



EUROPEAN ENGINEERING CONSULTANCY AND THE PROPOSED DIRECTIVE ON SERVICES IN THE INTERNAL MARKET

I. INTRODUCTION

The problems of EFCA with the proposed directive appear to concentrate on the country of origin principle (article 16), the derogations thereon (article 17) and on professional insurance (article 27) as they may affect the provision of service by European consulting engineers.

II. THE INTERNATIONAL ACTIVITIES OF EUROPEAN ENGINEERING CONSULTANCY

The only recent figures on the international activities of European Engineering Consultancy at disposal are those contained in the Syntec report of 7 February 2005, from which it appears that European activities outside of France represent only 650 million € in a total turnover of 17 billion €. Thus, whereas 10.5% of total French turnover is realised abroad, only 3.78% is realised in other countries of the EU.

These figures, which should be put in a context of the relevant figures for other EU countries¹, seem to confirm a finding which EFCA made already many years ago i.e. European engineering consultants are more active in foreign third country markets than in other EU countries. A possible first explanation for the relatively high figures for export of services to countries outside the EU is the fact that the local profession in these countries was less developed and that European consultants benefited from European development programmes for third countries.

However, it is understood that the above percentages do not treat as exports to other EU countries the activities which are developed in joint venture with local consultants in those countries or through take over of a local consultant. Through the use of such channels there is substantial activity of European engineering consultants in other EU countries.

¹ FRI-Survey of architectural and consulting engineering services 1999: Statistical analysis related to the EU Services Directive. This study reveals that overall cross border European trade of EFCA members represents even less than 1%. FRI (Denmark) has carried out this annual survey between 1994 and 1999.

The Commission considers this form of free movement and establishment of service providers as an “arrangement strategy”:

“Contacts with interested circles confirm these arrangement practices, and in particular those involving the establishment of partnerships with local operators in order to “renationalise” the situation and thereby, circumvent the reluctance of certain authorities to grant access to their national market” (Report on the State of the Internal Market for Services – COM (2002) 441 final of 30.07.2002, p. 68).

From the above could be concluded that the national rules for access and exercise of service activities are effective as barriers for more intra-community service activity.

III. ABOLISHMENT OF BARRIERS FOR ENGINEERING CONSULTANCY SERVICES

Research² was done on barriers for the construction industry following the publication of a draft general directive on the liability of service providers. National construction related legislation did not seem to create barriers to the provision of cross-border services or to affect the quality of consumer protection.

The Commission’s Report on the State of the Internal Market for Services (COM(2002)441) lists consulting engineers as service providers who are subject to barriers, e.g.

- nationality requirements (p. 17 – footnote 17),
- differences between the member states regarding activities considered to be “regulated professions” (p. 20 – footnote 47),
- differences regarding the fields of activity covered by a particular professional qualification (p. 21).

The question to be answered is whether the proposed directive for services will indeed contribute towards a more integrated market for engineering consultancy services and whether the proposed means are adequate.

² GAIPEC REPORT, October 1992 (construction related professions and industry sectors – Groupement des Associations InterProfessionnelles Européennes de la Construction)

IV. GENERAL COMMENTS ON THE COUNTRY OF ORIGIN PRINCIPLE

1. The country of origin principle is embedded in Chapter III of the directive concerning the free movement of services.

The introductory clause 19 of the proposed directive distinguishes clearly between the situations covered by the freedom of establishment and those covered, due to the temporary nature of the activities concerned, by the free movement of services.

Thus, the scope of application of the country of origin principle is limited to those service providers who deliver a service in another EU country without establishing themselves there.

A first possible problem is therefore the risk of abuse of the freedom to provide services by service providers who should, because of the intensity or frequency of their activities in other EU countries, establish themselves there and comply with the rules of the host country (as they may be relaxed in the meantime as a result of the implementation of Chapter II of the proposed directive).

2. The country of origin principle, now envisaged for the free movement of services exists already for the free movement of goods, which need only comply with the requirements of their EU country of origin.

Services cannot be compared to products, however, because a product, once produced, can move independently from its manufacturer. Services, on the other hand, cannot always be dissociated from their provider who, if the service has to be rendered in another country, has often to move to that other country as well. Thus the pure design activity of an engineer can be delivered in his country of origin (in the form of blue prints which are mailed to the host country where construction takes place) but he cannot fulfil his control and advisory role in the construction process without moving to the host country where the building activity takes place. The proposed directive thus deals with both the subject of the service and the provider himself. This is more complex than dealing with goods and makes the application of the country of origin principle inappropriate for services.

