



European Trade Union Confederation (ETUC)  
Confédération européenne des syndicats (CES)

## **ETUC report on preparation of implementation of the Directive on Services in the Internal Market (123/2006/EC)**

### **Quiet revolution or Community big bang?**

#### **INTRODUCTION**

Barely 30 days after the deadline for transposition of the Directive on Services, i.e. 27 January 2010, the European Commission sent a letter of formal notice to 20 of the 27 Member States for failure to transpose the measure on time. These 20 Member States had two months to submit to the Commission a comprehensive and detailed table listing the different national measures for execution of each of the Service Directive's provisions, failing which they would be sent a reasoned opinion, the final stage of proceedings before referral to the Court of Justice for failure to transpose the directive.

It appears today that six Member States (Bulgaria, Greece, Latvia, Poland, Slovenia and Slovakia) were unable to implement the directive before April 2010. According to a December 2009 review by Commission staff, these six countries have not at this stage adopted any legislation transposing the Services Directive. Paradoxically, "these are the Member States that wanted to go further in liberalising services in the internal market", commented ironically, on Wednesday 6 January 2010, Evelyne Gebhardt (S&D – DE), the European Parliament's rapporteur on the directive.

At this stage, eleven Member States (Denmark, Spain, Estonia, Finland, Hungary, Malta, Netherlands, Czech Republic, Romania, United Kingdom and Sweden) have adopted national legislation transposing the Services Directive. Another eight Member States (Austria, Belgium, Cyprus, Ireland, Italy, Lithuania, Luxembourg and Portugal) are expected to have finalised the national transposition process by the end of the first half of 2010. "Given the complexity of the directive, we are seeing a fairly high rate of implementation. We expect that two thirds of the Member States" will have transposed the directive "by the first quarter of 2010", according to DG MARKT. It is a fact that the scope of the Services Directive in some cases entails making major changes to the Member States' regional legal order. In Spain, 47 national acts and 100 regional acts were amended.

The Commission is checking the conformity of national legislations with the Services Directive point by point. This comprehensive review could possibly result in new infringement proceedings for inadequate transposition or poor application.

Subsequently – from 2011 –, the Commission is expected to deal with the case of complaints lodged by service providers against national providers or Member States for failure to fulfil obligations under the directive.

In parallel, the Member States, by groups of five, have launched a screening of their national legislations concerning authorisation schemes, requirements to be evaluated, freedom to provide services and multidisciplinary activities. This exercise will last all year and the Commission will present a screening report at the end of 2010.

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Drafted under the dictates of political compromises, the Services Directive is a badly written text, riddled with needless repetitions and ambiguities that are not entirely cleared up by the Commission's transposition handbook. Some observers are even saying that the scope of the text will not be clarified until the first references for preliminary rulings are submitted to the Court of Justice.

The following report contains three sections. It presents:

- a brief overview of the directive's specific context and of the implementing guide;
- identification of the challenges and problems for the future with a view to actions and initiatives at European Union level;
- proposals and recommendations for the future.

## **PART ONE: CONTEXT OF THE SERVICES DIRECTIVE**

### **CHAPTER 1: BACKDROP**

#### **1. The particular context of the Services Directive**

1.1. The Services Directive forms part of the general context of EU enlargement. It was initially negotiated by 15 States then approved by 27. The negotiation brought to light a polarisation between the States wishing to use the directive as an opportunity to strengthen the internal market for services and free movement of service providers and the Member States that wished to safeguard their regulatory framework for services and their own protection and controls.

Debates were all the more intense because the EU is faced with three legitimate demands:

- the legitimate aim of making services the driver of growth and competitiveness;
- the legitimate aim of giving the "new" EU Member States the chance to enjoy a comparative advantage in certain types of services and to play a leading role in the EU's overall growth;

