



EUI Working Papers

LAW 2007/20

Setting the Scene

How did Services get to *Bolkestein* and Why?

Bruno De Witte

**EUROPEAN UNIVERSITY INSTITUTE
DEPARTMENT OF LAW**

*Setting the Scene
How did Services get to Bolkestein and Why?*

BRUNO DE WITTE

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s), editor(s). If cited or quoted, reference should be made to the full name of the author(s), editor(s), the title, the working paper or other series, the year, and the publisher.

The author(s)/editor(s) should inform the Law Department of the EUI if the paper is to be published elsewhere, and should also assume responsibility for any consequent obligation(s).

ISSN 1725-6739

© 2007 Bruno De Witte

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy

<http://www.eui.eu/>
<http://cadmus.eui.eu/>

Abstract

This paper traces the origins of the recently adopted general services directives of the European Union, and addresses the question why such an important piece of internal market legislation was adopted so recently, and anyway well after the 1992 deadline for the completion of the internal market. It argues that piecemeal liberalisation of services has occurred on a regular basis ever since 1992. For each of those specific service directives, the EU institutions decided on the appropriate regulatory mix between liberalisation and targeted harmonisation. This regulatory mix was largely abandoned in the Commission's original proposal to introduce the country-of-origin principle across all services covered by the directive. It is argued in this paper that this regulatory shift was ill-advised and explains the strong political resistance which the original 'Bolkestein' draft encountered from the side of other political and civil society actors, leading to a rather different outcome in the final version of the directive.

Keywords

Provision of services – harmonisation – negative integration – positive integration – regulatory competition

Setting the Scene - How did Services get to *Bolkestein* and Why?¹

Bruno de Witte

1. Introduction

This paper seeks to situate the new Services Directive in the evolution of European Union law and, in particular, the European Union's internal market law and policy. It focuses on the legal and political context in which the Commission presented its original draft directive (often called the 'Bolkestein draft' after the name of the Commissioner who was then, in 2004, in charge of internal market policy), and on the innovative characteristics of that original draft. The subsequent modifications of that draft, leading eventually to the approval of a revised version by Council and Parliament, are described only to the extent that they contrast with the Bolkestein draft. More detailed analysis of the final version of the Directive can be found in other contributions to this symposium.

In examining the path leading to the launching of the Bolkestein draft in January 2004 (section 2 below), two related questions spring to mind: Why did the Commission propose a general directive on services only in 2004, almost 50 years after the signature of the Treaty of Rome which already contained a commitment to put in place the right of establishment and the freedom of provide services within the common market? And if Europe had been able to live without a general services directive for so long, why this sudden perception of its need in the early years of the new century? Section 3 will then examine to what extent the Bolkestein draft constituted a 'legal revolution', or, to put it in softer terms, a major discontinuity in internal market law. The Conclusion will then offer a short epilogue of this recent episode of EU law, by pointing out to what extent the discontinuity was undone again in the final version of the Directive.

2. The Long Road to *Bolkestein*

"The service sectors play a role of growing importance in the European economy. But their potential for much more significant growth is being artificially pinned back by regulations and practices which significantly inhibit the free flow of services and thus the free play of competition between companies supplying them." This citation may sound like an extract from the Commission's explanatory memorandum of the draft

¹ This paper is based on a presentation at a workshop on the services directive organised by Rachael Craufurd Smith and Niamh Nic Shuibhne at the Europa Institute in Edinburgh, in September 2006.

directive on services and, in fact, one finds very similar language in the first paragraph of that memorandum.² However, the cited words are actually from the Cecchini report of 1988, the famous paper of the European Commission that sought to galvanise governments, firms and citizens by extolling the expected benefits of a single market.³

Now, if the assessment of the problem was quasi-identical in 1988 to what it was in 2004, why did the Commission draw from it the consequence that there was a need for a general directive on services only in 2004, and not already at the time the '1992' legislative package was formulated (i.e. in the mid-80's)?