3. The country of origin principle is furthermore inconsistent with the principle applying to the posting of workers, for which the rule is applicability of at least certain rules of the host country.

If the latter has been defended by the concern for maintenance of the “acquis social” in the host country, its immediate effect, if not its objective, was also not to distort competition as a result of the influx of cheaper workers. It would appear that the principle of applicability of at least certain local rules has to be accepted in relation to service providers for the same reason.

If the host country has higher standards and professional requirements, and assuming they comply with the requirements of the proposed directive, these should apply without discrimination to all service providers whatever their origin and without regard as to whether they are established in the host country or not.

If the standards and requirements are unduly high or complex, and constitute unjustified barriers for service providers, they have to be abolished or relaxed, for both national and other EU providers no matter where they are established (cfr. article 15 of the proposed directive).

4. The proposal provides in Chapter II for the simplification of procedures and formalities applicable to access to a service activity (article 5) and prohibits authorisation schemes unless they comply with certain conditions (articles 9, 10 and 14).

The so-called “Convergence Programme” contains certain due dates for reporting obligations in this respect, but the timing for national abolition of undue requirements for service providers or for the effect of alternative European actions as envisaged in article 41.(4), is not strict.

Hence, the application of the country of origin will be effective much earlier than the possible relaxation of national administrative procedures.

In view of the confusion which the application of the country of origin may create (see e.g. item paragraph V.3. hereafter), it would seem preferable to realise the free movement of services of Chapter III of the proposal – whether on basis of a country of origin principle or of a host country principle – after, instead of before or simultaneously with, the realisation of freedom of establishment for service providers as envisaged in Chapter II of the proposal.

The obligation which the directive intends to impose on the member states for the purpose of increasing freedom of establishment and securing quality of services should be effective first and as soon as possible be the subject of the convergence programme described in Chapter IV. Only then would the adequate circumstances for the free movement of services on basis of a country of origin principles as envisaged in Chapter III be realised.

5. If the Community opts for the free movement principle prior to minimal convergence of the national systems applicable to service providers, as it has done for the free movement of products, a considerable burden will be put on the recipient of the services. He would have to familiarise himself with the rules of the country of origin in order to assess whether he prefers the service subject to these rules to the service of a provider who is subject to the well known rules of the recipient’s own country.

As the purchaser of goods imported from other EU countries, the recipient of the service would have to familiarise himself with the market of the country of origin in order to be able to compare the price/quality ratio between services not just from different providers but from different origins.

The choice for the recipient of the service (as for the purchaser of a product) will become larger but not necessarily easier. Due to the lack of convergence between the EU countries, the services will be hard to compare.

As services tend to be less standardised, their recipient will face more problems than the purchaser of goods when offered a choice between services which comply with non-harmonised requirements.

Article 26 of the proposed directive tends to assist the recipient in his quest for information on providers and recipients but does not address e.g. the language barriers which may exist!

6. The new burden for the service purchaser of comparing services from different origins and subject to different rules, may in theory be compensated by a higher quality or lower price of the “imported” service. The question is, however, whether this advantage will in practice be realised. Indeed the advantage of the service provider to render services in the host country under the same rules as in his country of origin will be a real advantage only if he can compete in the host country by offering:

- (i) either at least the same quality of services as those offered by the national providers, for a cheaper price, or
- (ii) a better quality for the same price.

Thus service providers from countries with low prices or high quality are the only ones which may benefit from the country of origin principle.

7. The country of origin principle is combined with a duty of the country of origin to monitor and supervise the service providers also when active abroad (articles 16.(3) and 34).

The proposal acknowledges that the supervision will be difficult for the country of origin and consequently requires the host country to give assistance and cooperate for this supervision (article 35). The experience with the posting of workers directive has confirmed the problems of combined control.

The cooperation necessarily implies an increase of administrative work of the two countries and consecutive costs which could be avoided if the rules of the host country were applied to the service providers locally active and supervised by the same country.

The choice of the country of origin rules (rather than the host country rules) for application to service providers rendering services in other EU countries without establishing themselves there, clearly is to the advantage of the service providers who want to operate European-wide.

