Liberalisation of the market in services: a threat to workers' health and safety

The proposed Bolkestein Directive[1] sets out to lift all restrictions on the provision of services. In a big departure from the traditional Community law approach of harmonizing existing national legislation to create common rules, this proposal actually aims to perpetuate differences between national rules so as to fuel undercutting competition. Centrally, the draft directive will authorize businesses in one Member State to provide services in the territory of another provided they comply with the rules in their country of origin. Also, Community checks on the provisions in the state where the service is being provided will be tightened up. Some provisions are prohibited, while others are "questionable" and can only be maintained if the Member State can show an overriding reason like protection of occupational health (necessity), that they are non-discriminatory and are proportional to the objective pursued. This latter requirement brings in value judgements of political expediency. Employers could attempt to have many national provisions struck down by claiming that the rules are too stringent and that more limited measures would be more in line with the proportionality principle.

Spin-offs on health and safety

The proposed Bolkestein Directive will not directly change the way national health and safety law applies to employees from third countries providing services, because the proposal's country of origin principle does not apply to matters covered by Posting of Workers Directive 96/71. Even so, the proposed Services Directive's attempt to foist on Member States a general rule that service providers should be subject only to the national provisions of their country of origin poses a serious indirect threat to the enforcement of health and safety rules. Also, the requirements that are prohibited by the directive will make it very hard to carry out inspections and checks to enforce the Posting of Workers Directive.

The problems involved can best be illustrated by a number of practical examples:

- All the Community States have widely-differing provisions on preventive services[2]. In Belgian law, for instance, they must be formed as non-profit-making organizations with a management set-up which combines trade union participation with elements of public oversight. To ensure that prevention activities are run in a coherent and planned manner, employers must as a rule enlist the services of only one preventive service, and company-service relations are governed by detailed statutory provisions. In France, the provisions on health surveillance require individual health checks to be combined with collective preventive activities

The international dimension of the Bolkestein Directive

A great many Member States have voiced disquiet about the Commission's approach. They see that the Bolkestein directive will significantly impair their ability to regulate the services market. Whole swathes of the economy (public services, health, temporary agency work) would be sucked into a downward spiral of competition.

The Commission's ultra free-market approach is partly to do with the international dimension of the Directive. The Commission is trying to strengthen its own hand in the World Trade Organization's General Agreement on Trade in Services (GATS) talks. The GATS is setting out to open up 160 sectors of activity, including health ($ 3 500 billion worldwide) and education ($ 2 000 billion) to completely unfettered competition. It is a project to commercialize virtually every area of human activity (apart from the armed forces, law enforcement, justice and a few other odd areas by rights reserved to States). The end result would be to dismantle public services and tie States' hands in passing rules to protect social and employment rights, health or the environment. The disastrous liberalization of the water industry in some Latin American countries is a practical illustration of what consequences these negotiations could bring.

In a European Parliament hearing held on 11 November 2004, Mr Raoul Marc Jennar, a researcher with Oxfam-Solidaire (Belgium), analyzed the linkages between the Bolkestein directive and the GATS, pointing up the many similarities between the Commission proposal and the GATS. The proposal for a directive, if adopted, would bring an automatic transfer of Member States' responsibilities to the Community institutions. The Commission would no longer have to involve Member States in framing Community strategy in the GATS negotiations. Seen from this angle, the reasons for the very radical character of the proposal and the Commissioners' backing for it are not hard to divine.

The full text of Mr Jennar's submission is available on the European Parliament's website: http://www.europarl.eu.int/hearings/20041111/imco/contributions_en.htm.

[1] Proposal for a directive on services in the internal market. Although the proposal is referred to in shorthand as the "Bolkestein Directive", it is, like all proposals for directives, an initiative adopted by the European Commission as a body, headed at the time by Mr Romano Prodi. Former Competition Commissioner Bolkestein clearly does not bear the full political responsibility for this proposed measure alone.

[2] See the special report in *TUTB Newsletter* No. 21, June 2003. Sharp differences are also found in the rules on coordination of mobile and temporary construction sites, where lack of Community-level harmonization means that the proposal for a directive could well open the door to uncontrolled competition.

in the workplace (the "tiers temps" - one-third of the occupational doctor's time spent on workplace activities) by a preventive service. Other States (like the United Kingdom) have almost no provisions on preventive services, but instead a "free market" in consultancy services that escapes all public or trade union surveillance.

- Requirements on the use of scaffolding vary between countries. Some turn a relatively blind eye to the use of suspended or flying scaffolds, while in others it is tightly controlled. Legislation and regulation here tend to be backed up by other requirements: labour inspectorate specifications, provisions of collective agreements, requirements of joint prevention bodies, terms in public works contracts, etc.
- Some Community countries allow asbestos removal to be done only by approved firms that meet strict requirements on the training of workers, the equipment used, and working methods. In some countries, the type of employment contract may be a relevant factor in these requirements (e.g., temporary workers not to be employed in asbestos stripping)[3].

