



# The struggle over the Services Directive – a turning point for EU decision-making?

*Presentation Outline*

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**The struggle over the Services Directive – a turning point for EU decision-making?**

Unique event or a permanent change of the role for the European Parliament and extra-institutional forces in the EU pattern of power-relations and decision making?

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*Status for the study:* Pursued in depth interviews with actors in the different DGs of the Commission, main actors in the EP, the Social Partners (ETUC/BusinessEurope) and key actors in Sweden (SN, LO, Ministry) as a case of Nordic MS strategies.

*Remaining interviews:* Some interviews in the EP, Council (Coreper), possibly brief phone interviews with reps from some other MS (ex PI, Germany, ....)

*Prospects:* Plan to finish interviews and produce a first draft January. Present finished Working Paper (and/or article) for May conference.

ALL COMMENTS AND SUGGESTIONS ARE WELCOME!

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## 1. Introduction

- Situating the topic and the study - why is it interesting to study the decision making-process behind this directive?
  - Main question ...
  - Reference to the Formula-project and the study (data)
  - Structure of the paper/article
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- **Context:** In January 2004 the European Commission launched a new directive intended to break up what it saw as the frozen internal market for services in the EU and the EEA. The Bolkestein Directive, named after the Dutch Commissioner for Internal Market affairs, soon became subject to widespread popular opposition and eventually got, together with the infamous 'Polish Plumber' entering the EU after the Eastward enlargement 1 of May 2004, much of the blame for the defeat of the Constitutional Treaty in the French and Dutch referenda in 2005. After a long-drawn process of political haggling, negotiations, and mobilization among trade unions and social movements in the EU, the European Parliament the 16<sup>th</sup> of February 2006 adopted an amended version of the Directive which was swiftly accepted by the Commission and embraced by the European Council in December 2006. By many observers the compromise struck in the EP were hailed as a path-breaking step towards democratization of decision-making in the EU. Not only did the European Parliament, in interaction with popular forces and trade unions in Europe, establish itself as the key lawmaking European institution; (for the first time in Community history?) a broad transnational coalition of social movements won through with substantial changes in a directive of fundamental importance for one of the four freedoms of the single market and hence for the economic development of the enlarged EU.
  - The aim of this article is not to discuss the content of the compromise directive, but to account for the decision-making processes that that led to the unexpected outcome. How, who, where, why - what does it tell about the emerging system of MLG in the EU? How representative is the SD process – a case of what? A contingent exception?
  - The overriding thematic of our study – emerging patterns of multilevel governance (MLG) in the EU, applied to the area of service mobility and labour market regulation, in which phase-1 analyses the character and dynamics of the European level of the MLG-regime in this realm
  - Labour law relevance of the SD issue: Nexus between economic freedoms (art 49, EEA 36) and social regulation at European level (PWD/equal rights), the strained links between promotion of competing national economic interests and protection of national social/IR systems; i.e the issue can shed light on dynamics shaping the interaction between economic integration and social dimension, the scope for regime competition, and how various actors, institutions and interests try to translate such considerations into EU regulation

## 2. Background and research questions:

a) **Aim of the section:** Sketch the background, context, importance of the directive and the key controversial issues.

- Timing and context: Lisbon, Enlargement, New Constitution, New EP, New Commission...  
-> phase of transition, disequilibrium, critical juncture of European integration
- Key issues:
  - Who were the key institutions and actors, what were their main interests/aims and the main coalitions during the different stages of the process? (Particularities of the (formal) process?)
  - How were their behavior, strategies and willingness to compromise shaped by the legal and institutional ramifications and the particularities of the process – in legal terms and in real terms?
    - At what levels did they act - EU vs national – in different stages... upstream vs downstream processes?
  - To what extent were they influenced by popular forces and pressures from without the EU institutions, and to what extent did member state actors and interests impinge on the policy-shaping deliberations/negotiations?
  - What were the main determinants of the social partners' strategies, their internal interest intermediation, and their capacity to influence by entering/creating coalitions – with whom, at what levels, how?

b) **What could be expected in view of existing literature and former studies of EU decision-making in this realm?**

