ASSER PRESS

Legal Issues of Services of General Interest

The EU Services Directive: Law or Simply Policy?

Maria Wiberg

Springer

Legal Issues of Services of General Interest

More information about this book at http://www.springer.com/series/8900

Maria Wiberg

The EU Services Directive: Law or Simply Policy?

ASSER PRESS

Springer

Maria Wiberg
Department for the EU Internal Market
Swedish Ministry of Foreign Affairs
Stockholm
Sweden

ISBN 978-94-6265-022-0 ISBN 978-94-6265-023-7 (eBook)
DOI 10.1007/978-94-6265-023-7

Library of Congress Control Number: 2014943747

Published by T.M.C. ASSER PRESS, The Hague, The Netherlands www.asserpress.nl
Produced and distributed for T.M.C. ASSER PRESS by Springer-Verlag Berlin Heidelberg

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Series Information

The aim of the series *Legal Issues of Services of General Interest* is to sketch the framework for services of general interest in the EU and to explore the issues raised by developments related to these services. The Series encompasses, inter alia, analyses of EU internal market, competition law, legislation (such as the Services Directive), international economic law and national (economic) law from a comparative perspective. Sector-specific approaches will also be covered (health, social services). In essence, the present Series addresses the emergence of a European Social Model and will therefore raise issues of fundamental and theoretical interest in Europe and the global economy.

Series Editors

Ulla Neergaard
Faculty of Law
University of Copenhagen
Studiestræde 6
1455 Copenhagen K
Denmark
e-mail: ulla.neergaard@jur.ku.dk

Johan Willem van de Gronden
Faculty of Law
Radboud University
Comeniuslaan 4
6525 HP Nijmegen
The Netherlands
e-mail: j.vandeGronden@jur.ru.nl

Erika Szyszczak
Sussex Law School
University of Sussex
Brighton, BN1 9SP
UK
e-mail: E.Szyszczak@sussex.ac.uk

Markus Krajewski
Fachbereich Rechtswissenschaft
Universität Erlangen-Nürnberg
Schillerstraße 1
91054 Erlangen
Germany
e-mail: markus.krajewski@jura.uni-erlangen.de

Preface

The understanding and interpretation of the EU Services Directive is a moving target and thus both an enduring and thrilling investigation. This book is the result of my profound curiosity in understanding the Services Directive and what consequences it could have on the national room for manoeuvrability for the Member States of the EU.

The process of forming the final text has been an exciting journey in which I have had great support. I would therefore like to express my gratitude to Uppsala University which, through a scholarship, has enabled me to finalise this book. I would also like to express my special thanks to Prof. Ulla Neergaard, Prof. Johan van de Gronden and Prof. Markus Krajewski for giving me this opportunity and, in this respect, especially, Prof. Erika Szyszczak for also providing insightful comments and help in improving the text. Furthermore, many thanks to Associate Professor Jane Reichel and Prof. Antonina Bakardjieva Engelbrekt for their general support and to Robert Houser for the language corrections. Finally, my deepest thanks to my loving family for allowing me to take the time to complete this mission.

Stockholm, Summer 2014

Contents

Abbreviations

CER	Closer Economic Relations Trade Agreement
EAEC	European Atomic Energy Community Treaty
ECHR	European Convention on Human Rights
ECSC	European Coal and Steel Community
EEC	European Economic Community
EFTA	European Free Trade Area
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
NAFTA	North American Free Trade Area
SEA	Single European Act
SGEI	Services of General Economic Interest
SGI	Services of General Interest
TEC	European Community Treaty
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organisation

Chapter 1
Introduction

Contents

1.1 Background

Trade in service activities has been shown to be of immense economic importance. It represents more than 65 % of the Gross Domestic Product (GDP)[1] within the European Union (the Union) and today constitutes the engine of economic growth, providing about 65 % of the workforce in the Member States.[2] However, a very small part of the services market relates to cross-border services between the Member States.[3] Towards the end of the 1990s and in the early 2000s focus was

[1] Commission Communication on the implementation of the Services Directive—A partnership for new growth in services 2012–2015, COM(2012) 261 final. In Recital 4 of Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market [2006] OJ L 376/36 (Services Directive), it is said that the service sector represent 70 % of EU GDP.

[2] Source: Eurostat, National Accounts, annual average. See also the Commission staff working paper on the extended impact assessment of proposal for a directive on services in the internal market SEC(2004) 21.

[3] In 2010 only 20 % of the services market relates to cross-border services between the Member States; see '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, 9 May 2010, at p. 53.

