# All's Well That Bends Well? The Constitutional Dimension to the Services Directive

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Services Directive – Peculiar harmonisation technique – Unusual design – Key provisions giving rise to constitutional problems – Special derogation system – Freezing of the Rule of Reason – (In)compatibility with EU primary law – Appropriate legal basis? – Non-transposition by several member states – Arguments for a benign assessment of the Commission and the Court – Problematic enforcement in horizontal situations – Possible solutions and their shortcomings – Overall need for a flexible approach

## Introduction

There has been no dearth of scholarly writing on the Services Directive.[1] The original 'Bolkestein draft' even attracted an overkill of attention in public media, largely due to the controversial inclusion of a 'country of origin principle'.[2] To some, apparently, this provision represented a bold step into a no-go-area, a shocking and fundamental shake-up of the internal market. In response to the mass protests and criticism, a watered-down, but still far-reaching Directive proposal was tabled and ultimately agreed upon at the end of 2006. The twenty-seven EU member states were to bring all the necessary laws, regulations and administrative provisions into force before 28 December 2009.[3] They thus set themselves a three

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[1] *Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market*, *OJ* [2006] L 376/36.

[2] 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 last included as Art. 16 in the *Proposal of the Commission of 25 February 2004 for a Directive on services in the Internal Market*, COM(2004) 2 final.

[3] In accordance with Art. 44 SD.

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year deadline, which they may genuinely have believed to be feasible. At present, almost one year further down the road, the implementation scorecard does not display an entirely rosy picture. To a great extent, this may be attributable to the Directive's innovative, if not to say wholly revolutionary design, for it contains a great number of surprising elements and puzzling features that render correct interpretation difficult, riddle the implementation trajectory with pitfalls, and are likely to lead to formidable complications at the enforcement stage.

In this contribution, we will focus on some aspects of the Directive that have been either ignored, overlooked or insufficiently addressed in legal literature up until now. Plenty has already been written about the Directive's impact on the substantive law of the European Union.[4] Therefore, we shall investigate instead in what way the Directive transforms the core constitutional concepts that lie at the heart of the Union's internal market architecture. As will become clear, the revolutionary design of the Directive, in particular the harmonisation technique employed, has several dramatic consequences: numerous long-standing rules and principles of EU law are put to the test, pushed to their limits, and may ultimately have to be revised or even abandoned altogether. We therefore invite the reader to join us on a thorough exploration of the Directive's constitutional dimension – for in our opinion, it is precisely here that its impact appears greater than that of any previous directive.

In what follows, we will engage in a number of theoretical reflections on the special features of the Directive. Attention will first be devoted to the Directive's origin, structure and harmonisation technique. The Directive shares with many other directives the aim of removing regulatory and administrative barriers to the free movement of trade. However, the approach it adopts differs significantly from the techniques deployed in 'classic' internal market Directives.

In the next section, we zoom in on the ground rules and exceptions contained in the Directive. Thereby, its key provisions take centre stage: Article 16 on temporary, and Article 9 on permanent provision of services. This analysis elucidates how the peculiar design of the Directive gives rise to various constitutional complications, bearing on hallmark concepts of European law.

In the sections that follow, we shift our angle of discussion to salient problems of implementation and enforcement. We will first take stock of the transposition process, whereby we take a closer look at the state of play in various member states and the difficulties experienced there. In the subsequent section, we concentrate on enforcement issues. As we shall see, one of the most poignant illustrations of the unparalleled challenges raised by the Services Directive resides in its problematic effect in domestic legal systems.

[4] The most detailed study to date is perhaps Catharine Barnard, 'Unravelling the Services Directive', 45 *Common Market Law Review* (2008) p. 323-394.

At the end of this contribution, we will draw the lines together, summarise our findings, and rehearse our argument once more, making the case for a special and unusual approach towards a special and unusual directive.

## The Directive's origin, structure and harmonisation technique

The Services Directive has played a starring role in the Lisbon Strategy, launched in 2000 in order to enhance the economic competitiveness of the EU.[5] In the Europe 2020 strategy, this ambition has been restated and reinforced.[6] The aim of the Directive is to establish a true internal market for services. Unlike other harmonisation measures, at least in principle, it covers *all* services, unless they are explicitly excluded from its scope.[7] It goes without saying that it is virtually impossible to set detailed standards for unlimited and undefined groups of services. Thus, the Union legislator was forced to come up with an alternative technique for harmonising the conditions for competition on the internal market. The key provisions of the Directive do not oblige member states to incorporate specific standards into their national legislation, but impose upon them the duty to refrain from adopting or having in place laws that restrict cross-border provision of services (on a temporary or a permanent basis). This technique immediately raises the question of how the technique employed in the Directive relates to the harmonisation methods commonly employed in EU law.

Legal doctrine usually distinguishes between several harmonisation techniques, such as total harmonisation, minimum harmonisation and the so-called 'New Approach'.[8] However, it is hard to fit all possible forms of harmonisation into one comprehensive scheme, as the methods pursued differ from policy area to policy area. To assess the technique employed by the Directive correctly, we should examine first how the Union legislature usually deals with competition distortions resulting from national rules on services, authorisations and standards. The aim of the Directive is, after all, to remove obstacles to the free trade in services, and this piece of EU law, *inter alia,* targets national authorisation schemes.

[5] *See*, for example, *Working together for growth and jobs. A new start for the Lisbon Strategy, Communication from Commission President Barroso*, COM(2005) 24 final.

[6] *See* Communication from the Commission, *Europe 2020. A strategy for smart, sustainable and inclusive growth*, COM(2010) 2020 and the *Conclusions of the European Council of 25 and 26 March*, EUCO 7/10.

[7] Arts. 1 up and to 3 carve a considerable amount of services out of the Directive's ambit. Art. 4 stipulates what is meant by 'services' within the meaning of the Directive. In essence, it derives the definition of the concept of 'service' from the ECJ's case-law on the Treaty provisions on free movement of services (Art. 56 et seq. TFEU).

[8] *See*, e.g., P.J. Slot, 'Harmonisation', 21 *European Law Review* (1996) p. 382 et seq.

*Harmonisation measures and services in the EU*

The design of EU harmonisation measures concerning services usually contains the following features: the country of origin principle, a single licence system and a detailed set of substantive rules.[9] For a good understanding, we will elaborate a bit further on these features.

The country of origin principle is closely related to the well-known concept of mutual recognition, which has been an evergreen of EU law since *Cassis de Dijon*.[10] That judgment was predicated on the Treaty rules on free movement. Under the mutual recognition rule, a member state may not prohibit goods from being introduced in its market if they are marketed in accordance with the national standards of another member state. In other words, the regulations of the home state, i.e., the state where the good concerned is manufactured, provide the relevant legal framework for assessing the compatibility of this good with the law. The market operator concerned is freed from the dual burden to comply with both the host state and home state rules.[11] In principle, the regulations of the host state, i.e., the state where the good is imported, are irrelevant. In the case-law of the ECJ, the mutual recognition approach has been extended to services as well.[12] Consequently, as long as a service provider complies with the national standards of his home member state, he is allowed to provide these services on all national markets in the EU.

It should, however, be noted that, according to settled ECJ case-law on free movement, member states may depart from the mutual recognition rule if they can rely on 'mandatory requirements' (the 'Rule of Reason') or Treaty exceptions. It may even be argued that respect for mandatory requirements is inherent to the concept of mutual recognition in free movement law, as member states must grant access to services provided by foreign providers only if the legitimate public interest objectives are not put in jeopardy. Thus, under the Treaty rules on free movement, mutual recognition is not connected to assessments based on the equivalence of host state and home state laws, but rather prompts a review in light of possible objective justifications and the proportionality principle.[13] Mutual recognition, as developed by the Court in the context of the Treaty provisions on free move-

[9] *See* B.J. Drijber, 'De bezems van Bolkestein' ['The brooms of Bolkenstein'], *Nederlands Tijdschrift voor Europees recht* (2004) p. 16.

[10] ECJ 20 Feb. 1979, Case C-120/78, *Rewe-Zentral AG* v. *Bundesmonopolverwaltung für Branntwein* (*Cassis de Dijon*).

[11] Markus Möstl, 'Preconditions and Limits of Mutual Recognition', 47 *Common Market Law Review* (2010) p. 409.

[12] *See*, for example, ECJ 7 Oct. 2004, Case C-189/03, *Commission* v. *The Netherlands*.

[13] *See*, e.g., Kenneth A. Armstrong, 'Mutual Recognition', in Catherine Barnard and Joanne Scott (eds.), *Law of the Single European Market. Unpacking the Premises* (Oxford, Hart 2002), p. 234 and p. 235.

ment, mainly boils down to examining whether the rules of the host state are necessary and proportionate *vis-à-vis* the alleged general interest objectives. If not, the mutual recognition rule applies, which means that service providers do not have the duty to comply with the host state regulations. Actually, in this approach, equivalence between the host state and home state rules is virtually of no interest at all.

In harmonisation measures that apply to services, the mutual recognition rule is transformed into the country of origin principle, which essentially comes down to a jurisdiction rule. The country of origin principle determines which national legal system applies, by stipulating that a service provider only needs to live up to the standards of his home state; service providers are therefore not obliged to comply with the national laws of the host state. Evidently, this principle enhances market access in the EU and aids the free movement of services.

EU harmonisation measures usually combine the country of origin principle with a single licence system: a service provider is then only obliged to apply for an authorisation with the home state authorities.[14] An authorisation granted by a home state authority gives access to the markets of all member states of the EU, and, as a result, the service provider concerned need not apply for authorisations with any other member state's authorities. Harmonisation provisions on single licences remove administrative burdens and facilitate the free movement of service providers.

Inherent to the jurisdictional nature of the country of origin principle and the single licence system is that member states may not derogate from these rules, whereas, in contrast, as said, the free movement case-law on mutual recognition allows for derogations based on the Rule of Reason and Treaty exceptions. Whereas mutual recognition entails assessing host state laws, the country of origin principle and the single licence system deployed in EU harmonisation measures link home state laws to host state laws by requiring that service providers only respect the rules of the country of establishment. After all, providers observing home state standards are in competition with host state providers observing their host state standards on the same – host state – market. Hence, EU harmonisation measures have substantially moderated the mutual recognition approach.