- Intergovernmentalism vs supranationalism, neo-functionalist spill-over vs genuine *sui generis* game of policy-making and compromise over multiple levels?
- The relationship between national interests, functional economic interests (business/labour), and ideological preferences?
- As a key internal market issue one could envisage that economically driven, realist/national interests were dominating/shaping the process:
- According to studies on the social dimension social/labour interests might – through the triad of Comm/EP/ETUC - attain influence on softer issues, but the fundamental asymmetry of the EU would suggest that the logic of economic/national interests would be superior in this issue concerning one of the fundamental freedoms.
- Yet, the particular history and context of the SD might indicate that traditional assumptions would not necessarily hold true; cf unexpected big leaps had formerly occurred in times of flux (e.g. SEA, Maastricht Treaty...)

- The Commission prop had not been subject to the usual processes of dialogue and anchoring;
- The dossier was quite unique, aimed at redefining/reconciling key pillars of the Treaty, secondary regulation and case-law, entering into uncharted terrain;
- Enlargement might change conventional perceptions of economic and national interests and alter inherited power-relations and coalitions;
- Constitutional process and rupture might alter the political calculus of key actors

-> extremely complex process under fairly unique circumstances, which could be envisaged to pull in diverse directions, i.e. *Europeanisation* or *re-nationalisation* of both the substance of regulation and of the decision-making determinants...

**c) Analytical purpose:**

In view of the former, our purpose is, rather than testing specific hypothesis, of more inductive character, that is, to provide a descriptive analytical narrative of the process on the basis of which our main aim is to reveal the decisive set of factors that can account for the unexpected importance of the EP (and ETUC/NGO influence) in this instance of law-making.

On that basis – discuss what is this a case of?

- > a general property/pattern of EU MLG decision-making?
- > a unique, deviating example?
- > an illustration of the contingent character of decision-making in EU-MLG (thus being a distinct but not exceptional case)

Our hunch/proposition, thus far, is that the SD process represents such an exceptional set of issues and circumstances, in which the configuration of actors, institutional relations and political coalitions of power were in flux and the political stakes so high, that the outcome, until differently proven, should be treated as an atypical but not unique event.

In the end, we will in this view reflect a bit over what this case can tell about the more general pre-conditions for parliamentarians and social movements gaining exchange power to obtain decisive influence on key pieces of legislation within the would-be-polity of the European Union.

### 3. Research design

- Case study - in-depth examination of a single instance or event – building on a series of preliminary studies and secondary material.
  
- Based on semi-structured qualitative interviews with key actors in the Commission, in the European Parliament, with working-groups representatives in the Council and with the social partners, at European level and national level (Sweden).
  - Access to core shapers of the compromise
  - Semi-structured interviews leave the respondent with a great deal of freedom in how to reply, well-suited for instances where a good deal of knowledge is already acquired about the subject, but where depth, details and insider's perspective is wanted.
  
- Delimitation: Focus on the processes at the European level
  - the role of national actors and of Nordic influence are illustrated by views of Swedish actors, checked with selected sources in other MS (Germany, PL, and other Nordic countries)
  - Special attention to the EP and the ETUC roles in the process

#### 4. Empirical analysis – descriptive narrative

Three phases of the decision making process: Actors, interests and interest intermediation

##### 4.1. Short description of the process and the EU co-decision procedure.

###### a) *The process and key issues*

- January 2004, the Commission presents its draft on a Directive on Services in the Internal Market (COM (2004) 02 final).
- 2005-2006 - intense dispute about the proposal, partly broad mobilization, demos etc, shift of emphasis/initiative from the Commission and the Council to the EP
- Most of the disagreements were settled inside the European Parliament, presented in its first position in February 2006 – “the compromise” proposal (and outcome).
  - In the EP the proposal was accorded to the relevant working committee, in this case the Committee on Internal Market and Consumer Protection.
  - Cooperation with the Committee on Employment and Social Affairs.
  - The purpose of this procedure is that the relevant committee shall draw up a report which can form the basis for the plenary vote.
- Key substantial issues:
  - The original draft of 2004 suggested the controversial country-of-origin principle, according to which service providers would be subject mainly to the law of the country they were established, except PWD (constrained by control restrictions)
  - In the second draft, the wording of the country-of-origin principle was removed, and replaced with ‘the freedom of providing services’. Additionally, the scope of the directive was reduced.
- After the Parliament compromise, the Commission presented a revised proposal in April 2006, where the text from the Parliament was more or less intact.
- The Council did not make any big changes either, just technical adjustments. The second reading in the European Parliament took place in November 2006, and the Council and the Parliament finally accepted the directive in December 2006.
- The Member States got three years to implement the Directive, which will be a key subject in phase-2 of the Formula project

