The controversial point is the method by which the EU directive intends to expand competition in the services sector. However, the liberalisation of this sector is indispensable: suffice it to say that,

The Bolkestein directive: Real and false problems

SOCIETY

by Tiziano Treu

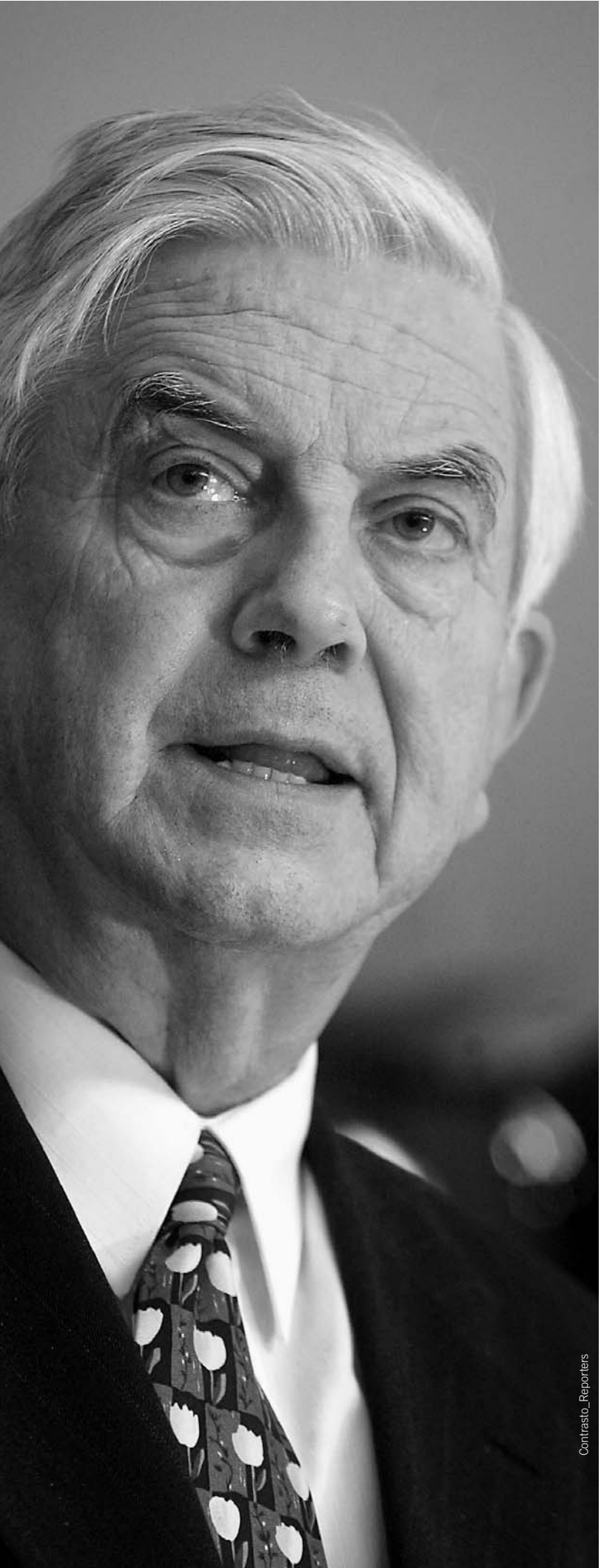
while services account for about 60% of European GDP, trade in services accounts for a mere 5 percent. This explains the compromise that has been reached

The proposed directive known as the Bolkestein directive is one of the most controversial ones in recorded EU history. It has been the subject of contrasting views on the part of member States – largely favourable as regards the East European countries and the views of the "old" Europe, mainly worried about competition from low-cost services offered by the new member States. There is widespread concern among categories of service providers that would be affected by the liberalisation (artisans, traders, professionals etc.) as well as among salaried workers in the West and their trade unions, who fear (only partially with good reason) negative repercussions, both direct and indirect, on their working conditions. Moreover, there is a continuing and serious lack of information as regards the proposed directive; on the contrary, it has often been the subject of a real campaign of disinformation, which has contributed to aggravating (and occasionally distorting) the reasons for the conflict. And yet the subject has always been a central one on the Community's agenda; it can actually be retraced to the EU's main principle – encouraging free circulation of goods as a way to integrate markets and thereby stimulate competitiveness and growth.