Before trying to answer that question, the main steps leading to the Bolkestein draft will be recalled. In fact, the proposal for a directive was not a sudden initiative springing from the brain of Commissioner Bolkestein and the civil servants of DG internal market. The idea of a 'new deal for services' had received the backing of the other European Union institutions, most importantly of the European Council that had included it in its Lisbon agenda – of which, in fact, it constitutes one of the few potential 'hard law' elements. However, one should note that the Conclusions of the Lisbon European Council (in March 2000) had not referred to a general directive on services with so many words. They only requested a 'strategy for the removal of barriers to services' to be set out by the end of 2000. Alongside this, the Lisbon Conclusions had asked for the continuation of the sector-specific approach to internal market legislation, focusing in particular on three areas: electronic commerce; the services of general economic interest (gas, electricity, postal services and transport); and financial services. This was in line with the earlier Action Plan for the Single Market of June 1997, the most ambitious policy document produced by the Commission since the 1985 White Paper, which listed a large number of policy proposals together with a timetable for their implementation, on the model of the White Paper. One of the actions proposed in the Action Plan (though certainly not the most prominent) was to 'Break down the barriers in service markets', but it consisted of policy proposals relating to single services markets (financial services, utilities and air transport), with no trace at all of the idea of a general directive on services.⁴ Nor had that idea appeared in the follow-up *Strategy for Europe's Internal Market* which the Commission launched in 1999.⁵

The idea of a general directive appeared for the first time in the strategy paper for services, requested by the Lisbon European Council, which the Commission produced on 29 December 2000.⁶ In that paper, the Commission proposed a two-track approach. On the one hand, it proposed to take new initiatives of both a legislative and non-legislative nature relating to particular service sectors, in accordance with its existing approach. On the other hand (and this was the main novelty of the December 2000 paper), it promised to "pave the way for a horizontal approach to free movement of services with a view to its implementation in 2002." The ground layer of that 'pavement' was to be "an all-embracing and systematic analysis of the persistent

² Commission proposal for a Directive on services in the internal market, COM(2004) of 13 January 2004, at p.5.

³ Paolo Cecchini, *The European Challenge 1992 – The Benefits of a Single Market* (1988) at p. 37.

⁴ *Action Plan for the Single Market*, 4 June 1997, in particular at pp. 31-34.

⁵ *The Strategy for Europe's Internal Market*, COM(1999) 624 of 24 November 1999.

⁶ *An Internal Market Strategy for Services*, COM(2000)888 of 29.12.2000

barriers to free movement of services and their spill-over effects across economic sectors”, and the Commission revealingly added that such a comprehensive analysis would be the first since the General programme of 1962 (thereby at the same time belittling the way services had been dealt with in the 1992 project). On the basis of that groundwork, and depending on the nature of the barriers to trade that would have been identified, the Commission would then (during the year 2002) propose action of three different kinds: infringement actions based on the directly applicable Treaty provisions on services; non-legislative mechanisms; and finally, “targeted harmonisation”. The Commission specified that targeted harmonisation need not necessarily be sector-specific harmonisation; rather, “if the barriers identified are horizontal in nature (common to several sectors or having consequential effect on the provision of other service activities), a horizontal legislative instrument and specific harmonisation measures will be needed.” (p.7) At this stage, therefore, a horizontal directive was for the first time mentioned, though only as a possibility.

However, in the Annex to its strategy paper, the Commission was rather more sanguine; there it announced that in 2002 “for barriers which are horizontal in nature, an instrument *will* be proposed” that would entail “targeted harmonisation of requirements affecting several sectors” but also “a mechanism to ensure that the Internal Market can be used by all European service providers as their domestic market, notably through the efficient application of the principle of mutual recognition.” Thus, the promise of an *instrument* that would combine a *horizontal approach* with rules to better enforce the principle of *mutual recognition* was made in December 2000, though it was somewhat hidden in the annex to the Commission’s strategy paper. This also indicates that the Commission had a pre-conceived view of the matter: even before it had accomplished the comprehensive analysis of existing barriers (to be undertaken in 2001), it already indicated what would be one of its main consequences: the proposal of a global legal instrument to deal with those barriers.

In fact, it took the Commission until 2004 rather than 2002 to make its proposal for a directive. The comprehensive analysis of existing barriers to trade in services was duly undertaken⁷ and led, unsurprisingly, to the conclusion that a general legal instrument was indeed necessary to sweep away the cross-sector barriers to trade in services. This instrument was formally announced by the Commission in the update of its Internal Market Strategy paper, published in May 2003.⁸ The draft directive itself was published by the Commission on 13 January 2004, after it had received approving nods from the Council and the Parliament and from a number of interest groups.⁹

So, back then to the initial question of why such a general directive on services appeared necessary in 2004, whereas it had not been proposed by the Commission as part of its earlier internal market plans of the mid-80’s and mid-90’s. For that, a brief rehearsal of those earlier internal market plans will be useful.

