The EU Services Directive and the Public Services

– a Norwegian perspective

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Foreword

In the autumn of 2007, the Norwegian Union of Municipal and General Employees entered into a partnership agreement with the Norwegian organisation “No to the EU”, chiefly concerning a number of different investigative and reporting tasks. The initial focus of attention was various aspects of the EU Services Directive. A working group was accordingly appointed in January 2008 to look into the same problems and issues that had been dealt with in the reports on the Services Directive commissioned by the Norwegian Ministry of Trade and Industry. The working group consisted of Dag Seierstad (No to the EU), Peder Martin Lysestøl (Trondheim and Sør-Trøndelag University College), Trond Nordby (University of Oslo), Hans Holte (Norwegian Union of Education, Oslo), Morten Harper (No to the EU), Unni Hagen (Norwegian Union of Municipal and General Employees), Rolv Rynning Hanssen (Norwegian Union of Municipal and General Employees), Hilde Loftesnes Nylén (No to the EU) and Rakel M. Solbu (Norwegian Union of Municipal and General Employees).

The working group has concentrated primarily on the area of public services. The result of its endeavours is a thorough working document, with which the group wishes to focus on a number of problems and issues which they believe the reports commissioned by the Ministry do not address, and to put these matters on the agenda. In our view, the document raises a number of questions which it is crucial the Norwegian government should address in connection with their deliberations on the Services Directive, in line with the objectives laid down in the Soria Moria Declaration.

The welfare state is based on the principle of giving according to ability and receiving according to need. The public sector is the foundation of the welfare state, and all welfare services shall be publicly owned, funded and operated. Secure, well-qualified and motivated public servants provide the best services; they are best acquainted with the recipients of the services and their needs, and they have the expertise to deal with them. Public sector employees have a right to know how the Services Directive will impact on their everyday working lives.

Oslo, 23 April 2008

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Summary

The aim of the EU Services Directive is to promote the trade in services across national borders by removing barriers which have been introduced by national states to safeguard the interests of consumers, the environment, social rights, employment rights and democratic decision-making processes.

The European Commission has stated repeatedly that no clear boundary can be drawn between non-economic services (which fall outside the scope of application of the Services Directive) and services in the general economic interest (which fall within the scope of the Directive). The EU Member States can have their own opinions on where the boundary should go, but in the final instance it will be determined by the European Court of Justice (ECJ). This is particularly worrying since the Commission is constantly asserting that the boundary is not a fixed one. And it becomes even worse when we find the Commission explaining that "in any event it will be impossible for the Member States to consider all services in a given area, for example all educational services, as non-economic services of general interest".

Any activity consisting of supplying goods and services in a given market by an undertaking constitutes an economic activity, regardless of the legal status of the undertaking and the way in which it is financed. Services provided generally for payment must be considered as economic activities. This also applies if those who benefit from the services do not themselves pay for them. It follows, therefore, according to the Commission, that "almost all services offered in the social field can be considered economic activities". All that is then required is a sliding transition—or a couple of ECJ judgments—before the Services Directive covers far more social services than those specified in it today.

Legal opinion within the EU has stressed repeatedly that the Services Directive does not change the prevailing law in the EU nor, therefore, in the EEA. The Directive only legalises the prevailing law created by the ECJ through its judgments. Many fundamental aspects of the Services Directive are contentious and unclarified. For example, the Directive's advocates assert that the so-called "country of origin principle" was removed from the Directive in the compromise arrived at by the European Parliament in February 2006. The country of origin principle means that an undertaking which provides services in other Member States, shall—with the exception of health, environment, public order and security—comply with the regulatory framework in the Member State where the undertaking is registered and not the Member State where the services are provided. The Member State in which the undertaking is registered is also required to carry out checks to ensure the rules are complied with. Professor Finn Arnesen of the Centre for European Law at the University of Oslo says, in his report on the effect of the removal of the country of origin principle, "that the change may appear to be of more cosmetic than practical significance".

Two bodies are instrumental in the systematic restriction by the EU of the public sector's scope of action: the European Commission and the ECJ. The conclusion of the reports commissioned by the Ministry of Trade and Industry to the effect that the Services Directive has little significance for public services, is a conclusion which only has meaning as a "judicial snapshot" of the prevailing law on public services. This snapshot completely ignores the fact that the EU system is driven by a set of dynamics which are constantly changing the prevailing law to the virtually unrecognisable in the case of many services

which have been public in all the EU and EEA Member States. The reports ignore the fact that, for those who wanted a Services Directive, the Directive is only another stage on the road towards an ever more liberalised social order.

If a Norwegian law has unintended effects, it can be changed. In the EU, there is only a theoretical possibility for this to happen. Surprising decisions by the ECJ and new interpretations have their legal basis, almost without exception, in the market freedoms of the EU, which were laid down by treaty fifty years ago and which can only be changed if all the Member States agree. Uncertainty regarding the legal situation can easily turn into anxiety. In one area in particular, anxiety has been especially marked: How secure are our basic public services? Can they be operated as national parliaments have decided, and as governments put those decisions into effect?

Throughout its existence, and in an increasingly target-oriented fashion, the Commission has been a driver of internal liberalisation within the EU. There are no examples of the Commission taking the initiative to change things in the opposite direction. And the Commission has the exclusive right to propose legislation in the EU. The ECJ has a similar key driver role. From the start, the ECJ has regarded it as its supreme duty to realise the fundamental principles of the EU Treaty on the free movement of goods, services, capital and persons. Whatever the politicians cannot—or dare not—clarify, is clarified by the judges in the ECJ. There is no reason to believe that the key driver roles of the Commission and the ECJ have vanished with the introduction of the Services Directive; nor is there is any reason to believe that, with this Directive, the EU has come to the end of the road with its liberalisation project.

Any reservations raised by Norway against the Services Directive could be the inspiration for other European countries to fight to change the content of the Services Directive so as not to force Europe in the direction of market liberalisation as unequivocally as the Commission would wish. This may have significance far beyond Norway’s borders. Within the EU itself the battle is lost, but the struggle against the tight embrace of market liberalisation, extending to ever more areas, is in no way over.

Chapter 1

The historical and economic background to the Services Directive

A. The Services Directive in the light of the theory of judicialisation of the Norwegian Study on Power and Democracy

by Trond Nordby, Professor in the Department of Political Science, University of Oslo

The European Union has developed over time in the direction of a federation in which the legislative, executive and judiciary powers are raised above the corresponding powers of state in the individual Member States. In this respect, the EU has a dynamic character made manifest by the fact that its earlier pillar structure will definitively disappear when the Lisbon Treaty comes into force. The three pillars, which will then fuse together, are: (1) the internal market, (2) the judicial-political dimension, and (3) foreign and security policy.

The free movement of services is regulated by a number of articles in the EC Treaty and also by Article 36(1) of the EEA Agreement:

> "Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in an EC Member State or an EFTA State other than that of the person for whom the services are intended."

Assessed against this provision, the Services Directive appears to be more of a tightening of rules that were adopted long ago. By rendering control more difficult of the kind of pay foreign workers receive, the Services Directive "lubricates" the free flow of persons. According to Article 16(2) of the Directive, Member States (including the EEA States, if they approve the Directive) are not entitled to demand that foreign workers on temporary contracts or assignments should have an "establishment in their territory ", nor can they demand that foreign workers should be registered with an authorisation or hold a residence permit in order to provide those services.

The way in which the Services Directive will function corresponds in many ways with what the Norwegian Study on Power and Democracy has described as "judicialisation". The Study's final report from 2003 defines this term as follows (p. 116):

> "Judicialisation implies that larger areas and more detailed elements in society are being regulated by laws and directives, that the decision-making competence of the courts and other judicial institutions is increasing at the expense of political and administrative bodies, and that interests are increasingly being formulated as legal requirements."

As an example, the report mentions the EEA Agreement and other treaty obligations. In the only preliminary report published prior to the final official report, "Power distribution

and judicialisation" (Nytt Norsk Tidsskrift No. 2/2000), Øyvind Østerud points out that the European Court of Justice (ECJ) played a key role in connection with the integration process. Under the Treaty on European Union, the European Court can "overturn or set aside national laws and national policy" where these conflict with EU law. If the Member States do not agree with the Treaty, they can change it, but doing so requires a unanimous vote.

In this way, the EEA Agreement has made Norway part of the EU's judicial area, which means that the ECJ, in those areas where the EEA Agreement applies, can overturn or set aside schemes and rules which derive from political-administrative decisions and established legal practice (see the Finnanger judgment from 2000). Viewed in this perspective, it is scarcely correct to say that the Services Directive is creating new law or establishing new principles in relation to the way in which the ECJ would otherwise have adjudicated. But by creating a more detailed regulatory framework, the Services Directive is tightening up prevailing principles.

If Norway does not reject the Directive, we will be nailed fast, even more so than with the EEA Agreement, to a regulatory framework which is in the process of winning through within the EU. In addition, it will become clearer to all parties what the EU as a liberalisation project can lead to. This Directive will have unfortunate consequences for the civilised and stable forms of pay and collective wage determination which until now have characterised Norway and the other Scandinavian countries.

Much of the controversy surrounding the Services Directive concerns the "country of origin principle" (a term not mentioned explicitly in the latest version of the Services Directive), which is to say whether an undertaking providing temporary services in another EU/EEA Member State is required to comply with the rules in the Member State where its head office is based, not in the Member State were the services are provided. The Directive furthermore requires that when an undertaking has been approved in one of the Member States in question, it should automatically be approved in all the others. Those who are at risk of being affected by these provisions are workers from low-cost countries who are on temporary employment contracts in another EU/EEA Member State—so-called "posted workers".

Like other authorisation provisions as we know them from Norwegian legislation, in several areas the Services Directive entrusts it to the discretionary judgment of the ECJ to give the Directive an exact content. What, then, could we expect other than interpretations which underscore a general tendency to permit the ECJ to strengthen the position of the four freedoms? Confirmation of this assumption can be found in the judgments in the Viking Line and Vaxholm cases.

Norway has a long tradition of determining pay and collective wages in large areas of employment through free negotiations between the parties concerned, and with the inclusion of the State as a third party in various ways and to varying degrees. The *Storting* (Norwegian parliament) does not participate directly in actually determining pay—other than through basic legislation. The Services Directive, together with other EU/EEA laws, therefore means less for representative government than for the actual tripartite co-operation that takes place during pay determination. Here, there is a risk that, should disputes arise over interpretation, the Services Directive will be instrumental in these decisions being transferred to the ECJ in Luxembourg.

As a diagnosis, therefore, this judicialisation impacts directly on the EU system—in the sense that it further strengthens the diagnosis of the EU's lack of democracy. For the EEA

State of Norway, it is the Scandinavian model that is in danger. The one consequence of this should be for Norway to terminate the EEA Agreement as quickly as possible. That the EU, by leaving decisions to the ECJ, is being instrumental in doing away with the free right to negotiate, makes the argument that Norway should join the EU in order to influence policy lose its relevance.

B. The fight for an international market for services

By Peder Martin Lysestøl, Senior Lecturer in Economics at Trondheim and Sør-Trøndelag University College

The object of this discussion is to bring the spotlight to bear on the forces behind the demand for a free market for services. The EU Services Directive is not an "idea" created by Conservative bureaucrats in Brussels. The demand for an international market for services is a consequence of the development of the globalised economy. The demand is fuelled by the transnational companies' growing need for new markets and new profit opportunities.

Historical retrospect

The phase of national capitalism, with the development of welfare states, appears to have been a brief interlude in the history of capitalism. In time, the development of a strong public sector, and national regulation designed to control capitalism, became a threat to "free market forces".

In the OECD countries, tax revenues as a percentage of GDP rose on average from 25% to 34% between 1955 and 1975. In Norway the increase was particularly high, from 30% to 47% (Lysestøl and Eilertsen 2001, p.28).

In the 1970s, a political offensive, headed by the USA (Reagan) and the UK (Thatcher), was launched to reverse this trend. This is described in detail in the book "En nyliberal revolusjon" ["A Neo-liberal Revolution"] (Lysestøl and Eilertsen 2001). In Norway, too, the idea of less market regulation took hold. A landslide of liberalisation was carried out during the 1980s by a number of different governments. The EU system, with its objective of the four freedoms as laid down in the Treaty of Rome, was a good tool for enabling European big business to carry through the liberalisation. Strong forces were mobilised to put a stop to public sector growth and to liberalise the EU market.

In Norway, oil was the driving force. Oil, the most international commodity in the world, became the foundation of the Norwegian economy. Foreign capital poured into Norway and Norwegian capital was invested throughout the world. The growth in capital exports speaks for itself: while, in 1980, less than 10% of jobs in the 30 largest Norwegian industrial groups were outside Norway, by 1995 that figure had climbed to 40%! The growth in capital exports has subsequently continued at the same rate. The demand for trade liberalisation led to the virtual disappearance of barriers to the trade in manufactured products. While tariff rates on manufactured products averaged 45% after WWII, they are now down to about 4%.

During the past 30-40 years, much of the economic growth has taken place in the sphere of public and private service provision. In Norway, services account for 74% of employment. The accumulation of the Oil Fund (Pension Fund) has prompted Norwegian

capital to take a particular interest in new markets the world over. There is little doubt that Norway can become an active driving force in the international market for trade in services. When, in 2000, the EU declared in Lisbon that it aimed to become "the world's most competitive market", this was also a declaration that the service sector, which comprises 70% of all production, would become a more important part of the "free" market. It is this historical process which has led to the adoption of the Services Directive.

What are "services"?

In the process of economic development, there has been a general tendency for production to move from agriculture and primary industries, to industry and other secondary industries, and to the present-day situation, in which an ever larger proportion of production takes place in the service sector. A large part of the internationalisation of service production now takes place in the form of its "users" moving. Norwegian students, for example, purchase educational services for millions of kroner annually in Australia, the USA and EU countries.

"Service capital" wants much more than this, however. If you are going to sell services on a large scale, you have to produce where people live, where the markets are. If you are selling health services, you need to have a hospital where people live. If you are selling education, your school must be local, i.e. your capital has to be moved and have the freedom to move.

Throughout their history, the various countries have developed standards and rules governing the level of service provision. This means that there must be a powerful deregulation of the services market before it functions as big business wants it to function. Banks and insurance companies, estate agents and advertising agencies can make big profits in the field of private service provision. This is not possible in the large public sector.

As a result, countless analyses, reports and projects from the OECD and the EU have supported the privatisation of as much of the public sector as possible. This effort has also succeeded to a certain extent. Public spending as a share of GDP has been significantly reduced in most countries. If we compare the public sector today with the situation in 1990, we can see a clear trend emerging (source: OECD):

	Public spending as percentage of GDP	
	1990	**2007**
Norway	53	41
Sweden	61	54
United Kingdom	42	45
EU	50	46
USA	37	37

Although the tendency is clear, especially in the case of Norway, it is also evident that countries like the USA and the UK, whose public spending has never been on a level with that of Norway, are having problems in cutting expenditure further. The same trend is evident if we look at public sector employment. In the Nordic countries, in the past 10 years public sector employment has fallen from 37% to 34%, while in the USA it has remained at 16% and in the UK at 20% (source: ILO).