Although the country of origin principle and single licence system inevitably result in the removal of obstacles to free trade, the EU legislature is aware that they could hamper the pursuit of certain public interest policies. To resolve or alleviate this problem, many EU harmonisation measures introduce a (detailed) set of standards, which must be transposed into the national legal order of the

[14] *See* R. Graham, 'Mutual Recognition and Country of Origin in the ECJ Case Law', in R. Blanpain (ed.), *Freedom of Services in the EU* (Alphen aan de Rijn, Kluwer Law International 2006), p. 16.

member states.[15] The harmonised rules, then, aim not only at the establishment of a level playing field for service providers, but also at protecting objectives of general interest. Hence, the country of origin principle and the single licence system go hand in glove with a harmonised set of standards.[16] The creation of a single set of regulatory requirements leads to equivalence between home state and host state rules.[17] For example, the Audiovisual Media Services Directive[18] sets, *inter alia*, standards for television advertising and rules for protecting children from adult content. As all member states have the duty to align their national legislation with the standards set at EU level, it may be expected that home state and host state laws contain virtually the same requirements. Consequently, the enactment of standards at the EU level amounts to regulatory equivalence and automatically links the home state laws to the host state laws.

*The design of the Services Directive*

Strikingly, the Directive does not fit well in the model the EU legislature usually employs when setting standards for services. Compared to the common approach to harmonisation, it follows a wholly different path.

To start with, a salient difference is that in the Directive a harmonised set of regulatory rules is absent. As already mentioned, the EU legislature did not attempt to enact specific standards for a wide range of services covered by the Directive. Remarkably, regulatory equivalence of home state and host state laws, which used to be one of the key features of EU harmonisation measures concerning services, will not result from this Directive. Consequently, national standards will continue to vary from member state to member state, which means that the conditions for competition are not harmonised.

Although from the beginning of the drafting process, regulatory equivalence did not form part of the Directive, the first draft did contain a country of origin principle. Pursuant to Article 16 of this proposal, it was not for the host state to impose obligations upon providers that temporarily provide services on its territory, as solely the home state laws would provide for the legal framework for these cross-border services.[19] As this draft was met with extremely fierce (political and

[15] Cf. Markus Klamert, 'Of Empty Glasses and Double Burdens: Approaches to Regulating the Services Market à propos the Implementation of the Services Directive', 37 *Legal Issues of Economic Integration* (2010) p. 119.

[16] *See also* Möstl, *supra* n. 11, at p. 415 and 416.

[17] Armstrong, *supra* n. 13, at p. 228.

[18] *Directive 2010/13 of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services*, *OJ* [2010] L 95/1.

[19] *See supra* n. 2.

societal) opposition,[20] Article 16 was modified so that it now states that the freedom to provide services in other member states must be respected.

Traces of the country of origin principle are, however, still discernible in the present Directive. In our opinion, these traces can be found in Article 16, which concerns the temporary provision of services, but also in Article 9, that provides the relevant framework for the provision of services on a permanent basis. Pursuant to these provisions, member states must respect the free movement of services and the freedom of establishment. The point of departure seems to be that foreign providers only need to comply with the laws of the home state. However, on further consideration, it turns out that these provisions have not been drafted as hard and fast rules. Their wording differs quite a lot from comparable provisions contained in classic internal market directives, as Articles 16 and 9 SD do not refer to home state laws; rather they confine themselves to setting requirements for host state laws. What is more, the Directive explicitly provides that member states may derogate from the prohibitions contained in Articles 16 and 9. Since exceptions may be relied upon, the principles on which these provisions of the Directive are based are not (entirely) of a jurisdictional nature. After all, they allow for a mixed application of home state and host state standards, whereas the country of origin principle contained in classic EU harmonisation measures explicitly provides that host state rules may not be applied and, as result, prevents a combined application of host state and home state rules. Below, the exact meaning of Articles 16 and 9 will be explored. However, from the analysis carried out so far, it is apparent that these provisions of the Directive are not based on a 'full-blown' version of the country of origin principle.[21]

It is even more difficult to discern traces of the single licence approach in the Directive, as this piece of EU legislation does not explicitly provide that an authorisation granted by the home member state gives a service provider access to the markets of other member states. However, several provisions do prohibit member states from imposing authorisation obligations on foreign services providers. For example, Article 16 (section 2 sub b) stipulates that a member state may not require that a service provider from another member state wishing to pursue activities (on a temporary basis) on its territory apply for prior authorisation. As a result, the authorisation granted by home state authorities suffices for the service provider to not only carry out economic activities on its home state market, but also on host state markets (of other EU member states). Furthermore,

[20] *See* Stefan Griller, 'The New Services Directive of the European Union. Hopes and Expectations from the Angle of a (Further) Completion of the Internal Market (general report)', in H.F. Koeck and M.M. Karollus (eds.), *The New Services Directive of the European Union FIDE XXIII Congress Linz 2008* (Vienna, Nomos 2008), p. 381.

[21] Cf. Catharine Barnard, *The Substantive Law of the EU. The Four Freedoms*, 3rd edn. (Oxford, Oxford University Press 2010), p. 409.

Article 9 SD departs from the prohibition for member states to have in place authorisation schemes for the access to or exercise of service activities. However, it is noteworthy that member states may rely on a Rule of Reason-type exception in order to justify such schemes. In our view, this exception entails that Article 9 is not a clear-cut example of a single licence approach. What is more, this provision does not refer to authorisations granted under home state laws, but sets out requirements that are applicable to host state authorisation schemes. Like Article 16 (section 2 sub b), Article 9 solely concerns host state regulations (containing authorisation obligations). Hence, the Directive is not based on a single licence approach in the classic sense.

In sum, the Directive introduces a new way of harmonising the conditions for competition in the internal market. Not only does it lack a set of harmonised standards, but it also moderates the well-known country of origin principle and single licence system. In essence, it combines negative integration (i.e., the Treaty provisions that prohibit member states from restricting free movement) with positive integration (i.e., harmonisation measures, which require member states to comply with rules set at EU level). It may even be argued that provisions such as Articles 16 and 9 SD are based on the Treaty language of the free movement rules.[22]

The Directive does not come up with a common set of standards that the member states must incorporate in their national laws applicable to services, but aims at interlinking the various national markets of the EU, by obliging member states to remove all kinds of obstacles to free trade.[23] Put differently, the EU fails to develop a common set of rules for services that reflect values and principles shared by its member states. To compensate for this failure, it has adopted a piece of legislation that establishes cross-links between the national markets and legal systems of its member states.

*The Directive's harmonisation technique: New constitutional challenges*

Overall, the Directive adds a whole new dimension to the trusted methods of harmonising the conditions for competition. By mixing elements of positive and negative integration, the Union's legislature has taken a huge step towards integrating the services markets of its member states, since political agreement on the appropriate level of protection with regard to a wide variety of services need not be reached. The establishment of a true internal market for services now appears within a hair's breath. There is, however, a serious drawback to this progress: as

[22] Barnard, *supra* n. 4, at p. 352, 353 and 361

[23] J.W. van de Gronden, *Hervormingen in een dienstbaar Europa. Over diensten, uitdagingen en Europees recht* [Reforms in a Europe of service. On services, challenges and European law (Deventer, Kluwer 2008), p. 34 and 35.

remarked, the boundaries between negative and positive integration have been blurred, which presents us with several new challenges that are not at all easy to overcome. A number of constitutional concepts and rules developed by the ECJ have to be reappraised and thought through once more. Some of these relate to the fundamental freedoms, others concern institutional and enforcement matters.

As regards the first category, a rich case-law exists on the relationship between EU harmonisation measures and the Treaty provisions on free movement, which essentially spells out that the free movement rules contained in the Treaty do not apply anymore to those policy fields that have been subjected to harmonisation.[24] This sharp dividing line drawn between positive and negative integration raises the question as to how the key provisions (Articles 9 and 16 SD), which are partly of a 'negative integration nature' and partly of a 'positive integration nature', must be interpreted.

As regards institutional and enforcement issues, settled case-law ordains that Directives be transposed into national law.[25] The majority of the directives that harmonise competition conditions contain standards that directly affect the legal position of individuals. In other words: such directives provide for a harmonised set of rules. These standards must be 'copied' into national laws with great care, an exercise that aims to guarantee that individuals can ascertain the full extent of their rights and duties.

In contrast, Articles 9 and 16 SD do not contain such standards, but basically amount to instructions that are directed in their entirety to the (national and sub-national) legislatures of the member states. How then must member states transpose these provisions into national law? Moreover, it is not clear how the ECJ's standard doctrines with regard to the direct effect of directives should be applied to the instructions enshrined in the Directive. In the following sections, we will address the aforementioned questions in subsequent order.

## The ground rules and exceptions – When more is less?

Article 16 (on temporary provision of services) and Article 9 (on permanent provision of services) constitute the Directive's key provisions. In this section, we shall attempt to establish the exact meaning and ambit of these articles. We will first engage in an analysis of Article 16 SD and Article 9 SD, and subsequently examine how these provisions relate to EU primary law.

[24] *See*, e.g., ECJ 10 July 1984, Case 72/83, *Campus Oil Limited and others* v. *Minister for Industry and Energy and others* and ECJ 19 March 1998, Case C-1/96, *The Queen* v. *Minister of Agriculture, Fisheries and Food, ex parte Compassion in World Farming.*

[25] *See* for instance ECJ 17 Sept. 1987, Case 291/84, *Commission* v. *Netherlands* and ECJ 28 Feb. 1991, Case C-131/88, *Commission* v. *Germany*. On the transposition of directives in general, *see*, e.g., Sacha Prechal, *Directives in EC Law* (Oxford, Oxford University Press 2005), p. 73 et seq.

*Articles 16 and 9 SD: Evolving constitutional concepts?*

As already mentioned, in the first draft of the Directive, Article 16(1) was based on the (in)famous country of origin principle, but due to the storm of objections that ensued, the final version of this provision turned out markedly differently. Now, it obliges member states to 'respect the right of providers to provide services in a Member State other than that in which they are established.' Further, it states that the 'Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.' Then it moves on by putting forward that 'Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements' unless they can rely upon particular exceptions lined out in the Directive.

What is meant by this ambiguous provision? In legal doctrine, several authors have stressed that Article 16(1) must be interpreted in the light of EU primary law, and especially in the light of the ECJ's settled case-law on the Treaty provisions on free movement.[26] The Directive also acknowledges this itself.[27] Accordingly, one must examine how the ECJ has gone about interpreting Article 56 TFEU (formerly Article 49 TEC). In the Court's case-law, this provision has been interpreted ever more expansively.[28] It nowadays appears to encapsulate a market access test. Consequently, all national measures that render the access to the market of a particular member state impossible or less attractive are caught by this Treaty provision.[29] Hence, it must be assumed that Article 16 SD is based on a market access test as well, and that it therefore forbids all member state measures of a restrictive nature, irrespective of the fact whether they are discriminatory or not. Put differently, the Union legislature has copied the Treaty provision containing the prohibition to restrict free movement of services, and has pasted it into the Services Directive. This 'copy-paste operation' underlines one of our main findings in the previous section: Article 16 SD indeed presents a mix of negative integration and positive integration.

