

Consumer Protection Aspects of the European Commission's Proposal for a Directive on Services in the Internal Market

Legal Opinion Presented at the Nordic Seminar Held
at the Swedish Konsumentverket on June 1. 2004

Ida Otken Eriksson and Ulf Öberg

Consumer Protection Aspects of the European Commission's Proposal for a Directive on Services in the Internal Market
- Legal Opinion Presented at the Nordic Seminar Held at the Swedish Konsumentverket on June 1, 2004

ANP 2004:795

© Nordic Council of Ministers, Copenhagen 2004

Print: Ekspressen Tryk & Kopicenter

Copies: 330

Printed on paper approved by the Nordic Environmental Labelling.

Nordic Council of Ministers

Store Strandstræde 18
DK-1255 Copenhagen K
Phone (+45) 3396 0200
Fax (+45) 3396 0202

Nordic Council

Store Strandstræde 18
DK-1255 Copenhagen K
Phone (+45) 3396 0400
Fax (+45) 3311 1870

www.norden.org

Consumer Co-operation in the Nordic Countries

The aim of the co-operation in the Nordic Committee of Senior Officials on Consumer Affairs is to promote consumer safety, protect their financial and legal interests, inform consumers and promote their education, and promote consumer influence in society. Exchange of information, reports, and research will contribute to the Nordic consumer policy and provides a platform for joint Nordic presentation in international contexts.

Nordic co-operation

Nordic co-operation, one of the oldest and most wide-ranging regional partnerships in the world, involves Denmark, Finland, Iceland, Norway, Sweden, the Faroe Islands, Greenland and Åland. Co-operation reinforces the sense of Nordic community while respecting national differences and similarities, makes it possible to uphold Nordic interests in the world at large and promotes positive relations between neighbouring peoples.

Co-operation was formalised in 1952 when *the Nordic Council* was set up as a forum for parliamentarians and governments. The Helsinki Treaty of 1962 has formed the framework for Nordic partnership ever since. *The Nordic Council of Ministers* was set up in 1971 as the formal forum for co-operation between the governments of the Nordic states and the political leadership of the autonomous territories, i.e. the Faroe Islands, Greenland and Åland.

Innehåll

Innehåll.....	5
Förord.....	7
Slutsatserna från diskussionen var i huvudsak följande.....	7
1 Introduction	9
2 Main Provisions of the Proposed Directive.....	11
3 General Problems as to the Actual Impact of the Proposed Directive	13
3.1 Does the Proposed Directive have Sufficient Legal Basis in the EC Treaty? ..	13
3.2 Increased Pressure on the Distinction between Free Movement of Services and the Freedom of Establishment: Temporary Activity and Abuse.....	14
3.3 The new “dynamic” approach: Vaguely formulated obligations vague legal consequences?	19
4 To what Extent does the Country of Origin Principle cover Business-to-Consumer Relations?	21
4.1 General	21
4.2 The Derogation in Article 17 (21): “Contracts Concluded by Consumers”	21
4.3 The Derogation in Article 17 (21): “to the Extent that the Provisions are not Completely Harmonised”	23
4.4 Derogation from Article 16: “Within the Coordinated Field”	23
5 Other Provisions of the Proposed Directive which Appear to Affect Consumer Protection.....	25
5.1 The rules on Freedom of Establishment: Lowering of the level of protection through simplification of procedures and evaluations of equivalence?	25
5.2 Case-by-case derogations from the Country of Origin Principle: Safety, public health, public policy (protection of minors).....	27
5.3 Quality of Services – General Harmonisation also as regards Business-to-Consumer Relations	27
5.4 Supervision and Mutual Assistance – Will this really be effective?	28
5.5 Convergence Programmes as Consumer Protection?	28
5.6 Identification of the Need for Further Harmonisation as regards Consumer Protection	28
Conclusions	31

Förord

EU-kommissionen lade den 13 januari 2004 fram ett förslag till ramdirektiv för tjänster på den inre marknaden som syftar till att öka rörligheten för tjänster inom EU. Denna rapport syftar till att belysa vilka effekter förslaget kan komma att få för konsumentskyddet. Är det konsumentskydd som föreslås tillräckligt och vad får en generell ursprungslandsprincip för effekter för konsumenterna?

I juni 2004 hölls ett nordiskt samrådsmöte om förslaget till tjänstedirektiv i styrgrupp för juridiska frågor under Nordiska Ämbetsmannakommittén. För att belysa direktivets rättsliga konsekvenser hade styrgruppen inhämtat det rättsutlåtande av Ida Otken Eriksson och Ulf Öberg, doktorander i EG-rätt vid Stockholms universitet som här publiceras. Rättsutlåtandet låg till grund för diskussionen.

Slutsatserna från diskussionen var i huvudsak följande.

–Ursprungslandsprincipens omfattning behöver klargöras och eventuellt begränsas så att den överensstämmer med hittillsvarande praxis för principens innebörd.

–Både begreppen etablering och tillfällig verksamhet kan ställa till problem i praktisk tillämpning.

–Undantaget i artikel 17 punkt 21 som anger att direktivet inte ska tillämpas på ”avtal som ingåtts av konsumenter för utförande av tjänster, om de bestämmelser som de omfattas av inte är fullt harmoniserade på gemenskaps nivå” är ytterst oklart. Det är svårt att ta ställning till omfattningen av undantaget om det inte klargörs vad som menas med *avtal som ingåtts av konsumenter* och *fullt harmoniserade* bestämmelser.

–Enligt artikel 26 punkt 3 behöver viss information endast lämnas på tjänstemottagarens begäran. Det är otillfredsställande från konsumentsynpunkt att t.ex. information som berör hälsa och säkerhet inte alltid ska ges till konsumenter utan särskild förfrågan.

–Ingripanden i enskilda fall enligt artikel 19.1 bör omfatta alla ingripanden till skydd för konsumenter.

–Vid ingripanden enligt artikel 19 ska den medlemsstat som vill skydda tjänstemottagare följa de krav som ställs upp i artikel 37. Proceduren för ingripanden för att skydda tjänstemottagarna är alltför omfattande och inskränker i praktiken möjligheterna till ingripanden för att skydda konsumenter.

1 Introduction

In January 2004, the Commission presented a proposal for a directive on services in the internal market¹ (hereinafter “the proposed directive”). The proposed directive is part of the so-called Lisbon process that purports to making the EU the most competitive and dynamic knowledge-based economy in the world by 2010. This goal is to be achieved i.a. by the establishment of a “genuine” internal market in services – a sector which considerable potential for economic growth and job creation is considered not to have been fully exploited yet. Thus, the objective of the proposed directive is to provide a legal framework that shall eliminate the remaining obstacles to the freedom of establishment for service providers and the free movement of services between the Member States.