M. Wiberg, *The EU Services Directive: Law or Simply Policy?*,
Legal Issues of Services of General Interest, DOI 10.1007/978-94-6265-023-7_1

placed on a renewed agenda to realise the internal market for services. This was based on the fact that the Union is in no position to disregard the dysfunctional internal market[4] for services particularly during times of economic downturn and widespread unemployment. The Lisbon European Council[5] in 2000 proclaimed that "[t]he Union has today set itself a new strategic goal for the next decade: to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion".[6]

Concurrently, it was also emphasised that focus should be on enhancing the quality of regulation. The seven principles of necessity, proportionality, subsidiarity, transparency, accountability, accessibility and simplicity were set out in a report from the Mendelkern Group[7] as being essential for "better" governance in the EU. These principles provided the foundation for the 2001 White Paper on European Governance,[8] and also the 2002 Commission Action Plan[9] for simplifying and improving the regulatory environment.[10] During the last decade these issues have been related to realising the internal market goals, and have become increasingly important referring to the need of not only "better" but also "smarter" regulation within the Union.[11]

In the endeavour to provide for economic growth and governing the area of free movement of services the Lisbon European Council, inter alia, invited the European Commission (Commission) to propose a comprehensive Internal Market Strategy to remove national barriers to the free movement of services,[12] which was accomplished by the Commission at the end of 2000. The Commission proposed a

---

[4] Generally "common market", "internal market" and "single market" are used synonymously within the discussions related to Union law. See Barnard 2010, p. 12, referring to Oliver et al. 2010. See also Mortelmans 1998, Sect. 2.4. Today Union documents mainly refer to "the Single Market", see for example Commission Communication on the action plan for the single market CSE(97) 1 final and Commission Communication on better governance for the Single Market COM(2012) 259 final. In general the terms "internal market", the "common market" and the "single market" are used as synonyms in this book.

[5] Lisbon European Council 23–24 March 2000.

[6] Ibid, Presidency conclusions, para 5.

[7] Commission White Paper on Governance COM(2001) 428.

[8] See the Final Report of the Mandelkern Group on Better Regulation 13 November 2001.

[9] Commission Communication action plan simplifying and improving the regulatory environment (2002) 278 final.

[10] Hatzopoulos 2012, p. 332.

[11] See for example Commission Communication on the single market act twelve levers to boost growth and strengthen confidence "Working together to create new growth" COM(2011) 206 final and Report from the Commission on subsidiarity and proportionality (16th report on better lawmaking covering the year 2008) COM(2009) 504 final.

[12] Commission Communication, an internal market strategy for services, COM(2000) 888 final, p. 2.

horizontal approach to harmonising all requirements having effects on several sectors, as well as providing for an efficient application of the principle of mutual recognition[13] to establish a true internal market for services.[14]

Eventually this led to the enactment of Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market [2006] OJ L 376/36 (Services Directive). In the proposal for the Services Directive it was stated that previously it had not "been possible to exploit fully the growth potential of services because of the many obstacles hampering the development of services activities between the Member States".[15]

The objective of the Services Directive is to realise the internal market for services. Its full implementation,[16] which covers services accounting for approximately 45 % of the Union GDP, is estimated to have potential economic gains ranging between € 60 and 140 billion, representing a growth potential of between 0.6 and 15 % GDP.[17] Thus, its success is of great importance to the Union.[18] Successful implementation here within the meaning that the internal market for services in fact works, not only for the benefit of service providers, but also for recipients and the overall economic progress of the Union.[19]

However, in the author's opinion successful liberalisation of the free movement of services requires legal certainty and predictability in order to create trust. The Services Directive must therefore be transparent and understandable and, moreover, may not undermine the Member States' aspirations to regulate services which they consider as essential to the welfare state.

In light of this, the ambitious initial proposal of the Services Directive comprised a radical horizontal approach and country-of-origin principle; both techniques seen as speedy and efficient ways of dismantling trade barriers. However,

---

[13] Ibid, p. 15.

[14] Ibid, p. 15, referred to as "Action 3".

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

[16] Including the additional actions to be taken in accordance with Articles 38, 39 and 41 of the Services Directive.

[17] 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, 9 May 2010, p. 53 and Commission Communication on the implementation of the Services Directive—A partnership for new growth in services 2012–2015, COM(2012) 261 final.

[18] See e.g. Europe 2020: Europe's growth strategy; http://ec.europa.eu/europe2020/pdf/europe_2020_explained.pdf, and also Commission Communication, Annual Growth Survey 2014, COM(2013) 800 final.

[19] These potential economic gains may, be questioned, see Hay 2007. Hey argues that the obsession within the Union regarding "competitiveness" combined with the Services Directive, inter alia, results in price reductions that drive down wages. If the quantity of the service demand does not rise as its price falls, this will reduce the financial value of the sector, and if the earnings of the population decrease, the overall fiscal income decreases.

this proposal was caught between the objective of realising an internal market for services and the fears of the Member States of the effects of Union law on national regulatory autonomy being to extensive. The concerns regarding the Member States' possibilities to retain control of social policy issues and secure their regulatory competence, as well as their regulatory autonomy, therefore prompted the Parliament to drastically alter that proposal. This is why in the final version of the Services Directive, the country-of-origin principle was abandoned and the list of exempted service activities extended and clarified in relation to labour law and services closely related to the welfare state.

