

The Transposition and Enforcement of the Services Directive: A Challenge for the European and the National Legal Orders

Henri DE WAELE*

In the European Union, after a long and arduous struggle, agreement was reached on the adoption of the so-called Services Directive in 2006. This Directive aims to create a level playing field for services and to remove all remaining regulatory and administrative obstacles for service transactions in and between Member States. The present short contribution focuses not on the substantive aspects of the Directive but rather highlights its institutional and constitutional impact. Attention is drawn to the great challenge facing the European and national legal orders when it comes to the successful transposition and effective enforcement of its provisions. In order to rise to this challenge and meet the objective of a fully liberalized services market in Europe, a radical alteration in ECJ caselaw appears all but inevitable.

1. INTRODUCTION: THE GROWING IMPORTANCE OF RULES ON SERVICES

The EU Rules on the free movement of services, service providers, and service recipients have been massively gaining in importance over the course of the past decade. An identical statement can in fact be made with regard to the global rules on cross-border services that have emerged in the wake of the GATT's Uruguay Round (1986–1993).¹ In Europe alone nowadays, services are estimated to constitute no less than 70% of all economic transactions.² Many of these, for example, in education, healthcare, media, and communication, are considered vital for the good functioning of modern-day society. It was therefore not surprising that the EU's Lisbon Strategy placed much emphasis on furthering and streamlining this particular domain.³ Rumours regarding a premature

* LL.M., PhD, Lecturer in EU Law, Radboud University Nijmegen (The Netherlands). I am indebted to Prof. Johan van de Gronden for having inspired this particular contribution and to Prof. Harry Janssen for his valuable comments on an earlier draft. The usual disclaimer applies.

¹ Which culminated in the signing and conclusion of the so-called 'General Agreement on Services' or GATS in 1995.

² See the Report of the High Level Group chaired by Wim Kok, *Facing the Challenge. The Lisbon Strategy for Growth and Employment* (Luxembourg: Office for Official Publications of the European Communities, 2004), 24.

³ The Lisbon Strategy (also known as the Lisbon Agenda or Lisbon Process) was set out by the European Council in Mar. 2000. Its aim is to make the EU the most dynamic and competitive knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion, and respect for the environment by 2010. After initially moderate results, the Lisbon Strategy was simplified and relaunched in 2005; see *Working together for growth and jobs. A new start for the Lisbon strategy*, Communication from Commission President Barroso, COM (2005) 24 final.

death of said Strategy have however not been greatly exaggerated: currently, the EU is one year removed from the target of 2010 for making Europe the most competitive knowledge-based economy worldwide, and so far, results are off-key in almost every respect.⁴ Of course, this is partly due to the systemic failure of the global economy since 2006, triggered by the 'credit crunch' and the international financial crisis. Little blame in any case may be placed on the European Commission, which has ab initio been encouraging innovative rules and practises, clearing the path for a steadfast growth in service transactions. The celebrated (infamous to some) Services Directive bears particular testimony to that: the early 'Bolkestein draft' certainly displayed no lack of ambition, and was only involuntarily stripped of its more audacious provisions (most importantly its 'country of origin-principle'⁵) when civil society, trade unions, and the public-at-large took to the streets, in Brussels and beyond, and chose to put up a fight.⁶ A slimmed-down but still far-reaching design was agreed by the end of 2006, aiming to create a genuine internal market in services by removing any remaining regulatory and administrative barriers. The EU Member States need to have implemented it in their national legal systems by the end of this year.⁷ For all the political turmoil and controversies that have been overcome so far, for lawyers and judges, the real challenges may however still be ahead. The following paragraphs outline and discuss some salient legal complexities concerning the transposal and enforcement of the 2006 Services Directive (hereinafter 'the Directive'). The central tenet of this contribution is that, as current and imminent experiences with the Directive will make clear, traditional implementation strategies of the Member States bear little fruit, in turn necessitating a radical U-turn in the caselaw of the European Court of Justice (ECJ) regarding the effect of EU law in the domestic legal order.⁸ All this becomes increasingly acute if the Lisbon Strategy is given a new

