Chapter 2
Background to the Harmonisation of the Free Movement of Services

Contents

2.1 Introduction

The process leading to the adoption of the Services Directive was not straightforward and the first proposal was profoundly modified before it was finally adopted by the Parliament and the Council in 2006. A principal consequence of the modifications was that the country-of-origin principle, to be applied in relation to the temporary provision of services, was abandoned. One central reason for this may be traced back to the specific characteristics of the free movement of services, which include both transborder movement of persons, either receiving or providing services, and also "service activities".

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2.2 Specific Characteristics of the Free Movement of Services

2.2.1 Introduction

What constitutes "services" is usually negatively defined, characterised as residual in contrast with other economic activities such as the provision of goods.[1] However, some characteristics may be pointed out as characterising services, such as economic activities being immaterial and intangible, produced and consumed simultaneously, non-cumulative, non-storable, non-quantifiable and involving, and requiring a certain amount of trust between a provider and receiver of the services.[2] Trust in the quality of services may be attained through the establishment of standards, labels, trademarks, franchises, codes of conduct, etc., by the service providers whereby the national regulatory system needs to secure a minimum level in this respect.[3] Furthermore, the quality of services is signified to a great extent by requirements of education and skills, access to information, access to credits and insurance, etc.[4] Such regulations may allow or prohibit the provision of services, impose conditions on their exercise and affect their costs. Thus, prohibiting national restrictions affecting the provision of services, opens up for regulatory competition in areas of law not only affecting the commercial activities as such, but also in areas of sensitive nature for the Member States.

2.2.2 Regulatory Competition Within the Union

Economic integration and the establishment of a single market create regulatory competition among the Member States, which are thereby constrained in their capacity to govern their own nation state.[5] Nevertheless, the Union institutions are not capable of governing all issues affecting the single market with the same degree of effectiveness and democratic legitimacy as nation states may.[6] In addition, the mobility of economic actors has increased over the years.

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[1] See Article 57 TFEU. See also Case C-20/03, *Criminal proceedings against Marcel Burmanjer, René Alexander Van Der Linden and Anthony De Jong* [2005] ECR I-4133, at paras 33–35.

[2] Hatzopoulos 2012, pp. 4–5.

[3] Ibid, pp. 8–9.

[4] Hatzopoulos 2012, p. 17, see also Hindley and Smith 1984.

[5] The fundamental freedoms, subject to a common judicial review, provides for a powerful liberalising effect beyond that which had previously been observed in their international cooperations concerning customs unions and common markets. Barnard even concludes that it has stronger liberalising effects than within the federal USA, see Barnard 2009.

[6] See Scharpf 1997, p. 521.

It is in light of the above that the specific characteristics of services and distribution of regulatory competence between the Union and the Member States within the area of free movement of services is set out. Concerns of the Member States, such as those expressed in relation to the initial proposal of the Services Directive, are based on the fact that service providers are free to establish throughout the Union merely by complying with the rules of the country-of-origin, notwithstanding the location where the services are provided, thus opening up the possibility for a "race to the bottom". It is feared that providers will establish in the Member State with the lowest level of national rules, whereby the other Member States would be inclined in turn to lower their requirements to the same extent in order to attract economic actors to their territory. The above results in effects not only on national tax revenues but also labour rights and job creation, etc.

However, the result of regulatory competition does not always create a "race to the bottom". It may also create a "race to the top". Market competition among goods or services produced under the regulations of different Member States allows consumers to select the optimal regulatory system.[7] Trustworthy regulations, provided either by private associations or by national legislation in relation to, for example, health, safety or financial risks, may become a competitive advantage in confirming superior product or service quality. Certain quality preserving national requirements considered justified by Union law may furthermore legitimise hindering non-conforming foreign products or services from entering the national market and thereby are not at all exposed to regulatory competition.[8]

However, national policies increasing the costs but not the quality of the products or services may not rely on this rationale. Social regulations of working conditions, employment security or industrial relations, taxes, etc., may affect the costs of products or services but not necessarily the quality. Thus, it is not possible to purely rely on the self-interested consumer to prefer goods or services produced under more stringent process regulations. Scharpf, noted, it is "insufficient to Europeaniz[e] those market-correcting governing functions which, at the level of the member states are most vulnerable to the pressures of economic competition".[9] The final version of the Services Directive is shaped by these facts, that, simply speaking, the free movement of services exhibits specific characteristics in contrast with the free movement of goods and persons (establishments and workers).