This trend is due to the fact that there is strong political resistance to the privatisation of public services. The introduction of a new overarching regulatory framework like the Services Directive is intended to help remove whatever barriers exist to the "free flow" of services. From 2020, there will be a significant increase in the number of old-age pensioners. This means that there will be a sharp rise in the need for care and healthcare services for the elderly. The aim for private sector capital is to position itself to take a far larger share of this important service market than is presently the case.

Status of market liberalisation up to the present

Although Norway has never been a member of the EU, market liberalisation has followed the same pattern as in the EU Member States, and, as a result, Norway is now considered by the OECD as being a country which through the past 25 years has come a relatively long way in the process of liberalisation. This view is well supported by a report published by the OECD in July 2005[1)]. Here, the OECD has looked at the level of liberalisation in the Member States in four areas, in all of which significant liberalisation has taken place in the past ten years. In particular, many barriers to trade and investment have been removed.

A. Regulation of markets for goods, services, capital and workers

Norway's position as regards regulation is approximately in the middle of the scale. While there is far more regulation in Norway than in the USA, Norway is close to the EU average and is more deregulated than France and Spain. Both Sweden and Denmark have deregulated considerably more than Norway.

B. State control

This is the area in which Norway is "trailing behind". The reason for this is chiefly that the Norwegian State is still an important enterprise owner. There are 50% more employees of publicly owned enterprises in Norway than in Denmark, and there has been only a slight fall in the number of employees of publicly owned enterprises in the past ten years. Both the EU and the majority of European countries have less state control than Norway.

C. Barriers to "entrepreneurship"

Few countries in the OECD area have created as good conditions for fostering entrepreneurs as Norway. Norway is far ahead of the EU average and also ahead of the USA. In Europe, only the UK and Ireland are more "entrepreneur-friendly" than Norway. This may have to do with the strong tax liberalisation process which took place in Norway in the 1990s. An overview compiled by the OECD of the trend in capital tax from 1996 to 2006 shows that, in 2006, Sweden and Norway had the lowest tax level of all the countries:

Sweden and Norway	28%
UK	30%
USA and Japan	39%

D. Barriers to trade and investment

Here, too, liberalisation has come a long way in Norway. Again, the UK is deemed to be one of the countries which has liberalised most. Norway is on a level with the USA and with the EU average, and is deemed to be far more liberalised than EU Member States like France and Italy.

[1)] Conway, Paul; Nocoletti, Giuseppe and Janod, Véronique: Product Market Regulation in OECD Countries: 1998 to 2003 Economics Department Working Papers No. 419, April 2005.

Summing up

Economic development in the past 30-40 years has been characterised by strong growth in the services sector. There is everything to indicate that this trend will continue into the future. In a few decades, a far greater percentage of jobs than today will be connected with services in care for the elderly, healthcare and other services as a result of big demographic changes. If private sector capital is to expand in the future, these areas will be of key importance. It is therefore important for those wishing to strengthen Norwegian capitalism to adapt the social security system and the regulatory framework around it, so that it opens up for large-scale privatisation in these areas.

As the OECD analyses show, “the neo-liberal revolution” in Norway has developed at roughly the same pace as developments within the EU and the OECD area. In some areas, Norway is even at the forefront when it comes to creating the conditions for fostering private enterprise. The World Trade Organisation (WTO) views health, education and water as the great future markets for international capital. Norway has a strong tradition whereby these are public sector areas. The question is whether the trade union movement and others who defend the welfare state will be capable of resisting this broad market adaptation strategy. It is in such a perspective that the fight against the Services Directive must be viewed.

Chapter 2

From draft to Directive

Background and preparatory acts

The European Council summit in Lisbon in March 2000 set the objective for the EU to become "the most competitive and knowledge-based economy in the world by 2010". This would be accomplished by speeding up liberalisation "in areas such as gas, electricity, postal services and transport" and by ensuring that the free trade assumed in the EU Treaty also extended to other services.

Frits Bolkestein, the European Internal Market Commissioner, was asked to put forward a proposal for a services directive which could remove "barriers" to the trade in services. Bolkestein mapped this area by asking business organisations and a number of individual companies about the kind of barriers they encountered when they wanted to provide services in other countries. The results were summarised in the "barrier report" (COM (2002) 441 final).

This "barrier report" completely disregarded the fact that many of these "barriers" had been introduced in order to safeguard the interests of consumers, the environment, social rights, employment rights and democratic decision-making processes.

Both the "barrier report" and Bolkestein dismissed all such considerations as protectionism. It is important to note, however, that very few of the barriers were aimed specifically at service providers from other countries. Only a very few "discriminate on the basis of nationality", but treat domestic and foreign service providers equally. Any rule which "discriminates on the basis of nationality" would have been judged illegal by the ECJ quite independently of any Services Directive.

While Bolkestein's report was concerned with the barriers arising from regulatory frameworks and administrative practice, a study made by PricewaterhouseCoopers cast the spotlight onto what business leaders believed to be the most important barriers to the cross-border trade in services, most of them emphasising cultural and linguistic barriers and not the administrative barriers which the Services Directive was determined to do away with ("Impact of the proposed EU Directive on Services in the Internal Market", August 2005).

The Bolkestein Directive

The European Commission presented a draft Services Directive in January 2004. The purpose of the Directive was—and is—to increase competition for the provision of services across national borders in the EU and EEA areas. That this was essential in order for the EU to become the world's "most dynamic and competitive area" was—and remains—the view of the Commission.

The core of the draft Directive was made up of two main principles: the principles of reciprocal approval and country of origin. This means that service providers who are approved or authorised in one EU or EEA Member State shall be able to offer their services in every other EU and EEA Member State. And that means that the responsibility for making checks on companies which provide services in other Member States will be assigned to the Member State where the undertaking was registered based on the rules in that Member State—and not in the Member State where the services are provided.

The Commission's proposal catapulted the EU straight into its toughest class war conflict

for many a year. Never has any EU proposal been met with such violent protests—from trade unions, from consumer organisations and from organisations for users and clients in the health and social services sector. The European trade union movement stood together in condemning the proposed Services Directive and mobilised huge demonstrations throughout Europe, the most recent and largest being in Strasbourg when the European Parliament met to begin deliberating on the Directive on 14 February 2006.

The European Trade Union Confederation (ETUC) took a clear stance, distancing itself from the Directive, as did most of the trade unions in Eastern Europe—whose governments welcomed the Directive. With the popular referendums in France and the Netherlands in May and June 2005, the Services Directive became an important part of the basis of mobilisation to defeat the proposed EU Constitution.

The compromise decision in the European Parliament

On 16 February 2006, the European Parliament voted to adopt a compromise draft which is less dramatic than the Commission's proposal—but also so unclear that it will be the ECJ which must finally decide how the Directive should be understood. In the discussions prior to the compromise decision, the Social Democrats in the European Parliament attempted to have social policy and consumer protection included in the Directive's "overriding reasons relating to the public interest", that is to say interests which could provide a basis for imposing requirements on foreign service providers. Following some tough tugs of war, they gave up only days before the referendum.

In a press release issued by Malcolm Harbour, MEP and Group Co-ordinator for the large Conservative grouping in the European Parliament (EPP), it was established that it was a condition of the compromise that social policy and consumer protection should not be reckoned as "overriding reasons relating to the public interest" (press release of 14 February 2006). The Commission could therefore safely state in their own press release, following the European Parliament's decision, that the purpose of the Directive was still the same: "to remove all barriers to the free movement of services in the EU".

Amendment proposal from the Commission in April 2006

Following the compromise reached in the European Parliament in February, it was expected that the Commission would send the Directive largely unchanged to the members of the European Council of Ministers. It could be a risky business to make anything other than cosmetic changes to the vulnerable compromise which the two big party groups in the European Parliament, the Social Democrats and the largest Conservative group, had managed to cobble together. It therefore came as a surprise when, in April 2006, the Commission presented a revised draft Directive with extensive changes in relation to the compromise version from the European Parliament. The Commission had inserted changes in the actual text of the law in as good as every article—and also in the many recitals in the Preamble to the Directive.

Entire paragraphs were removed or changed, new paragraphs were inserted and sentences were reworded. If the European Parliament's compromise version had been difficult to penetrate, the Commission's new proposal did not make matters simpler. The European Parliament had removed healthcare and the majority of social services from the Directive together with most of the references to the country of origin principle. On all these three points, however, it appeared that the Commission was carrying out a "damage limitation" exercise.

The Commission made it clear that the "Rome 1 Convention" on choice of law must be included in the Directive, which could potentially introduce the country of origin principle

by the back door (see Chapter 10). A separate health services directive would be proposed (see Chapter 8), and the Commission's Communication on social services gave worrying indications of the possibility that an increasing number of social services could gradually fall within the scope of the Services Directive (see Chapter 7).

Amendment proposals adopted by the European Council of Ministers on 29 May 2006

At a meeting of the European Council of Ministers on 29 May 2006, even more changes were proposed in relation to the compromise decision reached in the European Parliament. The Council of Ministers resolved that sectors such as energy, water, postal services and education should be periodically evaluated against the rules in the Services Directive, despite the fact that these services are basically excluded from the Directive (see Chapter 8).

The European Parliament wanted to exclude all social services, but the Council of Ministers did not. The Council was only willing to exclude "social services relating to social housing, childcare and support for families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State" (Article 2(2)(j)). The Norwegian translation, which was posted on the Internet by the Ministry of Trade and Industry in December 2006, stated, in short [in English translation], that the exclusion applied to "social services relating to social housing, childcare and support for families and persons in need".

The European Parliament had been in favour of excluding from Article 15 all services provided in the general economic interest. This was reworded by the Council of Ministers to the effect that such services are excluded only insofar as they do not "obstruct the performance, in law or in fact, of the particular task assigned to them". This wording is not easy to understand, but corresponds to what is laid down in Article 86(2) of the EC Treaty. This article has been used as a basis for a series of judgments by the ECJ, which means that the Member States cannot overturn the rules of the internal market when outsourcing a public sector task to an undertaking, be it public or private (Haar, Ny Agenda, 4 July 2006).

The European Parliament removed "legal services" from the Directive. The Council of Ministers put them back in.

The Council of Ministers weakened the text as regards insurance and guarantee schemes for consumers, particularly in the case of services provided from another Member State. The European Parliament wanted consumers to know if an undertaking had been reprimanded by a trade organisation because of poor trade ethics. This the Council of Ministers did not want (Haar, Ny Agenda, 14 June 2006). But more important than this is that the European Parliament wanted to remove "temporary work agencies" completely from the Directive, while the Council of Ministers wanted only to exclude "temporary work agency services". This may mean that authorisation schemes for temporary work agencies will be given such narrow limits that control of such agencies will be significantly weakened.

The Social Democrats' last thrust in the autumn of 2006

Evelyn Gebhardt, the Group Co-ordinator for the Social Democrats, presented the compromise decision in the European Parliament as "a success for social Europe" (EU Observer, 4 April 2006). However, in September 2006 she put forward eleven draft amendments aimed at regaining something of what had been lost in February (Haar, Ny Agenda, 6 September 2006). The intention was to dispel the disquiet that was still

present in parts of the trade union movement. ETUC wanted to include some definitions of “vital significance” which could make it clear that labour law and social services lay completely outside the scope of the Directive. In addition, the basic rights of the trade union movement must be better protected.

The European Parliament compromise from February 2006 could be read as though the Services Directive recognised national labour law—without reservation. But at its meeting in May, the Council of Ministers passed an additional motion saying that the Directive does not interfere in national labour law “which respects Community law”. Thus national labour law was made explicitly and in principle subordinate to Community law.

The Social Democrats attempted in connection with the final reading of the Directive in December 2006 to dampen this subordination by replacing it with a lateral arrangement, whereby the Directive would not interfere in rules of labour law “which are in accordance with European law and national law and practice”. However, the Social Democrats were then informed in no uncertain terms, both by the Conservative majority in the Parliament and by the Commission, that everything they had achieved in February would be lost if they proposed new amendments. It ended with the Social Democrat group withdrawing their amendments.

Accordingly, the wording of Article 1(6) is now as follows:

> “This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law”.

Chapter 3
The content of the Directive

The objective of the Services Directive is to establish "general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services" (Article 1(1)). The Directive makes a distinction between establishment in another Member State and "service provision" across national borders. The European Commission describes the difference as follows:

> "Establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period. By contrast, according to the case-law of the ECJ, the freedom to provide services is characterised by the absence of a stable and continuous participation in the economic life of the host Member State. (…) Establishment requires integration into the economy in the Member State involving the acquisition of customers in that Member State from the basis of a stable professional domicile" (Handbook on implementation of the Services Directive—"Services Directive", European Commission 2007, p. 36 (English-language version).

In practice, however, it is not immediately evident what is what:

> "As the ECJ has consistently held, the distinction between establishment and provision of services needs to be made on a case-by-case basis, taking into account not only the duration but also the frequency, periodicity and continuity of the provision of services. It follows from this, as concluded by the ECJ, that there can be no general time limits set in order to distinguish between establishment and service provision" (Handbook …, European Commission 2007, p. 36 (English-language version)).

The rules governing service provision are set out in Articles 16-18 of the Directive, while the rules governing establishment may be found in Articles 9-15.

Services excluded from the scope of application of the Services Directive

The Services Directive follows the definition in the EC Treaty (Article 50) as to what a service consists of: it means "any self-employed economic activity, normally provided for renumeration, as referred to in Article 50 of the Treaty" (Article 4(1)). The same definition is given in the EEA Agreement, Article 37.

The Directive comprises all services which are not specifically excluded from it. The following services are excluded:

– activities connected with the exercise of official authority (police, prisons, courts of law)
– financial services, healthcare services and non-economic services of general interest (Articles 2(2) and 2(3))
– some services of general economic interest, such as postal services, "certain services in the gas and electricity sector", waste treatment and water supply
– air transport, maritime and inland waterways transport, including port services, as well as road and rail transport, including urban transport, taxis and ambulances (Article 2(2)(d)). Driving school services, car rental services and a number of other services in the transport sector do, however, fall within the scope of the Directive (Handbook …, European Commission 2007, p. 13 (English-language version))

– hiring-out of workers by temporary work agencies (Article 2(2)(e)). Other services provided by temporary work agencies, such as placement and recruitment, fall under the Directive (Handbook …, European Commission 2007, p. 12 (English-language version))
– audiovisual services (TV, radio and cinematographic services) (Article 2(2)(g))
– gambling activities, including lotteries (Article 2(2)(h))
– "social services relating to social housing, childcare and support of families and persons in need". This wording makes it extremely unclear as to which social services the Directive covers, and several documents from the Commission emphasise that this lack of clarity is deliberate on the part of the Commission (see further discussion in Chapter 6).
– the activity of judicial recovery of debts. Non-judicial recovery of debts does, however, fall under the Directive (Article 17(5)).

The services which are excluded from the Directive are fully subordinate to EU treaties, and, therefore, freedom of establishment (EC Treaty, Article 43) and the free flow of services (EC Treaty, Article 49) apply also for them.