- the legitimate aim of placing certain services, especially services of general economic interest and not-for-profit services, social services, healthcare services and personal services in a situation where it is not the market that determines the delivery and quality of services, but in the final analysis, the public powers.
- 1.2. The directive fits into the context of the liberalisation of key services of general economic interests (telecommunications, railways, energy and postal services). Services of general interest account for 26% of gross domestic product (GDP) and represent an important component of the EU's social models. This element carried a lot of weight in the negotiation and evaluation of the Services Directive. It is obvious that the semantic collision between services in the broad sense and public services shed a special light on the issue. Many stakeholders, particularly in the trade union movement, stigmatised this move to speed up liberalisation even further.
  - 1.3. The text also forms part of the context of the "Better Lawmaking" agenda, in which the Services Directive represents an important element, particularly considering its provisions on administrative simplification. Here too, many denounced the deregulation brought about by the Services Directive and the emergence of *soft law* in a number of its provisions (Art. 26 – policy on quality and Art. 37 – codes of conduct at Community level).
  - 1.4. The directive is also in keeping with a general context of significant weakening of the founding pillars of our European societies (State, social security, social protection, labour law, mutual associations, trade unions, etc.), which are regularly called into question or even challenged in their role and functioning.

Some saw as a quiet reform what should probably be interpreted as a "Community big bang", particularly in the way the Member States will have to consider administrative and regulatory cooperation with their peers, the EU and the service providers concerned.

The Services Directive can be approached in two ways:

- (a) from the aspect of the real potential it represents in terms of global competitiveness;
- (b) or from the aspect of the changes it brings about, which may alter the States' political and administrative structure.

## **PART TWO: IDENTIFICATION OF THE CHALLENGES AND PROBLEMS FOR THE FUTURE WITH A VIEW TO ACTIONS AND INITIATIVES AT COMMUNITY LEVEL**

1. **The findings of the survey conducted by the European Trade Union Confederation**

The survey conducted among the ETUC's affiliates on implementation of the Services Directive presented interesting results that all tend to point in a fairly consistent direction.

The results must of course be qualified, because, on 14 October 2009:

- unions from only 21 of the 27 Member States had responded to the questionnaire<sup>1</sup>;
- the open response method allowed an important margin of subjectivity;
- the reaction and response time (during the summer) may not have allowed for optimal collection of relevant data.

The questionnaire and response collection method used in the survey were not validated scientifically, so the results can present a methodological bias that must be taken into account. The survey nevertheless gives feedback and presents interesting findings on how the Services Directive is understood.

### 1.1. Consultation and participation of trade unions in negotiation of the Services Directive

On the whole, there is a fairly wide range of situations. In only 28.5% of the countries that responded to the questionnaire (6 of 21 countries: Germany, Spain, Czech Republic, Ireland, Latvia and Cyprus) were the trade unions actively involved. The survey does not say whether their observations and amendments had an impact. It only states that there was a formal process that allowed the unions to make their views heard.

Adding to this figure of 28.5% serious consultation, the 28.5% formal consultation (6 of 21 countries: Bulgaria, Austria, Finland, Poland, Sweden and Lithuania), which in fact consisted more of an information exercise than active participation, gives a total of 57% relative involvement. This involvement nonetheless emerges relatively late, i.e. at an advanced stage of the transposition process, namely at a time when it is too late to amend the text.

In nearly 40% of the responses (8 out of 21 questionnaires: Belgium, Denmark, Estonia, France, Italy, Luxembourg, Malta and Portugal), there is a total absence of consultation and in some cases a refusal on the part of the authorities in spite of a request by the trade unions. The Italian trade unions (CGIL, CISL, and UIL) reported an absence of debate at national level.

### 1.2. Results of the screening (authorisations, requirements prohibited or to be evaluated)

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<sup>1</sup> The following countries had not responded to the questionnaire as of 14 October 2009: Netherlands, Slovakia, Romania, Hungary, Greece and Slovenia.

The result of the screening could have been expected to result in criticisms or observations by the trade unions most involved. However, quite significantly, the trade unions consulted (particularly the Austrian union ÖGB) seem to have confidence in the national authorities for implementing the crucial phase of the transposition process that consists of detecting, in the authorisation and requirements schemes, those that should be prohibited or modified to conform to the directive.

The phrase that recurred most often in the survey was "pending the results of the screening". So the screening is seen as the almost objective basis on which to work on an ex post basis, whereas this phase in fact represents an essential step that should have been followed on an ex ante basis.

One trade union organisation (Czech-Moravian Confederation of Trade unions – CMKOS) was able to discuss the results of the screening with the ministers and institutions concerned.

