

# The Struggle over the Services Directive: A case study of inter-institutional decision-making in the EU

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Paper presented at Arena Centre for European Studies,  
University of Oslo  
09.02.2010

## **Abstract**

This article analyses the process of co-decision leading to adoption of the Directive on Services in the Internal Market (2006/123/EC) and discusses what the process can teach us about the inter-institutional interaction shaping legislative decision-making in the EU. The decisive role of the EP in this case, and the strong influence of the minority Socialist Party and the European Trade Union Confederation on the outcome, can only be understood in view of the contingent dynamics of inter-institutional negotiations and coalition-building at EU level that were unfolding under the pressure from Eastward enlargement, Treaty ratification and unprecedented public mobilisation in the Member States. Cutting across the distinctions between intergovernmental and supranational dynamics of EU governance, the case lends support to recent analyses emphasizing the importance of informal, shared processes of deliberation and interest-intermediation between the involved EU institutions, conditioning power-relations and outcomes of EU decision-making.

**Key words:** Services Directive, EU decision-making, European Parliament, ETUC, multilevel governance

## 1. Introduction

This article analyses what the two years of political struggle leading to adoption of the contested Directive on Services in the Internal Market (2006/123/EC) can teach us about inter-institutional power-relations, dynamics, and conditions influencing the ability of the European Parliament (EP) to assert itself in legislative co-decision-making in the EU. Hailed by many as a milestone for democratisation of EU decision-making (Kowalski 2006), the outcome whereby the Council, the Commission, and the conservative majority in the EP gave up their initial support for the controversial Bolkestein draft and accepted a compromise strongly influenced by the Socialist minority in the EP, and their allies in the European Trade Union Confederation (ETUC), can only be understood in view of the contingent dynamics of inter-institutional negotiations, cross-cutting coalition-building at EU level and public mobilisation in the Member States in the context of Treaty reform and crisis.

When the European Commission launched the Services Directive in January 2004, the intention was to break up what was seen as the frozen internal market for services in the EU. The Bolkestein Directive, as it was called after the Dutch Commissioner for Internal Market affairs, was initially well received in the Council but soon became subject to political controversy and mass protests across Europe. By introducing the so-called Country of Origin Principle, implying that cross-border service providers would mainly be subject to the laws of their home country, the protestors claimed that the directive would invite unprecedented regime-shopping and wholesale social dumping (ETUC 2004). After a long-drawn political process, the European Parliament (EP) voted for an amended version of the Directive on 16 February 2006 in its first reading, which was swiftly accepted by the Commission and adopted virtually unaltered by the Council on 12 December 2006.

The past decades' transformation of European governance has unleashed grand debates regarding the division of power and influence between the institutions at European level, and the interaction between public actors at national and European levels in shaping EU legislative decision-making (Olsen 2009, Hix et al 2007). The outcome of the strife over the Services Directive draws attention to the role of informal inter-institutional processes and mechanisms of EU decision-making that are often overlooked in debates about the impact of formal changes in EU treaties and rules, thus challenging conventional assumptions about the distribution and sources of power in EU decision-making. Over the past decades it has, first, been widely held that the decisive power centre in EU legislative decision-making is the Council, in which national economic interests are assumed to prevail over social and ideo-

logical concerns (Moravcsik 1993). Second, the European Parliament has in spite of its strengthened role under the co-decision procedure established by the Maastricht Treaty in 1993 and revised in the Amsterdam Treaty 1997 (Shackleton 2000), usually been regarded as a junior partner with limited influence on issues of vital economic importance to the Member States. Third, the Commission has been viewed as the key inter-institutional power-broker at the EU level, forcefully promoting the four freedoms constituting the core of the EU project. Fourth, organized business and product market interest groups have been portrayed as by far the most influential and successful lobby groups at the EU-level (Traxler and Schmitter 1994, Greenwood 1997). Organized labour has been viewed as structurally disadvantaged by the particular opportunity structure of the EU decision-making machinery and the specific challenges of internal interest intermediation (the logic of membership) facing the highly diverse associations of European trade unionism – especially as regards key economic issues (Visser and Ebbinghaus 1992, Dølvik 1998).

The Services Directive case fits badly with conventional assumptions on all these counts. The outcome of the strife was puzzling. How could the Socialist minority in the EP and the ETUC gain such a strong influence on an item of fundamental importance for one of the four freedoms where they were at collision course with organized business, a major share of the Member States, and, not least, the Commission? And why was the Conservative/Liberal majority in the Parliament so willing to compromise?