The Commission White Paper on completing the internal market, of 1985, is better remembered for what it said about goods than about services, perhaps because of its innovative and eye-catching emphasis on the removal of ‘physical barriers’ to trade (i.e.

⁷ *The State of the Internal Market for Services*, COM(2002) 441 of 30 July 2002.

⁸ *Internal Market Strategy – Priorities 2003-2006*, COM(2003) 238 of 7 May 2003.

⁹ See fn. 2 above.

border controls), which is more relevant to goods than to services. However, the main legal and economic content of the White Paper related to what was rather vaguely called the ‘removal of technical barriers’, and under that heading due attention was given to the common market for services. The Commission in fact stated that in its view ‘trade in services is as important for an economy as trade in goods.’¹⁰

The Commission did not, at the time of its White Paper, consider the enactment of general legislation on trade in services, but rather proposed to target a selected number of crucial service sectors, namely financial services, transport, broadcasting and a rather vaguely defined group of communication services.¹¹ In addition, ‘horizontal’ legislation to facilitate the supply of a range of different services was proposed under two separate headings: that of public procurement and that of recognition of diplomas. By implication, it appears that the adoption of a *general* horizontal cross-sector directive (as opposed to the ‘specific horizontal’ directives for diplomas and procurement) was not considered to be necessary with a view to completing the single market.

The action programme was duly carried out in the following years, leading to the adoption prior to the 1 January 1993 deadline of a set of banking and insurance directives, directives liberalising the various modes of transport (land, water, air), the directive ‘Television without Frontiers’, the directive on public procurement for services, and the two directives for recognition of diplomas (89/48 and 92/51).

In parallel to the ‘1992’ legislative programme, the European Court of Justice refined its own approach to the free movement of services. In 1991, shortly before the completion of the internal market programme, it had, as a major element in the ‘convergence’ between the common market freedoms, clearly stated that the Treaty requires “the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another member State where he lawfully provides similar services.”¹² This formula has been repeated ever since, sometimes even with increased severity in its terms. Thus, whereas the *Säger* judgment mentioned restrictions which *prohibit or otherwise impede*, the Court in the posted workers case of *Mazzoleni* referred to a “restriction (...) which is liable to *prohibit, impede or render less advantageous* the activities of a provider of services (...)”.¹³ The existence of unnecessary ‘double burdens’ (in the country of origin and in the country of service provision) is at the heart of the Court’s scrutiny. This sweeping extension of the scope of the Treaty prohibition was compensated by the fact that national restrictions, if indistinctly applied, may be kept in place if they are necessary to achieve one of a long list of mandatory requirements. The mandatory requirements test, as well, was firmly put in place by the early 1990’s.¹⁴

¹⁰ *Completing the Internal Market*, White Paper from the Commission to the European Council, 14 June 1985, COM(85) 310, at p.26.

¹¹ *Idem*, pp. 26-32.

¹² Case 76/90, *Säger v Dennemeyer*, (1991) ECR I-4221, para 12.

¹³ Case C-165/98, *Mazzoleni*, (2001) ECR I-2189, para 22. The same formula is used in other recent cases.

¹⁴ Notably, also in 1991, in the *Tourist Guides* cases. The test was most clearly spelled out in the *Gebhard* judgment of 1995, para 37.

There was thus, in the early 1990s, a clear double-track approach to the establishment and functioning of the internal market for services: on the one hand, the most 'obstructed' and economically important sectors had been the subject of sector-specific internal market legislation as part of the 1992 programme, and on the other hand, the European Court of Justice had put in place a 'catch-all' legal regime, which allowed the Commission (in its other capacity of guardian of the Treaty) and interested firms or individuals to tackle national impediments to the services market that had been left in place by the EC legislative programme.