In many countries, the screening was still in progress or being completed at the time the questionnaire responses were due. This situation did not allow the unions consulted to discuss the results of the screening.

### 1.3. Excluded sectors – problems identified

Only two problems were identified but they are huge: the principle of local autonomy and the mechanism for evaluation and follow-up of the effects of the legislation and the protection of sectors excluded from the directive.

The CGT (France) reported that unions, associations and especially certain operators went to great lengths to make sure that social services of general interest were taken into account. The CGT mentioned in this respect a report drawn up by the "Collectif SSIG", which called for excluding from the scope of the directive legislation on social housing and the living conditions of the most deprived, social establishments and services and social medicines, as well as legal protection for youth. The two Bulgarian trade unions that responded – CITUB and CT "PODKREPA" – shared the CGT's position on this point.

The abovementioned report also proposed to "give a legal basis to the general interest partnership agreement" as a means of resolving the problems that can be created by the use of subsidies.

The report also stressed that it was necessary to focus on the situations that were actually likely to undermine intra-Community competition. It suggested certain options aimed at streamlining the state aid scheme, which it considers disproportionate, and establishing a set of indicators that allow an assumption of compliance with Article 107.1 (ex-Article 87.1) on state aid and reversal of the burden of proof.

The Finnish trade unions – SAK, STTK and AKAVA – nevertheless explained that all the sectors excluded from the Services Directive were excluded in Finland, which

could cast doubt on certain social services, which may have been excluded too quickly<sup>2</sup>.

The limited number of responses to the question is difficult to interpret. Does it mean that the trade union organisations do not foresee any difficulty for these areas or that their future is uncertain? Does it mean that it is too soon to identify any problems that may be linked to the excluded sectors? This is an important point on which further analysis is needed.

#### 1.4. Identification of problems for the future

This question was sensitive because we asked the trade union organisations to project into the future and the unknown without knowing the exact result of the screening and, more often than not, without first having seen the final transposition texts.

Predictably, there are few responses to this question, even though it is essential (6 out of 21: Germany, Italy, Portugal, Spain, Sweden and Finland).

Surprisingly, several trade union organisations expressed the view that this question was more the responsibility of the government.

Among the difficulties foreseen are the following:

- the directive's impact on labour law, social security and the tax system (DGB, SAK, STTK and AKAVA). In this connection, the DGB commented that a European Union level study of the directive's impact on labour law, social security and tax systems would be justified;
- implementation of the Services Directive. The increase in the number of posted workers is mentioned, but it is not really clear exactly what problem this will create (reduction in rights, greater flexibility, greater competition, etc.). The Finnish trade unions SAK, STTK and AKAVA commented that an economic impact analysis would probably have brought to light a significant increase in the number of posted workers;
- one union (the DGB) noted that the most important challenge would be the consultation of posted workers and the question of mutual recognition of their membership. Other unions (CGIL, CSIL, UIL, CCOO) observed that uncertainties with regard to the implementation and effectiveness of negotiating rules related to work and employment justify the need to intensify provisions for posted workers;

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<sup>2</sup> By way of comment, we would note that the exclusion of certain sectors from the directive's scope does not deprive these sectors of the obligation to comply with Treaty of Lisbon rules. The exclusion of a service does not protect it at all from the Treaty's useful effects and says nothing about how it will be affected by national law.

- uncertainty over the state of regulations (administrative authorisations and requirements) at the local level, where responses to questions concerned only a limited part of the local administration. The CGIL, CISL and UIL reported that for Italy, with its 20 regions, two autonomous provinces and 8,000 municipalities, it will be difficult to maintain any form of homogeneity at national level to comply with the obligations of the Services Directive;
- the integration of the different information systems (i.e. collaboration between the central government and local governments);
- transparency and reciprocity between regulatory provisions in the different member states with regard to authorisations.

Lastly, several unions used the questionnaire to request the use of the points of single contact to inform service providers on social and labour legislation in force in their respective Member States.

## **2. A few additional remarks: the treatment of SGEI in the directive**

### **2.1. Services of general economic interest (SGEI)**

In the case of a draft directive aimed at applying to the entire services sector, the question of its intermeshing with Community law applicable to services of general economic interest (SGEI) is inevitable. In this respect, the debate on SGEI was one of the foremost political debates with Parliament. However, there are few results in the end. SGEI other than those referred to in Article 2.1 are still included in the scope of the directive. This is especially the case for postal services but also environmental services, water supply and purification services, services for the storage of hazardous goods, etc.

