Freedoms and Regulation: Economic and Legal Aspects of EU Trade in Services

Giuseppe Bertola and Lorenza Mola *

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Interactions between market forces and social and regulatory policies are always problematic when economic integration spans the borders of separate policymaking entities. This paper analyzes theoretical and practical conflicts between national regulatory frameworks and international trade opportunities in the services industry. It highlights similarities and differences between the European and global liberalization processes in this and other fields, focusing particularly on provisions regarding posting of workers and mobility of self-employed service suppliers. Issues arising in the context of trade in services through personal mobility are more difficult to solve than in the context of trade in goods, but less difficult than in the context of outright migration. While intra-EU and external liberalization processes are both slow and controversial in the services field, our review of their parallel evolution suggests that progress towards efficient integration of markets and policies is possible if synergies between internal and external legal instruments are suitably exploited.

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1. Issues

The European and global policy processes of trade-in-services liberalization are slow and controversial, and are intertwined with equally controversial deregulatory processes in domestic labor and professional services markets. Monti (2003) stated that *'It is the Commission's role as the guardian of the Treaty continuously to monitor markets, to ensure that competition in the internal market is not distorted and to propose action where necessary and justified. In this my colleague in charge of the Internal Market, Mr. Bolkenstein and myself, are working together in parallel.'* Neither of the efforts to deregulate domestic services markets and to dismantle barriers to cross-border trade in services has so far enjoyed much success.

In Europe, the Bolkenstein directive proposal [COM(2004)2], aimed at completion of a European Single Market to include services, was opposed in first reading by the European Parliament in 2005; opposition to it came mostly from left-wing portions of the political spectrum, and from relatively rich countries. The original directive proposal relied radically on country-of-origin principle. Only removal of that principle allowed a new draft of the Directive, featuring a very long list of exceptions to the basic principle of freedom to provide services throughout the EU, to be was finally approved by the Parliament and adopted jointly with the Council in late 2006 [Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, in GUCE L 376 of 27 December 2006, pp.36-68.]

Services trade liberalization is one of the most controversial aspects not only of the European, but also of the global economic integration process. At the same time as the Bolkenstein Directive encountered formidable obstacles in the EU co-decision process, the Doha Round of trade negotiations was stuck on issues involving not only agricultural market liberalization, but also services market access. At the Hong Kong Ministerial Conference of the World Trade Organization developing countries expressed fears of foreign dominance of their (public) services should they be opened to competition in exchange for access of their agricultural goods to developed countries' markets [WT/MIN(05)/DEC, 22 December 2005].

Controversy about dismantling of trade barriers is, of course, not news. The eight rounds of global trade-in-goods liberalization and the long path of European economic integration both needed to surmount opposition, reconciling vast differences of opinion and interest. Just because most goods trade has been liberalized, however, controversy about trade in services is all the more striking, and deserves to be analyzed as an interesting middle ground between largely uncontroversial (by now) trade liberalization and hugely controversial immigration. The global and European dimensions of

the process are tightly related to each other. On the one hand because services trade may be diverted within and without the boundaries of the EU by the evolving interplay of rules at each of the two levels. On the other hand, because the economic, legal, and political aspects of services trade are intricately linked between the national, EU, and global levels. As in other areas, such as energy and immigration, in the area of services imperfect legal and economic integration implies that external policy issues face individual EU member countries rather than the Union as a whole.

The EU is based on a structure of internal freedoms and common external policies. Both are incomplete, to varying degrees across different industries, and in related ways as regards internal trade and external positions. In this paper, we point out that the much slower pace of labor and services market integration than of product market integration is rooted in the stronger political significance of the more visible forms of economic integration that entail personal mobility, and in the greater need for regulation of relatively complex market interactions. While the implications of economic integration for national economies and welfare systems are much the same when it entails trade in goods or services (and factor price equalization) as when it entails personal mobility, service provision through mobility of natural persons on the one hand may excite some of the same cultural tensions as immigration, and on the other hand may be subject to more serious asymmetric information problems than trade in goods (to the extent that what is traded is more closely tied to personal qualities than to easily assessed technical characteristics). While full liberalization of trade in goods entails removal of all tariffs and quotas and harmonization of technical requirements (or mutual recognition), full liberalization of trade in services may be perceived to be tantamount to deregulation, and is not an appealing policy proposition in countries that – for a variety of reasons – do extensively regulate their services industries.

The rest of the paper analyzes the relevant tensions and reviews the process of their resolution through negotiated harmonization of requirements in the context of the EU Single Market program and of EU countries' participation in the General Agreement on Trade in Services (GATS). Section 2 outlines economic and legal frameworks of analysis for economic and policy integration processes. Section 3 reviews regulation of mobility provision of services within the EU. Section 4 analyzes from a similar perspective the less well known and insightful issues arising in the context of external negotiations regarding provision of services in EU countries by third country nationals, and access of EU entities to third-country services markets. Section 5 concludes summarizing lessons from recent experiences, and outlining how legal and policy uncertainty may be resolved by further integration processes.

2. Insights and methods

Economic integration makes it possible to exploit comparative advantage and specialization opportunities, and fosters the efficiency of competitive market interactions. But markets are not always perfectly competitive, and tax and regulatory policies are implemented both in order to affect the distribution of economic welfare and to offset market imperfections. At the same time as trade becomes increasingly free across countries, within each country trade is in fact not completely free, but is subject to tax and regulation policies.

The two subsections below discuss ways in which economic integration interacts with policies in these respects, and ways in which country-specific policy frameworks may be revised and integrated.

2.1 The economics of market integration and policy

Like all change, economic integration affects distribution. For example, removal of barriers to trade and factor mobility may allow poor countries' citizens to compete with the relatively poor citizens of rich countries, and rich countries' relatively rich citizens to invest their wealth in poor countries, obtaining higher returns. Through such channels, it may increase inequality in rich countries, and increase the costs of redistribution policies meant to prevent poverty and decrease inequality. Integration, by making it easier for private market interactions to work around regulatory constraints, may make it difficult for governments not only to achieve politically desirable within-country income distribution, but also to enforce regulation in fields where laissez faire competition does not suffice to achieve efficiency. If it is not accompanied by integrated policies, economic integration hinders both sets of policies in both respects. It need not be beneficial in theory. Allowing markets to be larger and more powerful improves welfare when markets work well, but can certainly lower welfare when market outcomes are not optimal. If financial markets do not provide individuals with suitable protection against the risk of poverty and of income fluctuations, or asymmetric information prevents markets from providing high-quality services, government interventions in the form of social and regulatory policy are welfare-enhancing. Both are endangered by 'races to the bottom' if integration of markets is not accompanied by integration of policies. and regulatory aspects of policy.

In general, economic integration is restrained by concerns about the feasibility of redistribution policies and regulatory policies. The tension between integration and policy has different intensity in different context. For example, economic integration of countries with similar levels of development and factor endowments should not have strong implications for income distribution, as its efficiency benefits are expected to come from intra-industry trade fostering economies of scale

variety: in that context (which approximates that of the European Community's original membership) concerns about redistribution policies may well not be as strong as they are when trade is liberalized between countries at widely different levels of development (as in the case of the European Union's subsequent enlargements). The relative importance of policy concerns is also different depending on the structure of markets. Removal of international barriers strengthens competitive forces. The impact of this on market efficiency and income distribution obviously depends on the prevalence of monopoly power before integration, on the one hand, and on the extent to which imperfect competition reflects scarce and asymmetric information rather than artificial barriers to entry. In such markets, regulation can affect the distribution of monopoly rents and/or improve market efficiency. To the extent that regulation is made more difficult by economic integration, economic integration will be opposed by producers who enjoy regulation-generated rents, and/or by consumers concerned with product quality. In theory, this perspective may imply that some markets are easier to integrate than others, and can explain why integration is more or less appealing to different economic. In practice, labor and services markets have proved to be more difficult to integrate and liberalize in the European Union, as we discuss in the Section 3.

2.2 Modes of legal integration

Competition is beneficial in well-organized markets, but the organization of markets requires collectively agreed legal provisions. Whenever economic integration may trigger socially inefficient or politically unappealing deregulation, through enforcement problems or 'race-to-the-bottom' regulatory competition, the extension of markets is possible only if accompanied by suitable extension of policy and legal frameworks across the borders previously guarded by trade and mobility barriers. The complex task of ensuring that legal frameworks are consistent with economic integration can be achieved if a constructive negotiation framework is able to pursue the collective gains from a broader and appropriately regulated market. It can rely on a variety of legal techniques (or 'models') developed in the context of trade liberalization and/or economic integration in order to make appropriate approaches and tools available for different types of barriers and regulatory frameworks. Broadly, conceptual distinctions may be drawn between **relative** (or contingent) and **absolute rules**, and between **top-up** and **bottom-up** liberalization techniques, according to **positive** or **negative** legal instruments of integration.

Absolute rules are content-based: in the economic integration context, they make explicit reference to existing obstacles to international economic interactions, and provide for their treatment in the form of elimination or reductions of barriers, such as prohibitions to apply or impose specific requirements on certain transactions. **Relative rules** are typically based on the principle of non-discrimination. They prescribe either that similar foreign goods, or services or investment, should

be treated similarly (external non-discrimination, or 'most favoured nation treatment'), or that foreigners should not be treated differently from similar nationals (internal non-discrimination, or 'national treatment,' whereby the rules of the country of destination apply regardless of products or traders' nationality). Both of these prescriptions are obviously easier to specify by policy-makers or negotiators than an explicit list of absolute provisions and they also may be much more far-reaching than limited concessions. However, both rely upon a relatively vague and problematic concept of 'similarity' both as regards their applicability, and as regards their prescriptions. As non-discrimination (or equality) requirements are expressed in relative terms, they may only be applied to debatably 'similar' economic situations (to comparable products, or traders, or investors). And as the prescription of similar treatment is usually expressed in such terms as 'not less favourable,' such rules can enforce the same market access situations for all entities concerned but do not completely rule out barriers and impediments insofar these obstacles and limitations also apply to the best-treated foreigners or to national entities. By their nature and formula, indeed, relative rules generally do not specify any content, not even about the similarity required for objects or economic agents to which they apply, but rather are contingent on an existing or future class of rules, i.e. take their content as well as adapt to their changes automatically.