In addition, both elements of this legal strategy were elastic and therefore able to cope, in principle, with future challenges. The *judicial* approach was inherently open-ended, and therefore fit to identify new forms of trade in services¹⁵ as well as newly emerging impediments to such trade; it also covered gaps left even where internal market legislation had been adopted.¹⁶ The *legislative* approach was not exhausted by the 1 January 1993 deadline, but could be used also later to deal with newly emerging problem sectors (or to adapt existing legislation to newly arising concerns). In fact, there was a fairly large number of services directives in the 1990's, leading Paul Craig to observe an increased emphasis on services (rather than goods) in post-1992 legislation.¹⁷ Notable items of services legislation were the telecommunication directives, the directive on electronic commerce 2000/31, and a whole host of financial services directives that have developed into a highly complex self-contained regime.¹⁸ In addition, there was the posted workers directive of 1997, which is formally a services directive in terms of its legal basis, but stands out from the previously mentioned directives in that its primary aim was to reinforce the social protection of workers rather than to facilitate the trade of services. From the point of view of the firms providing cross-border services, this directive forces them to comply with two different sets of labour law rules (those of their country of establishment and those of the country where they post workers), which is why some critics have argued that this Directive did not, in fact, *facilitate* the free movement of services (as its legal basis requires), but hinder it.¹⁹

¹⁵ The gradual delineation of healthcare as a service for the purpose of EC law is very well known; but see also more anecdotal judicial 'discoveries' of new services, such as the grant of fishing rights by one individual to another (Case C-97/98, *Peter Jägerskiöld v Torolf Gustafsson*, (1999) ECR I-7319, para 36).

¹⁶ For example, there have been many cases on recognition of diplomas which the Court has examined on the basis of the EC Treaty because the diploma directives did not, for one reason or another, apply to the facts of the case.

¹⁷ P. Craig, 'The Evolution of the Single Market', in C. Barnard and J. Scott (eds), *The Law of the Single European Market. Unpacking the Premises* (2002) 1-40, at p.30.

¹⁸ Financial services became the object of a separate Commission action plan in 1999, COM(1999) 232 of 11 May 1999 and have since led a legal life of their own. On the financial services directives, both pre- and post-1992, see among others, V. Hatzopoulos, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services* (1999), at pp. 413-450 ; E. Wymeersch, 'The Future of Financial Regulation and Supervision in Europe', *Common Market Law Review* (2005) 987-1010; D. Chalmers, C. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law* (2006), chapter 18.

¹⁹ For discussion of this point (and of the overall content of the Directive), see P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?', 34 *Common Market Law Review* (1997) 571; and M.-A. Moreau, 'Le détachement des travailleurs effectuant une prestation de services dans l'Union européenne', *Journal du droit international* (1996) 889. See, furthermore, C. Barnard, 'Posted Workers and the Services Directive', in this collection.

Why and when did the Commission start considering that this double-track approach was not sufficient for the establishment of a 'true' single market of services? One explanation could be the inherent weakness of the judicial limb of the double-track approach. There was a strong suspicion that the European Court of Justice, in its case-law, only dealt with the proverbial tip of the iceberg and that most impediments to trade in services remained hidden under the surface because the Commission failed to identify them in its infringement investigations, because the individual persons or firms suffering from those restrictions failed to take legal action, and because national courts, when confronted with such cases, failed to enforce the Treaty and/or to refer preliminary questions to the European Court of Justice. This suspicion – that many humanly and economically obnoxious impediments to the cross-border provision of services continue to exist in the post-1992 European Community – would seem to be confirmed by the marked increase of services cases before the ECJ in recent years. In their recent survey of case law on services, Hatzopoulos and Do note that the ECJ “has gone from deciding 40 cases in the five year period between 1995-1999 to deciding over 140 cases based on Art.49 between 2000-2005”.²⁰ It is not entirely clear whether this marked increase is fortuitous (there are a number of 'repeat cases' about certain specific questions, such as the dozen judgments about the posting of workers in situations not covered by the relevant directive), whether it indicates a growing awareness of long-existing restrictions to services trade, or whether they reflect an increase of such obstacles in member state laws and regulations. Whatever the reasons, the growing amount of ECJ cases – assuming that they still only constitute the tip of the iceberg, though perhaps a slightly bigger tip than before – seems to indicate that there are serious problems with the effective application of the internal market rules on services. One should be cautious in assuming that these 'problems of effective application' are entirely due to protectionist inclinations of the member states; they may also partially be due to the lack of clarity in the ECJ's doctrines of what constitutes an 'impediment' and when 'mandatory requirements' are acceptable, thus encouraging litigants and national courts to refer cases to Luxembourg in order to find out whether or not a particular national measure is compatible with the EC Treaty. However, both these explanations for the increased case-law (identification of more barriers, or uncertainty as to how to qualify potential barriers) can serve as arguments for replacing the judicial approach with a comprehensive legislative approach covering all barriers to services trade.