However, their activity in the host country will create a burden for

- a. the authorities of their country of origin who will have to supervise their activity outside their territory,
- b. the authorities in the host country who will have to assist the authorities of the country of origin,
- c. the recipients of the service who will need to inquire about the rules applicable in the country of origin,

- d. the established service providers in the host country who may have a competitive disadvantage if the service provider from the country of origin has less administrative obligations, hence less costs etc.
- Who will bear the ultimate costs of a. and b.?
- Is the price or quality advantage which the recipient may hope to obtain from contracting with a service provider from another EU country worth the extra cost of gathering information (c.)?
- Does the competitive advantage of the foreign service provider (d.) not constitute a discrimination of the local providers who are, until the EU harmonises the national rules, subject to stricter rules?

V. CONSTRUCTION RELATED SERVICES AND THE COUNTRY OF ORIGIN PRINCIPLE

1. Construction is in all EU countries a highly regulated industry.

Beyond the standards and norms for products and processes which are the subject of harmonisation, most construction related professions are regulated. Construction is subject to local mandatory laws (e.g. zoning rules, health and safety rules, special professional liability regimes, some of them with penal sanctions). According to article 16.(2) of the proposed directive, the country of origin principle covers national provisions relating to access to and exercise of a service activity, but in particular also requirements governing the quality or content of the service and the provider's liability.

It is particularly difficult to distinguish, among the many rules applicable to construction, between those which are and those which are not "relating to access and exercise of a service activity" and for many mandatory rules of the place of construction it will be difficult to determine whether they are superseded by the rules of the country of origin (e.g. decennial liability in France and Belgium and mandatory insurance of professional liability for architects in Belgium).

2. Construction related services are likely to come under at least one of the derogations from the country of origin principle. E.g. article 16.(17) – specific requirements linked to the particular characteristics of the place where the service is provided and with which compliance is indispensable for reasons of public policy or public security or for the protection of public health or the environment.

The exception leaves open questions of interpretation, though, and it is to be feared that it will lead to different application in different member states.

Moreover, the question arises what relationship exists between the requirements linked to the particular characteristics of the place where the service is provided and with which compliance is indispensable for reasons of public policy/security or public health (article 17.(17)) on the

one hand, and services which present a particular risk to the health or safety of the recipient referred to in article 27, on the other hand.

If a list of the latter is to be established by the Commission (article 27.(5)), why should the Commission not also, for clarity's sake, establish the list of requirements meant in article 17.(17)? This would meet the concern of different interpretations of this article by different member states.

3. If the different service providers on a simple construction site are subject to different national rules, the recipient may well be facing either an overlap of responsibilities, quality guarantees, insurances, personal qualifications, or gaps in the cooperation between the various participants.

The recipient would be well advised to contractually agree with each of the service providers on the applicability of local law, not only to his contract but also to the professional requirements for each participant.

Article 17.(20) foresees an exception to the country of origin principle for the freedom of the parties to choose the law applicable to their contract. Query whether the parties are also free to contract out of the country of origin principle to the extent it governs non-contractual issues.

4. The country of origin principle seems to assume that the differences in regulation of service providers from one EU country to another are minor or only a matter of detail and that therefore only the law of the country of origin of the service provider applies to him even when he works temporarily abroad.

The differences between the EU countries are sometimes much more fundamental.

Thus, a possible problem for the application of the country of origin principle to a service provider who renders a service in another EU country consists in the possibly different definitions of certain types of services or professionals who usually deliver these services.

E.g. if designing a building is in the host country the monopoly of certain qualified service providers, and if a service provider is in his host country free to deliver designing services, he can design a building in the host country.

Alternatively, a consulting engineer who is not in his home country entitled to design buildings (because he is not a member of the *Ordre des Architectes*), will not be authorised either to deliver design services in another EU country, even if design activities are not regulated there, because the law of his country of origin does not allow him to design buildings.

The differences in national legislation concerning construction referred to in the Commission's Report on the State of Internal Market for Services (see II above; e.g. regulated activity of German Dipl. Ing.) are likely to create utmost confusion if the country of origin principle is applied to movement of construction services without prior harmonisation or effect of the Convergence Programme envisaged in Chapter VI of the Directive.

5. Although the proposed directive does not state so explicitly, the choice of the country of origin principle for application to service providers who render services outside that country, appears justified exclusively by the supposedly short term or temporary nature of the activity outside the country of origin. Otherwise there appears to be no justification for exempting a service provider from local rules which apply to everybody in the host country state who wishes to provide such service.