Relative rules range from national treatment, at one end, to the **mutual recognition principle** and to the **country of origin principle** at the other extreme. Both of the latter principles imply either a sound reciprocal confidence or an adequate level of harmonization between the regulatory frameworks applying to the comparable entities. The mutual recognition principle and the country of origin principle are symmetric in some respects to the *ius loci* principle of 'national treatment' rules. Both have similar implications as regards applicable laws, but can be distinguished in terms of whether legal provisions apply to specific country of destination's regulation, or concern the whole set of regulations governing that situation. For example, mutual recognition of professional qualifications and licensing requirements implies that the host country should allow source country nationals to perform regulated services only if qualifications and licenses have previously been agreed as equivalent. The broader country of origin principle deprives the host State of the power to set the applying (equivalent) conditions, and leaves it to each home State to determine which qualifications and licenses allow performance of services in both States. Thus, the country of origin principle as a general rule encompasses mutual recognition of the other country's whole regulatory framework within a certain scope. It requires a higher degree of mutual confidence than mutual recognition of detailed regulations that are explicitly deemed to be equivalent. Then, it probably can be applied successfully only once a certain level of harmonization has been achieved.

Another economic and legal dimension of regulatory barriers and of their removal refers to their modes of operation and intensity. Internal regulation makes it difficult to access a domestic market, whether at the border (as in the case of a visa) or internally (as in the case of registration requirements in order to start an economic business). And deregulation can adopt a 'top-down' technique, whereby all activities are liberalized except for what is specifically excluded (in a *negative list*); or a 'bottom-up' approach, whereby liberalization applies only to rules included in a *positive list*.

In practice, these concepts and techniques are involved in processes of **negative integration**, consisting essentially of abolitions of impediments through relative or absolute rules; and in processes of **positive integration,** which specify comprehensive rules and new rule-making powers: a form of positive integration is **harmonization**.

3. Within-EU freedoms

The general interactions between policies and economic integration reviewed in the previous section are extremely relevant to the Economic and Monetary Union process in Europe. The 'negative' integration process meant to implement the freedoms enshrined in the EU Treaties and foster competition deregulates markets, and clashes with real or perceived needs to restrain market forces. 'Positive' integration, i.e. the introduction and harmonization of common rules, has been difficult in the areas where it has taken place, such as the workplace and product safety *acquis*. And it is even more difficult or impossible in other important areas, such as social protection and professional licensing.

Lack of effective policy integration has predictable consequences for the extent of feasible economic integration, and for the allocation of external policymaking powers at the supranational Community level, across the four internal freedoms of mobility for goods, capital, services (and freedom of establishment), persons. The absence of internal barriers to trade in goods necessarily requires a common EU position in external negotiations concerning tariffs and third-country products' access to the single internal markets, and a very high degree of goods market integration had to be accompanied by integration of markets' legal frameworks. It used to be the case that cars required yellow headlights to be registered in France, and headlight sweepers to be registered in Sweden. Like explicit tariffs and quotas, the aspects of such rules that aim at segmenting markets (and act as implicit barriers to trade) can be simply repealed simultaneously in all countries. But other aspects of technical specifications are meant to enforce safety standards in matters too difficult for individual customers to judge. So, the Single Market Program did not simply abolish explicit barriers to trade, but also painstakingly harmonized the legislation – from the safety- and

pollution-relevant features of cars, to size of pens in chicken coops – that would have functioned as implicit barriers to trade if left untouched, and would have left markets unable to function if simply dismantled. Mutual recognition of technical standards, stemming from the 'origin' or 'Cassis de Dijon' principle, played an important residual role in areas where explicit supranational harmonization efforts would have been excessive.

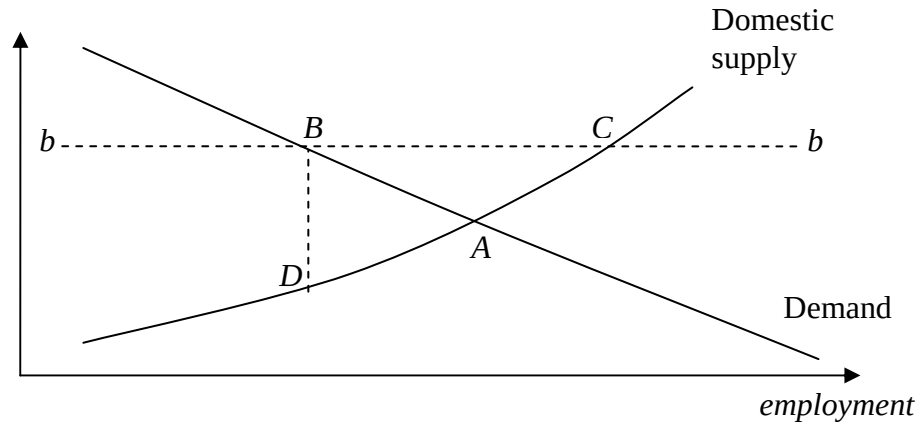
Capital mobility is also essentially free, with some tensions regarding lack of harmonized capital income taxation. Personal mobility for economic reasons is formally unrestrained, but subsidiary, non-harmonized policies still limit access to social infrastructure. In practice it is difficult to devise and implement the EU common immigration policy envisioned since the Amsterdam Treaty (Kuijper, 2000). Cross-border market access in services industries remains rather heavily restrained even after recent Directive (and this implies peculiarly complex external arrangements, reviewed in the next section). The reasons for differently incomplete integration across the four areas reflects the different extent to which a 'positive integration' common regulatory framework would be necessary in theory, and is in practice made difficult heterogeneous status quo policy configurations and lack of a suitable negotiation framework.

We proceed to illustrate this general mechanism with a discussion of economic and legal aspects of two particularly controversial integration modes, both involving personal mobility, where conflicts between National policies and international market integration are particularly apparent, and still unresolved: the Posted Workers case, and the Bolkenstein effort to achieve a single market in services.

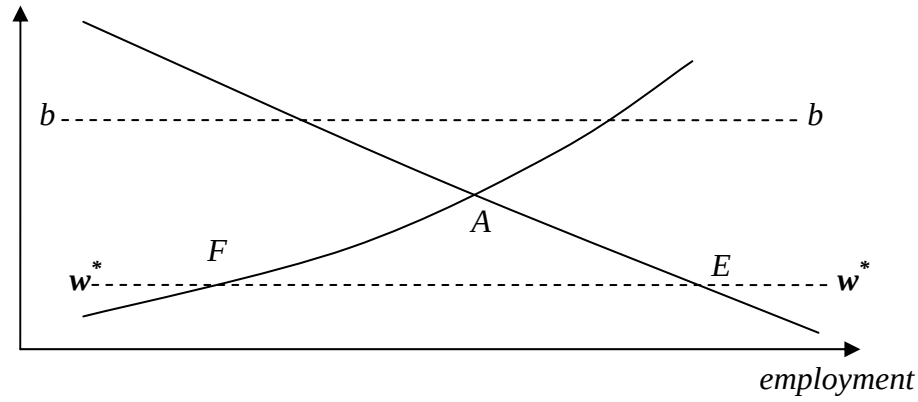
3.1 Posting of workers

The origins and current configuration of worker posting rules in the EU offer clear insights into the Community's approach towards the interaction between free movement of services mandated by the EC Treaty and national systems of social policy. In the early 1990s, implementation of Single Market public procurement rules implied that much East-German construction activity was performed by British, Portuguese, and Italian firms posting workers to German construction sites, at the same time as many German construction workers were able to draw unemployment benefits of Bismarckian generosity. Clearly, integration grants both rich and poor countries new trade and specialization opportunities: East German reconstruction would of course have been much more expensive if only German labor could have been employed. Equally clearly, the German system of employment-based social insurance was ill equipped to cope with the new types of labor market risk generated by economic integration. As illustrated in Box 1, generous income guarantees for domestic workers are inconsistent with competition by low-wage foreigners.

Box 1: Foreign competition and labor income support policies



The figure above depicts demand and supply in a country's market for low skill labor. Different (and not unrelated, but not displayed) demand and supply schedule determine employment in higher-skill labor market segments. In laissez faire, equilibrium is at point *A*. Suppose the corresponding income is deemed too low, and policies are put in place to raise income of low-skill workers to the level of line *bb*. Employment decreases to point *B*, as the higher price of production reduces the derived demand for labor. At the margin, the cost of labor is higher than the wage at which workers are willing to supply their labor: the difference, i.e. the vertical distance between points *B* and *D*, has to result from the mix of taxes, subsidies, and regulations implemented to achieve the *bb* minimum welfare floor. The horizontal distance between points *B* and *C* measures labor that would be willing to work at the going wage *b* but, prevented by rules and payments from bidding down the wage, remains unemployed. This outcome is inefficient as regards the market in question, but imperfections in other markets (such as those for financial, insurance, and education services) and politico-economic considerations can very well justify the social/public costs of only employing units of labor up to *B*, and subsidizing those with lower productivity and/or higher opportunity costs.
Suppose now that the labor of similarly skilled workers from other countries can access the market depicted in the figure, either via trade in goods whose imports displace domestic production of the sectors whose derived demand for labor is depicted above, or directly via personal mobility. And suppose that the cost of employing foreign labor is lower than the laissez faire point *A* in the figure (and, a fortiori, than the welfare floor level of points *B* and *C*): this lower cost can result from laissez faire demand and supply schedule crossing at a lower level in foreign labor markets where unskilled labor is more abundant, or can only be employed in less productive firms, and can produce competitive export goods or has incentives to migrate. As shown in the figure below, the availability of cheap foreign labor would benefit consumers but greatly increases the cost of income-support policies.



