



## **Briefing: Bolkestein Directive**

# **Commission's proposal for a Directive on Services in the Internal Market<sup>1</sup>**

### **Short Introduction**

The Commission presented an amended proposal of the Services Directive on April 4 2006. The amended proposal incorporates some proposed amendments by the European Parliament, from its first reading (16 February, 2006). It also includes clarifications proposed by the Council.

This briefing provides an assessment of the Commission's (new) proposal based on the Position Paper by EEB/G8.

### **Summary**

#### **So, should environmentalists still be worried?**

The general answer is no. Environmental (including the urban environment; public health) conditionality is evident in several relevant sections of the proposal. The 'country of origin' principle has been changed to 'freedom to provide services' and its provisions and derogations altered accordingly. Services dealing with water distribution and supply services and waste water services; treatment of waste; and the shipment of waste within, into and out of the European Community are exempted from the 'freedom to provide services', as are others such as services in the gas sector, electricity sector, coordination of social security systems etc. Taxation, social and health services are excluded from the scope of this (proposed) directive too.

Service provided by service providers from outside your country will still have to respect your country's environmental legislation. The country where the service is being provided (in this case, your country) is responsible for supervising the activities under its territory, carrying out checks, inspections, investigations etc necessary to supervise the service provider. In cases of serious acts with potential to cause damage to health, safety

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<sup>1</sup> Amended Directive of the European Parliament and of the Council on services in the internal market. COM (2006) 160 final. 2004/0001 (COD). Brussels 4.4.2006.  
[http://europa.eu.int/comm/internal\\_market/services/docs/services-dir/guides/amended\\_prop\\_en.pdf](http://europa.eu.int/comm/internal_market/services/docs/services-dir/guides/amended_prop_en.pdf)

of persons or the environment in its territory, the Member State (your country) shall notify other Member States concerned and the Member State where the service provider is established (an alert mechanism).

The discussion on the Directive is, however, not over yet.

**What was EEB/G8<sup>2</sup> concerned about in the Commission's original proposal<sup>3</sup>?**

(Please see box below)

**“The Commission however does not pay attention to the major issue of the directive legalising violations of national environmental laws and policies by foreign service providers and the general undermining impact that it can have on the effectiveness and acceptability of such laws and policies. Nor does the Commission pay attention to the complications which the “country of origin” principle will bring for environmental authorities, who will be required to operate in 25 or more countries to control the activities of “their” service providers abroad, rather than just one.**

The Directive does provide an opening to diverge from the country-of-origin principle (article 17, par. 17) but that is formulated in a rather restrictive way, which could lead to a lot of disputes.

The organisations consider that national, regional and local rules with regards to the protection of people's health, the environment and biodiversity should be fully respected by any economic actor in the relevant area, irrespective where such an actor comes from. **Therefore the “country of origin principle” should not apply in any way in these areas.**

The organisations have four reasons for this position;

1. The need for certainty for citizens that their authorities can and will apply the agreed national, regional or even local, environmental and public health policies and legislation, without being restricted in their enforcement mandate in any way due to the origin of certain actors;
2. The reality that still considerable differences exist between EU Member States with regards to the content of their environmental and public health protection policies, as well as with the seriousness of enforcement;
3. The recognition in the EC Treaty, articles 174 and 176, that Member States are allowed, within certain limits, to maintain and develop their own environmental policies beyond what has been agreed on the EU level;
4. The ridiculous burden that the Directive puts on “countries of origin” to control the behaviour of “their” service providers when providing services abroad, in up to 24 other Member States.

CONCLUSIONS:

- 1. The Directive should fully and systematically exempt from the country of origin principle any legislation or other policy related to the protection and/or improvement of the environment, of biodiversity and of public health.**
- 2. The Directive should ensure that authorities in Member States, on the**

<sup>2</sup> <http://www.eeb.org/activities/networking/g8-bolkestein-statement.pdf>

<sup>3</sup> [http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004\\_0002en03.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2004/com2004_0002en03.pdf)

**relevant level, have the unrestricted right to require that foreign service providers are familiar with, and comply with, the relevant environmental, nature protection, and public health legislation for the situation in which they will operate, and are able to communicate with citizens who might be affected by certain activities, in the local language.**

Footnote: (article 17, par. 17): [the country of origin principle shall not apply to] “specific requirements of the Member States to which the service provider moves, that are directly linked to the particular characteristics of the place where the service is provided and with which compliance is indispensable for reasons of public policy or public security or for the protection of the public health or the environment;”

### **The current Commission’s amended proposal: did our recommendations make a difference?**

In general, yes. As has been stated in the summary above, environmental conditionality is evident in several relevant sections of the proposal and the ‘country of origin’ principle has been changed to ‘freedom to provide services’ and its provisions and derogations altered accordingly. Other services have also been exempted from ‘freedom to provide services’. The concept of equipment: “... *does not refer to physical objects which are either supplied by the provider to the client or become part of a physical object as a result of the service activity such as building materials or spare parts or which are consumed or left behind in situ on the course of the service provisions such as combustible fuels, explosives, fireworks, pesticides, poisons or medicines*” (Recital 39b).