The aim of this article is not to discuss the content of the compromise Directive (see Barnard 2008) but to use the decision-making process that led to the Directive as a case to highlight the importance of informal interaction, negotiations and coalition-building across institutional boundaries in conditioning power-relations between and within the main EU institutions (Farrell and Heritier 2004; Shackleton 2000), and identify factors that can sometimes enable even extra-parliamentarian forces and popular movements at Member State level to make a difference in the machinations of EU decision-making.

The article is based on a case-study of this process, focusing on factors shaping the role and influence of the European Parliament. With issues and processes external to the legislative dossier, such as the Treaty ratification crisis, Eastward enlargement, and public mobilisation at Member State levels, exerting significant influence on the process, the case illustrates how multi-level dynamics can condition party politics and negotiations in the EP. The study builds on 16 semi-structured interviews with key actors in the European Parliament, the European Commission, and the main European social partner organizations as well as with central actors from Sweden, Germany and Poland. The interviews are supplemented by re-

view of official papers, position papers, press-releases, and relevant research literature.<sup>i</sup> Polish and German interviewees were chosen because they represent the largest countries of the ‘New’ and ‘Old’ Member State camps in the Council and the EP, while the Swedish interviewees represented the Nordic country that was most actively engaged in the strife (Ahlberg et al 2006).

## **2. Background: Context, issues, and legal framing**

The 1986 Single Act had pointed out removal of obstacles to free movement of services as a central element of the internal market programme (De Witte 2007). The Commission had long complained that administrative and regulatory barriers hampered the free flow of services and soon presented its Internal Market Strategy for Services,<sup>ii</sup> in which services and the information society were highlighted as key drivers of the new economy. The next step from the Commission was a report on the state of the internal market for services, which was presented during the summer 2002.<sup>iii</sup> The strategy was based on a horizontal rather than a sectoral approach because of the interdependence of different service activities. About half a year later, in May 2003, the Commission announced that it would make a proposal for a Directive on services in the internal market before the end of 2003. It should be based on a mix of mutual recognition, administrative cooperation and harmonization.

The draft Directive<sup>iv</sup> launched in January 2004 by Commissioner Bolkestein was extremely complex and broad in scope. Aimed at simplifying the establishment of service companies in other Member States (‘single contact point’) as well as abolishing host country restrictions on cross-border provision (trading) of services, it was hard to comprehend even for legal specialists. In terms of cross-border service provision, the most controversial element was the introduction of the so-called country of origin principle (CoOP). This implied that temporary service provision, with a few exceptions, regarding e.g. minimum working conditions, would be subject only to the law of the country in which they were established, implying a strong notion of the mutual recognition (Barnard 2008a). The main issue of controversy related to labour law pertained to the implications for the regulation, control and monitoring of conditions for posting of workers. Although the proposal assured that the (hard nucleus of the) Posting of Workers Directive (96/71EC) should still apply and contained a derogation from the CoOP in respect of posted workers (see Fischinger and Schlachter 2009), it proposed that the main responsibility for monitoring and control of posting of workers was shifted from the host Member State to the country of origin.

Being presented just before the Eastward enlargement 1 May 2004, the proposal was hailed in the new Member States, relieving some of the humiliation they felt by the simultaneous erection of transitional restrictions on free movement of workers in most old Member States. Among the sceptics in the old Member States, however, the introduction of the CoOP and the weakening of control opportunities, were eventually perceived as levers for a profound liberalization that would encourage regime shopping, company relocation, unequal treatment, and low-wage-dumping of posted workers (Hendrixc 2008, Kowalski 2006).

### *Framing of the decision-making process*

After the Directive was launched by the Commission 14 January 2004, the proposal was subject to initial discussions in the Council while at the same time going to the European Parliament for a first reading. The legal basis for the Directive<sup>v</sup> provided for the co-decision procedure.<sup>vi</sup> This procedure, introduced by the Maastricht Treaty, concedes to the European Parliament the right of legislative partnership with the Council. The final agreement of the two institutions is essential if the text is to be adopted as a law. The procedure comprises one, two or three readings. This means, for example, that if the Council agrees after the first reading, the text is adopted. If it is impossible to reach an agreement, the legislation cannot be enacted (Duff et al 1994, Corbett et al 2000).

The Members of Parliament must therefore judge the likelihood that their amendments to a proposal will be accepted by the Commission and avoid (becoming subject to unanimous decision-making and) the risk of blockage in the Council. The options of the various interests in the Parliament thus depend on the views and constellations in the Council as well as of the stance of the Commission, shaping the room of manoeuvre, possible coalitions, and the power relations in the negotiations within the EP. The same goes for the different camps in the Council, implying that the risk of failure and non-decision weighs heavily on the actors in both institutions (Shackleton 2000: 333). Recent research has drawn attention to the importance of informal consultations and preparatory ‘trialogues’ (ibid, Farrell and Heritier 2004) where the Council Presidency and the EP rapporteurs play central roles in sorting out possible common positions, the room of manoeuvre, and no-goes for the involved actors, suggesting that the co-decision procedure may form basis for broader inter-institutional and cross-party dialogues rather than the one-shot power-bargaining implied by analyses inspired by game theory (Rasmussen 2007).