3. Continuity and Change in the Draft Directive

The perception that 'something major' needed to be done by the European legislator to enhance services trade in the European Union does not explain why the Commission drafted its proposal of 2004 in the way it did. In particular, it is not clear why it proposed within one draft directive two very different regulatory regimes, dealing respectively with the conditions for *establishment* in other EU states by service firms, and with condition for cross-border *provision of services* by firms operating from other EU states.²¹ The first part of the Draft, dealing with the right of establishment,

²⁰ V. Hatzopoulos and T. U. Do, 'The Case Law of the ECJ concerning the Free Provision of Services: 2000-2005', *Common Market Law Review* (2006) 923-991, at 923.

²¹ Note that the Directive (as already its 2004 draft) refers in its title to the broad notion of services adopted in the context of GATS, rather than to the narrower definition of the EC Treaty, where the

emphasized administrative simplification and cooperation, and contained only a limited and 'soft' programme of regulatory reform. The second part, dealing with the right to provide services *stricto sensu*, had a few elements of administrative simplification but was dominated by an ambitious regulatory reform programme which is characterized by the adoption of the country-of-origin approach. Thus, as far as establishment abroad of service providers is concerned, the main emphasis was on *administrative simplification and cooperation* at the time of taking up their economic activity, whereas the subsequent exercise of that activity was to be, in principle, regulated by the laws of the host country (subject to a duty for that host state to evaluate the need to impose all these domestic requirements on service providers originating from another EU state: see Article 15 of the draft). As far as provision of services without establishment was concerned, the main emphasis was not on getting rid of administrative formalities but on the much more radical idea that these service providers should in principle be *regulated by the state of origin* and not by the host state (Article 16 of the draft).

The first part, on administrative simplification and cooperation, constituted an innovation but one which was anchored in the tradition of internal market law, and it may be compared with the diploma recognition and public procurement directives. Those earlier legislative instruments had identified particular ways in which a whole range of services were being impeded, and had proposed to tackle these impediments by *horizontal cross-sector directives focusing on a particular type of barrier*: namely, the requirement of a national diploma, and the lack of transparency with which member states' public sectors hired commercial services. The administrative simplification part of the Bolkestein draft was similar to those earlier pieces of EC legislation. It drew from the Commission's experience (in its capacity as guardian of the Treaty) of receiving frequent complaints about the complexity and stealthy protectionism inherent in administrative authorizations for the establishment and provision of services by foreign professionals and firms, particularly in some (southern) member states of the European Union. Such purely administrative barriers had also been repeatedly challenged through preliminary references and almost invariably struck down by the European Court.²² Legislation had banned prior authorisation schemes with regard to particular services, as for example in Article 4 of the electronic commerce directive, but one could see the need for a 'clean sweep' at such prior authorizations and registration duties across all service sectors, with regard to both establishment and cross-border provision of services. This could have formed the object of a separate horizontal directive, which would have had as its central aim to launch a frontal attack against the red tape that hinders access to the services market quite apart from any substantive regulatory

'Modes 3 and 4' of supply of services (to use GATS terminology) are covered in part by the freedom of *establishment* rather than the freedom to provide *services*. As was noted by Eeckhout, "in EC law terms, GATS covers freedom to provide services and freedom of establishment – but the latter only by service suppliers, not of course by goods manufacturers." (P. Eeckhout, "Constitutional Concepts for Free Trade in Services", in G. de Búrca and J. Scott (eds), *The EU and the WTO – Legal and Constitutional Issues* (2001) 211-235, at 221). Like the GATS, the new Services Directive is a legislative measure to facilitate not only the freedom to provide services (in the EC Treaty sense), but also the right of establishment (though limited to *service* providing firms and individuals); hence also its double legal basis in Articles 47(2) and 55 of the EC Treaty.

²² See for example Case C-58/98, *Corsten*, judgment of 3 October 2000 (obligation for a foreign architect of entering his name on the local register of tradesmen before providing his services in Germany).

purpose. It would have been the kind of ‘targeted horizontal harmonisation’ envisaged by the Commission in its services strategy document of December 2000.

Instead, the Commission in its 2004 draft took a much broader view of the content of the new horizontal directive by adding to it a very different element, namely the cross-sector regulatory programme based on the country-of-origin principle. This element was less obviously necessary, its implications were less clearly spelled out, and it created the virulent opposition which led to a painful retreat in the revised version of 2006.

