

# WRR

WETENSCHAPPELIJKE RAAD VOOR HET REGERINGSBELEID

## **ENCAPSULATING SERVICES IN THE 'POLDER'**

### **THE BOLKESTEIN DIRECTIVE IN DUTCH POLITICS**

*J.L.M. Pelkmans and S.T. van Kessel*

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## **1 INTRODUCTION**

### **1.1 Background and context**

The EEC treaty already comprised a clear commitment to the free movement of services 50 years ago. Thus, the aims specified in art. 2, EC, are pursued via a range of means and instruments exhaustively listed in art. 3, EC, including art 3 (c) on free movements. It reads as follows: "...an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital". Even if it is undoubtedly correct to observe that the accomplishment of free movement via cross-border liberalisation and harmonisation was and is sensitive for *all four* types of markets specified in art. 3 (c) and that many directives and infringement procedures in the past have been subject to politicisation both domestically and at the EC level, the resistance in services has always been particularly strong. Indeed, neither the ECJ nor the Commission had acted in a systematic way on the free movement of services before the White Paper on the Internal Market. The only sectoral exception was transport, which has a special chapter in the treaty. However, even in transport, the Council did not act in a serious fashion, reason for the ECJ in the spring of 1985 to take the remarkable step of convicting the Council (!) in a case brought by the EP (!) for a "failure to act" (now, art. 232, EC).

The White paper and the Single Act (in force since 1987) prompted action in a few major services sectors (especially the six modes of transport and the three financial markets of banking, insurance and investment & securities). Despite the legal basis in the treaty and the powerful generic definition of the internal market introduced by the Single Act (now art. 14, 2, EC), the Commission and the other EC institutions did not initiate a wholesale attack on the numerous barriers to free movement in the public utilities sectors or horizontally for many other services markets. This can be explained by several reasons (including great uncertainty of *how to find the proper combination* of liberalisation and harmonisation) but social and political sensitivities were prominent among them. Thus, the period after the Single Act until (say) the late 1990s is characterized by ad-hoc-ery in addressing the free movement of services, without any sense of strategy. In public utilities ('network industries') the lead was taken by the competition Commissioner and only very gradually, and after much politicisation, broadened to the entire Commission, followed hesitantly by Council and EP, dependent on the case. These network industries (in the Treaty called "services of general economic interest", art. 86, EC) remain sensitive even today and, not surprisingly, also play a role in the case of the initial draft Services Directive of January 2004. A few other sectors were addressed, usually as a result of specific pressures or cases ruled by the ECJ. Gradually, the ECJ developed a body of case law which could be utilized as a basis for a horizontal approach. The *Säger* case of 1991 in the European Court of Justice is a landmark case. A comparison can be made with the 'Cassis-de-Dijon' case of 1979 in which the Court ruled in

favour of mutual recognition of (technical) goods regulation between member states. In the Säger case the ECJ ruled:

Article 59 [now, 49] EC requires (...) also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services (European Court of Justice 1991: *Case C-76/90*).

Whereas the ECJ can only respond to cases brought to it, the political bodies of the EC could assume a **strategic** approach for services as a whole, given their enormous economic significance, and could employ **regulatory** instruments, which tend to be specific and more prescriptive (unlike case law).

However, the very nature of services renders it very difficult to devise a strategy. Services other than government services are, in principle part of the internal market if 'economic' (e.g. not 'social' in the sense of not-for-remuneration) but this distinction – well-known to specialized lawyers familiar with the case law – is not made in the Treaty text. This has led to a range of border cases submitted to the ECJ, in turn leading to a great deal of uncertainty. Moreover, services are highly diversified and cannot be treated in the same way as goods (say, in a customs union). Finally, whereas goods can be separated from the workers producing them and exported, stored and marketed at different points in time, services are usually produced and consumed at the same moment. The crucial implication of this point is that services and labour are almost inseparable. In turn, this means that services competition has an immediate impact on the labour producing the services, whether via free movement or free establishment, in contrast to goods competition across intra-EU borders which often leaves options to fend off direct rivalry. This property of services, probably more than any other aspect, creates extreme sensitivities in relatively low-skilled-intensive services. To put it simply, services regulation in the EC context often amounts to little else than labour regulation. Or, less simply, there is a closer connection between services regulation and labour market regulation than in the case of goods. By implication, since services have long been protected, their liberalisation cannot but affect the restrictive labour market regulation at least to some degree. Moreover, the Services Directive is a means to liberalise the internal services market in a horizontal way, which means that apart from the excluded sectors, many services sectors are to be liberalised at once. The upshot is that what appears, on the face of it, to constitute long overdue services liberalisation, in fact turns out to be resisted as an attack (perceived or real) on labour market protection and enforcement.

The economic weight of services is nowadays far greater than agriculture and industry together. According to the OECD, services “account for two thirds of total output and 68% of total employment, but exports represent only one-fifth of intra-euro area trade” (OECD 2005: 1). Without non-market services, the sector still comprises between 35 and 50% of the EU Member States’ GNP. During the 1990s it began to dawn on political leaders in the Union that industry and agriculture could never be expected to propel economic growth in the EU-15. At the same time, there were forceful signals that services in Europe were less dynamic than possible and (in some sectors) than in the US. Once the Lisbon process was initiated in 2000, the logic of pursuing a horizontal strategy for an internal market in services as an essential ingredient of EU's economic growth had become unassailable. It was widely supported politically, indeed, also at the highest political level.

The Commission’s proposal on a Directive on Services in the Internal Market of 2004 (the ‘Bolkestein’ draft directive) is an elaboration of this strategic logic. However, the ‘Bolkestein Directive’ generated a large amount of turmoil amongst politicians, labour unions, interest groups and citizens. The reliance on ECJ language and the principles it employs are very different from how regulations are typically made. Whereas regulations give prescriptions about what is to be done and what is forbidden, and this usually in considerable detail, ECJ case law leads to rulings derived from complex reasonings based on key principles and long-standing interpretations. Case-law is almost by definition not complete due its being driven by specific cases not covering the entire domain. Finally, there is a risk if ECJ rulings underlie regulation, in that the ECJ rulings are interpreted too widely for regulatory (and clarity) purposes. Some if not all these aspects played a role and led to widespread uncertainty and fears. One such fear was that the Directive would create to a liberalised service market in which national social standards, particularly in the EU-15, would be endangered and jobs move to the low-wage Member States in Central Europe or the jobs in the EU-15 would be taken over by migrating services workers from the new Member States. A range of other controversies emerged as well, partly about what was to be excluded from the scope of the directive (especially as to the free movement articles), partly about the softening of the impact, partly about the restoration of some regulatory autonomy for the Member States. Conversely, the new Member States applauded the proposal as a belated effort to accomplish an essential part of the internal market, one where their service providers could effectively compete in some specific segments, both under free movement and free establishment. It is against this background that the paper is written.



## **1.2 Objectives and structure**

This paper will focus on the 'politicisation' of the draft Services Directive in the Netherlands. Although initially the draft Directive led to some political attention not least because of its potential economic and social impact as well as its strategic importance, the debate remained essentially within the habitual channels of policy preparation (such as the parliament and the Social and Economic Council (SER)). The political elite and socio-economic circles in the Netherlands tended to welcome the draft as long overdue, even if there was great interest in the techniques of liberalisation and regulation. But contestation was at first next to none; only at a later stage, be it still fairly limited, political anxiety and a climate of greater uncertainty emerged. The paper will investigate why contestation was at first largely absent in Dutch society. In addition, we will consider and attempt to understand the modest 'second wave' of contestation, roughly a year later, led by arguments and second-thoughts imported from abroad.

The paper addresses three research questions: one about 'embedding in Dutch society', one about 'legitimacy' and finally an attempt to construct a 'counterfactual'.

First, we analyse how Dutch EU-policy with regard to the Services Directive was pursued, and how this policy was 'embedded' in Dutch democracy and society (focusing on embedding actors and their strategies, embedding variables like communicating Europe, and embedding channels);

Second, we assess what problems of political legitimacy concerning the Directive can be identified and how they developed:

- driven by the substance of Dutch EU-policy?
- driven by the way Dutch EU policy is made (process)?
- prompted by more general 'mismatches' in the citizen-politics relationship in the Netherlands?

Third, we attempt to construct a 'counterfactual', simulating, as it were, how Dutch EU-policy with regard to the draft Directive could have been better embedded in Dutch democracy and society (e.g. focussing on key actors or variables that formed an obstacle for democratisation/politicisation; aspects of leadership style or media involvement that formed an obstacle for 'democratic communication and deliberation' regarding the issue). It is of course arbitrary to define what 'better' refers to. One way to reduce the arbitrariness is to be informed how the embedding took place in selected other Member States. However, since it is quite recent (indeed, legislation at EC level has been adopted but is not yet in force) there is

scant well-researched international literature on the subject of (domestic) politicisation and it is therefore unclear to what extent a solid comparison with other countries is feasible.

The structure of the paper is as follows. Section 2 deals with a stylized description of the substance of the draft Directive, in particular its regulatory design and the main aspects which were politically controversial. This should enable us to clarify why and with respect to what major items the draft Directive was politicised. We also expect the description to help us assess the role of perception in the political process because in several aspects the gap between assertions about the draft and the actual (sometimes literal) legal substance of the draft proved to be very wide. Perceptions, or perhaps framing, are closely related to political strategies of certain actors. Section 3 identifies the actors in the Netherlands. Their stance about the various drafts will be summarized, as well as the debates emerging between the actors in the Dutch political arena and certain interest groups. This may help us to understand the emerging political consensus, even though some anxieties eventually emerged and a degree of contestation among certain actors survived Dutch decision-making. Section 4 focuses on the role of the Dutch newspapers. We sketch how the Services Directive has been discussed in different newspapers, concentrating on the main issues and on the expectations (actors in) the newspapers had regarding the effects of the Services Directive. Section 5 explores the perceptions amongst Dutch citizens. This section will be based on Eurobarometer data and other existing data sources from opinion research about the Directive and issues related to it. We hope to identify possible legitimacy problems and to determine their causes. Section 6 offers a brief and highly selective international comparison and section 7 concludes in addressing questions of embeddedness, politicisation and legitimacy of the Directive in Dutch society, with the help of "what if" queries, a proxy for a counterfactual.

As this paper served to 'nourish' the WRR report *Europa in Nederland* with case-specific data about the Services Directive, some sections are written down in a rather encyclopaedic fashion. This explains the paper's rather extensive length.



## **2 SUBSTANCE OF THE DRAFTS**

In this section the initial Commission proposal and the main amendments will be set out. The focus will be on two politicized issues of the Directive: the country of origin principle and the extent to which sectors of general economic interest would fall under the Directive. These elements have proven to be the most contested issues in the debate about the Services Directive. Although many amendments were adopted, the more important modifications of the proposed Directive concern these two aspects. Far fewer amendments relate to the 'freedom of establishment'. This is interesting, especially because, for services, this is at least as important as free movement. However, in terms of political contestation, there is little in the free establishment aspects that can be expected to add value for our study, and this is the reason why it will be ignored in the remainder of the paper. It is nevertheless of interest to be aware of the findings of the two leading economic simulation studies (CPB, 2006, and Copenhagen Economics, 2005): some two-third or more of the simulated economic gains derive from the liberalisation of the freedom of establishment in services, much less from the origin principle.

The reason that much contestation focussed on the country of origin principle is probably due to the fear that, by relying on this principle, foreign service suppliers would be able to circumvent host country labour law. As argued by critics, the country of origin principle would also have liberalising consequences for services of general interest such as health care and education, leading to a so-called race to the bottom. Although many of these arguments may well lack validity, the expressed fears that countries would not be able anymore to uphold their domestic labour laws and to protect their sectors of general interest found fertile ground for contestation. Precisely because the 'freedom of establishment' does uphold national preferences as expressed in domestic regulation (unless forbidden due to discrimination or disproportionality), and the country of origin principle does not, the feared consequences of the country of origin principle probably appealed to the imagination of the larger public and, in the absence of a proper understanding of its role and limitations, became an obvious target of criticism exploited by those opposed to the Directive.

### **2.1 The initial proposal**

The initial draft Directive was mainly a means to codify the rulings of the ECJ and much less to harmonise the internal market for services in a horizontal way. In the Commission's proposal of 2004 the avowed objective of the Services Directive is "to establish a legal framework to facilitate the exercise of freedom of establishment for service providers in the Member States and the free movement of services between Member States" (European Commission 2004b).

The first chapter of the Directive deals with its scope.

As the Court of Justice has consistently held with regard to Articles 49 et seq of the Treaty, the concept of service covers any economic activity normally provided for remuneration, without the service having to be paid for by those benefiting from it and regardless of the financing arrangements for the remuneration received in return, by way of consideration. Any service whereby a provider participates in the economy, irrespective of his legal status or aims, or the field of action concerned, thus constitutes a service (European Commission 2004b: 31).

Services that are non-economic, that is, not provided for remuneration, are excluded from the Directive as well as services largely financed by the government. There are also derogations for sectors that are already covered by sectoral directives, such as finance and transport. The initial proposal covers certain *services of general economic interest*. For instance, postal services and the provision of electricity, water and gas are covered, yet are excluded from the country of origin principle (the reason is that the sectoral liberalisation is combined with EU and national regulation which was agreed not to be undermined). The initial draft leaves the definition of 'services of general economic interest' in the hands of the member states (this is standard case law under art. 86) and the proposal does not require member states to open up services of general economic interest to competition. In fact, this is done via separate directives applicable to specific network industries, a process going on approximately since the late 1980s.

Second, with regard to the freedom of establishment outlined in chapter II (European Commission 2004b: 46-54) the Directive aims to simplify authorisation procedures and to improve the transparency of those procedures. Restrictions with regard to establishment for the sake of public interest need to be non-discriminatory, necessary and proportionate. Member states are disciplined in article 14 of the draft by a 'black list' of prohibited requirements, which were all in the 2002 Commission status report on barriers in the internal market for services. Article 15 lists other requirements which are prohibited unless the member state can demonstrate that they serve public interest. A member state has to notify the restrictions to the Commission, which are then jointly evaluated by the member states.