The text passed by Parliament recognises that "the directive should not apply to non-economic services of general interest <sup>(3)</sup>. (...) The directive applies only to services of general economic interest, i.e. services that correspond to an economic activity and that are open to competition". On this point, it should be mentioned that the Commission departed from the position of the European Parliament, which requested the exclusion of "services of general interest as defined by the Member States" in Article 2. With stronger reason, Parliament rejected the exclusion of services of general economic interest <sup>(4)</sup> from the scope of the directive, a demand which

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<sup>3</sup> The term "services of general interest" designates service activities, whether revenue-producing or not, considered to be of general interest by the public authorities and therefore subject to specific public service obligations. Mentioned in Article 86.2 of the EC Treaty, services of general economic interest are revenue-producing service activities that meet general interest missions. This is the case in particular for network services (transport, energy, telecommunications and postal services). There is still a "grey area" where in the final analysis the economic nature is not a reliable criterion to describe certain activities (not-for-profit, tradition, no payment by the beneficiary, mandatory or essential nature of the services provided, etc.). This is the case, for example, where there is an economic service provided but where the nature of the service is clearly non-economic.

<sup>4</sup> All the amendments concerning the request for exclusion of services of general economic interest were rejected by around 60% (against) to 40% (in favour). For example, amendment 251 tabled by the PES, which

nevertheless reflected an internal logic to the extent that transport and electronic communications (telecommunications) were excluded straight away by the Commission in its original proposal.

It should nonetheless be noted that Parliament passed several amendments that limit the proposal's impact on SGEI:

- Article 1.3 states that "this directive does not deal with the liberalisation of services of general economic interest, reserved to public or private entities, nor the privatisation of public entities providing services". Nor does it affect "the freedom of Member States to define, in conformity with Community law, what they consider to be services of general economic interest, how those services should be organised and financed, and what specific obligations they should be subject to";
- Article 2.2 excludes certain SGEI: port services, healthcare services ("regardless of the ways in which they are organised and financed at national level or whether they are public or private"); audiovisual services; social services related to social housing, childcare and support of families, social security services;
- SGEI are excluded from certain provisions of Article 15.1 to 15.4 concerning requirements by the public authorities which the Commission wishes to evaluate to determine the relevancy of the measure (minimum tariff, requirements with respect to shareholding or obliging a provider to take a specific legal form, quantitative or territorial restrictions, etc.). Thanks to Parliament, SGEI will have greater room for manoeuvre. They will be able to meet their public service obligations without coming within the scope of the directive with respect to prior authorisation;
- SGEI are exempted from application of Article 16 (on the country of origin principle, see below): "Article 16 shall not apply to services of general economic interest which are provided in another Member State, inter alia postal services, transport services, electricity distribution and supply services, gas transport, distribution, supply and storage services, water distribution and supply services and waste water services and services for the treatment of waste".

## 2.2. Social services of general interest (SSGI)

The social services referred to in Article 2.2(j) are excluded to the extent that they are provided by the State, by providers mandated by the State and which therefore have the obligation to provide such services, or by charities recognised as such by the State.

According to the Commission, the list (social housing, childcare and support of families and persons permanently or temporarily in need) covers all social services. However, certain associations, especially in France, take the view that the list is not

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requested "the exclusion of SGEI and SGI from the scope of the directive" was rejected in a vote of 365 against, 269 for and 3 abstentions. A similar amendment by the Greens was rejected in a vote of 483 against, 154 for and 3 abstentions. Amendments 372 and 390 tabled by the EUL Group that requested exclusion from the scope of the directive of SGEI which the Member State or the European Union subjects to specific public service obligations were rejected in a vote of 381 against, 262 for and 4 abstentions.

complete and that other services should be added. The EP plenary session rejected the wording "social services such as...", which suggests a list of examples.

A decisive factor in determining whether a service is included in the directive appears to be the fact that the service is provided by a private operator acting on a State-given mandate. In other words, the "privatisation" of a social service of general interest brings it into the scope of the Services Directive.