⁴ On 24 Mar. 2009, Felipe González, chairman of the new Reflection Group on the Future of Europe, decided to call a spade a spade and went public with the statement that the Lisbon Strategy had effectively failed. The European Commission has however repeatedly stated that exact progress on the Strategy is hard to measure, and has persistently refused to take a 'Eurovision song contest' approach and rank the twenty-seven Member States (see <www.ec.europa.eu/growthandjobs/faqs/developments/index_en.htm>, last visited on 20 Apr. 2009). The grim statistics on the lack of progress so far may nonetheless be gleaned from the *2009 European Growth and Jobs Monitor: Indicators of Success in the Knowledge Economy*, an annual competitiveness survey published by the 'Lisbon Council' think-tank, available at: <www.lisboncouncil.net> (last visited on 20 Apr. 2009).

⁵ According to this principle, service providers wherever active in the EU would only have to comply with the rules and laws in force in their Member State of origin. It was included as Art. 16 in the draft *Proposal of the Commission of 25 Feb. 2004 for a Directive on services in the Internal Market*, COM (2004) 2 final.

⁶ The mass resistance, widely reported by the media, probably met its famous high water mark in May 2005, when local members of the electricians' trade union in France responded to Commissioner Bolkestein's Directive proposal by demonstrating and cutting off the electricity to his French holiday cottage. Although trade unions and NGOs were perhaps most vociferous in their opposition, intensely hostile views also existed within the two biggest parliamentary groups in the European Parliament (the centre-right EPP-ED group and the social-democrat PES faction) as well as several EU Member States (among which Greece and Italy).

⁷ *Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec. 2006 on services in the internal market*, Official Journal 2006 L 376/36; Art. 44 states that 'Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive before 28 Dec. 2009'.

⁸ For an overview of recent developments in ECJ caselaw concerning the scope of the prohibition contained in Art. 49 EC, see Jochen Meulman & Henri de Waele, 'A Retreat from *Säger*? Servicing or Fine-Tuning the Application of Article 49 EC', *Legal Issues of Economic Integration* 33 (2006): 207–228.

lease of life from 2010 onwards, and if a further stimulation and deregulation in the field of services is pursued in the near future.⁹

2. A BRIEF SCAN OF THE DIRECTIVE

Contrary to a domain like EC competition law where numerous sectoral pieces of legislation continue to exist alongside one another, in the field of services, a bold and deliberate choice has been made in 2004 for launching a comprehensive legislative framework. In fact, the scope of application of the Services Directive has never been restricted to the field of services *sensu stricto*, and also covers situations wherein service providers avail themselves of their rights of free establishment. The current Directive consists of eight chapters and counts forty-six articles in total. Overall, its content may be divided into three parts, the first part providing a further elaboration on its exact ambit. Here, in accordance with Article 50 of the EC Treaty, a service is defined as ‘any self-employed economic activity, normally provided for remuneration’.¹⁰ Due to this generic definition, the scope of application is truly astonishingly broad, covering such diverse manifestations as tourism, legal assistance, management consultancy, and prostitution.¹¹ The second part of the Directive pertains to the establishment of service providers and service recipients, and the third part to services *sec* and the uninhibited provision thereof. These two parts make up the core of the Directive and have already been studied in great detail elsewhere.¹² In the following paragraphs, our inquiry will be limited to two articles only, included in the aforementioned second and third part, as these exemplify the transposition difficulties facing the Member States and the Union – which, in turn, are thought to lead to enforcement difficulties as well. Nonetheless, the observations made on these specific provisions are also of relevance to other domains of EU law, and may equally apply to other secondary legislation, since the Directive under review here is a typical product of the currently employed harmonization techniques in the EU.¹³

⁹ As recommended in the latest edition of the WTO’s periodic *Trade Policy Review*. According to the Secretariat Report of 2 Mar. 2009 on the trade policies and practices of the European Communities (available at: <www.wto.org/english/tratop_e/tp314_e.htm>, last visited on 20 Apr. 2009), a robust economic recovery and sustained growth hinges on structural regulatory reforms and a further liberalization of services, both at the intra-EC level and vis-à-vis third countries.

¹⁰ Article 4 of the Directive.