The purpose of this legal opinion is to identify and make a preliminary analysis of how the proposed directive will affect consumer protection in the Member States. The opinion shall serve as a basis for discussion on the Nordic seminar on the proposed directive held at the Swedish Konsumentverket on June 1, 2004. Possible evaluations and preliminary conclusions presented in the present legal opinion are strictly personal and the responsibility of the authors alone.

As an introduction, we will present a short survey of the main content of the proposed directive (see below 2). Thereinafter, we will point to some general problems as to the actual impact of the proposed directive (see below 3). Subsequently, we will discuss the most important question posed by the proposed directive as regards consumer protection – i.e. to what extent business-to-consumer relations are covered by the *country of origin principle* (below 4). Thereafter, we will raise a number of other aspects of the proposed directive that appear to affect consumer protection in the Member States (5). Finally, we will try to draw some preliminary conclusions (see below 6).

As the focus of this opinion is on traditional consumer protection, we will not discuss the provisions in the proposed directive on the assumption of non-hospital health care costs, or the provisions on the posting of workers. Moreover, we will not enter into the field of international private law, i.e. questions concerning which law applies to consumer contracts.

¹ Proposal for a Directive of the European Parliament and of the Council on services in the internal market (presented by the Commission), COM(2004) 2, [SEC(2004) 21].

2 Main Provisions of the Proposed Directive

The proposed directive consists of seven chapters. Chapter I contains general provisions and defines i.a. the scope of the proposed directive (Article 2). The directive is supposed to apply generally to services supplied by providers established in a Member State. Only financial services, electronic communications services and networks, transport services as well as certain questions in the field of taxation are expressly excluded.

Chapter II is concerned with the abolition of obstacles to the freedom of establishment for services providers. The Member States shall simplify their procedures and formalities applicable to access to a service activity and to the exercise thereof (Article 5). In accordance with the principle of mutual recognition, the Member States shall accept documents from other Member States which serve equivalent purposes or from which it is clear that the requirement in question has been satisfied. Furthermore, the Member States shall establish so-called “single points of contact”, where it is possible for a service provider to complete all procedures and formalities needed for access to and exercise of his service activities (Articles 6-8). The Member States shall also make their different authorisation schemes and procedures compliant with certain conditions (Articles 9-13).

Article 14 lists a number of forbidden requirements, i.e. requirements that the Member States may not make access to or the exercise of a service activity subject to compliance with (a “blacklist”). Article 15 contains a list of requirements that can be upheld provided that they are non-discriminatory, necessary and proportional (“grey list”). The Member States shall screen their legislations for any such requirements and report these to the Commission. Any new measures of this kind shall also be notified.

Chapter III of the proposed directive deals with the free movement of services. The so-called *country of origin principle* is stated in Article 16. According to this principle, the Member States shall ensure that providers are subject only to the national provisions of their Member State of origin. The *country of origin principle* covers i.a. the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider’s liability, as well as supervision of the provider and his services, including services provided by him in another Member State. Article 16.3 contains a list of requirements that the Member States may not, “for reasons falling within the coordinated field”, restrict the provision of services from another Member State.

Articles 17-19 list different possibilities of derogations from the *country of origin principle* (general derogations, transitional derogations and case-by-case derogations). Article 17 provides i.a. that the *country of origin principle* does not apply to “(21) contracts for the provision of services concluded by consumers to the extent that the provisions governing them are not completely harmonised at Community level”.

Articles 20-22 lie down certain rules as to the recipients of services provided from other Member States. Such recipients may not in any way be disfavoured and shall be able to obtain, in their Member State of residence, certain information, i.a. on the requirements

applicable in the other Member States relating to access to and exercise of service activities, in particular those relating to consumer protection.

Article 23 concerns the assumption of the costs of non-hospital care in another Member State. Articles 24 and 25 deal with posting of workers.

Chapter IV of the proposed directive concerns quality of services and provides i.a. that certain information on the service provider and the services provided shall be made available to the recipient. This chapter contains further provisions on i.a. professional indemnity insurances and guarantees (Article 27), after-sales guarantees (Article 28), commercial communications by the regulated professions (Article 29) and multidisciplinary activities (Article 30), as well as on settlement of disputes (Article 32).

Chapter V of the proposed directive concerns supervision and mutual assistance. Chapter VI concerns convergence programmes. The Member States shall, in cooperation with the Commission, take accompanying measures to encourage the drawing up of codes of conduct at Community level, in conformity with Community law, in certain areas, e.g. in the area of the regulated professions.

Article 40 foresees the possibility of further harmonising measures. In particular, in order to ensure the proper functioning of the internal market for services, the Commission shall “assess the need to take additional initiatives or to present proposals for legislative instruments, particularly in relation to ... (d) consumer protection and cross-border contracts”.

Articles 41 to 43 provide provisions on different kinds of reporting from the Member States as well as from the Commission.

The deadline for transposition of the main part of the proposed directive is scheduled for 2007. However, the single points of contact shall be established not later than 31 December 2008 and certain derogations from the *country of origin principle* shall end at latest on 1 January 2010.

3 General Problems as to the Actual Impact of the Proposed Directive

3.1 Does the Proposed Directive have Sufficient Legal Basis in the EC Treaty?

The proposed directive is based on the first and third sentence of Article 47(2) EC and Articles 55, 71 and 80(2) EC. The two last Articles concern transport and Article 55 refers to Article 47(2), making it applicable to the free movement of services. Article 47(2) first sentence mandates the Council to “issue directives for the coordination of the provisions laid down ... in Member States concerning the taking-up and pursuit of activities as self-employed persons”. According to Article 47(2) second and third sentence, the Council “acting unanimously(...), shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons. In other cases, the Council shall act by qualified majority”.

The proposed directive concerns the possibilities of acceding to and exercising activities in other Member States. However, as concerns free movement of services, the proposed directive introduces a *country of origin principle*. It could be argued that the establishment of a general *country of origin principle* goes beyond the actual legal basis in Articles 43, 49 and 47(2) EC.

Article 43 EC provides expressly that the freedom of establishment shall “include the right to take up and pursue activities ... *under the conditions laid down for its own nationals* by the law of the country where such establishment is effected...” (emphasis added). Likewise, Article 50.2 EC states that “Without prejudice to the provisions of the Chapter relating to the right of establishment, the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions* as are imposed by that State on its own nationals” (emphasis added).