The truth is that, while this principle has been progressively implemented in terms of norms as well as in practice as regards goods and, to a different extent, people, the free circulation of services has so far been more of a legal concept than a concrete fact. The need to also promote and regulate this aspect has become increasingly concrete in recent years for a fundamental reason – the one on which the proposal is based. While the share of services in the European (as in the world) economy has grown to the extent of providing over 60% of GDP, trade in services has grown far more slowly, accounting for less than 5% of GDP in the 15-member as well as the 25-member Europe. The figures hence unequivocally demonstrate that the integration of the services market is lagging behind the market for goods. They confirm just as unequivocally that this delay is due to the existence of different and often restrictive rules in the various member states.

Overcoming these obstacles, as the directive proposes to do, is an objective that is not in itself contested.

Opening up the services sector to competition among countries and within each country, as was earlier the case with industry, is essential



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to stimulate our continent's growth: competition is a "driver of productivity". The difference in Europe's growth as compared to other countries, starting with the U.S., is largely due to the low productivity of our services.

Proposed steps: the country of origin principle; the harmonisation principle

The critical point that sparked the controversy concerns the method by which the directive intends to expand competition in the services sector. Specifically, the controversy is directed at the affirmation, contained in Article 16 of the original proposal, of the so-called country of origin principle, according to which service providers are subject exclusively to the laws of the member State of which they are citizens and are, conversely, exempted from the norms of the State in which they operate.

This method of intervention is the most drastic of all the possible steps because it frontally opposes the fundamental principle of the sovereignty of national law, according to which the rule applicable to services is that of the target country.

This rule is deeply ingrained in the provision of services-related employment, particularly that of subordinate employment (largely approved recently by directive 96/71).

A different solution, in principle the most in accordance with an ordering of Europe that would wish to integrate "positively" is that of harmonisation, i.e. the issuing of Community norms aimed at homogenising or at least bringing the different national laws closer together, particularly by fixing common standards accepted by all. This is the path the Community has taken in other regulation contexts, whether of a technical or a social nature. The numerous directives concerning subordinate employment are typical of the latter and are an example of positive integration of the European system, aimed at reconciling the opening of markets with the guarantee of rules able to safeguard working conditions and thereby cohesion in a social

_Ex-internal market commissioner Frederik Bolkestein, author of the highly controversial EU directive that seeks to expand competition in the services sector

Europe. In the specific case of services, this path was deemed to be impracticable on the grounds of the need to quickly overcome the differences in regulations that constitute obstacles to the free trade of services.
Because of the large number of services and the variety of their specific characteristics, harmonisation in the short term – carried out, on the other hand, for specific sectors such as transport, telecommunications etc. – was deemed to be unrealistic.
While the issue in itself would not be insurmountable, the process of harmonisation can be expected to be slow and partial, as has been the case in other sectors – from technical regulations for the most diverse products to administrative procedures and subordinate employment itself. The slowness and partiality, which can be attributed to the fact that Community authorities are scarcely able to impose common rules on different national regulations, are an element of great weakness of the entire European constitution that can be seen in the individual steps taken. In our case, too, only a greater ability to establish common rules through a harmonisation adapted to positively integrating the different national systems would have made it possible to give more adequate responses than those provided during the tormented course of the directive and the compromise solutions that have so far emerged, i.e. to expand competition in the various service sectors without undermining interests worthy of being safeguarded. A similar emphasis comes from the economic and social committee of the Union when it reminds the Commission that the necessary conditions will have to be created for a generalised application of the country of origin principle, particularly by favouring a harmonisation with high worker protection standards.
With this path having been deemed impracticable, the direct path – or, if we prefer, the shortcut originally proposed by the Commission, based on the general application of the country of origin principle – showed itself to be equally prohibitive. In fact it immediately encountered opposition, justified (among other things) by the fear that a total opening up to competition would lead to the dangerous phenomenon of dumping, i.e. competition that would lower the existing conditions in various countries.