Additionally, if a service provider is established in the Member State where s/he provides a service, s/he comes under the scope of application of the ‘freedom of establishment’ – meaning that the laws/regulation/requirements in the country of establishment apply (this is his/her ‘original’ country). If s/he is carrying out activities in another country other than where s/he is established, the service activities provided are then covered by the ‘free movement of services’ – meaning that the country where the service is being provided is responsible for supervising the activities under its territory, carrying out checks, inspections, investigations etc necessary to supervise the service provider. The Member State where the service is provided is obliged to honour requests by the Member State of establishment – as when a Member State where the service provider is established requests the competent authorities of the Member State where the service is being provided to carry out checks, inspections, etc. The competent authority can decide on the appropriate measures to take to meet the request. In cases of serious acts with potential to cause damage to health, safety of persons or the environment in its territory, the Member State shall notify other Member States concerned and the Member State of establishment (an alert mechanism).

### **More details**

Article 4: **Definitions** (only a few given here)

(4) "Member State of *establishment*" means the Member State in whose territory the

Provider of the service concerned is established;

*(7a) “overriding reasons relating to the public interest” means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation of the national historic and artistic heritage; social policy objectives and cultural policy objectives;*

*(11) "Member State where the service is provided" means the Member State where the service is supplied by a service provider established in another Member State;”*

Freedom of establishment of service providers (Chapter II a. Section I – Authorisations; Section II – Requirements prohibited or subject to evaluation). Under the new proposal, the following are subject to accord with “reasons relating to public interest”, as one of the requirements for granting authorizations; or against which authorization and requirements can be limited or denied: Authorization schemes (Art. 9); Conditions for the granting authorization (Art. 10); Duration of authorization (Art. 11); Selection from among several candidates (Art. 12); Prohibited requirements (Art. 14).

Free movement of services (Chapter III: Section I – Freedom to provide services and related derogations; Chapter V – Administrative Co-operation): The former ‘country of origin principle’ (Art. 16) is now ‘Freedom to Provide services’ (Art. 16), with corresponding changes in requirements and derogations. Under ‘freedom to provide services’ Member States in which the service is provided are to ensure free access to and free exercise of a service activity within its territory, as stipulated in Art. 16, paragraph 1:

*“Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:*

- (a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established,*
- (b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment,*
- (c) proportionality: the requirement must be suitable for securing the attainment of the objective pursued, and must not go beyond what is necessary to attain that objective.”*

But, Member States can impose requirements “...with regard to the provision of *provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment, and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in*

*conformity with Community law, its rules on employment conditions, including those laid down in collective agreements.” (Paragraph 3).*

Additional derogations from freedom to provide services (Art. 17) include<sup>4</sup>:

*“(1) Services of General Economic Interest which are provided in another Member State, inter alia:*

*(d) water distribution and supply services and waste water services;*

*(e) treatment of waste;*

[...]

*(12) the authorisation regime provided for in Articles 3 and 4 of Council Regulation (EEC) No 259/93 on the supervision and control of shipments of waste within, into and out of the European Community<sup>53</sup>”.*

(Please see below, for reference (53) above)<sup>5</sup>

Administrative cooperation (Chapter V)

*“Article 33a*

*Mutual assistance – General obligations for the Member State of establishment*

*2. The Member State of establishment shall undertake the checks, inspections and investigations requested by another Member State and shall inform the latter of the results and, as the case may be, of the measures taken. In so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State. The competent authorities can decide on the most appropriate measures to be taken in each individual case in order to meet the request by another Member State.”*

*“Article 35*

**Supervision by the Member State where the service is provided in the event of the temporary movement of the provider**

*1. With respect to national requirements which may be imposed pursuant to Article 16 or Article 17, the Member State where the service is provided is responsible for the supervision of the activity of the service provider in its territory. In conformity with Community law, the Member State where the service is provided:*

*- shall take all measures necessary to ensure that service providers comply with those requirements as regards the access to and the exercise of a service activity;*

*- shall carry out the checks, inspections and investigations necessary to supervise the service provided.*

[...]

*3. At the request of the Member State of establishment, the competent authorities of the Member State where the service is provided shall carry out any checks, inspections and investigations necessary for ensuring effective supervision by the Member State of*

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<sup>4</sup> Derogations: Article 16 does not apply to these

<sup>5</sup> OJ L 30, 6.2.1993, p. 1. Regulation as last amended by Commission Regulation (EC) No 2557/2001 (OJ L 349, 31.12.2001, p. 1).

establishment. In so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State. *The competent authorities can decide on the most appropriate measures to be taken in each individual case in order to meet the request by the Member State of establishment.*”

“Article 34

**Supervision by the Member State of establishment in the event of the temporary movement of a provider to another Member State**

1. *With respect to cases not covered by Article 35(1), the Member State of establishment shall ensure that compliance with its requirements is supervised in conformity with the powers of supervision provided for in its national law, in particular through supervisory measures at the place of establishment of the service provider.*
2. *The Member State of establishment shall not refrain from taking supervisory or enforcement measures in its territory on the grounds that the service has been provided or caused damage in another Member State.*
3. *The obligation laid down in Paragraph 1 shall not entail a duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the Member State where the service is provided. Such checks and controls are carried out by the authorities of the Member State where the service provider is temporarily operating, on request of the authorities of the Member State of establishment, in accordance with Article 35.”*

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