This means that nationals from other Member States may establish themselves in other Member States, if they comply with all the conditions posed in that Member State. Likewise, regarding free movement of services, service providers may temporarily provides services in another State under the “same” conditions as are imposed by that State. Forcing Member States to accept the conditions under which different activities are carried out in other Member States, i.e. the *country of origin principle*, can be seen as conflicting with these formulations. Indeed, the introduction of a *country of origin principle* can be said to contradict the existent case law of the Court on both freedom of establishment and services, as the *country of origin principle* eliminates or seriously reduces the possibilities of the Member States to motivate particular legislation by invoking mandatory requirements and proportionality.

Introduction of a general *country of origin principle* could also be seen as going beyond the formulation in Article 47(2) EC that concerns “*coordination* of the provisions ...

concerning the taking-up and pursuit of activities as self-employed persons” (emphasis added). At least, introduction of a general *country of origin principle* could seem to need simultaneous important accompanying harmonisation measures (as has been the case i.a. in the banking and insurance sector) in order to become “coordination” and not simple unconditional mutual recognition.

Against this understanding, it can be invoked that the proposed directive actually harmonises important aspects of the provision of cross-border services, as i.a. the information to be given to the recipient (Article 26), settlement of disputes (Article 32), supervision (Article 34) and mutual assistance (Article 35). Also, it should be held in mind that the Court of Justice has interpreted the actual express wording of Article 49 EC extensively, stating that the Member States may not force service providers from other Member States to comply with all conditions posed in national law (see further discussion on this just below)

Under all circumstances, it appears somewhat surprising that the Commission has not chosen the internal market provision in Article 95 EC as a legal base for the proposed directive.

3.2 Increased Pressure on the Distinction between Free Movement of Services and the Freedom of Establishment: Temporary Activity and Abuse

The proposed directive is based on a strict distinction between application of the rules on free movement of services and of the freedom of establishment, the first situation being regulated by Chapter II and the latter situation being regulated by Chapter III.

This is in apparent accordance with the relevant provisions in the EC Treaty and the case law of the Court of Justice. As stated above, Article 43 EC provides expressly that the freedom of establishment includes the right to take up and pursue activities under the conditions laid down for its own nationals by the law of the country where such establishment is effected. When it comes to the free movement of services, however, the Court has stated in its case law that “... a Member State may not make the provision of services in its territory subject to compliance with *all* the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services” (emphasis added).²

Thus, there is traditionally a fundamental difference between application of the rules on the freedom of establishment and the free movement of services. In the first case, the host state may require that the interested party comply with *all* conditions laid down by national law; in the latter case, not all conditions in national law may be applied.

The proposed directive aggravates this difference. With the proposed directive, a service provider that invokes the free movement of services may, by virtue of the *country of origin principle*, rely entirely on the rules applicable to him in the country of origin and can thus in principle avoid all different rules in the host state. However, a service provider who decides to establish himself in a new Member State may only invoke the proposed directive to the limited extent laid down by Chapter II. Once established and

² See e.g. Case C-76/90 Säger v. Dennemeyer [1991] ECR I-4221, para. 13.

exercising his activities in the new Member State, he shall in principle comply with all rules of the new state of establishment.

It is obvious that this distinction puts increased pressure on the definitions as to when a situation is covered by the rules on the freedom of establishment respectively the rules on the free movement of services. Service providers will have an interest in invoking their right to free movement of services and the *country of origin principle*, instead of establishing themselves in other Member States. However, the question as to when a given situation is covered by the rules on the freedom of establishment respectively by the rules on free movement of services is not clearly defined in the directive. Recitals 15 and 19 refer to the case law of the Court and Article 4 can be seen as further refining the notions of “service” and “establishment”.

Recital 15 of the proposed Directive is worded as follows:

“As the Court of Justice has consistently held with regard to Articles 49 et seq of the Treaty, the concept of service covers any economic activity normally provided for remuneration, without the service having to be paid for by those benefiting from it and regardless of the financing arrangements for the remuneration received in return, by way of consideration. Any service whereby a provider participates in the economy, irrespective of his legal status or aims, or the field of action concerned, thus constitutes a service”

According to Recital 19 of the proposed Directive,

“Where an operator travels to another Member State to exercise a service activity there, a distinction should be made between situations covered by the freedom of establishment and those covered, due to the *temporary* nature of the activities concerned, by the free movement of services. The Court of Justice has consistently held that the temporary nature of the activities in question must be determined in the light not only of the duration of the provision of the service, but also of its regularity, periodical nature or continuity. In any case, the fact that the activity is temporary does not mean that the service provider may not equip himself with some forms of infrastructure in the host Member State, such as an office, chambers or consulting rooms, in so far as such infrastructure is necessary for the purposes of providing the service in question.” (our emphasis)

Article 4(1) of the proposed Directive defines “service” as meaning “any self-employed economic activity, as referred to in Article 50 of the Treaty, consisting in the provision of a service for consideration”. Article 4(5) defines “establishment” as meaning “the actual pursuit of an economic activity, as referred to in Article 43 of the Treaty, through a fixed establishment of the provider for an indefinite period”.

According to Article 3 of the proposed Directive, “Member States shall apply the provisions of this Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services.” Further guidance as to the fundamental distinction between “services” and “establishment” must therefore be sought in the case law of the Court.

Article 50 EC states that "Services shall be considered to be 'services' within the meaning of this Treaty where they are normally provided for remuneration, insofar as they are not governed by the provisions relating to freedom of movement for goods, capital and persons." On this basis, it is widely held that the provisions of the Treaty related to services are subsidiary to the other provisions of the Treaty, which are related to the fundamental principle of free movement.

The Court of Justice has, in its case law, laid down further criteria as to when a situation is covered by the rules on the freedom of establishment respectively the free movement of services. However, the Court has also stated that "a member state cannot be denied the right to take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by article 59 [now Article 49 EC] for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that state. Such a situation may be subject to judicial control under the provisions of the chapter relating to the right of establishment and not of that on the provision of services".³

Thus, the right to free movement of services may be "abused" if the right is invoked solely in order to avoid certain rules in the other state.⁴

As stated in Recital 19 to the proposed directive, according to the case law of the Court, free movement of services presupposes that the activity of the person in question is *temporary*. The temporary nature of the activity of the person providing the service in the host Member State has to be determined in the light not only of the duration of the provision of the service but also of its regularity, periodical nature or continuity. In contrast, the rules on the freedom of establishment apply when a Member State national pursues a professional activity on a stable and continuous basis in another Member State.