[7] Ibid, p. 522.

[8] Scharpf 1997, p. 523.

[9] Scharpf 2000, p. 23.

2.2.3 Home-State or Host-State Control

The specific characteristics of the diverse objects subject to the right to move freely entail that different categories and types of national measures and regulations may be affected. In this respect, the free movement of services shows similar characteristics both with regard to the free movement of goods as well as the free movement of persons, whereas the free movement of goods and persons are fundamentally different from each other. Crucial issues are that persons raise security and welfare implications in a way that goods do not and concerns legal areas of greater sensitivity to the Member States.[10] This can be exemplified by discussing whether in principle, home- or host-state control applies to the free movement of goods in contrast with the free movement of persons.

One of the fundamental principles in relation to the free movement of goods is the principle of Mutual Recognition.[11] Mutual Recognition creates a presumption, in the absence of harmonisation on the EU-level, that goods legally produced or sold in one Member State should be able to be sold equally in all other Member States without having to adjust to the regulations of the state where it is purchased, if the requirements set out in both Member States fulfil the same objective. Any additional requirement imposed by the state of purchase[12] is prohibited in accordance with the free movement of goods, unless justified by an accepted reason. The country-of-origin thereby, in principle, sets the regulatory limitations regarding goods sold within the Union as a whole, setting up the national regulations affecting goods for regulatory competition between the Member States. Host-state rules must in this respect co-opt regulatory decisions taken in the home-state.[13] Nevertheless, the regulations of the state where the goods are purchased apply to the goods sold there, but must not create a double burden on goods originating in other Member States. In other words, in principle home-state control applies.

The principle of Mutual Recognition also applies to the free movement of persons, however only in relation to a person's nationality. It is the province of each Member State to regulate questions of citizenship as to its own citizens and define the connecting factors required of a company or firm if it is to be regarded as incorporated under its laws.[14] Whether based on the place of birth, parents'

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[10] Barnard 2010, p. 225.

[11] See Regulation (EC) No 764/2008 of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and repealing Decision No 3052/95/EC [2008] OJ L 218/21. The principle of Mutual Recognition will be further discussed in Part III, see for example Sect. 11.3.4.

[12] Article 35 TFEU sets out that quantitative restrictions on exports as well as all measures having an equivalent effect, are to be prohibited between Member States, however in such cases mutual recognition is not an issue.

[13] For such discussion, see Klamert 2010, p. 131.

[14] Case C-210/06, *CARTESIO Oktató és Szolgáltató bt.* [2008] ECR I-9641, at para 110. See also cases such as Case C-192/99, *The Queen* v. *Secretary of State for the Home Department, ex*

nationality, the seat[15] of a company or registration in a national register,[16] these issues are therefore for the Member States to decide. The fact that a Member State recognises a person's nationality, both as regards individuals as well as legal persons, must be mutually acknowledged by all Member States. In other words, Mutual Recognition applies in relation to the nationality of persons making use of free movement but, it is the regulations of the state to which the person has permanently moved that apply in general to the activities performed there.

Therefore, in contrast with the free movement of goods, the national regulations of the country-of-origin and the state within which a person resides do not compete with each other. The national regulations of the state of establishment or within which a person works in principle govern both the commercial activities performed within its territory as well as the person who executes these activities in such territory. The transborder activity safeguarded by the free movement of persons is the right for natural or legal persons to be established in a new "home" state to perform commercial activities or to work there on a basis equal to the nationals of that state.