Allowing access to labor whose willingness to work is represented by the horizontal line $\mathbf{w}^*\mathbf{w}^*$ would bring the laissez faire labor market equilibrium to total employment *E*, of which only *F* are domestic workers, and *FE* are foreigners. Consumers benefit from the lower price and higher quantity corresponding to the movement down the derived demand for labor; in the absence of income support policies, the equilibrium

wage of low-skill workers in the country would fall from the level of *A* to that of *F*. The units of labor with opportunity costs between those levels would be employed in those opportunities, and lose the surplus. In the presence of a welfare floor and of the wedge illustrated in the previous figure, the increase in production is even more dramatic from point *B* to point *E*. But the increase in the cost of income support is also dramatic: in the limit case where all nationals are entitled to benefits that are higher than the wage at which foreigners are willing to work, then all (not just some) of the nationals are replaced by foreigners. This limit case, and the perfect elasticity at $\mathbf{w}^*\mathbf{w}^*$ of foreign labor supply, are of course an exaggerated depiction of more general and nuanced phenomena. They are however not very distant from what was observed in Germany in the aftermath of unification, when the Single Market European bidding rules made it possible for firms employing British, Italian, and Portuguese labor to undercut German firms whose labor costs were propped up by generous unemployment insurance provisions meant to support construction workers' income in the face of cyclical and seasonal fluctuations, rather than of international market competition (see Bean et al, 1998).

As discussed in Bean et al (1998) and their references, the German government's reaction was twofold. On the one hand, it reduced German construction workers' entitlement to unemployment benefits. On the other hand, and simultaneously, it imposed a minimum wage for construction work done on German soil (regardless of the worker's and employment contract's nationality). This triggered a lengthy and heated controversy regarding the legitimacy of such essentially trade-preventing measures in the EU context. From the economic point of view, in fact, a minimum wage for posted workers reduces incentives to exploit gains from trade in labor services, just like a minimum price for imports is equivalent to a trade quota.

From the legal point of view, the controversy was based on the contrast between two strands of legal developments at the EC level: that aimed at free labor mobility (of posted workers, in this case), an that aimed at guaranteeing employees' rights (the terms of employment applicable to the posting situation). As to **mobility**, by the 1990s EC law provided for workers' movement from one Member State to another either under the norms on free movement of workers and freedom of establishment, or under the rules on free movement of services. The two former freedoms entail the foreigners' stable presence in the Member State of destination (i.e. migration, whether long or short term). Services movement freedom, instead, is temporary by definition (art.50, par.2 ECT): a service providers is supposed to enter the country with the clear intention of leaving it after performing the services (mobility as a two-way ticket).

Since the 1990s, the EU developed specific law and jurisprudence on the posting of workers within the framework of the freedom to provide services, stemming from the European Court of Justice (ECJ) inclusion of the posting of workers as one of the possible modalities under which an undertaking established in a EU Member State may provide services into another Member State [Case C-133/89, Rush Portuguesa, 27 March 1990, point 15, ECR I-1425]. According to the ECJ, the principle of free movement for workers was not involved, because the posted workers return to their country of origin after the completion of their work, without at any time gaining access to the

labour market of the host Member State. This overturned the long-established view that posting of workers fell within the free movement of workers: only key personnel (highly specialized workers, whose physical presence is accessory to delivery or maintenance of products) were thought to be covered by the freedom to provide services [see also Houwerzijl, p.180]. In the 1990s, ECJ case-law tended to broaden the range of situations where foreign workers could freely enter into another Member State to perform their work. Progressive extension of free worker mobility, and the resulting interactions with National Welfare States, eventually led to essentially complete freedom to move and reside in another Member State, now extended to all European citizens and their family through the overarching free movement of persons [see art.18 ECT and the implementing Directive of the Parliament and of the Council n.2004/58 of 29 April 2004, to be implemented by Member States by 1 April 2006].

The right to move into the country of posting, accordingly, was well established, but could be granted on the basis of the worker mobility or service provision 'freedoms'. The two had different implications for **conditions of employment**. If the posting situation fell under the free movement of workers, then art.39 ECT would apply, and impose equal treatment between nationals and non-nationals in wages and other working and employment conditions. This principle was meant not only to entitle workers to a decent employment protection but also to prevent unfair competition [Case 167/73, ECR 360, par.45]. Under free provision of services, national treatment also applies: 'the person providing a service may, in order to do so, temporarily pursue its activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals' (art.50, par.2 ECT). This is meant as a liberalizing clause, guaranteeing no less favorable conditions to the non-national service provider than to nationals.

But which employment conditions should have apply to the posting? Those in the employment law of the Member States where the employee is employed or those of the Member State of posting? Because of the private nature law of employment law, the Convention on the Law Applicable to Contractual Obligations (the 'Rome I Convention') applied. This Convention is an instrument of private international law, rather than a Community legislative instrument. It was signed by the Member States in 1980, came into effect in 1991, and its provisions were applicable to employment situations involving different countries with conflicting applicable laws. This Convention poses the principle of freedom of choice of the law by the parties (the employer and the employee), which can be made and can be changed at any time (art.3). In the absence of a choice, art.6, par.2 states that the employment contract is governed by the law of the country where the employee habitually carries out his work under that contract. On this basis, it was natural to apply a country of origin legal framework to posted workers' employment relationships. According to art.6, par.1, the

parties' choice of law must not result in depriving the worker of the protection guaranteed by the mandatory rules of the law which would govern the contract following art.6, par.2. At the same time, art.7 - saying that mandatory rules of another country must be applied provided that certain conditions are met - made it possible for Member States to impose more stringent or burdensome rules than those of the applicable law. According to the Court's case-law previous to Directive 96/71, Community law did not preclude Member States from applying their legislation, or collective labor agreements entered into by both sides of industry, to any person who was employed, even temporarily, within their territory, no matter in which country the employer was established. Similarly, Community law did not prohibit Member States from enforcing those rules by appropriate means, when it was established that the protection thereby conferred was not guaranteed by identical or essentially similar obligations by which the undertaking was already bound in the Member State where it was established [*Rush Portuguesa* and *Vander Elst*]. However, such an option given to Member States could be exercised only insofar as the applicable law was their own.

In 1996, the Council and the Parliament adopted Directive 96/71 concerning the posting of workers in the framework of the provision of services. The scope of this Directive was allowed by art.20 of the Rome I Convention, stating that the Convention was to be applied without prejudice of any EC legislation and implementing national measures taken in particular matters covered by the Convention. Because its legal basis was set in the free movement of services (art.47, par.2 and art.55 ECT), rather than in any social policy mandate, the Council could approve the directive by qualified majority vote, thus overriding the British Conservative government veto to any piece of common legislation in the social field.

The Directive expressly sought to preserve fair competition and protection of workers' rights during the posting (Recital n.5); to these ends, the act sought to coordinate Member States' laws in order to guarantee that the employer would apply certain minimum protective provisions to the posted worker in the Member State of posting (Recital n.13). Thus, the Directive made the optional character of Art.7 of the Rome I Convention obligatory (Recitals 7-11, and art.3, par.1) while stipulating the favor principle (Recitals 14, 17, and art.3, par.7). According to the equal treatment provisions in art.3, par.1, Member States shall ensure that, whatever the applicable law and in specified matters, the undertakings guarantee workers posted to their territory the terms and conditions of employment which, in the Member Stat where the work is carried out, are laid down by law and or/ by collective agreements or arbitration awards universally applicable. These rules apply in the matters of maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay, conditions of hiring-out of workers, health, safety and hygiene at

work, protective measures for pregnant women and young people, and non-discrimination provisions. As a limitation to this national treatment, the favour principle stated in Art.3, par.7 guarantees that host country's law only applies when working conditions in this country are better than in the home country.

However, neither the Directive or national implementing legislation specify how to decide which working conditions are more favorable. This gave rise to much additional ECJ case-law, mostly originating from construction sector controversies about minimum wages, contributions to social funds, and working conditions. The issue is always that of which law should be given priority, and the decision is always based on a comparison between the posted workers' protection under the home State and the host State laws [see *Guiot*, Case C-272/94, ECR (1996) I-1915; *Arblade*, already quoted; *Mazzoleni*, Case C-165/98 (2001) ECR I-2189; *Finalarte*, joined cases C-49/98, C-50/98, C-52/98, C-68to71/98, ECR (2001) I-7831; *Portugaia*, Case C-164/99, ECR (2002) I-787; *Wolff & Müller*, Case C-60/03, ECR (2004) I-9553]. In the last three cases, for the first time, the comparison involved very different levels in wages, such as those prevailing in Germany and in Portugal. Finally, in Case C-341/02, *Commission v. Germany* [2005], the Court found that Germany had failed to take into account, as constituent elements of the minimum wage, *all* of the allowances and supplements paid by the employer established in another Member State.