The fact that the activity is temporary does not mean that the provider of services within the meaning of the Treaty may not equip himself with some form of infrastructure in the host Member State – including an office, chambers or consulting rooms – in so far as such infrastructure is necessary for the purposes of performing the services in question.⁵

The Court has recently elaborated these criteria in the *Schnitzer* ruling.⁶ The Court held that "services" within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years, where, for example, the services in question are supplied in connection with the construction of a large building. Services within the meaning of the Treaty may likewise be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States, for example the giving of advice or information for remuneration. The Court stressed that no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of

³ See e.g. Case 205/84 Commission v. Germany [1986] ECR p. 3755, para. 22.

⁴ See e.g. Case C-148/91 Veronica Omroep [1993] ECR I-487 and Case C-23/93 TV 10 SA [1994] ECR I-4795.

⁵ Case C-55/94 Gebhard [1995] ECR I-4165, paragraph 27, and Case C-131/01 Commission v Italy [2003] ECR I-1659, paragraph 22.

⁶ See Case C-215/01 Bruno Schnitzer [2003] ECR I-0000.

service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty.

Still, the Court stated that the mere fact that a business established in one Member State supplies identical or similar services with a greater or lesser degree of frequency or regularity in a second Member State, *without having an infrastructure* there enabling it to pursue a professional activity there on a stable and continuous basis and, from the infrastructure, to hold itself out to, amongst others, nationals of the second Member State, *is not sufficient* for it to be regarded as established in the second Member State (our emphasis).

The Court concluded as concerns the main proceedings in the *Schnitzer case* – which it was a matter for the national court to determine – that the Portuguese undertaking in question “does not appear to have an infrastructure in Germany allowing it to be regarded as established in that Member State, or to be seeking illegitimately to evade the obligations imposed by that Member State's national legislation”.⁷ Thus, the Court left the main question to be decided by the national court, but still quite clearly stated that at least some infrastructure appears to be necessary in order for a person to be covered by the rules relating to establishment.

In the light of the above, the case law of the Court as concerns the borderline between the free movement of service and the freedom of establishment is far from clear. If anything, the Court seems to favour application of the free movement of services, as long as the company in question at least has not established any infrastructure in the host State and does not openly seek to evade obligations imposed by that Member States legislation.

The proposed directive is likely to put further pressure on this distinction and this case law. With the proposed directive and the introduction of a fundamental *country of origin principle*, there is a rather serious risk that service providers will establish themselves in the Member States with the least restrictive (most favourable/“lowest”) requirements for exercise of the activity in question and systematically rely on the right to free movement of services when it comes to the provision of services in Member States with more restrictive (special/ “higher”) requirements for the exercise of the profession in question.

This may lead to complex questions arising as to when the provision of services to another Member State is exercised to such an extent that the service provider should be considered as established there and therefore should comply with *all* the rules of the host Member State. As long as the Court – as in the *Schnitzer ruling* – chooses a solution which focuses on infrastructure, service providers seem to have ample opportunities of avoiding to comply with all the rules of the host Member States, even if the provision of services is exercised to a very important extent and on a more or less continuous basis.

As to the reservation for the case law on “abuse”, or, in the terms of the *Schnitzer ruling*, persons “seeking illegitimately to evade the obligations imposed by that Member State’s national legislation”, even this case law is called into question by the recent *Centros* case law, where the Court stated that “the fact that a national of a Member State who wishes to set up a company chooses to form it in the Member State whose rules of company law seem to him the least restrictive and to set up branches in other Member States cannot, in itself, constitute an abuse of the right of establishment. The right to

⁷ See the *Schnitzer-ruling* cited above, para. 28-33.

form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty.”⁸

It is very easy to apply this line of reasoning to the area of free movement of services and conclude that service providers are free to establish themselves in the Member States whose rules seem to be the least restrictive and rely on the fundamental right to provide services in other Member States, without complying with all rules applicable in that Member State.

In this way, the proposed directive may lead to strained competition conditions for companies by tradition established in Member States with relatively “high” requirements. Seen in a longer perspective, these Member States risk being forced to modify their traditional requirements, since these are in any way not applicable to all companies actually operating on the market. This development may in the long run lead to further indirect harmonisation of all national rules on the provision of services (“race to the bottom”). Such a development would basically be contrary to the starting point, deriving from the relevant Articles of the EC Treaty and the present case law of the Court, that the freedom of establishment “only” gives other EU-citizens a right to be treated in the same way as the nationals of the Member State of establishment.

In the context, however, it should also be borne in mind that the case law of the Court on the freedom of establishment appears to “close in” on the case law related to free movement of services. Thus, e.g. in the *Wouters case*, the Court did not rule out that a prohibition on multi-disciplinary partnerships between members of the Bar and accountants could be caught also by the prohibition in Article 43.⁹

Another problem as to the distinction between the freedom of establishment and the free movement of services may also arise as regards undertakings in other Member States operating with the business model that they establish “only” a sales office in a given Member State, but actually provide the service in question from another Member State. Does the distinction between establishment and free movement follow the formal establishment or is it relevant where the service is actually provided? This is important in particular as regards protection of recipients of those services and of consumers. Consumers going into a sales office in their home country may be led to believe that the establishment of the sales organisation entails that even the underlying service fulfils all requirements set up in the legislation of their own Member States.

In conclusion on this point, the proposed directive may have the effect, if not from a legal, then from a practical point of view, to inverse the relationship between the provisions of the Treaty related to services and to establishment. The *country of origin principle* may, in effect, render the provisions of establishment residual and subsidiary to the provisions of the Treaty concerning services. Irrespective of whether this is a desirable result or not, it can be discussed whether this venture, proposed in secondary legislation, is possible without prior modifications of the Treaty.

Under all circumstances, it must be held in mind that this development has already widely been initiated by the extensive case law of the Court as regards the freedom to provide services and the delimitation as regards the establishment provisions.

⁸ See Case 212/97 *Centros* [1999] ECR I-1459, para. 27.

⁹ See Case C-309/99 *Wouters* [2002] ECR I-1577, para. 122.