### **3. The process: From the Bolkestein proposal to the compromise in the Parliament**

The launch of the Services Directive did not spark any immediate reactions. Most of the Member-States welcomed the draft as a necessary tool to improve the inner market (Miklin 2008). The main parties in the European Parliament also appeared unaware that the Services Directive could become a subject of controversy. No-one seemed to grasp the dimensions of the proposal, which had been subject to little discussion outside the DG Internal Market in the Commission.

The two years of negotiations and decision-shaping can be divided in two stages: 1) the preparatory, positioning stage from January 2004 until the first reading in the responsible Parliamentary Committee (IMCO) in November 2005, followed by 2) the stage when the drama culminated in the decisive «hot» phase of negotiations when a solution had to be found and a compromise was struck in the plenary EP first reading in February 2006.

In order to understand the broad engagement in the process it is also important to bear in mind the horizontal approach the draft was based on, which meant that it would establish a general legal framework applicable to virtually all economic activities involving services. The work with the Directive became therefore very complex, with a wide range of stakeholders.

#### *The preparatory and positioning phase: Actors and events*

When the EP started to work on the Commission draft, in parallel with initial discussions in the Council, ten parliamentary committees were involved in scrutinizing different aspects of the proposal. Eventually two of these EP committees came to play the dominant roles; the Internal Market and Consumer Protection Committee (IMCO) was responsible for preparing the EP proposal on the Services Directive, but the work proceeded in close cooperation with the Committee for Employment and Social affairs.

From the outset, the majority of the actors inside the Parliament could agree on two things: They wanted to see a new regulation in this field and they wanted to shape the Directive in the Parliament. The main parliamentary groups also soon realized that if they should be able to shape the outcome, win accept from the Commission, and avoid a blocking of the Directive in the Council, they would need a solid majority in the Parliament. But as the division of views between and within the EP party groups gradually came to the fore, a shared concern was indeed whether it would at all be possible to arrive at a solution that could gain the necessary support. Besides the salient division of views between The Group of the Euro-

pean People's Party (Christian Democrats) and European Democrats in the European Parliament. (EPP-ED) and the Socialist Party (PES) concerning the CoOP, the scope, and the protection of labour law, both groups spawned highly divergent views and interests, for example between Eastern and Western MEPs, crossing traditional party lines.

During 2004, growing public mobilization was seen at national level throughout Western Europe. Trade unions, NGOs and parliamentarians organized hearings and demonstrations, gradually alerting the public, governments and politicians. It is not entirely clear where the external opposition to the Bolkestein draft originated, but it seems that it was spreading like a 'grass-fire' from different directions. Clear is however, that during the autumn of 2003, several months before the launching of the Directive, the Swedish trade unions had got hold of the draft. When the proposal became public in January, they were therefore already well prepared and immediately informed the Swedish government about their worries (Miklin 2008). When the alarm-bell was pushed in LO in Sweden, a warning message was also sent to the European Trade Union Confederation (ETUC).

Within ETUC and its national affiliates the CoOP and the restrictions on host country control were quickly identified as a major challenge to the national posting regimes, creating vast opportunities for regime-shopping.<sup>vii</sup> Well aware of the danger of being accused of protectionism against the new Member States, the ETUC soon agreed not to go against the need for a Service Directive but opt for a radical recast of the proposal (Arnold 2008). In so doing, divisions between affiliates in the new and old Member States also had to be overcome. The common platform that was developed focused on erasing any links to national labour law, preserving the Posting of Workers Directive untouched, narrowing the scope of the Directive, and eliminating the CoOP (Kowalski 2006, Jönsson 2006). If that failed, the fall-back position of the ETUC leadership was to achieve a blocking minority in the Council, meaning that the established ETUC 'Task-Force' from the beginning worked closely with key Member States in parallel with the European Parliament.

By contrast, the employer side, where representatives of the powerful BUSINESSEUROPE<sup>viii</sup> unconditionally had supported the Bolkestein draft from its birth, soon became disadvantaged by division and disarray. The interests of small and medium-sized companies organized in UEAPME, in EuroCommerce, and even within BUSINESSEUROPE, should prove increasingly difficult to reconcile with the immobile, official stance of BUSINESSEUROPE.

As things evolved during 2004, it became clear that the launching of the Bolkestein draft was poorly prepared and badly timed by the Commission. No proper consultation or



social dialogue had taken place. With the growing influx of low cost service providers from the new Central and Eastern European Member States after 1 May 2004, and the debate about ratification of the new Constitutional Treaty arising, the Services Directive soon became part of a much wider and more heated political struggle.