Continued controversy about posting of workers is a clear indication of tensions between national welfare systems and economic integration. Tensions are more general, however. Since building has to be performed on-site, by temporary migration of construction workers, tensions are more visible than in the case of, for example, relocation of automotive plants. Immigration is even more visible, and excites even clearer resentment when immigrants are felt to draw on the destination country's welfare system. As the posted workers case clearly illustrates, however, foreigners need not draw benefits themselves to trigger important consequences. When foreign competitors cause the low wages of native low-skill workers to fall below welfare benefit floors, substitution of the indigenous poor by foreigners is effectively subsidized by the taxpayers of more generous constituencies. And when this is not acceptable by the destination country, attempts to restrict mobility and economic integration are the logical consequence.

3.2 Regulation and provision of services in the EU

Policies that support low incomes are unsustainable when economic integration opens the country to competition from poorer foreigners are willing to work for less than the welfare-state floor. In general, and as shown clearly by the regulation of worker postings reviewed in the previous subsection, the tension between national Welfare States and international competition calls for limits to international economic integration.

Similar inconsistencies between national policies and international competition arise in the context of trade in services. All member countries of the European Union regulate their services industries, in different ways and with different degrees of stringency, and in all countries the presence of foreign services suppliers is limited. Figure 1 displays indicators of professional services regulation and of the presence of foreign professionals: the latter indicator is imprecise, as its definition covers mostly but not only non-EU permit holders, and its measurement on a flow basis reflects transitional dynamics that are likely to be at different stages across countries. The number of permits issued in each country generally reflects both demand- and supply-side factors. A small number of permits may be observed because no attractive work opportunities are available for foreigners, or because work opportunities for foreigners are indeed attractive but are also tightly rationed. From either perspective, it is interesting and unsurprising to see a broadly negative relationship between the intensity of observed professional work inflows and the tightness of professional services regulation (with higher numbers indicating stronger restrictions to competition). In countries that restrain competition in the professional services industry, such as Italy and Germany, few foreigners are able to offer their services; looser regulation, as in Sweden or in the UK, is accompanied by larger foreign inflows. Of course it would be desirable to control for determinants of inflows other than regulatory constraints, so as to understand large differences in such inflows across countries with similar internal regulation (such as Denmark, the UK and Sweden). But while proper control is impossible, given the small number of observations, this noisy evidence indicates that argument that countries where markets are more heavily regulated are less open to access by foreigners.

As in any other field, stringent internal regulation is inconsistent with international liberalization. In the case of services, however, international economic interactions do not necessarily tend to decrease the income of relatively poor residents of rich countries (faced, like German construction workers, by plentiful competitors from poorer countries), and policies that limit competition are not necessarily motivated by redistribution towards relatively poor domestic residents. Resistance to deregulation and integration may be motivated by protection of rich producers' income and/or of

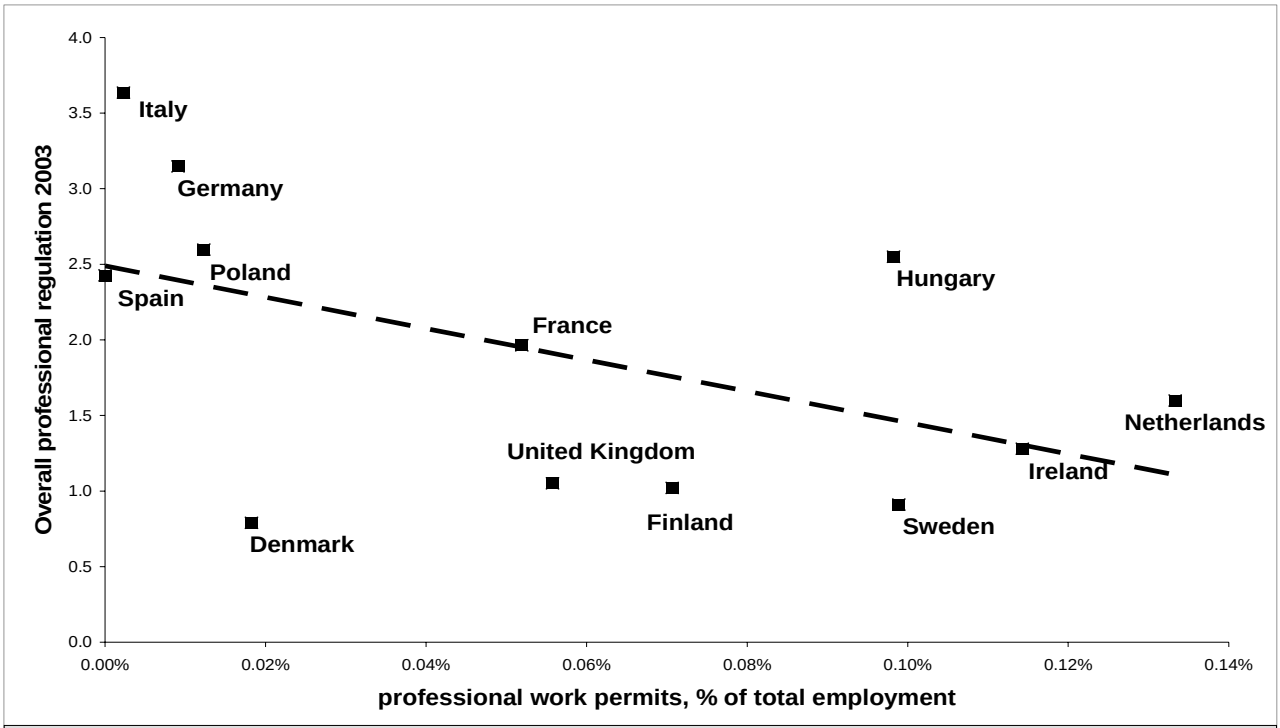


Figure 1 Professional services regulation and professional work inflows.

Horizontal axis: Annual inflow of professional work permit holders as a fraction of total country employment; definitions vary across countries, source: European Commission Communication SEC(2005)1680 'Policy Plan on Legal Migration', Table 4. Vertical axis: overall regulatory index for professional services, source: Conway and Nicoletti (2006).

the quality of available services, either or both of which may be the victims of allowing international access to domestic markets.

Just as liberalization of trade in goods allows high-income individuals in rich countries to purchase goods manufactured by less developed countries' cheap labour, foreign access to low-skill (e.g. household care) service markets may improve the terms of trade for the relatively rich citizens of rich countries. In the case of high-skill professional services, however, opposition to international trade goes hand-in-hand with opposition to liberalization of internal markets, and reflects concerns about efficiency as well as distribution motives. On the one hand, regulation of services may address market failures in delicate matters of health, education, and other personal services. When quality is important but difficult to assess, competition may indeed associate high quality with high prices and incomes, and producers may attract customers with signals of their self-confidence, such as luxurious premises. Combined with enforcement of minimum quality standards, high prices possibly ensure supply of high-quality. Combined with barriers to entry and ceilings on the number of suppliers, however, minimum prices simply enforce monopoly power, and support the market incomes of producers.

Whether motivated by quality concerns or (possibly perverse) income distribution issues, resistance to trade in high-skill services in developed countries could be overcome by international (or supranational, within the EU) agreement on harmonized regulation. In comparison to the case of goods markets, regulation is at the same more difficult and more necessary in the case of skilled services provision. More difficult, because the very pronounced heterogeneity of country-specific regulatory frameworks makes it impossible to adopt country-of-origin principles (as the first version of the Bolkenstein directive attempted to do), and a positive-list harmonization approach would have deal with the fact that plumbers' skills and medical doctors' qualifications are not as easily defined as a car's safety and pollution characteristics. But harmonization is more necessary, and lack of harmonization a steeper obstacle to effective integration, because service providers' skills may be even more difficult to assess than cars' characteristics for customers or market agencies, and poor judgment – at least in the case of health services - can have even more severe consequences. Moreover, just like opposition against trade in manufactures (and low-skill service), opposition to services trade liberalization has distributional and social motivations: services regulation also serves purposes of income support for service providers, and is differently stringent in richer countries than in poorer countries, which have more pressing priorities than services quality.

These tensions were all very apparent in the controversies surrounding efforts to liberalize trade in services within the EU. In principle, freedom to provide services within the Community is established whereby restrictions to such a freedom are prohibited as regards service providers who are nationals of another Member State (art.49, par.1 ECT). In practice, the limited extent of liberalization reflects the way in which such prohibition has so far been implemented by Community' jurisprudence and legislation (the two are intertwined, and their interaction is interestingly related to trade-in-good liberalization developments). The Treaty provides instruments for a mixed enforcement strategy. The comprehensive legal mean for assuring un-restricted freedom to provide services is non-discrimination in the form of national treatment, as non-discrimination on the basis of nationality is a general principle of EC law (art.12 ECT). This means that service providers have the right to temporally exercise their activity in another Member State 'under the same conditions that country imposes on its own nationals' (art.50 ECT), i.e. not under worse (or less favourable) conditions. The country-of-destination principle is thereby in force; mutual recognition is expressly provided upon the adoption of directives only as far as professional qualifications are concerned (art.50 and art.47 ECT). Legislative harmonization stems from a double source: with regards to specific services (art.52 ECT) and horizontally (art.55 and Art.47, par.2 ECT). The latter provides that, in order to make it easier for persons to provide trans-national services, the Council and the Parliament 'shall issue directives for the coordination of the provisions

laid down by law, regulation or administrative action in Member States concerning such activities'. These directives must be adopted by qualified majority vote, as is generally the case in the internal market field, unless their implementation 'involves in at least one member state amendment of the existing principles laid down by law governing the professions with respect to training and conditions of access for natural persons.'