Furthermore, there are already certain legislative precedents to this effect, though more limited than the proposed directive as to their extent.¹⁰

3.3 The new “dynamic” approach: Vaguely formulated obligations - vague legal consequences?

The proposed directive is a framework directive based on a new so-called “dynamic” approach. This means that the directive does not only provide certain generally (“horizontally”) applicable specific rules that the Member States shall transpose. The proposed directive also obliges Member States, in general terms and without further explanation, i.a. to “modernize” and “simplify” their national laws, prescribes that additional harmonisation shall take place and encourages alternative initiatives as ethical rules and codes of conduct.

This new “dynamic” approach certainly appears to make room for flexibility – which can be considered necessary by virtue of the great variety of the nature of services covered by the proposed directive. Still, the “dynamics” also give rise to important legal uncertainty. Several Articles in the Directive are vaguely formulated, do not create apparent rights or obligations and do not have any clear deadlines for implementation. Consequently, it is very difficult to foresee exactly what will be their effect in the future.

An important example of such a vague provision is Article 5 according to which the Member States shall “simplify” the procedures and formalities applicable to access to and exercise of a service activity. What is meant by “simplify”? May this Article in time become directly effective, to the effect that service providers and recipients may rely on it in order to have unnecessary complicated procedures and formalities declared inapplicable?

Likewise, what will happen if a Member State sets up a “single point of contact” but some mistake takes place, whereby a service provider does not get all the information he is entitled to? May the service provider in question rely on Article 6 – that the information obtained is complete – and can he in this case carry on his activity without complying with the requirements he had not been informed about?

Further questions arise as to the actual impact of the numerous provisions on actions that Member States shall take in the future, in cooperation with the Commission, e.g. concerning accompanying measures to encourage providers to take action on a voluntary basis, in order to ensure the quality of service provision (Article 31) and in order to encourage the drawing up of codes of conduct at Community level (Article 39). What will happen if the Member States fail to agree on these future measures?

Also, it is difficult to foresee what is meant by the numerous references to “mutual assistance”, e.g. in the area of supervision (see Articles 34 and 35). What will be the legal consequence if a Member State fails to respond to this obligation of “mutual assistance”?

In conclusion, the proposed directive raises important questions as to the actual impact of these vaguely formulated provisions. May these in the future become directly

¹⁰ See, i.a., Öberg, Ulf, Principen om ömsesidigt erkännande och ursprungslandsprincipen i gemenskapsrätten – särskilt med hänsyn till marknadsföringsåtgärder, friheten att tillhandahålla tjänster och skyddet för konsumenter, Rapport till Nordiska Ministerrådet Konsument, TemaNord 2003:534.

effective? In this case, the Member State in question may not invoke national measures that are contrary to the directive against individuals. Still, as a general rule, directives may not have horizontal direct effect.¹¹ Thus, service providers should not be able to rely on the provisions of the directive against other individuals, if the directive creates obligations for these individuals. However, according to the case law of the Court, national law must be interpreted in the light of the proposed directive and directives may very well have “adverse repercussions” on the rights of third parties.¹²

Thus, returning to the examples mentioned above of the service provider challenging unnecessary complicated procedures and formalities according to Article 5 and the service provider who did not get information about all requirements in national law at the “single point of contact”, it cannot be excluded that service providers may be able to invoke these provisions of the proposed directive even in the context of proceedings between private parties (e.g. proceedings where a recipient demands that a contract should be cancelled because the service provider – even though established in the Member State in question – does not comply with all requirements in national law).

¹¹ Case C-91/92 Faccini Dori [1994] ECR I-3325.

¹² Case C-201/02 Wells [2004] ECR I-0000, para. 56-57.

4 To what Extent does the Country of Origin Principle cover Business-to-Consumer Relations?

4.1 General

As stated above, the proposed directive is based on a strict distinction between application of the rules on the freedom to provide services and of the freedom of establishment. As regards Chapter II, these provisions seek to facilitate that services providers establish themselves in other Member States. Once established in another Member State, the service provider is supposed to comply with all requirements laid down by the law in the country of establishment, i.e. also in relation to consumer legislation. In this way, the provisions in Chapter II are not supposed to directly affect consumer protection in the Member States (see below for a discussion of possible indirect consequences).

However, Chapter III directly concerns consumer protection to the extent that the *country of origin principle* applies to service providers established in one Member State and offering their services in other (host) Member States. According to Article 16.1 the *country of origin principle* applies “within the coordinated field”, in particular as regards “the behaviour of the provider, the quality or content of the service, advertising, contracts and the provider’s liability”. Still, Article 17 (21) exempts “contracts for the provision of services concluded by consumers to the extent that the provisions governing them are not completely harmonised at Community level”.

It is far from clear what is actually covered by this derogation. Questions arise as to the meaning of “contracts concluded by consumers”, “to the extent the provisions are not completely harmonised” and the formulation in Article 16.1 “within the coordinated field”.

4.2 The Derogation in Article 17 (21): “Contracts Concluded by Consumers”

According to the strict wording of Article 17 (21), the derogation only covers “contracts ... concluded by consumers”, that is the situation when a consumer has actually concluded a contract. Thus, the *country of origin principle* does not apply to the provisions governing the contract and its conditions, e.g. the right to regret, formalities as whether the contract should be written or not, what information should the consumer be given beforehand, when the product is faulty, what kind of guarantees apply etc. In this respect, under the proposed directive, the consumer may rely entirely on the legislation applicable in his home state, even though the service provider is established in another Member State.

However, read *e contrario*, this understanding of Article 17 (21) implies that *the country of origin principle covers all other consumer aspects*, for example all rules as to the behaviour of the service provider and as to his advertisement directed towards

consumers in other Member States. This would mean e.g. that public authorities in the host state are excluded from taking measures against a service provider established in another Member State because of certain advertising methods forbidden in the host state but not in the Member State of establishment.

In favour of this interpretation of Article 17 (21) is the general principle that derogations should not be interpreted extensively. Furthermore, Article 16.1, establishing the *country of origin principle*, expressly makes a distinction between “the quality or content of the service, advertising” and then “contracts”, whereas Article 17 exempts only “contracts”.

Still, this understanding of the proposed directive can be seen as somewhat surprising, as the Commission continuously throughout the explanatory memorandum to the proposal gives the general impression that consumer protection in general is not regulated by the proposed directive, but shall be harmonised by separate measures (see e.g. page 8 bottom line “this proposal is without prejudice to any legislative or other Community initiatives in the field of consumer protection” and Article 40.2(d) as to additional initiatives in relation to consumer protection). Most importantly, it does not follow from the explanatory memorandum to the proposal that the proposed directive may in fact regulate aspects of business-to-consumer relations.