###### b) *The legal frameworks and basis<sup>1</sup> for the proposal* entailed the application of the co-decision procedure and was thus subject to qualified majority voting in the Council.

- The co-decision procedure<sup>2</sup> introduced by the Maastricht Treaty (1992) concedes to the European Parliament the right of legislative partnership with the Council
  - Brief outline and explanation how/why this procedure creates pressure for a strong majority in the EP, including the role of the Commission readings (critical point underscored in some interviews – if the Commission disagrees, unanimity is required in the Council. Other aspects of the procedure that favour broad compromise, lawyers?)

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<sup>1</sup> Article 47 (2) and article 55 of the Treaty, as well as article 71 and 80 (2).

<sup>2</sup> Article 251 of the Treaty



**4.2 The different phases of the decision making process** - the actors, their interests and the possible multilevel character of the game.

**First phase: From Lisbon to Bolkenstein.**

*Actors:* The European Commission (DG Internal Market) and the Council.

*Purpose/aims:* The efficiency of the internal market of services. Show that Europe can deliver.

- The service directive intends to create a general legal framework in order to eliminate existing barriers to freedom of establishment of service providers and the free movement of services between member states. The establishment of a genuine internal market in services is considered to be a key step in the Lisbon-process.
- The Lisbon European Council in 2000 launched a process of economic reform aiming to make EU the most competitive and dynamic knowledge-based economy in the world by 2010. The Commission's Communication on an Internal Market Strategy for Services was issued in December 2000 and Member States, other Community Institutions and interested parties were asked for their views.<sup>3</sup> In the 2002 report from the Commission the complexity and severity of legal barrier is seen more far more wide-ranging than was expected when the new strategy for Services was launched.
- In November 2002 the Council stated: ..«that very high political priority should be given to the removal of both legislative and non-legislative barriers to services in the internal market»<sup>4</sup>.
- In May 2003, the Commission announced that it would make a proposal for a Directive on services in the internal market before the end of 2003. It should be based on a mix of mutual recognition, administrative cooperation and harmonization where strictly necessary, and encouragement of European codes of conduct/professional rules.
- In October 2003 the European Council identified the internal market as a key arena for improving the competitiveness of the European economy.<sup>5</sup>
- I January 2004 the Commission launched the proposal of a Service Directive, with a poor consultation process. The draft was not properly rooted – neither inside the Commission, nor in the other institutions (Parliament and Council) and the social partners.

**Second phase:** From the Commission's launching (Jan 2004) to the Parliament's first reading (Feb 2006). The most important question in this part of the article is: What were the role and the interplay of the central actors in the European Parliament, and how did the other actor's interests affect this political process?

*Actors:* The European Parliament, The Social Partners at European level, national trade unions. The Commission and the Council had a more withdrawn, but not unimportant, role.

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<sup>3</sup> Ibid.

<sup>4</sup> Proposal for a directive of the European Parliament and of the Council on services in the internal market COM (2004) 2 final/3

<sup>5</sup> Ibid

*Interests:* Common interest from all actors in achieving a directive for services to ease the service-mobility. This includes a better service-mobility from «new» to «old» member states (east-west dimension). Protection of national labour law and the status of the Posting of Workers Directive were important interests from the ETUC, national trade unions and several Member States. ETUC had an interest in mobilizing to show independency from the Commission. A side-effect of the mobilization against the service directive was an aim to rescue the new European Constitution. Specific national interests: The Swedish case.