[26] *See*, for example, Gareth Davies, 'The Services Directive: Extending the Country of Origin Principle and Reforming Public Administration', 32 *European Law Review* (2007) p. 235; Barnard, *supra* n. 4, at p. 361 and 361, and E. Belhadj et al., 'De Dienstenrichtlijn: de gebreken van de deugden? Een eerste verkenning van de Dienstenrichtlijn', *SEW* (2007) p. 362.

[27] *See* Art. 3(3) SD. In this regard, it should be noted that in its case-law, the ECJ is also of the opinion that secondary EU law should be interpreted in accordance with primary EU law. *See*, e.g., ECJ 9 June 1992, Case C-47/90, *Delhaize* v. *Promalvin*.

[28] *See*, e.g., ECJ 25 July 1991, Case C-76/90, *M. Säger* v. *Dennemayer & Co.* and ECJ 10 May 1995, Case C-384/93, *Alpine Investments BV* v. *Ministerie van Financiën*.

[29] *See*, e.g., Barnard, *supra* n. 4, at p. 377-380. A highly critical analysis of the ECJ's case-law on free movement and market access has been provided by Jukka Snell, 'The Notion of Market Access: A Concept or a Slogan?', 47 *Common Market Law Review* (2010), p. 437-472.

Given the striking similarities between the provisions in the Treaty and the Directive with regard to the free movement of services, one could ask whether Article 16 SD brings about any substantial change of law. In our view, the real added value of Article 16 SD resides in the way the Directive deals with exceptions. As known, in free movement law, the ECJ has developed an open and dynamic list of exceptions; the Rule of Reason is capable of accommodating virtually every public interest that plays a significant role in modern society. Apart from the Treaty exceptions (which address a limited number of public interest issues only), member states may protect a wide range of interests considered to be of particular concern in their national legal orders by relying on the Rule of Reason, provided that the conditions set out in the ECJ case-law (such as compliance with the principle of proportionality) are met.[30] The Directive, however, presents us with a different approach towards exceptions to the prohibition of restrictions on the free movement of services. It changes the simple and straightforward structure of the Rule of Reason (and Treaty exceptions), mainly based on the proportionality test, and introduces a 'three-tiered derogation system'.

The Directive introduces three categories of exemptions that are all based on a different logic. The first exemption category is modelled after the Rule of Reason: Article 16(1) provides that the free movement of services may be restricted if this is necessary with a view to 'reasons of public policy, public security, public health or the protection of the environment', and if the principles of non-discrimination and proportionality are respected. A striking difference with the Rule of Reason as developed in the free movement case-law is that Article 16 limits the number of public interests that may be taken into account. No open and dynamic list of public interests, but a narrow group of justifications lies at the heart of the exemption contained in Article 16(1).[31] The third limb of Article 16(3) quite surprisingly repeats the narrow list of the first limb, and then adds to this list 'employment conditions, including those laid down in collective agreements.' Although employment conditions are not public interests themselves but rather means to protect such interests (connected, for example, with objectives of social policy), it may be assumed that this slightly widens the exemption of Article 16(1) SD. This does, however, not call into question the finding that, unlike the Rule of Reason (as developed in *Cassis de Dijon*),[32] this exemption relates to a very narrow

[30] It is apparent from the ECJ's case-law (such as ECL 30 Nov. 1995, Case C-55/94, *Gebhard* v. *Consiglio dell' Ordine degli Avvocati e Procuratori di Milano*) that the following conditions have to be met: 1) the measure at hand does not discriminate directly; 2) it must be justified by overriding requirements of general interest ('mandatory requirements'); 3) it must be suitable for securing the objective concerned; 4) it may not go beyond what is necessary.

[31] B. Hessel, 'Gemeenten en de Dienstenrichtlijn' ['Municipalities and the Service Directive'], 7296 *De Gemeentestem* (2007) p. 124.

[32] Traces of the Rule of Reason were already present in ECJ 11 July 1974, Case 8/74, *Procureur du Roi* v. *Benoît and Gustave Dassonville*.

group of justifications. In this context, it should be pointed out that it is not completely clear why the exemption of the first limb has been repeated in the third limb. An explanation may possibly be found in the second limb of Article 16, which prohibits member states from imposing specific obligations on service providers based in other member states, such as the obligation to have an establishment in their territory.[33] Has the EU legislature perhaps repeated the exemption in the third limb, in order to make sure that this exemption is capable of justifying not only the prohibition of Article 16(1) (which is more or less of a general nature) but also the specific bans listed in Article 16(2)? If so, why does Article 16(3) not explicitly refer to Article 16(2)? We will have to await ECJ case-law to resolve these ambiguities and obtain further guidance on this matter. In any event, it is clear from the outset that the way the first and third indent of Article 16 are drafted is not in line with the principles of good governance, nor with the standards set by the EU's 'Better Regulation' program.[34]

The second category of exemptions is based on principles that are (entirely) different from those of the first category. Article 17 SD exempts a wide variety of service activities from the scope of Article 16 SD. Not only does this exemption not refer to public interests (it rather refers to concrete services such as services of general economic interest and acts requiring by law the involvement of a notary), but it also gives the member state *carte blanche*. Article 17 is crystal clear about the status of the services listed in this provision: Article 16 does not apply to these services. So, the Article 17 exemption is of relevance for both the general prohibition contained in Article 16(1) and the specific bans of Article 16(2). What is more, the application of the Article 17 exemption does not depend on conditions such as respect for the principle of proportionality, as the 'Article 17 services' are simply placed outside the scope of the Directive. It therefore suffices to point out that a particular service is on the list of Article 17 in order to argue that Article 16 does not apply. Hence, in our view, given the far-ranging character of the exemption concerned, not even the temporary provision of 'Article 17 services' has been harmonised. By consequence, national laws governing 'Article 17 services' must only be assessed in the light of the Directive to the extent that they affect the provision of these services on a permanent basis. In so far as national measures concern the temporary provision of these services, the Treaty provisions on free

[33] The specific obligations mentioned in Art. 16(2) had already been a subject of ECJ scrutiny and were found to violate EU free movement rules. *See* the *Commission's Handbook on the Implementation of the Services Directive* (Luxembourg, Office for Official Publications of the European Communities 2007) at p. 40 et seq.

[34] According to the Better Regulation Agenda of the Commission, new EU legislation and policies must be of the highest quality possible. *See*, e.g., *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Third Strategic Review of Better Regulation in the European Union*, COM(2009) 15 final.

movement constitute the legal framework of their review, since non-harmonised policy areas are subject to EU free movement law.[35]

The third category of exemptions relates to a particular issue. Article 18 SD allows for case-by-case derogations if the safety of services is at stake. In exceptional circumstances, the competent authorities of a member state may take measures with regard to the safety of the services concerned in respect of a provider of another member state. However, a member state must initiate the mutual assistance procedure as envisaged by the Directive, which entails the involvement of the Commission and the member state where the service provider concerned is established.[36] It may be expected that it will be extremely difficult for a member state to successfully invoke the exception of Article 18.[37] In any event, this exemption is modelled as a prior notification procedure, which entails completion of a procedure before action may be taken.

The analysis above shows that in the Directive, the 'single-structured' approach of the Rule of Reason has been replaced by a three-tiered exemption model. Articles 16-18 SD introduce respectively a Rule of Reason-style exemption based a narrow group of justifications, a *carte blanche* for services listed in Article 17, and a prior notification-based exemption for safety issues. It goes without saying that this complicated system will have appreciable impact on the member states' room for manoeuvre. It is highly likely that national authorities will be confronted with disputes as to whether a particular measure may benefit from one of the exceptions of the three-tiered exemption structure. From time to time, drafting a piece of national legislation in relation to services will involve a painstaking further scrutiny as to which exception may be relied upon.

An additional issue of more general constitutional interest is that the Directive has 'frozen' the list of public interests that may be invoked in derogation of the free movement of services.[38] As mentioned, the Rule of Reason only caters for a limited number of public interests. The exclusionary clause of Article 17 solely

[35] *See* J.W. van de Gronden, 'The Services Directive and Services of General (Economic) Interest', in M. Krajewski, U. Neergaard and J.W. van de Gronden (eds.), *The Changing Legal Framework for Services of General Interest in Europe. Between Competition and Solidarity* (The Hague, Kluwer Law International 2009), p. 248 and 249, and *see also*, e.g., ECJ 10 July 1984, Case 72/83, *Campus Oil Limited and Others* v. *Minister for Industry and Energy and others.*

[36] *See* Art. 35 SD.

[37] After all, it should be proved, *inter alia,* that the measures concerned 'provide for a higher level of protection of the recipient than would be the case in a measure taken by the Member State of establishment in accordance with its national provisions.' *See* Art. 18(2) SD.

[38] Cf. Barnard, *supra* n. 4, at p. 365 et seq. In the first case on the Directive, currently pending before the ECJ, A-G Mazák acknowledges in his Opinion that the justifications contained in Art. 16(1) SD are indeed limited. *See* para. 62 of the Opinion of A-G Mazák in ECJ 18 May 2010, Case C-119/09, *Société fiduciare nationale d'expertise comptable* v. *Ministre du budget, des comptes publics et de la fonction publique*. This case concerns the interpretation of Art. 24 SD on commercial communication.

covers those services that are explicitly mentioned. Article 18 confines itself to regulating safety issues. In this regard, another constitutional principle should be recalled: national laws governed by EU harmonisation measures must not be assessed in the light of the Treaty provisions on free movement. The ECJ has inferred from this that the Treaty exceptions and the Rule of Reason are incapable of justifying derogations from EU directives and regulations.[39] Consequently, member states may not derogate from the principle to respect the freedom to provide services in order to protect public interests not mentioned in Articles 16-18, provided that the services they want to regulate are covered by the Directive. An important example of a public interest conspicuous by its absence is consumer protection. Accordingly, although consumer protection was acknowledged as the very first 'mandatory requirement' (Rule of Reason) in *Cassis de Dijon*, it now seems irrelevant for national regulatory measures on services.