Third, central to the freedom to provide services section in chapter III (European Commission 2004b: 55-62) is the country of origin principle in article 16. The country of origin principle (=CoOP) relates (solely) to the free movement of services objective. According to the principle the service provider can temporarily provide services in a market

of a foreign member state under the law of the country where its company is based. The exact amount of time the service provider is allowed to operate under the law of the country of origin is not specified in the draft. Of course, in actual practice such a provision of temporary services is usually counted in months or even weeks, but the ECJ has always refused to set a maximum time limit. Article 16 contains prohibitions with regard to requirements that a member state can impose on service providers, such as the obligation of having an establishment on its territory and that of acquiring specific authorisations. However, the country of origin principle is not relevant for service providers who are permanently established in another member state. Also, the country of origin principle does not apply to a number of excluded sectors mentioned in article 17. These are for instance services that are regulated in sectoral directives (e.g. communication and transport) and services like mail and gas, water and electricity distribution. Perhaps even more critical for an understanding of the debate is the fact that the Posting of Workers Directive (96/16), which guarantees a certain hard core of employment terms and conditions for posted workers (i.e. temporary workers for service provision), remain intact, including e.g. minimum wages. The origin principle need not be applied if the member state can justify this by reason of protection of public policy, public security and public health. This concurs with the Treaty text; the case law of which has led the ECJ to deal restrictively with such derogations. Finally, the principle does not apply to consumer contracts.

Lastly, chapters IV to VI of the proposed Directive contain provisions with regard to the quality of products and consumer protection and the mutual cooperation and supervision between member states. Chapter VII contains final provisions.

## **2.2 The amended proposal**

After the European Parliament voted in favour of a heavily amended version of the Services Directive (in February 2006), in its second reading the European Commission adopted a new version of the Directive largely consistent with the Parliament's wishes (European Commission 2006). During the Competitiveness Council of May 2006, the EU ministers largely agreed with this version. The most notable deviations regarding the EP proposal relate to the screening and notification obligations, discussed below. With regard to the scope of the Directive, the amended draft shows some notable differences. The Commission decided to comply with the European Parliament's insistence to exclude certain sectors (European Commission 2006: 3-4). The most prominent exclusion is the health care sector, since the inclusion of certain parts of this sector in the draft Directive was politically contested. Also, social services such as social housing and childcare have been removed from the scope of the Directive. This might be confusing to the reader; if services are 'social' in the sense of not-for-remuneration, they do not fall under the notion of services applicable to the internal market, as we saw before. However, some social services may have similar social

purposes (e.g. the care for the elderly and childcare) but are nonetheless provided against market remuneration. By eliminating social services from the Directive, the tricky problem of the exact borderline between non-economic social services and economic social services was made irrelevant and, in so doing, anxiety in such circles was greatly reduced.

Other excluded sectors, not directly related to the 'general interest', are temporary work agencies, security services, audiovisual services, gambling activities, services connected with the exercise of official authority and taxation. Also, amendments in the newest proposal "delete the relevant provisions regarding the removal of administrative obstacles and regarding obligations of Member States to cooperate regarding the posting of workers and the posting of third country nationals" (European Commission 2006: 13). Moreover, in Article 4, the new paragraph 7a is included which deals with the definition of "overriding reasons relating to the public interest" (European Commission 2006: 43). This concept includes matters of public security and public health, but also matters of 'national historic and artistic heritage' and 'cultural policy objectives'. The usage of the notion of overriding reasons in several provisions in the Directive leaves room for the member states to impose restrictions on their domestic services market. However, ECJ case law will probably prevent a wide application of this route.

The provisions concerning the freedom of establishment in chapter II remained similar to the initial draft of 2004. This cannot be said about the free movement of services, in chapter III. This part has been drastically revised. In the new version the Parliament's re-labelling of the 'country of origin principle' into the 'Freedom to provide services' was honoured by the Commission. Far more important than re-naming article 16, key passages are removed, such as paragraph 16-1, at first defining the origin principle: "Member States shall ensure that providers are subject only to the national provisions of their Member State of *origin* which fall within the coordinated field [of the country of origin principle]" and paragraph 16-2: "The Member state of *origin* shall be responsible for supervising the provider and service provided by him, including services provided by him in another Member State" (European Commission 2004b: 55, italics added). Meanwhile, the newly included paragraph 16-3 in the amended proposal makes it easier for the member states to impose requirements on the service provider:

The Member State to which the service provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment, and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in conformity with Community law, its

rules on employment conditions, including those laid down in collective agreements (European Commission 2006: 55).

Critics argue that the derogations in article 16 are insufficiently specified, which seems to leave room for the member states to exclude many sectors. Member states can for instance interpret 'reasons of public security' in a very broad way (as indeed e.g. Belgium used to do), which allows them to circumvent the stipulations in the Directive. Again, if barriers in the services market are going to be contested, a new wave of ECJ rulings will be inevitable. This is odd if not counterproductive, because the very purpose of the broad horizontal draft directive was to shift from a too great reliance on case-by-case rulings of the Court to more general regulation and liberalisation, based on a political process and enactment by the European legislator, hence, presumably with greater political legitimacy.

Furthermore, articles 24 and 25 of the initial proposal have been deleted, containing specific provisions on the posting of workers and on the posting of third country nationals respectively. Due to the removal of these articles, member states might still impose certain requirements with regard to posted workers. Although the Commission was not pleased with the removal of these articles by the EP, the amendments have been incorporated in the new proposal. As an alternative, the Commission presented guidelines in order to enhance the administrative cooperation between member states. The upshot of the removal of articles 24 and 25 might once again be a greater reliance upon ECJ rulings.

The Commission did not accept the European Parliament's removal of the screening- and notification obligations for member states. In the amended Commission proposal this screening- and notification obligation has been re-introduced into the establishment part (article 15-7 in the new Commission proposal), but not in the free movement of services part. The Competitiveness Council of 29 and 30 May 2006 decided that screening- and notification obligations will also apply to the free movement of services part (article 41 and 43). On November 16 2006 the EP accepted these amendments in the second reading of the draft, and the Services Directive was finally adopted.

### **2.3 Winners and losers**

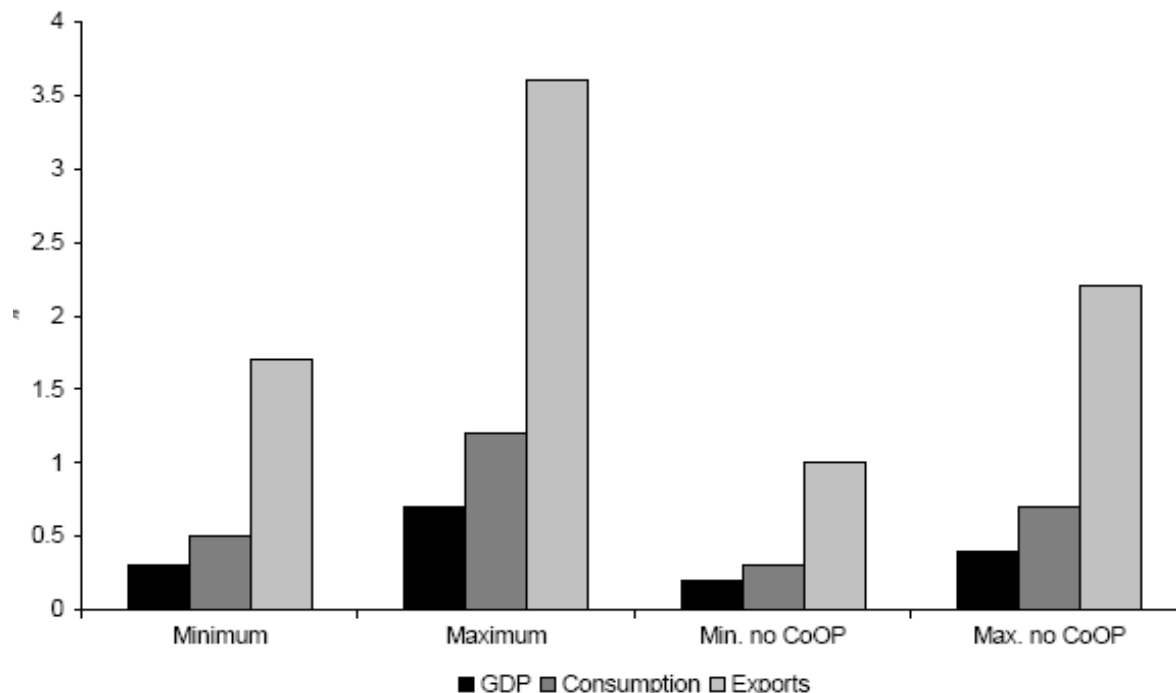
The CPB simulated that the initial draft Directive would lead to an increase of bilateral services trade by about 30% to 60% (Kox et al. 2005: 66). For the Netherlands, the changes in services imports and exports would be smaller, because of the relative openness of the Dutch economy. The draft's overall welfare effects would also be positive. With regard to overall consumer effects, the CPB argues that "More competition lowers service prices, brings



more variety and innovative service products. This will enlarge the consumer surplus, and thus benefit domestic consumers in most EU countries” (Kox et al. 2005: 67).

Who are potential ‘winners’ and ‘losers’ of the Services Directive drafts? Answering this question is to a certain degree a matter of speculation; the initial draft will never come into force and the adopted Directive still has to be implemented. It is therefore more appropriate to speak in terms of ‘opportunities and threats’. The initial proposal would have provided opportunities for services providers having been hindered before by trade and market access barriers, both in terms of establishment and freedom to provide services. With regard to threats, the CPB notes that: “Some intra-sectoral and intersectoral restructuring processes and employment shifts are likely to take place in domestic service industries” (Kox et al. 2005: 68). Threats emerge for service producers not competitive enough to withstand foreign competition. These service providers might have ‘survived’ so far because of the existing restrictions on their domestic service market. As a result, threats could also appear for the employees of these uncompetitive businesses. Local sectors considered to have benefited from ‘protection’ include the private security sector, temporary work agencies and the audiovisual sector.

Politically and legally, the most conspicuous modification in the amended draft Directive is the exclusion of the CoOP. CPB simulations of 2006 showed that by implementing the Directive without this principle “intra-EU services trade increased by 19 to 38 per cent” (Bruijn, de et al. 2006: 47). This is substantially lower than the 30% to 60% increase including the principle. In figure 1, CPB estimates regarding the effects of excluding the CoOP are shown for the European-wide GDP, consumption and exports.



*Figure 1. Macroeconomic effects of Services Directive with and without the Country of Origin Principle (Source: CPB 2006: 48).*

Concerning sectoral effects, the amendments that have been included in the revised draft will probably reduce the opportunities and threats, as outlined above. The revised draft is widely considered to be less far-reaching than the initial Commission proposal of 2004. It should be noted, however, that the new text, especially article 16 (where at first the origin principle was formulated, but by implication several other articles linked to this article too) is highly controversial in legal terms. It might not survive a case against it in the ECJ [see e.g. Editorial Comments, *Common Market Law Review*, 2006, no. 2].

It is difficult to become more specific, especially since opinions and analyses with regard to the drafts are contradictory, also amongst experts. While the SER largely agrees with the proposed draft of 2004, be it with a range of technical amendments (SER 2005), former Director General for Industry in the European Commission Stefano Micossi is more critical about the initial draft. He argues:

One must recognise that straight application of country-of-origin rules would have entailed a radical step-change in EU regulation, going well beyond the ECJ case law and raising legitimate concerns of weakening standards of protection of recipients. Therefore, on this I would side with those who have argued that the Commission's proposal had gone too far (Micossi 2006: 7).

Also, there are questions about the effects the amendments will have on the political influence of individual member states. It is argued that due to the ambiguity of certain stipulations in the revised draft, it is likely that the need for rulings by the ECJ will increase rather than decrease (as was the original idea behind the directive). Since the ECJ, given its mission and duties, has to give priority to the firm principles in the Treaty (like free movement), even if this has often been interpreted as 'pro-integration judicial activism' (be it that the ECJ has shown some reticence since the early 1990s), services market liberalisation might still progress somewhat in this fashion, yet outside the scope of national and European politics.

### **3 DUTCH ACTORS**

The present chapter surveys the positions of and debate between relevant actors in the Netherlands. The task is to explore whether and how the Directive has been politicised: which aspects of the Directive were highlighted by the different actors? The list of Dutch actors consists of the Dutch government, the Dutch Lower House (Second Chamber), the SER, Dutch MEP Ieke van den Burg, employer- and labour organisations and other interest groups. The chapter is divided in three parts. Section 3.1 sets out the positions of the actors regarding the initial Commission proposal of 2004. In 3.2 the SER report and the reactions it generated will be considered. Thirdly, the positions of the actors with regard to the amended proposal will be dealt with, followed by the stance of other interest groups.

#### **3.1 Dutch actors and the initial proposal**

##### **3.1.1 Relation between Ministerial departments**

The overall position of the Dutch government with respect to the Services Directive is relatively positive. Minister Laurens-Jan Brinkhorst of Economic Affairs and member of the D66 party was the coordinating minister. Brinkhorst was a driving force behind the positive stance about the Directive, while the Departments of Justice and Social Affairs appeared to be more reserved. Possible explanations include the fact that the Directive would lead to a set of complicated transfers of power the Justice Department would have to deal with. Social Affairs probably also had reservations about the transfer of power to the European level. Furthermore, the influence of the notary sector on the Justice Department and the influence of labour unions on Social Affairs may have led to a more critical stance. Nevertheless, some divergence between ministries is not out of the ordinary and ultimately the government formed a unified position about the draft Directive.

The position of the Dutch government was presented to the Parliament mainly by Brinkhorst. The following sections will focus on the communication between Brinkhorst, and occasionally State Secretary Van Hoof (Social Affairs) and leading government officials, and the Parliament.

##### **3.1.2 Dutch Government and Parliament about the initial proposal**

On September 20, 2004 minister Brinkhorst of Economic Affairs sent a letter to the Dutch Parliament on the preliminary position of the Dutch government about the draft Services Directive (TK 21501-30 (2004), Nr. 59). The government generally supports the Commission's initial draft. It considers a Directive with a broad scope desirable and assures that the Directive will not lead to a liberalisation of services of general interest. The country of origin principle is supported. The government holds that the horizontal character of the Directive and the country of origin principle in particular replace the ineffective way of

liberalising the movement of services in a case-by-case manner. However, Brinkhorst insists on a clearer demarcation of the scope of the CoOP, an extension of the derogations, for instance for education, and the importance of national law concerning the posting of foreign workers.