The many amendments to the proposal resulted in the Services Directive in its final version constituting an ambiguous regulatory measure, representing a compromise of lengthy and strenuous deliberations between the Union institutions and the Member States. The Services Directive has therefore been criticised for being drafted without consideration being taken for its incidental effects on non-trade matters or, for the proper division of power between the Union and the Member States and, that it unduly modifies the effects on the Member States national regulatory autonomy.[20]

This may be seen against the backdrop of a three-part relationship: a common aspiration to realise the internal market for services to create an overall economic progress within the Union, which is merely conferred with specified regulatory powers and, the Member States as represented by political interests expressing concerns related to the effects on national regulatory autonomy.

This is the case since one of the cornerstones of the Union is the undertaking to create an internal market, established in part by the four freedoms, also referred to as the fundamental freedoms,[21] in accordance with the Treaty on the Functioning of the European Union (TFEU). These four freedoms mandate that in this endeavour the Member States of the Union are prohibited from imposing unjustified discriminatory restrictions or hindering access to their markets in relation to the free movement of goods, services, persons and capital. Reflected are the rights of both citizens and companies of the Member States to engage in cross-border trade in tangible (goods) or intangible (services) products, and for persons to move freely and work or establish businesses within the Union, and freely transfer capital and payments as between the Member States. The Member States must thus on their part observe,

[20] Davies 2007, p. 233 and O'Leary 2011, pp. 520–521.

[21] The Court has referred to them as "fundamental freedoms" in cases concerning the four freedoms as now under Articles 34, 45, 49, 56 and 63 TFEU, see for example Case 139/85, *R. H. Kempf* v. *Staatssecretaris van Justitie* [1986] ECR 1741, at para 13; Case C-456/10, *Asociación Nacional de Expendedores de Tabaco y Timbre (ANETT)* v. *Administración del Estado* [2012] ECR 0000, at para 53 and; Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union* v. *Viking Line ABP and OÜ Viking Line Eesti* [2007] ECR I-10779, at para 45.

give effect to and respect these fundamental freedoms within their national legal orders and in the exercise of their regulatory competence within their autonomy.[22]

The legislator of the Union, represented by the European Parliament (Parliament) and the Council of the European Union (Council) on an initiative by the Commission, may adopt regulatory measures in order to realise these fundamental freedoms in accordance with the conferral of powers set out in the Treaty. This implies that the Union institutions on their part, in the exercise of the powers conferred on them to regulate the internal market, must comply with, and respect, the distribution of regulatory competence between the Union and the Member States as set forth in the Treaty.

However, the scope of the fundamental freedoms and thus also their effects on the national room for manoeuvrability for the Member States is mainly defined by the Court of Justice (Court) in its case law interpreting Articles 34, 45, 49, 56 and 62 TFEU.[23] This case law is based on a different rationale from that of the distribution of regulatory powers between the Member States and the Union. This means, for example, that national measures adopted within a regulatory area such as taxation or social policy may still constitute restrictions within the meaning of the fundamental freedoms despite such regulatory areas falling outside the regulatory competence of the Union.

Interpretative difficulties associated with the above-mentioned three-part relation are therefore unavoidable as the Court has established the scope of the fundamental freedoms, the objectives of which the Union legislator may provide regulatory measures to realise, decisive as to the effects of Union law on the national regulatory autonomy of the Member States. The identification of restrictions to free movement is thus inherently connected to the constitutional operations of the Union and the vertical allocation of powers. Furthermore, the identification of restrictions is characterised by a negative obligation on the Member States not to restrict trade in the endeavour to create an internal market, whereas through the vertical allocation of powers that same objective is to be fulfilled, however, through positive regulation such as approximation and harmonisation.

---

[22] This may be said to reflect a "Europeanization" of the Member States laws. For a discussion of the different aspects of "Europeanization", see Snyder and Maduro (eds.) 2000. The notion of Europeanization has been discussed vividly in an extended number of texts provided by both legal scholars and political scientists, see for a list of such literature, http://europeanization.wordpress.com/europeanization/. Though a broad concept touching upon a vast number of other aspects than the Europeanization of law, it is only the latter aspect of this concept that is referred to here.

[23] Hatzopoulos 2012, p. 99.

1.2 The Subject of This Study

The overall aim of this book is to discuss whether the Services Directive is to be interpreted as law or simply policy. This interpretation is conclusive as to the Directive's effects on the national regulatory autonomy of the Member States. Policy in this context meaning an instrument not binding as to its textual meaning but, rather, introducing a "strategy" to monitor and govern the Member States in regulating service activities, founded on cooperation and consent.