Thus, in spite of the general impression given in the Commission’s explanatory memorandum to the proposal, it is important to note that if the Member States should fail to agree on the other proposals under negotiation in the consumer field¹³ and if the proposed directive thus enters into force before these other initiatives, the proposed directive can be seen as introducing a general *country of origin principle* also as regards e.g. advertising directed towards consumers in other Member States.

We want to stress that this interpretation of Article 17 (21) is not the only one possible. Article 17 (21) could in effect also be interpreted more extensively, as covering everything that goes on before the conclusion of a consumer contract, thus including advertising directed towards consumers.

Surely, the information given to a consumer and the advertising methods used before a contract is concluded is vital to the evaluation of the contract itself, e.g. as to whether the contract has been validly concluded, whether the services are faulty etc. Thus, it would seem that a consumer who has been “tricked” into buying a specific service by unfair advertising should be able to rely on his homeland legislation in this respect according to the derogation in Article 17 (21). That a public authority or a consumer organisation should not be able to do this preventively, before a contract has actually been concluded, seems paradoxical.¹⁴ Therefore, in our view, it cannot be excluded that Article 17 (21) could be interpreted as covering a wider field of consumer relations than just “contracts concluded”, thus covering also the Nordic so-called “marketing law”.

¹³ Mainly the proposal for a directive concerning unfair business-to-consumer commercial practices in the internal market (COM (2003) 356 final of 18.6.2003), the proposal for a Regulation concerning sales promotions in the internal market (COM(2002) 585 final of 5.10.2001) and the proposal for a regulation on cooperation between national authorities responsible for the enforcement of consumer protection law (COM(2003) 443 final of 18.7.2003).

¹⁴ See, as regards Article 5(3) of the Brussels Convention Case C-167/00 Henkel [2002] ECR I-8111.

Still, it must be stressed that this interpretation is far from certain and that it should therefore be made clear before adoption of the proposed directive what is actually covered by the derogation in Article 17 (21). This could be done either in the recitals to the proposed directive or by a more clear formulation of the derogation itself.

4.3 The Derogation in Article 17 (21): “to the Extent that the Provisions are not Completely Harmonised”

The derogation in Article 17 (21) implies that once the provisions governing contracts concluded by consumers have been completely harmonised, the *country of origin principle* will apply.

This formulation can be seen as heavily prejudicing the outcome of future negotiations on how the provisions on consumer contracts should be harmonised. Indeed, in order to fit into the framework provided by the proposed directive, it can be argued that this future harmonisation exclude the possibility of prescribing full harmonisation with supervision or other measures to be decided by or carried out by the host Member State.

This consequence is even aggravated, in case Article 17 (21) is interpreted (or reformulated more expressly) as covering not only strict “consumer contracts”, but also other “consumer relations” as i.e. advertising. With this interpretation, it can be argued that the proposed directive prejudices the outcome of the negotiations as to the possible future Community rules on e.g. unfair commercial practices, resulting in that the control of any such unfair commercial practices shall be carried out by the home state to the exclusion of the host state.

4.4 Derogation from Article 16: “Within the Coordinated Field”

According to Article 16, the Member States shall ensure that providers are subject only to the national provisions of their Member State of origin “which fall within the coordinated field”. It can be questioned what the reservation “within the coordinated field” actually means.

Most obviously, the reservation refers to rules other than those which affect the access to and exercise of an activity, for example rules relating to public order – e.g. speeding limits in cities. Still, a considerable grey zone exists as to what is the “coordinated field” or “access to and exercise of an activity”. As has been demonstrated in the case law of the Court, many measures not directly connected to the access to and exercise of an activity may actually influence and/or restrict the activity in question.

It could be argued, i.a. on the basis of the decision of the Court in the *De Agostini* judgment¹⁵ that the *country of origin principle* does not hinder Member States from invoking certain other legislation not directly covered by the scope of application of the directive. However, in our view, it is doubtful whether the ruling in *De Agostini* can be invoked in connection with the proposed directive. The proposed directive is of a general nature and covers an extensive field. If the directive is interpreted as covering also consumer relations (see discussion above), the Member States will hardly be able to invoke any national consumer related legislation against service providers relying on the *country of origin principle*.

¹⁵ Cases C-34-36/95 Konsumentombudsmannen mot De Agostini [1997] ECR I-3843.

5 Other Provisions of the Proposed Directive which Appear to Affect Consumer Protection

5.1 The rules on Freedom of Establishment: Lowering of the level of protection through simplification of procedures and evaluations of equivalence?

As stated above, the proposed directive presumes that once a service provider has established himself in another Member State, he is required to respect all rules applicable in this state i.a. as to consumer law. Thus, Chapter II in the proposed directive does not directly affect consumer protection in the Member States as a service provider – once established – will have to comply with all consumer rules in the state of establishment. Still, consumer protection is affected in an indirect manner.

The obligation of the Member States stated in Article 5 as to the simplification of procedures and formalities applicable to access to and the exercise of a service activity may entail a lowering of the level of protection traditionally known in the Member State in question. The “simplification” of procedures and formalities can be imagined to include e.g. the abolition of different stamps and notary verifications of documents. Even though certainly old-fashioned, such rules have undoubtedly been introduced and applied continuously in order to hinder fraud and other criminal initiatives and to protect consumers.

On the contrary, the obligation stated in Article 5.2 to examine whether documents from other Member States serve equivalent purposes of different national documents, should not affect consumer protection, as authorities are fully allowed to reject documents that are not equivalent of national requirements. Still, the provision that they may not require that a document from another Member State be produced in its original form or as a certified copy or as a certified translation potentially opens the door for manipulation.

Obviously, Member States must be sure of the equivalence of documents and in this regard it is important that the procedures for mutual assistance actually function, i.e. that the Member State having to analyse a document from another Member State can actually get effective help in understanding and “translating” the document in question. If this assistance is not given in a loyal and conscientious manner, a service provider might establish himself in a Member State even though he does not fully answer to all the requirements set up in national law, which the consumers are entitled to rely on.

The single points of contact do not appear to have any particular effect on consumer protection. Still, if a mistake occurs and a service provider is able to rely on the proposed directive (see discussion above), may the service provider also invoke this against a consumer having made use of the established service providers’ services? This is probably so, as the directive itself does not create obligations for individuals. In this regard, it does not appear to be of importance whether the third party is a consumer or not.