The initial position of the Dutch political parties is revealed in the meeting of November 17 2004 when the Parliamentary Commission on Economic Affairs debates the letter of Brinkhorst (TK 21501-30 (2004), Nr. 68). Jan Jacob van Dijk, representing the Christian Democrats (CDA), proposes to request the Social Economic Council (SER) for a report with recommendations (see also TK 21501-30 (2004), Nr. 65). He also asks for guarantees with regard to health care, labour conditions and consumer protection. Arda Gerkens of the Socialist Party (SP) is worried about the consequences of the Directive. To her, the proposal is unacceptable; it will lead to a 'market jungle' and social dumping. All public services should be kept outside its scope and the CoOP should be deleted. Liberal Eske van Egerschot (VVD) wants clarifications regarding practical implications of the Directive. Kris Douma of the Social Democrats (PvdA) is sceptical about the CoOP, concerned about the protection of labour conditions and insists on better monitoring of bogus self-employed workers. Bert Bakker of Democrats '66 (D66) claims that the Directive should come into force soon, although he notes that there is a large number of uncertainties. Stressing that the country of origin principle is a necessary feature of the Directive, he supports the request to the SER. Kees Vendrik of the Green party (GroenLinks) states that his party will not support the Directive, unless further research about its impact is commissioned. In his answer Brinkhorst states that he is positive about the discussion on the Directive and reassures the Parliament that the Directive will not lead to competition between member states with respect to labour conditions, resulting in 'race to the bottom'. In addition, Brinkhorst agrees about a request for a SER report. This report was requested in December 2004. Central topics of the request are the relation of the Directive to the existing Treaty, the scope of the Directive and the application of the country of origin principle.

Parliamentarians outside of the Commission on Economic Affairs also refer to the Directive in this period. In the meeting on March 17 2005 the Parliamentary Commissions for European Affairs and Foreign Affairs discuss, among other issues, the agenda for the European Council with the relevant ministers (TK 21501-20 (2005), Nr. 613). Hans van Baalen (VVD) states that he supports a broad scope of the Bolkestein Directive and demands clear goals in order to complete the internal market. Harry van Bommel (SP) argues that the fear for social dumping, as expressed in Germany and France, is justified.

### 3.1.3 Dutch social partners about the initial proposal

#### *Employer organisations: VNO-NCW and MKB*

The largest Dutch employer organisation VNO-NCW<sup>1</sup> shows its approval of the Commission's proposal in a letter to the Parliamentary Commission of Economic Affairs (VNO-NCW 2004). In this letter of 22 October 2004, the VNO-NCW subscribes to the Commission's goal to enhance the free movement of services and the freedom of establishment for service providers. The criticism that the Directive would lead to a 'race to the bottom' is not justified according to the VNO-NCW, since the Posting of Workers Directive prevails and remains untouched (VNO-NCW 2004: 3).

On March 18, 2005, the Dutch employer organisation for Small & Medium Enterprises (MKB), together with its Belgian partner organisation, presents a 'ten-issues' manifesto regarding the Lisbon Strategy for the upcoming European Council in which the Services Directive also appears (MKB 2005). The MKB states that, although a free internal market is beneficial for entrepreneurs, the initial proposal needs to be amended, for it interferes with existing EU law and certain concepts have an ambiguous meaning in several members states. Although the MKB and its Belgian partner in principle favour the CoOP, the organisations argue that the principle might be too ambitious due to the lack of harmonisation of services regulation in the EU.

#### *Labour unions: FNV*

The largest Dutch labour union (Federatie Nederlandse Vakbeweging, FNV) sets out its thoughts concerning the Services Directive in an internal report of January 27, 2005, at the outset of the SER report trajectory (FNV 2005a). The FNV notes that the position of the European Trade Union Confederation (ETUC) serves as a basis for its own position.

The FNV states that the removal of barriers in the internal services market will lead to economic growth, but that a 'race to the bottom' has to be prevented (FNV 2005a: 7). Therefore, it needs to be checked whether the Directive has negative consequences for the labour market and whether services of general interest are safeguarded. The Directive's scope is now insufficiently clear and, for instance, retirement funds have to be excluded. According to the FNV, there are good reasons to exclude the health care sector, but this may not be realised in practice (FNV 2005a: 9).

FNV discusses the CoOP, too: social policies and employment contracts should be excluded from the principle (FNV 2005a: 14). If the exclusion of employment contracts is not feasible, it should be at least guaranteed that the existing European regimes with regard to employment contracts (EVO) will be upheld. Also, in order to preclude 'mailbox firms', the

concept of 'establishment' should be clarified. The FNV wishes to exclude the posting of workers from the Directive, but argues that the exclusion of self-employed workers goes too far (FNV 2005a: 16-7). Instead, better monitoring should prevent the emergence of bogus self-employed workers. The FNV is concerned that, as a result of the Directive, the country where the service is provided has only limited means to take action against foreign service providers.

Although the ETUC appraisal formed a basis for the FNV stance, the FNV has been less negative about the Directive than the ETUC. Later in 2005, the FNV reaches a consensus with the CNV (the Christian labour union) and employer organisations in the SER (see below). The Dutch labour unions were the only ones in the EU reaching consensus with employers and government about the Directive. Nevertheless, on February 10, 2005 Brinkhorst blames the FNV for systematically providing an incorrect, negative image of the Directive (TK 21501-20 (2005), Nr. 276).

The position of the FNV has not always been unambiguous. For instance, the FNV itself notes on its website on June 29, 2005, that its membership of the 'Platform Stop the Services Directive' (see below) is problematic given its support of the SER report (FNV 2005b). That there were distinct views within the FNV became increasingly clear: one or more sectoral unions (e.g. construction; harbours) within the federation stuck to the position of the more radical ETUC. Members of the SP within the FNV were also more sceptical about the Directive, due to the negative stance of their party. Nevertheless, these noises were like ripples in a pond and did not cause significant contestation inside the FNV.

#### 3.1.4 Dutch MEP Ieke van den Burg: The Bolkesteinbubble

One of the Dutch members of the European Parliament most active on the Services Directive is Ieke van den Burg of the social-democratic PES group. Together with former SP member Roeline Knottnerus she wrote a critical booklet in March 2005 about the initial proposition of the Services Directive: 'The Bolkesteinbubble'.

The authors question the positive simulations of the CPB about the impact of the proposed Directive on the Dutch economy (Burg, van den and Knottnerus 2005: 12). Since service providers can operate in a foreign country, under the rules of their country of origin, the proposal may lead to unfair competition and 'social dumping'. Also, as argued in her chapter 3, the Services Directive will have negative consequences for the position of employees (Burg, van den and Knottnerus 2005: 31-46). Service providers will formally move their office to a country with lenient rules regarding taxes, social policy, safety and environment. The authors argue that the Directive is unclear about its relation with the Posting of Workers Directive as

well as the enforcement of collective labour contracts. Other problems emerge because, according to the proposal, the country of *origin* is responsible for the monitoring of the service provider. This may not always occur sufficiently.

Chapter 4 deals with Services of general interest (Burg, van den and Knottnerus 2005: 47-60). The authors argue that social and public services will fall under the scope of the Directive, for instance the health care sector. Risks might increase because foreign medical service suppliers might not have to comply with all domestic safety measures, for instance with regard to the use of radioactive materials (Burg, van den and Knottnerus 2005: 54).

In the concluding chapter, Van den Burg notes that the Services Directive has become a political 'hype', that few of the politicians involved know what the Directive is about and that populist caricatures prevail in the framing of the Directive (Burg, van den and Knottnerus 2005: 62).

### **3.2 The SER report and reactions on it**

#### **3.2.1 The SER report**

The Social and Economic Council (Sociaal Economische Raad, SER) which brings together employers, employees and independent experts is an institution that is arche-typical for the Dutch 'poldermodel'<sup>2</sup>. The draft report of the SER on the Services Directive became public in April 2005, followed by the final version (adopted by the Raad) in July.

The SER report starts with the merits of an open market for services and the positive simulations of the CPS and Copenhagen Economics (SER 2005: 27, 35-8). In chapter three, the points of departure of the SER are provided: the desirability of better regulation accompanying significant liberalisation of services, the application of subsidiarity and proportionality, a reduction or minimisation of the regulatory burden, proper enforcement of national enforcement of European legislation and neutrality with respect to other European legislation (SER 2005: 39). The SER states: "Against the background of the relevant Treaty stipulations and the (no doubt developing) case law of the European Court of Justice in this respect, the question is not *if* service transactions must be further liberalised, but *how* this will be done" (SER 2005: 43). Although the SER stresses the importance of neutrality of the Directive in a *legal* sense, the report holds: "prosperity benefits created by market opening will go hand-in-hand with the distribution effects that for some – especially in the previously strongly protected sectors – may have negative effects (no pain, no gain)" (SER 2005: 49).

The SER underlines the desirability of a broad scope of the Directive (SER 2005: 143). The report discusses several sensitive sectors, including the sectors health care and education.



The SER is quite positive about the proposals with respect to health care and argues that, essentially, public interests are guaranteed (SER 2005: 77). Nevertheless, the SER asks for clarifications with regard to the “application of medical-ethical requirements in relation to the exact scope of the derogation from the application of the country of origin principle” (SER 2005: 79). As to the education sector, the report notes that education systems, (mostly) financed by governments, are excluded from the Directive’s scope. The Directive only applies to very specific (commercial) aspects of the educational sector, which is desirable.

In chapter 5 the report considers the relationship between the Directive and the existing Treaty and, in particular, the CoOP. As the SER notes, the draft Directive excludes (in its art. 19) the possibility for member states to invoke ‘rule of reason’ derogations (as developed by the ECJ under art. 28, EC). This means that a member state cannot independently exclude a sector from the internal market. The SER has no objection, yet emphasizes that the implementation of article 19 should be phased (SER 2005: 108). The SER insists on the need to better ensure administrative cooperation.

Although the report generally concurs with the intentions behind the CoOP, the SER criticizes the proposal with regard to the demarcation of the principle. In order to prevent the spread of so-called ‘mailbox firms’, the SER emphasizes the need for a better definition of the term ‘establishment’ (SER 2005: 111). Also the definition of ‘contract’ is seen as unclear, which may lead the CoOP to interfere with private international law.

Finally, the report discusses the relation of the Directive with employment law in cross-border situations and holds that the EU applicability of the Rome Convention, concerning employment contracts, and the Posting of Workers Directive should remain beyond any doubt. Also, in order to prevent the problem of bogus self-employed workers, “it is useful to stipulate in the Services Directive that this Directive also respects the right of the host country to define the term ‘worker’ in cases that do not come under the scope of application of the Posting of Workers Directive” (SER 2005: 132).

### 3.2.2 Dutch Government and Parliament after the SER report

On May 10, Brinkhorst expresses his preliminary support of the SER draft report (TK 21501-30 (2005), Nr. 96). The Parliamentary Commission of Economic Affairs responded in a meeting on May 24 (TK 21501-30 (2005), Nr. 107). Van Egerschot (VVD), Bakker (D66) and Van Dijk (CDA) express their support for the Directive. Van Dijk nevertheless asks the government for clarity regarding the policy against self-employed service providers who do not comply with the Dutch labour conditions. Douma (PvdA) concentrates on the criticism in the report and is especially worried about the Directive’s neutrality concerning labour

conditions. He also questions the SER's remarks about the Directive's scope with regard to education and other public sectors. Vendrik (GroenLinks) is concerned about the effects of the CoOP as well as the effects of the Directive on services of general economic interest and, again, asks for an analysis of those effects. Gerkens (SP) does not perceive the SER advice as giving broad support for the Directive. She remains worried about the consequences for public services and concludes that the CoOP should be removed.

On the 2<sup>nd</sup> of June 2005, the day after the negative referendum result on the Constitutional Treaty, it is noted that the Directive played a significant role at the referendum in France, in contrast to the Netherlands (TK 21501-30 (2005), Nr. 109). Van Dijk (CDA) argues that the role of the SER explains this, as such an institutional facility does not work in France<sup>34</sup>

Brinkhorst's positive stance towards the Directive is substantiated further in September, when the government informs the Parliament about the effects of the Directive for services of general economic interest, the regulation regarding bogus self-employed workers, and the effects of the Directive on health care. Brinkhorst argues that services of general economic interest should be included, but wishes to extend the quality guarantees in the light of the CoOP (TK 21501-30 (2005), Nr. 115). As to bogus self-employed workers Brinkhorst and Van Hoof (Social Affairs) argue that effective control by the host country is necessary and that the social partners are partly responsible for this (TK 21501-30 (2005), Nr. 118). With respect to the effects on health care, Brinkhorst and Minister of Health Hoogervorst state that the Directive does not change much in this sector (TK 21501-30 (2005), Nr. 119). They note, however, that health care might be removed from the Directive because of resistance in other member states.

On the 23<sup>rd</sup> of September Brinkhorst sends a letter to the Parliament in which he sets out the official view of the government concerning the SER report, as well as the report of the Raad van State (RvS) (TK 21501-30 (2005), Nr. 120). The government concurs with the views of the SER report, except for the government's wish to preserve the possibility to justify trade barriers based on 'rule-of-reason'. Moreover, the government agrees with the RvS that the Services Directive should not affect domestic criminal law. The Parliamentary Commission for Economic Affairs reacts on September 29 (TK 21501-30 (2005), No. 122). Van Dijk, Van Egerschot and Bakker agree with the government's position. Douma still has reservations; he wonders whether the government takes the problem of bogus self-employed workers seriously. However, he supports a Directive with a broad scope, if it provides certain guarantees regarding consumer protection, social policy and environmental protection.

### **3.3 The amended proposal**

#### **3.3.1 Dutch Government and Parliament about the amended proposal**

The European Parliament adopted an amended proposal of the Services Directive on February 16, 2006. In a meeting of several Dutch Parliamentary Commissions the Council on General Affairs and External Relations of February 23 is discussed (TK 21501-02 (2006), Nr. 673). Van Baalen (VVD) notes that the Directive is crippled by the European Parliament's amendments. State Secretary of European Affairs Nicolai notes that the European Parliament has amended the Directive more than he would have liked. Brinkhorst also expresses his concerns about the amendments in a letter of March 2 concerning the upcoming Competitiveness Council on March 13 (TK 21501-30 (2006), Nr. 131). Attached to the letter on the Competitiveness Council of March, a comparative list is provided which juxtaposes the EP proposal with the Dutch position on the Directive (TK 21501-30 (2006), Nr. 133). The main differences consist in the many EP amendments about (numerous) derogations, the weakening of the screenings obligation, the removal of the CoOP and the softening of the requirements for administrative cooperation.