The grounds for questioning whether the Services Directive is to be interpreted as law or policy are that, on the one hand, the Services Directive provides for harmonisation of substantive rules and regulations through negative obligations, seeking to repeal all national requirements having effect on the provision of services and the establishment of service providers. On the other hand, it introduces a unique implementation process, including a number of innovative new governance instruments, indicating its principal objective being something other than approximation of national regulations. In fact, the Directive provides for more procedures to be followed during the implementation period than substantive harmonisation.

Central is that the Services Directive instead of generally providing for positive obligations on the Member States to create a level playing field, it establishes negative obligations reflecting the case law of the Court interpreting Articles 49 and 56 TFEU. Concurrently, despite being adopted as a legislative act of positive integration, the Services Directive also exhibits features of a more broadly conceived governance device, launching a process of evaluation and consultation that, according to its preamble, is to "make possible the progressive and coordinated modernisation of national regulatory systems for service activities which is vital in order to achieve a genuine internal market for services".[24]

Negative obligations may be found in Articles 14, 15 and 16 of the Services Directive which prescribe that the Member States are not to make the access to, or exercise of, a services activity in their territory subject to compliance with any requirements[25] which fail to respect the principles of non-discrimination, necessity

[24] Recital 7 of the Services Directive.

[25] In Article 16 it is stated that the "Member States shall not make access to or exercise of a service activity in their territory subject to compliance with *any requirements* [emphasis added]", while Article 14 provides that "Member States shall not make access to, or the exercise of, a service activity in their territory subject to compliance with *any … discriminatory requirements* based directly or indirectly on nationality or, in the case of companies, the location of the registered office [emphasis added]. In addition, Article 15 establishes those requirements that must be evaluated by the Member States. It sets out that the Member States shall examine, firstly, whether their legal system makes access to a service activity or the exercise of it subject to compliance with certain specified *non-discriminatory requirements* and secondly, that the Member States verify that those specified requirements satisfy the conditions of: (a) non-discrimination: requirements must be neither directly nor indirectly discriminatory according to nationality nor, with regard to companies, according to the location of the registered office; (b) necessity: requirements must be justified by an overriding reason relating to the public interest; (c) proportionality: requirements must be suitable for securing the attainment of the objective

and proportionality.[26] What constitutes a "requirement" in this respect may be found in Article 4(7) of the Services Directive.

Articles 14, 15, 16 and 4(7) of the Services Directive provide for certain specifications in relation to the established case law of the Court, suggesting that the Services Directive has greater far-reaching effects on the national regulatory autonomy of the Member States than Articles 49, 56 and 52 TFEU. That is the case since the Services Directive stipulates that "requirements" are those national measures falling within a specific and closed definition and, such requirements must be purely non-discriminatory. Furthermore, as regards the temporary provision of services, in addition such non-discriminatory requirements may merely be justified by a limited number of reasons. By contrast, Articles 49, 56 and 52 TFEU, as interpreted by the Court, reflect an open ended definition of national measures and a non-exhaustive list of justifications.

One question that arises is whether the final version set out in Articles 14, 15, 16 and 4(7) of the Services Directive, by specifying the previously recognised interpretations of the negatively defined obligations provided in Articles 49, 56 and 52 TFEU, extend the liberalisation of the internal market for services and service providers? Moreover, and most importantly, do those specifications constitute legally sound and legitimate modifications of the balancing act between the interest to establish the internal market and national public interests as recognised by the Court in its case law? Or, could the Directive raise constitutional difficulties within the Union legal order related to the established hierarchy of norms and division of regulatory powers, taking into consideration that it constitutes an act of secondary law possibly extending the scope of primary law. Central in this respect is that the Services Directive aims to provide for approximation through negative obligations and negative integration.

The question is all the more pertinent in light of the principle of conferred powers. According to Article 5(2) TEU, competences not conferred upon the Union in the Treaties remain with the Member States. This principle requires the Union and its institutions to refrain from (unduly) overstepping the limits of the powers conferred on it. In this respect, one should also bear in mind the fact that as a result of the fears of loss of national regulatory autonomy reflected by the objections within the Parliament, the Services Directive was considerably revised before it was adopted.

(Footnote 25 continued)
pursued; they must not go beyond what is necessary to attain that objective and it must not be possible to replace those requirements with other, less restrictive measures which attain the same result." In addition, it is provided in Article 15(4), this "shall apply to legislation in the field of services of general economic interest only insofar as the application of these paragraphs does not obstruct the performance, in law or in fact, of the particular task assigned to them".

[26] Article 9 of the Services Directive also provides for a negatively defined obligation, however, in relation to the specified concept of "authorisation schemes", which is merely incidentally discussed in this study.

In light of this, a second question is thus whether the Directive, despite its form as a traditional legal instrument, is better understood as a governance instrument to control and steer the national processes of implementing the Directive and to continuously regulate service activities? If this assumption is correct, a follow-on question would be, how such an understanding may influence the interpretation of the Services Directive taking into consideration the first question posed?