¹¹ Nonetheless, certain specific services have been excluded from its reach, partly because other rules are already in existence (e.g., for financial and audiovisual services), partly because they were considered too controversial for inclusion (e.g., healthcare and specific services relating to social housing and childcare).

¹² See e.g., S.J.H. Evans, ‘The Services Directive: Great Expectations? An Initial Overview of the Rights and Obligations of the Services Directive’, in *EU and WTO Law on Services: Limits to the Realization of General Interest Policies within the Services Markets*, ed. Johan van de Gronden (The Hague: Kluwer Law International, 2008), 41–72; Catharine Barnard, ‘Unravelling the Services Directive’, *Common Market Law Review* 45 (2008): 323–394; Stefan Griller, ‘General Report’, in *Die neue Dienstleistungsrichtlinie der Europäischen Union – The New Services Directive of the European Union – La nouvelle directive de l’Union européenne relative aux services*, ed. H.S. Koeck & Margit Karollus, FIDE XXIII Congress, Linz 2008 (Baden-Baden: Nomos, 2008), 379–421.

¹³ Compare, e.g., the recent *Proposal for a Directive on the application of patients’ rights in cross-border healthcare*, COM (2008) 414 final, and also *Directive 2007/64/EC of the European Parliament and of the Council of 13 Nov. 2007 on payment services in the internal market*, Official Journal 2007 L 319/1. For an excellent short overview and further discussion of the various approaches and methodologies of harmonization, see Paul Craig & Gráinne de Búrca, *EU Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2008), Ch. 17, 604–636.

3. IMPLEMENTING THE SERVICES DIRECTIVE: TWO KEY PROVISIONS

For the purposes of the present inquiry, the first provision to be analysed is Article 9 of the Directive, which stipulates that:

- Member States shall not make access to a service activity or the exercise thereof subject to an authorization scheme unless the following conditions are satisfied:
 - (a) the authorization scheme does not discriminate against the provider in question;
 - (b) the need for an authorization scheme is justified by an overriding reason relating to the public interest; and
 - (c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective.

Thus, an authorization scheme for any service activity will henceforth only be possible if the scheme is justified by an overriding reason of public interest, if the operation of the scheme is proportionate to its aims, and if it does not entail any form of direct discrimination. The experienced EU lawyer cannot fail to notice that these requirements correspond one-on-one with the so-called ‘mandatory requirements doctrine’ or ‘rule of reason’ laid down by the ECJ in *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* in relation to the free movement of goods, as more recently applied to services and establishment in the seminal *Manfred Säger v. Dennemeyer & Co.* and *Reinhard Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* judgments.¹⁴ Essentially then, this provision does little more than reflect the law as it stands today; thus, it is devoid of novel normative content. By consequence, it is hard to understand how Member States should go about transposing this provision. Ordinarily, Directives are formally addressed to the EU Member States, but materially usually also entail obligations for natural and legal persons. This is however not the case as regards Article 9 of the Directive, which is both formally and materially addressed to the legislator. It is then rather understandable that several Member States have actually chosen *not* to implement said provision into rules of national law.¹⁵ At the same time though, this could be said to constitute a violation of their EC law obligations – for in doing so, they have knowingly disregarded the most hardcore prohibition regulating the classic, and nowadays the most important of the four freedoms. Of course, in defence, it may be pleaded that the added value of said provision is, as said, practically nil. Nonetheless, several other articles of the Directive (e.g., Article 10 paragraph 4 and Article 13 paragraph 4) build upon Article 9, and further specify the

¹⁴ Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein* [1979] ECR 649; Case C-76/90, *Manfred Säger v. Dennemeyer & Co.* [1991] ECR I-4221 (hereinafter ‘Säger’); Case C-55/94, *Reinhard Gebhard v. Consiglio dell’Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165.

