercise their freedom of establishment and enable the free movement of services. The Directive aims to eliminate both the obstacles that impede the freedom of establishment and those that impede the free movement of services. In order to eliminate the obstacles that impede freedom of establishment the proposal provides for the simplification, streamlining and screening of the authorisation schemes of the Member States. Conditions imposed on establishment must be non-discriminatory and proportional and it must be possible to objectively justify them. In order to eliminate the obstacles in respect of the free movement of services the country of origin principle will be implemented. Pursuant to this principle, Member States are obliged to accept incoming services from a service provider who is established in another Member State and provides similar services there in a legitimate manner. The Directive allows a number of general, temporary and specific exceptions to this coun-

try of origin principle. The elimination of obstacles that impede the establishment of service providers and the freedom of service provision goes side by side with measures in the areas of consumer protection, quality of services and mutual assistance between national Governments.

#### *Economic effects of the Services Directive*

According to calculations by the CPB (*Netherlands Bureau for Economic Policy Analysis*) and Copenhagen Economics, elimination of the obstacles will give an important impulse for economic growth and employment in Europe and will therefore contribute to the success of the Lisbon strategy for increased dynamics in the European economy.

#### **Points of departure**

##### *Further regulation of service transactions desirable*

The SER feels that Member States and social partners must get the Lisbon strategy underway by taking a lot more responsibility for interpreting the Lisbon agenda to a national level. In a European context the main objective is to eliminate the remaining obstacles to the functioning of the internal market. Because of the contribution the Services Directive will make to increased dynamics of the European economy and higher employment levels, the SER regards the further regulation of the internal market for services in a positive light. A policy-based arrangement is also preferable over the elimination of obstacles via the case-law of the European Court of Justice. The individual case approach of the European Court of Justice takes too long for the general opening up of the service transactions and, by definition, leaves no room for more strategic considerations. The European Court of Justice can only instruct the Member States on what they *cannot* do.

##### *High level of protection important criterion*

In addition to the contribution to improved economic growth and higher employment levels, an important criterion is whether the Services Directive will fulfil the ambition of high standards of public health, security, environmental protection and consumer protection that is anchored in the Treaty. In this context it is relevant that, in the context of the free movement of services, the European Court of Justice has recognised the protection of workers as an objective of general interest.

##### *High level of protection assumes the proper enforcement of the Directive*

To create a basis for the opening up of national markets there needs to be confidence that the Member States will in fact implement and comply with common rules and agreements about market opening and the intended high level of protection in the areas of public health, security, environmental protection, consumer protection and worker protection. This underlines the great importance of the proper enforcement of the

Services Directive. To achieve this enforcement there must be sound guarantees for the administrative cooperation between and within the Member States. This also constitutes an important criterion for the Directive.

*Neutrality in respect of other European regulations desirable*

Finally it is important, for a number of reasons, that the Directive adopts a neutral approach in respect of areas that are already – or are expressly not – covered by European legislation and regulations. It is very specifically not the objective of the Directive to make changes to European legislation in areas other than cross-border service provision. Important points for attention in this respect are respecting the responsibility of the individual Member States with regard to the health policy and the structuring and realisation of health services, and the responsibility of the individual Member States with regard to the structure of the educational system and with regard to the designation and enforcement of the applicable employment law in cross-border situations.

**The sectoral scope of the Services Directive**

*Advice questions*

The Government has asked the SER which sectors should come under the scope of the Directive. Specific attention is requested for: services of general economic interest, the care sector, the education sector, the social services and the regulated professions (including civil-law notaries, solicitors and (court) bailiffs).

*Focus not only on sectors in which public interests play a role*

This focus on sectors in which public interests play a role is certainly justified. However, it must be stressed that the Services Directive is primarily intended for, and aimed at, many service areas – such as business services – in which providing freedom of establishment and of transactions does not or hardly affect the public interests that require protection. In these service areas it doesn't take much to ensure that broader market opening and stronger competition actively result in better service to the customer, and therefore in increased social prosperity.

*Actual points that are relevant for assessing the sectoral scope*

The Framework Directive applies, in principle, to all services provided to companies and consumers for which an economic consideration is received. If this consideration is missing – as in the situation of publicly funded education, for instance – the service in question does not come under the scope of the Services Directive. Furthermore, the stipulations regarding freedom of establishment apply only to those services that are open to competition. This means it will continue to be possible to regulate certain services of general economic interest by granting exclusive and special rights that limit or exclude competition in respect of these services. The draft Directive is therefore not an instrument for revoking existing monopolies for services of general interest or for privatising certain sectors.