- The Commission launched the proposal for a new service directive just months before the EU enlargement 1st of May 2004. This timing – or lack of timing – became a critical factor in process. A broad, horizontal, directive in the core of the inner market was combined with the fear of the “polish plumber”. In addition, the French started their debate about the new constitution in connection with the referendum. These circumstances led to surprisingly harsh reactions and intense combat over the directive.
- At first glance, the directive was not seen as controversial, but was welcomed from most of the Member States as a necessary tool to improve the inner market.<sup>6</sup>
- The alarm-bell was pushed in LO in Sweden. But among our informants it is not a general view that the opposition was started by the Swedish trade union. Different theories about the starting point for the opposition.
- Election to the European Parliament and a new Commission came to office. Bolkenstein went out and McCreevy became responsible for the directive. As opposition grew, the fatherhood for the directive faded. Not many actors in Brussels would like to see themselves as soldiers in the fight for the service directive. In the public spheres, both the Commission and the Council seemed reluctant. It was difficult for the Commission to actively defend this “hot political potato”, and a strategy of low profile was chosen. The struggle was left to the politicians in the Parliament.
- Inside the parliament, it was a common interest to show themselves as proper lawmakers. A broad consensus was needed, to make sure that the directive was backed by the Commission and not blocked by the Council. Without this backing, the fear was that there would not be any directive. The vote from the Internal Market Committee had not the necessary support, and therefore the negotiations continued before the plenary vote. This was why the compromise was made of the two major political groups, PES and EPP, even if the EPP and the Liberals had the majority in the Parliament
- A compromise became possible because the actors had a shared interest in getting the directive through. The inner market is a core area in the community, and it was a strong will from all parties to get a solution. Besides, Europe needed to deliver after the turndown of the Constitution in the French referendum in the summer 2005. Additionally, this was a matter with great importance for the new Member States. The new Member States regarded the opposition as a way to stop the free movement from east to west.
- The Council worked also parallel, with the text of the Directive. The coalitions differed, depended on the questions in matter. The Council was uncertain whether the Parliament

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<sup>6</sup> Miklin, E. (2008), National Interests or Individual Ideological Preferences? The Services Directive inside the EU's Council of Ministers, Paper to be presented at the 4th ECPR Pan-European Conference on EU-Politics, 25-27 September 2008, Riga/Latvia.

managed to present a result. The Council gave a signal in 2005 that the EP should respect the European Social model (guidelines).

- The social partners played different roles. The employers were split in the matter, and came late onboard. Some member organizations of *BUSINESSEUROPE* saw the directive as an opportunity to change the implementation and interpretation of the Posting of Workers Directive in some Member States.
- ETUC had a double strategy. The confederation used the Service Directive as an opportunity to show the members that the ETUC was not “in the pocket of the Commission”. At the same time, the ETUC hoped that the opposition to the directive could save the Constitution. The ETUC was in the streets, demonstrating, and at the same time delivering new texts inside the Parliament. Or as an insider in ETUC states it: “The final manifestation was like walking on eggs”.
- The ETUC played a very active role and served the parliamentarians with alternative texts in addition to meetings with parliamentarians, the Commission and Council. The ultimate goal was to get rid of the country of origin-principle from the text. ETUC functioned as a mediator between the politicians, slowly introducing new texts from an internal 7-point program. At the end, an alternative text to the country-of-origin-principle was handed to a member of the PES-group, but it should not be known where the text came from. This text was, surprisingly to the ETUC, included in the next proposal to article 16. ETUC regarded this as having won set, game and match.
- ETUC was concerned having members from the new countries on board. The organization made a trade: ETUC gave up the transitional arrangement for the free movement of workers from the new member states and got support in return.
- The Commission was not at the public stage in the process, but gave signals during the negotiations on what could be accepted in the end.
- National interests and the Member State’s influence as part of the multilevel process: The Swedish case as an example. Parallel concern about the Laval-case in Sweden. The question of free movement contra national regulations therefore became a big issue in more than one way. In the public debate in Sweden these matters were tied together.

**Third phase:** From the Parliament’s first reading to the final decision in the Council in December 2006.

*Actors:* The Commission, the European Parliament, the Council.

*Interests:* An «untouchable» compromise – take it or leave it.