¹⁵ Among which Germany, the Netherlands, Italy, and the United Kingdom; see the respective national reports in Koeck & Karollus, *supra* n. 12.

requirements on authorization schemes in order for these to be in compliance with EU standards. Now in fact, Member State authorities have in the past years embarked upon a 'grand tour of reflection', verifying at every level of public administration whether their national rules and schemes on service provision are 'Europa-proof' in light of the Directive. Despite this verification exercise, one could still insist that their Treaty obligations have not been met. Though their choice was admittedly one between a rock and a hard place, full implementation of Article 9 did not truly take place: after all, this generally requires the adoption of binding rules of national law, either through primary (a general law or official act of parliament), or by means of secondary (delegated) legislation.¹⁶

The second article to be considered here is Article 16 of the Directive, which provides:

Member States shall respect the right of providers to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

To this it is added (*inter alia*) that Member States may not make access to, or exercise of a service activity in their territory subject to any rules that are directly or indirectly discriminatory, unnecessary, as well as disproportional to the objective pursued. Again, even the casual connoisseur of EC law will recognize the intrinsically codifying nature of the provision concerned: in accordance with vested caselaw of the ECJ regarding Article 49 EC, any restrictions on service provisions are prohibited save for possible justification because of mandatory requirements, that is, application of the rule of reason-doctrine.¹⁷ Again, this left Member States little or no room for implementation – verbatim transposition being hard to imagine, moreover, appearing legally superfluous anyhow. Nonetheless, in the same vein as before, one is inclined to conclude that, so long as in a Member State no corresponding binding rules of national law are adopted, Article 16 cannot be said to have been fully and properly transposed.

4. ENFORCING THE SERVICES DIRECTIVE: THE REAL CHALLENGE AHEAD

As noted above, for the creation of the long-awaited internal market in services, the Directive is of the utmost importance, but its objectives are unlikely to be attained if is not implemented timely or correctly, and if subsequently, enforcement of its essential provisions cannot be ensured in full. Here then appears to lay the great challenge for the European and the national legal orders. Although a 'non-transposition-strategy' of Member States regarding Articles 9 and 16 is, as stated, far from unintelligible, formidable problems may arise shortly due to the vested caselaw of the EU Courts. The position of the ECJ with regard to the enforcement of provisions of Directives that have not

¹⁶ Thus, J.H. Jans et al., *Europeanisation of Public Law* (Groningen: Europa Law Publishing, 2007), 13–14, referring to the two leading cases Case 97/81, *Commission v. Netherlands* [1982] ECR 1819 and Case C-361/88, *Commission v. Germany* [1981] ECR I-2567.

¹⁷ Or 'imperative reasons relating to the public interest'; see the *Säger* case, cited *supra* n. 14, para. 15.

been implemented into national law is quite clear: these cannot be effectuated before national courts in disputes between private parties.¹⁸ Though the picture is not entirely consistent and certain cracks have emerged over the past years, in EC law, it still remains a core principle that obligations flowing solely and directly from a Directive may not be imposed by an individual upon another individual.¹⁹ This then would entail that, in any disputes between service providers and/or recipients falling within the (vast) ambit of the Directive, it is impossible to claim that a national rule of law contravenes its Article 9 or 16. Thus, if for example, a domestic undertaking were to sue a service provider from a Member State for operating without the permit required by national law, the latter would be unable to contend that the permit requirement violates Article 9: provisions from an unimplemented Directive cannot be effectuated between private parties. In fact, though one could say that the existence of the permit requirement proves that the Directive was not (or incorrectly) implemented, it is actually quite difficult to be certain about this: as it cannot be effectuated itself, a judge does not get to decide the case on its merits and test whether the permit requirement should indeed have been abolished or not.²⁰ Similar hardships would be experienced if, for example, an undertaking were to litigate against a rival non-domestic service provider for non-compliance with applicable national standards on the service concerned, as the latter firm could not defend itself by invoking Article 16. Naturally, the occurrence and persistence of such situations undermines the overriding goal of (further) services liberalization in Europe, and, rather than eliminating still existing obstacles, easily provokes new segmentations in the internal market.²¹

To overcome these troubles, the present author contends that *idées reçues* ought to be reconsidered and established concepts revised. Alternatively, however, one might prefer to follow trusted routes and paths. A viable strategy could appear to be continuation of the *CIA Security International SA v. Signalson SA and Securitel SPRL* (hereinafter ‘*CIA Security*’) and *Unilever Italia SpA v. Central Food SpA* (hereinafter ‘*Unilever*’) trail.²² In these two cases, private parties were allowed to rely on a Directive’s provisions vis-à-vis one another; according to the ECJ, these provisions did not define the substantive scope of

¹⁸ Case 152/84, *M. Helen Marshall v. Southampton and South-West Hampshire Health Authority* [1986] ECR 723; Case C-91/92, *Paola Faccini Dori v. Recreb Srl* [1994] ECR I-3325 (hereinafter ‘*Dori*’).