Provisions that will encourage social dumping

Commissioner Bolkestein's proposal for a directive could undercut existing levels of protection.

- Article 9 limits States' ability to set up authorization schemes. More specifically, the State must show that the objective pursued cannot be attained by means of a less restrictive measure. This kind of test is fraught with uncertainty, since there may be reasonable differences over how far to err on the side of safety in order to ensure effective protection of workers' health.

- Article 15 sets out a list of requirements that would have to be evaluated, a number of which could impact health and safety rules. The requirements cited in points 2 (b); 2 (d); 2 (f); 2 (g) and 2 (j) are of the essence of how preventive services operate in several Member States, for example (see box below). They are designed to enable preventive services to do their job by balancing the conflict between the interests of the "direct client" (employer) and the protected interests (workers' health and public health) which requires preventive services not to be purely market-driven but governed by a set of rules that foster a coherent, planned approach to prevention. For example, a number of countries have requirements that go beyond the individual professional qualifications of prevention experts and stipulate that services must possess multidisciplinary capabilities (which involves having a minimum number of different staff). Here again, the underlying justifications of such requirements may be evaluated in very different ways. Point 2 (j) is particularly important in making the obligation on the provider to supply other specific services jointly with his service a requirement "to be evaluated". Many countries' laws attempt to avert fragmentation of prevention activities by requiring delivery of bundled services, e.g., individual health surveillance must be combined with an evaluation of collective working conditions.

- Article 15.5 is more restrictive still in making any new requirement (after the Directive has come into

Some of the article 15 questionable requirements

Article 15 sets out a long list of requirements that must be evaluated by reference to three principles: non-discrimination, need and proportionality. While there are no issues with the first of these principles, the second is largely informed by different perceptions of the interests that need protecting, and the third effectively subjects national regulation of service activities to Community control, including in all areas where no Community harmonization measure exists. Anything that hampers the free play of market forces could be put in doubt regardless of the kind of service. Health care and advertising, services to disabled persons and pet grooming are all lumped together in the same boat!

Point 2 (b) concerns requirements that place an obligation on a service provider to take a specific legal form, like a non-profit-making organization. This is clear evidence of how the proposal is not limited to tackling prospective protectionist measures, but aims to impose for-profit-based competition in all service sectors.

Point 2 (d) concerns access to service activities being reserved to particular providers by requirements other than those concerning professional qualifications or provided for in Community instruments. This poses a threat to any requirement that addresses potential conflicts of interest. For example, in most Community countries, employers may not require occupational health doctors to police sickness absences.

Point 2 (f) deals with requirements that fix a minimum number of employees. A number of European Union countries require preventive services to be comprised of a minimum number of individuals so as to bring together the different areas of expertise needed for multidisciplinary intervention.

Point 2 (g) refers to compulsory minimum and/or maximum tariffs. This, again, is a requirement made in several Community countries to avoid completely unregulated competition that would undermine quality.

Point 2 (j) concerns an obligation on the provider to supply other specific services jointly with his service. This is a frequent requirement to avert fragmentation of prevention activities.

[3] The example of asbestos removal work can be extrapolated to many other high-risk jobs, where national legislation and practices do not simply lay down rules on job qualifications but also many other requirements on business organization, working methods, equipment, supervision of activities, etc.

Foiling the total liberalization of dock work
How can trade union action help produce better Community legislation ?

It is easy to get lost in the maze of Community institutions. The decision-making bodies are not in touch with ordinary people's concerns. This often prompts feelings that little can be done about it. Even at national level, it is not easy for individuals to have an active say in politics. But there are some encouraging precedents to show that trade union mobilization can make a difference and shape policy options. The example briefly outlined here relates to legislation that could have done serious damage to living and working conditions.

The attempt to forcibly liberalize dock work would have created serious risks to health and safety. Transport workers' unions began an all-out campaign immediately the proposed liberalization was announced by the European Commission. One of the most dangerous aspects of the reform was what was called the self-handling principle which would have allowed ship owners to have vessels loaded and unloaded by personnel of their own choice, which could be casual labour hired for the purpose, or ship's crew lacking dockers' skills. This principle put dockers' jobs and safety at risk, and created competition which would undercut wages and working conditions. Below is a short timeline of the events.