In the meeting of March 9 (TK 21501-30 (2006), Nr. 134), questions arise about the 'Dear-Charlie' letter addressed to Commissioner Charlie McGreevy (Internal Market) in which Brinkhorst, together with colleagues from five other Member States, pleas for an effective Directive. Irrgang (SP) is still concerned concerning the amended proposal. Vendrik (GroenLinks) asks whether the minister is truly guided by the SER report and blames the minister for 'shopping selectively' in the SER report. Ieke van den Burg, MEP for the PES is taking part in the meeting and states that the aim of ensuring the freedom of establishment and free movement of services has been retained in the amended proposal. There is no drastic setback in the Directive's aims and the new compromise, which enjoys broad support, leads to more clarity regarding services of general economic interest and the protection of the public interest.

The Commission presents its revised draft of the Services Directive in second reading on April 4. Three days later Brinkhorst gives the first reaction of the government, dominated by its disappointment (TK 21501-30 (2006), Nr. 135). The same day the Parliament discusses the previous European Council conclusions in a plenary session (TK 64ste Vergadering (2006)). Karimi (GroenLinks) is relieved that the initial Bolkestein Directive has been eliminated. She is not content with the Dutch government wishing to retain the initial proposal. Van Baalen (VVD) and Van der Ham (D66) express their regret. Prime Minister Balkenende (CDA) notes that he found himself isolated with his insistence to create a more effective Directive, but that he sided with the Council's conclusions in order to preserve the fragile compromise.

On April 12, in the meeting with the Parliamentary Commission on Economic Affairs (TK 21501-30 (2006), Nr. 142), Van Dijk (CDA) airs his disappointment about the removal of the CoOP and the narrowing of the Directive's scope. He is pleased that the screening and notification obligations have been re-introduced. Van Dijk observes that the political reality allows no other outcome and that this result has to be accepted. Douma (PvdA) warns for protectionism in the EU, but does not understand why Brinkhorst is so negative about the amendments. Irrgang (SP) is still concerned about the Directive, while Aptroot (VVD) has the impression that there is hardly any progress in the strengthening of the internal market. In his answer Brinkhorst expresses his regrets, yet argues that the Dutch government has to take into account the political reality. In the meeting of May 18 (TK 21501-30 (2006), Nr. 144), Egerschot (VVD) argues that the Netherlands has suffered a heavy ideological defeat, due to the compromises in the Directive. Douma argues that some modifications in the new proposal go further than necessary.

In the written government reaction of 15 May on the Commission proposal (TK 21501-30 (2006), Nr. 141), Brinkhorst repeats the Dutch position with regard to the upcoming Competitiveness Council on May 29 and 30. In this Council the amended Commission proposal is accepted, with the important addition of a screening- and notification obligation. Brinkhorst claims that this was an important issue for the Netherlands in the Council (TK 21501-30 (2006), Nr. 143). The chairman of the drafting committee for the SER report, Professor Piet Jan Slot advocated such an obligation (*Het Financieele Dagblad* 31-03-2006).

### 3.3.2 The social partners about the amended proposal

#### *Employer organisations: VNO-NCW and MKB*

In a press release on February 16, 2006, VNO-NCW expresses its regret about the amendments of the European Parliament (VNO-NCW 2006). The growth in jobs will not be as large as it would have been under the initial proposal and the especially the small and medium enterprises are hindered in making use of opportunities. VNO-NCW is also disappointed that several sectors are removed from the Directive's scope and appeals to the Commission and the Council to seek a better balance between a free services market and proportional derogations.

Contrary to VNO-NCW, however, the MKB expresses its approval of the European Parliament's decision in a press release on the same day (MKB 2006). Due to the proposal, companies will have improved access to foreign markets and barriers in the services market can be brought down. The new compromise provides a realistic Directive, which is doubtlessly better than no Directive at all. The initial proposal would have caused "unequal"

competitive conditions, since foreign companies could have provided services according to the law of their country of origin.

#### *Labour unions: FNV*

The FNV is generally positive about the Parliament's amendments, despite its support of the SER report. On its website, the FNV states that it is pleased with the 'dismantling of the explosive Bolkestein Directive' by the European Parliament (FNV 2006b). A number of threats, for instance related to the CoOP and employment law, have been averted. This position is an unambiguous departure from the unanimous SER opinion, publicly supported by the FNV.

Interestingly, a dispute breaks out between FNV chairwoman Agnes Jongerius and Brinkhorst; on February 14, 2006, the FNV states that Jongerius is enraged by the reaction of Brinkhorst towards the FNV (FNV 2006a). Brinkhorst blames the FNV for its negative attitude, while Jongerius blames Brinkhorst for ignoring the SER report.

### **3.4 Involvement of other interest groups**

The drafts of the Services Directive did not arouse many interest groups apart from the labour unions. An internet-site has been installed under the URL [www.dienstenrichtlijn.nl](http://www.dienstenrichtlijn.nl), hosting the organisation 'Platform Stop the Services Directive' ('Platform Stop de Dienstenrichtlijn'). This platform consists of political parties (PvdA, Groenlinks, SP) the FNV, the national students union, an environmental NGO (Milieudefensie) and several left-wing groups involved in Third World development and humanitarian issues. The platform is worried about the negative effects of the Directive on social and environmental matters and its criticism mainly focuses on the CoOP. The involvement of the PvdA seems a bit peculiar since this party has been much less negative in the Dutch Parliament about the Directive than, for instance, the SP. Moreover, one can read on the internet site that, when it comes to the European Parliament's amendments of February 16, the PvdA speaks about a 'victory for social Europe', while the SP speaks about 'a heavy blow for social Europe' (PSdD 2006).

Finally, a number of interest groups expressed their views regarding the Directive. For instance, the Association of Private Security Organisations (Vereniging van Particuliere Beveiligingsorganisaties, VPB) sent a letter to the SER on January 20, 2005 in which the VPB pleads for the exclusion of the private security sector from the Directive (VPB 2005). On the other hand, the temporary work agencies sector expressed its wish to be included in the Directive. In an urgent letter to members of Government and Parliament on February 6, 2006, the Association for temporary work agencies (Algemene Bond Uitzendondernemingen, ABU) states that it is concerned about the desired exclusion of the sector by the European

Parliament (ABU 2006). As the ABU states, by excluding the temporary work agencies from the scope of the Directive, the freedom of services will not apply to this sector and due to newly proposed requirements, the administrative pressure on temporary work agencies will increase.

### **3.5 Conclusions**

Some tentative conclusions about the roles of actors can be drawn. First, about political- and administrative uncertainty. Initially, up until the second reading stage in Brussels, Dutch parliamentary actors have been somewhat confused or uncertain about the draft proposal. Gradually, this has been removed or reduced by frequent interaction between the Second Chamber and the government (both in oral and written proceedings) as well as by the extremely detailed and painstaking work of the SER which was determined not leave any doubt about the meaning and technicalities of the draft, so that many misleading assertions or misunderstandings would no longer stand in the way of well-considered decisions. After the SER report, a Parliamentary majority and indeed the government agreed with its conclusions. Nevertheless, a few parliamentarians did not fully embrace the SER report and challenged other MPs about the 'true' substance of the SER report.

Second, about leadership. No doubt, minister Brinkhorst fulfilled a leadership role in the political process. His party (D66) is also the most prominent supporter of the Directive in the Dutch Parliament. The VVD and, after the SER report, the CDA supported the position of the Dutch Government.

Third, in terms of politicisation, there was some moderate degree of political disagreement, with the PvdA in the delicate position of the 'cautious and willing but to be convinced'. This is telling insofar as the issue was not dividing the Second Chamber according to coalition versus opposition lines. With regard to the sceptical camp, issues of contestation mainly related to matters of labour conditions and employment. The SP has been the most negative about the initial proposal, even about the amended proposal of the EP. GroenLinks also opposed the initial proposal, yet did not invest the same effort as the SP to politicise the issue. Occasionally, the stance of the PvdA was somewhat ambiguous. The FNV was the most active interest organisation with regard to the topic. Although the FNV reached agreement in the SER, it did, for instance, call upon its members to demonstrate against the Directive in Brussels and Strasbourg. Also, a dispute emerged between chairwoman Jongerius and Brinkhorst about the contents of the SER report.

Finally, as to embedding, the critical role of the SER is exemplary for the way the Dutch 'polder' approach works. It does not necessarily mean, however, that the role of parliament

reduces to trivial proportions. Indeed, it was the Second Chamber specifying the type of questions for the SER, apart from the initiative it took to compel minister Brinkhorst to ask for a SER report in the first place. But it is typical that the Second Chamber and the government tend to look at such a report (with a reputation of quality and based on the well-tested consensus model of the deliberations in the SER) with a 'prejuge favorable' as long as the report is adopted unanimously, as it was. In Dutch politics, there would seem to be a strong presumption of more 'legitimacy' after a unanimous SER report, in particular when such a difficult and sensitive topic is at stake. Yet, the question arises whether legitimacy is indeed *automatically* secured after a unanimous SER report, without this report being familiar to the wider public. What is legitimate in the environment of the political actors might not necessarily be legitimate for citizens. We shall return to this point in the concluding section..

## **4 THE DIRECTIVE IN THE NEWSPAPERS**

This section focuses on the communication about the Directive in Dutch newspapers. Questions include how the Services Directive has been reported and discussed in different newspapers, concentrating on the two selected issues of the Directive and the expectations about the effects of the Services Directive on Dutch service providers and the Dutch economy as a whole. The analysis will identify certain 'peaks' in the attention paid to the Directive in the media.

### **4.1 Selection of the articles**

We performed a newspaper-analysis of the period January 2004 (when the Commission presented its initial proposal) until July 2006. For this analysis we used the database Lexis-Nexis and selected five newspapers; one specialised economic newspaper (*Het Financieele Dagblad*) and four 'mainstream' newspapers (*NRC Handelsblad*, *De Telegraaf*, *Trouw* and *De Volkskrant*). *Het Financieele Dagblad* (FD) is a relatively small newspaper specialised in economic news and, due to its technical character, is not widely read by the Dutch population. FD can be regarded as a paper with a liberal economic outlook. *NRC Handelsblad* (NRC), *Trouw* and *De Volkskrant* (VK) are considered as the 'quality' newspapers, on average read by people with a higher education.. These papers are fairly 'open', without a major bias. The VK is considered to have a slight left of the centre orientation, while the NRC is considered to have more of a right of the centre attitude. *De Telegraaf* (TG) is by far the largest newspaper, more easily accessible, usually with less detailed and technical articles and greater attention for popular and entertaining news items. Nevertheless, the financial and economic section in the TG is quite extensive and has a liberal-economic orientation. The search term used in Lexis Nexis was *dienstenrichtlijn*. In this way, not all the articles that we found are necessarily related to the Services Directive. What it means is that, in these articles the Directive is mentioned or discussed briefly. The search term generated 378 articles, excluding double articles and news-indexes.

### **4.2 First glance**

At first sight, the distribution of articles amongst the different newspapers is quite remarkable. Incontestably, the FD provided most articles in which the Services Directive is



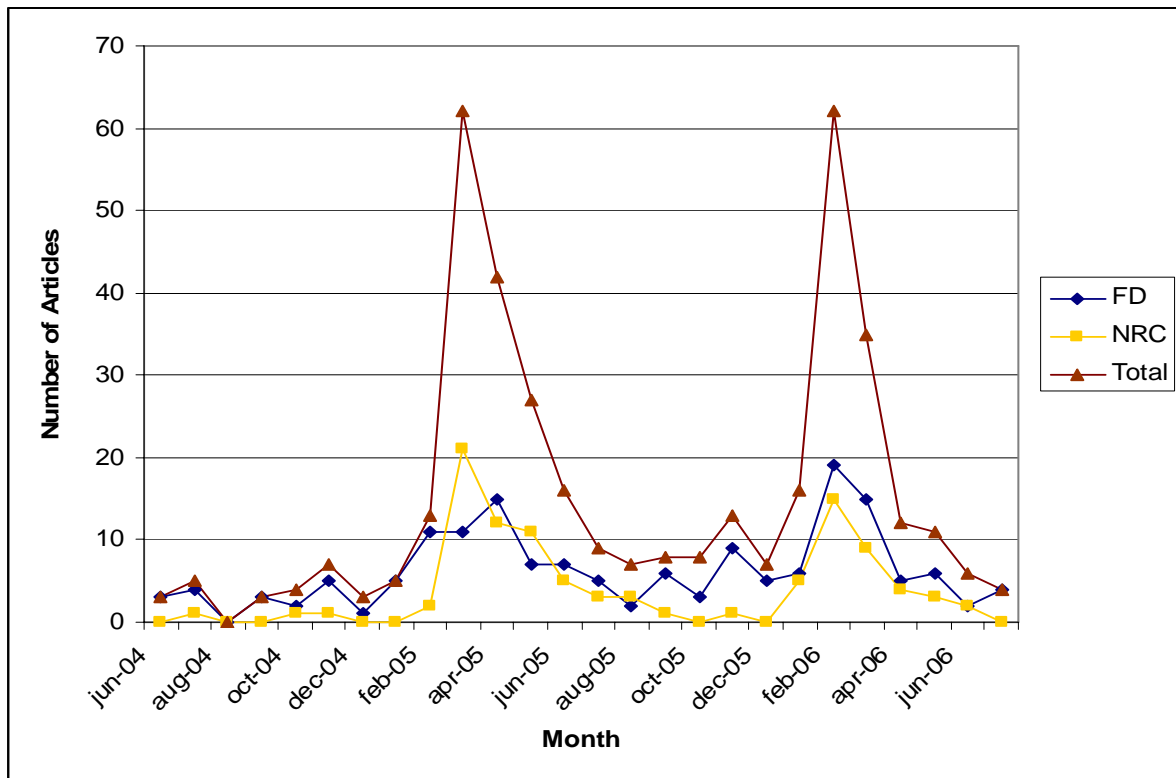


Figure 2 The number of articles in the FD and NRC containing the word 'Services Directive'

mentioned (155). Of the other newspapers, the NRC (78) has the highest number of articles in which the Directive is referred to. VK (50), Trouw (36) and TG (39) are not far apart but at a lower level. Also, the distribution of the number of articles per month is surprising. First, no article is either written on the Directive or contained the word 'Services Directive' before June 2004. However, by using the search terms *Bolkestein* and *diensten* (services), we found six articles in January and February 2004 about the initial proposal. Second, one can recognize two clear peaks. The first one stretches from March 2005 to the end of May 2005. The second peak emerges at the end of January 2006 and fades away after March. A closer analysis of the articles is provided below in four parts, roughly corresponding to the peaks and lows in the media attention. Those periods are January 2004-January 2005, February 2005-June 2005, July 2005-December 2005 and January 2006-July 2006.