¹⁹ Neither may public authorities do so (prohibition of ‘inverse direct effect’): see Case 80/86, *Criminal Proceedings against Kolpinghuis Nijmegen* [1987] ECR 3969. From such ‘obligations imposed upon individuals’, one should however distinguish ‘mere adverse repercussions on the rights of third parties [which], even if the repercussions are certain, do not justify preventing an individual from invoking the provisions of a directive against the Member State concerned’: see Case C-201/02, *The Queen on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-723, para. 56.

²⁰ Leaving the issue unresolved save for eventual Commission infringement proceedings on the basis of Art. 226 EC.

²¹ The so-called *Von Colson*-duty of harmonious or Directive-conform interpretation, despite having been reaffirmed not long ago as a particularly strong one (see Joined Cases C-397/01 to C-403/01, *Bernard Pfeiffer and others v. Deutsches Rotes Kreuz* [2004] ECR I-8835), would not be able to resolve the issue, as it can never produce a *contra legem* result, i.e., take offending national provisions integrally ‘out of business’; see Case C-334/92, *Wagner Miret v. Fondo de Garantía Salarial* [1993] ECR I-6911, and Case C-105/03, *Criminal proceedings against Maria Pupino* [2005] ECR I-5285.

²² Case C-194/94, *CIA Security International SA v. Signalson SA and Securitel SPRL* [1996] ECR I-2201; Case C-443/98, *Unilever Italia SpA v. Central Food SpA* [2000] ECR I-7535.

the legal rule on the basis of which the national court had to decide the case before it, creating neither rights nor obligations. Now, it has been assumed in legal doctrine that these were exceptional cases, triggered by the supposed special features of the so-called Notification Directive.²³ Successful attainment of the goals of the Services Directive could however be achieved by applying an identical line of reasoning: after all, Articles 9 and 16 as such do not contain any substantive rules for citizens and undertakings either, but rather call upon the legislator. In similar vein to the provisions of the Notification Directive, they create neither rights nor obligations. In fact then, future caselaw on the Services Directive may offer an excellent opportunity for the Court to revitalize the *CIA Security/Unilever* approach and clarify its underlying mechanics more fully. No revolutionary roads would thus have to be followed.

A second viable strategy might appear to be, to link in with the enigmatic *Werner Mangold v. Rüdiger Helm* (hereinafter '*Mangold*') case²⁴ and expand upon its hitherto rather obscure foundations. In this case, even before the implementation period of the Directive concerned had expired, the national judge was instructed to apply its substantive provisions in conjunction with a general principle of EC law in a horizontal dispute between an employer and an employee.²⁵ This enabled a material review of the relevant (German) national rule, which was thought to violate European rules on age discrimination, leading some commentators to question the overall consistency of ECJ caselaw on direct effect.²⁶ However, in cases falling within the ambit of the Services Directive, where Articles 9 and 16 are certain to regulate and possibly solve the dispute at hand, one could well employ the *Mangold* line and allow for a combined reliance on the Directive's provisions and the fundamental freedoms from the European Treaties. It would not at all be hard to regard the latter as general principles of Community law for this purpose. Again, the ECJ may find an excellent opportunity here to demystify the underpinnings of earlier caselaw, counter its critics, and elaborate upon the cautious new direction of late.²⁷

Whatever route is taken, the classic *M. Helen Marshall v. Southampton and South-West Hampshire Health Authority* (hereinafter '*Marshall*')/*Paola Faccini Dori v. Recreb Srl* (hereinafter '*Dori*') stance on the complete absence of horizontal effects for

²³ Council Directive 83/189/EEC of 28 Mar. 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, Official Journal 1983 L 109/8, as amended by Directive 94/10/EC of the European Parliament and the Council of 23 Mar. 1994, Official Journal 1994 L 100/30.