The ETUC tried to take advantage of the situation by applying a dual strategy. By taking a leading role in the fight against the Bolkestein draft, it hoped to prove its credentials as a genuinely popular vanguard for Social Europe, independent of the Commission, thereby strengthening its credibility in the defense of the new Treaty in the upcoming referendum campaign in France. This balancing act was further complicated by the fact that the affiliates from the new Member States saw the opening of the service markets as crucial to their membership in the EU, and were basically positive to the Bolkestein proposal. Part of the deal eventually made was that the ETUC should argue for lifting of the transitional restrictions on the free movement of workers.<sup>ix</sup> In return, the majority of the organizations from the new Member States complied with the ETUC strategy when it came to the conclusive phase. Unlike *BUSINESSEUROPE*, the ETUC thus managed to keep its disagreements ‘in-house’ and could pursue its active pressure strategy in apparent unity (Holsaae et al 2006, Arnold 2008).

In November 2004 the two parliamentary committees involved (IMCO and the Employment Committee) organized a joint hearing with experts and representatives of the social partners. This hearing is by several of our sources pointed out as the turning point as far as public attention about the directive was concerned. Laying out the intricacies and the widely diverging understandings of the proposed Directive, the event revealed how difficult it would be to reach a viable majority in the EP. In addition to the cleavages cutting across party lines, the views in the Internal Market Committee and the Employment Committee diverged strongly.

During the early stage after the launch, the Commission acted as if it was business as usual. There were ordinary meetings with the political groups in the Parliament, the Council, employers and the trade union movement. But as the temperature rose, it became more and more difficult for the Commission to defend the ‘hot political potato’ publicly. At the end of 2004 the Prodi Commission was replaced by the incoming Barosso regime. During the crucial stages of the decision-making process there was thus a new Commissioner, Charlie McCreevy, in charge of the Directive who felt no personal fatherhood for the proposition, which by many of the actors was labeled the «orphan»-directive. Our sources also suggest that the change of Commission also paved the way for a shift of Commission approach.

During his first months in office, McCreevy held meetings with General Secretary of ETUC, John Monks, a contact which was held alive until the very last days of the process. In this period Monks also had conversations with the Council President, Jean-Claude Juncker, and with the French President Jaques Chirac, while ETUC representatives had special meetings with the Socialist faction in the EP (Kowalski 2006). These contacts reflect that in parallel with the protracted preparations in the EP, the Council continued its work on the Directive, clearly influenced by the change in public opinion.

When the new Council President Juncker met with the EP to present his work program early January 2005, he expressed skepticism of the Commission proposal.<sup>x</sup> In response to misgivings about the proposal from the French and German governments, cracks in the Commission defense of the Directive were also displayed when Commissioner McCreevy in February 2005 publicly acknowledged that the directive «was not going to fly» in its current form and called for changes in the CoOP and exclusion of healthcare and public services.<sup>xi</sup> Soon after, the French President Chirac prodded the German Chancellor Schröder to suggest the Directive be replaced by a new one.<sup>xii</sup>

Hence, the external pressures on the EP to find a way out were building up, further magnified by the Employment Summit in Brussels 19 March in the front of which the ETUC staged a large demonstration with 75,000 participants. With the referendum on the Constitutional Treaty to be held in France two months later, President Chirac stated during this meeting that the proposal was ‘unacceptable’ for France, and enjoyed broad backing from amongst others Germany, Sweden, Belgium, Denmark and Luxemburg (Flower 2007).

When the EP gathered after the summer 2005, the political context of its work with the Services Directive had thus changed dramatically since the launch one and half year earlier. The unison support for the Bolkestein proposal had withered both in the Council and in the Commission, and with the defeats of the Constitutional Treaty in the French and the Dutch referenda the Community had run into an acute legitimacy crisis where the entire political establishment in Europe was desperately looking towards the EP, hoping it could find a way out of the conundrum.

### *The «hot phase» of negotiations in the EP*

When entering the final phase in the Parliament, from November 2005 until the plenary vote 16 February 2006, the issue was pending in IMCO, but the Employment Committee was involved in all questions regarding labour law, including the country of origin-principle (CoOP). The first proposal from the IMCO was ready in November 2005. Here the scope of

the directive was reduced, but still the controversial country of origin principle was intact. Rapporteur Evelyne Gebhardt, a German Social-Democrat, unsuccessfully tried to change the CoOP with a phrase of «mutual recognition», building on existing case law on free provision of services. Since the eventual vote from the committee had not sufficiently broad support, the negotiations had to continue until the plenary vote.