Answering these questions make it possible to conclude whether the Services Directive is better understood as law or simply policy and what are its *actual* effects on the national regulatory autonomy of the Member States. More specifically, whether Articles 14, 15, 16 and 4(7) of the Services Directive extend the effects of Union law on the national regulatory autonomy, or whether those Articles must be understood in light of the overall context of the Directive and, thus, be interpreted extensively. In such case, it is also possible to discuss whether the Services Directive must be considered rather as a policy document and, what could be the consequences as to the understanding of the effects of the Directive on the national regulatory autonomy of the Member States.

However, before moving on it must, firstly, be emphasised that the focus of this study is the free movement of services. This is the case since the general design of the Services Directive is a direct consequence of the specific characteristics of service activities. The overarching aim of the Services Directive is to realise a "true internal market for services" whereby also the right to establish as a service provider is regulated by the Directive. Thus, despite the fact that the central attention is on Article 56 TFEU, Article 49 TFEU is also discussed in the following analysis. Falling outside the core of this study is Article 9 of the Services Directive establishing that Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless non-discriminatory, justified by an overriding reason relating to the public interest and being proportionate. This is the case as Article 9 of the Services Directive explicitly prohibits "authorisation schemes" and not "requirements" as defined by Article 4(7), Article 9 of the Services Directive, as well as Articles 14, 15 and 16 of the Services Directive, impose a negative obligation on the Member States, though in relation to the concept of "authorisation schemes", whereby numerous arguments made in relation to Articles 14, 15 and 16 of the Services Directive may also be made in relation to Article 9 of the Directive. For the sake of clarity and simplicity an analysis of Article 9 of the Services Directive is left outside of this study.

Secondly, when reference is made to free movement within the Union in this work, what is generally intended are goods, services, establishments and workers and not capital. This is a consequence of the free movement of capital losing much of its significance in relation to a principal discussion of the other freedoms as a result of the creation of the monetary union.

Thirdly, the object of this study is not to question what has previously been established in this respect. This is the case since the scope and application of the free movement of services and the right to establish in a Member State other than

that of nationality has been comprehensively discussed by a number of scholars.[27] The objective is rather to illustrate the somewhat erratic and, in certain respects, ambiguous interpretations rendered by the Court in illustrating the demarcation of Articles 49, 56 and 52 TFEU, denoting the effects on the room for manoeuvrability within the national regulatory autonomy of the Member States. This to make possible the contrast of the scope and effects of the Services Directive, as set out in Articles 14, 15, 16 and 4(7), vis-à-vis the scope of the relevant Treaty provisions and to conclude whether the Directive brings about any undue modifications as to the effects on the national regulatory autonomy of the Member States.

1.3 Structure of the Study: A Dualistic Approach

1.3.1 Introduction

Given the two-edged character of the Services Directive, in the sense that it might be understood as a conventional legal instrument and also as a governance device, the study takes a dualist approach.

The background to adopting such a dual approach is, in addition, the fact that the Union is founded on a multi-level legal system[28] in which the Member States have conferred on the Union regulatory powers, albeit within limited fields of law. In the absence of Union regulation, the Court has established the substance of the Treaty Articles on the fundamental freedoms and the objective,[29] to establish an internal market through negative obligations, has constituted the main focus of interpretation. In this respect, non-justified national restrictions may not be applied to transborder trade, no matter within which area of law such restrictions are adopted.[30]

Furthermore, such an objective-oriented, or teleological, interpretation could either be founded on a narrowly construed understanding of the objective of the fundamental freedoms and those "conceptual definitions"[31] provided in the case

[27] See, e.g., St Clair Renard 2007; Mortelmans 2001; Hatzopoulos 2012; Jarass 2002; Davies 2003; Snell 2008; Bernard 1996; Biondi 2009.

[28] See Nielsen 2011, p. 91. The Union constitutes a multi-level legal system consisting of 28 legal systems, or rather 28 + 1, the 28 Member States plus the European legal system.

[29] Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration* [1963] ECR 1. See furthermore, inter alia, Neergaard and Nielsen 2011, p. 95; Hettne and Otken Eriksson 2011, Chap. 3; Fennelly 1996, discussing the Court and its approach to objective, or context oriented interpretation.

[30] Article 19(1) TEU. The Union principles of supremacy (Case 6/74, *Flaminio Costa* v. *ENEL* [1964] ECR 585) and direct effect (Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos* v. *Netherlands Inland Revenue Administration* [1963] ECR 1) require that national measures which are found to be contrary to the Treaty Articles regulating the fundamental freedoms are not to be applied in relation to intra-Union activities, see Sect. 8.2.2.

[31] Neergaard and Nielsen 2011, p. 184.

law of the Court denoting their scope. Or, broadly construed, taking into consideration the development of the internal market over time and the overall function and objective of the internal market in general. In the following discussion, it is these two different objective-oriented interpretations which are set against each other, taking into consideration the fact that the Services Directive establishes negative obligations to be implemented through positive harmonisation.