#### 4.3 January 2004-January 2005: First skirmishes in the newspapers

We initiate our media analysis in January 2004, when the Commission presented its initial proposal. Six articles were found where the initial proposal by Bolkestein was mentioned in January and February, using the deviating search terms mentioned above (four in the FD, two in the TG and one in NRC). In one of these articles (TG 28-02-2004) the opposition of Belgium against the Directive is referred to. No news item containing the word *Services Directive* appeared until June 5 that year. The first news articles mainly comprise news

coverage related to the improvement of the EU's competitiveness in which the Services Directive is merely mentioned as an instrument to achieve this.

In these articles the positive stance of Minister Brinkhorst towards the Directive is noted. Also, the positive stance of the VNO-NCW and the somewhat more nuanced position of the MKB are mentioned, as well as the worries of labour unions in the EU (e.g. FD 19-07-2004). Further, the articles refer to the concerns of the FNV and the Dutch Parliamentarians Jan Jacob van Dijk (CDA) and Chris Douma (PvdA). These concerns are mainly based on the fear for a race to the bottom due to the CoOP and the protection of services of general interest. On September 24 the FD reports about the positive simulation of the CPB about the impact of the Directive (FD 24-09-2004). Furthermore, the hesitant stance of the Justice Department is mentioned (FD 01-10-2004).

As to the European level, the FD writes that France and Germany are the most notable opponents of the CoOP (FD 01-10-2004). In the Competitiveness Council of November 25, Belgium, Denmark, France, Portugal, Sweden and Greece share these reservations (NRC 26-11-2004). Yet, this article also mentions that during the Council, Germany had a surprisingly positive stance. Trouw (26-11-2004) adds that the member states will probably exclude health care from the Directive's scope and notes that Brinkhorst is disappointed about the negative reactions. In the European Parliament concerns exist similar to the concerns of the Dutch actors (FD 12-11-2004). Another mentioned actor is for instance the European Consumer Organisation (BEUC), which is moderately positive about the initial proposal. Moreover, demonstrations of labour unions on November 11 are mentioned.

A number of actors write opinion pieces in this period. The first article of the sample is that of Erik Meijer and Rene Roovers, both candidates MEP for the SP (FD 05-06-2004). They focus in particular on the CoOP and warn for its effects: a pan-European race to the bottom. Similarly, Ieke van den Burg (MEP PvdA) states that, with regard to the free movement of persons, the SER underestimates the danger of social dumping (FD 07-06-2005). The Directive would contribute to this social dumping. In addition, Van der Gaag (temporary work agencies organisation ABU) argues that the temporary work agencies should fall under the Directive's scope (FD 29-11-2004). MEP for the SP Kartika Liotard writes several articles arguing that the Directive will only cause trouble (e.g. VK 06-12-2004). Due to the CoOP, foreign service suppliers can ignore Dutch law and a race to the bottom will occur. Also, the quality of services of general interest (e.g. home care) will be threatened. Instead, Sophie in 't Veld, MEP for D66, argues that the Directive is desirable (FD 05-01-2005), after which Liotard responds by arguing the contrary (FD 10-01-2005).

#### **4.4 February 2005-June 2005: increased attention**

On February 3, 2005 the FD reports the objections of French president Chirac and Prime Minister Raffarin towards the draft Directive, which will undoubtedly lead to revisions in the proposal (FD 03-02-2005). Two days later, the paper notes that the German chancellor Schröder opposes the proposal too, and that Commission President Barosso is willing to modify the initial draft (FD 05-02-2005). The CoOP is the most criticised item. In this month, the negative stance of European labour unions about the Directive is mentioned in several short articles. On March 4, several papers report the intention of Commissioner McGreevy to amend the Directive in such a way that it would not cause social dumping (FD, TG, NRC, Trouw 04-03-2005). Further references to the Directive are made in articles on the European Council where especially France pleads for amendments to the initial proposal. Other opponents of the initial draft are Germany, Denmark, Sweden and Belgium, while the Netherlands and the Central European countries wish to preserve the proposal. On April 14 the NRC reports about the amendments in the European Parliament proposed by rapporteur Evelyne Gebhardt (NRC 14-04-2005). Other articles refer to the differences in views in the EP with regard to these amendments.

In many articles the Directive is linked to the referendum on the draft Constitutional Treaty in France, where the Directive played a far more important role than in the Dutch referendum. It is often argued that Chirac opposes the initial draft in order to show the French people that France can still play a major role in the EU. In this way Chirac hopes to achieve a positive referendum result. Some related articles are dedicated to the trip of former Commissioner Bolkestein to France in order to defend 'his' Directive, and the forceful and sharply different reactions this visit prompted.

The newspapers also refer to the debate on the Directive in the Netherlands. On March 15 and 16 respectively, the NRC and Trouw report that FNV chairwoman Agnes Jongerius encourages people to join the international demonstration against the Services Directive on March 19 in Brussels (NRC, Trouw 15 and 16-03-2005). Most newspapers report about this demonstration. A lobbyist for the Christian Labour Union (CNV), states that the CNV does not take part in the demonstrations because of the SER report. Nevertheless, the CNV does have concerns regarding quality and accessibility of public services and the preservation of proper labour conditions (NRC 17-03-2005).

In the first week of April, newspapers report about the draft version of the SER report. The FD concludes that the Dutch labour movement is the first one in the EU to support the Directive (FD 06-04-2005). Nevertheless, FNV and CNV speak of a 'divided report' regarding certain labour conditions. Subsequently, the FD reports that the Dutch Parliament generally supports the Directive once the preservation of Dutch labour conditions would be guaranteed

(FD 25-05-2005). Thus, the Parliament essentially agrees with the SER report. On June 15, the FD features an item about the act to extend the collective employment contracts (cao's) for foreign service suppliers to all sectors (The Waga law) (FD 15-06-2005). Minister De Geus drafted this act, supported by the CDA, PvdA and other opposition parties. The VVD and D66 are against. Douma (PvdA) and Weekens (VVD) point to the risk of foreign workers claiming to be self-employed in order to circumvent the collective employment contracts. Furthermore, in some background articles on the referenda, the Directive is mentioned.

Concerning opinion articles, the editorial of the FD on February 8 holds that by deleting the CoOP, the effectiveness of the Directive will be lost (FD 08-02-2005). The editorial in the NRC (16-03-2005) has a similar message. A staff member of the FNV expresses his disagreement with this argument (FD 28-02-2005). D66 MEP Sophie in 't Veld claims that the demonstrations in March will be *against* employment growth and that European labour unions and left-wing parties use populist language (VK 17-03-2005). Auke Blauwbroek of the FNV responds with the notion that in 't Veld is badly informed since the Directive *does* endanger labour conditions (VK 18-03-2005). Van Baalen (MP VVD) also criticises the opponents of the initial draft (NRC 25-03-2005), in turn countered by Van Bommel (MP SP) (NRC 06-04-2005). Liotard argues that the SER report entails much more criticism on the draft Directive than Brinkhorst had wished (FD 15-04-2005). Bart van Riel and Marko Bos of the SER secretariat respond by stating that Liotard overblows the criticism of the SER with regard to the Directive (FD 23-04-2005). In this way she creates a negative image, while the SER report is much more nuanced. Finally, Kathelijne Buitenweg (MEP GL) and Femke Halsema (MP GL) state that an important reason for the French 'no' was Bolkestein's Services Directive which opens the door for social dumping (NRC 09-06-2005).

#### **4.5 July 2005-December 2005: The level of attention drops**

The competitiveness of the EU is again the main theme in this period. Certain actors, for instance the OECD (FD 13-07-2005) and European Commissioner Verheugen (FD 20-07-2005), see the Directive as an indispensable means to enhance competitiveness. Also, the NRC (12-05-2005) states that European ministers of finance all agree that the EU economy should be more competitive and that therefore, the Services Directive should be adopted. Furthermore, the VK reports that Barosso is irritated by the protectionist stance of Chirac, who in turn accuses the Commission of not protecting employees (VK 07-10-2005).

Several articles deal with the Directive itself. In October, EP rapporteur Gebhardt states that the EP is divided about the Directive (FD 20-10-2005). Issues of contestation include the scope of the Directive and the CoOP. Economist Jacques Pelkmans argues that this polarisation between left and right in the EP might ruin the Directive. Subsequently, a

number of newspapers report about the approval of the CoOP by the Committee on the internal market in the EP (FD, NRC 23-11-2005, Trouw 24-11-2005). Most of the EVP and Liberal members vote in favour.

The Directive is mentioned in an opinion article by Jan Marijnissen (Dutch MP SP) and Paul Ulenbelt (staff SP) (VK 23-09-2005). They argue that the 'no' in the referendum is also a no to the ongoing liberalisation. The arrival of illegal Polish workers will cause unfair competition on the labour market. This instance of politicisation forms a clear signal that the Services Directive is politically linked to a range of contextual problems which are not in the legal text of the directive.

#### **4.6 January 2006-Present: Second peak in attention**

In January 2006, a number of articles refer to the (violent) demonstrations in Strasbourg against the draft Harbour Directive and its similarities with the Services Directive. In February, the FD again refers to labour union protests in Strasbourg, this time about the Services Directive. Moreover, the newspapers report about the emergence of a compromise between the EVP and the Socialist group in the EP. The VVD and D66 fractions in the EP will vote against the compromise, because it has watered down the draft Directive too much, while GroenLinks and the SP claim that the proposal should be amended further (TG 14-02-2006). The EP fraction of the CDA is moderately positive, while the PvdA is definitely positive. On February 16, the newspapers report about the adoption of the drastically amended Directive in first reading in the EP. The amendments are welcomed by the ETUC, while UNICE shows its disappointment. The newspapers also note the dissatisfaction of Central European countries with the outcome in the EP.

In March several articles again refer to the negative image of the EU and the urge to improve European competitiveness. Also, the European Council returns in a few articles. As reported, Brinkhorst is positive about the position of most member states that wish to go further than the EP (FD, TG 14-03-2006). However, most Heads of Government can live with a Directive equivalent to the EP proposal (FD, VK 25-03-2006). Barroso states that the Commission will follow the amendments of the EP (TG 22-03-2006). Indeed, the newspapers report that the Commission agrees to a large extent with the EP amendments (NRC, FD, TG 05-04-2006). On May 30 the newspapers (TG, FD, NRC) mention the agreement between the member states on the revised Directive, based on a package deal between Germany, France and the UK. The Socialists and the EVP expect that the EP will agree upon the proposal later in the year (FD 31-05-2006).

In the Netherlands, the TG pays attention to the troubled relationship between Brinkhorst and Jongerius, provoked by the presence of the FNV at the demonstration in Strasbourg (TG 15-02-2005). As it turns out, the Dutch Parliament is not satisfied with the EP proposal; VVD, PvdA and, to a lesser extent, CDA find that the EP has gone too far (FD 24-02-2006). ABU and VNO-NCW are disappointed as well. After the European Council, State Secretary Karien van Gennip of Economic Affairs expresses her relief that the obligation to notify barriers has been re-introduced in the proposal, which makes the Directive more acceptable (FD, TG 30-05-2006).

In one of the opinion articles coordinator of the GATS platform Roeline Knottnerus (SP) argues that all sorts of regulations protecting consumers, employees and environment have been left out in the Directive (12-01-2006). On the contrary, Bolkestein defends the Directive and insists that it has nothing to do with illegal work (NRC 09-02-2006). The Directive is meant to undo bureaucratic obstacles and will generate extra jobs. Furthermore, several editorial commentary sections are dedicated to the Directive in February. Marijn Jongma, editor of TG, argues that the Directive does not lead to social dumping, but to healthy competition (TG 11-02-2006). FD correspondent Hendrik Jan van Oostrum states that the amendments hollow out the Directive and give countries the opportunity to continue taking protectionist measures (FD 15-02-2006). The TG and the NRC (16-02-2006) are also negative about the amendments by the European Parliament. Finally, professor Piet Jan Slot (the chair of the SER drafting committee) states that the EP proposal is not acceptable in a legal sense and will not open up the services market (FD 31-03-2006). The member-state obligation to notify barriers, which has been removed by the EP, should be re-introduced.

#### **4.7 Conclusions**

Examining the articles, certain patterns can be found. The issue highlighted most in the newspapers is the CoOP. In almost all articles, this principle is mentioned in combination with fears that it generates a risk of undermining national labour conditions (a 'race to the bottom') due to the entry of low-wage workers from Eastern Europe and social dumping. Equally, there is a concern that the principle would lead to abuse by setting up mailbox firms. Another issue is the quality of services of general interest.

Although these were the main issues in the articles, at first the news reports did not make judgements about the validity of these arguments. Only at a later stage, in the second and fourth period, the op-ed sections of the FD, NRC and TG show that the editors are in favour of a more ambitious Directive than the amended version. According to these editorial articles, the initial proposal would have had a more positive effect for the Dutch and the European economy. Finally, the newspapers hardly distinguish the two main features of the Directive:

the freedom of establishment and the freedom to provide services. The fact that the CoOP does not apply to companies establishing in a foreign member state is almost never mentioned.