This question of a mandate necessitates specific development. Even if the question of State aid is expressly excluded from the scope of the directive, we would observe that mandates are a central concept in the 2005 post-Altmark package concerning the financing of SGEI.

### 2.3. The six different SGI statutes in the directive

A careful reading of the Services Directive shows that the coherence of SGI (SGEI and NESGI) is demolished. There are at least six different SGI statutes:

- a) NESGI excluded as such (NESGI, given their economic nature, are not covered by the reference treaty). Three examples are mentioned by the Commission: national education, the social security scheme and the statutory pension scheme;
- b) SGEI expressly excluded from the scope of the directive: transport and electronic communication services, audiovisual services and port services;
- c) SGEI included in the directive by virtue of freedom of establishment (except for Art. 15.1 to 15.3) but not by virtue of the principle of freedom of movement: postal, energy, water and waste services;
- d) SGEI which are governed by the entire directive: environmental protection services, external employment protection services, etc.
- e) SSGEI excluded from the scope of the directive: social housing, support for families and persons in need, etc., primarily those mandated, recognised or provided by charities;
- f) SSGEI included in the scope of the directive (private SSGEI and other SSGEI).

This patchwork of SGI and their removal from the socio-economic field are elements that will need to be evaluated.

### 2.4. The potential of the new provisions of the Treaty of Lisbon

The Treaty's new provisions (Article 14 and Protocol 26 on SGI) are more for show than a real legal basis constituting a protective and truly positive base for SGEI.

However, this legal basis, in combination with Article 114 (ex-Article 95) constitutes a perfectly valid reference to justify a Commission initiative.

The question of the legal basis seems to be less problematical than the question of political choice. And it is important to recognise that the balance of power at the Commission, but also in the EP since the Rapkay report on SGI (2006), is not to the advantage of those who support a framework instrument, even one limited to:

- SSGEI;
- a common base for all SGEI.

The new Article 14 of the Treaty of Lisbon states that:

"... the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services."

It should be noted in passing that this Treaty provision is written in the imperative ("shall"), i.e. it gives the Commission the obligation to act, under threat of a finding of failure to fulfil its obligations.

The Commission is therefore perfectly entitled to present proposals for regulations, for a given sector for example, that establish:

- the economic and financial conditions that allow SGEI to accomplish their tasks (cf. follow-up of Decision 86.3 which focuses exclusively on State aid);
- reporting on the functioning of universal service, minimum service, tasks related to services of general interest, etc.

#### 4. Healthcare

The exclusion referred to in Article 2, paragraph 2, point f), covers "healthcare and pharmaceutical services provided by healthcare professionals to patients with a view to evaluating, maintaining or restoring their state of health when these activities are reserved to a regulated healthcare profession in the Member State in which the services are provided".

The exclusion of healthcare services covers only the activities reserved to a regulated healthcare profession in the Member State where the service is provided.

Services that cannot be provided without the requirement of specific professional qualifications must therefore be covered by measures for implementation of the directive.

Likewise, activities aimed at improving welfare are included in the scope of the directive.

## **PART THREE: PROPOSALS AND RECOMMENDATIONS**

### **1. Proposals on support and follow-up of transposition**

#### **1.1. One-stop shops and smart points of contact**

The establishment of one-stop shops and administrative cooperation will constitute a form of "revolution". The importance of this measure was long underestimated, but it in fact constitutes one of the most innovative and least controversial aspects of the directive.

This is really a "Copernican revolution", what I would call "**think European first**", to paraphrase the sub-title of the Small Business Act.

It is a pragmatic, large-scale measure, transversal in scope, which aims to mobilise the national, regional and local administrations in the 27 Member States to put freedom of establishment and free movement of services into practice.

It is an extremely important step that will determine the future success of the directive and which suggests other positive developments. It must be possible to carry out all procedures and formalities relating to access to a service activity easily, by distance and electronically, through one-stop shops.

These one-stop shops are meant to evolve into second-generation centres, namely **smart single points of contact**, which will provide operators with quality information that should help foster mobility among service providers and economic activity.

Should these points of contact be able to provide information on labour law and social protection in force? This is not foreseen by the directive, but it could certainly be useful. It would be conceivable to select points of contact in several Member States, on a voluntary or pilot project basis, before extending the experience to all of them.

