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Paths to Harmonization: Legal Evolution of Internal and External Trade in Services through Personal Mobility in the EU

*By Giuseppe Bertola and Lorenza Mola**

Abstract

Ensuring that legal frameworks are consistent with market integration is always complex, and the task is particularly problematic in the services sector. This article focuses on liberalization and regulation processes within the European Union (EU), and on their interaction with multilateral negotiations and commitments, in areas of international economic activity involving temporary mobility of natural persons. We first review legal techniques aimed at resolving tensions between regulation and economic integration, then discuss their application in the context of the European Community Single Market programme's completion and of the European Community (EC) and its Member States' participation in the General Agreement on Trade in Services (GATS). Our analysis of the different configurations and effectiveness of the legal instruments in the two contexts suggests that interactions between internal and external negotiations may foster efficient integration of markets and policies.

1. Introduction

There is a large and growing literature on the necessary but difficult processes of services trade liberalization within countries, across the European Union (EU), and in the multilateral global context. The EU is engaged in internal trade liberalization efforts at the same as it seeks to formulate a single position in the multilateral General Agreement on Trade in Services (GATS) negotiations. Harmonization is difficult in this field, and so are the negotiations that might lead, on the basis of concessions across more and less developed countries and

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taking into account regulatory constraints, to multilateral commitments replacing the current patchwork of bilateral agreements.[1]

In this article, we analyze the interface between the internal EU and global multilateral services trade frameworks, focusing on interactions between legal techniques and instruments at the two levels in the areas of services provision entailing the mobility of natural persons.

Within the EU, international trade in services liberalization is tightly linked to deregulatory processes in domestic labour and professional services markets. Commissioner Monti correctly highlighted the parallel and mutually reinforcing character of EU and national service markets' liberalization efforts when he 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 Bolkestein and myself, are working together in parallel.'[2] Five years later, however, the twin efforts have both made limited progress. The Bolkestein Directive Proposal,[3] aimed at completion of a European Single Market, to include services was opposed in first reading by the European Parliament in early 2006.[4] Opposition to it came mostly from left-wing portions of the political spectrum, and from relatively rich countries. The proposal relied radically on the country-of-origin principle for the free movement of services. Only the removal of that principle allowed a new draft of the Directive,[5] featuring a very long list of exceptions and reservations to the basic freedom to provide services throughout the EU, to be finally approved by the Parliament and adopted jointly with the Council in late 2006.

Services trade liberalization is also highly controversial in the global economic liberalization context.[6] At the same time as the Bolkestein Directive

1. The problematic character of such multilateral commitments is discussed by Hoekman, Mattoo and Sapir, 'The Political Economy of Services Trade Liberalization: A Case for International Regulatory Cooperation?', *Oxford Review of Economic Policy* 23 (2007): 367, who also review recent developments and literature in the services trade field.
2. Monti, 'Competition in Professional Services: New Light and New Challenges', speech at Bundesanwaltskammer, Berlin, 21 Mar. 2003. For an analysis of the legal complementarities and differences between the two policy areas, see Mortelmans, 'Towards a Convergence in the Application of the Rules on Free Movement and on Competition?', *CML Rev.* 38 (2001): 613, and quoted literature thereby, emphasizing the 'primary and overriding objective of the provision on free movement and competition: the establishment and operation of the Common Market', 623.
3. Commission's Proposal for a Directive of the European Parliament and of the Council on services in the internal market, COM(04)2fin/3.
4. See the Gebahrdt's Report, named after of the German PSE MEP who was rapporteur for the EP Committee on the Internal Market and Consumer Protection's at first reading, on 15 Dec. 2005.
5. Directive 2006/123/EC of the European Parliament and of the Council of 12 Dec, 2006 on services in the internal market, OJ 2006, L 376/36.
6. See Breining-Kaufmann, Chadha and Winters, 'The Temporary Movement of Workers – GATS Mode 4', in Winters and Pradeep (eds), *Bridging the Differences: Analysis of Five Issues in the WTO*

encountered formidable obstacles in the EU co-decision process, the Doha Round of trade negotiations was stuck on issues involving also services market access. At the Hong Kong Ministerial Conference of the World Trade Organization (WTO),[7] developing countries expressed fears of losing 'policy space' should their (public) services be opened to foreign competition, especially since their citizens' access to developed countries for the purpose of providing services is still restricted by temporary work-permit and visa policies. Further negotiations are in progress, but it is not yet sure that the conclusion of the Doha Round will include agreement regarding the services area.

The European and global liberalization processes, in interaction with national regulatory frameworks, are particularly controversial in areas of international economic activity involving temporary mobility of natural persons.[8] While the physical presence of strangers may excite some of the same cultural tensions as immigration,[9] policy issues interestingly also arise from economic considerations. In the labour and service markets, what is traded is more closely linked to personal qualities and individual well being than in the case of goods exchange, where impersonal technical characteristics can be harmonized and/or subject to mutual recognition. Standard legal integration techniques are politically difficult, as they may be perceived to be tantamount to deregulation, an unappealing outcome for countries that – for a variety of reasons – do extensively regulate their labour and services markets.