So far, our analysis has concentrated on the free movement of services. However, Article 9 SD also belongs to the key provisions of the Directive and pertains to the freedom of establishment. The provision prohibits member states from making the access to or exercise of a service activity subject to authorisation schemes. However, these schemes are justifiable if they do not discriminate, are necessary with a view to an overriding reason relating to the public interest, and do not go beyond what is necessary. Article 9 SD thus contains both the prohibition not to restrict the freedom of establishment and the exception to this prohibition. Furthermore, it solely regulates authorisation schemes. Article 9 SD leaves untouched the general requirements of national law that may affect the freedom of establishment. For example, the provision of French law that precluded banks from paying remuneration on sight accounts – which was at stake in *CaixaBank*[40] and found to be incompatible with the Treaty rules on the freedom of establishment – is not covered by Article 9 SD. Such a national provision does not introduce an authorisation scheme, but is limited to imposing 'general' obligations upon market operators and remains, therefore, subject to the general EU rules on establishment.

Compared to Article 16, the added value of Article 9 SD seems much more limited, as it mirrors ECJ jurisprudence on the freedom of establishment to a great extent. It may be derived from the case-law of the ECJ that authorisation schemes fall within the scope of Article 49 TFEU (former Article 43 TEC), as they hinder market access.[41] Remarkably, Article 9 SD has been drafted in such a

[39] *See*, for example, ECJ 5 Oct. 1977, Case 5/77, *Tedeschi* v. *Denkavit*.

[40] ECJ 5 Oct. 2004, Case C-442/02, *CaixaBank France* v. *Ministère de l'Économie, des Finances et de l'Industrie*, para. 21.

[41] *See,* e.g., ECJ 10 March 2009, Case C-169/07, *Hartlauer Handelsgesellschaft mbH* v. *Wiener Landesregierung and Oberösterreichische Landesregierung.*

way that its exception encompasses an open group of public interests. As a result, it reflects the ECJ's case-law on the Rule of Reason, which is based on an open and dynamic list of exceptions and the method developed by the ECJ under the Treaty provisions on free movement has been transposed into Article 9. When it comes to the freedom of establishment, Article 9 SD does not bring about any important changes to the basic structure of the freedom of establishment.

*Constitutional review (I): Questioning the Directive's compatibility with EU primary law*

It is apparent from the previous sections that Articles 16-18 SD have dramatic changes in store for the EU rules on the free movement of services. In contrast, Article 9 SD by and large mirrors the Treaty provisions on the freedom of establishment and the Court's case-law on these provisions. Since the basic structure of the freedom of establishment is not affected by the Directive, we contend that Article 9 is not incompatible with the Treaty. After all, it confines itself to confirming long-standing jurisprudence. However, it is not clear from the outset whether Articles 16-18 SD are in line with the Treaty provisions on the free movement of services, since the Rule of Reason, which in the perception of the ECJ is inherent to the Union's fundamental freedoms, is 'frozen' by these provisions. Hence, it must be examined whether the Directive is compatible with the Treaty as far as the rules on free movement of services are concerned.

In various cases, the ECJ has held that not only member states, but also the EU legislator itself is bound by the Treaty provisions on free movement.[42] It has, however, also contended that the Union legislature enjoys a wide discretion when intervening on the internal market,[43] as it acts in the interest of the entire EU and is not focussed on one particular national interest.[44] The legality of a EU measure can be affected only if the measure is manifestly inappropriate in the light of the objective which the Union legislature seeks to pursue.[45] Furthermore, it should

[42] *See*, for example, ECJ 20 April 1978, Joined Cases 80 & 81/77, *Société Les Commissionnaires Réunis SARL* v. *Receveur des douanes and SARL Les fils de Henri Ramel* v *Receveur des douanes*.

[43] *See*, for example, ECJ 20 May 2003, Case C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA* v. *Asda Stores Ltd and Hygrade Foods Ltd* [2003], and ECJ 14 July 1998, Case C-284/95, *Gianni Bettati* v. *Safety Hi-Tech Srl*.; *see also* S.A. de Vries, *Tensions within the Internal Market. The Functioning of the Internal Market and the Development of Horizontal and Flanking Policies* (Groningen, Europa Law Publishing 2006), p. 314, and K.J.M. Mortelmans, 'The Relationship between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market – Towards a Concordance Rule', 27 *Common Market Law Review* (2002) p. 1333.

[44] *See* ECJ 25 Jan. 1977, Case 46/76, *Bauhuis* v. *Netherlands*.

[45] *See* ECJ 8 June 2010, Case C-58/08, *Vodafone, Telefónica O2 Europe, T-Mobile International and Orange Personal Communications Services* v. *Secretary of State for Business, Enterprise and Regulatory Reform*, para. 52; ECJ 12 July 2001, Case C-189/01, *H. Jippes, Afdeling Groningen van de Nederlandse Vereniging tot Bescherming van Dieren and Afdeling Assen en omstreken van de Nederlandse Vereniging tot Bescherming van Dieren* v. *Minister van Landbouw, Natuurbeheer en Visserij*, paras. 82 and 83.

be kept in mind that only a very small number of EU legal acts has ever been found to violate the general EU free movement rules.[46]

One could argue that the Union legislature has actually limited the list of justifications in order to stimulate the functioning of the internal market, which is in the overall interest of the EU. Also, in deciding complicated economic matters, such as harmonising the competition conditions on the internal market for services, the Union legislature has a wide margin of appreciation.[47] It is thus up to the EU legislator to determine in which circumstances the removal of obstacles to free movement should have priority over other interests such as consumer protection. As a matter of fact, EU harmonisation measures usually limit the member states' competences to protect (national) public interests, and as a consequence, the curtailing effects on the possibility to pursue national policies of general interest brought upon by the Directive do not of themselves constitute a convincing reason for finding this Directive to be incompatible with the Treaty provisions on free movement. What is more, as the Directive displays a mix of negative and positive integration, it essentially forbids restrictions to free movement, and it is, therefore, in line with the prohibitions contained in these Treaty provisions.

Then again, it may be put forward that the Directive affects policy areas that (predominately) belong to the member states' competences. The Union legislature has limited competences and, since the entry into force of the Lisbon Treaty, specific Treaty provisions have been put in place that demarcate the powers of the EU and the member states (Articles 2-6 TFEU). Article 6 TFEU, for example, explicitly provides that the EU may only support member states' actions in areas such as tourism and culture. Nevertheless, national measures governing touristic or cultural service activities are caught by the prohibition laid down in Article 16 SD if these measures restrict the access to or the exercise of the services involved. It could be argued that member states are limited in exercising their competences in these policy areas (in so far as the touristic or cultural concerns at stake cannot be accommodated in the exceptions contained in Articles 16-18 SD). However, in our view, this does not mean that the Directive violates EU primary law. After all, the Directive does not introduce substantive rules as to how member states should design, for example, their tourist or cultural policies. Admittedly, Article 2(5) TFEU does provide that, in areas where the Union's powers are limited to carrying out actions to supplement national measures, the EU may not adopt legally binding measures that entail harmonisation of member states' laws and regulations. However, the Directive does not oblige member states to enact specific standards in

[46] *See* Mortelmans, *supra* n. 43, at p. 1332.

[47] *See* more generally Alexander Fritzsche, 'Discretion, Scope of Judicial Review and Institutional Balance in European Law', 47 *Common Market Law Review* (2010) p. 361-403, criticising the reluctance of the judiciary to engage in a more intense scrutiny.

tourism or culture, nor to align their policies with tourism- or culture-specific EU rules. It has not shifted the authority of setting priorities and adopting laws in these areas from the national to the European level: it remains up to the member states to determine how particular objectives should be attained. The Directive outlaws measures that lead to restrictions on free movement of services, in so far as these restrictions are not justifiable in the light of the public interests acknowledged by this piece of EU legislation. Yet, it does not introduce a ban on other national measures, i.e., those that are justifiable or do not even constitute any restriction of free movement of services. So, it may be expected that the ECJ will develop an approach in its case-law parallel to that in other sensitive areas such as healthcare and national systems of property ownership. This would mean that in Services Directive cases, the ECJ will start its argumentation by acknowledging that certain matters (e.g., those listed in Article 6 TFEU) fall within the scope of national competence. Subsequently, however, it would move on by arguing that this finding does not call into question that the member states, when exercising these competences, must observe the requirements imposed on them by the Directive. The ECJ came to similar findings in cases where member states argued that the full application of the EU free movement rules to health care or national systems of property ownership would strain the national competences in these areas.[48] In other words, the Court perceives the free movement rules as fundamental conditions that limit national policy measures, leaving the member states with no other option than to resign themselves to this 'fact of life in the Union'.

However, it should be noted that the Union legislature has to respect policy-linking clauses when adopting internal market measures. Article 169(1) TFEU, for example, stipulates that a high level of consumer protection should be the point of departure of all EU policies. Article 9 TFEU contains a similar provision for interests such as a high rate of employment, social protection, education and public health, which must then also be taken into account at the drafting of EU legislative acts.[49] The ECJ might decide that, in light of these policy-linking clauses, the exclusion of public interests such as consumer protection from the grounds of justification in Articles 16-18 SD leads to the illegality of (at least these parts of) the Directive. Yet, another escape route exists here, as the ECJ could still consider that the EU legislator did not make a manifest error, as it may be argued, for

[48] *See* for instance, ECJ 13 May 2003, Case C-385/99, *V.G. Müller-Fauré* v. *Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet* v. *Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen*, paras. 100-108; ECJ 16 May 2006, Case C-372/04, *Watts* v. *Bedford Primary Care Trust and Secretary of State for Health*, para. 92; ECJ 1 June 1999, Case C-302/97, *Klaus Konle* v. *Republik Österreich*, para. 38; ECJ 4 June 2002, Case C-367/98, *Commission* v. *Portugal*, para. 48; ECJ 4 June 2002, Case C-483/99, *Commission* v. *France*, para. 44 and ECJ 4 June 2002, Case C-503/99, *Commission* v. *Belgium*, para. 44.

[49] *See* De Vries, *supra* n. 43, at p. 315.

example, that consumer protection is already adequately addressed in specific Directives on EU consumer law. On top of that, mention should be made of Article 22 SD, which obliges service providers to make information on important issues available to consumers.