In order to ensure the freedom to provide service, the ECJ has progressively strengthen the provisions of art.49 and 50 ECT in many ways. First, the Court has recognized that they have direct effect, i.e. they confer a directly enforceable right upon individuals (Case 33/74, *Van Binsbergen*, I *01299*). Second, the Court has interpret them as covering both direct and indirect discrimination: direct discrimination on the basis of service providers' nationality or residence is of course prohibited both at the entry (for example, a nationality requirement for the provision of accounting services, as it was the case in Italy) and as regards the exercise of the service activity (for example, a required link between the place of permanent establishment and the place where the services are provided: *Van Binsbergen*). Less obviously, case law also prohibits measures are prohibited that apply both to national and foreign services providers, but *de facto* result in an indirect discrimination vis-à-vis foreigners (for example, Italian Universities' worse working contracts for foreign language lecturers, who are unlikely to be Italian nationals, was found to be a form of indirect discrimination). Third, the Court has gone even further, by extending the leverage of prohibition of restrictions to those national measures which, without being discriminatory by nature or in their effects, obstruct foreign service providers' access to the national market or render the exercise of their provision too difficult. As the ECJ itself has recently recalled, 'it is settled case-law that Article 49 EC requires not only the elimination of all discrimination on grounds of nationality against service providers who are established in another Member State, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where he lawfully provides similar services.' (see case C-244/04, *Commission vs. Germany*, 16.01.2006, paragraphs 30-31).

The ECJ does admit national restrictive measures which obey to overriding public interest, such as 'the need to ensure observance of professional rules of conduct connected, in particular, with the administration of justice and with respcet for professional ethics' (*Van Binsbergen*, par.14), or consumer protection (Case C-76/90, *Säger*, ECR 1991 I-4221, in the case of a patent renewal service provider) or maintenance of public order (Case C-275/92, *Schindler*, ECR 1994, I-1039, in the case of prohibited large-scale lotteries). However, such restrictions must be objectively justified (necessary) and proportionate to achieve the imperative requirement of public interest. In these

respects, the case-law on freedom to provide services is rather similar to the Cassis de Dijon decision in goods-trade liberalization. Implementation of restrictive measures on service providers lawfully providing similar services in the Member State of establishment is generally prohibited, unless necessary and proportionate to pursue an overriding public interest.

The legal means set down by the Treaty on order to enhance freedom to provide services have been activated on the legislative level too in recent years, in the direction of better regulation, facilitation and transparency, within the Commission's 'Internal Market Strategy for Services' (COM/2000/888). Horizontally introduced by the case-law, mutual recognition was regulated in legislative acts as regards diplomas and professional qualifications. The historical path shows that firstly ten sectoral directives covering qualifications in highly-regulated services sectors were taken, namely the professions of nurse responsible for general care (1977), dentist and veterinary (1978), midwife (1980), architect and pharmacist (1985). A first general system for the mutual recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration was regulated first (Council Directive 89/48/EEC of 21 December 1988) , and was followed by its extension to professions for which the required level of training is not as high. Whereas the directive on doctors aimed to facilitate free movement and mutual recognition of diplomas (1993), the directive on lawyers (1998) concerned only establishment.

This process has led the whole set of existing acts to be consolidated and replaced by Directive 2005/36/EC, which consolidates and modernizes the rules currently regulating the recognition of professional qualifications. Freedom to provide services is strengthened, by virtue of innovations that introduce a two-folded mutual recognition principle is two-folded. On the one hand, those Member States which condition access and pursuit of a regulated profession to specific professional qualifications must recognize professional qualifications obtained in one or more Member States if the they allow the owner to exercise the same profession there (art.1). On the other hand, as far as free provision of services is specifically addressed (Title II), Member States are prohibited from restricting, for any reason relating to professional qualifications, the free provision of services in another Member State if the service provider is legally established in a Member State for the purpose of pursuing the same profession there; in case the host Member State does not provide for regulation of the profession, it has to give free entrance and pursuit of that profession to service providers established in another Member States who have exercised for at least two years in the previous ten years (art.5, par.1). Interestingly, the Directive clearly specifies that mutual recognition applies to regulations on entry and pursuit of a profession as regards professional qualification,

whereas the national treatment rule[1] applies to disciplinary rules having a direct and specific link with the professional qualifications, such as the definition of profession, the scope of the activities covered, the use or titles and serious professional malpractice which is directly and specifically linked to consumer protection and safety (art.5, par.3). Significant exemptions towards foreign service providers are set concerning requirements placed on professionals established in the home Member State, relating to (a) authorization by, registration with or membership of a professional organization; (b) registration with a public social security body in view of the insurance for activities pursued (art.6). Some procedural requirements are allowed upon the first move (art.7), coupled with provisions on administrative cooperation (art.8) and information duties vis-à-vis the recipients of the service (art.9).

Legislative harmonization has been pursued mainly on the basis of art.47, par.2 ECT, which covers not only establishment but also provision of services (art.55 ECT). This has been the case for Television without frontiers (Directive 89/552), postal services (Directive 97/67), financial services (for example Directive 2004/39 on markets in financial instruments). Very interestingly, some of these harmonizing instruments do contain the principle of the home country, although it 'appears practical for reasons associated with the type of service' [Graham, p.45]. Most fully developed is the application of the home country control in the financial services directives; here, harmonization of minimum or 'key' national regulatory standards are necessary in order to allow the principle of state control to work. This experience supports the argument that full harmonization in national regulatory systems is necessary, otherwise national regulations operate by their own and laws are to be divided according to the host country or the home country principle [Graham, p.46]. Such a situation would surely jeopardize efforts towards freedom of services through legal certainty and transparency.

A comprehensive application of the home country principle was attempted by the Bolkestein proposal of a Directive on services in the internal market (COM/2004/002). The proposed text, which aimed to coordinate, at Community level, the modernization of national systems for regulating service activities, was based on a combination of techniques for regulating service activities. In particular, art.16, par.1 established the 'country of origin principle' for the free provision of services, according to which 'Member States shall ensure that providers are subject only to the National provisions of their Member State of origin which fall within the coordinated

[1] Whereas .3: 'The guarantee conferred by this Directive on persons having acquired their professional qualifications in a Member State to have access to the same profession and pursue it in another Member State with the same rights as nationals is without prejudice to compliance by the migrant professional with any non-discriminatory conditions of pursuit which might be laid down by the latter Member State, provided that these are objectively justified and proportionate.'

field'. The other distinguishing feature was that the state of origin would have been responsible for supervising the provider and its services, including services provided in another Member State (art.16, par.2). Finally, an absolute and exhaustive list of requirements a Member State may not impose on foreign service providers was also set. This overall approach differs from the mutual recognition principle, which would let States recognize that legal services legally provided in the home state may be provided in their territory. The draft directive expressly provided for the application of home country rules instead, and placed upon the home country the obligation to supervise services supplied abroad. General, transitional, and case-by-case derogations from the country of origin principle were foreseen, in order to take account of differences in the level of protection of the general interest in certain fields, the extent of Community-level harmonization, the degree of administrative cooperation, or certain Community instruments. In order to ensure effective supervision, the proposal established obligations of mutual assistance between national authorities and provided for a high degree of administrative cooperation between authorities by organizing the allocation of supervisory tasks, exchange of information and mutual assistance. Targeted harmonization was considered necessary to ensure protection of the general interest in certain essential fields where too wide a divergence in the level of protection, notably in the field of consumer protection, would undermine the mutual trust that is vital to the acceptance of the country of origin principle.

The proposal was not well received. Directive 2006/123 on services in the internal market (in force as of 2007, after a drawn-out co-decision process) is the result of a compromise between the Commission's proposal and the Council, on the one side, and the Parliament, on the other side. Thus, the coverage is limited by excluding from being affected by the directive whole categories of legislation (regulation of services of general economic interest, of monopolies providing services, measures to protect or promote cultural, linguistic and media pluralism, criminal law, labour law and social security legislation, in Art.1) and whole sectors of the economy (financial services, electronic communication services, transport, services of work temporary agencies, healthcare services, audiovisual services, gambling activities, services connected with the exercise of official authority, social services related to social housing, childcare and support of families and persons, private security services, notaries and bailiffs, and the field of taxation; Art.2). Moreover, it is provided that other Community law, including the Directives 96/71/EC on posted workers and directive 2005/36 on professional qualifications, should prevail on the Services directive. Within its limited scope, the Directive relies on harmonization of procedures and regulations through a prohibition/derogation technique, according to which requirements and procedures imposed on Member States vis-à-vis alla service providers who are nationals of a Member State, i.e. indistintly

thier own nationals and the other Member States' nationals. Chapter II addresses administrative simplification (through provisions on simplification of procedures, points of single contact, right to information, and procedures by electronic means). Chapter V deals with the quality of services by requiring Member States to ensure availability of certain information to services recipients, to eliminate all prohibitions on commercial communication in the regulated professions, to ensure tha possibility of multidisciplinary activities, although authorizing the application of certain listed requirements, to encourage voluntary adoption of quality policy instruments by service providers and finally to take some measures for the settlement of disputes. Chapter IV on mutual assistance places obligations and procedures on Member States; supervision by the Member State of establishment in the event of the temporary movement of a provider to another Member State is made residual with respect to the general responsibility of supervision by the host country. Chapter IV of free movement of services does not mention the country of origin principle anymore. Art.16 establishes the obligation on Member States to 'respect the right of providers to provide services in an Member State other than that in which they are established, ensuring free access to and free exercise of a service activity within their territory.