The different premises of the free movement of goods, in contrast with the free movement of persons, has meant that the free movement of goods has been based on home-state control and mutual recognition, whereas the free movement of persons is regulated through host-state control and mutual recognition of nationality and equal treatment. However, the free movement of services shows characteristics similar both to the free movement of goods as well as the free movement of persons. This is reflected in the fact that on some occasions the approach adopted by the Court in relation to the provision of services follows that of the free movement of goods, whereas in other cases the Court adopts an approach based on the movement of physical persons, or is dealt with as a category of its own.[17] Thus, on a principal level the free movement of services is caught in a limbo between the free movement of goods and persons.[18]

It would be rational, on one hand, to adopt the same approach in relation to service providers as in relation to establishments being set up and persons working in another Member State. The state within which an individual or legal person

(Footnote 14 continued)
parte: Manjit Kaur, intervener: Justice [2001] ECR I-1237; Case C-212/97, *Centros Ltd* v. *Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459; and Case C-208/00, *Überseering BV* v. *Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

[15] This theory of recognition refers to a company's or firm's seat, where for example its board or owners are situated physically, and not necessarily where it is registered.

[16] The theory of "incorporation" basically requires that a company or firm be registered in a national register to be considered a company in that state.

[17] See for such discussion Hatzopoulos 2012, pp. 21–22.

[18] Or as expressed by Edward and Shuibhne 2009, pp. 244–245, that "services sit—sometimes uncomfortably—on the borderline between, on one hand, the law regulating the freedom of market (particular the freedom to market 'invisibles') and, on the other, the law governing the personal right of free movement of the service provider, or in the case of corporations, of the provider's employees".

conducts commercial service activities sets the regulatory limitation in respect of the activities conducted there. On the other hand, it would also be rational for commercial service activities to compete throughout the Union on an equal basis founded on the principle of Mutual Recognition, whereby the country-of-origin establishes the regulatory limitations.

The free movement of services is generally founded on the latter, within the meaning that the principle of Mutual Recognition and home-state control applies. This entails that not only are the service activities set up for competition throughout the Union, but also all national measures affecting the price and quality of a service, such as direct taxation, social security, professional qualifications, etc. The effects on the national regulatory autonomy in such situations thereby become of a more sensitive nature than in relation to goods. This is the case since certain regulatory areas affected, such as direct taxation and social services, do not come within the conferred regulatory powers of the Union. This has led to reflexion and concern within the Member States as to loss of regulatory autonomy as regards social and welfare policies.

In relation to the Services Directive, added to the fact that the initial proposal was based on the "country-of-origin principle", the difficulties in its adoption are not surprising since it would imply an even further loss of regulatory autonomy for the Member States. The country-of-origin principle implied that service activities and service providers merely had to comply with the regulations of the state of establishment notwithstanding the location at which the service was performed. Taking the principle of Mutual Recognition even one step further,[19] the Member States were not to apply their national rules to services originating in another Member State provided in their territory.

2.3 Background to the Adoption of the Services Directive

2.3.1 Introduction

The initial proposal of the Services Directive was modified which meant that its regulation of the free movement of services was altered by nature. Most importantly the country-of-origin principle was abandoned and replaced with a negatively defined obligation that the Member States are: "not make access to or exercise of a service activity in their territory subject to compliance with any requirements".[20] Furthermore, the exemptions made from the scope of the Services Directive was extended and also clarified.

[19] Van de Gronden and de Waele 2010, conclude that the country-of-origin principle essentially comes down to a jurisdiction rule, p. 401.

[20] Third paragraph of Article 16(1) of the Services Directive.

2.3.2 Initial Proposal of the Services Directive

The process leading to the Services Directive started as early as 1997 when the Commission presented an Action Plan for the Single Market,[21] demonstrating ambitious features similar to the 1985 White Paper on the Completion of the Internal Market,[22] and establishing a timetable to reach certain goals. The 1985 White Paper on the Completion of the Internal Market proposed that the internal market be realised by 1992. This was partially the culmination of the initial focus on the free movement of goods during the 1960s to the 1980s.[23] Despite the acknowledgement of the growth potential of the internal market for services, which had grown between 1973 and 1982,[24] the 1985 White Paper focused on the realisation of the internal market of goods.