Clear opinions about the Directive come from the side of actors mentioned in the news reports and from opinion articles. On the side of opponents of the Directive, SP politicians and members often appear in the news and also write many opinion articles. They repeatedly argue that the CoOP will lead to unfair competition and deterioration of labour conditions. Also the risks with regard to services of general interest are mentioned. Dutch MEP Ieke van den Burg (PvdA) appears regularly in the news, too; she has similar concerns. In addition, the position of the FNV is outlined frequently and its staff appears regularly in news reports and opinion articles. The FNV is predominantly concerned about the safeguarding of Dutch labour conditions. At the other side, D66 MEP Sophie in 't Veld writes several opinion articles and the positive stance of Brinkhorst is repeatedly found in the news reports. They stress the economic benefits of the Directive and, especially in 't Veld (and also Van Baalen and Bolkestein), disapprove of the arguments of the opponents of the Directive. The organisation for temporary work agencies ABU and employer organisations are frequently recurring interest organisations. Both are in favour of a Directive with a broad scope.

## 5 PUBLIC OPINION

Data of public opinion with regard to the Services Directive is scarce; no opinion polls exclusively related to the Directive have been performed under the Dutch population. The Dutch government included the Directive in the questionnaire concerning public opinion about the EU (*NederlandinEuropa.nl*). Also, data is available about the stance of the Dutch citizens with regard to the new member states and the effects of the accession on employment in the Netherlands. Although not primarily related to the Services Directive, these figures tell something about the concerns existing amongst the Dutch citizens. The data in this section originates from three sources: *NederlandinEuropa.nl*, *Eurobarometer*, and *Peil.nl* (opinion researcher Maurice de Hond). In section 7 we relate the figures on public opinion to the possible legitimacy problems prompted by the Directive.

### 5.1 Context: concerns about jobs

In 2005, 70% of the respondents approved of Dutch membership of the EU (Eurobarometer 2005: 20). Another interesting finding in this Eurobarometer is that 67% of the Dutch respondents argued that membership of the EU has a positive effect on the Dutch services sector (Eurobarometer 2005: 26). Also, 77% of the respondents believed that a larger degree of competitiveness on the internal market would have a positive effect. These figures are much higher than the mean of the EU25.

Also, data is available on Dutch public opinion about the consequences of European integration and enlargement for the level of employment in the Netherlands. In Eurobarometer surveys of Dutch public opinion the Directive has not been mentioned. However, a noteworthy fact that Eurobarometer data indicate is that the transfer of jobs to member states with low wages forms the greatest fear of Dutch citizens (e.g. Eurobarometer 2004: 21, 2005: 21). About three quarters of the respondents indicate that this is their main fear, and this number remains quite stable. Partially, this fear can be traced in the Flash Eurobarometer containing a post-referendum survey in The Netherlands (Flash Eurobarometer 2005: 13, 15). 7% of the no-voting respondents indicate that the Constitutional Treaty would have had a negative effect on the employment situation in the Netherlands. However, it should be noted that 10% of the yes-voting respondents argue that the Constitutional Treaty would have strengthened the economic and employment situation. Finally, opinion researcher Maurice de Hond investigates the opinion of the Dutch people with regard to the opening of borders towards Central European workers (Hond, de 2005). 65% of the respondents are opposed to the total opening of the borders, while 33% is in favour. D66 voters (with 59%) are the only respondents in favour of opening the borders. Also, the question whether the immigration of more workers from the new Central European



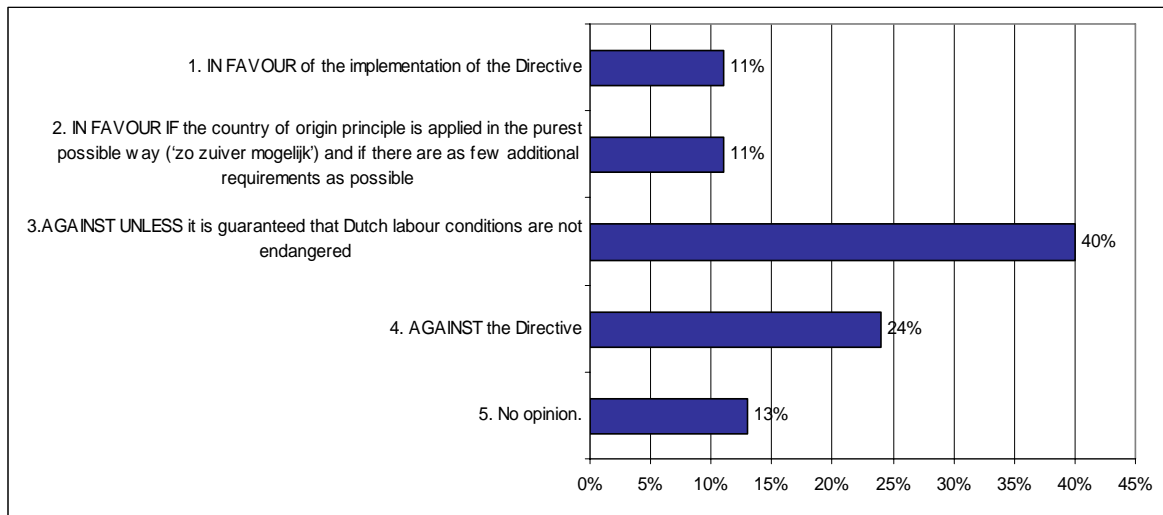
member states is beneficial for the Dutch economy is posed. 62% of the respondents answers no, against 28% of respondents answering 'yes'. Among GL- and D66-voters more respondents answer positive than negative (respectively: 47% against 44% and 43% against 37%). On both questions, Wilders- and LPF-supporters answer most negatively, while the SP-voter's answers lie in between the answers of the supporters of Wilders and the LPF and the answers of the supporters of the mainstream parties (VVD, CDA, D66, PvdA, GL). These figures correspond with the Eurobarometer data about the concerns of the Dutch citizens regarding the effects of the EU on their employment status. According to the surveys, the Dutch people consider Central European workers as a threat, both because jobs would move to the east and because Central European workers would take away jobs in the Netherlands.

## **5.2 Specific opinions about the Services Directive**

In the questionnaire of *NederlandinEuropa.nl* the question was asked whether the Service Directive is desirable (NederlandinEuropa.nl 2006: 70). The respondents received a very brief description of the Directive. As an example, it is stated that as a result of the Directive, Dutch plumbers do not have to comply anymore with Polish conditions, and Polish plumbers do not have to comply anymore with Dutch conditions. As is explained, this is called the CoOP. Subsequently, five options were given, outlined in *Figure3* below.

The figure shows that most of the respondents have reservations with regard to the Directive. 24% is flatly against the Directive, while 40% is against, unless Dutch labour conditions would be preserved. Only 11% of the respondents are flatly in favour, while also 11% is conditionally in favour.

More specifically, the higher educated respondents are on average less negative about the Directive than the respondents with a lower education (NederlandinEuropa 2006: 119). Furthermore, more Eurosceptic respondents and respondents that did not feel as involved with the EU are more negative about the Directive (NederlandinEuropa 2006: 137-8). Also interesting to note is that, again, D66 voters are the least negative about the Directive; with regard to the respondents' political party preferences, this is the only group in which more respondents concur with statement 1 (purely in favour, 18%) than with statement 4 (purely against, 15%) (NederlandinEuropa 2006: 156).



*Figure 3: Public Opinion with regard to Services Directive (Source: NederlandinEuropa.nl 2006: 25).*

With regard to the 5 largest parties (PvdA, CDA, VVD, GroenLinks, SP), the respondents of the SP are the most negative about the Directive: 7% concurs with statement 1, while 31% concurs with statement 4. These figures are similar to the ones of smaller 'populist' parties as the LPF, PvdV (Wilders) and Group Nawijn, and other parties on the wings of the political spectrum such as the ChristenUnie and SGP. Supporters of the other four large parties do not deviate much in their answers, although VVD-and CDA-voters are somewhat less negative than PvdA- and GroenLinks (GL)-voters. Finally, on average, respondents do not sympathise with the CoOP; according to the report, respondents argue that everybody should be treated equally (NederlandinEuropa 2006: 25). The entrance of Polish workers is associated with the loss of jobs, yet some respondents indicate that there is an advantage as well: the low labour costs of Central European workers.

Important to note is that the validity of these results is questionable, or in any event exceedingly hard to assess properly. The description of the Directive supplied with the question is very brief and cannot possibly suffice for a good understanding. The only feature of the Directive mentioned is the CoOP and this is done in a dubious way, to put it mildly. Moreover, by stating that, as a result of the Directive, Polish plumbers do not have to comply with Dutch conditions, the question becomes rather suggestive and is at least in part incorrect. With such ill-drafted information about the Directive it is unlikely that respondents were able to come to an appropriate answer. Lastly, the question does not take into account the amendments that have been made to the Directive; the CoOP already belongs to the past. Nevertheless, the patterns and the distribution of answers amongst political party support are quite revealing.



## **6 INTERNATIONAL COMPARISON**

In this section we compare the Dutch policy-making process about the Directive to the process in several other EU member states. This comparison is limited by lack of sources and by the problem that national politics is strongly idiosyncratic. A more profound understanding requires knowledge about distinct national path dependencies and their socio-political appreciation. Below, the motives of the countries supporting a far-reaching Directive will be provided first, followed by brief notes on country cases: France, Germany and Sweden.

### **6.1 Proponents of a far-reaching Directive**

The Dutch government turned out to be amongst the staunchest supporters of the Bolkestein draft. Other proponents of a Directive close to the original draft included the 'new' Central and Eastern European member states and the United Kingdom.

The member states from Central and Eastern Europe were primarily in favour of a far-reaching Directive because of the perceived positive economic effects that such a Directive would generate. It should be realized that the new Member States have always understood the potential attractiveness for their workers and small service firms to exploit the freedom to provide services in the internal market. In the United Kingdom on the other hand, the general political free-market consensus is the main explanation of the fact that a Services Directive close to the original draft was supported. The Directive did not generate a widespread societal response in the UK. In the end, however, the UK agreed with the revised Commission proposal in the Council of May 2006 due to a package deal with Germany and France. In so doing, the UK abandoned a blocking minority against a far-reaching Directive: the Central and Eastern European member states and the Netherlands.

### **6.2 The French Case**

The French case is interesting for several reasons. An interesting parallel with the Netherlands is that both countries are founding members of the EU, involved with the internal market integration from the start. Also, both countries held a referendum which led to the rejection of the Constitutional Treaty. Striking differences include the general opinion about the EU, the social economic structure and the politicisation of the Services Directive. French general opinion towards the EU has been more mixed than the public opinion in the Netherlands, where, until recently, a 'permissive consensus' existed towards the EU. The social economic structure in France is far less 'consociative' than the Dutch 'poldermodel'. French labour unions tend to be more radical than their Dutch counterparts and the prolonged presence of the communist CGT – with some remaining strongholds in owned

enterprises, public utilities and all the larger sea ports – marks a sharp contrast with Dutch industrial relations. The very different and manifestly weaker position of the French SER (Conseil Economique et Social) implies that this institution is at best one of the many players in the policy process and not one with accepted (and legitimate) authority, even for the leading political actors, as is the case in the Netherlands. Finally, the Directive has been politicised to a much larger extent in France. The Directive has also been an important issue in the referendum on the Constitutional Treaty (Flash Eurobarometer 2005).

The Polish plumber symbolised the framing in the French debate. The Services Directive became a kind of test case for the left. It was seen as yet another 'undefendable' step of what was said or asserted to be a 'new neo-liberal agenda'. Very little of such framing can be identified in the Netherlands, and if so, only late. There might be some overlap in what one might denote as the "*indirect agenda*" of the Bolkestein Directive. Consider the following social issues, *none* of which is strictly spoken part of the services draft directive:

- The free movement of workers now that those workers come from the new Member States with low wages;
- Illegal labour services, either by workers from EU countries with lower wages (and other labour cost) - that is, illegally avoiding the rules and payments compulsory under host-country-control - or by workers from third countries (who may or may not be legally in the host country in the first place), as a result of the sloppy and unconvincing enforcement of Member States;
- Posted workers, for short assignments; these rules existed long before the Bolkestein draft and were maintained;
- Several evasive constructions such as the self-employed (with softer rules), services offered by 'independents' (getting around host country control), quasi-fake established employment agencies (in reality, empty-shell companies really settled somewhere else, but abusing the local rules for posting in another EU country at inferior conditions) and mailbox companies.

None of these issues is really new. What is perhaps new is that enlargement to the East has greatly increased sensitivity to them. It is in this climate of suspicion and at times bitterness amongst workers with lesser skills or in low-skilled sectors or in footloose sectors (a menace which can implicitly lead to blackmail by the management of firms) that the services draft had to be made acceptable. Given a radical principle (CoOP), the misunderstandings that this principle gave rise to (without profound knowledge of EC law), and the very close association between (low skilled) services and wage costs due to simultaneous consumption, strong resistance was bound to build up. Whereas in the Netherlands, the SER could not only clear

up a range of misunderstandings in a careful and lengthy (but undisturbed) process but attempt to improve the predicament of certain service workers (e.g. insisting on much tougher national enforcement; refining the local application of posted workers rules; insisting on a recognized quality mark for employment agencies), while proposing precise amendments of the draft to the government, in France no such 'disarming' and functional mechanisms were available. Moreover, in France the willingness to take the draft serious was non-existent in certain circles as it was ideologically regarded as part of the 'wrong' agenda and had to be blocked no-matter-what. In such circumstances, politicisation is not only much more likely and intense, one can hardly expect anything else. If contestation is sharpening, demonstrations (absent in the Netherlands) by labour unions are a routine weapon. Contestation became even harsher once the Services Directive was sucked into the slipstream of the Constitutional referendum debate, losing all sense of substance and turning into emotional symbolism. In the Dutch referendum, the Bolkestein Directive did not even play a marginal role.

### **6.3 The Swedish and German Cases**

Other opposing countries included e.g. Germany and Sweden. These countries opposed the Directive not so much for ideological reasons, but rather because of their specific labour laws. Together with Denmark, Germany and Sweden are the only EU member states not having a general minimum wage legislation, a central feature in the Services Directive debate in these countries given the CoOP. Furthermore, with the absence of a general minimum wage in these countries, the Posted Workers Directive would not provide any legal wage restrictions on the posted foreign workers (since host-country control would not include that), unless extensive supplementary domestic legislation (allowed under the Posted Workers Directive) is put in place. Alternatively, the social partners in Sweden and Denmark hold the view that what prevails – indeed, must prevail according to them - are the domestic arrangements about wage and non-wage conditions. Of course, such a set-up risks to throw up 'private barriers' to the free movement of services insofar as little or no scope remains for (say) service providers to exploit their cost advantages. Technically, these 'barriers' are likely to go even further than host-country control based on minimum wage legislation <sup>5</sup> and this is one among several reasons why the ECJ soon has to rule on a prominent Swedish case where labour unions prevented an Estonian builder to provide services without an agreement with the Swedish social partners.