There are also certain sectors that do not come under the draft Directive because a separate sectoral approach already applies to these sectors. These sectors are financial services (including supplementary pensions), transport and telecom services.

What can the Services Directive mean for the other sectors (including services of general economic interest)? To start with it is necessary to make a distinction between the regime for the freedom of establishment and that for the free movement of services. The application of the country of origin principle to service transactions is often regarded as a considerable impairment to the options the Member States have for guaranteeing the relevant public interests. However, a certain infrastructure is required to be able to offer a large number of services of general interest (consider, for instance, intramural health care), in which case the freedom of establishment of service providers is relevant and *not* the free movement of services and the country of origin principle that applies in this context.

In so far as there is in fact free movement of services the draft Directive makes a number of exceptions with regard to the application of the country of origin principle. Among other things these exceptions relate to the network sectors mail, electricity, natural gas and water, the statutory tasks of civil-law notaries, and services that are prohibited in a Member State for reasons of public order, public safety or public health. Member States must also be able to continue to impose specific requirements with regard to public order, public safety, public health or environmental protection on account of the special characteristics of the location where the service is being provided.

If Member States wish to guarantee public interests in a hybrid (combined public-private) system they are confronted with certain restrictions imposed by European law when trying to structure such a system. These restrictions are a given: regardless, the new Services Directive will not make any substantial changes to this situation. The Services Directive will, however, create possibilities to make it clear(er), in advance, what is and is not acceptable under European law.

#### *Broad scope of the Services Directive desirable*

The broadest possible reach of the Directive is, in principle, the preferred situation. Consumers are not helped by large numbers of specific exceptions and special stipulations. There is also a risk of an excessively high legislative pressure on companies. At the same time the rule applies that for a number of sectors and types of activities specific regulations are needed and will always be needed, in particular with regard to the protection of certain general interests. The possibility of specific sectoral harmonisation (or cross-border self-regulation) must remain open if it appears there is a need. The instrument of the Framework Directive provides good options in this respect, too.

*SER view with regard to sectoral scope of specific sectors*

Based on the above considerations, the SER arrives at the following view with regard to the questions posed by the Government in respect of the scope for a number of specific sectors:

- *Services of general economic interest.* The draft Services Directive only applies to services that may be considered economic activities. This means that services that are mostly financed from public funds, or are not subject to competition, will not come under the Services Directive. The Services Directive will, in principle, apply to the remaining services of general (economic) interest. It would not make sense to place services of general economic interest outside the scope of the Services Directive. This would not stop the free movement of services and the freedom of establishment as the Treaty, and the European Court of Justice's interpretations of the Treaty over the years, continue to apply. Furthermore, the European Court of Justice will continue to pass judgements about the free movement of services and the freedom of establishment for service providers in future. Seen in this light this Directive is an important opportunity to ensure a good future balance between market integration and policy integration.
- *Health care.* The draft Directive gives the Member States room to guarantee public interests in respect of the quality and accessibility of, for instance, care facilities. Not permitted, however, is the unnecessary restriction of the freedom of establishment and of services through the use of discriminating and obscure requirements that cannot be objectively justified. This starting point is deserving of support. Clarification will be required about the room that remains after the opening up of the service transactions for establishing medical-ethical requirements. The stipulations in the Services Directive clarify and reinforce the position of recipients of health care services.
- *Education.* This sector will actually mostly fall outside the scope of the Directive because, in the case of education in the context of the national education system, the recipient does not give the service provider an economic consideration. Education which is (primarily) financed out of public funds, does not constitute a service within the meaning of the EC Treaty.
- *Regulated professions.* The statutory tasks of civil-law notaries and court bailiffs will – rightfully – be excluded from the application of the country of origin principle. There is no reason to also exclude non-statutory tasks. This means that the individual Member States will have to clarify the distinction between statutory and non-statutory tasks once again.

**The Services Directive and the Treaty***Advice questions*

The Government has asked the SER to look at the relationship between the Services Directive and the Treaty. This question concentrates on two points:

- The need for the Services Directive if the free movement of services has already been laid down in the Treaty.
- The relationship between the grounds for derogation in the Services Directive on the one hand and the Treaty and the case-law of the European Court of Justice on the other hand.

The first point concerns mainly the limitation suggested in the Services Directive in respect of the grounds for derogation that Member States can invoke to impose restrictions on the free movement of services in individual cases.