This ‘regulatory competition’ part of the Bolkestein draft was more problematic because, unlike the administrative simplification part, it represented a substantive shift compared to the ECJ’s case law, and compared to the Commission’s own approach in drafting internal market legislation. The case law of the European Court of Justice does not challenge, as a matter of principle, the application of the host country’s laws and regulations. The principle of mutual recognition, as adopted by the Court, simply meant that the host state must take into account the laws and regulations to which the service provider is subject in its home state, so as not to create unjustified double burdens. This is not the same thing as imposing, as a matter of principle, the application of the laws of the country of origin.

As for the Commission’s own earlier strategy, both pre-1992 and post-1992, it consisted in identifying particular service sectors, in which national regulation was particularly intrusive and in which EC-based liberalisation promised to bring particularly great economic benefits. In tackling these sectors, the Commission each time proposed a particular mix of liberalisation and harmonisation (or deregulation and re-regulation), which then became the object of debate within the Council and the European Parliament, leading to directives containing a particular regulatory mix. This mix was usually criticized from both sides of the ideological spectrum, for being too deregulatory or (on the contrary) for being too interventionist. This pattern was repeated for each of those directives, starting from the television without frontiers directive in 1989 up until the electronic communications directive in 2000 and the revised public procurement of services regime of 2004. The principle of home country control was often adopted in those instruments, but it was counterbalanced by an amount of harmonisation which reduced the discrepancy between the laws of the home and host countries. Some scholars have argued that, taken as a whole, internal market legislation post-1992 was marked by “an ‘advocacy alliance’ of civic interest groups, stringent-standard producers, several member state governments, the Parliament, and often the Commission in favour of more stringent standards,”²³ whereas other commentators have found a strong pro-market bias in some or most of this services legislation. What matters is that this ideological battle was fought on a case by case basis with regard to a particular sector for which the Commission had started by identifying a need for common European rules.

This time, with the Bolkestein draft, the Commission proposed a regulatory programme applying to the whole range of services (rather than a single one), without an attempt at listing those services (unlike what happens in the context of GATS).²⁴ Moreover, the regulatory balance was decidedly tilted away towards deregulation with only a little

²³ A.R. Young, ‘The Single Market – A New Approach to Policy’, in H. Wallace, W. Wallace and M. Pollack, *Policy-Making in the European Union*, 5th ed (2005) 93-112, at p. 107.

²⁴ WTO, Services Sectoral Classification List.

amount of re-regulation. The basic principle was that the laws of the host country would not apply to the service provision, but instead the laws of the home country in which the service provider was established. The draft directive did not aim at total liberalisation since it provided for measures of so-called horizontal harmonisation that come under the heading 'quality of services' and aim at the protection of consumers of commercial services.²⁵ However, the Commission's draft did not propose any harmonization related to non-market concerns. In fact, it would have been difficult to address those non-market concerns in a horizontal directive dealing with the whole range of services, given that those concerns tend to be service-specific (for example: the concern for the administration of justice relates to legal services, the concern for cultural diversity relates to broadcasting services, etc.). Some of these concerns appeared in the Commission's draft, but only as *grounds for derogation*, in Article 19. However, the list of Article 19 was drawn much more narrowly²⁶ than the general interest grounds for restriction recognized by the ECJ in its 'mandatory requirements' case-law, and could be seen to *replace* the Treaty-based grounds of derogation recognized by the ECJ. Non-market values were thus exclusively seen as grounds of derogation, to be rolled back as far as possible, and not as positive objects for Community regulation, as they used to be in the earlier sector-specific approach. The well-considered regulatory mix that characterized the earlier sector-specific directives was absent this time.

This important *regulatory shift* remained unexplained in the Bolkestein draft. The shift formed a distinct example of Commission entrepreneurship, since it had been advocated neither by the other EU institutions nor by major interest groups. It was the Commission's own invention, but, it is submitted, not a very happy invention. The fully-fledged adoption of the home country principle would have required a more sustained argument, showing that sacrificing some of the regulatory standards in the host member states was a necessary price to pay in order to reap the economic benefits of market liberalisation for services. The problem, though, is that such a 'regulatory cost v economic benefits' argument can only be convincingly made with reference to specifically defined service sectors (showing why these specific sectors suffer from undue regulation and have a potential for cross-border development on the basis of home country control), rather than with reference to an amorphous and undefined mass of service sectors. In fact, the regulatory part of the services directive can hardly be considered as a form of 'targeted harmonisation' which was envisaged by the Commission in its services strategy paper of 2000, since the target is not clearly identified. To promote a regulatory shift 'across the board' presupposes a leap of faith which the Commission was prepared to make but which it could not convince the other political actors (represented in the Council and the Parliament) to make. The latter were simply not convinced that there was a huge untapped potential of cross-border provision of services that would be unleashed by a shift to home country control; whereas they did see the many regulatory drawbacks of such a shift. A related problem in this regard was that the Commission draft did not seek to clarify to what extent it would apply to public services; to a large extent, this lack of clarity resulted from the lack of clarity in the

²⁵ Article 26 and ff. of the draft Directive.