As Swedish labour relations strictly remain a matter of collective agreements (with very strong aversion against legislation), the unions feared a loss of bargaining power due to the consequences of the Services Directive. Also, the perception that the Directive would counter the general social-democratic political consensus in Sweden played a role. Hence, in a

statement Swedish minister for industry and trade Thomas Östros declared that “[f]ar – reaching changes to the [original] Commission proposal are required if Sweden is to be able to accept the Services Directive”, as “[w]e do not accept a services directive that will negatively impact the position of collective agreements, health and medical care, schools or the solutions we have chosen for particularly important areas, such as pharmaceutical and alcohol issues. This is crucial.” (Regeringskansliet 2004).

In Germany, the fear prevailed that high unemployment in combination with the absence of minimum wages would stimulate the inflow of a large number of low-cost workers from the East. What is more, parts of the industry opposed the Directive in view of the former craftsmen-system in Germany, which made it difficult to establish a company in some sectors. Although this law had already been abolished in 2004, the Services Directive provided yet another threat to the crafts sectors (see e.g. Nicolaidis & Schmidt, 2007). The German government responded to the fears of unions and certain service sectors by opposing the original draft Directive. After the first reading of the EP in February 2006, the government welcomed the amendments and stated that the CoOP would have undermined “wage, social security, safety, and environmental standards” (Bundesregierung 2006).

## 7 **ENCAPSULATING SERVICES IN DUTCH POLITICS - COUNTERFACTUALS AND CONCLUSIONS.**

Dutch politics about the draft Services Directive has been typical for socio-economic decision-making processes in the Netherlands and atypical compared to many EU countries. This final section will inspect the specificities of the Dutch decision-making process of the Services Directive. We do so by considering possible 'counterfactuals' (i.e. 'what-if' questions). What would have been the effects of more politicisation, a different communication and a different timing of communication and politicisation about the Directive in the Netherlands? Would the Dutch government position have enjoyed greater legitimacy under these hypothetical circumstances? Would more *politicisation* of the issue have led to more *legitimation* of the support of the directive? The what-if queries will be preceded by an analysis of the Dutch policy-making process about the Directive, relying on the four concepts critical to the WRR project: *political and administrative uncertainty, politicisation, societal embedding* and *legitimacy*.

### 7.1 **The Dutch policy-making process of the Directive**

The Services Directive is a highly technical issue, hard to understand for citizens that do not have the time, or desire, to study its contents. Although the Directive is largely a means to codify the ECJ rulings regarding the free movement of services, and to protect much more effectively free establishment in services, it remains a *political* issue as the Directive may affect the distribution of income and jobs in the internal market. The fact that political leaders decided to open up the internal market decades ago, including the market for services (more specifically in 2000 with Lisbon), does not automatically *depoliticise* the issue of the Directive. Quite the contrary, it is the prudent and selective approach employed so far in services, in other words, *not* launching an overall attack at all barriers in services markets, which has depoliticized this area of EU policy making. Given the political salience of the proposed directive, it is therefore crucial to adopt a Services Directive that meets the terms of legitimacy.

Interesting and important to note is that the no-camp in the EU would seem to have won the crucial part of the 'battle' on the Directive, that is, on the CoOP and sensitive derogations. And this was accomplished without dropping the establishment section. In that fashion the anxieties of many citizens have been addressed. However, this is not, or hardly, due to the actions of Dutch actors. Dutch labour unions have assumed the most moderate stance towards the Directive (at least, in the EU-15), while the Dutch Government and a Parliamentary majority advocated a Directive much closer to the original draft than the current proposal. Only two sectoral unions in the FNV, the SP, minor interest groups at the



national level and a few Dutch Members of the European Parliament (e.g. Ieke van den Burg (PvdA) and Kartika Liotard (SP)) have campaigned against the draft. Many of them consider the new proposal as a victory (e.g. the FNV and Ieke van den Burg), while the SP still considers the amendments to be insufficient.

Before asking the "what-if" questions, the four key concepts in the 'Europa in Nederland' project will be related to the services debate in the Netherlands: *political and societal uncertainty, politicisation, societal embedding and legitimacy*.

#### *Political and societal uncertainty*

In the case of the Services Directive, *substantive* political uncertainty rather than *procedural* political uncertainty played a role. In the Dutch Parliament, MPs had numerous questions for clarification. Minister of Economic Affairs Brinkhorst (D66) fulfilled a significant informative and guidance function. In other words, Brinkhorst performed a clear 'leadership' role. Although some difficulties emerged in interpreting the draft, one cannot say that there was significant administrative uncertainty. Concerning the Directive, a relatively low level of societal uncertainty existed, compared with the uncertainties abroad. This might be attributed to the longstanding Dutch tradition of leaving technically complex directives to the political and administrative elite, given the 'permissive consensus'. The upshot of this implicit delegation was that the EU knowledge amongst citizens was very poor, but this seemed to worry very few people until recently. In this sense, the lack of uncertainty can also be read as the continued trust in the implicit delegation to the elite. Only for specific groups perceiving themselves as potential losers, this trust was fading away. Once delegation was mistrusted, of course the lack of knowledge immediately led to uncertainty. The SP, parts of the labour unions and certain civil society groups expressed their concerns about the Directive. These concerns consisted of *insecurities* (fears regarding financial and economic consequences) rather than doubts about the *meaning* of the Directive. However, in general the issue did not lead to widespread anxiety in Dutch society, presumably the result of a low level of attention for the Directive. Of course, that low level of attention may well have been the result of a lack of societal and political contestation. The upshot is that, in Dutch society, the Directive did *not* noticeably contribute to uncertainties and insecurities related to the broader topic of EU integration.

#### *Politicisation*

The Dutch debate about the Directive undoubtedly caused some politicisation of the regular Dutch political processes. Political parties in the Dutch Parliament took up contrasting positions and this entailed consequences for the outcome of the decision-making process. The SP has been the clearest opponent of the initial, but also of the amended, proposal.

GroenLinks was against the initial proposal, too, but did not make much effort to politicise the issue. The stance of the PvdA in the Dutch Parliament has not always been clear. The three government coalition parties (CDA, VVD, D66) were, after ample information was provided, in favour of an ambitious Services Directive. These three parties formed a majority in the 2004-2006 Dutch Parliament.

A well-known characteristic of the Dutch 'polderculture' consists in the covering up of political conflicts in consensual processes against the backdrop of a pacifying societal context. One might also denote it as 'encapsulation' of politically and technically difficult social issues. The long trajectory of the SER before producing a (unanimous) report with regard to the Services Directive is an example. In the SER, employers and employees aim to reach consensus and Government and Parliament often concur with the SER's view, once it is unanimous. In this way, an issue as the Services Directive becomes *depoliticised* and the incentives for politicisation in the larger societal context disappear because it is seen as superfluous and/or the main contestants are all satisfied.

### *Societal Embedding*

The concept of 'societal embedding' refers to the involvement of citizens with a certain issue. Through a process of embedding, citizens form an opinion about a certain topic, which enables the mobilisation of informed support or opposition.

The degree of societal embedding concerning the Services Directive has not been high. The attention in the newspapers has not been conspicuous (see section 4). Another explanation might be that the lack of politicisation in Dutch society also caused a lack of societal embedding of the issue. In a 'top-down' sense, information from the political elite to the society at large was lacking. 'Bottom-up', the SP, FNV and several civil society groups made efforts to 'embed' the Directive through politicisation of the issue. For instance, the FNV appealed to its members to join European demonstrations against the Directive and a number of members complied. However, the overall societal embeddedness remained quite limited.

### *Legitimacy*

The concept of legitimacy is related to the public opinion; a certain policy is legitimate when it is acceptable for citizens. There are several reasons why policies are seen as (un)acceptable: some are related to the system of democracy, some to feelings of identification and some to the substance of proposals. A distinction can be made between 'input-' (government *by* the people) and 'output-legitimacy' (government *for* the people) (Scharpf 1999). Input-legitimacy refers to the decision-making process and the possibilities for citizens to influence this

process. This influence can be exerted in an indirect way through political actors or interest organisations. In this case input-legitimacy amounts to the degree in which citizens' opinions are in fact *represented*. Connected to this sense of being represented is the citizens' demand for accountability of the representatives in the parliament or other key bodies. Output-legitimacy hinges on the substance of a certain policy; whether *this* policy is *acceptable* for citizens and whether this policy reaches its targets. Following e. g. Beetham & Lord (1998) as well as Thomassen (2002) a legitimate policy also requires a certain extent of European identification and citizenship.

We discuss the concept of legitimacy in the case of the Directive along the four requirements presented above: input-legitimacy, accountability, output-legitimacy and identification/citizenship. In the case of the Services Directive, direct democracy like a referendum was absent and indeed never considered (in any event, before the 2005 referendum on the new EU treaty, a national referendum had never been held and the legal basis for it did not exist). The question is then whether political actors and interest organisations represented the opinions of citizens. In this question, input- and output-legitimacy might overlap, since the opinions of citizens are unquestionably linked to the outcomes of a decision-making process. However, if democratic rules are respected, the decision might still be 'acceptable' to voters so there is no one-to-one relationship with the outcome of the political process. In terms of input legitimacy, taking the public opinion data as indication, opinions of citizens have been represented in a rather imperfect fashion (see section 5). Most parties deviated from their voters' negative stances towards the Directive. One must bear in mind, however, that citizens were probably not very well-informed about this issue, given the lack of information in the newspapers, and probably in the media as a whole. The lack of politicisation might in turn have caused this lack of media-attention.

However, although citizens have been critical when asked directly, a high level of societal contestation has remained absent. Neither the substance of the drafts, nor the Dutch decision-making process with a prominent role for the SER has been seriously contested. This might have to do with the fact that citizens simply *do not care*. However, considering that in other countries public contestation was present, this is unlikely to be the whole story, certainly not in the later stages. Another explanation is the lack of involvement of Dutch citizens. If citizens do not know what is going on, how can they be expected to protest against it? The least one can say is that, if there were legitimacy problems, they were not *revealed*. There are strong indications (Van Keulen, 2006; Van Grinsven, van Keulen en Rood, 2006) that the lack of involvement of citizens is typical for the Dutch way of dealing with European issues. These 'elitist' and technical decision-making processes in the Netherlands, of which the process of the Directive can be seen as an example, have likely contributed to a growing

euro-scepticism of segments in the Dutch population. This is amplified by a general lack of accountability in ways understandable and interesting for the Dutch citizens.

Turning to the output-side of legitimacy and considering the contents of the Services Directive, the question can be asked whether Dutch citizens support the idea of service market liberalisation. Considering Dutch public opinion (see section 5), the Directive could *potentially* have led to output-legitimacy problems in Dutch society. Dutch people seem to have a clear opinion about related issues (the 'indirect agenda' of the debate on the Bolkestein Directive) such as the perceived or actual movement of jobs to Central European countries and the entry of Central European workers on the Dutch labour market. Yet, as already stated, large scaled protests remained absent in the Netherlands. It is not certain, moreover, how citizens evaluated the final outcome of the decision-making process of the Directive, if indeed they assessed the outcome at all. However, considering the worries many citizens have about European economic integration and the negative stance about the Directive in the *NederlandinEuropa* survey, many Dutch citizens will probably not regret the watering-down of the Directive. In terms of output legitimacy, therefore, potential legitimacy problems might be traced to the positive stance of the Dutch government about the Directive, rather than to the outcome at the European level. .

Finally, with respect to identification, one wonders whether the negative stance towards workers from Eastern Europe can be explained by the lack of identification of Dutch voters with the larger EU. People might not like the idea that Eastern European workers come to the Netherlands simply because they are *foreign* and because they do not conform to Dutch culture and identity. However, it might also be the case that citizens fear Eastern European workers merely because they constitute an economical threat. Whether Dutch workers or Polish workers take over jobs is irrelevant here. According to Jacques Thomassen (2005), an indication for the existence of EU-wide 'social capital' is the level of mutual trust. For instance, the level of trust of Dutch citizens towards Polish people is quite low, although not much lower than the trust in French people and not as low as the trust in Italians (Thomassen 2005: 75-6). Hence, even when leaving aside the question what 'trust' actually means, it does not seem to be justified to trace legitimacy problems to the lack of mutual feelings of 'citizenship' *specifically* between Eastern Europeans and Dutch citizens.

In a more abstract sense, a failure of identification due to a lack of loyalty to- and 'estrangement' from the European political elite might have been fed by this issue. The decision-making process might have contributed to the feeling among Dutch citizens that EU policy just 'happens to' people without having any sense of control. The fact that a considerable degree of attention for this subject was missing in the Netherlands at the time

that decisions were made, might enhance the feeling that EU policy is made without consulting (Dutch) citizens.

## 7.2 Embedding and Politicising the Directive in the Netherlands

How could more involvement and more political contestation with regard to the Directive have been accomplished? Firstly, this would start with **better communication** of the issue. Considering the relatively modest amount of newspaper articles, the communication of the Directive to Dutch society has not been extensive. Increasing the attention and information about the Directive would be a beginning, as a necessary condition for the process to be more politicised and the issue better embedded. This can be seen as a responsibility of the media, and in other ways of the government, possibly also for interest and civil society groups including business.

Secondly, the supporting camp, including the Dutch Government and businesses, could have been more involved in the public debate. Rather than taking a reactive stance in denying the risks of the Directive that the opponents put forward, the supporting camp could have been more effective by providing targeted information about possible concrete advantages of the Directive, rather than mentioning abstract macro-economic figures. **If the supporters had played a more active role** in the debate, and if the attention for the Directive had been more widespread as a result, a more open process of politicisation might have occurred. As a by-product, also other features of the Directive apart from the CoOP and sectors of general interest might have been highlighted. This would have provided a more complete picture of the Directive to the larger public and could also have triggered a more 'measured' debate.

Thirdly, **a different timing** of the attention would have been required. The first peak in the newspaper attention came only in March 2005, more than a year after the presentation of the initial proposal and at a time when the Dutch government had already formed a preliminary stance towards the first draft. Such a peak seems to be a bit late if people need to be involved. More attention could have been paid on moments when Dutch actors debated the issue and 'windows of opportunity' emerged for the Dutch government to actually influence the proposal.