All in all, it may be expected that a possible constitutional review of the Services Directive by the ECJ will not (appreciably) affect the validity of this piece of EU legislation. However, the Court may well proceed to smoothen the edges of the Directive, by moderating well-known concepts such as public policy and public health. It cannot be ruled out that these concepts will evolve further in the near future, meaning that they will be interpreted considerably more broadly under the Directive than under the classic free movement rules. Hence, in some cases, there may be substantial pressure to widen up well-known justifications such as the 'public policy' derogation, regarded as a reason to justify restrictive national measures not only in EU free movement law but also in situations falling within the ambit of the Services Directive. Although the ECJ has given a narrow interpretation as to what 'public order' encompasses,[50] national legislatures may be tempted to argue that, under the Directive, a wider range of measures than commonly accepted in the classic free movement case-law benefits from this exemption, as the Directive limits the number of justifications. So, the ECJ might be convinced to change its jurisprudence on these exceptions and give a different meaning to constitutional concepts such as public policy and proportionality. It could also consider extending the reach of justifications that do have a place in Article 16, which could lead to an accommodation of consumer protection issues in exceptions such as public policy and public health. Hence, the absence of consumer protection as a Rule of Reason may inspire the ECJ to recast the classic EU interpretation of public policy and public health. Although the Commission has repeatedly stressed the importance of the settled case-law for such concepts,[51] the ECJ may well decide to change its approach to these concepts, as the validity of long-standing and possibly legitimate national policies may be at stake. Put differently, well-known concepts such as public policy may be reframed in a more flexible interpretation, in order to adapt the Directive to two conflicting desiderata: to establish an internal market for services on the one hand, and to pursue legitimate objectives of general interest on the other. Hence, widening-up the exceptions laid down in Articles 16-18, especially those related to public policy, public security, public health, the protection of the environment and employment conditions, might be perceived by the ECJ as a more apposite solution to ease the tensions caused by the limited scope of the Rule of Reason, rather than finding that the

[50] *See*, e.g., ECJ 4 Dec. 1974, Case 41/74, *Yvonne van Duyn* v. *Home Office*.

[51] *See* the *Commission's Handbook on the Implementation of the Services Directive* (Luxembourg, Office for Official Publications of the European Communities 2007) at p. 38 and 39.

Directive is incompatible with EU primary law. On the one hand, such an approach respects the wide margin of appreciation of the Union's legislature. On the other, it moderates the adverse effects resulting from the strong emphasis put on the necessity of opening-up the various services markets.

*Constitutional review (II): Questioning the Directive's legal bases*

The Directive was based on Articles 47 and 55 TEC, now Articles 53 and 62 TFEU. Pursuant to these provisions, the EU may adopt measures in order to 'co-ordinate' the taking-up and the pursuit of service activities on both a permanent and temporary basis. Given the revolutionary design of the Directive, we should now examine whether Articles 53 and 62 TFEU serve as proper legal bases for this piece of legislation.

To start with, it should be noted that these Treaty provisions refer to the term 'co-ordinate', whereas the Treaty provision containing the general legal basis for adopting harmonisation measures on the internal market contains the term 'approximation'. However, it could be derived from the *Tobacco Advertising* judgment that 'co-ordination' and 'approximation' refer to the same concept of harmonisation. After all, in that case, the ECJ ruled that Articles 53 and 62 TFEU correspond to Article 114 TFEU, as they expressly refer to measures intended to make it easier for persons to take up and pursue activities by way of services. In the eyes of the Court, those provisions are also intended to confer on the EU legislature specific powers to adopt measures intended to improve the functioning of the internal market.[52]

In *Tobacco Advertising*, the ECJ has also set out the criteria for the use of Articles 53 and 62 TFEU (and of Article 114 TFEU) as legal bases for adopting harmonisation measures. The measure concerned should have as its object the improvement of the conditions for the functioning of the internal market and must purport to eliminate appreciable distortions of competition.[53] This approach has been confirmed by other judgments of the ECJ.[54] Strikingly, the ECJ has

[52] *See* ECJ 5 Oct. 2000, Case C-376/98, *Germany* v. *Parliament and Council*, para. 87.

[53] In ECJ 12 Dec. 2006, Case C-380/03, *Germany* v. *Parliament and Council*, it was decided that it is enough, in order for an internal market measure to be based on Art. 114 TFEU, to pursue one of these two objectives (removal of obstacles to free movement or undistorted competition). *See also* Damian Chalmers et al., *European Union Law. Text and Materials* (Cambridge, Cambridge University Press 2010), p. 691.

[54] *See* ECJ 12 Dec. 2006, Case C-380/03, *Germany* v. *Parliament and Council*; ECJ 14 Dec. 2004, Case C-210/03, *R* v. *Secretary of State for Health, ex parte Swedish Match*; ECJ 10 Dec. 2002, Case C-491/01, *The Queen* v. *Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* and ECJ 8 June 2010, Case C-58/08, *Vodafone, Telefónica O2 Europe, T-Mobile International and Orange Personal Communications Services* v. *Secretary of State for Business, Enterprise and Regulatory Reform*.

accepted that (total) bans on the manufacturing of particular goods or the provision of specific services for, e.g., reasons of public health may even be based on Articles 114, 53 and 62 TFEU, as in essence such bans lead to the emergence of a level playing field on the internal market.

In our view, the Directive's clearly fulfils the conditions developed in *Tobacco Advertising* and subsequent case-law. The Directive prohibits a wide range of national restrictive laws, whereas the Lisbon and Europe 2020 Strategies point to the existence of many obstacles to the free trade in services that (threaten to) distort or impede free competition. For Articles 53 and 62 TFEU to be applicable, it is sufficient that the EU harmonisation measure at issue governs free movement, and thereby equalises the conditions for competition.[55] It goes without saying that these concerns lie at the heart of the Directive, which mainly focuses on the elimination of national regulatory measures that amount to (non-justifiable) restrictions on the free movement of services and the freedom of establishment. Remarkably, the question of the legal basis of the Directive is opposite to the problems that were at issue in the *Tobacco Advertising* jurisprudence. Whereas in the latter cases the Union legislature obliged the member states to put an end to the trade in particular harmful goods and services and to introduce obstacles to this trade, the Directive forces member states to remove a wide variety of national obstacles to the trade in services, and to stimulate the latter. From the perspective of the proper functioning of the internal market, lying at the heart of the criteria developed by the ECJ in the *Tobacco Advertising* jurisprudence, Articles 53 and 62 TFEU (and Article 114 TFEU) constitute a much more appropriate legal bases for the Directive than for bans on trade in particular goods and services.

It has, however, been argued in legal doctrine that the Directive works differentially from a Directive approximating national laws, and that it therefore cannot be viewed as a harmonisation measure mandated by Articles 53 and 62 TFEU.[56] The point would be that the Directive challenges every national requirement having restrictive effects on the free trade in services and allows only for an escape in a limited number of regulatory concerns such as environmental protection. We tend to disagree with this line of reasoning. It should be recalled that the ECJ has held that the legal bases in the Treaty, such as Article 114 TFEU, may also be used for adopting measures other than classic 'approximation' instruments.[57] So long as the harmonisation measure concerned is closely linked to the subject-matter of the acts approximating the laws, regulations and administrative provisions of the

[55] *See* De Vries, *supra* n. 43, at p. 272.

[56] *See* Klamert, *supra* n. 15, at p. 126-129.

[57] *See* ECJ 6 Dec. 2005, Case C-66/04, *United Kingdom* v. *Parliament and Council* and ECJ 2 May 2006, Case C-217/04, *United Kingdom* v. *Parliament and Council*.

member states, Article 114 may be regarded as an appropriate legal basis.[58] In other words, Article 114 TFEU may be used to create mechanisms that stimulate harmonisation, as well as to adopt immediate harmonisation measures.[59] Since Articles 53 and 62 TFEU correspond to Article 114 TFEU, this finding pertains to the Treaty provisions on services and establishment as well. In our view, it cannot be denied that the Directive comes very close to approximating national laws, as it bans obstacles to free trade and, as a result, contributes to the removal of competition distortions that result from differences in the domestic rules of the member states. A full and correct implementation of this Directive will lead to highly similar national standards and a level playing field. All in all, then, the conclusion seems inescapable that Articles 53 and 62 TFEU have served as correct and appropriate legal bases for the Services Directive.

## Transposing the Directive fully and correctly – A mission impossible?

Whereas the issues discussed so far may occupy scholars and practitioners for years to come, perhaps the successful implementation of the Directive ranks highest on the list of challenges that currently face the member states.[60] Several provisions call for noteworthy shifts in bureaucratic burdens and in legal and administrative responsibilities, among both centralised and decentralised public bodies and offices.[61] Nevertheless, in our opinion, here again the aforementioned Articles 9 and 16 SD present the greatest challenge of all. As remarked above, these key provisions oblige the member states to respect the rights of foreign service providers and of those seeking to establish themselves in another member state. They are thus essential to fight protectionism and avoid any unjustified restrictions. All the same, the *prohibitions* contained in Articles 9 and 16 do little more than reflect the law as it stands today; in this respect, they are devoid of novel normative content. They are both formally and materially addressed to national legislators and entail no obligations for natural and legal persons. By consequence, it is hard to see how member states should go about transposing these provisions. There is hardly room for real implementation: verbatim transposition is hard to imagine, as a national rule identical to the content of the Directive provisions

[58] Case ECJ 2 May 2006, C-217/04, *United Kingdom* v. *Parliament and Council*, para. 45.

[59] *See* Chalmers et al., *supra* n. 53, at p. 693.

[60] Although what may be dubbed 'the implementation trajectory' can be broken down into several stages (*see*, e.g., the refined approach of J.H. Jans et al., *Inleiding tot het Europees Bestuursrecht* (Nijmegen, Ars Aequi 1999), p. 32 et seq., who distinguish between transposition, operationalisation, and application), we consider implementation to be synonymous with transposition.

[61] This dimension is explored further in Davies, *supra* n. 26.

would appear rather odd and would fit uneasily in domestic legal systems. The question might then also arise in which specific law they would have to be incorporated.

This is not to say, however, that no member state engaged in such a 'copy-pasting' exercise: the UK has, e.g., gone down that road.[62] At the same time, the outcome is rather schizophrenic, for in the resulting statute the member state basically tells itself that it ought not restrict the freedom to provide services and the freedom of establishment. Moreover, such implementation creates a false sense of security. Indeed, at face value, the member state would appear to have met its EU law obligations in full. At the same time, however, the novel provisions are of little consequence, since they do not prevent the adopting of subsequent rules that grossly violate the prohibitions spelled out in the earlier statute.[63] In this light, it is rather understandable that a number of member states have actually chosen not to implement these provisions at all.[64]

This holds, for example, for Germany, where the obligation to set up points of single contact through which service providers can access information and administrative formalities has emerged as a major obstacle to implementation. The federal configuration of the country exacerbated matters, and has resulted in a patchwork rug of individual regulations laid down by the *Länder*.[65] Although the *Bundesministerium für Wirtschaft und Technologie* (the federal economic affairs department) has strived to coordinate issues and the representatives of the *Länder* did initially respond favourably, the latter have mostly gone at it alone. Neither on the federal, nor on the state level have rules been adopted that mirror the Directive's

[62] *See* § 14 and 21 of the *Provision of Services Regulations 2009*, Statutory Instrument 2009 No. 2999.