- **13 February 2001.** European Commission publishes its proposal for a directive on market access to port services.
- **25 September 2001.** First action day called by the European Transport Workers' Federation. Protests by British, Spanish and Belgian dockers.
- **14 November 2001.** European Parliament amends the Directive, but leaves the self-handling principle intact.
- **13 December 2001.** Several thousand dockers join the ETUC demo at the Laeken European Summit (Belgium), getting a big public focus on their demands.
- **19 February 2002.** European Commission brings forward a new proposal, which ignores the changes called for by Parliament.
- **14 March 2002.** Dockers are prominent in the ETUC's Barcelona European Summit demo.
- **June 2002.** First strikes in six different countries (including Norway) against the European Commission's proposals.
- **25 June 2002.** Council of the Ministers adopts a common position, which includes even worse self-handling provisions.
- **January 2003.** Second action day with 24-hour strikes across 17 countries.
- **17 February 2003.** 500 dockers in 13 European countries respond to the European Transport Workers' Federation's call to protest their demands outside the European Parliament building in Brussels.
- **18 February 2003.** European Parliament's Transport Committee works out a compromise that limits the Directive's most dangerous aspects, but still accepts self-handling on certain conditions.
- **20 February 2003.** 250 dockers demonstrate in Antwerp against the visit of European Transport Commissioner Loyola De Palacio.
- **10 March 2003.** 3,000 dockers from five countries demonstrate outside the European Parliament building in Strasbourg beneath the slogan "Leave it to the specialists. It's our job".
- **12 March 2003.** European Parliament votes through the Directive on second reading, with the requirement that self-handling should be subject to prior authorization.
- **15 April 2003.** Council of Ministers rejects the European Parliament's amendments. Conciliation procedure initiated.
- **9 September 2003.** Strike actions in Belgian and Dutch ports.
- **29 September 2003.** Rotterdam sees a protest by 9,000 dockers from nearly a dozen countries (including a delegation from the United States). Work stoppages in Belgian, French and Dutch ports. Dockers from southern European countries hold a protest march in Barcelona.
- **30 September 2003.** Conciliation procedure results in a text which allows self-handling in certain conditions. Voting is very close-run in the European Parliament delegation. The very same day, the European Transport Workers' Federation rejects the outcomes of the conciliation procedure. It announces further action by dockers against the Directive, which still has to be approved by Parliament in plenary session.
- **17 November 2003.** A petition of 16,000 signatures is handed in to the President of the European Parliament protesting against the conciliation procedure compromise text. In Belgian ports, workers start each break an hour ahead of time. Massive email campaign to MEPs.
- **20 November 2003.** European Parliament rejects the conciliation procedure directive by 209 votes for, 229 votes against and 16 abstentions. This is only the third time in 10 years that a conciliation procedure text has been voted down in Parliament's plenary session.

force) subject to meeting an additional criterion: proof that new circumstances exist. Article 15.6 makes the adoption of new requirements subject to a Community notification and control system. Unlike the situation in other areas (technical standards, for example), such a system would not be operating within a framework harmonized by Community legislation. It would significantly restrict Member States' ability to introduce improved levels of protection for workers, and poses a challenge to the national responsibilities recognized under article 137 of the Treaty.

- Article 16 of the proposed directive lays down the country of origin principle which leaves service providers subject only to the rules of their country of origin. Where occupational health is concerned, such rules may conflict with national provisions. Article 16.3, in particular, prohibits a number of requirements. Point (h) prohibits any "requirements

which affect the use of equipment which is an integral part of the service provided". A requirement in a collective agreement for the construction industry, for example, stipulating that only a certain type of scaffolding was to be used in order to guarantee a high level of safety would be in breach of the provisions of the Bolkestein proposal. Similarly, requirements for the equipment to be used on an asbestos removal site could be called into question if the country of origin had different requirements. This is anything but pure speculation: the matter has never been completely harmonized by the Community Directives on health protection for workers exposed to asbestos. Point (h) throws open to question the exercise of national responsibilities for the use of work equipment resulting from Directive 89/655 of 30 November 1989, which provides for a minimum level of harmonization and leaves States free to introduce or maintain provisions that guarantee a better level of protection for workers. Also, regulation of periodic controls on special-risk work equipment is still largely a national responsibility. Here, too, national rules could be thwarted in the case of a service provider whose country of origin has less stringent rules.

In short, the proposed Bolkestein directive seriously undermines the application of health at work rules which in many cases involve the definition of requirements for service providers who may have a direct role in prevention (preventive services, organization of health surveillance, construction site coordination, etc.) or as economic operators whose activities may affect the health and safety of workers (e.g., building contractors, temporary employment, etc.). Far from bringing about a harmonization consistent with the protection of safety and health, the proposal restricts Member States' abilities to introduce rules that guarantee quality of work by what may be key players in health and safety. This would also affect many non-state actors, since the "requirements" that are prohibited or constrained by the proposal for a directive may be collective rules laid down by professional bodies or associations. By listing prohibited and questionable requirements ("to be evaluated"), the proposal for a directive far overshoots its professed aim. It does not stop short at tackling whatever discriminatory requirements might prospectively be laid down purely to protect a national market, but sharply curtails States' abilities to continue regulating the market in services. This would have very dire consequences for workers' health and safety. ■

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