#### *Focus on limiting the grounds for derogation*

The free movement of services is laid down in the Treaty. However, by invoking compelling reasons of general interest, such as public health, Member States can, in individual cases, impose restrictions on service providers from other Member States. The measures taken by the Member States must however be proportionate and necessary and must not discriminate between national and international providers. What these compelling reasons of general interest or grounds for derogation are is partly laid down in the Treaty and partly determined by the European Court of Justice's interpretation of the Treaty. The Services Directive limits the grounds for derogation to the grounds for derogation stipulated in the Treaty. Procedural restrictions are also imposed on appeals invoking the grounds for derogation. This restriction of the grounds for derogation results from the application of the country of origin principle, according to which the Member States cannot restrict the activities of service providers from other Member States who comply with the laws of their country of establishment.

#### *Country of origin principle not an absolute principle*

The country of origin principle is not an absolute principle, including in the Services Directive. Firstly, the Services Directive contains a number of general, temporary and specific exceptions to the country of origin principle. Moreover, the principle is supplemented by a system of support for recipients, allowing them to acquaint themselves with the legislation of other Member States, and by harmonisation of the rules regarding transparency in service activities. The Services Directive also provides for the enhancement of the administrative cooperation between the Member States. Finally the Services Directive contains stipulations to promote self-regulation and, where necessary, supplementary harmonisation measures in sectors.

An important point in evaluating the proposed limitation of the grounds for derogation in the application of the country of origin principle is the quality of these supporting measures. The scope of the country of origin principle is also a point for consideration.

#### *Limiting the grounds for derogation may create tension in respect of the Treaty*

Is all this consistent with the Treaty? In itself it cannot be a contravention of the Treaty if the Member States decide to tie their own hands by invoking the grounds for derogation. However, it remains to be seen what the European Court of Justice would

decide in a case where a Member State that was outvoted in the formulation of the Services Directive were to impose restrictions by invoking the general interest and referring to the limitations in respect of the grounds for derogation recognised by the European Court of Justice and the existing lack of proper administrative cooperation, supplementary harmonisation measures or codes of conduct. It is not unlikely that, in such a case, the European Court of Justice would ascertain that there was tension in respect of the Treaty.

*Proposal for a temporary safety valve*

In order to prevent such tension a temporary 'safety valve' is required. This means that the limitation of the grounds for derogation provided for in Article 19 of the Services Directive will not come into effect immediately but will come fully into effect no later than the start of 2010. The proposal implies that the country of origin principle will be implemented forthwith but that Member States will, until 2010, have the option to take measures against a service provider established in another Member State pursuant to the compelling reasons of general interest recognised by the European Court of Justice. During the transition phase it could be stipulated that the Member States are obliged to report any measures based on the general interest they have taken against a service provider established in another Member State to the Commission and the Member State of origin, stipulating the reasons (notification). Based on this notification the Commission – in line with Article 40 of the Services Directive – will have to seriously consider if it is necessary to formulate supplementary harmonisation proposals prior to 2010.

The conclusion is that limiting the grounds for derogation in respect of the free movement of services is acceptable, provided the implementation is phased. Another important condition is that the recommendations in respect of the quality of the supporting measures and the demarcation of the scope of the country of origin principle discussed below are realised.

*Increased mandatory administrative cooperation*

Confidence in efficient collaboration between the Member States and in strict enforcement is a basic condition for the proper functioning of the country of origin principle: after all, the Member States must be able to rely on the fact that public interests are sufficiently guaranteed in the Member State of establishment. However, the stipulations in the Services Directive regarding administrative cooperation between the Member States are too ambiguous. The stipulations need to be further defined so that it can be established more clearly in which cases the Member States are in default on this point. The Commission must also be given a clearer role in the monitoring and realisation of the administrative cooperation between the Member States. These measures must, in extreme cases, give the Commission the opportunity to instigate infringement proceedings in the European Court of Justice if Member States do not comply with their obligations on this point.

*Guarantees for consumer protection*

The proposed Directive does, in principle, offer sound guarantees for the protection of consumers. However, in some points clarifications are required and a number of points are capable of improvement. The regulation for the provision of information would have to be brought in line with the more binding regulation in the proposed Framework Directive for unfair trade practices. The regulation in respect of the guarantees also needs to have a more binding character.

*Further clarification of the place of business criterion*

The effect of the country of origin principle is demarcated by the definition of 'establishment' and by the definition of 'contracts'. An important aspect of the administrative cooperation between the Member States concerned is the prevention of so-called 'PO box companies', which wrongly invoke the country of origin principle. In order to exclude PO box companies a more exact definition of the term 'place of business' is needed in the Directive, in accordance with the judgements of the European Court of Justice and the existing EU regulations. To this effect, good administrative cooperation between the Member States is also important.