Services within the scope of the Directive

The Commission has compiled the following list of services which fall within the scope of application of the Directive. The list is not intended to be exhaustive, since the Directive covers all services which are not explicitly excluded:

> "The activities of most of the regulated professions (such as legal and fiscal advisers, architects, engineers, accountants, surveyors), craftsmen, business-related services (such as office maintenance, management consultancy, the organisation of events, recovery of debts, advertising and recruitment services), distributive trades (including retail and wholesale of goods and services), services in the field of tourism (such as services of travel agents), leisure services (such as services provided by sports centres and amusement parks), construction services, services in the area of installation and maintenance of equipment, information services (such as web portals, news agency activities, publishing, computer programming activities), accommodation and food services (such as hotels, restaurants, catering services), services in the area of training and education, rental (including care rental) and leasing services, real estate services, certification and testing services…"
> (Handbook …, European Commission 2007, p.10 (English-language version)).

Rules for incoming service providers

The rules for incoming (foreign) service providers (free trans-border movement of services) are provided in Articles 16-18 of the Directive. Article 16 establishes that the host Member State must abstain from imposing its requirements on incoming service providers except where justified by the four reasons enumerated in Article 16 (1) and which are repeated in Article 16 (3): interests of public policy, public security, public health or environmental protection. In addition, any such requirements must comply with the principles of non-discrimination, necessity and proportionality.

The Commission explains how this is to be understood:

> "As a result, service providers will know that they will not be subject to the legislation of the receiving Member State except where its application is justified for the four reasons set out in Article 16(1) and 16(3), (or the legislation in question is covered

> by a derogation provided for in Article 17)" (Handbook …, European Commission 2007, p. 36 (English-language version)).

In other words: incoming service providers can rely on the country of origin principle applying, with the exceptions set out in Articles 16(1), 16(3) and 17 (see otherwise the discussion in Chapter 9).

Overriding reasons relating to the public interest—what are they?

The terms "public policy", "public security" and "public health" stem from Article 46 of the EC Treaty. The Commission has discussed in detail the content of these terms (Handbook …, European Commission 2007, pp. 37-38 (English-language version)).

According to the Commission, all these concepts have been "consistently interpreted in a narrow sense" by the ECJ. There must be "a genuine and serious threat to a fundamental interest of society" for such interests to be taken into account, and it is for the Member State invoking these public interest objectives to demonstrate the risks involved. In that case, it is the Commission and the ECJ which need to be convinced that a public interest is involved. For this reason, there are few examples of the ECJ having accepted that public policy interests justify imposing requirements on service providers (Handbook …, European Commission 2007, p. 37 (English-language version)).

With respect to the concept of "public health", the ECJ has provided no specific definition of what it is supposed to cover. But here, too, there has to be "a genuine and sufficiently serious threat". In a directive adopted in 2004 on the right of citizens of the European Union and their family members to move and reside freely within the EU's Member States, the concept of the public health interest is explained as follows:

> "The only diseases justifying measures restricting freedom of movement shall be the diseases with epidemic potential as defined by the relevant instruments of the World Health Organisation and other infectious diseases or contagious parasitic diseases if they are the subject of protection provisions applying to nationals of that Member State" (Handbook …, European Commission 2007, p. 38 (English-language version)).

The interest with respect to environmental protection may appear to be defined less narrowly than the other three public interests, but in all these cases it has to be carefully examined whether application of the host Member State's requirements is necessary and proportionate (Handbook …, European Commission 2007, p. 38 (English-language version)).

In Recital 40 to the Preamble, the Directive refers to the ECJ's understanding of public interest objectives, and lists a number of interests recognised by the ECJ in various contexts. In relation to the regulation of incoming service providers, the Services Directive severely restricts what can be accepted as an overriding reason relating to the public interest. According to Article 16, the only relevant public interests are public policy, public security, public health and environmental protection.

The requirements of non-discrimination, necessity and proportionality

Public policy, public security, public health and environmental protection are thus the only public interests which can justify imposing requirements on incoming service providers.

But if that is the case, there must be equally strict requirements imposed on domestic service providers. The requirement of "non-discrimination" means precisely that an incoming provider must be treated in every respect in the same way as a domestic provider (Article 16(1)(a). A reference to public policy or environmental protection must not imply protection of domestic providers.

That a requirement must be "proportionate" means that the provision of services from other Member States cannot be restricted, for social or other reasons, if such interests can be safeguarded in other ways. Every requirement applied must be "appropriate to secure the attainment of the objective it pursues and must not go beyond what is necessary in order to attain it." What is "necessary" is defined as "the least restrictive means to achieve the objective" (Handbook …, European Commission 2007, pp. 38-39 (English-language version)).

This leads to a situation where there are far fewer opportunities to impose requirements on foreign-based service providers. Control measures which are put in automatically, based on a general fear of fraud or misuse by a person or undertaking, will not be accepted.

Rules applying to establishment

The basic set of rules governing service provision through establishment in another Member State is provided in Articles 9-15. Article 15 lists a series of requirements which can only be applied if they do not discriminate between foreign and domestic service providers, are justified on the basis of public interest objectives (that is to say public policy, public security, public health and environmental protection) and are proportionate (appropriate to secure the attainment of the objectives and not go beyond what is necessary to attain the objectives). The Member States shall evaluate all such requirements in their own legislation and remove them if they are not non-discriminatory, cannot be justified by an overriding reason relating to the public interest, and are not proportionate. This last means that Member States will need to evaluate in each case whether the objective cannot be achieved by "less restrictive means" (Handbook …, European Commission 2007, p. 32 (English-language-version)).

Examples of prohibited requirements

Article 14(5) prohibits the application of an "economic test" before an authorisation is given. This means a clear restriction on public-sector scope of action. A local authority can be prohibited from restricting private offerings of certain services in order to ensure that those offering them have an economic basis for doing so—or to ensure that it is possible to maintain a public service offering in the area concerned.

Article 15(2)(a) prohibits "quantitative and territorial restrictions". It is prohibited to set a ceiling for the number of service providers who can establish in a certain area—or in relation to the population of an area. It is also prohibited to require a certain minimum geographical distance between providers offering the same service. Economic aims, such as ensuring the economic basis of specific categories of service provider, do not constitute "overriding reasons of public interest" and cannot be invoked to justify quantitative or territorial restrictions (Handbook …, European Commission 2007, p. 33 (English-language version)).

A requirement cannot be imposed for service providers to take a specific "legal form" (Article 15(2)(b)).

The application of the prohibition against "specific contractual arrangements between the

provider and the recipient", as set out in Article 16(2)(d), can have great significance. The Commission explains this as follows: "This would be the case if a Member State would exclude by law the possibility of carrying out certain activities as a self-employed person, for instance by requiring that they are always carried out in the context of an employment relationship" (Handbook …, European Commission 2007, p. 40 (English-language version)).

This impacts on the "anti-contractor clause" to be found in Norwegian public procurement regulations, which is designed to ensure that Norwegian pay conditions can be imposed as a condition for contractors submitting tenders for public building and construction projects. This is also the conclusion of FAFO's report "Tjenestedirektivet og regjeringens handlingsplan mot sosial dumping" ["The Services Directive and the Government's Action Plan against Social Dumping"].

Implementation of the Services Directive

The Directive presupposes that Member States will amend their legislation. This means that some individual laws will have to be amended, that new individual laws must be passed and that "a new horizontal framework law should be considered" for the implementation of the Services Directive (Handbook …, European Commission 2007, p. 8 (English-language version)). Articles 9, 14, 15, 24 and 25 in particular require changes to current legislation.

In order to determine what will need to be changed, the following process must be followed.

1. The governments shall review all laws and regulations.
2. The governments shall send a report on the results to the Commission and to the governments of all the other Member States.
3. The Council of Ministers shall study the reports and leave it to the Commission to follow up whatever conflicts with the Services Directive or other rules governing the EU internal market. The follow-up may be done by means of a "regulatory committee procedure"—or by presenting the Member States with draft legislation containing stricter requirements.

The regulatory committee procedure involves the Commission's proposal being deliberated on by a separate committee, where it requires a qualified majority in favour in order to be passed. If the proposal is opposed, the Commission can present it to the Council of Ministers, where a qualified majority against the proposal is required in order for it not to be passed (Council Decision of 1999/468/EC: Article 5).

The Commission consequently has great influence on the way in which the Services Directive will be used in the Member States' public services.

Chapter 4

Consequences for public services

"With law shall the country be built", it was once said. Here in Norway, it was Norwegian law which determined what public authorities of every kind could—or could not—do. The position was the same in every other European country. That is no longer the case, neither in the EEA State of Norway nor in any other EU Member State. Now, EU rules dictate what public authorities cannot do—and then national law determines what *can* be done within the framework of the prohibitions set by the EU rules.

This sets narrower limits for the scope of action in the public sector. In addition, the EU's rules and regulations are troublesomely unpredictable. A surprising judgment from the ECJ can sweep aside thoroughly prepared decisions by popularly elected assemblies. The resulting powerlessness is just as great every time the Commission or the ECJ chooses to interpret the rules more narrowly than before.

It was the ECJ itself which, in 1964, established the principle that the Community's common laws and regulations take precedence over the law of Member States (see the Italian case of Flaminio Costa v. ENEL, Case 6/64). In the area of healthcare, the ECJ has on several occasions pronounced sensational, liberalising judgments—frequently completely contrary to political decisions and expectations. Since 1979, when the ECJ in principle opened up the possibility of free choice of medical practitioners and hospitals throughout the EU, and right up to the present day, the ECJ has progressively forced through an increasingly closer co-ordination of EU Member States' health policies. One of the most important decisions came in the summer of 2001, with the Smits/Peerboms judgment (Case C-157/99), in which the ECJ established that healthcare services also fall within the scope of Articles 49 and 50 of the EC Treaty on the free movement of services. The case dealt with two Dutch nationals who had not had reimbursed their expenses for hospital treatment in Germany and Austria. The governments of twelve countries, including Norway, became engaged in the case, but the ECJ would not be convinced by the arguments that healthcare was a public service which must remain outside market rules. More recently—in April 2008—the ECJ intervened in the public authorities' imposition of requirements for a decent level of wages among those delivering services to the public sector (Rüffert judgment, Case C-346/06). This was a sensational judgment which came into conflict with the implementation of the international ILO Convention No. 94, which opens up precisely for public authorities to set conditions for wages and employment in the case of local authority or State contracts.

If a Norwegian law has unintended effects, it can be changed. In the EU, there is only a theoretical possibility for this to happen. Surprising decisions by the ECJ and new interpretations have their legal basis, almost without exception, in the market freedoms of the EU, which were laid down by treaty fifty years ago and which can only be changed if all the Member States agree. Uncertainty regarding the legal situation can easily turn into anxiety. In one area in particular, anxiety has been especially marked: How secure are our basic public services? Can they be operated as national parliaments have decided, and as governments put those decisions into effect?

The Services Directive has greatly reinforced this anxiety because it is full of sentences which can be understood in many different ways. All clarification is left to the Commission—and, in the final instance, to the judges in the ECJ.

A website instead of a framework directive for public services

There have been calls from many sources for the EU not to adopt a Services Directive until public services were assured a secure legal basis in the EU's own rules and regulations. The Commission chose the opposite order of sequence: first a services directive with unclear scope—and then some vague promises of a directive on public services. The trade union movement and many user organisations have called for the EU to adopt a directive which can protect public services of general benefit against the competition rules in the internal market. The Commission has rejected these calls. Instead, it has produced a document stating how the Commission views what are known in EU language as "services of general interest" (SGI).

Instead of a clarifying law text, a website will be set up in which the Commission will clear up any confusion regarding public services. The website will tell us to what extent public services fall under the rules for the internal market. For the Commission, the simplest thing will be to have full control of this sensitive area. It is the Commission which is responsible for ensuring that the rules are complied with and that the EU's decisions are put into effect. It is enough, then, for the Commission to have an overview of what the relationship should be between the public sector and EU competition rules.

Public services can be services which fall under the Directive

Public services are evaluated in two of the reports commissioned by the Norwegian Ministry of Trade and Industry. These are: "Tjenestedirektivet—grensen mellom tjenester av allmenn økonomisk betydning og ikke-økonomiske tjenester av allmenn betydning" ["The Services Directive—the dividing line between services of general economic interest and services of general non-economic interest"] by Erling Hjelmeng, and "Oppgaver i offentlig regi og tjenestedirektivet. En økonomisk/administrativ tilnærming" ["Public sector tasks and the Services Directive. An economic/administrative approach"] by Bjarne Jensen. Both reports conclude that the Services Directive has/will have little significance for public services in Norway.

Erling Hjelmeng observes:

> "The conclusion is that the Services Directive has limited significance for SGEI [services of general economic interest]" (Hjelmeng 2008, p. 15).

Bjarne Jensen comes to by and large the same conclusion:

> "The main conclusion is that the Services Directive need not have any significant impact on the performance of public services and activities in Norway" (Jensen 2008, p. 5).

A key point in both reports is the relationship between the provision of non-economic services and services of general economic interest.

The relationship between non-economic services and services of general economic interest

In the position statement of the Norwegian government dated 24 May 2006, one of the points made is that the government "wants a clear delimitation between services of general interest and services of general economic interest". It is difficult to see that the two reports do much towards satisfying that wish. At the same time, there has been no contribution from the EU toward creating a "clearer delimitation".

This delimitation has also been sought by the Danish *Folketing* (parliament). In response to a question on this point, the Danish Minister stated on 25 November 2005:

> "There is no official definition of 'services of general interest'. Whether a given service is considered to be of a general nature or a general economic nature, it is basically up to the Member States themselves to define in accordance with the EC Treaty and the ECJ's case law. The Member States' decisions in this respect are, however, in the final analysis subject to the ECJ's evaluation."

Bjarne Jensen sums it all up as follows:

> "The most uncertain classifications between services of general economic interest and non-economic services of general interest will, as mentioned, be related to individual welfare services in connection with education and childcare, healthcare and social services, culture, and, to some extent, services from the technical sector (water supply and wastewater services, refuse collection and disposal services and other technical municipal services)" (Jensen 2008, p. 14).

In the case of water, wastewater and refuse collection and disposal services, because of the way in which they are financed—fully funded services in the form of charges based on the cost principle—it is "an open question" as to how they will be evaluated (Jensen 2008, p. 15).

Jensen states repeatedly that "an individual Member State can itself decide, if it so wishes, by means of legal provisions, what constitutes services of general economic interest" (Jensen 2008, p. 17). But at the same time, he acknowledges that "in the final instance it (will) be Community law which decides any disputes" (Jensen 2008, p. 22). Confirmation of that fact is made more than clear by the Commission:

> "Whether a service which a Member State considers to be of general interest is of an economic or non-economic nature has to be determined in the light of the case law of the ECJ referred to above" (Handbook …, European Commission 2007, p.12 (English-language version)).

In view of the dynamics which have characterised the ECJ over the past 30 years, it is difficult to comprehend the optimism of Jensen's conclusion.

Bjarne Jensen does view as a problem "the unclear and uncertain delimitation between the terms non-economic services of general interest and services of general economic interest. Decisions pronounced by the ECJ and the EFTA Court and decisions of the European Commission and the Council of Ministers can provide guidelines as to which services and activities will or will not in future be defined as falling under these terms. We must therefore expect interpretations in these areas to depend on the development processes and dynamics of the EU system".