Thus, the country of origin principle is replaced by an absolute provision for market access and treatment (i.e., non contingent upon another set of norms), accompanied by qualified and specified exceptions (i.e. the possibility for Member states to subject access to or exercise of a service activity to compliance with requirements). These exceptions are not innovative, but they are exhaustively listed in detail: they concern non-discrimination, necessity and proportionality (par.1) and public policy, public security, public health or the protection of environment (par.3). In any case, some other requirements are explicitly forbidden (par.2). Art.17 contain general derogations from art.16 provisions in 15 fields of activity, including Community legislation on free movement of persons (Directive 2004/38)and third country nationals. Art.18 provides for the possibility of case-by-case derogations. Were it not limited and derogated in such many and varied ways, the positive provision for free access to and free exercise in the national market by service providers established in another Member State would have brought far reaching liberalizing consequences.

4. The external dimension of EU trade in services

After a lengthy, controversial, and incomplete liberalization process, posted workers and service providers who are citizens of an EU Member State do enjoy free entrance to and rights to stay in every EU Member State, as citizenship is now the overarching legal basis for free movement; and their market access is similarly unrestrained insofar as their activities fall within the scope of freedom to provide services, which provides for elimination of all barriers especially through

national treatment. Market integration in these areas is not yet complete, however. Not only because regulations applying to service providers are not yet harmonized across countries and sectors, but also because of the uneven and complex market access rules for third-country nationals and service suppliers who reside in a Member State and are service suppliers as regards their provision of services in another Member State.

The tensions discussed in the previous sections are even more apparent when it comes to provision of services by third-country nationals, where sensitive issues are involved such as Community market protection and immigration. Indeed, the question is two-folded, as it concerns third-country nationals' both movement within and access to the EU. On the one hand, were the internal market perfectly realized, precluding these service providers from enjoying free movement to supply a service into another Member State would economically not have sense. On the other hand, perfect market integration would also imply common rules as regards access to the EU, both by third-country nationals who wish to establish themselves or reside in a Member State and provide a service, and by those service providers coming to the EU just to provide a service occasionally and temporarily. But because market integration in services is still imperfect, and regulation of a common migration policy is still in the making, the EU remains, to very a large extent, nationally fragmented towards third-country nationals who provide services.

Taking account of such an imperfect integration, one would wonder whether extending freedom to provide services and establishing common rules from service providers coming from third countries would even be feasible or desirable. Pressure towards such liberalization, however, does not only come from a desire to achieve internal market integration. On the one hand, there is an increasingly prevalent political view of the EU as an 'area of freedom' for long-term residents as well as for EU citizens. On the other hand, the EU and its member countries face increasing international pressures to offer common rules on grounds of its trade policy, and recent multilateral negotiations have increasingly focused on services trade liberalization (Winters et al, 2003). Service providers temporarily moving into the EU to provide a service fall under multilateral trade in services rules in the WTO (the GATS). Thus, they are covered by EU external trade competences in the field of services. As a result, EC institutions' decision powers are intricately relevant. This makes GATS an interesting test case for resolution of tensions between international economic integration and national regulatory and social policies.

In the following, we first outline the legal framework applying to third-country nationals who, once allowed into the EU, wish to move into another Member State in order to provide services is

analyzed. Next we discuss conditions for access to the services market(s) of the EU are considered, focusing in particular on whether and how they are set by Member States or at the EU level.

4.1 Intra-EU mobility of third-country service providers

Very different rules apply depending on whether third-country nationals are dependent workers employed by an EU service supplier, or independent service suppliers established in a Member State. The issue of within-EU movement of third-country nationals for service provision is a peculiar example of the tensions generated by the EC fundamental freedom to provide services and the integration of differently regulated markets. According to art.49, par.1 and 2 ECT, third-country nationals are not covered by EC rules on freedom to provide services. Restricted opportunities for EU-wide access is possible by the combined provisions of art.55 and art.48 ECT, whereby freedom to provide services is granted to companies formed by non-EU nationals 'in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community' art.48 ECT). Such third-country nationals are not entitled to rights of free movement as physical person, and free movement of services provisions are applicable to them only through such companies. This certainly does not foster market integration [Condinanzi, Nascimbene, Lang, p.179], and implies that third-country nationals or companies formed in a third country which have a branch in the EC are excluded from the freedom to provide services. Secondly, art.49, par.2 gives the Council the faculty to extend ECT provisions on free movement of services 'to nationals of a third country who provide services and who are established within the Community'. Since the Single European Act (1987), the Council decides by majority vote in this area. As in other cases, legislative standoff can be resolved by judicial power when there is a strong need for resolution.

This occurred with the posting of third-country nationals by EU service providers, in the well-known Vander Elst case. At the time when posting of workers became a sensitive issue (see Section 3), third-country nationals employed in a Member State were not covered by art.39 free movement of workers (although this provision addresses 'workers of the Member States', it has generally be interpreted as applying, together with its derived legislation, to EU citizens only[2]) and their moving into another Member State within the posting had to comply with migration requirements of that Member State (unless the person concerned was a citizens of a third country which had an international agreement providing for free movement either with the EC or with the Member State of posting). EC service providers which employed third-country workers would have thus suffered a

[2] See Case C-147/91, *Laderer*, 25 June 1992, ECR (1992) I-04097, points 7-9; Regulation n.1612/68/EEC on freedom of movement for workers within the Community, art.1.

competitive disadvantage because of the extra-costs imposed by these authorizations and procedures, and the freedom to provide services would have hampered.

As regards dependent workers' entry and stay in the State of posting, in the well-known Vander Elst Case [C-43/93, 9 August 1994, ECR I-3803] the Court held that EC law precludes Member States from requiring undertakings making the posting and which 'lawfully and habitually employ' (the 'Vander Elst's formula') nationals of non-member countries, to obtain work permits for those workers from a national immigration authority and to pay the attendant costs. The Court thus formulated the criteria according to which the so-called 'Vander Elst's visa' had to be delivered to third country posted workers: being lawfully employed in the Member State in which the employer is established; having been issued with work permits in that Member State; holding valid documents permitting them to remain in the Member State where services are to be provided for as long as necessary to carry out the work; and not in any way seeking access to the labour market in that second State. Member States' authorizations were thus bound to these Community-based requirements, unless overriding reasons relating to the public interest capable of justifying restrictions on the freedom to provide services (art.46 ECT) applied (for example, prevention of abuses to access the employment market, the protection of workers and legal certainty [Joined Cases C-369/96 and C-376/96 *Arblade and Others*, ECR (1999), I-08453]). In the recent Case 244/04, *Commission vs Germany* [OJ C 60, 11.03.2006, p. 5], Germany relied upon each of these overriding requirements in order to justify both the practice based on the checking of certain criteria, in advance of the posting and by the German diplomats in the Member State of the employer, and its restriction to workers employed for at least a year by the provider, established in another Member State. The Court condemns Germany on both sides because of the unnecessary and disproportionate character of the measures at stake to pursue Germany's public interest objectives.

Thanks to the ECJ, Community requirements were thus finally introduced as regards intra-Community movement of third-country workers under the posting of services, but because of the need to guarantee and enhance free movement of services and not by extending free movement of workers on the basis of residence. Interestingly enough, such an *enclave* in EU law is still in place. Although Directive of the Council n.2003/109 of 25 November 2003 grants third-country nationals who are long-term residents the right to freely enter and stay in another Member State, it expressly excludes posted workers and providers for the purposes of cross-border provision of services (art.14, par.5 of the Directive).

On the contrary, legislative standoff was not overcome as regards the implementation of art.49, par.2. In 1999, the Commission issued a Proposal for a Council Directive extending the freedom to

provide cross-border services to third-country nationals established within the Community (COM/1999/3).

The Commission pointed out that it was not justifiable that a third country national with an ongoing actual link with the economy of a Member State should be unable to benefit the of the freedom to provide services otherwise than by setting an enterprise according to art.48 ECT nor as in its capacity of natural person as a self-employed service provider whose activities add value to the economy of a Member State. It also prevented Member States' fears by stressing that such a Directive would not affect the application of national provisions affording such persons a degree of social protection equivalent to that enjoyed by employed workers.[3]

The proposed text limited the Directive's coverage to those third-country nationals who are service providers and who actually and continuously maintain a link with the Member State of establishment for at least 12 moths, excluding those working in the transport sector (art.1). The Directive set a 'EC service provision card' to be obligatorily granted by the Member State of establishment upon request by the service provider, who has thus the right to enter and provide the service alternatively to entry visa, residence permits, authorizations etc (art.2). Member States of destination must ensure equality of treatment between third-country nationals and citizens of the Union as regards the recognitions of diplomas, qualifications and certificates acquired within the EU (art.3). Anyway, the Community preference principle applies, in that Member States shall not give more favourable treatment to self-employed persons established outside the Community than to those established within the Community (art.4). Member State may derogate on grounds of public order, public security or public health (art.5). The proposal was blocked by the Council, which could not find enough positive votes to form qualify majority.

4.2 External access to EU services markets

Personal mobility of third country nationals into the EU is regulated very differently in the case of persons migrating to the EU, and in that of persons coming to the EU on a temporary and occasional basis. And while there is no multilateral venue for migration negotiations (Hatton, 2007), services provisions by means of personal mobility is the subject of General Agreement on Trade in Services negotiations. The EC has no common rules on the access and exercise of service provisions from firms and self-employed service suppliers from outside the EU, both when these third-country service suppliers wish to migrate into a Member State for the purposes of an economic activity ('economic migration') and when they provide their service on a temporary basis.