*Further clarification of the scope of the contracts and private international law*

The country of origin principle applies to the contracts of service providers. However, the Directive does not define what exactly is considered a contract: does this term refer to the actual service provision or does it also relate to the contracts the service provider enters into with parties involved in the realisation of the service? This point must be further clarified in the Services Directive.

This is also important because the application of the country of origin principle to contracts and liability may interfere with private international law. This potential interference and its possible consequences must be mapped out more clearly. This will allow for a well-founded consideration between the country of origin principle for the simplification of service transactions on the one hand and the legal protection of parties as laid down in private international law on the other hand. For the proper realisation of service transactions it *may* be relevant to also apply the country of origin principle to contracts and liability, where appropriate. This would relate mainly to contracts and obligations between companies. For those aspects that come under the SER sphere of activity, such as employment law and consumer protection, the SER recommends that private international law, with its safeguards for the protection of weaker legal parties, be honoured.

**The Services Directive and employment law in cross-border situations***Advice questions*

The Government has asked the SER to evaluate the application and scope of the country of origin principle, taking into account the consequences for the employment market and the consequences for the dispensation of justice, control and enforcement. The SER

has condensed these questions into the question what influence the Services Directive has on both employment law in cross-border situations and the enforcement thereof. As a starting point the SER uses the premise that it is undesirable for the Services Directive to interfere with existing European regulations in respect of employment law. Any changes to this employment law must be assessed on their own merits: the current balance between the protection of workers on the one hand and market opening on the other hand cannot be upset without due consideration. In view of the indications that the enforcement of employment law in cross-border cases is insufficient it may be worthwhile to assess whether, in this area, the proposals in the Services Directive could result in a better balance between market opening and the protection of workers.

#### *The Services Directive and the Posting of Workers Directive*

Under current European regulations the employment law of the host country applies to a certain hard core of the employment terms and conditions of workers who are posted to another Member State. The so-called *Posting of Workers Directive* stipulates that this hard core includes, among other things, maximum hours of work, minimum wages, Occupational Health & Safety regulations and minimum number of paid leave days. A Latvian company that secondes workers to the Netherlands is therefore obliged to comply with the Dutch Occupational Health & Safety regulations and must pay its workers at least the Dutch minimum wage. If the posted workers work in the construction sector, the company in question is also bound by Collective Labour Agreements stipulations that have been declared generally binding.

The *Services Directive* stipulates that the country of origin principle does not apply to those aspects that are provided for in the *Posting of Workers Directive*. The Services Directive does therefore not affect the aforementioned obligations of the Latvian company that secondes workers to another Member State. With regard to the implementation of the Posting of Workers Directive the desired neutrality of the Services Directive in respect of existing employment law in cross-border situations is therefore guaranteed.

#### *Expansion of the Terms of Employment (Cross-Border Work) Act (WAGA)*

According to Article 3.10 of the Posting of Workers Directive the Member States have the option to declare the relevant stipulations from Collective Labour Agreements that have been declared generally binding applicable to sectors other than the construction sector. In the Netherlands a legislative proposal to this effect, expanding the so-called WAGA, has been submitted to the Lower House. The Council assumes that the Lower House will accept this proposal. This legislative proposal guarantees that it will be possible to properly manage the increase in cross-border service transactions and therefore the increase in posted workers.

#### *Neutrality in respect of existing employment law still insufficiently guaranteed*

However, the exclusion of those aspects of the country of origin principle that are regulated by the Posting of Workers Directive is not sufficient to guarantee the desired neutrality of the Services Directive in respect of existing European employment law in

cross-border situations, as there are cross-border situations in which the Posting of Workers Directive does not or no longer apply. In these situations the Treaty is relevant with regard to the law that applies to contractual obligations (*The Rome Convention – Convention on the Law applicable to Contractual Obligations*). Those aspects of employment contracts that are regulated by the Rome Convention are not excluded from the country of origin principle. Because the Rome Convention forms part of the employment law that currently applies in cross-border situations, the desired neutrality of the Services Directive in respect of this law is therefore insufficiently guaranteed. The Rome Convention also remains relevant in situations that do come under the posting situations. The Posting of Workers Directive only stipulates that the mandatory law of the host country applies to the hard core of employment terms and working conditions. With regard to employment terms that fall outside or go beyond this hard core the country of origin principle could, potentially, interfere with the Rome Convention.

#### *Proposal for improved neutrality guarantees*

The Services Directive must therefore ensure that the Rome Convention will continue to apply in respect of employment contracts, of course with due observance of the specific stipulations regarding posting in the Posting of Workers Directive. The text of the Directive must be watertight on this point.