One central tool of interpretation of the Services Directive that is frequently referred to in this study, and that needs to be addressed in particular in this context is the Commission Handbook on the implementation of the Services Directive[32] (Handbook). This is to inform and instruct the Member States in their efforts to implement the Directive's objectives. This Handbook does not have any legally binding force and, as such, the Court is not required to take it into consideration in its interpretation of the Services Directive. Nevertheless, the Court seems to afford it great interpretative value.[33] The Handbook provides information on how the Services Directive has been understood during the implementation and evaluation procedures, as the Commission is the central coordinator. The Member States' understanding of the Services Directive seems therefore to a great extent reliant on the Handbook, as there is no other explicit source of interpretation.

Nevertheless, on one hand, it may be strongly questioned whether the Commission is in such a position as to direct the Member States in their implementation of a legislative act adopted by the Council and the Parliament, especially since the initial proposal from the Commission was both strongly criticised as well as modified by the Parliament. The Commission is not the legislator but merely the initiator of legislation within the Union, representing the interest of the Union and not the Member States and consisting of bureaucrats and experts. On the other hand, the Commission, in accordance with Article 17 TEU, "shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union".

It is in this context that the understanding of the Services Directive provided in the Commission's Handbook must be understood when referred to in the following discussion.

1.3.2 Part I: Points of Departure

As provided above, the overarching aim is to discuss whether the Services Directive is to be interpreted as law or simply policy and how in fact it affects the national regulatory autonomy of the Member States.

---

[32] Commission Handbook on Implementation of the Services Directive (2007). http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf.

[33] See Case C-57/12, *Fédération des maisons de repos privées de Belgique (Femarbel) ASBL* v. *Commission communautaire commune de Bruxelles-Capitale* [2013] ECR 2013 p. I-0000, paras 37, 43, 46 and 47.

Initially the specific characteristics of the free movement of services within the meaning of Union law are presented in Chap. 2, since the design of the Services Directive is, to a great extent, a consequence of these specific characteristics. Central to the discussion is that service activities, in principle, are regulated by the state-of-origin, opening up the possibility for regulatory competition between the Member States and potentially having effects on social policy and welfare issues.

Secondly, Chap. 3 outlines the background to the adoption of the Services Directive. Furthermore, the content of the Services Directive, as finally adopted, is examined through a discussion of the implementation process in Sweden, based on the author's own observations and interviews of an official closely involved in the implementation procedure in Sweden, in light of the modes of governance utilised especially in transposing the Services Directive. Empirical material from the Swedish implementation process is discussed, such as reports from meetings, agendas, personal observations from meetings and hearings.

The Services Directive constitutes a binding secondary legislative act in the form of a "directive" which implies that the Member States must act by way of implementation. Thirdly, it is outlined in Chap. 4 the general characteristics of directives as legislative instruments. However, secondary legislation, such as the Services Directive, provided by the Union must be adopted in compliance with the Treaties and not regulate issues falling outside the scope of the powers conferred on the Union by the Member States.

Fourthly, Chap. 5 discusses the foundational idea of regulatory autonomy, denoting the room for manoeuvrability for the Member States as contrasted with the regulatory power conferred on the Union and the legal foundation of the Services Directive. The study then turns to analyse the two-edged character of the Services Directive.

1.3.3 Part II: Legal Positivist Approach

Part II related to the first question posed seeks to discuss to what extent Articles 14, 15, 16 and 4(7) of the Services Directive modify the scope of Articles 49, 56 and 52 TFEU and what the legal implications could be of possible modification. This first approach adopts a traditional positivistic and dogmatic interpretation reflecting generally on the wording of Articles 14, 15, and 16 of the Services Directive, in light of the Directive being a binding act of secondary legislation. The focus is set on the most important conceptual definitions in this context.[34]

Article 49 TFEU states that "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited". Article 56 TFEU provides that "restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Member

[34] For a discussion of legal concepts within Union laws, see Azoulai 2012.

States who are established in a Member State other than that of the person for whom the services are intended". Article 52 TFEU prescribes that Articles 49 and 56 TFEU "shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health". The Court has in addition established that national restrictions on the free movement of services or freedom of establishment may be justified by any reason related to the public interest.[35]

In contrast, Articles 14, 15 and 16 of the Services Directive state that the Member States may not make the access to or exercise of a services activity subject to any requirements, as defined by Article 4(7) of the Directive, unless they comply with the principle of non-discrimination. All directly or indirectly discriminatory national requirements are totally prohibited. In addition, Articles 15 and 16 of the Services Directive prescribe that non-discriminatory national requirements are also to comply with the principles of necessity and proportionality. Article 15 of the Directive establishes that non-discriminatory requirements having effects on the freedom of establishment of service providers may be justified by an overriding reason relating to the public interest. In relation to the temporary provision of services, non-discriminatory requirements may only be justified in accordance with Article 16 of the Services Directive if necessary in respect of public policy, public security, public health or environmental protections.