- In April 2006 the Commission drafted a revised proposal based very closely on the Parliament’s text. At the same time the Commission issued a Communication on the Posted Workers’ Directive. Different interpretation of the Commission’s changes (article 1) (substantial or cosmetic changes?)
- The role of the Austrian Presidency.

## 5. Discussion

Our preliminary analysis of the process highlights a series of particularities that in combination contributed to shaping the form and outcome of the decision-making process:

- the particular context and constellation of interlinked processes - Enlargement, Constitution strife, situation of flux – need for EU to deliver and resolve the issue
- the shift in the configuration of actors, interests and power-relations in the Council created a more complex and challenging context of interest intermediation
- the Commission's preparation of the process – no dialogue and anchoring inside and outside of the Commission
- the shift of Commission – from Bolkestein to McGreevy – > 'the orphan' to whom no one would claim fatherhood /ownership
- the character of the issue, substantially and legally, concerning one of the four freedoms as well as secondary legislation, and introducing new regulatory methods (horizontal approach and CoP);
- the legal framing of the decision making process (the co-decision procedure) facilitated/required compromise-building within the EP, and between the EP and the Commission, to avoid blockage in the Council
- the public politicization and mobilization – related to the Constitution process – created window of opportunity for popular forces, and the ETUC in particular, to exert external pressure and act as broker between various factions within the EP and vis-a-vis the Commission and Council (whereas the business camp apparently was restrained by internal divisions and fear of institutional deadlock)
- The strong interest of the Council and the Commission in finding a workable solution provided the EP an extraordinary opportunity to constitute itself as an autonomous legislator and gave it power in negotiations with the former institutions, at the same time forcing the different factions in the EP to find a compromise
- The above factors gave impetus to coalition-building and exploitation of informal actor networks across boundaries between the various EU institutions, ideological factions and member states, enabling key actors with multiple allegiances to intermediate and broker compromise formula that could be viewed as acceptable by all stakeholders and sold as a face-saving win-win outcome.

## 6. Tentative conclusions – a turning point of EU decision-making?

- Not a turning point towards a new pattern of EU decision-making and power relations between the EU institutions with the EP in a generally strengthened role, nor a unique, deviating case, but rather an example of the contingent character of legislative decision-making in the multi-institutional EU system.
- The decisive role of the EP (and ETUC) was thus distinct and probably atypical but not exceptional.
- The procedural frameworks (co-decision) do grant the EP an important role in most cases, but the seemingly almost quasi-sovereign legislative function of the EP in this case can be attributed to an instance of exchange power that not often occurs:
  - First, given the circumstances the EP controlled something the Council and Commission desperately wanted/needed, providing the EP with unusual negotiating power vis-a-vis the Commission and the Council; second, the division of views in the Council and the need for a proposal the Commission could agree to created strong internal pressures for a broad compromise ('responsibility, prove your credentials'), at the same time, third, implying that the Commission and the Council had considerable tacit/informal influence on the process of compromise-building in the EP. This implied a three-way process of negotiation and accommodation, in which the forces that were most critical/least interested in the Bolkestein Directive, that is the Social Democratic PSE-group in the EP, softer parts of the Commission, and not least the ETUC, achieved a relative strengthening of their bargaining position. In order to rescue the directive the Conservative group was willing to go quite far in accommodating PSE demands.
  - These dynamics, further, opened room for the ETUC who, according to its two-pronged approach, worked both inside the system through the EP, through allies in the other institutions and via important member states (e.g. France, Germany, Sweden...) as well as from without through mobilizing popular protest, member unions and social movements. Our sources do, however, indicate that the former footwork was of greater importance for the outcome than the (threat of further) external mobilization.
- In theoretical terms, the processes did not follow a strictly intergovernmentalist logic (realist/national interest), although the East-West dimension clearly had such ingredients. Neither can it be seen as a simple result of supranational, neo-functional spill-over from economic integration, although the broad interest in opening the service markets can be seen in such a perspective. With the central role of the EP, the impact of ideological and party/political lines – which were reinforced by the shadows from the Constitutional processes – attained greater salience than usually assumed in EU decision-making. Such lines of division/coalition-building also seemed to influence the behavior of key member state governments, altogether contributing to the picture of a complex process of inter-institutional and multi-layered negotiations, coalition-building and compromise.