This becomes even more problematic given that Jensen's report ends as follows:

> "It will therefore be an extremely complex task to examine the potential consequences for the public sector and for users of public services of the application of the Services Directive to areas of public sector activity. It will surely demand separate analyses for each relevant area of activity. The time scale for this project has not made it possible to examine these consequences in this report. In my opinion, the Services Directive need not have a significant new impact on the

> performance of public services in Norway. Therefore, impact analyses should be carried out before the authorities begin creating the conditions to enable public sector activity in Norway to fall within the scope of the Services Directive" (Jensen 2008, p. 24).

What this all boils down to is that it is not possible to examine the consequences for the public sector without making extensive analyses of every single relevant area of activity. The sweeping conclusion that "the Services Directive need not have significant impact on the performance of public services" is, therefore, a mystery.

KS believes the scope of action is narrowing

In April 2007, the Norwegian Mission to the EU in Brussels presented a report on services of general interest, which stated, inter alia:

> "According to KS [Norwegian Association of Local and Regional Authorities], the scope of action for services of general interest has become ever narrower because of various judgments from the ECJ. At the same time, this has produced an unforeseeable situation for public services which lie in a grey zone between internally and externally organised services, such as being able to award contracts without prior tenders in connection with inter-municipal co-operation. These ECJ judgments also contribute greatly to a feeling that national, regional and local authorities' scope of action is being constantly eroded and narrowed down. Not least, there is growing concern that the ECJ is to an ever increasing extent shaping policy, because policy and the regulatory framework in this area have been vague" (p. 20).

The same report refers to the viewpoints of CEMR [Council of European Municipalities and Regions], the European umbrella organisation of which KS is a member:

> "Many organisations have engaged in discussions concerning which services belong to, respectively, SGI (services of general interest) and the sub-category SGEI (services of general economic interest). According to CEMR, the placing of services in these categories will be important, as it will determine which services are—or are not—subject to EU competition rules. Many also fear that, in reality, this discussion is about the first move on the part of the EU in a future liberalisation policy—where the consequences in the next round may be the enforced putting out to tender of SGEI (services of general economic interest)" (p. 21).

Authorisation schemes are accepted, but on specific terms

Authorisation schemes must be non-discriminatory, justified by overriding reasons relating to the public interest, and proportionate (Article 9). Articles 14 and 15 show which requirements cannot be imposed on the granting of authorisations. They must, inter alia, satisfy the conditions of non-discrimination, necessity and proportionality. It is not permitted to make an authorisation dependant on whether there is sufficient demand in the market (Article 15(4)).

The Directive may have consequences for the Norwegian Planning and Building Act

The Commission has notified that the Services Directive may affect legislation which regulates the provision of services in what are described as town planning and building standards:

"Thus, when implementing the Directive, Member States need to take account of the fact that legislation labelled as 'town planning' or 'building standards' may contain requirements which specifically regulate service activities and are thus covered by the Services Directive. For instance, rules on the maximum surface of certain commercial establishments, even when contained in general urban planning laws, would come under the Services Directive and, as a result, will be covered by the obligations in the establishment chapter of the Directive" (Handbook …, European Commission 2007, p. 14 (English-language version)).

Chapter 5

Consequences for educational services

It is probable that the core of the Norwegian educational system, the educational services regulated by the Day Care Institution Act, the Education Act, the Private Schools Act, and the Act relating to Universities and University Colleges, will not be covered by the Services Directive—as the prevailing law is defined today. It is equally clear that education which is mostly paid for by pupils, students or family may fall within the scope of the Directive. It is the size of the own-contribution payment which has a bearing on what can be excluded from the Directive and what is covered by it. It is in no way clear as to where the boundary goes. The ECJ has also attached importance to whether an educational service is publicly or privately financed, and whether it is a profit-making operation.

> "In practice, this presumably means that the activity operated by, for example, Bedriftsøkonomisk Institutt [BI Norwegian School of Management], will not fall under the Directive, while the activity at the Treider college will. Although the funding awarded to BI over the government budget is only 18 per cent of its revenues and the course fees paid by students cover the remainder, BI is run as a charitable foundation, the institution is not privately owned, its purpose is not to make a profit, and it is part of our national educational system. Treider AS, on the other hand, is a private limited liability company, owned by Anthon B Nilssen Utdanning AS, one of Scandinavia's largest private providers of educational and course activities, according to college.treiderNorway.no." (Erik Orskaug: "Tjenestedirektivet—en oversikt", UNIO, January 2007)

This distinction is in accordance with the Preamble to the Services Directive:

> "The Court of Justice … has recognised that the characteristic of remuneration is absent in the case of activities performed, for no consideration, by the State or on behalf of the State in the context of its duties in the social, cultural, educational and judicial fields, such as courses provided under the national education system … The payment of a fee by recipients, for example, a tuition or enrolment fee paid by students in order to make a certain contribution to the operating expenses of a system, does not in itself constitute remuneration because the service is still essentially financed by public funds" (Recital 34).

There is nevertheless great uncertainty as to how definitively educational services are excluded from the Services Directive. This is underscored by the fact that there was a contested vote on education when the European Parliament arrived at its compromise solution on the Directive in February 2006. The two Left groups in the European Parliament, the Social Democrats and the Socialist Left, proposed that the entire educational sector should be removed from the Services Directive. That proposal was defeated by the Conservative majority in the European Parliament.

It is for this reason that every educational service must be assessed on the basis of whether it is enough of a service of general interest to qualify—and not a service of general economic interest. In the final instance, it is the ECJ which decides such issues.

Evaluations from the Danish and Norwegian teaching unions

The Danish Union of Teachers (DLF) does not view the reservations in the Directive as in any way being a guarantee of what is likely to happen:

> "The Court of Justice has decided provisionally that all public education lies outside the EU's legislative competence, also in cases where that education is partially financed by students and their parents. Thus, the major part of the Danish public education system appears so far to be excluded from the Services Directive. This may, however, prove to be but a short respite, partly because the Member States have no influence on the ECJ's decisions, and partly because there is no kind of guarantee that the Court of Justice will continue in its case law to 'protect' education from EU legislation".[2)]

The Danish Union of Teachers fears that "foreign undertakings may gain access to supplying a large number of vocational education offerings, supplementary training and course activities, without the Danish authorities being able to impose any requirements as to quality and content. It is not difficult to imagine that such course providers will be more interested in their bottom line than in quality".[3)]

The Danish Teacher Trade Unions (DLI), the umbrella organisation serving all the Danish teaching organisations, took an even tougher stance in November 2006, in a letter addressed to the Educational Committee of the Danish *Folketing*:

> "One thing is certain: there is at the present time a frightening lack of clarity as to what consequences the Services Directive may have for the Danish educational system".[4)]

The demand in principle from the DLI was, therefore:

> "The government should be made to pledge that if there is a single krone from the public purse in an educational offering, that offering should be kept outside the scope of application of the Services Directive. Only in this way can it be ensured that content management, quality control and knowledge-sharing in the field of education remains a national affair also in the future."

Here in Norway, the Confederation of Unions for Professionals (Unio) chose, in a consultation letter of 13 February 2007, to take it as a given "that the Directive clearly excludes educational services, including those offered by 'private providers', from the scope of the Directive".

The consultation response issued by Unio, dated 9 May 2006, included the following:

> "Unio takes the view that the traditional Norwegian educational system regulated by the Education Act, the Private Schools Act, and the Act relating to Universities and University Colleges, does not fall within the scope of the Services Directive.
>
> We request that the government clarify this and in that connection emphasise the possibility opened up by the Directive for each Member State individually to draw the line between services of general interest and services of general economic interest, wherever that is unclear.
>
> The ECJ has in previous cases attached importance to the size of the own-contribution payments when it comes to determining whether or not a service is

> an economic activity and thus exposed to competition. This may lead to some educational services in the field of higher education being defined as services of general economic interest and thus falling within the scope of the Directive. The same applies to adult education. With regard to vocational training, there should be no doubt that this falls outside the Directive's scope of application in Norway, whereas it may have a different position in other Member States where vocational training is the responsibility of employers".

ETUCE's statement

The European Trade Union Committee for Education (ETUCE) expresses in a statement dated 11 May 2006 a much greater degree of concern than Unio:

> "The consequence of these legal uncertainties will undoubtedly be an increase in the number of cases at the European Court of Justice (ECJ), which will determine the application of the EU trade and competition laws to the education sector at national level".

ETUCE therefore calls on the Council of Ministers to secure a complete exclusion of the education sector from the draft Services Directive.

ETUCE refers to the fact that it will be utterly crucial whether an educational service is defined as a service of general interest (SGI) or a service of general economic interest (SGEI). According to ETUCE, it is not easy to draw this distinction since in various EU Member States there are private institutions receiving public funding, public institutions receiving private funding, and public-private partnerships of various kinds.

Since the European Commission will not clarify where the boundary goes between these two types of services, it will be for the ECJ to decide on a case-by-case basis. In ETUCE's opinion, the question of determining whether the education sector should be governed by "open competition and market regulations in the EU internal market" must be subject to political accountability at national level. It must not be subject to the case law of the ECJ.

For ETUCE, the Services Directive gives rise to "a crucial political question: What should be granted higher value, the right to free trade in an open education market or member states' right to fully regulate their education sector with a view to securing high quality and equal access throughout life to its population?"

The danger posed by business models and unit price funding

Kenneth Haar from Ny Agenda in Denmark has pointed out that it may be difficult in the long term to keep some parts of the education sector outside the scope of the Services Directive. He cites as an example the fact that the universities are now in general receiving funding according to a "taximeter scheme". If State support follows the person studying to too great a degree, a clear economic divide is created between the educational institution and the State. The possibility could then easily be opened up for any provider of educational services to call for funding on the same model as public universities. At the same time, a situation arises in which the possibilities open to the public authorities to secure quality and to control the content of the education are weakened (Kenneth Haar: "Service uden hensyn. Analyse av "Bolkestein Light", det reviderede forslag til EUs servicedirektiv", Ny Agenda 2006).

There is much to indicate that the Services Directive may be instrumental in weakening political governance and national control of the education sector and that it may

therefore contribute to greater market influence and cause the sector to become more market-driven. Unio in Norway and DL in Denmark have challenged the authorities to clarify whether we have guarantees that the traditional, law-regulated education system will be kept outside the scope of the Services Directive. Thus far, there have been no satisfactory clarifications.

The European Commission gives little hope of any such clarification being given:

> "In any case, it will not be possible for Member States to consider all services in a specific field, for example all education services, as non-economic services of general interest" (Handbook on implementation of the Services Directive—"Services Directive", European Commission 2007, p. 11 (English-language version).

Chapter 6
Consequences for social services

The Services Directive shall in principle apply to all services for which there is supply and demand in a market. This might suggest that publicly funded social services are outside the scope of the Directive. Article 2 shows that it is not that simple:

> "2. This Directive shall not apply to the following activities:
> (...)
> j) social services relating to social housing, childcare and support of families and persons in need,"

From the Preamble to the Services Directive:

> "(27) This Directive should not cover those social services in the areas of housing, childcare and support to families and persons in need which are provided by the State at national, regional or local level by providers mandated by the State or by charities recognised as such by the State with the objective of ensuring support for those who are permanently or temporarily in a particular state of need because of their insufficient family income or total or partial lack of independence and for those who risk being marginalised. These services are essential in order to guarantee the fundamental right to human dignity and integrity and are a manifestation of the principles of social cohesion and solidarity and should not be affected by this Directive.
>
> (33) … Consumer services are also covered …. and, to the extent that they are not excluded from the scope of application of the Directive, household support services, such as help for the elderly (...)"

Almost all services in the social field can be considered economic activities

Following the European Parliament's deliberations in February 2006, the following social services were excluded from the Directive: "social services within the areas of housing, childcare and support for families and persons in need". This was also the wording in the final decision of December 2006.

There is, however, still uncertainty with respect to where the boundaries go in practice. This uncertainty is due, inter alia, to the fact that the Commission—three weeks after it accepted the compromise solution reached in the European Parliament in April 2006—issued a Communication on "social services of general interest" which contained a disquieting message ("Implementing the Community Lisbon programme: Social services of general interest in the European Union" COM (2006) 177 final, 26 April 2006).

The press release published in association with the Communication by the Commission affirmed that "Today's Communication makes no changes to Community law, but future changes cannot be discounted". Henceforth—every other year—a report will be presented "describing the latest modernisation trends, case law and developments".

The Communication begins by stating that the EU Member States are increasingly outsourcing public sector tasks to the private sector also in the social field and are also entering into "public-private partnerships" (PPPs). This "trend towards modernisation" is resulting in a situation in which ever larger parts of the social services fall under

Community law, so that "the conditions for the application of certain Community rules need to be clarified".

The Communication establishes that any activity consisting of supplying goods and services in a given market by an undertaking constitutes an economic activity, regardless of the legal status of the undertaking and the way in which it is financed. Services provided generally for payment must be considered as economic activities. This also applies if those who benefit from the services do not themselves pay for them. It therefore follows, according to the Commission, that "almost all services offered in the social field can be considered economic activities". All that is then required is a sliding transition—or a couple of ECJ judgments—before it is completely uncertain what the Services Directive will mean for social services.

An Annex to the Communication stated that "As a general rule, it is not possible to envisage compiling a list of activities that would not a priori be economic. The concept of economic activity is an evolving concept linked in part to the political choices of each Member State". In practice, therefore, it is the ECJ which decides whether a specific activity is of an economic nature or not—according to the Commission.

Close the debate?

The Commission has taken the view that there is a clarified legal basis for the relationship between public services and the competition rules, and that it is therefore time to end the debate and instead focus on the practical implementation of the Directive. There have been very strong reactions to this. Many have been worried about the future of the social services. An alliance has developed between the trade unions, the public authorities with responsibility for social services and the Left grouping in the European Parliament. A common demand has been that the EU should develop legislation ensuring that the basic social services can still be offered as universal services and that they can continue to maintain high quality.

ETUC, for instance, wants to see a clearing up of the prevailing law by means of a directive designed to secure the status of public services. The Social Democrat group in the European Parliament and social policy umbrella organisations like EAPN and Social Platform want a "counterbalance against competition laws so that we need not wait for judgments from the ECJ." The European Federation of Public Service Unions (EPSU), with its 8 million members, stands together with its counterpart, CEEP, the public sector employers' organisation, in claiming that "welfare is dependent on standards which the markets cannot deliver".

Are home help services excluded?

The report commissioned for the Norwegian Ministry of Trade and Industry by Erling Hjelmeng, Professor at the Department of Private Law at the University of Oslo, cites the Commission's view that "almost all services offered in the social field can be considered 'economic activities' within the meaning of Articles 43 and 49", and therefore recognises that if something is considered a "social service", it is not decisive whether the EU classifies it as economic or non-economic.

Hjelmeng's report nevertheless makes light of the uncertainty which follows from this. Erik Orskaug of Unio is not, however, willing to accept that uncertainty:

> "Despite this, there will also be grey zones here which open up for the government to actively define the dividing line between services of general interest and services of general economic interest in a manner designed to create clarity. (…) We would

> in particular point out that home support services, such as home nursing and home help services, should clearly be defined as services of general interest which must be kept outside the Directive's scope of application, even if the own-contribution payments for some of these home help services can be considerable and thus open up for the opposite view, as the European Court of Justice has previously interpreted the payment criterion" (Erik Orskaug: -"Tjenestedirektivet—en oversikt", Unio, 31 January 2007).