Neither the information exchange system set up in Article 7 or the obligation to establish procedures by electronic means directly affect consumer protection in the Member States. However, as to the establishment of electronic procedures, it is obvious that this presupposes that a certain security level can be ensured. It seems slightly unrealistic that this should be possible already as of 31 December 2008 without dangers of fraud. The same considerations apply as to the adoption by the Commission of detailed rules in order to facilitate the interoperability of information systems.

According to Articles 9 and 10 authorisation schemes and particular conditions for the granting of authorisations may only be upheld if they are objectively justified and proportionate. The provisions mean that authorisation schemes may be upheld in order to protect consumers. Still, the provisions risk lowering certain standards. What measures are considered proportionate as to the protection of consumers? As the case law of the Court shows, this is a difficult question where interpretations may vary considerably between Member States.

Moreover, according to Article 9.2, Member States shall screen their legislations and motivate their different authorisation schemes. What will happen if this provision is not complied with? Will disrespect of the notification requirement mean that the authorisation in question cannot be invoked against interested parties, just as is the case in the area of notification of technical standards in directive 98/34/EC on the free movement of goods (see above)? In this case, businesses may be able to operate without given (non-notified) authorizations – also as regards consumers.

According to Article 10.3, duplication of requirements and controls, which are equivalent or essentially comparable, are forbidden. Also in this respect, it is important that the mutual assistance between Member States actually functions in order to prevent a lowering of standards.

Article 11 provides that authorisations granted to a service provider shall not be for a limited period, except in certain objectively justified cases. Thus, instead of the service provider being forced to show that he complies with all conditions of the authorisation, the national authorities will have to detect whether this is the case through supervision. This shifts the burden of proof, puts further burdens on the national authorities and may put consumers at risk to a higher extent than before.

The blacklist in Article 14 hardly affects consumers in any particular way. The list seems to just codify the main principles stated in the case law of the Court.

However, the requirements listed as grey-zone requirements in Article 15 may very well be upheld in a Member State in order to protect consumers. This is so i.a. in regard to (c) requirements which relate to the shareholding of a company, in particular an obligation to hold a minimum amount of capital for certain service activities and (d) requirements other than those concerning professional qualifications which reserve access to the service activity in question to particular providers by the virtue of the specific nature of the activity.

Here again, Member States are required to screen their legislation and report requirements of this kind to the Commission. It remains to be seen what threshold of tolerance the Commission will set. Non-observance of the notification requirement could lead to inapplicability (see above) – also as regards consumers.

5.2 Case-by-case derogations from the Country of Origin Principle: Safety, public health, public policy (protection of minors)

Article 19 provides that Member States in special cases may derogate from the *country of origin principle* as concerns the safety of services, including aspects related to public health, the exercise of a health profession and the protection of public policy, notably aspects related to the protection of minors. Still, certain conditions need to be fulfilled before the measure can be taken, i.a. the procedure referred to in Article 37 and proportionality.

The procedure in Article 37 may be lengthy if the Member State of origin does not respond. In all events, measures cannot be taken within a period of fifteen working days. In case of urgency, a Member State may invoke a special procedure (Article 37.6). Still, it can be questioned whether this procedure will be sufficient to hinder i.a. acute dangers to public health.

Moreover, the provision and the notification procedure may pose non-neglectable problems e.g. to the extent that Member States and scientists do not agree as to the possible danger/safety of a service and the level of protection sought. In this context, it must be noted that even though the Court in the field of public health has developed a so-called precautionary principle,¹⁶ the corresponding grounds for derogations in the Treaty have been interpreted rather restrictively in the case law of the Court.

5.3 Quality of Services – General Harmonisation also as regards Business-to-Consumer Relations

The chapter on quality of services applies generally to service providers established in a Member State, as well as to service providers who rely on the free movement of services. Thus, the rules apply also in all business-to-consumer relations in the Member States if no specific Community rules have been adopted. Thus, it must be assessed whether e.g. the information requirement in Article 26.1 that providers shall make available to the recipient is sufficient in consumer relations. This is the case even though certain of the provisions in the proposed directive clearly constitute “minimum harmonisation”. Article 26.5 e.g. does not prevent Member States from imposing additional information requirements applicable to providers established in their territory. Still, depending on the interpretation of the country of origin derogation as concerns consumer contracts (see above), these additional requirements can only be upheld in relation to service providers established in the Member State in question and not in relation to service providers established in other Member States and relying on the free movement of services and the *country of origin principle*.

The rules not constituting minimum harmonisation obviously affect consumer protection. The requirements in Article 27 e.g. imply that Member States may not require that other service providers be covered by professional indemnity insurances or guarantees (i.e. Member States may not require this for providers other than those whose services present a particular risk to the health or safety of the recipient, or a particular financial risk to the recipient).

Likewise, as regards after-sales guarantees, Member States will in the future hardly be able to impose stricter rules, e.g. that such information shall be given not only at the

¹⁶ See e.g. Case C-192/01, *Commission v. Denmark* [2003] ECR I-9693, para. 49-57.

request of a recipient and in information documents, but obligatorily in advance (see Article 28).

The removal of all prohibitions on commercial communications by regulated professions will affect consumers as they can in the future be confronted with commercial communications from e.g. lawyers and accountants (see Article 29). Will the professional rules referred to in Article 29.2 be sufficient to ensure an appropriate level of protection?

Furthermore, what are the legal consequences of Article 31, according to which Member States shall take accompanying measures to encourage providers to take action on a voluntary basis to ensure the quality of service provision? What will be the binding effect of such rules and to what extent can consumers invoke them? What if the initiatives of the Member States do not succeed in encouraging providers to take action on a voluntary basis?

Short of any general rules on settlement of consumer disputes, the rules in Article 32 will also apply to such disputes, i.e. Member States shall take the general measures to ensure that providers supply information as to where all recipient can send complaints and to ensure that providers respond to these complaints. How are the Member States actually supposed to carry out this undertaking?

5.4 Supervision and Mutual Assistance – Will this really be effective?

Obviously, it can be questioned to what extent the supervision carried out in the country of origin will be effective as regards services provided to other Member States. According to Articles 34 and 35, the Member States shall work together and give each other mutual assistance in order to ensure the supervision. For this purpose, the Member States shall also designate one or more points of contact.

What are the consequences if a Member State does not cooperate loyally? The proposed directive gives no clear answers to this question. Still, in the event of the temporary movement of the provider, the authorities in the host state shall participate in the supervision and may conduct checks, inspections etc. under certain conditions laid down in Article 36.2.