Opening up to competition and social dumping

The objection raises a real problem, related to all economic trade, not only as regards services but also as regards goods and capital in free markets. The problem relates to the possibility that individual countries (in the European context, the possibility is deemed to be more concrete for the Eastern countries) may decide to adopt permissive rules to attract capital and companies (both industrial and services-related) to their territory. Hence the problem goes beyond the circulation of services, and has been faced in every instance of a market opening up – seeking a balance between the need for competition and that of maintaining standards and rules that safeguard assets and rights worthy of protection.
As regards services, this balance is particularly critical compared to industry, for the supply of services generally requires the provider to be directly present on site and in contact with the user of the service. Actually, with the availability and growing use of information technology applied to the long-distance supply of some services (call centres, medical diagnosis, etc.), this is no longer always that necessary. This structural specificity contributes to explaining the (gradual) acceptance of the possibility that competition among industrial products avails of lower production costs, including labour costs, in certain countries; and why, on the other hand, the same tendency evokes more widespread reactions in the case of the supply of cross-border services, which require the proximity of supplier and user and hence place the former in direct contact with similar services and activities provided in the host country. Above all, in these cases work and company are often so close as to nearly coincide.
Economic theory would actually have it that the spread of competition, as the directive proposes, should not have a different impact depending on the goods in question. To quote French economics professor Gilles Saint-Paul: "Thus, there is no reason why French hairdressers should complain more about Polish hairdressers than about, say, Polish textiles, or indeed about competitions from the millions of unskilled unemployed in the French labour market". In a perfect labour market, all the negative effects of the liberalisation of haircuts would be diluted into

_Parliamentary debate on the directive led to a compromise solution aimed at juxtaposing the objective of greater competition with protection against the risks of excessive competition

the economy in the form of lower wages for everyone, and not be felt by hairdressers in particular. The fact is that labour markets are segmented, which makes it difficult to switch trades, in the short term at least. For this reason, the liberalisation of a service has negative effects on the suppliers of that service, who cannot reconvert themselves. But, on the other hand, it has been correctly noted that the regulatory barriers to entry play an important role in generating market segmentation, so that their removal would help to break the vicious circle of low mobility and low competitiveness, once again especially as regards services that are not exposed to competition.
In any case, and for these reasons as well, the different contents of regulations concerning the circulation of goods and services must be taken into account when considering the effects and feasible extent of liberalisation. The rules regarding the establishment and activity of service companies, some of which the directive has harmonised and simplified, have different motives and justifications that may be required to safeguard public assets such as the environment, factory safety and consumer defence – or may, conversely, be mere pretexts to block the entry of undesirable competitors, and the distinction is not always easy to establish in practice. On the other hand regulations on service supply have a different reach depending on whether the supply is in the form of self-employment (crafts, trades, professions, etc.) or in the form of salaried employment with the services company.

The principle of safeguarding subordinate employment

This distinction has been established, although not in an unequivocal way, in the Community regulation and is important to clarify – if not eliminate altogether – the context of the controversy. One of the reasons

for the opposition to the first drafts of the directive derived in fact from the incomplete definition of this point and hence the possibility that the country of origin principle could also be applied to the discipline of subordinate employment; i.e. to use a common reference, not only to the Polish plumbing company but to its employees as well. The point was clarified in an amendment by the European Parliament, which excluded matters concerning employee-related legislation (regulated by Directive 96/71, approved by the Italian Presidency and registered as Decree 72/2000) from the application of the country of origin principle. While this exclusion is not total, it is quite wide-ranging because it concerns national regulations (resulting from law or collective contracts effective *erga omnes*) concerning minimum wages, working hours, paid holidays, provision of employment, safety, health and hygiene, the working conditions of working mothers, children and the young, as well as the principle of non-discrimination. As a result, in these matters cross-border services companies must apply the rules of the country in which they operate, not the rules of their country of origin, to their employees. Conversely, regulations regarding the right to strike and costs related to welfare, hiring and firing are subject to the country of origin principle.
As we can see, this is a compromise solution that tends to balance – in an approximate way, if truth be told – the principle of competition with that of the safeguarding (of certain aspects) of subordinate employment. A compromise solution was also sought in the arduous process of approving the measure as regards the above-mentioned rules. To evaluate its sense, a clarification that is not generally explained must be made regarding the nature of the work involved in services activity.
The need for safeguards reserved for subordinate employees in that they are the weaker contracting party have made it necessary to protect working conditions with non-derogable norms. Such protection has become a typical feature of subordinate employment, common, albeit in different ways, to all European countries and partly transposed into Community directives. This is not the case as regards self-employment, from which services activity largely derives its support.