The Directive excludes "support for families and persons in need". But does it give a sure guarantee that municipal home help services are excluded?

Erik Orskaug has this to say:

> "Municipal home help services are managed by the public sector as part of the local authorities' total offering to elderly people who frequently need an integrated home support services offering, both home healthcare services provided by various groups of health professionals, and home help services, such as cleaning etc., which the elderly are unable to manage for themselves for health reasons. All these services are funded by the public sector, the healthcare services are free of charge, while the individual pays a contribution towards the home help. The contribution towards home help services is often graded according to income, with those with high incomes often paying far more than half the cost of the service. To the extent that the remuneration principle and the size of the own-contributions are decisive for determining whether these services will fall within the scope of the Services Directive, it will lead to a great lack of clarity since the own-contributions vary so much. Unio has previously asked the government to clarify whether care of the elderly as a whole should fall under 'social services' and thus be excluded from the scope of application of the Directive".

No clarification

No such clarification has come, either from the Norwegian government or the European Commission. On the contrary, there is little clarity when the Preamble to the Directive has the following to say regarding the scope of the Directive: "(…) and, to the extent that they are not excluded from the scope of application of the Directive, household support services, such as help for the elderly" (Recital 33).

There are also other grey zones. While nurseries and kindergartens are excluded from the Services Directive (Article 2(2)(j)), child welfare is a mixture of a service and an exercise of official authority (Hjelmeng 2008, p. 10). This creates an unclear situation since it is only that part involving the exercise of official authority which is excluded from the Directive. Labour market measures may also lie in the grey zone between a service and the exercise of official authority (Hjelmeng 2008, p. 10).

Chapter 7
The status of health services

Both public and private healthcare services are excluded from the Services Directive—regardless of how they are organised and financed, as set out in Article 2(2)(f) of the Services Directive:

> "2. This Directive shall not apply to the following activities:
> (…)
> f) healthcare services whether or not they are provided via healthcare facilities, and regardless of the ways in which they are organised and financed at national level or whether they are public or private"

From the Preamble:

> "(22) The exclusion of healthcare from the scope of this Directive should cover healthcare and pharmaceutical services provided by health professionals to patients to assess, maintain or restore their state of health where those activities are reserved to a regulated health profession in the Member State in which the services are provided."

The European Commission has specified this exclusion as follows:

> "This means that services which are not provided to a patient but to the health professional himself or to a hospital such as accounting services, cleaning services, secretarial and administration services, the provision and maintenance of medical equipment as well as the services of medical research centres, are not covered by this exclusion.
>
> Moreover, the exclusion does not cover activities which are not designed to maintain, assess or restore patients' state of health. For example, activities which are designed to enhance wellness or to provide relaxation, such as sports or fitness clubs, are covered by the Services Directive and will have to be covered by implementing measures.
>
> Furthermore, the exclusion of health services only covers activities which are reserved to a regulated health profession in the Member State where the service is provided. Services which can be provided without specific professional qualification being required have thus to be covered by implementing measures." (Handbook in Implementation of the Services Directive—"Services Directive", European Commission 2007, p.12 (English-language version)).

The Norwegian government proposed in its "position statement", sent to the EU on 24 May 2006, that the Directive should include a definition of health services—and that this definition should not be limited to services carried out by the health professions:

> "Regarding the exclusion of health care services from the scope of the directive, we propose that a definition of health care services is included in the directive. The definition should not restrict the exclusion to activities that are reserved to a regulated health profession in the Member State in which the services are provided."

It is not known that any such definition has been provided.

Concerning the work on a separate Health Services Directive

Both public and private healthcare services were excluded from the Services Directive in the European Parliament's first plenary reading in February 2006, and many welcomed that exclusion. However, the European Commission quickly made it known that it intended to prepare a separate directive on cross-border health services.

In September 2006, the Commission sent out for consultation an informal discussion document concerning the possible content of a Health Services Directive. The Norwegian government's response to the consultation document expressed no objections in principle to the Norwegian health system being made subject to an EU Directive, although it did set up a series of conditions which other governments may also have stipulated. While some of them probably conflict with what the Commission wishes to achieve with the directive, they are worded in such general terms that there is little that would be legally binding.

Here are some examples:

- Member States must be able to plan and control the costs of their health services
- national principles for setting priority between patients must not be undermined
- the quality of health services should be ensured
- the supply of sufficient health services in sparsely populated areas must be maintained
- Member States have a prerogative to make decisions regarding what constitutes appropriate and ethical treatment
- increased patient mobility must not result in greater social inequality with respect to accessibility to health services
- the situation must not arise whereby only the most resourceful patients can benefit from health services in other Member States
- women's health and female illnesses must be adequately provided for in a proposal from the Commission
- the freedom to provide health services and the right to establish in another Member State must not mean a right to access public funding of health services from that State

Jørn Petter Kvamme, senior adviser at the Norwegian Ministry of Health and Care Services, has admitted to the newspaper *Nationen* that the rules on the free movement of services put restrictions on Norwegian healthcare policy: "But we do not know exactly what those restrictions are. At the Ministry we have to ask what we should do to prevent the ESA coming after us".

Erik Orskaug of Unio has the following to say:

> "Whether there will be a replay of the conflict in areas which may result in social dumping of pay and employment conditions and a weakening of the position of labour law in connection with the trade in health services or new rules on reciprocal approval of professional qualifications, remains to be seen." (Erik Orskaug: "Tjenestedirektivet—en oversikt", Unio, 31 January 2007).

The Commission has several times postponed presenting a draft Health Services Directive—probably because the resistance of individual governments to the perspectives outlined in the consultation document has been too great. The Commission has now announced that it intends to present a draft directive in June.

With regard to Member States' governments, the Commission has a sure trump card. That is the ECJ, the Court which in the past decade has forced through a state of law

in the field of health services which is completely contrary to what most governments stand for.

When the ECJ shoves political democracy aside

The ECJ established in a judgment as far back as 1979 that if medical treatment in another Member State "was more effective" than that offered in the patient's home State, the treatment expenses should be reimbursed as though the treatment had been provided in the home State.

This immediately opened up the possibility of people being able to choose freely between medical practitioners and hospitals throughout the entire EU—in a situation in which few EU Member States had such an arrangement within their own borders. The unavoidable consequence was that the EU Member States—then nine in number—were obliged to harmonise not only their health insurance systems as quickly as possible, but also important parts of their healthcare policy, otherwise it would risk disturbing the balance among the Member States and undermining the control of national healthcare policy.

Free choice throughout the EU did not happen, however. Not then. Member States' governments were unanimous in calling for a change in the legal rules on which the ECJ had based its judgment. In 1981, the European Council of Ministers determined—unanimously—that national authorities could approve medical treatment in other EU Member States only if it was administratively and medically necessary, and only if the treatment was part of a national healthcare offering. Health policy thus remained a national affair, for almost twenty years.

But the ECJ got another chance in 1998 in connection with a new court case, when it established that national health policy must also be based on the EU rules on the free movement of goods and services. It was no longer possible for Member State's governments to respond with a demand for a change in the law, for this time the ECJ had chosen to derive its reasons for judgment from the EC Treaty, from the fundamental principles of the free movement of goods and services. These principles could only be changed if all the governments were in agreement to change them—which they were not. By this time the number of Member States had grown to 15, and it was becoming increasingly difficult to obtain full consensus.

Ten governments nevertheless became engaged in the issue and agreed that hospital treatment should not be considered a service of the kind stipulated in Article 50 of the EC Treaty, inter alia because it was a service free of charge to patients, for which there was no market. The ECJ did not agree, but asserted that health services fall under Article 50 and therefore under the principle of free movement.

And so it has continued. With fresh judgments in 2001 and 2003, the ECJ has step by step forced into being a situation whereby EU Member States are obliged to co-ordinate their health policies ever more closely—thus far, each in their own country.

What, then, is the connection with the Services Directive?

One connection is obvious. Once the Services Directive is adopted, there is a great danger that the principles from this Directive will also impact on the health sector (see Chapter 8 on how the Services Directive will be used as a model for services which are excluded from the Directive). By removing the health sector from the Services Directive, the driving forces behind the Directive no doubt hoped that trade unions and health sector user organisations would not engage in a direct fight against it. It is important that we do the opposite in the debate on the Services Directive here in Norway.

The opposition to the Services Directive within the EU has had significance for the kind of Health Services Directive the Commission can see the possibilities for promoting. If we in Norway can get the Services Directive rejected, it will likewise set strict limits for the kind of Health Services Directive that Norway can find acceptable.

Chapter 8

Consequences for services excluded from the Directive

In the European Parliament's deliberations on the Services Directive in February 2006, a number of service sectors were excluded from the Directive—either because they are regulated by other separate directives or because the European Parliament wanted to keep them outside the Services Directive. However, the European Council of Ministers resolved in May 2006 that service sectors such as energy, water, postal services and education should be periodically evaluated against the Services Directive. Any rules preventing competition in the provision of cross-border services were to be removed.

The Services Directive's requirement for full competition in cross-border service provision would, therefore, also apply in areas which thus far have been kept outside the scope of the Directive. Whatever has not been captured within the scope of the Services Directive, in its present adopted form, must be included in the same template in other ways. This understanding is confirmed by Professor Finn Arnesen of the Centre for European Law:

> "It is also possible to envisage the Directive being used, by parties as well as courts, as an argument for solutions equivalent to those chosen in the Directive also being used as a basis outside the Directive's impact area" ("Virkningen av at opprinnelseslandsprinsippet er tatt ut av tjenestedirektivet" ["The effect of the removal of the country of origin principle from the Services Directive"]—a report commissioned by the Norwegian Ministry of Trade and Industry in connection with the 2006 consultation on the Services Directive).

The Services Directive was therefore adopted by the EU before it was known what the decision would mean for basic public services. This order of sequence was surely a prerequisite for getting the Directive adopted. It helped neutralise opposition to the Directive from trade unions and organisations promoting the interests of the users of services excluded from the Directive.

Report by the law firm Hjort DA

In December 2007, the Ministry of Trade and Industry commissioned a report on the potential impact the Services Directive could be expected to have on services other than those which currently fall within the scope of the Directive. The commission was entrusted to the law firm Hjort DA. Here are some points from their report, which was completed by Frode Elgesem and Ane Grimelid on 3 March 2008 (see Frode Elgesem and Ane Grimelid "Tjenestedirektivets gjennomslagskraft for andre tjenester enn dem som er omfattet av direktivet").

Services which do not fall within the scope of the Directive fall into two groups:

1. Services regulated by other EU legislation
2. Services regulated by the provisions on the right of establishment and the free movement of services set out in the main body of the text of the EC Treaty/EEA Agreement.

1. Services regulated by other EU legislation:

The Services Directive shall, pursuant to Article 3(1), derogate for other EU directives and

regulations relating to service provision. The report by Elgesem and Grimelid of Hjort DA finds that "there is little scope to give the solutions in the Services Directive any impact as regards excluded services which are covered by other secondary legislation" (p. 4).

This is clearly contrary to what the Council of Ministers resolved in May 2006, even if that resolution is not part of the text of the Directive. Without referring to this decision, the report's authors take the view that the political significance of the Directive "will probably be somewhat greater" (p. 16):

> "… The character of the Services Directive as a harmonisation instrument in the field of services will (probably) be a 'source of inspiration' which it will be difficult to by-pass in the design of other legislation. The need for coherence and continuity in secondary legislation will probably also carry not insignificant weight" (p. 16).

In other words: a certain amount of scope for impact as regards excluded services is there nevertheless.

2. Services regulated by the provisions on the right of establishment and the free movement of services:

Here, the report's authors take the view that the situation is "a little more uncertain":

> "In our view, the Directive goes somewhat further on some points than current legislation in restricting the access of Member States to regulate services. The practice of the European Court of Justice and the EFTA Court indicates that the possibility cannot be excluded that solutions chosen in the secondary legislation may be of significance. The courts will examine whether there is a basis for assuming that the Services Directive's solutions already follow from fundamental principles and thus are an expression of a codification, or whether, following a specific evaluation, there is otherwise a basis for analogy. Although we currently take the view that there is little scope to draw analogies from the Services Directive to excluded services, we cannot leave out of account the fact that the Services Directive may have a certain liberalising effect on areas which are excluded from the Directive" (p. 4).

So: the possibility cannot be excluded of the Services Directive having a certain liberalising effect on areas excluded from the Directive. The report does not specify which service areas this may apply to or what kinds of liberalisation may be involved.

Does the Directive exceed the bounds of current EU law?

In the debate on the Services Directive, it has been claimed that the Directive does nothing other than codify the prevailing law already created through the judgments of the ECJ. The report by Elgesem and Grimelid cites some examples of the Directive nevertheless exceeding the bounds of current EU law:

1. May contribute to a certain liberalisation of the services sector
The report gives the following as the most general example:

> "In the light of the fact that, inter alia, the Preamble to the Services Directive itself states that the Directive 'builds on, and thus complements, the Community acquis', it cannot be ruled out that the Services Directive's solutions may affect interpretations of the provisions relating to services in the EC Treaty and the EEA Agreement, and thus contribute to a certain liberalisation of the services sector through future case law" (p. 24).

2. Far fewer interests than today can justify restrictions on incoming service providers
Article 16 is the key article which regulates the conditions for what the Danish text of the Services Directive calls [in English translation] "incoming service providers". Article 16(1)(a) gives a provider the right in principle to carry out services without barriers in any other Member State. Article 16(1)(c) then sets restrictions on the way in which Member States can limit this right. Elgesem and Grimelid refer to the restrictions which lie in the requirements of non-discrimination, necessity and proportionality (see Section 4) and comment on these restrictions as follows:

> "The provisions imply a restriction in relation to current treaty-based law. Pursuant to the provisions in the EC Treaty and the EEA Agreement on the free movement of services, as interpreted by the European Court of Justice and the EFTA Court, it is permissible to introduce national rules which imply discrimination on the ground of nationality, both direct and indirect. As long as the rules can be defended on the basis of either public policy, public security or public health, see the EEA Agreement's Article 33 and the EC Treaty's Article 46 (direct discrimination), or other pressing reasons relating to the public interest (indirect discrimination), there is no absolute prohibition equivalent to that set up in the Directive's Article 16(1)(a).
>
> The provision implies a restriction in relation to the theory of public interest as the basis for national restrictions: according to this theory, far more interests than those mentioned in Article 16(1)(b) can justify barriers to the movement of services, as long as the national measures are so-called nationality-neutral" (Hjort DA, p. 22).

3. Article 43 of the EC Treaty can hereafter interfere in the purely internal affairs of a Member State
Elgesem and Grimelid's report states that the Directive's provisions on the free right of establishment (Chapter III) in all essentials coincide with current law. It is nevertheless questioned whether the access to make a service activity conditional upon an authorisation implies a restriction on the right of Member States to regulate purely internal affairs. The report comments on the problem as follows:

> "Read in this way, the Services Directive also gives rise to restrictions in the regulatory competence also of the Member State of establishment and not only in the host Member State. In that case, it implies a difference from current law, since the ECJ has established on a number of occasions that the EC Treaty's Article 43 (like the rules on the free movement of services) does not apply to the purely internal affairs of a Member State" (p. 21).