Who determines when the provision of services is so intense that an establishment is required? The introductory Comment nr. 19 of the proposed directive refers to the criteria which the European Court of Justice uses to determine whether a service rendered in another EU country is covered by the freedom of establishment or by freedom of movement (i.e. duration of provision of service, its regularity, periodical nature or continuity). The question is whether these criteria are appropriate for construction related services where there is a priori a minimum duration of the service and an explicit link to a specific geographical location.

VI. INSURANCE

1. Mandatory professional indemnity insurance (article 27) is considered as one of the means to guarantee the quality of the services.

It is striking that, while the Commission aims at the abolition of so-called “barriers” and red tape it envisages the introduction of new obligations, such as mandatory PI insurance. Has the Commission studied the possible impact of insurance cost on the cost of the services and the respective impact of the presently existing so-called “barriers” and of prospective mandatory insurance on the quality of services?

2. Construction presumably belongs to the services which may present a particular risk to the health and safety of the recipient or a particular financial risk to the recipient.

In view of the fact that construction projects are generally joint projects in which the services of many different providers intertwine, the question arises whether all participants in construction projects should be insured or only some of them and, in the latter case, who? E.g. at present mandatory P.I. insurance exists in Belgium only for architects because the risks created by their professional negligence are notoriously more important than the remuneration they receive for their services or, in many cases, their personal financial status. Should Belgium extend this obligation to all construction service providers or does the justification for making insurance obligatory for the sole architects comply with article 27 of the proposal? If mandatory insurance for architects does not exist in (all) other EU countries, is there really a need for the EU to impose it in all countries?

3. The insurability of certain construction services is already a problem today. Even in countries where P.I. insurance is not mandatory, construction service providers, in particular engineering consultants, find it increasingly difficult to obtain insurance. Financial conditions are disproportionate to the price of the services and many risks even uninsurable.

Is the Commission aware of this situation or has it drafted article 27, simply assuming that assuring quality of service through insurance is to be preferred over the state control presently existing through imposed registration or requirements?

4. Article 27 does not explicitly state whether, in case of provision of a service (without establishment) in another EU country, it is the country of origin or the host country which should determine whether and which P.I. insurance should be taken out. It can be deducted from article 27.(3) that in case of movement of service the country of origin principle also applies to insurance.

Since mandatory P.I. insurance in principle aims at the protection of the public or of the service recipient (and article 27.(1) confirms this principle), only the host country rule seems appropriate to cover this.

Thus, the insurance aspect is another reason to doubt whether the country of origin principle is sound.

5. Insurance cover in the field of construction is often difficult to obtain except from or through a local insurer or broker because insurers or brokers from other countries are claimed (or claim themselves) not to be familiar with the local risks and liability laws (e.g. insurance of decennial liability in Belgium).

Opening the internal market for construction services as this proposed directive intends to do, inter alia by requiring more P.I. insurance thus seems premature as long as there is no true internal market for insurance services.

6. Article 27, as all other articles of Chapter IV of the proposal require the member states to take different unilateral actions, all intended to improve or maintain the quality of services.

The introductory considerations of the proposed directive do not refer to any present or specific quality problem for construction services in the EU, however. Thus, there is no reason to assume that the present “barriers” to access and exercise of the profession do not properly ensure an adequate level of quality. Abolishing these and replacing them by new national rules on inter alia P.I. insurance, after-sales guarantees, certification and assessment by independent bodies, seems to lead to the replacement of one set of national rules by another (even if article 31 attempts to shift the burden to regulate from the member states to the professional organisations). It does not bring harmonisation any closer, and will not necessarily create more freedom for movement of services.

VII. CONCLUSION

Chapters II, IV (with the exception of article 27) and VI of the proposal are an appropriate alternative to open up the market for services, if sectoral harmonisation appears unfeasible or too slow.

Chapter III, applying the country of origin principle for free movement of services is more problematic. By simultaneously creating 23 (!) general exceptions – besides transitional derogations – to the principle, the Commission acknowledges being aware that the principle cannot be soundly applied as such throughout the entire services industry. The construction industry certainly is one for which the principle is not proper, in view of the multi-party activity on a construction project and the health and security aspects involved.

Convergence and/or harmonisation should be realised first, before free movement on basis of the country of origin principle can be achieved. Until then, the country of origin principle is inappropriate for construction services.