Developing a **charter** or **code of conduct** is certainly a promising idea that could help make practices more consistent and lead to the drafting of specifications.

The idea will have to take root within the network of officials in charge of the single points of contact, who could find that different practices should be set out in a code of conduct.

Obviously, these points of contact will have to be given the resources they will need to carry out their tasks. This factor is regularly brought up by the 12 new Member States but it is not to be neglected considering the important added value a smart

single point of contact can create. It will nevertheless be important to avoid a "*big brotherisation*" of the system, which could nevertheless reveal interesting information on an anonymous basis.

Is it necessary to go as far as creating a **central data bank** on the occupation of foreign service providers or to put in place an electronic monitoring and control system of the occupations of foreign service providers? Obviously, this raises the sensitive question of respect for privacy and data protection.

### 1.2. Enhancing administrative cooperation

The virtual harmonisation of administrative cooperation between Member States is a fundamental point of the directive provided it is not limited to the exchange of information required to monitor the activities of service providers.

Administrative cooperation should be enhanced so as to make detailed statistics available, not only quantitative but also qualitative, on the profile of service providers, the choice of sectors, the evolution of employment, etc. This should include:

- a complete pooling and mapping of the European tertiary base through a cross-referencing of the different national, regional and local data while respecting privacy and data protection;
- identification of bottlenecks, the occupations insufficiently filled, qualification problems and flows of posted workers;
- work on the common difficulties encountered by service providers;
- creation of an early warning system, etc.

This will imply that the Member States work on the most standardised data possible. The creation of a standard European form seems indispensable over the longer term.

Work between Member States on best practice on integration, orientation or freedom to provide services could result in a very useful guide to best practice.

This stage of administrative cooperation is too important not to take advantage of all the added value it could offer.

### 1.3. A European observatory on the quality of services

Setting up a European observatory on the quality of services, similar to the many other European observatories that exist, based on the most competent national institutions and in close cooperation with the Commission, appears to be a useful option in so far as it would allow the involvement of stakeholders, in particular the representatives of employers, workers and consumers.

Such an observatory, which would also include members of public administrations as well as academics, would have the task of surveying and measuring the quality of European services.

EUROSTAT and the national statistics institutes should be partners of choice by making available information that could be used to judge the quality of services.

NACE codes are not yet used often enough in a Community perspective. They constitute a tool that could be better exploited.

#### 1.4. A practical and operational handbook

The Services Directive continues to be difficult to understand and sometimes abstruse.

As the Member States prepare to transpose the directive, the time has no doubt come for them to carry out, in cooperation with the Commission, instructional and explanatory initiatives:

- for economic operators who provide services, and especially small and very small enterprises and self-employed persons;
- but also for posted workers and employees who will have to live in this new more competitive environment;
- for public administrations (especially municipal, provincial, local, etc.), which more than ever will have to juggle with new rules and apply them on the ground;
- and last but not least, for citizens who are the final recipients and the first potential beneficiaries of the measure.

Obviously, this information will be different for each category:

- For service providers, especially the smallest, the challenge is the creation of new markets in Europe, the development of activity beyond national borders and sometimes beyond the EU's borders;
- For workers and employees who work in large or small structures that provide services, the challenge is different but equally important. The directive will exacerbate competition between service providers who were often protected against external competitors. For this category of persons, the challenge is adaptation, renewed training and the acquisition of new skills to be cushioned from the shock of market opening. It is indispensable for each Member State, at the level closest to workers, to make the most of the opportunity offered by this challenge to train, inform and prepare them.
- For the public administrations as well, it will be indispensable for the public servants and agents in charge of monitoring and applying the Services Directive to be correctly informed about the effects it will produce. The rules are going to be changed and they need to be informed correctly in time.
- Lastly, citizens are supposed to be the ultimate beneficiaries of the opening of the services market. They should be made aware of the opportunities this will offer.

In short, we recommend 27 services handbooks, a sort of guide to the universe of services<sup>5</sup> accessible online and at the single points of contact. This should be a practical document, with thumb indexes and references, that would include a common educational section on the directive as an introduction in all the handbooks. This should be a very didactic and instructive introduction to the Services Directive for those who are totally unfamiliar with it. This part would be drafted by the Commission or with close assistance from the Commission. It would be contained in all 27 handbooks.