The point of departure in Part II is a "black letter"[36] interpretation of Articles 14, 15, 16 and 4(7) in contrast with Articles 49, 56 and 52 TFEU taking into consideration that Articles 14, 15, 16 and 4(7) constitute a codification of the understanding of those Treaty Articles as provided by the Court in its case law.[37] The aim is to establish what is the valid law by considering relevant Union law which is normative in relation to the free movement of services activities, providers and recipients. Thus, this first approach reflects a "narrow" objective-oriented interpretation of the Services Directive and its wording, especially as set out in Articles 14, 15, 16 and 4(7).

It may be said that the understanding of Articles 14, 15, 16 and 4(7) is textual, denoted by their wording, taking into account their wording being based on the objective-oriented understanding of Articles 49, 56 and 52 TFEU represented by "conceptual definitions". The conceptual definitions discussed herein represent autonomous Union law understandings denoting the scope and effects of the Treaty Articles regulating free movement.[38] Such specified conceptual definitions

---

[35] Case 33/74, *Johannes Henricus Maria van Binsbergen* v. *Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299.

[36] "Black letter" law traditions in legal research have been described by Neergaard and Wind as characterised by adopting a positivistic and dogmatic approach and boil down to the character of research question posed to conclude what is valid law, see Neergaard and Wind 2012, p. 266, see further references in notes 7 and 8.

[37] See Recitals, 34, 37, 40, 56, 77, 89 and Article 4(8) of the Services Directive.

[38] See for example the reasoning by Maduro 1998, pp. 21–25.

are established by the Court to create a uniform interpretation of the obligations set forth in the Treaty Articles on the fundamental freedoms. In this respect, by developing the principle of equivalence of all language versions of the Treaty, the Court has minimised the risk of legal uncertainty due to linguistic diversity in EU law.[39] The conceptual definitions denoting the scope of Articles 49, 56 and 52 TFEU that will be subject to closer analysis as a first step in this part of the study are, "transborder activity", "restrictions", "justifications", "national measures" "service activities" and "established".

Firstly, Chap. 6 discusses what measures have an effect on transborder trade between the Member States. Secondly, Chap. 7 discusses the scope and effect of Articles 49, 56 and 52 TFEU as defined by the restrictiveness of national measures and what reasons may justify such measures in contrast with that which is stated in Articles 14, 15 and 16(1) in the same respect. Thirdly, Chap. 8 discusses what is meant by "measures" within the meaning of the Treaty rights of free movement taken into consideration their nature and type as well as what national bodies or persons are responsible for having adopted the measures, in contrast with that which is stated in Article 4(7) of the Services Directive. Lastly, Chap. 9 discusses what constitute "services" and within the meaning of the Treaty and "service activities" within the meaning of the Services Directive, which covers only the provision of services.

In light of this, it is possible to conclude whether the Directive establishes modifications to the recognised effects of Articles 49 and 56 TFEU in the sense of the wording of the Services Directive. By this means, a preliminary assessment can be made as to how far reaching those modifications are in relation to the previously recognised effects of Articles 49, 56 and 52 TFEU on the national regulatory autonomy of the Member and whether they are adequate and legitimate.

By possibly providing for undue modification of recognised interpretations of Articles 49, 56 and 52 TFEU, the Services Directive raises questions related to constitutional issues such as the hierarchy of norms and conferral of regulatory powers. However, the question is whether such a "black letter" interpretation of the Services Directive is sufficient. Part III of the study therefore adopts a different approach, considering the Directive in a broader perspective.

1.3.4 Part III: Contextual Approach

The second approach sets the focus on the design of the Services Directive. The Services Directive provide for little substantive harmonisation but introduces different procedures to be adopted and processes to be followed by the Member States during its transposition and after its implementation. It provides for a new and more profound type of collaboration and mutual evaluation to be conducted by

[39] Wahl 1994, pp. 25–26.

the Member States in cooperation with the Commission suggesting that it should instead be seen as a governance instrument. This second approach takes into consideration the Directive's "overall and broader" objective in contrast with the "narrow" approach adopted above. This is in the light of well-established theories in legal and political science and the Union being conceived of as a complex multi-level governance system having intricate effects on the Member States regulatory autonomy.

The contextual interpretation adopted here, while examining the Services Directive, takes into account the evolution of the internal market and the variety of new governance instruments used in facilitating the internal market in general and the free movement of services in particular.[40] More specifically, the evolution of the internal market throughout history is considered, reviewing the binding and non-binding regulatory measures employed in pursuing the objective of achieving free movement of economic resources within the Union. In this part, the analysis refers, in addition to the legal literature, to political science literature on governance and to certain economic discussions in relation to Union law.