[63] Admittedly, the schizophrenia is most acute as regards the central legislature in a unitary state. In contrast, a 'pasted copy' of Arts. 9 and 16 makes more sense when it functions as a binding instruction directed towards decentralised authorities, especially in federal states. But even then, the second point still stands, namely that the practise does not exclude the subsequent adoption of divergent rules by decentralised authorities: notwithstanding the fact that the national hierarchy of norms dictates that such rules would have to be considered unlawful *per se*, they *can* nevertheless still be adopted. Thus, a copying and pasting of Arts. 9 and 16 SD still does not ensure that the Directive will be transposed correctly.

[64] A general overview of the state of play in the various member states can be found in the *Commission Note to the Competitiveness Council of 25-26 May 2010: State of play on implementation of the Services Directive*, 9475/10 <register.consilium.europa.eu/pdf/en/10/st09/st09475.en10.pdf>.

[65] The good progress made in Belgium and Spain indicates that the troubles cannot solely be attributed to the complications of federalism. A general overview of the state of play in the *Länder* is available on <www.dienstleisten-leicht-gemacht.de/DLR/Navigation/laenderinformationen.html>, a website of the German federal government, which also functions as a portal to the respective state laws. For an in-depth report, *see* S. Leible (ed.), *Die Umsetzung der Dienstleistungsrichtlinie – Chancen und Risiken für Deutschland* (Jena, Jenaer Wissenschaftliche Verlagsgesellschaft 2008).

key provisions on free movement of services and free establishment.[66] In this respect, the question may be put forward as to whether a coordinated effort would have made any difference.

Similar problems have been experienced in the federal republic of Austria, where the *Bund*, the *Länder*, *Städte* and *Gemeinde* have had to align their efforts. The arising tensions were mainly due to the fact that the governments of the federated states were expected to perform a tuning and coordinating role *vis-à-vis* the lower levels of government, while being placed in subservience to the *Bund*, and not granted a formal role in the implementation process. Eventually, the Commission was notified of Austria's transposition through a comprehensive federal law, the *Dienstleistungsgesetz*. Yet, as in Germany, this federal law does not contain any clauses replicating Articles 9 and 16 SD.[67]

France, on the other hand, could have profited from the fact that it constitutes a centralised state. Yet, this has seemingly been no force for the better, since it is one of the countries that have failed to transpose the Directive in a timely fashion and there has been surprisingly little transparency so far in the working methods of the competent authorities.[68] Widespread concern continues to exist about the methods used to transpose the Directive, with no fixed deadline or timetable in sight for 2010. However, the French government has recently released a progress report, referring to a variety of economic sectors concerned, outlining a plethora of codes and statutes that have already been amended, and specifying some expected completion dates for novel ones currently in the pipeline. Strikingly, the text goes on to politicise an already sensitive debate by stressing the benefits brought by the Directive.[69] In any case, neither here nor in the accompanying *Présentation du processus de transposition* document, one finds a trace of the transposal of Article 9 or 16.[70]

The Netherlands, conversely, is one of the member states that have managed to complete the implementation track before the 28 December 2009 deadline, though this ultimately turned out to be a close call.[71] The Dutch authorities have

[66] *See* Koeck & Karollus, *supra* n. 20, at p. 124 et seq.

[67] For further details, *see* Georg Adler, 'Aspekte der Implementierung der Dienstleistungsrichtlinie in Österreich', 23 *Wirtschaftsrechtliche Blätter* (2009) p. 425-436.

[68] *See* <www.euractiv.fr/tag/entreprises-emploi/2010/02/08/france-en-retard-dans-transposition-directive-services_51141>.

[69] The *Rapport de synthèse sur la transposition* contains, e.g., the – rather disputable – statement that the Directive will add to France's already 'positive history' of having an economy of open services.

[70] Both are available at <www.sgae.gouv.fr/actualites/htmlpages/actu_transpo_directive_service.html>.

[71] The Royal Decree (*Koninklijk Besluit*) of 26 Nov. 2009 (published in the *Staatsblad* 2009, 505) stipulated that certain provisions of the *Dienstenwet* would enter into force on 7 Dec. 2009, others on 16 Dec. 2009, and yet others on 28 Dec. 2009 (the final date for completion of the implementation ex Art. 44 SD).

opted for a three-pronged approach and crafted a general law on services (the *Dienstenwet*), a decision on one single office (*Dienstenbesluit centraal loket*) and a further adaptive decision (*Aanpassingsbesluit Dienstenrichtlijn*). Civil servants and politicians have proved unable to shake the impression that Articles 9 and 16 SD were merely to be taken note of but did not require any follow-up action, in the sense that these provisions should be copied verbatim into national laws, as it concerned norms addressed to the legislator only.[72]

How should these practises be assessed? At face value, one might be inclined to conclude that they constitute egregious violations of European law: after all, in the EU's catechism of orthodoxy, non-transposition of Directives is generally classified as one of the cardinal sins. Article 288 TFEU does of course expressly provide that member states may choose the form and means they deem most fit. Gradually, however, ever more limits have been imposed on this discretion. Nothing stands in the way of delegating powers to domestic authorities and entrusting regional or local authorities with particular tasks and responsibilities, as has occurred with regard to the Directive, but this does not diminish the obligation to give effect to a Directive by means of national provisions of a binding nature, either through primary legislation (i.e., a general law or official act of parliament), or by means of secondary (i.e., delegated) legislation.[73] Seen from this perspective, the above-mentioned countries have indeed failed to meet the demands of EU law. In contrast, there is also the case-law underscoring that it is not always necessary to formally enact a Directive's stipulations in specific and express 'hard-law' provisions – the general legal context in a member state may already suffice, depending on the exact content of the relevant rules. Especially the existence of general principles of constitutional or administrative law may render transposition by specific legislative or regulatory measures superfluous, provided at least that those principles ensure the integral application of the Directive by the national authorities.[74] This line presents the member states referred to above with some definite foothold: full and comprehensive implementation, i.e., transposing every single provision of the Directive including Articles 9 and 16, would thus *not* seem to be an exigency. The Directive can be implemented by factual means: as long as the member states concerned and their authorities do not enact any law contravening Articles 9 and 16 SD, the implementation process may be deemed in

[72] Only recently did a first plea for further implementation emerge in Dutch legal literature: *see* M.R. Botman, 'De Dienstenwet: dekt de vlag de lading', *Nederlands Tijdschrift voor Europees Recht* (2010) p. 109-116.

[73] Thus J.H. Jans et al., *Europeanisation of Public Law* (Groningen, Europa Law Publishing 2007), p. 13-14, referring to the leading judgments in ECJ 25 May 1982, Case 97/81, *Commission* v. *Netherlands*, and ECJ 30 May 1991, Case C-361/88, *Commission* v. *Germany*. For more recent examples, *see* ECJ 20 Nov. 2003, Case C-296/01, *Commission* v. *France*, and ECJ 16 July 2009, Case C-427/07, *Commission* v. *Ireland*.

[74] *See,* e.g., ECJ 9 April 1987, Case 363/85, *Commission* v. *Italy*, para. 5.

line with the requirements laid down in Article 288 TFEU. After all, by indeed not adopting any restrictive measure, they have implemented the instructions contained in Articles 9 and 16 SD. So, in essence, the implementation of these provisions of the Directive consists in refraining from taking national measures that restrict free movement, which is in line with their 'negative integration dimension'.

The main characteristic of negative integration is that member states are precluded from taking any measures that have (illegitimate and adverse) effects on free movement. At the same time, the question will then arise as to whether the general legal context and general constitutional or administrative principles genuinely serve the purpose of ensuring unrestricted access to the services market and eradicate any possible remaining obstacle to free establishment. The screening operations conducted must be thorough and effective; in every sector of the economy, natural and legal persons should be fully aware of any novel entitlements accruing to them. Long ago, the Court already expressed its dissatisfaction with legislative ambiguity and stated that where a directive's provisions seek to create rights for individuals, the persons concerned ought to be able to ascertain the full extent of their rights and rely on them before the national courts.[75] General constitutional or administrative principles that allow for unfettered application of the Directive's rules, in spite of possible divergent or deficient national laws overlooked in the screening process, may be helpful, but the legal situation arising from those principles should be sufficiently clear and precise. According to the ECJ, this is of particular importance where directives confer rights on nationals of other member states, since they are normally unaware of such principles[76] – which is exactly the situation with regard to the Directive. It is therefore doubtful whether the choices made by member states such as Germany, Austria, France and the Netherlands suffice to guarantee the eradication of every obstacle to the provision of services and free establishment. At the same time, as argued, a slavish writing into national law of Articles 9 and 16 SD would not appear to have much added value either.

The state of play with regard to transposition has been a cause for widespread concern. In response to early estimations that more than half of the EU 27 would not meet the 28 December 2009 deadline, MEPs and members of the Commission expressed their doubts on both the methods pursued by individual countries and their timing.[77] Discontent also emerged at the national level. French politi-

[75] *See* ECJ 4 April 1974, Case 167/73, *Commission* v. *France*, para. 41.

[76] *See*, *inter alia,* ECJ 23 May 1985, Case 29/84, *Commission* v. *Germany*, paras. 22 and 23; ECJ 9 Sept. 1999, Case C-217/97, *Commission* v. *Germany*, paras. 31 and 32; ECJ 26 June 2003, Case C-233/00, *Commission* v. *France*, para. 76.

[77] *See* the *Report of the Debate of 11 November 2009 on the Implementation of the Services Directive*, this report is available on <www.europarl.europa.eu>. The early estimations received much adverse

cians argued, for example, that the rules (to be) adopted did not sufficiently respect clauses on health services, and that the social guarantees included in the text were being ignored by central as well as local governments. In Sweden, complaints were made that the Directive was deliberately misinterpreted, and utilised as a pretext to remove existing laws obliging companies to have at least one member of their team act as a contact point for state bodies and trade unions. Thus, for the past year, the pressure on member states to step up their efforts has been mounting from more than one side.