²⁴ Case C-144/04, *Werner Mangold v. Rüdiger Helm* [2005] ECR I-9981.

²⁵ It concerned Council Directive 2000/78/EC of 27 Nov. 2000 establishing a general framework for equal treatment in employment and occupation, Official Journal 2000 L 303/16.

²⁶ See 'Editorial comments: Horizontal Direct Effect – A Law of Diminishing Coherence?', *Common Market Law Review* 43 (2006): 1–8; Dagmar Schieck, 'The ECJ Decision in *Mangold*: A Further Twist on Effects of Directives and Constitutional Relevance of Community Equality Legislation', *Industrial Law Journal* 35 (2006): 329–341. For a more nuanced view, see Jan H. Jans, 'The Effect in National Legal Systems of the Prohibition of Discrimination on Grounds of Age as a General Principle of Community Law', *Legal Issues of Economic Integration* 34 (2007): 53–66; Christa Tobler, 'Putting *Mangold* in Perspective: In Response to Editorial Comments', *Common Market Law Review* 44 (2007): 1177–1183.

²⁷ It should be added though that the ECJ recently and ostentatiously avoided elaborating upon the tentative *Mangold* doctrine, despite critical input from A-G Mazák, in Case C-411/05, *Félix Palacios de la Villa v. Cortefiel Servicios SA* [2007] ECR I-8531. As remarked by Waddington, Case Note, *Common Market Law Review* 45 (2008): 904–905, when reading this judgment, 'one could easily be forgiven for assuming *Mangold* was simply a figment of the imagination'.

unimplemented provisions of Directives cannot be upheld in any case. For ruling out any applicability of the provisions of the Directive under review in horizontal disputes would mean reversing much of the progress already made in establishing an internal market for services – progress which was largely achieved through bold ECJ jurisprudence, expansive interpretations of the relevant rules in the EC Treaty.²⁸ From both a legal-theoretical and a practical lawyer's point of view, the quintessential horizontal character of the Directive renders sticking to a prohibition of such an effect in proceedings before national courts wholly inconceivable.

Though both of the abovementioned alternative approaches have their appeal, their drawbacks cannot go unmentioned. Building on the *CIA Security* and *Mangold* constructions, respectively, unavoidably rekindles the debate on their merits, and many of the earlier criticisms are bound to be rehearsed and repeated. Indeed, both routes provide tailor-made solutions for the problems arising at the enforcement of the Service Directive, but rather than bringing method into madness, they risk reinforcing the already rather byzantine character of the caselaw regarding the horizontal effect of Directives. If the choice is made to pursue and revitalize the *CIA Security* and/or *Mangold* route, as said, bringing clarity still has to be one of the central aims. Nonetheless, it is advocated here that a maximum of transparency would only be obtained if the ECJ were to reconsider its earlier *Marshall* and *Dori* position altogether, the general ban on horizontal effect, which can be seen as lying at the true heart of the problem. In fact, the *Marshall/Dori* stance itself has been under the heftiest fire overall. It has over the years been repeatedly and strenuously attacked by legal scholars throughout the EU, even by multiple Advocates-General at the Luxembourg Court itself.²⁹ *CIA Security* and *Mangold* have in this light been reported as possible early harbingers of a new age, but sadly have so far proven to be false dawns, exacerbating rather than diminishing the confusion.³⁰ Arguably, the advent of the Services Directive serves as a final wake-up call, and if future disputes relating to the enforcement of its provisions are to be solved satisfactorily, the

²⁸ The latter being so expansively interpreted as to regulate certain horizontal situations as well; albeit, so far, only those situations in which an individual can be said to wield a 'certain power' over another individual, and to be able to significantly hamper the full exercise of the Treaty freedoms in the same vein as a public law authority: see, e.g., Joined Cases C-51/96 and C-191/97, *Christelle Delière v. Ligue francophone de judo et disciplines associées ASBL* [2000] ECR I-2549 (concerning sporting associations); Case C-309/99, *J.C.J. Wouters, J.W. Savelbergh and Price Waterhouse Belastingadviseurs BV v. Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 (concerning the national bar association); Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779 (concerning large and powerful trade unions). Consequently, in the views of most commentators, the Treaty rules on services so far only exert an 'extended vertical effect'.