About two weeks before the vote, a small group consisting of MEPs from the two largest party-groups, PES and EPP-ED, was set up. This was a high-level group, including the vice-chairmen and chair-women, the rapporteur and the shadow-rapporteurs (Holsaae et al. 2006). Most of the controversial issues were still unsolved, but the participants shared the motivation for doing this: The parliamentarians had a golden opportunity to assert themselves as proper lawmakers and they were convinced that a new regulation of the services markets was needed. They were well aware that the alternative to a broad agreement about the text in the EP was most likely *status quo*, i.e. no Directive at all.

The final hurdles were related to article 16, where the Country of origin -principle (CoOP) was the key issue. In the EPP-ED, especially among the members of IMCO, the majority was strongly in favor of maintaining the CoOP, which for most of the PES was a no go. Given the reluctance of the parties to concede, a third way had to be found. This was the background for the phrasing «freedom to provide services», that became the core of the compromise. During this decisive phase PES had ‘secret’ contacts with people in the EPP-ED negotiating group, where central participants, especially from Germany and France, had close ties with parts of the trade unions and the federations of small-and medium sized businesses in their home countries. Actors with such cross-cutting allegiances played important bridge-building roles, facilitating the give-and-take negotiations that were unfolding.

Officially, the matter was now solely in the hands of the MEPs. But there were still dialogue with representatives of the Commission and the Council. National governments and parties were also following the Parliament’s work closely and held direct contact with their MEPs. Although the grand coalition of CDU and SPD that had taken office in Germany late 2005 never took a clear position (Miklin 2008), forces inside both parties actively prompted their groups to find a compromise. In fact, both the leaders of the EPP-ED and the PES in the EP were Germans. This eventually brought the chairman of the liberal group to accuse the grand coalition in Berlin of dictating terms in the EP and playing a pivotal role in watering down the Services Directive.<sup>xiii</sup>

ETUC had long worked closely with MEPs at both sides, and especially with the chairs of IMCO and the Employment Committee. By contrast, there were, as noted by a Con-

servative MEP, virtually no contact between the parliamentarians and BUSINESSEUROPE at this stage. During the final negotiations, the ETUC served key actors in the negotiating teams with alternative texts. Having worked on the basis of a ranked list of seven key demands, only the final issue then remained – ultimately to get rid of CoOP. When the magic formula «freedom to provide services» was pulled out of the hat, allegedly by the EPP-ED group, it was not clear where the idea originally came from. The «freedom to provide services» proposal was also informally floated to the team of McCreevy, who immediately indicated that such a formula would be accepted by the Commission. Besides the CoOP, eight additional sectors, among them Temporary Work Agencies, and cross-cutting areas including criminal law and private international law had been removed, and labour law was carved out completely (Flower 2006-7: 225).

Still uncertainty was high, and some hectic days followed with intense work to convince doubtful MEPs. Therefore, the ETUC continued to mobilize public pressure. On the day of the debate in the Parliament, the streets in Strasbourg were filled with demonstrators. The dual approach of the ETUC, lobbying pragmatically for a compromise inside the EP and mobilizing pressure in the streets outside reached a critical moment. In the vote 16 February a majority of 394 MEPs from respectively the Socialist group (136), the Conservative group (187), and most of the Liberal group (62)<sup>xiv</sup> supported the compromise text,<sup>xv</sup> while a minority of 215, comprising the green and leftist groups as well as the rightist nationalist groups, cast their votes against.

### *Back to the Commission and the Council*

After the EP compromise was adopted, the proposal went back to the Commission, which quickly presented an amended text based on the EP compromise.<sup>xvi</sup> According to MEP interviewees, the DG for Internal Markets did not want to accept the compromise, while the Cabinet of McCreevy saw no other option than going along with the EP compromise. Acknowledging that the EP would reject any significant amendments in the compromise in its second reading, the revised Commission proposal followed the EP text very closely (Flower 2007: 226). Moreover, by accepting most of the EP changes, the Commission ensured that the decision in the Council would not require unanimity but could be taken on the basis of qualified majority.

In the Council, there had been great uncertainty whether the Parliament really would manage to reach a compromise. The Council had therefore worked in parallel with the text of the Directive. Moving in a similar direction as the EP, the negotiations concentrated on the

country of origin-principle and the scope of the Directive. The coalitions were not stable, but depended on the question in matter. While negotiations in the Council usually take place behind closed doors, representatives of both the EP and the Social Partners were invited to present and discuss issues in Council working groups, something that is very unusual.

When the Council finally adopted a Common Position 31 May 2006,<sup>xvii</sup> it only implied minor adjustments in the text, e.g. extending the deadline for implementation to three years. The Directive was then sent back to the EP for its second reading 24 October 2006, with an unambiguous message that the compromise was ‘untouchable’.