This would also have contributed to the fourth item: **greater transparency**. More information at times when substantial decisions are made provides a better insight in what matters in the decision-making process. The newspapers did pay attention to the European level of decision-making regarding the Directive, but far less to the stance of Dutch political actors. The provision of information is also a responsibility of the relevant politicians.

Finally, the role of the SER has been a preponderant one. The Services Directive is a complicated subject which is also hard to understand for politicians. The existence of an advisory institution as the SER is therefore desirable. Moreover, the fact that employers and employees try to find consensus in this institution can lead to constructive outcomes and to an increase in the level of legitimacy for a certain policy. However, the risk exists that the parties involved in the SER *depoliticise* a certain issue. Indeed, the very SER process is likely to have that effect. As they take the lead with a compromise position, possible disagreements are overcome, and in so doing politicisation is pre-empted and little media attention will be attracted afterwards. The upshot is that incentives for citizens to get informed and involved with regard to this issue remain limited. Besides, politicians considered the agreement in the SER as a reason to disregard the merits of communication to society at large.

### **7.3 Embeddedness and politicisation related to legitimacy**

Concerning EU policy, Simon Hix argues that politicisation is the key to 'policy learning' and to an increase in legitimacy. With regard to the Services Directive, Hix states:

Currently there is widespread opposition to the liberalisation of the service sector in Europe. Citizens' views on this issue are soft and easily manipulated by vested interests, such as public enterprises and nationalistic newspapers. If there was a more open political debate on this issue, voters would learn that the proposed directive is not as radical as some of the opponents claim and also that liberalising the service sector is more likely to create jobs than erode jobs. The result would be a more measured debate and a likely policy compromise (Hix 2006: 9).

Stefano Bartolini is much more sceptical about the merits of politicisation. He argues for instance that it is questionable that Euro-parties can offer a significant left-right spectrum, since much of the agenda is predefined. Bartolini also holds that the narrow Treaty boundaries do not allow for real political mandates and that politicisation may raise expectations which may not be fulfilled, leading to an even worse citizen-EU relationship (Bartolini 2006: 45-6).

Considering the Dutch case, would more politicisation be an effective means to enhance the legitimacy of the Services Directive? One might consider the Constitutional Treaty, where politicisation of the issue clearly did *not* lead to an increase in legitimacy of this Treaty. However, it should be taken into account that the politicisation regarding this issue was not very 'balanced'; the opposing camp clearly took control over the campaign. The Directive is comparable to the Constitutional Treaty in that it is a very complicated and technical dossier, not easy to comprehend for the large majority of the population. Moreover, the Directive

deals with politically salient issues involving the distribution of income and employment and these are sensitive issues for a large number of people (see section 5). As with the campaign on the Constitutional Treaty, an increase of politicisation might have led too easily to the dominance of the sceptical camp, precisely because simple and fearsome slogans might substitute for complexity. Even with a well-performed promotion campaign of the Directive, the likely mismatch between citizens and politics with regard to EU policy may not succeed in increasing the support for this issue. The underlying problems of this long-disregarded mismatch cannot be done away with in a swift, substantive campaign about a highly intricate question. Of course, one should not push the comparison with the Constitutional treaty too far. After all, the mode of a referendum contrasts sharply with the routine adoption of a directive, even when politicized. Referenda prompt a drastic change in style and generate extreme simplifications, whereas such strategies do not work in parliaments when directives are debated.

Another complicating factor with regard to the politicisation of this issue is that it is easier to identify the 'losers' of an effective Services Directive than the 'winners'. Although competitive service providers can be marked as 'winners', the fear exists that Eastern-European service providers are more competitive than their Dutch counterparts (even if that is only the case for a few sectors). Therefore, at least the *impression* prevails that at the individual level there will be more identifiable 'losers' than 'winners' from the Directive in the Netherlands. On the other hand, as outlined in section 2.3, the 'winner' of the Directive might be the more abstract Dutch 'economy as a whole' or the 'general interest' of the Netherlands. While representatives of the alleged 'losers' can quite easily be recognised (most prominently the FNV and SP), there is not really a specific interest group that represents the 'general interest'. Thus, it is easy to imagine that politicisation of this issue would lead to an imbalanced debate in which the fears expressed by labour organisations outweigh the less represented arguments about the positive consequences for the Dutch economy as a whole. With regard to the Services Directive, however, the Government, the coalition parties and employer organisations acted as the counterweight of the FNV and SP. If politicisation is to be a means to enhance legitimacy the latter actors should have assumed a more active role in the debate.

Therefore, we cannot generalize about a possible counterfactual that intensifying the Dutch debate on the Directive would lead to an increase in support for the Directive. The highlighted issues in the news were the perceived dangers of the Directive, while the portrayed positive consequences consisted of abstract positive economic effects. In this way the debate has mainly been 'negative': opponents of the proposal emphasized the negative consequences of the Directive, while supporters mainly explained why the opponents were wrong. Problems of legitimacy might emerge with regard to the contents of the Directive,

since people may fear to lose jobs and income. Also, even when the attention for the Directive would have been more extensive, the timing could still have led to problems of legitimacy with respect to the decision-making process. More media attention need not lead to more legitimacy if this attention comes at a relatively late stage; people might feel that the decision-making process has already proceeded behind their backs. This also relates to the more general legitimacy problems concerning the citizen-politics relation.

Hence, politicisation and embedding do not automatically generate an increase in legitimacy. To accomplish this, the *terms* of the debate would have to be modified. Instead of a 'negative' debate, a more encompassing debate should have emerged. Supporters of the proposal should not limit themselves to criticising opponents or emphasizing abstract economic advantages of the Directive. Instead, they should focus on more tangible effects of the Directive, such as opportunities for Dutch companies and the benefits of Central European workers. In addition, supporters could have made more effort to promote and explain the Directive to a wider public. In the relatively timid debate outside the parliament, the dominance of the opponents of the Directive can partly be explained by the lack of initiative from the supporting-camp, including minister Brinkhorst and several political parties. Brinkhorst fulfilled a leadership-role in Dutch politics, but not in the wider societal debate. In order to convince people of the Directive's virtues, a clear leadership role for Brinkhorst in the broader debate would be helpful. Also, the timing of the communication should have started earlier. This might have led to the feeling amongst citizens that they are actually involved in the process.

When public opinion about the Services Directive turned out to remain negative, as shown in polls, it does not enhance the legitimacy of the policy-making process if the Dutch Government decides to stick to its relatively positive stance towards the Directive. If the Government wishes to enhance the legitimacy of this issue, and if its explanation and arguments in favour of a strong Directive do not find support in Dutch society, it either will have to campaign much more forcefully, or, it should propose, or agree to, amendments which respond to perceptions among voters.

Assuming that a far-reaching Directive does serve the Dutch economy; is the involvement of citizens desirable, given the risk that the Directive might have to be weakened or dropped? In addition, the opening of the Internal Services Market has been laid down in the Treaty long ago, so is it not more than logical that a far-reaching Services Directive comes into existence? Indeed, there may be valid grounds not to actively seek the involvement of citizens in the decision-making process of the Directive. Nevertheless, this line of action conflicts with the



aim to enhance the involvement of citizens with the EU. On the contrary, it might harden the cynical stance of citizens towards the EU and towards Dutch politics in general.

Finally, one could object to the claim that an increase of legitimacy of the Services Directive is ensured through more and better-timed attention, a more open debate and a more transparent decision-making process, since, looking at the opinion polls, citizens are concerned about the economic consequences of getting Central European countries into the EU. In turn, this might partly be explained by the lack of societal embedding regarding this issue. Nevertheless, the recently emerging Euroscepticism in Dutch society will not vanish instantly if topics as the Services Directive are better embedded in Dutch society. The 'permissive consensus' about Dutch EU policy making seems to have disappeared. The 'old-fashioned' decision-making process may no longer be an option and politicisation of EU policy may well be inevitable to increase the legitimacy of the EU in general. The present paper suggests that this might well be a long-run process rather than a sudden kink in a trend. The services dossier demonstrates that, although the conventional 'encapsulation' so typical for the Dutch polder approach can be a means to gain legitimacy for EU policy, a compromise in the SER may no longer provide the legitimation for politicians to abstain from further societal embedding. Perhaps long-run political processes about the EU in the Netherlands might be expected to change profoundly, following the shock of the referendum and the problems of legitimacy that might have caused it, but there is no case for arguing that the services directive has contributed to this new departure.

## **ANNEX 1 THE SERVICES DIRECTIVE'S TIME-LINE**

In this annex we provide a general time-line concerning the creation and modifications of the Service Directive. The description below will focus on the European level. In *table A* an overview of the time-line is provided as well as the involvement of Dutch actors.

As mentioned in the introduction, the intention of removing obstacles from the internal market already dates from 1957. Yet, this initially failed with regard to the services market. The Single Market program of 1985 can also be interpreted as a firmer attempt to address the obstacles on the services market and taken as a starting point for the time-line of the Services Directive. Still, over the last two decades, the removal of barriers in the services market has only been accomplished selectively.

In March 2000, the Lisbon strategy was embraced by the European Council, based on the aim to make the EU “the most competitive and dynamic knowledge based economy in the world by 2010” (European Commission 2004b: 3). Since a free internal market is deemed indispensable to reach this goal, the situation of the services market receives attention again and the Commission sets out ‘An Internal Market Strategy for Services’ (European Commission 2000). In July 2002 the Commission presents a report about the many, often highly restrictive barriers in the services market and their impact on the economy (European Commission 2002). Afterwards, the European Council repeatedly stimulates further work on this strategy. For instance, in the report of the Council meeting in November 2002 the Council explicitly encourages the liberalisation of the services market and “URGES the Commission to accelerate work on the second stage of the Internal Market Strategy for Services” (Council 2002: 11).

The first proposal for the Services Directive is presented by the Commission in January 2004 together with an impact assessment (European Commission 2004a; 2004b). In the meeting of the Council in March “the Council stress[es] the importance of the proposed Directive to which it will give high priority with a view to making speedy progress” (Council 2004a: 14). In the report of November 2004 the Council is positive about the general aims of the Directive, although it asked for clarifications for instance with regard to the scope of the Directive and the country of origin principle (Council 2004b: 16). However, the newspapers (see section 5) report that during the European summit some countries have serious reservations about the initial draft, most notably France and Germany.

In March 2005 labour unions demonstrate in Brussels against the draft Directive. They are afraid that the Directive will endanger labour conditions and that the Directive will lead to the take-over of jobs by Central European workers. Also in this month, the divergence

between the member states becomes clear again at the European summit. France is a firm opponent of the country of origin principle, together with a number of other countries. The Netherlands, the UK and the Central European countries are broadly in favour of the proposed Directive.

In December 2005 the European Parliament provides a voluminous final report on the Services Directive (European Parliament 2005). The Parliament, led by the German social democratic rapporteur Eveline Gebhardt, proposes numerous amendments. On February 16, 2006 the Parliament votes in favour of a drastically revised version of the Directive. The adopted amendments are mainly the result of the coalition between the Conservative (EPP-ED) and the Socialist group (PSE) in the European Parliament. Due to this coalition, the left wing groups, that wish to amend the initial draft even further, and the liberal group (ALDE), which claims that the amended proposal is watered down too much, do not get their way.

On April 4, 2006 the Commission presents a revised proposal that includes most of the amendments that were made by the European Parliament (European Commission 2006). On May 29, the Competitiveness Council expressed its political agreement with this proposal and on November 16 the European Parliament adopts the proposal in its second reading.

**1985 – 1993** => Single Market Programme, services only addressed selectively.

**1991** => Säger Case: (Cassis-de-Dijon type) Ruling ECJ on free movement of services; landmark.

**March 2000** => Lisbon strategy for socio-economic reforms: A call for a more competitive Union and the further removal of barriers in the internal market.

**December 2000** => Commission presents 'An Internal Market Strategy for Services', based on a horizontal rather than a sectoral approach of the services market.

**July 2002** => Report Commission on existing barriers in the internal market for services.

**November 2002** => Council urges Commission to accelerate work on Internal Market Strategy.

**January 2004** => Commission presents proposal Services Directive and impact assessment.

- September 2004 => Minister Brinkhorst sends letter to the Dutch Parliament in which he explains the position of the Dutch government and, broadly, supports the Directive.

**November 2004** => European Council is divided about the country of origin principle.

- December 2004 => Government requests advice from SER.
- April-July 2005 => SER advisory report (draft and final).

**March 2005** => Extensive labour movement protests against the Directive in Brussels.

=> Council divided: Notably France (also Germany, Denmark) oppose draft.

- March 2005 => Critical booklet 'Bolkesteinbubble' (Dutch PES delegation, EP).
- May/June 2005 => Negative referendum results with regard to the Constitutional Treaty in France and The Netherlands.
- Autumn 2005 => Second thoughts FNV regarding the Directive.

**December 2005** => European Parliament IMCO proposes heavily amended version.

**February 16, 2006** => European Parliament backs an amended version of the Directive.

**April 4, 2006** => Commission presents revised draft Directive in second reading, largely consistent with amendments European Parliament.

**April 25, 2006** => Council informally concurs with Council's amended version and wants to bring the matter to a conclusion by the summer of 2006

**May 29, 2006** => Council officially supports the revised Commission proposal.

**November 16, 2006** => European Parliament adopts Services Directive in second-reading.

*Table A. Time-Line Services Directive*



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## NOTES

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<sup>1</sup> Alliance between Verbond van Nederlandse Ondernemingen and Nederlands Christelijk Werkgeversverbond.

<sup>2</sup> Representatives of involved ministries also attend as observers and can speak when requested.

<sup>3</sup> Although France does have a Socio-Economic Council, it does not have an important intermediary and expert role for independent analysts and has a far less central position in the political process.

<sup>4</sup> Host country control based on minimum wages realizes non-discrimination in the host country at the cost of "drying up" a large part of the demand for labour or service provision (with lower wages). Thus, what looks like a principle inspired by non-discrimination has the unfortunate effect of taking away almost any opportunity of service providers from Central Europe to exploit the internal market and, in this sense, it is quite protectionist. For analytical proof, see Pelkmans, 2006, p. 198.