As we discuss in detail in a companion paper,[10] economic integration makes it possible to exploit comparative advantage and specialization opportunities, and fosters the efficiency of competitive market interactions. Markets are not

Agenda (Jaipur, CUTS, 2003); Foote, 'The General Agreement on Trade in Services: Taking Stock and Moving Forward', *LIEI* 29 (2002): 7; Domínguez and Jara, 'Liberalization of Trade in Services and Trade Negotiations', *JWT* 40 (2006): 113 for a review of the relevant negotiations.

7. WTO Ministerial Conference, Doha Work Programme, Ministerial declaration, adopted on 18 Dec. 2005, WT/MIN(05)/DEC.
8. Lavenex, 'The Liberalisation of Trade in Services as a Venue for Economic Immigration in Europe: Links Between the EU and the GATS', paper presented at ECPR Workshop *Beyond Fortress Europe? New Responses to Migration in Europe: Dual Nationality, Co-development and the Effects of EU Enlargement*, Copenhagen, 14-19 Apr. 2000, offers preliminary insights into links between international WTO negotiations and European integration in the area of trade in services. More general issues arising in the field of economic migration are analyzed in Trachtman, 'The Role of International Law in Economic Migration', Society of International Economic Law (SIEL) Inaugural Conference (2008), Paper Available at SSRN: <http://ssrn.com/abstract=1153499>.
9. Bhatnagar, 'Liberalising the Movement of Natural Persons: A Lost Decade?', *The World Economy* 27 (2004): 459 notes that socio-political barriers may be in the way of liberalization of worker movement, and argues that the temporary nature of service provision mobility is unlikely to have lasting social and cultural spillovers. As pointed out by Epstein, Hillman and Weiss, 'Creating Illegal Immigrants', *Journal of Population Economics* 12 (1999): 3, however, temporary work visits can easily turn into illegal permanent immigration.
10. Bertola and Mola, 'Services Provision and Temporary Mobility: Freedoms and Regulation in the EU' typescript (Università di Torino, 2008).

always perfectly competitive, however, and at the same time as trade becomes increasingly free across countries, within each country, trade is not completely free, but remains subject to tax and regulation policies meant to offset market imperfections and to influence the distribution of economic welfare. 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. Larger and more powerful markets improve welfare when they work well, but can certainly lower welfare when market outcomes are not optimal.

In this article, we focus on how legal techniques may resolve tensions between regulation and economic integration in the context of the Community Single Market programme's completion, and of the EC's and its Member States' participation in the GATS. Section 2 outlines a framework of analysis for economic and legal integration processes. Section 3 analyzes regulation of mobility provision of services within the EU. Section 4 discusses from a similar perspective the issues arising in the context of external negotiations regarding provision of services in EU countries by third-country nationals. Section 5 concludes summarizing lessons from recent experiences, and outlining how legal and policy uncertainty may be resolved as integration proceeds in these and other areas.

2. Legal and Policy Frameworks for Market Integration

The organization of markets requires collectively agreed upon 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.

2.1. Techniques of Legal Integration

The complex task of ensuring that legal frameworks are consistent with or conducive to markets' 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 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.[11]

11. See Ortino, *Basic Legal Instruments of trade Liberalization – A Comparative Analysis of EC and WTO Law* (Oxford, Hart Publishing, 2004), 16-30, for a complete and critical overview of approaches to trade liberalization (e.g., by growing intensity of integration: reduction of tariffs

In practice, these concepts and techniques are involved in processes of 'negative integration', consisting essentially of prohibition of impediments through relative or absolute rules; and in processes of 'positive integration', which specify comprehensive rules and imply new rule-making powers: a form of positive integration is harmonization. Very often, these techniques and underlying concepts are combined in an effort to liberalize and integrate markets and laws (as in the case of the Service Directive, see below Section 3.2).

'Absolute' rules are content based. When aimed at ensuring market integration, their provisions make explicit reference to existing obstacles to international economic transactions and provide for their treatment (in 'negative' form when they prohibit application of specific requirements, or in 'positive' form when they mandate common requirements or regulation, on particular aspects). 'Relative' rules are contingent on another class of rules. They are easier to specify by policy-makers or negotiators than an explicit list of absolute provisions, potentially much more far-reaching than limited concessions, and can adapt automatically to changes in the reference set of rules.

One specification of the relevant contingent rules is based on non-discrimination principle, among foreign goods, or services or traders ('most-favoured nation treatment', hereinafter, MFN), or between foreigners and nationals ('national treatment', whereby the rules of the country of destination apply regardless of products' origin or traders' nationality). As the prescription of equal 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. Aiming at ensuring that relevant transactions are treated equally regardless of the origin of the parties or goods, non-discrimination rules need to rely upon a relatively vague and problematic concept of 'similarity' as regards their applicability as well as their prescriptions.[12]

Other relative rules can refer to origin so as to maintain discrimination according to it, on the basis of the 'mutual recognition' or 'country-of-origin' principles. The two terms have similar implications as regards national applicable laws, and are normally used interchangeably in common practice and doctrine. For our purposes, and specifically for our analysis of the Bolkestein Directive, we will however maintain a distinction between mutual recognition of specific requirements or qualifications that are explicitly notified to satisfy common minimum criteria, and the country-of-origin principle as a general

and/or quantitative restriction; prohibition of all trade restrictive measures; prohibition of border measures and of discriminatory domestic ones; adoption of the mutual recognition principle; harmonization of general requirements; or adoption of uniform common rules).