The inter-institutional compromise was in other words considered so fragile that the second reading in the EP in practice was abandoned. As the Commission had slightly amended the wording of article 1.6 and 1.7 which, together with recital 14, should assure that labour law and the right to industrial action would not be affected by the Directive, forces in the EP and the ETUC suggested clarification of these passages. It is disputed whether the Commission amendments – emphasizing that the Services Directive will not affect labour law and industrial action which *respect Community law* – imply any difference in substance (see Barnard 2008a,b; Novitz 2008), but the attempt to erase the references to Community law was resolutely rejected.

#### **4. Accounting for the outcome of the inter-institutional negotiations**

What can the Services Directive case tell us about the mechanisms shaping power-relations in EU legislative decision-making? As a real compromise, the significance of the outcome has been contested. While the most liberal camp opposed the outcome for being bereft of any substance and teeth (Holsaae et al. 2006), the far left claimed that the principal amendments the EP made were merely about form and not of substantial importance. Striking in our interviews, though, was the extent to which key actors on both sides of the EP compromise (and in the other institutions) agreed on the significance of the changes the EP had achieved and the importance of the compromise for the standing of the EP and the EU.

Our analysis is premised on the judgment that the compromise, in spite of its unclear and ambiguous texting, implied significant amendments of the original Bolkestein proposal. The meaning of the «freedom to provide services» -formula is far from clear-cut, but building on Court jurisprudence and a strong notion of «mutual recognition» it has certainly less radical implications than the country of origin principle it replaced. The amendments with respect to limiting the scope of the Directive, excluding labour law, and the conditions under which

host states can restrict, monitor and control foreign service providers with the purpose of protecting workers were also significant (Barnard 2008 a,b; Fischinger and Schlachter 2009). In this respect, organized labour and the socialist camp in the EP won through with major parts of their demands for changes in the Bolkestein proposal (Kowalski 2006). Conversely, the conservative camp in the EP had to offer significant concessions, most prominently the CoOP, in order to achieve their aim of a horizontal Directive enabling effective implementation of free movement of services in a broad range of branches. Still, the puzzle is why the Socialist camp obtained such strong influence and the Conservatives went along with it – as did the Council and the Commission.

On the basis of our case-study, and in view of recent literature and theorizing on inter-institutional decision-making under the co-decision procedure, we will in this section highlight the factors that in our view were critical for the surprising outcome. A key insight that can be derived from the Services Directive case is indeed that the actual roles and influence of the respective actors involved cannot be inferred from the formal decision-making procedures, but are contingent on the constellation of interests in counterpart institutions, informal processes, and contextual factors that impinges on process. We will highlight four sets of factors that shaped the outcome: i) the contextual developments and changes in actor constellations; ii) the legal framing determining the bargaining conditions, iii) the public mobilization and extra-parliamentarian pressures; and, iv) the multi-level dynamics and coalition-building across institutional and party lines.

### *Contextual developments and changes in actor constellations*

In view of the failure to establish a proper internal market for services through the 1992-programme and the prominence attributed to accomplish this aim in the Lisbon process, the stakes involved in the Services Directive strife were high. The stakes were further heightened by the changes in the context associated with the ratification process of the new Constitution and the Eastward enlargement 1 May 2004. The latter point also implied substantial shifts in the structure of interests and composition of the Council. The promise of free movement of services was an issue of key symbolic importance for the new Member States, especially in view of the erection of transitional arrangements for free movement of workers. Among the ‘old’ Member States, the growing public resistance against the Services Directive, emerging as a centre-piece for the opposition against the Constitutional Treaty in the French referendum, fuelled doubts about the viability of the Bolkestein proposal. When the rejection of the Constitution in the French and Dutch referenda then threw the Community into an acute le-

gitimacy crisis, the Directive became a symbolic test case for the Community's ability to deliver on key priorities and prove its democratic credentials. With the risk of a clash between new and old Member States, this created a highly delicate situation in the Council.

The shift of Commission in November 2004, alongside the new Parliament elected, further implied that – in a situation of potential political paralysis – the entire actor and power structure of the EU was in flux. Apart from an even more unpredictable context of interest intermediation, this also implied that former stakeholders had left, opening for shifts in positions and coalitions. As shown above, this had probably most impact on the role of the Commission which was unusually low-key, Combined with the change in composition of the Council from 1 of May 2004, this provided a seldom opportunity for the newly elected Parliament.