²⁹ For the various arguments and further references, see F. Emmert & M. Perreira de Azevedo, 'L'effet horizontal des directives. La jurisprudence de la CJCE: un bateau ivre?', *Revue trimestrielle de droit européen* (1993): 503; F. Capelli, 'L'efficacia orizzontale delle direttive secondo una giurisprudenza incompiuta', *Diritto comunitario e degli scambi internazionali* (1994): 51; Paul Craig, 'Directives: Direct Effect, Indirect Effect and the Construction of National Legislation', *European Law Review* (1997): 519; Michael Dougan, 'The Disguised Vertical Direct Effect of Directives?', *Cambridge Law Journal* (2000): 586; Lorna Young, Miriam Lenz, & Dóra Sif Tynes, 'Horizontal What? Back to Basics', *European Law Review* (2000): 509; Takis Tridimas, 'Black, White and Shades of Grey: Horizontality of Directives Revisited', *Yearbook of European Law* (2002): 327; Sacha Prechal, *Directives in EC Law*, 2nd completely revised edition (Oxford: Oxford University Press, 255); Opinion of A-G Van Gerven in Case C-316/93, *Nicole Vaneetveld v. Le Foyer SA* [1994] ECR I-763; Opinion of A-G Lenz in *Dori* [1994] ECR I-3325.

³⁰ Thus, in the wake of these cases, the once promising solution of distinguishing between so-called *invocabilité de substitution* and *invocabilité d'exclusion* seems to have failed even before its proper take-off; compare Prechal, *supra* n. 29, 262.

time is ripe to do away with the misguided prohibition once and for all. Completing the internal market demands as much, which is and always has been the overriding aim of the *pères fondateurs*.

5. CONCLUSION: SHIFTING THE BOUNDARIES

As this contribution has very succinctly sought to point out, the Services Directive presents a great challenge to the European and the national legal orders. Its successful adoption at the EU level did not yet guarantee the desired final liberalization of the European services market. In order to achieve that objective, the Directive has to deploy its full effect, and for that, by the end of this year, the implementation phase first has to be completed successfully. Second, in the years ahead, no fetters whatsoever should be placed on its enforcement, for which the present paper recommends the abandonment of the *Marshall/Dori* line: it is in fact little short of an absolute necessity, and also a move highly anticipated for quite some time already.

National authorities in the EU Member States are experiencing plenty of difficulties in (having to adapt to) the various substantive norms included the Services Directive. As outlined above, the transposition of the latter's key provisions is, moreover, less easy than it seems, however large the expertise built up in the past, and despite the many best practises that have come to fruition so far. A new generation of Directives is looming ahead, forcing national authorities to deal with complicated questions of EU institutional law as well, enforcement issues taking pride of place. Perhaps one could say that, already at the inception of the Directive, a grievous error was committed, and that the Services Directive's construction is flawed of itself. For codifications of caselaw form its key provisions, and the transposition and enforcement complications described above both arise out of this particular drafting method. The boundaries between 'negative' and 'positive integration' have been blurred, by provocatively replicating broad prohibitions from EC primary law (the Treaty) in (effects-wise) more sharply confined harmonizing norms of EC secondary law (a Directive). In so doing, the European legislator has inadvertently forced Member States and their competent authorities, national courts, and even the ECJ, to reconsider their ways of old.

It might seem odd and somewhat far-fetched to call for a caselaw U-turn for the sole benefit of the Services Directive. Yet as said, this Directive constitutes only the first of a new breed, a lab model of inserting 'negative integration' clauses into secondary law. Moreover, the aim of the Directive and the growing importance of rules on services necessitates of itself that the challenge be faced rather than dodged. In the great game of drafting EC legislation, boundaries have been redrawn, and the umpire not keeping up does so at his own peril. A long-awaited change to the latter's rule-book may be all it takes to tackle the challenge ahead.