5.5 Convergence Programmes as Consumer Protection?

Any codes of conduct will certainly affect consumer's rights and it must be discussed if such rules are in any way supposed to be applicable instead of mandatory rules. In this case, it will be at the expense of consumer protection and a number of important questions arise. Will such rules be enforceable? By which organs? Is it recommendable from a consumer's perspective that codes of conduct, ethical rules and the like apply to consumer areas?

5.6 Identification of the Need for Further Harmonisation as regards Consumer Protection

According to Article 40.2(d), the Commission shall assess the need to take additional initiatives or to present proposals for legislative instruments, particularly in relation to

consumer protection. It appears from the *travaux préparatoires* to the proposal that only through such complete harmonisation, a “true” internal market for services may evolve as regards consumers. This clearly means that the Commission has decided to discard its earlier policy of ensuring consumer protection through minimum harmonisation and that the Commission intends to present further legislation in the consumer field.

Still, as mentioned above, important problems arise to the extent that the Member States do not succeed in agreeing on such further Community measures. In that case, the provisions of the proposed directive stand and to a certain extent apply also as regards consumer relations.

Conclusions

The proposed directive gives rise to many complex legal questions. It can be argued that the proposed directive does not have a sufficient legal basis in the Treaty and that it will entail that Member States in the long run may find difficulties in upholding particular requirements for businesses established on their territory, as these requirements need not be respected by businesses established in other Member States relying on the free movement of services and the *country of origin principle*. Furthermore, the proposed directive lists a number of obligations which are unclear and vague to their content, and which may create considerable legal uncertainty as to the consequences if the Member States do not comply with them.

In relation to consumer protection, the proposed directive also raises important questions. The proposed directive is a general framework directive and does not have as its express objective to regulate consumer relations. Still, it may end up doing just this.

The proposed directive clearly states that it is “without prejudice to any legislative or other Community initiatives in the field of consumer protection” and the Commission clearly foresees such particular consumer initiatives to be taken and to be “completely” harmonising. Thus, to the extent such particular consumer initiatives are taken, these will apply as “*lex specialis*” instead of the proposed directive.

Still, consumer areas, which are not at all harmonised, or only subject to minimum harmonisation, seem in principle to be covered by the directive. In the field of freedom of establishment, this does not pose any particular problems, as a service provider has to respect all requirements set up in the (new) Member State of establishment.

However, as concerns free movement of services, it is doubtful to what extent general consumer relations are covered, as the general derogation in Article 17(21) may be interpreted in different ways. Interpreted in an extensive manner, all circumstances relevant to the conclusion of a consumer contract are exempted from the *country of origin principle*. Interpreted in a more restrictive manner, only circumstances relevant to the conclusion of an actual contract are exempted, meaning that the *country of origin principle* applies to all other consumer relations.

We recommend that absolute priority be given to the clarification of the actual extent of this derogation, either in the Recitals to the proposed directive or in the provision itself.

Moreover, the derogation may even prejudice the outcome of future Community negotiations on consumer relations. Once the area in question is “completely harmonised”, the *country of origin principle* is supposed to apply, meaning that supervision, application of general clauses etc. are to be carried out in the country of origin. It can certainly not be ruled out that a future Community measure may be based on other principles, e.g. if it were to be decided in the proposal for a directive concerning unfair commercial practices that the application and interpretation of the provisions in question shall be carried out in the host state (the state of the consumer). Presumably, such a measure would have priority as “*lex specialis*” over the general proposed directive, but it can be seen as a forceful argument in the upcoming

negotiations that the proposed directive and any future measures in the field of consumer protection should be based on the same fundamental principles.

At least, the proposed directive sets certain pressure on the legislative agenda as regards other consumer relations – if such other measures are not agreed upon, the proposed directive may apply. If such other measures are not based on the same principles as the proposed directive, problems as to the logic and fundamental principles behind the legislative measures will arise.

In order to avoid such pressure on the legislative process, it could be considered to state clearly that the proposed directive does not apply as regards consumer relations as long as such particular Community initiatives have not been taken. Obviously, this would lead to an important reduction in the actual impact of the proposed directive and could possibly be seen as undermining the ambitious purpose to establish a “genuine” internal market also in the field of services.

This is so, in particular as it can very well be argued that it is impossible for service providers to ensure that consumers are only confronted with certain particularly elaborated advertisement material, whereas non-consumers may be presented with other advertisement material generally applicable due to the *country of origin principle*. Operating with double or different standards in this manner depending on whether the recipient is a consumer or not does not seem practical or realistic.

In conclusion, the proposed directive must be seen in the context of the other existing and future Community measures on the protection of consumers, since the proposed directive is not supposed to apply to the extent such other measures exist.

Still, business-to-consumer relations constitute a very important part of the field coordinated by the proposed directive. The fact that business-to-consumers relations are actually covered by the main principles laid down in the proposed directive can be seen as decisive to the actual effect or “success” of the proposed directive whose object it is so obtain a “genuine” internal market for services all to the supposed benefit of recipients and consumers who should be given an increased choice of cheaper and better services.

In this context, it is of outmost importance that the problems raised by the proposed directive are studied and analysed together with other possible Community measures at a point in the legislative process where it is still possible to adjust both these other Community measures and the proposed directive itself. The present Community regulation of business-to-consumer relations undeniably constitutes a complicated patchwork, which is difficult to comprehend, consisting presently i.a. of Directive 84/450/EEC concerning misleading advertising and comparative advertising,¹⁷ Directive 92/59/EEC on general product safety,¹⁸ Directive 97/7/EC on the protection of consumers in respect of distance contracts,¹⁹ Directive 98/6/EC on consumer protection in the indication of prices of products offered to consumers,²⁰ and Directive 98/27 on injunctions for the protection of consumer’s interest.²¹ To this already complicated patchwork are now added the proposals concerning unfair business-to-consumer

¹⁷ OJ L 250, p. 17.

¹⁸ OJ L 228, p. 24.

¹⁹ OJ L 144, p. 19.

²⁰ OJ L 80, p. 27

²¹ OJ L 166, p. 51.

practices, sales promotions, cooperation between national authorities²² and the proposed directive on services in the internal market – all measures with unclear legal consequences and internal coherence.

It is certainly worth considering whether EC and national consumer law would not benefit considerably in efficiency and clarity, if the adoption of the proposed directive could be linked to the enactment of a horizontal consumer protection regulation, possibly “only” applicable to the particular circumstances of cross-boarder provision of services.

Mariefred and Saltsjö-Duvnäs, 26 May 2004

Ida Otken Eriksson

Ulf Öberg

²² The proposals are cited above in note 13.