The White Paper targeted technical as well as physical barriers, adopting a horizontal approach. This implied that by removing the technical and physical barriers, it would be possible to move away from the concept of harmonisation towards that of mutual recognition and equivalence,[25] referred to as the "new" approach.[26] Principally, this new approach was to create regulatory competition between the states on the basis of the principle of Mutual Recognition, being horizontal to its effects in applying to all product-sectors.[27]

Little attention was given to the establishment of the free movement of services and service providers. The only services activities specifically targeted by the White Paper were those closely related to the sales of goods, as well as channels to promote goods such as: financial services and transport; new technologies and broadcasting services; and a vaguely defined group of communication services[28] related to cross-border communication and information. Other areas concerning the free movement of services were left as not harmonised. Therefore, it was generally still left to the Court to develop the main principles demarcating the scope and application of the right of free movement of services and service providers as set out in the Treaty in most aspects. In this respect, the Court has held

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[21] Commission Communication on the action plan for the single market CSE(97) 1 final.

[22] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985) COM(85) 310, see De Witte 2007, p. 2.
Commission Communication on the action plan for the single market CSE(97) 1 final, p. 7.

[23] See for a further discussion regarding the evolution of the internal market in Part III.

[24] Completing the Internal Market: White Paper from the Commission to the European Council (Milan, 28–29 June 1985), COM(85) 310, p. 26 where it is provided that "in 1982 market services and non-market services already accounted for 57 % of the value added to the Community economy while industry's contribution has dropped to less than 26 %". This may be compared with the situation today when the services market represents 70 % of the GDP within the European Union, as set out in Recital 4 of the Services Directive.

[25] Ibid, at para 13.

[26] Ibid, at paras 67–73.

[27] The principle of Mutual Recognition and the "new" approach is further discussed in Part III.

[28] De Witte 2007, p. 4.

that restrictions must not hinder access to the market and may be justified with reference to Article 52 TFEU or public interests.[29] The objective of realising the free movement of services and service provides (as well as in relation to the other fundamental freedoms) was thereby accomplished through balancing the detriment of a restriction against those interests protected by the restrictive national measures in question.

Eventually, three specific areas related to the services market were given special attention. The two areas of public procurement[30] and recognition of diplomas[31] represented extensive restrictions to trade in business activities and were regulated on the basis of a horizontal approach, drawing up general principles of Mutual Recognition. The third related to the rising concerns associated with the fact that labour was moving across borders in order to carry out service activities in Member States other than that of the establishment of the services provider. This issue was eventually dealt with by the Posting of Workers Directive,[32] which sets out that the rules concerning minimum working conditions and pay were to be determined by the state where the service activities were performed. For the reason of not allowing unwanted regulatory competition possibly leading to social dumping the Posting of Workers Directive was permitted to limit the free movement of services.

During the mid-1990s, the number of cases related to the free movement of services had increased,[33] indicating that the internal market for services did not function optimally.[34] In its 1997 Action Plan for the Single Market,[35] the Commission proposed four strategic targets to be tackled: Making the rules more effective, dealing with key market distortions, removing sectorial obstacles to market integration and delivering a single market for the benefit of all citizens.[36] The realisation of a true single market for services was not the main target of this

[29] See Case 48/75, *Procureur du Roi* v. *Jean Noël Royer* [1976] ECR 497, and Case C-55/94 *Reinhard Gebhard* v. *Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 as compared to Case 120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* [1979] ECR 649 (*Cassis*), and, for the same reasoning, see De Witte 2007, p. 5. This will be further discussed in Chap. 7.

[30] See for example Council Directive 92/50/EEC relating to the coordination of procedures for the award of public service contracts [1992] OJ L 209/1. See also Sundstrand 2012, pp. 58–59.

[31] Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration [1989] OJ L 19/16.

[32] Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services [1997] OJ L 18/1.

[33] Hatzopoulos and Uyen Do 2006, p. 923.