A second section should contain the text of the directive with comments specific to each Member State. The section on the points of contact, for instance, would give the contact information for all the points in the Member State concerned, etc. The comments on the text of the directive would be drafted by the Commission or with close assistance from the Commission. Every Member State would "superimpose" its own concrete references.

A third section should contain the essential national transposition texts (framework laws, implementing decrees, sectoral modifications, etc.). An internet link could refer users to subsequent adaptations of the law. This part would be drawn up by the Member State.

This handbook, which would be available in the 23 national languages and systematically in English in all the Member States, would help foreign operators to find their way through the national, regional and local landscape in a Member State. This initiative would be particularly important because the single points of contact do not have the role of providing tailor-made advice to operators, whether nationals or foreigners.

## **2. Proposals for initiatives to be implemented after transposition**

### **2.1. The indirect impact on other Community instruments**

In spite of article 2 of the directive, which excludes 11 sectors or areas of activity, and article 3, which establishes the precedence of sectoral legislation over the horizontal directive, the effects of the Services Directive on a number of provisions are very real and mean that these provisions must be rethought. For example, the announcement by the Commission President concerning a regulation interpreting the directive on the posting of workers demonstrates that considerable follow-up work on the effects of the Services Directive will be needed.

The evolution of the following instruments should in particular be studied:

- the impact of the Services Directive on professional qualifications;
- the impact of the directive on the Posting of Workers Directive;

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<sup>5</sup> The author drafted, with three other partners (Pour la Solidarité Asbl, ConcertES and Kleis), a **practical guide to State aid and Community regulations** based on the same principle (Brussels, 2009).

- the impact of the Services Directive on the draft directive on patient mobility;
- the impact of the directive on the Consumer Protection Directive.

## 2.2. An impact analysis after five years of implementation of the Services Directive

Four major phases can be identified in the emergence of the Services Directive and its future implementation:

- (1) 1999-2003: phase of preparation and initial development of the constituent elements of the directive (elements of case-law, etc.);
- (2) 2004-2009: phase of emergence, negotiation and preparation of implementation of the directive;
- (3) 2009-2014: phase of application, implementation and evaluation of the Services Directive;
- (4) 2014-2019: new phase of further development of the Services Directive and possibly a new initiative, as appropriate?

José Manuel Barroso declared, on 3 September 2009, in his "Political guidelines for the next Commission": *"We need to match this huge investment in **ex ante** assessment with an equivalent effort in **ex post** evaluation – to ensure that our proposals really do deliver what they promise and to enable us to revise and correct them where they fail to work as expected."*

It would be useful to apply the Commission President's recommendation to the Services Directive and to establish an ex post impact analysis after five years of implementation at Community level, i.e. by 28 December 2014.

Starting from the 2004 impact analysis of "Copenhagen Economics", it would be advisable to:

- ➔ Check whether the original working assumptions (in terms of growth, employment rate, etc.) have been confirmed;
- ➔ Analyse the consequences of the crisis and the exit from the crisis on the services sector;
- ➔ Update the development of certain services or certain behaviours among service providers;
- ➔ Extend reflection to the post-Doha WTO agenda.

The directive's impact on labour law and on social security and tax systems is not known at this stage. According to certain estimates, the directive could result in a very substantial increase in the number of posted workers. It therefore seems advisable to organise an impact assessment at European level. The consultation of posted workers emerges as a major challenge along with the question of mutual recognition.

With respect to how the directive will produce its effects, it would be useful to analyse the initiatives needed to remedy, as necessary, any negative consequences that may result from certain illegal practices.

A comprehensive and detailed impact analysis, which would take account of the profound impact of the three dimensions of Lisbon (economic, social and environmental), highlighting the last two pillars, appears indispensable.

### 2.3. Work on sensitive sectors

The Commission intends to work in a pragmatic way and in phases, starting from the requirements and authorisations maintained by the Member States, to determine whether possible sensitive sectors exist.

In fact, it appears difficult if not delicate to determine in advance the sectors that will present difficulties.

However, it is possible to target a few sectors that will have to be watched particularly closely, such as:

- Construction
- Real estate
- Services for businesses
- Services for persons
- Hospitality business
- Retail services
- Tourism

It will be very interesting in particular to see what the definitions of these sectors will cover at Member State level. Will similar requirements always be found in the Member States for the same sector?