#### *Legal framing and bargaining conditions*

The legal framing of the decision-making process had an important twofold impact on the negotiations in the EP and the interaction between the Council and the EP. While the co-decision procedure in itself has granted the EP substantial influence as co-legislator, the negotiating power of the EP can be amplified – but also constrained – in cases where EP amendments can unleash either a veto or a blocking minority in the Council. In the Services Directive case this was a double edged sword; if the EP went along with the original draft, a blocking minority of socially minded, labour friendly governments in 'Old' Europe could not be precluded, while too much dilution of the Directive was likely to be blocked by the liberal coalition of 'New' Member States, the UK and others. Such deadlocks are not uncommon and can be long-lasting. An essential precondition in this case was that a unanimous Council had called for liberalization of the service markets as one of the key targets in its Lisbon agenda. With the prestige vested in the Lisbon process and in this issue in particular, the stakes of the Council were high, implying that failure was hardly an option for the Council. The EP, including the Socialist camp, had from early on also embraced the aim of a Directive freeing up the service markets, implying that the credibility of the EP as a co-legislating institution was also at stake. The fear of failure was, however, much lower in the Socialist minority than in the EP majority as well as in the Council and the Commission. This granted the EP minority an extra edge in EP negotiations and gave ground for ideological and party-based coalition-building also across institutional boundaries. Yet, the common EP commitment to avoid failure provided strong incentives for a robust, broad settlement in the EP and implied that the price for non-collaboration among EP actors from the outset was very high.

### *Public mobilization and extra-parliamentarian pressures*

The scale of popular protest and public mobilization at national as well as European levels was –fuelled by the referenda campaigns over Treaty ratification in France and the Netherlands – unprecedented in the Services Directive case and added to the pressures on the EP and the Council to come up with a viable compromise. With the ETUC and the mainstay of trade unionism in the ‘Old’ Member States fronting the mobilization against the draft Directive, ETUC acceptance of a compromise appeared critical for a successful outcome. Combined with the uneven aversion of failure and hence asymmetric bargaining power among the party groups in the EP, this enabled the ETUC to establish itself virtually as a fourth institutional, extra-parliamentarian player, acting as broker and joker of the three-way informal negotiations that were evolving. In contrast to the European business associations, that usually have been considered superior when it comes to Community lobbying, the ETUC thus managed to maneuver itself into a gatekeeper position where it could also use its access to legal expertise to influence the process across all the involved institutions.

### *Multi-level interaction and coalitions across institutional and party lines*

The cross-cutting coalition-building in the EP cannot be understood without taking into account the multilevel character of the EU decision-making process. Albeit the EP is often considered to be the only truly European branch of EU decision-making, the MEPs tend to be in close contact with their domestic constituencies and representatives in other EU institutions. The compromise within the EP was further facilitated by the fact that in many European countries there are well-developed ties between the parties and the trade unions cutting across the ideological cleavage between Left and Right. In the continental/catholic European countries, the Christian unions, belonging to the ETUC since the early 1970s, have close ties with Christian Democratic and Conservative parties. In Germany, the CDU/CSU still contains a worker group with roots in the DGB. In the Services Directive process, central actors in the conservative group of the EP, also within the negotiating body, had a background in such networks and played important bridge-building roles – not only within the EP and vis-à-vis the unions, but also in relation to domestic governments and political constituencies. The importance of small entrepreneurs and craft companies in the voter base of many of the conservative parties, clearly also enhanced the compromise-building in the EP.

Viewed together, the above factors highlight that the interplay between – and the power-relations within – the various EU institutions are essential in explaining the outcome



of the decision-making process in the Services Directive case. The processes leading to the compromise further shows that the multi-institutional interdependencies of EU decision-making can indeed be strongly influenced by political dynamics and public reactions at Member State level, cutting across the distinctions between intergovernmental and supranational dynamics in EU governance. These features of the case lend support to recent analyses emphasizing the importance of informal, shared processes of inter-institutional deliberation, interpretation, and interest-intermediation, in shaping power-relations and outcomes of EU decision-making (Shackleton and Ranio 2003, Rasmussen 2007, Farrell and Heritier 2004).

## **6. Conclusion: a turning point of EU decision-making?**

Although the co-decision-procedure introduced in 1993 has strengthened the EP say in EU legislative processes, the determining role and influence of the EP in this pivotal case was indeed unprecedented. This has raised the question whether the EP ‘victory’ in the Services Directive case represents a path-breaking, pattern-setting event, signifying a shift towards a more democratically accountable mode of EU decision-making (Kowalski 2006), or rather resulted from a specific and fairly unique conjuncture of common factors conditioning power-relations in EU decision-making.

The Services Directive case was distinct in several respects: The original draft Directive was unusually far-reaching, the timing was extremely challenging, the Council was facing a damaging East-West conflict, and the broad public protest was unprecedented. With these factors virtually placating the Council and the Commission, the ball was played into the feet of the EP.