The principle of freedom of self-employment

For these activities, the general principle is that of the freedom of the parties to contractually define conditions without the imposition of external norms. Here, the refusal of the country of origin principle therefore does not have reasons comparable to those used to safeguard subordinate employment. If anything, a critical point in the matter could concern the difficulty of identifying a precise dividing line between self-employment and subordinate employment; there is hence the possibility that some activities – once again, especially service-related activities – may be qualified, by national authorities or with their tolerance, as self-employment and hence left without safeguards, whereas in reality they often conceal forms of subordinate employment. One of the most striking examples is the Italian experience of short-term contracts (previously "continuative collaboration" contracts, known in Italy as "co.co.co", and now called "project contracts") and VAT-registrations with a sole employer, which are subject to controversy as regards qualification times and, above all, their application. The criticality of the issue is also related to the fact that individual countries qualify types of employment, and it is not certain that the European Court can censure national choices in order to ensure the application of this directive. The Court's consolidated jurisprudence has supported the relevance of a Community notion of the subordinate employee so as to not leave member states to determine the context of application of the principle of free circulation and hence exclude certain categories of workers from the related guarantees. According to this orientation, intervention by the Court would be admissible to oppose qualifications by a country's lawmakers aimed at restricting the guarantees contained in the Bolkestein proposal in favour of subordinate employees working in cross-border companies (e.g. by "fraudulently" expanding the concept of self-employment).

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Moreover, the principle of contractual freedom is not an absolute one, and hence does not exclude that various aspects of the independent supply of services, either individually or in the form of a company, may also be subjected to regulations established to safeguard interests of a heterogeneous nature. Some regulations are established to safeguard essential public assets (such as safety, environment and consumer protection), while others are used more or less explicitly to defend the acquired benefits of specific worker categories or sectors: procedural formalities to authorise the exercise of the activity; to outsource work and to establish compulsory rates (minimum and maximum).

The compromise solution: competition and safeguarding public assets

The compromise solution that emerged through Parliamentary debate has substituted the country of origin principle with a selective indication, carried out through provisions concerning different aspects of national regulations: forbidding some as they limit competition and admitting others in that they are deemed to be useful to pursuing interests worthy of safeguards. This result, agreed on by the majority groups in Parliament, is balanced, in that it is intended to reconcile the objective of expanding competition with protection against the risks of competition on the rules.

Overall, the shock of competition would be less strongly felt than in following the application of the country of origin principle, which would have led to a general elimination of national regulatory barriers to the circulation of companies and services. However, it could still open the way to the fall of a system of protectionist norms. Its effect will depend in concrete terms on the method that member states use to apply it and, as a last resort, by the control of the European Court, which will be called upon, as in the past, to evaluate whether provisions by member States restricting the freedom of entry of foreign companies into national territory are justifiable.

In particular, the court will be expected to define whether and to what extent these limits are admissible in that they are fixed for the reasons of public interest indicated

generically in the directive. These are reasons pertaining to health, safety and public order, financial balance in the social security system, consumer and worker protection, equitable trade exchange, combating fraud, protection of the environment and intellectual property rights, preservation of the artistic and historical legacy and social and cultural policy objectives. It is also the Court's responsibility to apply the general principle by which restrictive rules must respond to the criteria of non-discrimination, proportionality and adequateness as concerns the objective pursued.
The jurisprudence of the Court reveals that it has used the return to the criteria of public order and interest and such to a limited extent, to legitimate national norms restrictive of the principles and fundamental values of the system. These precedents do not authorise automatic extrapolations to our case, not only in terms of the new features of the issues tackled in the Bolkestein proposal, but in terms of the content of the principles in potential conflict: it is one thing, for example, to use the criterion of public order to restrict the circulation of people, and another to apply it to legitimate national rules on the activity of services restricting competition. It is to be hoped that the Court will follow the indicated line strictly with sufficient clarity in the proposal, i.e. use such criteria only to safeguard public assets that are concretely appreciable and not to guarantee that protected sectors and hence monopolies cannot be touched.
Significant corrections in the restrictive sense compared to the original proposal have been introduced as regards the application of the directive. Non-economic services of general interest (no-profit, public education etc.), financial services and sectors governed by other Community norms have been subtracted from the directive, as well as the category of services of general economic interest (see list, Article 2). This exclusion, introduced by Parliamentary amendments, appears to be particularly questionable and susceptible of further reducing the impact of liberalisation, not least because the directive gives member States the power to define such general concepts without offering any clarifications as regards the distinctive characteristics of the service in question.