4. The complex rules on simplification and processes
Most of the articles in the Services Directive deal with everything that is intended to make it simpler for service providers to establish in another Member State and to provide cross-border services. Many of these rules alter the state of law between the service providers and the Member States. That is why the Directive may result in an increase in the trade in cross-border services.

Examples of sectors excluded from the Services Directive

1. Water
The European Commission has chosen water as an area for liberalisation ("Internal Market Priorities 2003-2006", European Commission, May 2003). One of its arguments is that there are big price differences in water supply services throughout the EU. The Commission takes this as a sign that there is insufficient competition, which is again because water is supplied through local monopolies. That these local monopolies can

be organised so as to be governed by local communities, has no significance for the Commission (David Hall: “EC Internal Market Strategy—Implications for Water and other Public Services”, PSIRU, May 2003).

The Commission has not succeeded with its liberalisation aims. In January 2004, the European Parliament voted against a proposal to liberalise water supply services. In the light of the resolution passed by the Council of Ministers in May 2006, the Services Directive can be used as the norm—and thus as leverage—for the step-wise liberalisation of water supply services.

Leo Grünfeld and Gjermund Grimsby of Menon Business Economics were commissioned to report on “Norsk økonomi og EUs tjenestedirektiv” [“The Norwegian Economy and the EU Services Directive”] by the Ministry of Trade and Industry. In their report, they conclude that water and wastewater services are a part of the EU Services Directive (p. 14). If water and wastewater services fall within the scope of the Services Directive, it means that this sector cannot be reserved for national participants, but must be open to all participants within the EEA.

2. Electricity
Electricity supply services have in principle been liberalised (Directive 2003/54/EC), although not in the way the Commission wants, because many governments are holding back, including the French and German governments. The Directive which (de)regulates electricity supply services gives governments some opportunity to impose obligations on the electricity suppliers, such as security of supply and “reasonable prices” (Directive, Article 3(3)). This does not prevent prices having risen much more steeply for households than for industry.

This national freedom of action goes beyond what the Services Directive would have allowed. This is also the situation in the case of electronic communication services. If the Services Directive gradually becomes the norm also for the legislation in these areas, it means a clear restriction on national freedom of action.

3. Health services
The Services Directive may also lead to an increasingly market-oriented public healthcare offering (see Chapter 7).

Chapter 9

What is left of the country of origin principle?

Many fundamental aspects of the Services Directive are contentious and unclarified. The advocates of the Directive claim, for instance, that the "country of origin principle" was removed from the Directive in the compromise arrived at by the European Parliament in February 2006.

This principle means that an undertaking which provides services in another Member State, shall—with the exception of health, environment and security—comply with the rules of the Member State where the undertaking is registered and not in the Member State where the service is provided. The controls to ensure compliance with the rules shall also be carried out by the Member State where the undertaking is registered.

This principle was expressed as follows in the Commission's original draft Directive:

> "Member States shall ensure that providers are subject only to the national provisions of their Member State of origin which fall within the co-ordinated field" (Article 16(1)).
>
> "The Member State of origin shall be responsible for supervising the provider and the services provided by him, including services provided by him in another Member State" (Article 16(2)).

The Preamble to the draft Directive stated:

> "In order to secure effective implementation of the free movement of services and to ensure that recipients and providers can benefit from and supply services throughout the Community regardless of frontiers, it is necessary to establish the principle that a provider may be subject only to the law of the Member State in which he is established"
> (Recital 37).

The "country of origin principle" as a specific term is no longer to be found in the Directive as adopted. But it is highly disputed that it has really disappeared. Astrid Lulling, Luxembourg, member of the EPP-ED, the big centre-right group in the European Parliament, summed up as follows the compromise decision in the European Parliament following the voting on 16 February 2006: "The country of origin principle is essential. The negotiators from my group will ensure that the new wording is identical with this principle. But the negotiators for the Social Democrats say they have succeeding in getting rid of it".

Malcolm Harcourt, leader of the EPP, the largest group in the European Parliament, expressed the same view in a press release issued on 14 February 2006: "With respect to Article 16 (on the country of origin principle), we have not changed it in substance".

The first version of Article 16 was headed "The country of origin principle". Following the compromise decision in the European Parliament, the heading was amended to: "Fri utveksling av tjenesteytelser" ["Free movement of services"] in the Danish translation or "Frihet til å yte tjenester" ["Freedom to provide services"] in the Norwegian translation.

In the Directive as finally adopted, Article 16 has acquired a completely new form. The term 'country of origin principle' is found at no point in the text following Article 16. The original article has been replaced by a long, new Article 16, setting out the requirements that Member States can impose on an incoming provider—and those they cannot impose.

The content of Article 16

> "Member States shall respect the right of providers to provide services in a Member State other than that in which they are established. The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory" (Article 16(1)).

Further, the same Article states that Member States shall not impose requirements which do not respect the following principles:

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

There is food for the legal profession here in abundance, particularly in the last two points. A Member State which limits service provision from other Member States for reasons of public policy or environmental protection will have to manage to convince the lawyers in the European Commission and the ECJ judges that the intention is in no way to protect the Member State's own service providers from competition from abroad. This is while the proportionality requirement means that it is not possible for social or other reasons to limit service provision from other Member States if such objectives can be attained in ways other than by preventing the cross-border "flow of services".

The country of origin principle still applies—with the derogations provided in Articles 16 and 17

Article 16 establishes, in other words, that the host Member State cannot impose requirements on providers other than those which can be justified for one of the four reasons mentioned in Article 16(1) and which are repeated in Article 16(3), i.e. reasons of public policy, public security, public health and environmental protection. In addition, all requirements must comply with the principles of non-discrimination, necessity and proportionality.

The European Commission explains how this should be understood:

> "As a result, service providers will know that they will not be subject to the legislation of the receiving Member State except where its application is justified for the four reasons set out in Article 16(1) and 16(3) (or the legislation in question is covered by a derogation provided for in Article 17)" (Handbook on implementation of the Services Directive—"Services Directive", European Commission 2007, p. 36 (English-language version)).

In other words: incoming service providers can rely on the country of origin principle applying, with the derogations provided in Articles 16(1), 16(3) and 17.

Recitals which have been removed

It was, therefore, not an insignificantly precise amplification when, in the version of the Directive which was adopted by the European Parliament in February 2006, the following appeared in the Preamble to the Directive:

> "In order to secure effective implementation of the free movement of services and to ensure that recipients and providers can benefit from and supply services throughout the Community regardless of frontiers, it is necessary to clarify to what extent service providers are subject to the legislation of the Member State where they are established and to what extent legislation of the Member State where the service is provided is applicable" (Recital 37).

This paragraph implied that the reality of the country of origin principle had been partially retained in the compromise decision of the European Parliament. However, the Recital was deleted when the Commission amended the Directive in April 2006, and it was not reinserted in the final decision of December 2006. Nor has there been any authoritative clarification of "to what extent service providers are subject to the legislation of the Member State where they are established and to what extent legislation of the Member State where the service is provided is applicable"—neither before nor after the final decision was taken on the Directive.

Who will carry out the checks?

The country of origin principle is now wrapped up in a judicial tangle in which the host Member State and the country of origin are supposed to share responsibility for carrying out the checks between them, without it being particularly clear which set of rules this should be based on or who is supposed to check what.

Articles 29-31 make it very unclear as to whether the checks on incoming service providers should be undertaken by the host Member State or the country of origin (in the Directive called "the Member State of establishment"). It appears from Article 29 that Norway can request the country of origin to undertake checks, etc., after which the authorities of that Member State shall inform Norway of the results and of the measures taken:

> "The Member State of establishment shall undertake the checks, inspections and investigations requested by another Member State and shall inform the latter of the results and, as the case may be, of the measures taken" (Article 29(2)).

Article 31 states that the "host Member State" can nevertheless undertake checks on incoming service providers within the framework of the requirements permitted in Articles 16 and 17:

> "With respect to national requirements which may be imposed pursuant to Article 16 or Article 17, the Member State where the service is provided is responsible for the supervision of the activity of the provider in its territory" (Article 31(1)).

The host Member State can therefore check that providers are in compliance with the requirements imposed "for reasons of public policy, public security, public health or environmental protection"—if the requirements comply with the principles of non-discrimination, necessity and proportionality. Within these restrictions, which are tight enough (see here Chapter 4), a host Member State principle therefore applies. But for all other requirements, Article 30 applies. Article 30 states that it is the "Member State of establishment" which is responsible for supervising providers which provide services

in another Member State, in which case it is the national law of the Member State of establishment that must be followed. Then, "the Member State of establishment shall ensure that compliance with its requirements is supervised in conformity with the powers of supervision provided for in its national law, in particular through supervisory measures at the place of establishment of the provider" (Article 30(1)).

There is nevertheless no "duty on the part of the Member State of establishment to carry out factual checks and controls in the territory of the Member State where the service is provided". It is the authorities of the host Member State which shall carry out the "factual checks and controls" (Article 30(3)).

Many unanswered questions

Since the checks and controls mentioned here are to be carried out "in conformity with the powers of supervision provided for in its national law", that is to say the law of the Member State of establishment, will this not mean that Norwegian authorities must be prepared to carry out "factual checks and controls" on the basis of the national laws of 29 different EU/EEA Member States? In that case, what extra resources will the Norwegian supervisory authorities need to carry out such checks and controls?

This may mean the development of 30 different legal standards. This issue has been raised by the Danish government in a memorandum to the *Folketing*:

> "To the extent that the law falls within the scope of Article 16, exclusionary provisions should be included in the special legislation exempting service providers from Member States which exercise a temporary service activity in Denmark. The law in its current state will be adhered to with regard to service providers which are established here in Denmark" ("Basic memorandum to the *Folketing*'s EU Committee—on the Services Directive", 15 May 2006, p. 23).

None of the reports commissioned by the Ministry of Trade and Industry has evaluated the risk that service providers, both Norwegian and non-Norwegian, may be tempted to establish and to register companies in Member States which have a weak regulatory framework and poorly resourced supervisory authorities.

The questions are many, and no answers have been provided by the Ministry or in the reports commissioned by the Ministry.

Much to wonder at

Article 31(3) of the Directive states:

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

On the basis of the text of Articles 29-31, it is impossible to be sure which set of rules and regulations—those of the Member State of establishment or those of the host Member State—these checks, inspections and investigations mentioned in Article 31(3) should be based on. But since a request is stipulated from the Member State of establishment, the most natural thing is to assume that it is the rules of the Member State of establishment which should be applied. None of the commissioned reports is of any help in determining whether this understanding is correct. The European Commission has provided no clarification, and may possibly not provide one at this stage. But the clarification is bound to come sooner or later—either from the Commission or the ECJ.

The Services Directive is, therefore, by no means chemically cleansed of the country of origin principle. It is in fact evident from a number of contexts that it remains lurking just beneath the surface. Article 18 states:

> "By way of derogation from Article 16, and in exceptional circumstances only, a Member State may, in respect of a provider established in another Member State, take measures relating to the safety of services" (Article 18(1)).

This may apply, for instance, to environmental controls:

> "For example, a provider may already be subject to environmental auditing in his Member State of establishment with regard to the environmental soundness of his operation and working methods and requirements in the host Member State must not duplicate that" (Handbook on implementation of the Services Directive—"Services Directive", European Commission 2007, p. 38 (English-language version).

It will at the very least be a complicated process to check incoming providers:

> "Procedurally, the Member State in which the service is provided may only take measures on its own after having requested assistance from the Member State where the service provider is established and after having complied with the steps set out in Article 35(2) to (6), including the obligation to notify the Member State of establishment and the Commission of the intention to take the measures and the reasons for it"
> (Handbook …, European Commission 2007, p. 43 (English-language version)).

Choice-of-law regulation

Whenever a cross-border contractual obligation is entered into, the need arises for what is known as "choice of law", to determine which Member State's law should apply if the parties end up in a legal dispute. The EU has hitherto regulated such choice of law in the "Rome I Convention" of 1980. This says that if the parties do not agree on which Member State's law shall apply, the law of the Member State in which the undertaking is established shall apply—in other words in conformity with the country of origin principle.

This convention will now be made law by means of a Regulation. A draft Regulation was presented in April 2006 (COM (2005) 650). In respect of service provision, the draft Regulation states that unless the parties to a contract agree otherwise, "a contract for the provision of services shall be governed by the law of the country in which the service provider has his habitual residence" (Article 4(1)(b)).

The draft Regulation was approved by the European Parliament on 29 November 2007 following a brief debate and without arousing any particular attention. Since the Services Directive shall derogate for other EU legislation which has significance for services (see Article 3(1)), this may mean that the country of origin principle has got in through the back door without arousing the slightest fuss.

The Regulation makes a derogation for the Posting of Workers Directive (Recital 11 and Article 22(a)), such that the country of origin principle does not apply to the pay and working conditions which the Posting of Workers Directive permits the host Member State to determine and control. In the case of all services involving users and consumers, however, it will not be Norwegian rules which apply if the services are purchased in another Member State.

Developments over time

Article 50 of the EC Treaty contains a host Member State principle of sorts: “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”.

It is a long time, however, since the ECJ interpreted this Article as a host Member State principle. In the Cassis de Dijon judgment, delivered in 1979, the ECJ established that a good which can be produced and lawfully sold in one State can also be sold in other States. Therefore, it is the rules in the State where the good originates which determine whether the good can be sold.

This judgment gradually began impacting on other ECJ judgments relating to the sale of services between Member States. In 1990, the principle was finally established in the Säger judgment (Case C-76/90):

> Following this judgment, the prevailing law was such that a service which could be provided in one EU Member State could also be provided in all the other Member States. Where the spotlight had previously been trained on “discrimination on the ground of nationality”, it was from now on trained on “barriers to providing services”. Any rule which could make it more expensive for a foreign service provider to provide a service than for a domestic provider, could be contrary to the EC Treaty (Hjalte Rasmussen: “EU-ret i kontekst”, 1998, p. 186).

This means that there is a great danger that the ECJ will interpret the tangle of prohibitions and conditions in Article 16 of the Services Directives as much as possible in conformity with the country of origin principle, which the ECJ has applied to the trade in services since the 1990 Säger judgment.

Conclusion

Professor Finn Arnesen of the Centre for European Law was commissioned by the Ministry of Trade and Industry to report on “The effect of the removal of the country of origin principle from the Services Directive”.[5)]

Professor Arnesen’s conclusion is that “the difference between the first draft and the April draft as regards the change from the country of origin principle to the right to provide services is essentially of a conceptual nature. The area in which the change is also of practical significance is in relation to the host Member State’s possibility of enforcing its requirements with regard to incoming service providers. The review will show, however, that it is doubtful whether there is access to impose any special requirements which go beyond those which follow explicitly from the Directive, so the change may appear to be of more cosmetic than practical significance” (p. 18).

It is, consequently, extremely doubtful whether the country of origin principle has really been removed from the Directive.

Elgesem and Grimelid take the same view in their report: “There is reason to emphasise that the change from the country of origin principle to ‘the right to provide services’ in Article 16 of the Directive was in all essentials of a conceptual nature” (Hjort DA 2008, p. 13).