[34] However, it may also be the case that the free movement of services has not been utilised frequently because it involves the physical movement of either a provider or recipient of services, which may entail social, economic, cultural and linguistic difficulties. See the discussions by O'Leary 2011, p. 504.

[35] Commission Communication on the action plan for the single market CSE(97) 1 final.

[36] Ibid, p. 7.

Action Plan, but was included in the third objective. Initially the removal of barriers with respect to financial services, utilities and air transport were singled out for attention.[37]

The Commission adopted a consultative Communication[38] in 1999 that set out its strategy for the internal market over the following 5 years. The Communication received positive responses from the Council, Parliament, European Economic and Social Committee and other interested parties.[39] The idea was to combine long-term strategic objectives with short-term, annually reviewed, target actions. The four strategic objectives were to improve the quality of life for the citizens, to enhance the efficiency of Union products and capital markets, to improve the business environment and to exploit the achievements of the internal market in a changing world.[40] A broader view was thereby taken regarding the progress to be made for the internal market and the developing Union.

In 2000, the Lisbon European Council emphasised that the Union had to set new strategic goals in order to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion. On the basis of the conclusions of the Lisbon European Council, the Commission was given the task of drawing up a strategy for the completion of the internal market for services. This strategy adopted a two-track approach. This in essence implied the creation of legislative and non-legislative measures in line with the existing method founded on mutual recognition, and also the adoption of a horizontal approach based on a comprehensive systematic analysis of the services market.

The first real indication of a Services Directive appeared in the Strategy Paper for Services,[41] which was adopted by the Commission at the end of 2000. Adopting such an approach was not a part of the request by the Lisbon European Council, which rather indicated the continuation of sector-specific harmonisation focusing on three main areas; electronic commerce, services of general economic interest and financial services. However, the idea presented in the Strategy Paper for Services was to draft an instrument that combined a horizontal approach with rules to better enforce the principle of Mutual Recognition.

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[37] Ibid.

[38] Commission Communication on the strategy for Europe's internal market COM(1999) 464 final.

[39] Commission Communication on the strategy for Europe's internal market COM(1999) 624 final, in the Introduction, "The Single Market Observatory, a study group operating under the auspices of the Industry section of the Economic and Social Committee, considered the Communication at their meetings of 8 October and 8 November. The Commission organised a hearing on 29 October which was well-attended by representatives of industry, trade unions, other non-governmental organisations and of the candidate countries" (A full report of the hearing could at the time (but not now) be found on the Commission's website. Other comments were received by e-mail and letter.)

[40] Commission Communication on the strategy for Europe's internal market COM(1999) 464 final, p. 4.

[41] Commission Communication, an internal market strategy for services, COM(2000) 888.

An analysis of the services market was presented by the Commission in July 2002,[42] which provided information on the extensive barriers still existing in relation to trade in services within the Union. The report and the impact assessment showed that the economic impact of the dysfunctional internal market for services amounted to a considerable drag on the Union economy and its growth potential, competitiveness and job creation.[43] Thereafter, in the Internal Market Strategy of May 2003[44] the Commission expressed objectives it believed the Union had to accomplish over the next 3 years to derive maximum benefits from the internal market after enlargement.[45] The introduction to this Strategy stated that:

> The Commission has already described the achievements of the Internal Market over the last decade [The Commission estimates that the Internal Market has delivered 2.5 million extra jobs and nearly €900 billion in extra wealth. See "The Internal Market – Ten Years without Frontiers", SEC (2002) 1417 of 7.1 2003]. This analysis shows the significant benefits that a properly functioning Internal Market can and does bring, but it also shows that the Internal Market does not yet function optimally in a number of ways and that sizeable benefits are therefore being missed. A fresh impetus is required to eliminate remaining weaknesses and allow the Internal Market to deliver its full potential in terms of competitiveness, growth and employment.[46]

A horizontal approach was proposed in relation to the free movement of services based on the country-of-origin principle in order to accomplish a true internal market for services within a short period of time, whereas sectorial harmonisation was considered too time-consuming. Thus, the Services Directive was proposed in 2004 founded on a new implementation strategy and a horizontal approach, applicable to all service sectors except for those exempted, the country-of-origin principle and the establishment of mutual assistance between national authorities.[47]

The country-of-origin principle implied that service activities and service providers merely had to comply with the regulations of the state of establishment irrespective of where the service was performed. This principle had previously been successfully adopted in the Television Without Frontiers Directive[48] and the E-Commerce Directive,[49] though these are services of very specific characteristics

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[42] Report from the Commission on the state of the internal market for services, COM(2002) 441.