#### *The Services Directive and enforcement of employment law*

Article 24 of the Services Directive deals with the enforcement of the Posting of Workers Directive. The European Commission observes that Member States often put up obstacles against the posting of workers. These obstacles are justified from the point of view of protecting workers. However, it is not always clear which motive prevails: protection of workers or protection of the local market. Against this background the Services Directive contains a number of stipulations that must result in a better balance between the possibilities for enforcing the Posting of Workers Directive on the one hand and market access on the other hand. In concrete terms this concerns the abolishment of certain disproportionate authorisation schemes and the improvement of controls in respect of the compatibility between the employment terms and conditions and the Posting of Workers Directive.

#### *A single point of contact for the registration of posted workers*

The Services Directive is looking, with good reason, for a better balance between enforcement of employment law on the one hand and market opening on the other hand. However, the proposed ban on a duty to report goes too far. This limits the possibilities for enforcement too severely. National enforcement falls short when, as a result of inadequate information exchange between the Member States, the competent authorities do not have an insight into the actual situation. Proper enforcement may also make it desirable – if necessary for specific sectors – for the competent authorities in the host country to be aware of the presence of service providers operating within the territory.

In structuring the duty to report the existing obligations and procedures in the context of European legislation must be followed as closely as possible so that, if possible, one department is created for the registration of posted workers. This duty to report must be strictly proportional and must not result in a hidden authorisation scheme.

#### *Bogus self-employed persons*

By ensuring the country of origin principle does not apply to those aspects that are regulated by the Posting of Workers Directive this Directive does not compromise the right of host countries to define the term ‘worker’ in the application of the Posting of Workers Directive. In order to prevent misunderstandings it is useful to stipulate in the Services Directive that this Directive honours the right of the host country to also define the term ‘worker’ in cases that do not come under the scope of the Posting of Workers Directive. The problems in respect of bogus self-employed persons lie mostly in differing definitions of the rights of the Member States and the unclear demarcation of the term ‘worker’ in the laws of the Member States.

#### *Temporary employment agencies*

A certain level of market regulation in the temporary employment sector may be considered advisable in order to prevent abuse in the area of temporary employment. The Services Directive must therefore provide possibilities for preventative measures, such as mandatory quality marks and authorisations. Needless to say, these measures must meet the stipulations of the Treaty: they must therefore be proportional, non-discriminatory and aimed only at enforcing the protection of workers. A European quality mark for temporary employment agencies could also be considered. The Services Directive also provides room for this form of self-regulation, and can encourage same.

#### *Enforcement and third-country nationals*

Article 25 of the Services Directive regulates the division of tasks between the Member State of origin and the host country with respect to the posting of third-country nationals. With a view to enforcement the proposed amendment of this Article by Luxembourg in its capacity as President of the EU deserves support. The implication of this is that the host country can obligate third-country nationals to report to the competent authorities upon their arrival in the host country. The amendment will also stipulate that the condition for the legal residence and employment of third-country nationals in the country of origin relates to the situation prior to the provision of services. In this context the proposal of the Dutch Government with regard to a service provider card to be issued by the country of origin also deserves support.

### **Final SER assessment**

#### *General*

The SER supports the further regulation of service transactions in the EU. Such regulation is required to realise an internal market for services. However, there is room

for improvement in the European Commission's proposal. Better guarantees are needed in respect of the implementation of the country of origin principle and the free movement of services based thereon. This relates specifically to the demarcation of the scope of the country of origin principle in relation to existing employment law, the balance between market opening and enforcement of the Posting of Workers Directive, a clearer definition of the term 'establishment', more binding regulation of the administrative cooperation between the Member States and limits on the grounds for derogation in the free movement of services when invoking compelling reasons of general interest.

*Consequences for the Netherlands and the other Member States*

The Services Directive is a good opportunity for the Netherlands to once again clearly formulate the public interests involved in the functioning of certain sectors and professions and then evaluate the way in which and the instruments with which these interests are guaranteed.

Confidence in efficient collaboration between the Member States and in strict enforcement is a basic condition for the proper functioning of the country of origin principle: after all, the Member States must be able to rely on the fact that public interests are sufficiently guaranteed in the Member State of establishment.

Like the other Member States, the Netherlands will have to use the period leading up to 2010 to achieve a proper division and coordination of tasks at a national level between the authorities involved in the enforcement of the Services Directive, and to invest in good administrative cooperation with the authorities in the other Member States.