It is highly unsatisfactory, therefore, that none of the reports commissioned by the Ministry of Trade and Industry deals with what the new wordings in Article 16 will mean in practice for checks and controls of incoming service providers in Norway. Which controls can be carried out? Which cannot be carried out?

The answer, my friend, is blowing in the wind …

Chapter 10

The fundamental problem for public services

It is a fundamental problem for the development of the EU that it is the rules which govern the internal market which determine how public services should be designed and offered to EU citizens. The scope and arrangement of public services define both whether a welfare state exists, how well developed it is, and to what extent services are rights to be enjoyed by the citizens of that state.

In a welfare society in which basic public services are perceived as rights, the citizen is not only a user or consumer of public services but also a stakeholder who should have the right to participate in determining the scope and arrangement of those services. To the extent that the Services Directive interferes in public services, however, it transforms the citizen into a customer. The Services Directive commands that there be neither exposure to competition nor privatisation—but the Directive will nevertheless systematically create the conditions for more commercialised public services.

This is related to the ideological notion that public services can be delivered most cheaply by private suppliers. Whether competition results in better quality or in a more just or equal distribution of benefits, there are few traces of in the text of the Directive—nor in the reasons for the Directive.

One of the fundamental principles of all EC and EU treaties since the Treaty of Rome of 1957 has been the “free movement of services”. This was long understood as a prohibition against all national rules which directly discriminate against foreign service providers in relation to domestic providers. Since the ECJ’s Säger judgment of 1990, the prevailing law has in principle been far more demanding: all rules and schemes which potentially or factually make it more difficult for foreign providers to compete on equal terms with domestic providers, must go. The objective of many of these schemes has been first and foremost to regulate the relationship between domestic providers, often based on social reasons which have strong support among society. Now, however, there is a requirement through the Services Directive to re-evaluate all such schemes, and solely on the basis of whether they make it more difficult for foreign service providers to compete.

Hjelmeng, Jensen, Elgesem and Grimelid see the dangers, but overlook them in their conclusions

The conclusion reached in the reports by Erling Hjelmeng and Bjarne Jensen, that the Services Directive will have little significance for public services, is a conclusion which only has meaning as a “judicial snapshot” of the prevailing law on public services.

This snapshot completely ignores the fact that the EU system is driven by a set of dynamics which are constantly changing the prevailing law in a market-liberal direction in the case of many services which have been public in all the EU and EEA Member States. The reports ignore the fact that, for those who were the strongest drivers of a Services Directive, the Directive is only another stage on the road towards an ever more liberalised social order.

Bjarne Jensen acknowledges that this is the direction in which things may go:

> "To be sure, such an understanding [that the Directive will not have major consequences for the public sector: our comment] arises as a result of constant pressure from various interests and players to convert public sector tasks to more market- and commercially-based solutions by use of an orderer or commissioner—with respect to model execution, competition exposure or privatisation of production of public sector tasks, outsourcing of public sector activities to private-law companies such as limited companies, and even full privatisation of public sector tasks. But it is precisely such methods that the Services Directive would give rise to if they were to be applied to public sector tasks. This means that solutions of this kind can be used irrespective of whether or not the tasks are currently subject to the Services Directive" (Jensen 2008, p. 5).

These are exactly the kinds of methods that the Services Directive may give rise to. Therefore, it will be easier for "solutions of this kind" to come into use when the Services Directive is in place—and not independently of the Services Directive.

The ECJ and the EFTA Court are creating new law

The EFTA Court, the Court of Justice for the EEA, can be invoked if it is not obvious where the dividing line goes with regard to public sector activity:

> "Unclear rules of law as to what constitutes public activity may open up for the EFTA Court to deal with more decisions on non-economic services of general interest and services of general economic interest" (Jensen 2008, p. 6).

A third report, authored by Frode Elgesem and Ane Grimelid of the law firm Hjort DA, describes these dynamics as follows:

> "Court-created law will—together with future developments in the ECJ's case-law—be a key premise for determining the substance of the EEA Agreement and the legislative acts incorporated in it" (p. 8).

The Services Directive is just such a legislative act.

One reason why so much of EU law is created by the ECJ is that the language in EU treaties is rarely that precise:

> "The key point of departure will generally be the wording. However, as regards in particular the main body of text of the agreement, the wording often provides little guidance, and thus gives scope for court-created law" (Hjort DA 2008, p. 8).

The European Commission and the European Court of Justice as drivers of liberalisation

Two bodies are instrumental in the systematic restriction by the EU of the public sector's scope of action: the European Commission and the ECJ.

Since the project to create the "internal market" was put on the stocks with the decision, in 1985, to adopt the Single European Act, the Commission has taken the initiative for the deregulation and liberalisation of sector after sector—and for the sectors which are still run by public authorities to be monitored ever more closely by the Commission and the European Court of Justice—here in Norway by the ESA (EFTA Surveillance Authority) and the EFTA Court.

Throughout its existence, and in an increasingly target-oriented fashion, the Commission has been a driver of internal liberalisation within the EU. There are no examples of the Commission taking the initiative to change things in the opposite direction. And the Commission has the exclusive right to propose legislation in the EU.

The ECJ has a similar key driver role. From the start, the ECJ has regarded it as its supreme duty to realise the fundamental principles of the EU Treaty on the free movement of goods, services, capital and persons. There are admittedly examples of the Court in individual cases having given weight to other considerations (such as the environment and the working environment), but the unquestionably dominant tendency has been for the Court to act in the direction of deregulation and liberalisation.

Through the case-law of the ECJ, the EC Treaty is today the most dynamic element in the EU system. The ECJ demands full impact for the Treaty's market freedoms in ever new—and surprising—areas of society. The European Parliament and 27 national governments become powerless appendages when the ECJ strikes with the EC Treaty behind it. Its judgments in the health sector illustrate this better than anything else (see Chapter 7 on health policy). For the Treaty can only be amended if all the Member States' governments agree.

Conclusion:

The Services Directive is—even for an EU Directive—an unusually impenetrable document, a document which through protracted to-ing and fro-ing within the EU has been re-formulated away from the crystal-clear market liberalisation that was its original goal. The social consequences of the Directive will first become evident when the ECJ determines how the Directive must be understood if it is to help foster the freest possible competition in the provision of cross-border services.

Such clarifications of what EU legislation actually means have been the ECJ's trademark in a manner that is unparalleled in any European country. No national court can determine as exclusively and irremediably how conditions of employment, business and industry should develop.

Whatever the politicians cannot—or dare not—clarify, is clarified by the judges in the ECJ. The politicians who founded the EU did not dare establish by treaty the rule that every EU law should take precedence over every national law, even the Member States' own national constitutions. But that is the way it must be, determined the ECJ, in order to realise the creation of "an ever closer union", a principal goal of the EU Treaty.

It has never been resolved either by the heads of State or ministers of the EU's Member States that all goods which are approved for sale in one Member State may be sold in any other Member State. This principle was put in place by an ECJ judgment in 1979—because the Court decided that this must be the sort of thing the EU's founders had had in mind when they resolved that there should be the "freest possible flow of goods" within the EU.

There is, therefore, all possible reason to expect it to be the ECJ which now forces through the "freest possible flow of services" through the tangle of confusion which characterises the text of the Services Directive.

There is no reason to believe that the liberalising driver roles of the Commission and the ECJ have disappeared with the introduction of the Services Directive; nor is there

consequently any reason to believe that, with this Directive, the EU has come to the end of the road with its liberalisation project.

One can safely assume that the Commission will go on taking the initiative to restrict the scope of action of the public sector, while the ECJ will, like before, go on surprising us with fresh judgments which help advance an even clearer supremacy for the EC Treaty's market freedoms.

Chapter 11:
What now?

A framework directive for public services?

Since 1998, the European Trade Union Confederation (ETUC) and a number of user organisations in the social field have been calling for the EU to adopt a framework directive on public services—a directive which will give public services a secure place in the total welfare offering to the population.

A report by the Norwegian Mission to the EU, dated April 2007, states:

> "As the very latest step in the fight for a framework directive on SGI (services of general interest), ETUC launched a petition campaign in November 2006 to get the Commission to act.
>
> The reason for ETUC's action or concern is that public services need to be strengthened and protected, so that everyone can benefit from them in the future. Services of general interest risk, it is claimed, being undermined by liberalisation and privatisation and of being made subject to market rules. ETUC has asked the Commission to present a proposal for a framework directive for all public services of general interest in order to protect them from market forces, so as to secure universal access to the services and to ensure that public interest objectives take precedence over profit.
>
> The need for public interest objectives and for social and societal objectives to take precedence over the market principle is the core point in ETUC's argument. This will be best secured through 'judicial security', in other words a framework directive which regulates and defines the services which shall not be subject to market principles and competition rules."

ETUC's petition campaign is being run in close collaboration with the European Federation of Public Services Unions (EPSU), which has 8 million members in 36 countries. Among these are the members of Norway's member organisations of EPSU: Norwegian Union of Municipal and General Employees (Fagforbundet), Norwegian Confederation of Trade Unions Section for State Employees (LO Stat), Norwegian Civil Service Union (Norsk Tjenestemannslag), Norwegian Union of Social Educators and Social Workers (Fellesorganisationen for barnevernspedagoger, sosionomer og vernepleiere), Norwegian Union of General Workers (Norsk Arbeidsmandsforbund), Norwegian Electrician and IT Workers Union (El & IT Forbundet), Confederation of Vocational Unions Section for State Employees (YS Stat), (KFO) and Norwegian Nurses Organisation (Sykepleierforbundet).

In the autumn of 2007, a petition with 510,000 signatures was delivered to the President of the European Commission. The European Parliament has also called on several occasions for a framework directive for public services. But in the EU it is only the Commission which can propose legislation, and the Commission has refused to propose such a framework directive.

The intention is clear: firstly, the Commission wants a Services Directive which secures as much competition as possible in the provision of cross-border services in the EU, based on the fundamental principles of the internal market; then a review will follow of whether

important public services are organised in conformity with the Directive. In this way, public services will become a remainder item—and possibly get a directive, at some time in the future, stipulating what has been left over for the public sector.

The order of sequence could have been the opposite: first a framework directive setting out how the public service offering within the European welfare states should be—and then a set of rules adapted to that framework directive. If that had happened, the end result might of course have been quite different. But the Commission could not take that chance.

This is how the Commission wants it to be:

> "In this context, it should be noted that, on the basis of the case-law of the ECJ, reasons of an economic nature (for example protection of a certain category of economic operators, maintaining a certain market structure, etc.), cannot justify restrictions of the fundamental freedoms of the Internal Market, including the freedom of establishment" (Handbook on implementation of the Services Directive—"Services Directive", European Commission 2007, p. 31 (English-language version)).

So, the Services Directive would be adopted before anyone knew what it might mean for basic public services. This order of sequence was surely a prerequisite for getting the Directive adopted. It helped disarm opposition against the Directive from trade unions and organisations which promote the interests of the users of public services.

The European Commission has tight control of the Directive's future

The original draft Services Directive had such a provocative content that many points of contention were swept under the carpet through the compromise reached by the European Parliament in January. This means that the actual clarifications concerning the Directive will be made by the ECJ, and the main task of the ECJ is to secure a market-liberal interpretation of the EU's rules.

The Commission, however, is in full control of day-to-day practice. The Member States' governments may consequently have taken a disastrous step, in May 2006, in adopting a procedure according to which they can only re-examine the Commission's measures to implement the Services Directive if there is a qualified majority in the Council of Ministers. A qualified majority means that at least around 72 per cent of the votes in the Council of Ministers must go against the Commission.

The Commission can, therefore, use the Services Directive quite freely to "effectivise" and "modernise" the public sector by means of gradual deregulation and commercialisation. This will be done by carrying out periodic "evaluations" of whether various public services and public regulatory frameworks can stand to be measured against the rules in the Services Directive.

The fight in the EU moves into a new phase

It is in no way necessary to leave such "evaluations" to governments, public administrations and the Commission. Everyone who is potentially affected by the Services Directive can also get involved. The adoption of the Services Directive is not the end of the political fight over the substance and content of the Directive; the fight will simply move into a new phase. It will then be crucial for the Directive's critics to transform the periodic "evaluations" of the Directive into a battleground (Haar p. 43).

Naturally, it is a problem that most of the popular opposition to the Directive has been

closed down in many EU Member States. That applies to large sections of the European trade union movement, to most Social Democrats, and to the opposition from many consumer environmments and user organisations in the social field. The French and Belgian socialists, the EPSU and the big German Construction Workers Union, IG BAU, are shining exceptions.

Kenneth Haar, the leading Danish critic of the Services Directive, places the contribution from the Danish trade union movement to the fight against the Services Directive "somewhere on the scale between embarrassing and scandalous" (Haar p. 43). However, the Vaxholm and Rüffert judgments imply such terrifying attacks on the Danish and Swedish model of employment and economic life that it is possible that the trade union movement in these countries may be re-energised and oppose the way in which the Services Directive is being used by the driving forces for market liberalisation.

The fact that grass roots opposition broke down following the well-marketed compromise in the European Parliament is, in itself, an important reason for strengthening the democracy-based criticism against the EU. The EU is a system in which it is particularly difficult for popular opposition environments to make headway. But that does not make the struggle less important—in this instance, the European fight to determine how the Services Directive should be implemented and used.

Any reservations raised by Norway against the Services Directive will be an important symbol and an inspiration for other European countries to fight to change the content of the Services Directive so as not to force Europe in the direction of market liberalisation as unequivocally as the Commission would wish.

The fight against the Services Directive may also determine what kind of Health Directive the EU may propose (see Chapter 7)—and whether our social services will fall progressively within the scope of the Services Directive's regulatory framework (see Chapter 6). Reservations raised by Norway against the Services Directive may, therefore, have significance far beyond Norway's borders. Within the EU itself the battle is lost, but the struggle against the tight embrace of market liberalisation, extending to ever more areas, is in no way over.

No hurry in Norway

Norway's Red-Green government has stated both in the Soria Moria Declaration and in other contexts that there will be more openness and access to genuine debate concerning contentious EEA Directives. The Report to the Storting No. 23 (2005-2006)—On the implementation of European policy—states:

> "The government will help ensure that the *Storting* is provided with a broad base of information to enable contributions to the debate and considered evaluations to emerge early on and to ensure that the relevant information is available".

It also states:

> "Everyone should have access to knowledge and insight which enables them to participate in the democratic process".

The Services Directive as a law text is a very large and, in parts, highly impenetrable document. It is not easy to absorb and acquaint oneself with—and there are strongly conflicting interpretations both of individual articles and of the totality of the Directive. This has become very evident from the debate both in Norway and internally within

the EU. Therefore, there is still great uncertainty as to how the Directive will interfere with the Norwegian statutory framework and Norwegian regulations. In the consultation statements made thus far by public bodies, trade unions and organisations, there are dozens of questions which demand clarification.

It has, consequently, been a minimum requirement that the government should present a thorough assessment of which laws and/or regulations must be amended if the Directive is to be enacted in Norwegian law—and that it should assess the way in which such changes, both negative and positive, are likely to affect Norwegian social conditions.