²⁶ The following grounds were recognized: 'the safety of services, including aspects relating to public health'; 'the exercise of a health profession'; 'the protection of public policy, notably aspects related to the protection of minors'.

definition of (commercial) services in the case law of the European Court of Justice.²⁷ However, it did open the door for concerns that the directive might set in place an uncontrolled mechanism for the dismantling of public services in the member states, or affect their capacity to protect the fundamental social rights of their residents.²⁸

4. Epilogue: Administrative Simplification and Failed Regulatory Revolution

The idea of adopting the country of origin approach to regulation without identifying the sectors to which it would apply was the core innovation of the Bolkestein draft, compared to the Commission's earlier internal market policy, but it was also the cause of its troubles. This idea is no longer upheld in the final version of the Directive. The main innovative content left after the revision of the draft is its programme for 'smooth administration' (chapters II and III of the Directive),²⁹ which fits better in the tradition of targeted cross-sector harmonisation that had been initiated by the diploma and public procurement directives.

As far as the regulation of services is concerned, the country-of-origin clause has been removed, but the price for the removal was the enactment of a highly complex and very confusing Article 16, which, taken as a whole, is reminiscent of the existing case-law of the ECJ on restrictions of services, but with some major differences which are not well explained in the rambling preamble of the Directive. Although the second sentence of Article 16(1) states that the "Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory", this promise of sweeping liberalisation is immediately tempered by the next sentence which makes clear that the host states may continue to apply their laws and regulations, as long as these are non-discriminatory, necessary and proportional – as the Court of Justice has consistently held in its case law on services. So far, Article 16 is only a restatement of existing court-made law. Paragraph 2 of Article 16 adds a number of prohibited requirements which, again, probably correspond to the Court's views of what is permissible, but the specification adds to legal clarity.

However, paragraph 3 of Article 16 attempts (deliberately or not?) to modify existing services law by specifying which are the acceptable justifications for host country requirements, namely: reasons of public policy, public security, public health, the protection of the environment, and rules on employment conditions. This list is much shorter than the list of mandatory requirements that the Court of Justice has come to recognize in the course of the years. Neither the text of the Directive nor its preamble explain why the Directive attempts to modify the Court's case law on this point. Indeed, the preamble gives the impression that no change was intended since it defines, in recital 40, the concept of 'overriding reasons relating to the public interest' with reference to the full list of mandatory requirements recognized by the Court of Justice,

²⁷ On this, see for example G. Davies, *EU Internal Market Law*, 2nd ed (2003), at 77-79.

²⁸ The latter perspective is the one adopted in the study of O. De Schutter and S. Francq, 'La proposition de directive relative aux services dans le marché intérieur: reconnaissance mutuelle, harmonisation et conflits de lois dans l'Europe élargie', *Cahiers de droit européen* (2005) 603.

²⁹ In fact, Chapters II and III form a unity, and it might have been better to join them together in one single chapter.

without adding that the crucial Article 16 only refers to some of those ‘overriding reasons’ leaving the rest in a legal limbo.

So, although the ‘revolution’ proposed in the Bolkestein draft was turned back by the Council and Parliament, the laborious compromise reached during the codecision procedure seems nevertheless to have produced (it is not clear whether this happened intentionally or not) a deregulatory shift compared to existing EC services law. This is only one of the many uncertainties raised by the text of the Directive.³⁰ One of the unintended negative consequences of the Commission’s radical draft of 2004 may have been that it forced the Council and Parliament to repair the ship at sea, with many detrimental consequences for the technical legal quality of the Directive.

³⁰ See for example the long list of less than clear points in the Directive discussed by B.J. Drijber, ‘Van democratie en bureaucratie: de Dienstenrichtlijn is erdoor’, *Nederlands tijdschrift voor Europees recht* (2007) 1-7.