[3] Art.137 ECT, within the Treaty Social provisions, provides for a supporting and complementing activity by the EC, notably as regards conditions of employment for third-country nationals legally residing in Community territory (g).

In the latter situation the EC and its Member States are internationally bound to their commitments made under the GATS. Indeed, the Commission has sought to take legislative action under its recently established migration policy (since the Treaty of Amsterdam, entered into force in May 1999), based on art.63,3 ECT, which provides that the Council adopts measures concerning conditions of entry and residence, and standards on procedures for the issue by Member States of long-term visas and residence permits.

In 2001, the Commission issued a Proposal for a Council Directive on the conditions of entry and residence of third-country nationals for the purpose of paid employment and self-employed economic activities (COM/2001/386). With this proposal, the Commission was pursuing quite an extensive common regulation, ranging from common criteria for admitting such third-country nationals ('economic needs test' and 'beneficial effects test'); a single national application procedure leading to one combined title, encompassing both residence and work permit within one administrative act; to the conferral of rights to third-country nationals whilst respecting Member States' discretion to limit economic migration: if third-country workers and self-employed persons fulfil all the conditions set out in Chapters II and III they may be admitted, unless Member States impose limitations in accordance with Chapter IV (e.g. national ceilings or limitations based on reasons of public policy, public security or public health). The Proposal did not go beyond the first reading in the Council, which had to decide by unanimity (art.67 ECT), and therefore was not adopted.

The issue was dealt with by Hague Programme in late 2004 and by a Green Paper in early 2005. At the end of 2005 the Commission published a Policy Paper on Legal Economic Migration, in which it makes the following proposals. A General Framework Directive is proposed in order to guarantee a common framework of rights to all third-country nationals in legal employment already admitted in a MS, but not yet entitled to the long-term residence status. It will not address admission conditions and procedures for economic immigrants, which will be laid down in specific instruments, with the exception of the single application for a joint work/residence permit. It will also not affect the application of the Community preference principle. On the contrary, the conditions of entry and stay for four specific categories of third country nationals are proposed to be set by specific directives: harmonization of entry and residence requirements will concern skilled workers, seasonal workers, Intra-Corporate-Transferees (ICT) and remunerated trainees. As a general principle, admission should be conditional on the existence of a work contract and on the 'economic needs test'; exceptions may be necessary for declared structural/temporary needs in certain sectors/occupations/regions.

These proposals for specific directives mainly overlap the international commitments which the EC and almost or all EC Member States agreed within the GATS framework. The proposed text says that international commitments entered into by the EC, or by the EC and its Member States, notably under the Common Commercial Policy, will need to be respected.

Since the establishment of the World Trade Organization in 1994, other multinational disciplines besides GATT (General Agreement of Trade and Tariffs) entered into force, applying to trade in services (the General Agreement on Trade in Services, GATS) and intellectual property (the Trade-Related Aspects of Intellectual Property Rights, TRIPs). The GATS defines international trade in services by means of the 'modes' or modalities these services are supplied, i.e. either by the cross-border of the service itself ('Mode 1', a legal consultancy provided via internet), by the recipient moving to the country where the service is supplied ('Mode 2', tourism), by the service supplier establishing a commercial presence in the host country ('Mode 3', foreign direct investment), or by the service supplier temporarily moving in its physical person capacity to the host country for the purposes of the provision of the services at issue ('Mode 4').[4]

The fourth mode is akin to the traditional concept of service provision in EU law. According to the definitions set out by the GATS, this modality of trading services internationally arises where firms from outside the EU provide services to a service recipient in a Member State by temporarily moving into that State through the posting of their workers, or where third-country nationals move temporarily to the EU to provide a service in a Member State. Interestingly, Annex 4 to the GATS clarifies that the scope of mode 4 does not extend to measures affecting persons seeking access to the employment market nor to measures governing citizenship, residence or permanent employment. Moreover, the right of Members to apply 'measures to regulate the entry of natural persons into, or their temporary stay in its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across its borders', is unaffected. Therefore, Mode 4 is differentiated by economic migration and immigration laws and requirements of Members (see below). However, 'such measures are not applied in such a manner as to nullify or impair the benefits accruing to any Member under the terms of a specific commitment'.

[4] Commercial linkages may exist among all four modes of supply. For example, a foreign company established under mode 3 in country A may employ nationals from country B (mode 4) to export services cross-border into countries B, C etc. Similarly, business visits into A (mode 4) may prove necessary to complement cross-border supplies into that country (mode 1) or to upgrade the capacity of a locally established office (mode 3).

BOX 2: GATS and the internal market in services

This Box reviews the main elements of the liberalization technique adopted by GATS, which leave a lot of room for Member Country manoeuvres, and discusses their interaction with policy competencied within the European Union.

The GATS negotiations framework

In order to achieve progressive liberalization of trade in services among Members, the GATS imposes non-discriminatory treatment among third countries (art. II Most Favoured Nation rule applies generally except for regional integration agreements according to Art.V) and transparency obligations (art.III). Besides these two general obligations, the GATS simply provides for a negotiating framework where WTO Members may choose to bind themselves to liberalizing commitments in an individual schedule of concession with respects to market access and national treatment. The 'market access' provisions, as laid down in Article XVI, cover six types of limitations that must not be maintained in the sectors and modes included in the schedule of specific commitments. Prohibited restrictions relate to, among others, the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers of the requirements of an economic needs test (ENT); the value of service transactions or assets (numerical quotas or Economic Needs Tests- ENT); the number of operations or quantity of output; the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service (numerical quotas or END). National treatment (Article XVII) implies the absence of all discriminatory measures that may modify the conditions of competition to the detriment of foreign services or service suppliers. Although these provisions are apparently far-reaching, they apply to services sectors and modes of supply included in each Member's schedule, unless otherwise specified discretionary by the Member in the schedule itself. Therefore, limitations may be listed to provide cover for inconsistent measures, such as discriminatory subsidies and tax measures, residency requirements, etc. In 1995, most Members committed to advance beyond their status quo. The Members' schedules of concessions are a very complex document when commitment make substantial progress towards trade liberalization.. Any of the entries under market access or national treatment may vary within a spectrum: the opposing ends are full commitments without limitation ('none') and full discretion to apply any measure falling under the relevant obligation ('unbound'). The schedule is divided into two parts. While Part I lists 'horizontal commitments', i.e. entries that apply across all sectors that have been scheduled, Part II sets out commitments on a sector-by-sector basis. A first round of negotiations on specific commitments occurred during the Uruguay Round itself. Currently, trade in services is being discussed in the context of the new services negotiations, which began January 2000, called 'GATS 2000' and which has been put within the Doha Development Round, still underway.

The EU and member countries' role in GATS

The EU does not express a single position in GATS negotiations still presents variations by Member States. This is due to the fact that the EC and the Member States still 'share' competence with respect to the GATS, according to most legal literature [Cremona, 2002]. Indeed, when the first commitments were bound in 1995, the EC did not even enjoy competence in trade in services except for Mode 1, and this implied that the GATS was signed jointly by the EU and by Member States and therefore overall commitments 'varied' at national level[5]. Since the 1990s, the EC Treaty and in particular art.133 on the (CCP) have evolved and the sphere of EC competence extended. In particular, since the Nice revision of the EC Treaty entered into force in 2003, Common Commercial Policy (CCP)'s relevant provisions (art.133.1-4) apply also to the negotiation and conclusion of international agreements in trade in services (art.133.5), such as the GATS. Traditionally, i.e. vis-à-vis trade in goods, within the CCP the EC has exclusive competence and the Council acts by qualified majority (Art.133.4). In order to conclude international agreements with third countries or international organizations, negotiations are carried out by the Commission within a mandate by the Council acting by qualified majority and with the assistance of a special committee (the '133 Committee') composed

[5] When the GATS Agreement was to be concluded within the WTO Agreement, at the end of the Uruguay Round in 1994, the EC Court of Justice adopted the Opinion 1/94 denying the EC exclusive competence to conclude the GATS for Mode 2 to 4 of service supply covered by this Agreements, on the grounds that those modes involving the movement of third country nationals fell beyond the EC competence. Accordingly, the GATS was to be signed as a 'mixed agreement', i.e. both by the EC and by its Member States, each for the parts of their respective competence.

of Member States' representatives. These agreements are signed and concluded by the Council. However, with respect to trade in services, the Treaty also (1) provides for some derogations to the normal procedure (art.133.5) and (2) maintains some Member States' competence alongside the EC's (art.133.6). Unanimity in the Council is required externally (a) when it also applies for the adoption of internal rules, (b) where it relates to a field in which the Community has not yet exercised the powers conferred upon it by this Treaty by adopting internal rules, or (c) with respect to horizontal agreements insofar either of the previous cases are concerned. Moreover, agreements including provisions which would go beyond the Community's internal powers, in particular by leading to harmonisation of the laws or regulations of the Member States in an area for which the EC Treaty rules out such harmonisation, fall within the shared competence of the Community and its Member States. This is explicitly the case for agreements relating to trade in cultural and audiovisual services, educational services, and social and human health services. The underlying principle of parallelism between EC's internal and external competences works as a guarantee that Member States' prerogatives are not overruled by EC's external action. According to this legal analysis, had the Directive proposed in 2001 been adopted, the requirement of internal regulation would have been fulfilled, thus conferring full external competence to the Community, except for those sectors explicitly ruled out of harmonization. Moreover, since the Council has not exercised its faculty, yet, to unanimously decide to subject migration policy to co-decision procedure and qualified majority vote (art.67.2 ECT), unanimity is required for a EC position on Mode 4 to be formed, and there is Member States will have the right to set nation-based commitments in the matters where unanimity is not found. Overall, therefore, Mode 4 is still within the 'shared competence' and unanimity in the Council is required. Were the proposed directives within the 2005 Policy Plan adopted (but presumably this will occur after the end of the Doha Round), such a partial harmonization of a 'Mode 4 situation' would give competence to the EC only with respect to the aspects covered by the internal acts.