These contextual factors implied, *first*, that the EP found itself in a position where it controlled the outcome of something the Council and the Commission urgently needed, primarily the Services Directive, but also their ability to rescue the Community from its credibility crisis. Consequently, the EP was equipped with exceptional negotiating power vis-à-vis the Commission and the Council. The legislative leverage the EP obtained in this case can thus be attributed to a perhaps unique instance of (inverse) asymmetric *exchange power* (Coleman 1966, Hernes 1975) in the relationship between the EP and its counterpart institutions.

Yet essential for the process of compromise-building within the EP was, *second*, that the procedural interdependence between the EU institutions involved under the co-

decision procedure constrained the power of the EP majority parties. Reliant on finding a solution that was acceptable to the Commission and not provoked a blocking minority by the Council members that were most critical of the original draft, the EP majority was forced to seek a compromise with the Socialist opposition. And given the pressure on the Parliament to deliver in a situation of political urgency, the consequences of failure were evidently considered so grave that none of the major groups in the EP were prepared to take the responsibility for turning down a possible compromise.

*Third*, as a result of the contingent relationship between decision-making in the three involved EU institutions, the three-way process of negotiations that unfolded, paradoxically, meant that the forces that were most critical of the original draft, such as the Socialist group in the EP and the ETUC, ultimately experienced a relative strengthening of their bargaining position. As suggested by the simple theory of *exchange power* (Coleman 1966), when two or more actors are negotiating over a transaction that is dependent on the consent of all actors to be accomplished, the least interested does indeed control the upper hand.

All together, the above factors gave impetus to coalition-building and development of informal networks across boundaries between the various EU institutions, ideological factions and Member States, that enabled actors with multiple allegiances to intermediate compromise formula that could be viewed as acceptable by all stakeholders and sold as a face-saving win-win outcome. None of these factors are as such unique for the Services Directive case; the special with the case was that all these factors were present simultaneously and worked in the same direction. In this view, there are no reasons to assume that the Services Directive-case represents a turning point in EU decision-making.<sup>xviii</sup> In our view it is therefore more plausible to regard the adoption saga of the Services Directive as an illustration that the contingent and interdependent character of decision-making in the multi-institutional and multi-level EU system, under certain conditions, can enable unexpected events to occur and unlikely coalitions to gain leverage. The decisive role of the EP (and ETUC) in the Services Directive case was distinct and probably atypical but most likely not exceptional, meaning that similar instances of conjoint parliamentary and popular mobilization of influence may reoccur.

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<sup>i</sup> The interviews were conducted under the insurance of full anonymity of the interviewee. A list of the interviewees, except a few respondents who preferred anonymity, can be obtained by the authors.

<sup>ii</sup> COM (2000) 888

<sup>iii</sup> COM (2002) 441, final

<sup>iv</sup> COM (2004) 002 final

<sup>v</sup> Articles 47(2) and 55 of the Treaty

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

<sup>vii</sup> ETUC Executive Committee Resolution 17-18 March 2004,  
[http://www.etuc.org/IMG/pdf/Priorites\\_2004\\_EN-3.pdf](http://www.etuc.org/IMG/pdf/Priorites_2004_EN-3.pdf)

<sup>viii</sup> From January 2007 the employer organization UNICE changed its name to BUSINESSEUROPE

<sup>ix</sup> ETUC Executive Committee Resolutions, 15-16 March and 5-6 December 2005. [http://www.etuc.org/IMG/pdf/Resolutions\\_2005-EN-5-2.pdf](http://www.etuc.org/IMG/pdf/Resolutions_2005-EN-5-2.pdf)

<sup>x</sup> [www.brysselkontoret.se](http://www.brysselkontoret.se), 13 January 2005, «EU närmar seg fackets syn med Juncker ved roret»

<sup>xi</sup> Financial Times, 3 March 2005

<sup>xiii</sup> Financial Times, 28 February 2006

<sup>xiv</sup> ALDE – Alliance of Liberals and Democrats for Europe.

<sup>xv</sup> In the EPP-DE 16 abstained and 32 voted against, while in PES 9 abstained and 35 voted against (Arnold 2008).

<sup>xvi</sup> Amended Proposal for a directive of the European Parliament and of the Council on services in the internal market, presented 4 April 2006 (COM(2006)160 PROVISIONAL VERSION.

<sup>xvii</sup> Com (2006)160 final

<sup>xviii</sup> The EP has indeed acquired a strengthened formal role under the co-decision procedure, that is extended to new areas by the Lisbon Treaty, But whether the *impasse* in the Council of 27 states in this case indicates that greater difficulties in reaching common Council positions will grant the EP – with more predictable transnational party groups – more influence on a permanent basis, is yet a hypothesis which requires further empirical probing.

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