But there is no cause for haste. The Services Directive will now have to be incorporated into the statutory frameworks of all the EU Member States, and, since this is a Directive and not a Regulation, they can choose to do it in various ways. The time limit for implementation within the EU is 28 December 2009. It would be particularly useful to know how our Nordic neighbours will choose to enact the Directive in their statutory frameworks. It may also be decisive for the scope of action within the Services Directive as regards the consequences which will be drawn from the Vaxholm and Rüffert judgments in Sweden and Denmark—and by the European Commission.

There is nothing new, either, in the fact that it can take a long time from a directive being adopted in the EU and until the Norwegian government comes to a decision on it. The three Food Additives Directives, on which the Jagland government took a decision in the autumn of 2000, were adopted by the EU in 1994 and 1995. The Gas Directive was adopted by the EU in June 1998, while the government's parliamentary bill to enact the directive in Norwegian law was first presented in February 2002. The EU finished legislating on European Companies (or SE Companies) in October 2001, but the legislation was not laid before the *Storting* until the autumn of 2004.

The best thing, therefore, would be for the government to defer the final deliberations on the Services Directive until we can see how the Directive is being implemented among our Nordic neighbours and until it becomes evident what sort of impact the Directive is having there on the situation in employment, on the position of services, and on the quality of the service offerings from both foreign and domestic providers. As unclear as the text of the Directive is in many places, this will first become evident through the practice the European Commission chooses to pursue and through the judgments of the European Court of Justice.

Summing up

The aim of the EU Services Directive is to promote the trade in services across national borders by removing the "barriers" to this trade.

Most of these "barriers" have been introduced by national states in order to safeguard the interests of consumers, to protect the environment, to secure social rights, and to safeguard working and employment rights and democratic decision-making processes. The European Commission dismissed such interests as harmful protectionism, despite the fact that few such rules were aimed specifically at service providers from abroad. They were introduced in order to regulate service provision in general, but, naturally, also applied to foreign service providers.

1. How the Services Directive was adopted by the EU

In the discussions prior to the compromise decision on the Services Directive reached by the European Parliament in February 2006, the Social Democrats attempted to have social policy and consumer protection included as interests which could form the basis for imposing requirements on foreign service providers. After a tough fight, they gave up only days before the voting took place, since the Conservative majority made it a condition of the compromise that social policy and consumer protection should not be included among the recognised interests.

Through the compromise in the European Parliament, health services and most social services were removed from the Directive together with most direct references to the country of origin principle. But the Commission struck back on all these three points with a "damage limitation" exercise in April 2006. Health policy would be liberalised through a separate Health Directive (see Chapter 7). A Communication on social services raised the disquieting prospect of more and more social services gradually falling within the scope of the Services Directive (see Chapter 6). The country of origin principle came in through the back door by means of the inclusion of the Rome 1 Convention on choice of law in EU legislation (see Chapter 10).

The European Council of Ministers made the Directive worse by its decision in May 2006:

- Excluded sectors were nevertheless not excluded: the Council of Ministers decided that sectors such as energy, water, postal services and education should be periodically evaluated against the rules in the Services Directive, despite the fact that these services were basically excluded from the Directive (see Chapter 8).

- Not all social services can be excluded: the European Parliament wanted to exclude all social services, but the Council of Ministers did not. The Council of Ministers only wanted to exclude "social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State" (Article 2(2)(j))."

- Labour law must respect EU law: the European Parliament's compromise from February 2006 could be read as though the Services Directive recognised national labour law—without reservations. But the Council of Ministers passed an additional amendment in May saying that the Directive does not interfere in national labour law "which respects the Community's laws". Thus, national labour law was made explicitly and in principle subordinate to EU law.

In September 2006, the Social Democrats proposed eleven amendments, in understanding with the European Trade Union Confederation (EUC), which would keep labour law and social services outside the scope of the Directive. The Social Democrats were, however, informed, in no uncertain terms, both by the Conservative majority in Parliament and by the Commission, that everything they had achieved in February would be lost unless the proposed amendments were withdrawn (see Chapter 2).

2. No establishment by law of what public services should be

Calls came from various sides for the EU not to adopt a Services Directive before public services were assured a secure legal basis within the EU's own regulatory framework. The Commission chose the opposite order of sequence: first a Services Directive with unclear scope—and then some vague promises of a directive on public services. In the EU, only the Commission can propose legislation, and it has not done so in this area (see Chapter 10).

3. Requirements imposed on service providers only if there is a genuine and serious threat to fundamental interests of society

Public policy, public security, public health and environmental protection, the so-called "overriding reasons relating to the public interest", are the only reasons which can justify imposing requirements on foreign service providers. These concepts, according to the Commission, have all been "consistently interpreted in a narrow sense" by the European Court of Justice. There must be "a genuine and serious threat to a fundamental interest of society" for such interests to be taken into account—and it is for the Member State invoking these public interest objectives to demonstrate the risks involved. In that case, it is the Commission and the ECJ which need to be convinced that a public interest is involved. For this reason, there are few examples of the ECJ having accepted that public policy interests justify imposing requirements on service providers (see Chapter 3).

4. The big difference between EU law and Norwegian law

If a Norwegian law has unintended effects, it can be changed. In the EU, there is only a theoretical possibility for this to happen. Surprising decisions by the ECJ and new interpretations have their legal basis, almost without exception, in the market freedoms of the EU, which were laid down by treaty fifty years ago and which can only be changed if all the Member States agree. Uncertainty regarding the legal situation can easily turn into anxiety. In one area in particular, anxiety has been especially marked: How secure are our basic public services? Can they be operated as national parliaments have decided, and as governments put those decisions into effect?

5. The European Court of Justice decides which services are sufficiently public to exclude them from the Directive

The Commission has stated repeatedly that no clear boundary can be drawn between non-economic services (which fall outside the scope of application of the Services Directive) and services in the general economic interest (which fall within the scope of the Directive). The Member States can have their own opinions on where the boundary should go, but in the final instance it will be determined by the European Court of Justice. This is particularly worrying since the Commission is constantly asserting that the boundary is not a fixed one. And it gets even worse when the Commission explains that "in any event it will be impossible for the Member States to consider all services in a given area, for example all educational services, as non-economic services of general interest".

6. The core of Norwegian education is excluded from the Directive—so far

It is probable that the core of the Norwegian educational system, the educational services regulated by the Day Care Institution Act, the Education Act, the Private Schools Act, and the Act relating to Universities and University Colleges, will not be covered by the Services Directive—as the prevailing law is defined today. It is equally clear that education which is mostly paid for by pupils, students or family may fall within the scope of the Directive. It is the size of the own-contribution payment which has a bearing on what can be excluded from the Directive and what is covered by it. It is in no way clear as to where the boundary goes. The ECJ has also attached importance to whether an educational service is publicly or privately financed, and whether it is a profit-making operation.

7. Uncertainty as to how definitively educational services are excluded from the Directive

There is therefore great uncertainty as to how definitively educational services are excluded from the Services Directive. This is underscored by the fact that there was a contested vote on education when the European Parliament arrived at its compromise solution on the Directive in February 2006. The two Left groups in the European Parliament, the Social Democrats and the Socialist Left, proposed that the entire educational sector should be removed from the Services Directive. That proposal was defeated by the Conservative majority in the European Parliament.

In practice, every educational service will be assessed on the basis of whether it is to a sufficient extent a service of general interest to qualify—and not a service of general economic interest. Since the Commission will not clarify where the boundary goes between these two types of services, it will be up to the European Court of Justice to decide the question on a case-by-case basis (see Chapter 5).

8. Modernisation is causing more and more social services to fall within the scope of EU law

Three weeks after the Commission accepted the compromise solution reached in the European Parliament in April 2006, it issued a Communication on “social services of general interest” which contained a disquieting message. The Communication begins by stating that the EU Member States are increasingly outsourcing public tasks to the private sector also in the social field and are also entering into “public-private partnerships” (PPPs). This “trend toward modernisation” is resulting in a situation in which ever larger parts of the social services fall under EU legislation, so that “there is a need to clarify how a number of EU rules should be applied”.

9. Almost all services offered in the social field can be considered economic activities

The Commission’s Communication from April 2006 establishes that any activity consisting of supplying goods and services in a given market by an undertaking constitutes an economic activity, regardless of the legal status of the undertaking and the way in which it is financed. Services provided generally for payment must be considered as economic activities. This also applies if those who benefit from the services do not themselves pay for them. It follows, therefore, according to the Commission, that “almost all services offered in the social field can be considered economic activities”. All that is then required is a sliding transition—or a couple of ECJ judgments—before the Services Directive covers far more social services than those specified in it today (see Chapter 6).

10. The Health Services Directive is postponed for the present

Both public and private healthcare services were excluded from the Services Directive in the European Parliament's first plenary reading in February 2006. The Commission quickly made it known that it was intending to prepare a separate directive on cross-border health services, and in September 2006 the Commission sent out for consultation an informal discussion document concerning the possible content of a Health Services Directive. The Commission has several times delayed presenting a draft Health Services Directive—probably because the resistance of individual governments to the perspectives outlined in the consultation document has been too great. The Commission has now announced that it intends to present a draft directive in June.

11. But the ECJ has nevertheless assured the free flow of health services

The Commission has a sure trump card with regard to Member States' governments. That is the European Court of Justice, the Court which in the past decade has forced through a state of law in the field of health services which is completely contrary to what most governments stand for. The ECJ has established that all health services fall within the scope of the EU Treaty's principle of the free movement of services (see Chapter 7).

12. Electricity, water, postal services and education will be periodically evaluated against the Services Directive

In the In the European Parliament's deliberations on the Services Directive in February 2006, a number of service sectors were excluded from the Directive—either because they are regulated by other separate directives or because the European Parliament wanted to keep them outside the Services Directive. However, the European Council of Ministers resolved in May 2006 that service sectors such as energy, water, postal services and education should be periodically evaluated against the Services Directive. Any rules preventing competition in the provision of cross-border services were to be removed. The Services Directive's requirement for full competition in the provision of cross-border services would thus also apply in areas which thus far have been kept outside the scope of the Directive. Whatever has not been captured within the scope of the Services Directive, in its present adopted form, must be included in the same template in other ways.

Despite this, the report authored by Frode Elgesem and Ane Grimelid of Hjort DA concluded that the Directive will have little impact on areas which are kept outside the Directive. The report's authors nevertheless take the view that they cannot "leave out of account the fact that the Services Directive may have a certain liberalising effect on areas excluded from the Directive" (see Chapter 8).

13. The Directive changes the prevailing law

Legal opinion within the EU has stressed repeatedly that the Services Directive does not change the prevailing law in the EU nor, therefore, in the EEA. The Directive only legalises the prevailing law created by the European Court of Justice through its judgments.

The report by Elgesem and Grimelid states, however, that the Services Directive changes the prevailing law in three ways (see Chapter 8):

- in that "the Services Directive's solutions may affect the interpretations of the provisions relating to services in the EC Treaty and the EEA Agreement, and thus contribute to a certain liberalisation of the services sector through future case law",

- in that far fewer interests than today can justify imposing restrictions on incoming service providers,
- in that Article 43 of the EU Treaty can hereafter interfere in the purely internal affairs of a Member State.

14. The country of origin principle disappeared as a term—but did it vanish altogether?

Many fundamental aspects of the Services Directive are contentious and unclarified. For example, the Directive's advocates assert that the so-called "country of origin principle" was removed from the Directive in the compromise arrived at by the European Parliament in February 2006. The country of origin principle means that an undertaking which provides services in other Member States, shall—with the exception of health, environment, public order and security—comply with the regulatory framework in the Member State where the undertaking is registered and not the Member State where the services are provided. The Member State in which the undertaking is registered is also required to carry out checks to ensure the rules are complied with. This country of origin principle triggered a storm of protests and is now wrapped up in a judicial tangle in which the host Member State and the country of origin are to share the responsibility for the checks between them, without it being particularly clear which set of rules this should be based on or who is supposed to check what (see Chapter 9).

15. A cosmetic change only

Professor Finn Arnesen of the Centre for European Law was commissioned by the Ministry of Trade and Industry to report on "The effect of the removal of the country of origin principle from the Services Directive". (The report is posted on the Ministry's website in association with the consultation documents.) Professor Arnesen's conclusion is that "the change may appear to be of more cosmetic than practical significance". Elgesem and Grimelid take the same view in their report: "There is reason to emphasise that the change from the country of origin principle to 'the right to provide services' in Article 16 of the Directive was in all essentials of a conceptual nature".

16. The market freedoms will determine the nature of public services

It is a fundamental problem for the development of the EU that it is the rules which govern the internal market which determine how public services should be designed and offered to EU citizens. In all Member States, the regulatory framework has developed on the basis of public interest objectives relating to the environment, social conditions, consumer protection and employment. The objective of many of these schemes has been first and foremost to regulate the relationship between domestic providers, often based on social reasons which have strong support among society. Now, however, there is a requirement through the Services Directive to re-evaluate all such schemes, and solely on the basis of whether they make it more difficult for foreign service providers to compete.

17. Judicial snapshots do not convey the dynamics surrounding the Services Directive

The conclusion in Erling Hjelmeng and Bjarne Jensen's reports to the effect that the Services Directive has little significance for public services, is a conclusion which only has meaning as a "judicial snapshot" of the prevailing law on public services. This snapshot completely ignores the fact that the EU system is driven by a set of dynamics which are constantly changing the prevailing law to the virtually unrecognisable in the case of many services which have been public in all the EU and EEA Member States. The reports ignore the fact that, for those who wanted a Services Directive, it is only another stage on the road towards an ever more liberalised social order. A third report commissioned by the Ministry, and authored by Frode Elgesem and Ane Grimelid of Hjort DA, describes these

dynamics as follows: “Court-created law will—together with future developments in the ECJ’s case-law—be a key premise for determining the substance of the EEA Agreement and the legislative acts incorporated in it” (p. 8). The Services Directive is just such a legislative act.

18. The Commission and the ECJ have always been the drivers of liberalisation. Will that still be the case hereafter?

Two bodies are instrumental in the systematic restriction by the EU of the public sector’s scope of action: the European Commission and the ECJ. Throughout its existence, and in an increasingly target-oriented fashion, the Commission has been a driver of internal liberalisation within the EU. There are no examples of the Commission taking the initiative to change things in the opposite direction. And the Commission has the exclusive right to propose legislation in the EU. The ECJ has a similar key driver role. From the start, the ECJ has regarded it as its supreme duty to realise the fundamental principles of the EU Treaty on the free movement of goods, services, capital and persons. Whatever the politicians cannot—or dare not—clarify, is clarified by the judges in the ECJ.

There is no reason to believe that the key driver roles of the Commission and the ECJ have vanished with the introduction of the Services Directive; nor is there is any reason to believe that, with this Directive, the EU has come to the end of the road with its liberalisation project.

19. Reservations raised by Norway may have significance in other countries

Any reservations raised by Norway against the Services Directive could be the inspiration for other European countries to fight to change the content of the Services Directive so as not to force Europe in the direction of market liberalisation as unequivocally as the Commission would wish. The fight for a Norwegian veto against the Services Directive may, therefore, have significance far beyond Norway’s borders. Within the EU itself the battle is lost, but the struggle against the tight embrace of market liberalisation, extending to ever more areas, is in no way over.

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