[43] Commission Proposal for a directive on services in the internal market COM(2004) 2 final, at p. 5.

[44] Internal Market Strategy—Priorities 2003–2006, COM(2003) 238.

[45] Ibid, p. 1.

[46] Ibid.

[47] Commission Proposal for a directive on services in the internal market COM(2004) 2 final.

[48] Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 289/23.

[49] Directive 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the internal market (Directive on electronic commerce) [2000] OJ L 178/1.

different from the physical provision of services. The specific characteristics of audio-visual services and services provided through the Internet, making it possible to receive these anywhere where technical devices facilitate the reception of those services, made the country-of-origin principle indispensable. However, the country-of-origin principle creating "regulatory competition"[50] is not extensively controversial in relation to audio-visual and e-commerce services since there are no persons moving across the national borders.

Even though the Member States approved the common aspiration to realise the internal market for services, the proposal of the Services Directive was not well received[51] and particularly not by the labour unions throughout the Union.[52] Their concerns in essence related to the fact that the proposal was founded on a horizontal approach, applicable to all service activities (except for those explicitly exempted) and on the country-of-origin principle. It was feared that this possibly could have effects on certain services of strong social character, and those rules closely related to the national welfare state.[53]

The sensitivity of social policy issues has prompted the Member States to keep such issues outside the regulatory competence of the Union when adopting harmonisation measures in relation to the internal market. This is due to the fact that harmonisation measures enacted within the internal market are normally regulated on the basis of the ordinary procedure and in accordance with the Community Method (as described, Chap. 5 as well as Sect. 11.3.2) with qualified majority voting by the Member States in the Council, whereby individual Member States may be outvoted. The Union may therefore merely support and complement the Member States actions in relation to social policy issues as provided in the Treaty.[54]

The uncertain scope of the Services Directive, and the fact that it was founded on the country-of-origin principle in relation to the provision of services, resulted in its effects being considered extensive on national regulatory autonomy.[55] This

[50] Barnard and Deakin 2002 also referred to by Davies 2006, at p. 4. See also Otken Eriksson 2005.

[51] See the concerns raised during the discussions within the Council, press release C/04/323, from Council meeting 2624th on Competitiveness (Internal Market, Industry and Research), 25 and 26 November 2004.

[52] See the positions taken by ETUC, the European Trade Union Confederation, http://www.etuc.org/r/76.

[53] See the discussions in the Opinion of the European Economic and Social Committee on the Proposal for a Directive of the European Parliament and of the Council on services in the internal market (COM(2004) 2 final—2004/0001 (COD)) [2005] OJ C 221/113, especially Sections 3.3 and 3.6. See also Council, press release C/06/160, on 29 May 2006. See also for a discussion regarding issues related to European welfare states and the effects of Union law in Davies 2006, and in particular pp. 22–23.

[54] See, e.g., Articles, 114, 153 and 2(5) TFEU. See Sect. 5.3.

[55] Barnard 2008, p. 329, references made to the position taken by the European Trade Union Confederation (ETUC) as well as to the remarks made by Evelyne Gebhard who was the European Parliaments Rapporteur for the Services Directive. Furthermore, see also the discussion by De Witte 2007.

was the case despite the fact that most service activities, closely related to the social welfare state as well as labour law, were exempted from the scope of the initial draft of the Services Directive.[56] Furthermore, at the same time, the new Constitutional Treaty was being deliberated with tendencies towards strengthening the powers and competences of the Union, further fomenting the fears of a loss of national sovereignty and increased powers of the Union.