It will be necessary to make sure that the Commission checks this information and groups the debates and problems reported by themes to be addressed in working groups, without forgetting the social partners.

### 2.4. External dimension of services

The European Union exports services: research and development, fashion and design, etc. This element will have to be taken into account in any future impact analysis.

Within the framework of the new EU 2020 strategy, it is obvious that the Commission's strategy for implementation of the fifth freedom must be matched with an ambition of the same nature outside the Union.

The action of the three Directorates-General most involved will have to be coordinated: DG Trade, DG ENTR with the new innovation action plan that is being drawn up, and DG MARKT, responsible for e-trade.

A holistic approach will be needed to ensure that the internal and external dimensions of the single market complement and strengthen one another. Above all, it is vital to ensure that the EU can win acceptance for strong positions in the WTO that reflect the European social models.

## **CONCLUSIONS**

First, the Services Directive doubtless constitutes a Community "big bang".

The period that opened on 29 December 2009 marks a new phase in European integration. Several provisions, such as administrative cooperation and the establishment of one-stop shops, will have the practical effect of reinforcing European integration. The main contribution of the Services Directive is expected to reside in creating simplification and greater transparency in administrative procedures in the different EU Member States. It is interesting to note, however, that some of the objectives set by the Services Directive have already been anticipated by both economic operators and Member States. Implementation of the directive is nevertheless expected to reduce significantly the level of regulatory barriers in a number of EU countries.

Second, the opening up and improved functioning of the single market for services must be matched with a set of guarantees or conditions:

- Limiting the effects of the Services Directive compared with other Community provisions, particularly the Detached Workers Directive, healthcare and Regulation 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and their families moving within the Community;
- Taking account of the specific characteristics of small operators providing SGEI, social services and non-profit services, whose particular features and contribution to the general interest must be better taken on board. State aid rules were made more flexible for small SGEI (cf. post-Altmark package) and it would be advisable for rules on freedom of establishment and free movement to be adjusted accordingly for such services;
- Providing for an ex post impact analysis that targets the impact of the Services Directive, particularly on the flow of posted workers, the fate reserved to them and the evolution of their level of social protection;
- Providing for consultation of the trade unions, civil society and consumers on follow-up of the Services Directive.

Concerning the latter point, it is obvious that the views of the national and European trade unions will have to be better taken into account in support and follow-up of implementation and ex post evaluation of the directive than they were in the preparation and screening phase. The Commission and the Member States will have to involve them more closely in due course. This is what emerges clearly from the survey conducted by the European Trade Union Confederation.

Third, the short-term impact of the Services Directive on the evolution of growth rates is expected to be relatively limited at EU level, particularly in the context of today's crisis. Growth is expected to remain at between 0.5% and 1,5% at most. Growth rates are likely to be higher in the less open countries, which will benefit from important feedback due to the dismantling of a number of regulatory barriers. The Services Directive is expected to have only a limited impact on exports of services to other EU countries, particularly because the services that bring the most growth, such as transport and communications, are excluded from the scope of the directive or are not exported to a significant extent at intra-Community level (hospitality services, personal services). Information technology activities, professional services and other services to businesses are expected to benefit the most from implementation of the Services Directive.

Fourth, it seems that the effects of the Services Directive will be most significant for SMEs rather than large enterprises, which are less sensitive to regulatory barriers and better prepared to penetrate intra-Community markets. The abolition of entry barriers is nevertheless expected to help medium-sized companies to extend their activities, primarily in cross-border areas or in neighbouring countries. Small and very small enterprises are expected to see an increase in their market share in the real estate and construction sectors, particularly in cross-border areas.

In our view, energy should be focused on:

- correct and effective transposition of the directive so as to preserve a level playing field between Member States;
- a transparent mutual evaluation, the results of which should be reported in particular to trade union organisations;
- smart administrative cooperation based on dynamic one-stop shops and that allows for better European integration.

Transposition of the Services Directive did not end on 29 December 2009. The year 2010 will be equally important, if only due to the gradual nature of transposition, its proper application and its future evaluation.

It is to be hoped that this Herculean task will enhance the EU in the general European interest.