Initially, the Commission made it known that it would not engage in any naming and shaming until the deadline had expired, that it was monitoring the situation closely, but would allow for a limited *période de grace*.[78] MEPs have nonetheless been adamant that it initiates procedures on short notice against those countries that continue to be in default.[79] The patience of the Commission appears to have run out remarkably quickly.[80] Therewith, the issue of what constitutes full and complete implementation in the specific case of the Directive is set to gain further saliency. Eventually, the ECJ may have to clarify, expand or delimit the purport of its earlier judgments.

We would venture to suggest here that, preferably, both Commission and Court stick to a benign approach. Following the Directive's review clause, the Commission is required to submit a first report on the application of the Directive by the end of 2011.[81] It would be highly useful if it were to express itself on the matter of Articles 9 and 16 in the clearest of terms, and state what (types of) actions are considered proper and sufficient in their wake. As stated, in our view, the most apposite position would be to stress the limited use of transposing (i.e., copying) said provisions into national rules. If this dossier were ultimately to arrive at the docket of the Court, a continuation of the line of jurisprudence whereby an absence of verbatim transposal can be compensated by the general legal context existing in a member state, to us appears to be the most sensible position to take, at least as far as Articles 16 and 9 are concerned. Of course, we do not advocate

comment in an earlier discussion, at a meeting of Parliament's internal market and consumer protection committee.

[78] *See* the *Report* referred in n. 77 *supra*; *see also* Commission Staff Working Document SEC (2009) 1684/2, as well as *The Services Directive: State of play and challenges with implementation*, speech by Mr J. Holmquist (DG Internal Market), available at <ec.europa.eu/internal_market/speeches/index_en.htm>.

[79] *See* the *Report of the Debate*, *supra* n. 77.

[80] On 24 June 2010, the Commission announced that it had sent the first reasoned opinions for failing to notify the regulatory changes required by the Directive; *see* <europa.eu/rapid/pressReleasesAction.do?reference=IP/10/821&format=HTML&aged=0&language=EN&guiLanguage=en>.

[81] Art. 41 SD.

turning a blind eye completely: before giving its blessing, the ECJ certainly ought to subject the areal of rules put in place to intense scrutiny and elucidate what their exact content must be to meet the demands stemming from the Directive's key provisions. Similarly, a per-country evaluation of those constitutional or administrative law principles instrumental to the attainment of the Directive's goals would present a true asset that may command great precedential value for the future. In any case, the benign approach towards implementation should solely concern the Directive provisions that contain instructions directed at the national legislatures of the member states, such as the Articles 16 and 9 SD.

In the preceding sections, we have already commented on the Directive's special features compared to earlier directives. Classic strictness would thus be uncalled for; a less than ordinary directive justifies a less than ordinary approach. The member states might seem to be manifestly defaulting in transposing the Directive fully and correctly. Yet, realistically, the latter amounts to little less than a mission impossible – unless one regards practical application as but one side of the coin and attaches intrinsic importance to paper realities.[82] Indeed, countries such as Germany, the UK and the Netherlands could have adopted rules mirroring Articles 9 and 16 SD word for word without much extra effort. In good faith, however, they have opted not to do so. It imminently falls on the Commission and Court to respond. We have argued here that, overall, there is good reason for them to take a lenient stance *vis-à-vis* the choices made.

## Enforcing the Directive – Horizontal headaches ahead?

In one respect at least, the Directive is not *that* unsual: as with other directives, the fulfilment of its aims would be jeopardised by untimely or incorrect implementation, and equally if, subsequent to implementation, its effective enforcement cannot be ensured. Nonetheless, in the last respect, the instrument under review appears to pose *more* problems than all earlier, more 'ordinary' directives.

It is settled case-law that a directive provision has direct effect if it is sufficiently precise and unconditional and the member state concerned has either failed to incorporate it timely in the national legal order, or failed to do so correctly.[83] As

[82] Which may well encourage a country to align itself closer to the wholly undesirable 'world of dead letters'-model of compliance, recently identified by political scientists; *see* Gerda Falkner and Oliver Treib, 'Three Worlds of Compliance or Four? The EU-15 Compared to New Member States', 46 *Journal of Common Market Studies* (2008) p. 293-313.

[83] *See*, for example, ECJ 6 Oct. 1970, Case 9/70, *Franz Grad* v. *Finanzamt Traunstein*; ECJ 4 Dec. 1974, Case 41/74, *Yvonne van Duyn* v. *Home Office*; ECJ 19 Jan. 1982, Case 8/81, *Ursula Becker* v. *Finanzamt Münster-Innenstadt*; ECJ 23 Feb. 1994, Case C-236/92, *Comitato di Coordinamento per la Difesa della Cava and others* v. *Regione Lombardia and others*; ECJ 5 April 1979, Case 148/78, *Criminal Proceedings against Tullio Ratti*.

already pointed out, in our opinion Articles 16 and 9 SD may be implemented by factual means, i.e., member states refraining from taking restrictive measures. Thus, the condition that a Directive is implemented incorrectly will already be fulfilled in relation to the Directive once a national authority of a member state adopts such restrictive measures.[84] Further, Articles 16 and 9 SD are sufficiently precise and unconditional, as they make clear which kinds of restrictions are unlawful.

However, another traditional position with regard to the enforcement of provisions of directives that have not been implemented into national law is painfully clear: even if they are generally capable of having direct effect, they cannot be relied upon before national courts in disputes between private parties. For almost thirty years now, it remains a core principle of EU law that obligations flowing solely and directly from a directive may not be imposed by an individual upon another individual.[85] This causes a first headache with regard to the enforcement of the Directive. What will happen if a member state does not implement Articles 9 and 16 SD? Such non-implementation takes place whenever a member state does not live up to the instructions contained in these provisions, i.e., not just when it does not transpose those provisions into national law, but, more fundamentally, every time a national authority adopts measures restricting the freedom to provide services or the freedom of establishment. As outlined, the 'non-transposition-strategy' regarding Articles 9 and 16 pursued by several member states is in itself far from unintelligible, but it renders the application of the Directive within the national legal order much more difficult. The ban on horizontal direct effect of unimplemented provisions from directives entails that, in any dispute between service providers and/or recipients falling within the ambit of the Directive, it is not possible to claim that a divergent rule of national law contravenes Article 9 and/or 16 SD. Thus, if, e.g., a domestic undertaking were to sue a service provider from another member state for operating without a permit required by national law, the latter would be unable to contend that the permit requirement violates Article 9, for that provision cannot be relied upon in disputes between

[84] We are of the opinion that an approach not based on verbatim copying of Arts. 16 and 9 into national laws could give rise to questions of direct effect. In contrast, Botman argues that in such an approach it is not consistent to assume that these provisions may have direct effect, as this requires, *inter alia,* the absence of implementation (*see* Botman, *supra* n. 72, at p. 112 and 113). She therefore contends that this 'inconsistency' shows that Arts. 16 and 9 should be incorporated word for word into a piece of national legislation. However, in our view, the essence of correct implementation in relation to the Directive lies in *not* adopting measures that restrict free movement. Hence, as soon as a Member State *does* adopt such measures, it fails to implement the Directive correctly, which means that the concept of direct effect comes into play.

[85] ECJ 26 Feb. 1986, Case 152/84, *Marshall* v. *Southampton and South-West Hampshire Health Authority*; ECJ 14 July 1994, Case C-91/92, *Faccini Dori* v. *Recreb*; ECJ 7 March 1996, Case C-192/94, *El Corte Inglés SA* v. *Blázquez Rivero*.

private parties. In fact, though one could say that the existence of the permit requirement proves *eo ipso* that the Directive was not (or incorrectly) implemented, in reality it is hard to obtain certainty on this issue: as the Directive cannot be invoked, a judge cannot proceed to consider the merits of the case and test whether the permit requirement should indeed have been abolished or not.[86]

Comparable hardships would be experienced if, e.g., 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. The occurrence of such situations evidently undermines the idea of further liberalisation of services.[87] As a result, instead of eliminating all remaining obstacles (including those left in existence after the various screening operations), the Directive provokes new segmentations in the internal market, since effective horizontal enforcement verges on the impossible in more than one member state.

In response, one might be inclined to point to the doctrine of indirect effect. After all, practising lawyers and judges usually first engage in an exploration of the possibilities for interpreting national law within the light of the wording and purpose of an EU law measure.[88] If this leads to an outcome in which the results envisaged by that measure can already be attained, the issue of direct effect does not arise and the applicable limitations thereon are not felt.[89] So, for the headaches of those attempting to litigate on the basis of the Directive's key provisions, the *Von Colson* obligation of harmonious interpretation might well prove to be an excellent medicine.[90] Moreover, the *Pfeiffer* ruling reaffirmed the duty as being a particularly strong one, prescribing that, even in the absence of nationals rules mirroring those of the Directive, all domestic laws and principles have to be employed in order to arrive at the solution prescribed by EU law.[91] We contend,

[86] Leaving the heart of the issue unresolved, save for eventual Commission infringement proceedings on the basis of Art. 258-260 TFEU (but the extra time involved renders that a much less workable compensation).

[87] In both cases, the route is barred to appeal to Arts. 56 and 63 TFEU instead: on the basis of the principle established in ECJ 5 Oct. 1977, Case 5/77, *Tedeschi* v. *Denkavit*, once an area of law has been harmonised, the Directive forms the exclusive framework within which to evaluate the eventual (non-)compatibility of provisions of national law.

[88] *See* Gerrit Betlem, 'The Doctrine of Consistent Interpretation – Managing Legal Uncertainty', in A.M. Schrauwen and J.M. Prinssen (eds.), *Direct Effect: Rethinking a Classic of EC Legal Doctrine* (Groningen, Europa Law Publishing 2002), p. 79.

[89] Cf. Prechal, *supra* n. 25, at p. 180-184.

[90] ECJ 10 April 1984, Case 14/83, *Sabine von Colson and Elisabeth Kamann* v. *Land Nordrhein-Westfalen*.