Thus, Part III turns the attention to the second question posed above and whether the Services Directive is better understood as a control and steering device rather than a traditional directive redefining the scope and effects of Articles 49 and 56 TFEU and, as such, must be interpreted accordingly. In its aim and objectives the Directive exhibits distinctive features and functions, introducing unique implementation and evaluation procedures and mechanisms to be used by and within the Member States.

A key point here, in contrast to Part II, is that the Services Directive focuses on procedures and the ways in which the national administrations are to operate, introducing little substantive content. Moreover, it provides for a rare and extensive implementation and evaluation process involving not only the Commission and the Member States, but also the public administrations of the Member States on regional and local levels, and also other market actors and stakeholders such as private organisations and associations.

The implementation process is probably not unique in that other directives to the same extent require notifications, collaborations, mutual consultation and exchanges between the Member States and their authorities, as well as encouraging of the involvement of associations or organisations to draft and implement codes of conduct.[41] However, the horizontal nature of the Services Directive and the limited substantive harmonisation it brings about imply that its substance is "formed" through the dynamic of the implementation process.

---

[40] See Maduro 2008, p. 3.

[41] Prechal 2005, pp. 46–47, see, e.g., Directives, 98/34/EC of the European Parliament and of the Council laying down a procedure for the provision of information in the field of technical standards and regulations [1998] OJ L 204/37 providing for a notification procedure and 2000/31/EC of the European Parliament and of the Council on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178/1.

In this respect, the obligations set out by the Services Directive do not provide for a purely top-down structure within the meaning that the supranational institutions adopt harmonisation measures to be transposed by the Member States imposing implementation obligations on the national authorities in line with the harmonisation requests. Nor does the Services Directive follow the typical structures of new modes of regulatory governance within the Union such as comitology, regulatory networks or the Open Method of Coordination. But, rather, the Directive represents a combination of different modes of governance. Therefore, two specific questions need to be discussed in Chaps. 11 and 12.

Firstly, what instruments or actions have been used to uphold effective decision-making, taking into consideration that the Court has at times been very progressive? Instruments or action may be legally binding, soft law or policy instruments, they may contain general or detailed requirements or strategies. Furthermore, what actors are involved: supranational, national or subnational, private or public?

Secondly, what constitutional legal conditions, related to the supranational oriented-system of the Union and its specified distribution of regulatory powers between the Member and the Union, have formed the realisation of the internal market for services and eventually the Services Directive? This issue is related to the fact that the supranational institutional system of the Union is founded on authority and policy-making shared on multiple levels of government—subnational, national and supranational—and, as such, it is necessary to maintain a regulatory balance between the Member States and the Union and its institutions. The integration process has thus come to represent a dynamic and interactive process. The Services Directive as a legal instrument will be discussed against the backdrop of which instruments and actions have previously been used to uphold effective decision-making, considering the constitutional legal conditions at the time being.

Finally, in light of the analysis undertaken related to Articles 14, 15, 16 and 4(7) of the Services Directive and the context within which the Directive has been adopted, conclusively in Chap. 13, final arguments as to whether the Services Directive is better understood as a law or simply policy, are presented and what are its possible effects on the national regulatory autonomy of the Member States. The analysis is carried out taking into account the specific features of the Union legal system and the free movement of services and service providers as well as the need to safeguard certain economic and political interests in order to establish the internal market for services.

Part I
The Services Directive, its Implementation and Legal Foundation

The Services Directive was adopted in the endeavour to realise a true internal market for services within the Union. However, the combination of the specific characteristics of the free movement of services, the Directive being founded on a horizontal approach and, the country-of-origin principle, resulted in the initial proposal being abandoned. Instead of the country-of-origin principle it was introduced in the modified proposal, similarly as was proposed in relation to the right to establish as a service provider, a negatively defined obligation prohibiting the Member States to impose any non-justified requirements affecting the free movement of services, reflecting the case law of the Court.

However, the scope of these Treaty rights, as established by case law, is delineated by a rationale different from that delineating the scope of the powers conferred on the Union by the Member States to adopt secondary legislation. Thus, providing for negative obligations in the Services Directive, constituting a legislative tool, generally to provide for approximation of the national regulations of the Member States, involves problems in relation to the distribution of regulatory powers within the Union and upset the established understandings of how to balance the interest to realise the internal market against the national interests of the Member States as established by the Court.

In the light of this, the following issues are discussed. Firstly, the background to the harmonisation of the free movement of services considering the specific characteristics of a service. Secondly, the contents of the final version of the Services Directive. Thirdly, what signifies the Services Directive as a legislative tool. Finally, what constitutes the rationale of the Court's definition of the scope of the fundamental freedoms in contrast with that of the regulatory competence conferred on the Union by the Member States.

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

Contents

2.1 Introduction

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

M. Wiberg, *The EU Services Directive: Law or Simply Policy?*,
Legal Issues of Services of General Interest, DOI 10.1007/978-94-6265-023-7_2