Nevertheless, what was agreed upon were the rules regulating the right to establish as a service provider and the novelties of introducing mutual evaluation procedures leading up to peer-reviews and case studies to be used to implement the Services Directive. Furthermore, it also provided that the Member States should, in cooperation with the Commission, take accompanying measures to encourage the drafting of codes of conduct at the Community level aimed at facilitating the provision of services within the Union. Not only was it necessary for the Member States and their administrations to participate in the implementation process but they were also persuaded to include professional bodies, organisation and associations in the process, as further discussed below.

2.3.3 Modified Proposal

The delicacy of balancing national and Union regulatory competence, as well as the extent to which Union law may affect national regulatory autonomy, and the common aspiration to create a true internal market for services collided in the context of the Services Directive. Founding the Services Directive on the country-of-origin principle gave rise to worries of excessive loss of regulatory autonomy in the form of the Member States not being able in any way to apply their national regulations to service providers established in other Member States.

This led to the Parliament requiring modifications[57] to the Services Directive before it could be enacted.[58] In essence, the rules on the right to establish as a service provider, the horizontal approach as well as administrative simplification and mutual evaluation process were maintained, but the list of exemptions was extended. The country-of-origin principle was abandoned and replaced with an obligation on the Member States to "ensure free access to and free exercise of a service activity within its territory" and "not make access to or exercise of a

[56] Report on the proposal for a directive of the European Parliament and of the Council on services in the internal market (COM(2004)0002—C5-0069/2004—2004/0001(COD)), Committee on the internal market and consumer protection, rapporteur: Evelyne Gebhardt.

[57] Ibid.

[58] For a critical reasoning, see the Editorial comment CMLRev 2006, regarding the Parliaments amendments where the country-of-origin principle was replaced by the set of generally formulated rules such as "non-discrimination" and transparency. The original proposal was founded on the country-of-origin principle and a set of exemptions provided in Article 17 of the Directive.

services activity in their territory subject to compliance with any requirements"[59] that do not respect the principles of non-discrimination, necessity and proportionality.[60] Lastly, it was emphasised that the Services Directive was to have no effect on services intimately connected with the social welfare state, social policy or labour law.[61]

The Services Directive was finally adopted in 2006, to be implemented by the Member States by the end of 2009. The revised Services Directive imposed a set of procedural rules requiring self-assessment as well as cooperation between the national administrations but very few substantive rules.[62] It obliges the Member States to identify all requirements that could have effects on services and establishments of service providers within its scope and to evaluate if such requirements are justified or not in accordance with its obligations. If a requirement was considered contrary to the Services Directive, by the end of 2009 it either had to be repealed or reported to the Commission as justified in accordance with the Services Directive.

The Services Directive's effects on national regulatory autonomy were considered reduced by removing the country-of-origin principle[63] and through extending the Services Directive's list of exemptions. Nevertheless, the worries related to the excessive effects of the Services Directive on the room for manoeuvrability within the Member States regulatory autonomy is not only founded on the extensive effects of the country-of-origin principle but also on the specific characteristics of the free movement of services. The Services Directive providing that the Member States may not impose "any requirement"[64] on transborder trade in services unless such requirement is non-discriminatory, justified or proportionate also limits the room of manoeuvrability within the national regulatory autonomy of the Member States. Furthermore, the Member States may not by any reason justify discriminatory requirements imposed on service providers that establish within the territory of a Member State other than that of nationality.

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[59] Article 16(1) of the Services Directive.

[60] Ibid.

[61] Ibid, Articles 1, 2 and 3.

[62] Hatzopoulos 2012, p. ix.

[63] For such reasoning, see Klamert 2010. Klamert concludes that Article 16 in the final version of the Services Directive being founded on host-state control whereby national restrictions are lawful unless successfully challenged. While, the country-of-origin principle represents purely home-state control, indicating that national law is not applicable in the first place.

[64] Article 16(1) of the Services Directive.

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