[91] Joined Cases ECJ 5 Oct. 2004, C-397/01 to C-403/01, *Pfeiffer and others* v. *Deutsches Rotes Kreuz*, but this was pronounced with similar vigour already in ECJ 13 Nov. 1990, Case C-106/89, *Marleasing* v. *La Comercial*.

however, that, for all its virtues, the doctrine of consistent interpretation would be unable to resolve the issue at hand, as it can never produce *contra legem* results, i.e., take offending national provisions integrally 'out of business' – which is precisely what is needed in the scenarios sketched above. The ECJ has been firm on this no-go-area: apart from the fact that such use of the interpretation technique would transgress the border between direct and indirect effect (circumventing the ban on horizontal effect of Directives), the Court contends that the principle of legal certainty militates against such a course of action as well.[92] Even if it were to take a more favourable stance, additional hurdles may be raised by national rules of construction and particular traditions of interpretation.[93] Furthermore, in *Kolpinghuis*, the ECJ held that the obligation of consistent interpretation is limited by the general principles of EU law, more in particular the principles of legal certainty and non-retroactivity.[94] At most then, the remedy of indirect effect but alleviates the headache and cannot cure it altogether: to combat any residual discrepancies in domestic law, as well as eventual non-compliant behaviour of private parties, full horizontal efficacy of the Directive remains indispensible.

Over the past years, tentative patterns of horizontal effects have in fact been cropping up in the Court's case-law.[95] *CIA Security* and *Unilever*, where private parties *were* allowed to rely on a Directive's provisions *vis-à-vis* one another, have gained considerable fame. Provisions of national law contrary to an EC directive had to be 'disapplied' in both these disputes. According to the ECJ, this did not breach the *Marshall/Dori* imperative as the domestic rules that were knocked out of the dispute did not define the substantive scope of the legal rule on the basis of which the national court had to decide the case before it and created neither rights nor obligations.[96] For effective enforcement of the Directive, an identical line of reasoning could be followed: its Articles 9 and 16 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 Directive in the above-mentioned cases, they create neither rights nor obligations. It has been assumed, however, that *CIA Security* and *Unilever* were exceptional judgments, triggered by (supposed) special features of the Notification Directive.[97] Yet, the range of potential manifestations

[92] *See* especially ECJ 16 Dec. 1993, Case C-334/92, *Wagner Miret* v. *Fondo de Garantía Salarial*, and ECJ 16 June 2005, Case C-105/03, *Criminal proceedings against Maria Pupino*.

[93] *See* Prechal, *supra* n. 25, at p. 193-199.

[94] ECJ 8 Oct. 1987, Case 80/86, *Criminal Proceedings against Kolpinghuis*.

[95] Christened 'incidental effects' in the 'Editorial Comments', 24 *European Law Review* (1999) p. 1-2.

[96] ECJ 30 April 1996, Case C-194/94, *CIA Security International SA* v. *Signalson SA and Securitel SPRL*; ECJ 26 Sept. 2000, Case C-443/98, *Unilever Italia SpA* v. *Central Food SpA*.

[97] Directive 83/189/EEC, *OJ* [1983] L 109/8, as amended by Directive 94/10/EC, *OJ* [1994] L 100/30.

of such an 'exclusionary horizontal effect' appears to be greater, as other incidents have involved different directives. Notably, in *Pafitis*, Directive 77/91/EEC, invoked by an individual against other private parties, was held to preclude the application of a conflicting rule of Greek law.[98] It takes formidable skill to maintain that, in a case such as this, the consequences that the other private parties had to endure as a result flowed solely and directly from the 'disapplication' exercise – in fact, obligations are imposed upon them in all but the name.

As a more general explanation for the increasing occurrence of such horizontal 'incidents', a doctrine of 'exclusionary effect' or 'invocabilité d'exclusion' has been advanced. But, before it could take-off properly, the *Pfeiffer* ruling was rendered, which was taken by some to signal its rejection.[99] Yet, if we are not mistaken, with the recent rulings in *Mangold* and *Kücükdeveci*, the concept receives a new lease of life.[100] In these two cases, the Court instructed national judges to apply substantive provisions of a directive in conjunction with a general principle of EU law in a dispute between an employer and an employee.[101] This enabled a material review of national rules that were thought to violate European rules on age discrimination. This strategy hands even better tools for successful enforcement of the Directive: for in cases falling within its ambit, where Articles 9 and 16 are certain to regulate and possibly solve the dispute at hand, one could well employ the *Mangold/Kücükdeveci*-mechanism, and allow for a combined reliance on the Directive's provisions and the general principles of free movement underlying the Treaties. True, both these judgments are ostensibly limited to the general principle of EU law that prohibits all discrimination on grounds of age, as given expression in Directive 2000/78. In addition, the ECJ drew from the fact that this principle was codified in Article 21(1) of the EU Charter of Fundamental Rights. Still, there is little reason why this novel mode of exclusionary effect could not be extended to other general principles – it surely ought to cover the four freedoms, the cornerstones of the internal market, which can lay claim to a similar fundamental status.[102]

[98] ECJ 12 March 1996, Case C-441/93, *Panagis Pafitis and others* v. *Trapeza Kentrikis Ellados*. *See also* ECJ 28 Jan. 1999, Case C-77/97, *Österreichische Unilever* v. *Smithkline Beecham* ; ECJ 30 April 1998, Case C-215/97, *Bellone* v. *Yokohama*; ECJ 13 July 2000, Case C-456/98, *Centrosteel* v. *Adipol*.

[99] *See*, e.g., Sacha Prechal, 'Case Note *Pfeiffer*', 42 *Common Market Law Review* (2005) p. 1445-1463; 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', 34 *Legal Issues of Economic Integration* (2007) p. 61-62.

[100] ECJ 22 Nov. 2005, Case C-144/04, *Mangold* v. *Helm*; ECJ 19 Jan. 2010, Case C-555/07, *Kücükdeveci* v. *Swedex*.

[101] It concerned *Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation*, *OJ* [2000] L 303/16.

[102] As confirmed in ECJ 5 Oct. 2004 Case C-442/02, *CaixaBank France* v. *Ministère de l'Économie, des Finances et de l'Industrie*, para. 21, and ECJ 10 March 2009, Case C-169/07, *Hartlauer Handelsgesellschaft mbH* v. *Wiener Landesregierung and Oberösterreichische Landesregierung*, para. 64.

One could object that even two swallows do not make a summer, and that the Court might want to shy away from building upon the new directions of late. As known, the criticism of *Mangold* has been overwhelming. *Kücükdeveci* may await a similar fate. Moreover, with these judgments, the ground-rules on the effect of directives are indeed gradually losing their coherence.[103] In addition, an element of circularity seems to loom in these judgments: after all, to circumvent its own ban on horizontal direct effect, the ECJ has beefed up the pervasiveness of general principles, yet, in practise, the latter can only be fruitfully applied if there is sufficient clarity as regards their implications. The provision of the Directive that gives expression to the general principle provides such clarity – thus materially, this provision is applied by the national judge – albeit under the guise of the general principle! Furthermore, since no ban exists on the imposition of obligations on individuals by general principles, the floor lies open for the resolution of a plethora of disputes where previously the *Marshall/Dori* imperative reigned mercilessly. This would prove a great boon to those litigating on the basis of the Services Directive, but mars the consistency of the case-law to an even greater extent. All the same, for all its virtues, if the highly sophisticated technique of utilising the exclusionary effect of general principles is to become the recommended route to bypass a blockade that was erected by the Court itself (the ban on horizontal effect), a complete eradication of that blockade would seem the more sensible course of action.[104] This would also serve the interest of legal certainty and the overall transparency of its jurisprudence better than adding further, refined and exotic twists.

## Conclusion

The Europe 2020 Strategy aims at boosting competitiveness, productivity, growth potential, social cohesion and economic convergence. It also emphasises that the single market needs to be taken to a new stage.[105] The crucial importance of the services sector for the European economies was reaffirmed in the recent *Monti Report*, which estimates that the potential economic gains from full implementation of the Services Directive range between 60 and 140 billion euro, representing a growth potential of between 0,6 and 1,5 % GDP.[106] At the same time, the Re-

[103] Cf. Editorial Comments, *supra* n. 95.

[104] In the same vein Henri de Waele, 'The Transposition and Enforcement of the Services Directive: A Challenge for the European and the National Legal Orders', 15 *European Public Law* (2009) p. 523-532 at p. 530-531. A meticulous analysis of the (lack of) arguments for maintaining *Marshall/Dori* in the present day and time provides Paul Craig, 'The Legal Effect of Directives: Policy, Rules and Exceptions', 34 *European Law Review* (2009) p. 349-377.

[105] *Conclusions of the European Council of 17 June 2010*, EUCO 13/10, p. 4.

[106] *A New Strategy for the Single Market at the Service of Europe's Economy and Society. Report to the President of the European Commission, José Manuel Barroso, by Mario Monti*, available at <ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf>, p. 53.

port admits that successful implementation requires an unprecedented effort by member states.[107] One might say that the latter largely flows from the fact that the Directive does not fit well in the European legislator's usual model for setting standards for services. As outlined in the preceding paragraphs, from a constitutional perspective, the Directive already takes the internal market to a new stage: by mixing elements of positive and negative integration, by introducing a radical new approach towards possible derogations from the free movement rules, by freezing the list of public interests involved, and through key provisions that require fundamental shake-ups of the member states' systems of public administration. As illustrated, the negative side to all this recasting, moulding and stretching of established rules and principles should not be overlooked, in particular the unhelpful blurring of the boundaries between harmonisation techniques, and the phrasing of exceptions in ways that are not consonant with the principles of good governance. By consequence, countless tried and tested approaches have to be abandoned. For one thing, there seems little sense in attempting to interpret and apply the Directive's system of exceptions rigidly. In the same vein, that some member states have opted not to implement key provisions of a directive should for once be approached with sympathy – albeit that this leads to novel puzzles and hardships, especially at the level of resolution of disputes between private parties.

Overall, the Commission seems to have its work cut out for it for the first assessment of the Directive's application, scheduled to be published at the end of 2011. The *Monti Report* proposes an ambitious approach to the evaluation process and recommends that the Commission take all necessary enforcement measures to ensure a rapid full implementation of the Directive.[108] At the political level, few seem to realise, however, that the Directive's styling and design raise many more complications than any other EU legal instrument. In the foregoing, we have suggested that good results can be achieved if the European institutions adopt a less than fierce position and follow a more flexible approach, e.g., in their traditional interpretation of exceptions (such as public policy) and towards the classic requirements for the transposal of directives. On top of that, the EU legislature may well have to revise the Directive on some points.[109] Also, its effective (horizontal) enforcement can only be guaranteed as long as earlier precedents are reconsidered and the case-law is construed flexibly. The need for further liberalisation of the services market lies beyond doubt. Overcoming the constitutional problems the Directive poses is nevertheless an essential precondition for attaining that goal.

[107] Ibid.

[108] Ibid. As indicated (*see supra* n. 78), the Commission seems to be going down this road indeed.

[109] For example, by adding consumer protection as exception to the freedom to provide services contained in Art. 16 SD.