Grazia Neri

_Countries like France, which strictly regulate the services and labour market, are among the most strenuous opponents of the directive, while relatively de-regulated countries like the U.K. have shown that they are favourable to it

The economic effects of the directive: East and West

The directive has not yet been fully drafted and the continued controversies in this regard leave open margins of uncertainty, even if presumably on non-decisive aspects. The impact of the proposal on the cross-European trading of services is also the theme of contrasting evaluations, starting with evaluations concerning the negative effect of the opening of markets deriving from the compromise solutions gradually added to the text. Much will depend, as we said earlier, on the result of the application of national rules and the interventions of the Court of Justice. Although the directive explicitly excludes (considering Article 58) any desire to influence national initiatives in the matter, even a partially positive impact of the proposed liberalisation would have the effect of shoring up national law-making tendencies in the same direction. Events in Italy over the last few months are significant: they signal a strengthening of the push towards liberalisation precisely in some traditionally protected sectors that are more resistant to change, from trade to some self-employed professions, banks, insurance and even the very particular category of taxi drivers.
In fact, the various member States have adopted differentiated and, to some extent,

_The effects of the directive will depend to a large extent on the way it is applied at the national level. Italian events of the last few months signal a strengthening of the push toward liberalisation (above: Joaquin Almunia and Mario Monti)

non-linear approaches to the various stages of the directive. It has been noted that there is no automatic correspondence between these positions and the current type of regulation of services within individual States. It is true that countries like France, which strictly regulate the services market, are among the most strenuous opponents of the directive, while relatively de-regulated countries like the U.K. have always shown that they are favourable to it; but the reverse is not true, in that all the new Eastern member States, and curiously enough Ireland, which have particularly rigid rules by Western standards, are among the defenders of the directives. This means that the East European countries will be called upon to undertake liberalising reforms as radical as those undertaken by the "old" Europe if there is a genuine desire to create a single market for services.

The extent of liberalisation and consensus

One final observation: it is commonly held that the liberalisation of services would favour service providers working in the East European countries, as they are well-placed to export this type of activity, of which they have a large supply at reduced cost, while it would produce net losses for work providers in Western countries, even more so considering that these workers would not be able to easily reinstate themselves in other activities. This indicates that the effect of trade would potentially favour East European suppliers, even more so in that it is accompanied by a high work mobility in those countries, and accounts for the resistance of the same groups in the Western countries. Moreover, the advantages gained by companies in one country that have recourse to lower-cost services provided by companies in other countries must take into account the differential in productivity among various suppliers of the same services: as regards cross-border European trade, it would be influenced by the as-yet lower relative productivity of the Eastern European countries.

Empirical evidence suggests that Italy stands to gain overall from liberalisations, since the strong regulation of these sectors partly accounts for the fact that our rates are high. Liberalising these sectors should lower their costs. The estimation of overall gains and losses, whether of individual countries or, above all, individual groups of operators within it, depends in fact on more complex factors: the level of segmentation of the various markets and hence the mobility of labour and, on the other hand, the extent of the liberalisation. For this reason it can be said that the positive effect of the process of liberalisation is decisively linked to its spread. Likewise, this very extension should influence the possibility of obtaining a consensus on the reforms to be implemented. If, in fact, the process of liberalisation refers to an ample range of goods and services, the losses of individual concerned groups will tend to get spread over the generality of subjects and hence be reduced. Moreover, the same groups will be more easily compensated by the positive effects of the reform on the conditions of price and consumption of liberalised goods, with positive fallout on the advantages of a vast section of citizens and consumers.

This is an important analytical consideration, which should also guide Community and national policy decisions, in the sense of suggesting a non-sectorial and restrictive approach to the issue but widespread, organic liberalisation programmes.