The interaction between the EU and GATS members is interestingly intricate (see Box 2 for details). The basis issue is that of whether the EU has competence to conclude agreements, alone or together with Member States, and whether it can agree to EU-wide commitments or Member-State-bound specific commitments. As is already the case for trade in goods, under the Common External Tariffs and the other commercial policies, if the EU were a perfect integrated market in services then it would be impossible to enforce different entry and exercise conditions across Member States. But because of the current legal division of competences in the EU system, the EU does speak with one voice in the GATS (the Commission's), and the agreements have different contents according to common positions or individual Member States'.

Therefore external powers are limited by the lack of harmonisation at the EU level vis-à-vis third country nationals and service providers, thus still allowing room of manoeuvre for national limitations and variations to specific commitments within the GATS. However, in the multilateral trade in services negotiations the EC is demanded to provide for legal certainty and access to its EC-wide services market, i.e. for a common position reflecting common discipline, in place of national regulatory barriers. This goes hand in hand with the efforts internally taken by the Commission to provide for harmonization of requirements on entry, stay and exercise of the service activity within the EU by third-country national service suppliers. Thus, the Commission acting as the Community negotiators seeks to present a single offer to the other WTO members, typically under the form 'all Member State...'. But the Commission also has to represents all the differing

positions of the Member States in GATS Mode 4, in case unanimity is not found ('all Member States except...'). The resulting schedule is a long list of country-specific restrictions in some of its parts which, as shown in Tables 1 and 2, presumably reflect specificities of each country's regulatory framework.

TABLE 1
EC and Member States' commitments on Intra-Corporate Transferees in GATS: horizontal and sector examples

	Market access	National treatment
Horizontal	- belonging to one of these categories: managers, specialists, graduate trainees - at least one year of employment - Temporary transfer through commercial presence in the territory of the EC MS concerned - commercial presence where transferred must effectively provide like services (no HU) - belonging to one of these categories: managers, specialists, graduate trainees - no END required - max 3 years of stay	Unbound except for measures concerning the categories of natural persons referred to and committed in the Market Access column
Construction sector	All MS except CY, HU, MT: unbound except as indicated in the horizontal section CY, HU, MT: unbound	All MS except CY, HU, MT: unbound except as indicated in the horizontal section CY, HU, MT: unbound
Nurses, physiotherapists and paramedical	All MS except CY, CZ, EE, HU, MT, SI, SK: unbound except: AT: 3 year prior experience DK: max 18 months IT: ENT, regional vacancies LV: nationality requirement CY, CZ, EE, HU, MT, SI, SK: unbound	All MS except CY, CZ, EE, HU, MT, SI, SK: unbound except as indicated in the horizontal and subject to these specific limitations: DK: residence requirement CY, CZ, EE, HU, MT, SI, SK : unbound

Source: Council for Trade in Services - Special Session - Communication from the European Communities and its Member States - Conditional Revised Offer, TN/S/O/EEC/Rev.1, 29/06/2005

TABLE 2
EC and Member States' commitments on Contractual Service Suppliers- Employees of Juridical Persons (sector examples)

	Market access	National treatment
Horizontal	All MS except CY - employees of juridical persons without commercial presence in the EU - upon obtention of a service contract from a final consumer; all MS except EE, LT: for a period up to 12 months - at least 1 year of previous employment by the service provider - university degree, professional qualifications when required by EC and MS laws, and professional experience - no exercise of the professional title - numerical ceiling, except for DK, IT, NL, SE, UK - no more than 12 months staying - 10 new MS: in force since 2011	Unbound except for measures concerning the categories of natural persons referred to and committed in the Market Access column LT: unbound
Construction sector	All MS except FR and NL: unbound FR and NL: unbound except as indicated in the horizontal sector but without application of a numerical ceiling, and FR: technicians - transfer to a commercial presence in FR which has a contract with a juridical person - work permit delivered for a period not exceeding 6 months -presentation of work certificate and a letter - END - the commercial presence has to pay a tax to the International Migration Office	All MS except CY, CZ, HU, LT, MT, PL, SI, SK: unbound except as indicated in the horizontal section CY, CZ, HU, LT, MT, PL, SI, SK: unbound
Nurses, physiotherapists and paramedical	unbound	unbound

Source: Council for Trade in Services - Special Session - Communication from the European Communities and its Member States - Conditional Revised Offer, TN/S/O/EEC/Rev.1, 29/06/2005

During the first years of the 2000 round of GATS negotiations, the EC presented its initial offers on improved market access and national treatment (April 2003) and a conditional revised services offer by the EC and its MS (July 2005). This offer is based on a consolidated schedule of the EC-25 and takes into account improvements already made in the initial offer. The offer draws a complex framework of minimum threshold commitments, that is, of the level of liberalization the EC and its Member States are willing or ready to offer vis-à-vis service suppliers from outside the EC. Most of current commitments on movement of persons are linked to the existence of a commercial presence in the Member States and concern highly-skilled or specialized manpower. In the 2005 offer, the Commission made progress in two directions: horizontal commitments on mode 4 (i.e. categories of persons covered across all sectors) apply to almost all Member States, with very few national exceptions; new categories have been scheduled, entering the EU to provide a service on a contractual basis.

The EC and its Member States offer to commit the following categories: intra-corporate transferees (persons working in a senior position or possessing an uncommon essential knowledge, temporarily transferred in the context of the provision of a service through commercial presence – an office, branch or subsidiary - in the territory of a Community Member State; graduate trainees are hereby included); business visitors (representatives of a service supplier or persons working in a senior position within an intra-corporate transfer, who respectively seek to sale a service or provide assistance to the setting of a commercial presence); 'contractual service suppliers' (CSS) independently from commercial presence, encompassing 'employees of a juridical person' (EJP) which supplies the service to a final consumer on the basis of a contract and 'independent professionals', self-employed persons which have obtained a service contract from a final consumer in one of the Member States. Restrictions regarding intra-corporate transferees and business visitors are not specified sector by sector. Contractual services suppliers, that are *de-linked* from any investments established into a Member State, are instead granted market access only in specific sectors listed in the horizontal section itself.

The EC and the Member States' offered schedule imposes conditions and requirements in order to grant access to overseas service suppliers. These concern especially horizontal requirements about the juridical form of the employer; a certain period of employment by the service provider previous to the movement or the admission; exclusion of inter-services movement; academic, professional qualifications and professional experience; numerical ceilings, replacing economic need tests. Other significant requirements are scheduled by Member States in the sector-specific section. For example, a nationality condition is foreseen in professional services by five Member States, in accounting by two, in pharmacists by four. Some activities are reserved to the members of the relevant professional body in the host country, such as advice and drafting of legal documents by members of the regulated legal and juridical professions in France. Italy maintains a residence requirement for Contractual Service Suppliers in the Accounting Services as to National treatment. All 25 EU MS are unbound as regards national treatment of CCS in the auditing Sector.

In summary, the EC's and the Member States' commitments under GATS Mode 4 result from different levels of negotiation. On the one hand, the Commission tries to convince countries to present a common position. The relevant negotiations unavoidably involve internal matters, as a common position requires (and countries often resist) some harmonization and some removal of internal barriers. This is an obvious *de facto* tension, even though the Introduction of the Schedule a contains the legal *caveat* that the commitments 'apply only to the relations between the Communities and their Member States on the one hand, and non-Community countries on the other. They do not affect the rights and obligations of Member States arising from Community law. At a

different level, negotiations and lobbying at the Commission also involve Europe-wide (rather than country-specific) services producers, whose interests mainly lie with protection against and access to non-EU competitions and markets.

5. Concluding comments

The facts and mechanisms reviewed and discussed in this paper highlight policy tensions and possible resolutions within the European Union and the World Trade Organization Conceptual and practical interactions between the two levels illustrate the general principle that an internal market necessarily implies a common external position. While the Single Market Program readily implies a common EU position as regards trade in goods, lack of harmonized immigration and citizenship rules obviously prevents EU-level negotiations with third countries as regards migration flows. In the absence of a single labor market, it is difficult to envision a common immigration policy. And since internal harmonization proves to be very difficult in services markets, external relationships are unsurprisingly difficult too. Only a properly harmonized supranational regulatory framework in the services area would establish a supranational exclusive competence in external negotiations, and enable European member countries, already represented by one voice in the GATS, to undertake the same commitments as it happens in the GATT.

The field of trade in services and temporary worker mobility, as an intermediate case between trade in goods and outright migration, features incomplete internal harmonization and multi-layered external negotiations, whose interaction and evolution offer insights of more general interest. Our analysis of various aspects and modes of service provision suggests that the extent to which general principles are applicable to specific situations depends in interesting ways on the structure of market interactions, on the legal instruments used to regulate them, and on the mechanisms adopted to achieve market and policy integration. As is the case along other dimensions of the EU's legal evolution, ECJ case law inspired by application of fundamental 'freedom' principles plays a crucial role in fostering internal market and policy integration in the case of personal mobility for the purpose of trade in services. In the case of trade in services, the desirability of a common position on international trade in services also proves to be a force of progress. Inasmuch as EU countries need to participate (individually as well as through Commission representation) in external negotiations, the GATS process of global trade liberalization contributes in practice to pressure towards harmonization of country-specific regulation within the EU, and removal of internal trade barriers.

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