12. We will not review in detail the extensive literature and case law, in both the EC and WTO contexts, on the applicability of non-discrimination (or equality) requirements to debatably 'similar' products, or services, or traders.

rule implying mutual recognition of the other country's whole regulatory framework within a certain scope. The distinction is important because while confidence in each other's national rules can suffice to support mutual recognition of specific regulations, only a much higher degree of confidence (or previous harmonization) can support application of an encompassing country-of-origin principle to broad and poorly delimited fields.

Other economic and legal dimensions of regulatory barriers and of their removal refer to their modes of operation and intensity.[13] 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).

Finally, deregulation can follow two approaches. It can adopt an 'opt-out' technique, whereby all activities are liberalized except for what is specifically excluded in a 'negative list' of derogations (this technique is also dubbed 'top-down' or 'principle/derogation'). Alternatively, it can employ an 'opt-in' (or 'bottom-up') technique, whereby liberalization applies only to rules included in a 'positive' list of commitments. We will discuss their different roles, feasibility and implications particularly when analyzing the structure of the various internal and international instruments available to the EU to regulate service provision by third-country nationals (see Section 4 below).

2.2. Policies and Freedoms

The international trade liberalization and economic integration techniques reviewed above are particularly relevant in the context of the European economic integration process.[14] Internally to the EU, across the borders of Member States, the European Single Market 'negative' integration process enshrined in the EC Treaty (ECT) is meant to prohibit obstacles to the movement and foster market competition. Deregulation, meant to foster market development, is inconsistent with the aim of restraining market forces when they are perceived to be detrimental to welfare. 'Positive' integration, i.e., the harmonization and introduction of common rules through EC secondary legislation and case law, 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 policymaking powers at the supranational Community level, across the four internal freedoms of mobility for goods, capital, services, and persons. The absence of internal

13. Ortino, cited *supra*, n. 11.
14. See Mortelmans, 'The Common Market, the Internal Market and the Single Market, What's in a Market?', *CML Rev*. 35 (1998): 101, for an historical and critical analysis of legal problems related to the internal market evolution.

barriers to trade in goods always requires a common position in external negotiations concerning third-country products' access to the internal market, and in the case of the EU a very high degree of goods market integration had to be accompanied by integration of national markets' legal frameworks. The Single Market Program did not simply abolish explicit barriers to trade, but also painstakingly approximated in 'opt-in' fashion the legislation that would have functioned as implicit barriers to trade if left untouched, and would have left markets unable to function if simply dismantled. Broad mutual recognition, on the basis of the country-of-origin principle established by the '*Cassis de Dijon*' case, played an important residual 'opt-out' role in areas where supranational regulation efforts would have been excessively complex, or unnecessary. Recent developments include proposals for uniform goods market access procedures across EU Member States in fields not covered by EC substantial harmonization.[15] Capital mobility is also essentially free, with some tensions regarding lack of harmonized capital income taxation and of not-yet full external EU representation. Conversely, within-EU personal mobility is much lower than in the US, also because of incomplete legal integration.[16] While labour mobility is formally unrestrained, subsidiary non-harmonized policies still limit access to social infrastructure. This also makes it difficult to devise and implement the EC common immigration policy envisioned by the Amsterdam Treaty.[17] Free movement of services remains rather heavily restrained even after the recent Directive (and this implies peculiarly complex external arrangements, discussed in Section 4). 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 by heterogeneous status quo policy configurations and lack of a suitable 'negotiation' framework.

3. EU Posted Workers and Services Provision Regulatory Frameworks

We proceed to illustrate the limited applicability of a broad country-of-origin principle to the services sector, focusing on two particularly controversial

15. See A.S., *From the Board*, 'Institutionalization of Market Access', *LIEI* 35 (2008): 1, on the Commission's Proposal for a Regulation of the European Parliament and of the Council laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State and relating Decision 3052/95/EC, COM(07)36fin.
16. Finkin and Jacoby, 'Labour Mobility in a Federal System: The United States in Comparative Perspective', *International Journal of Comparative Labour Law and Industrial Relations* 20 (2004): 313.
17. Kuijper, 'Some Legal Problems Associated with the Communitarisation of Policy on Visas, Asylum and Immigration under the Amsterdam Treaty and Incorporation of the Schengen Acquis', *CML Rev.* 37 (1999): 345.

integration modes involving personal mobility within the EU: the Posted Workers case, and the Bolkestein effort to achieve a single market in services.

In terms of the legal techniques reviewed above, the ECT provides instruments for a mixed enforcement strategy aimed at preserving suitable regulation in the field of services. Although restrictions to the freedom to provide services within the EC are prohibited as regards service providers who are nationals of another Member State (Article 49, paragraph 1 ECT), this negative provision is not cast in absolute terms. It is only pursued in relative terms, where non-discrimination is provided through the country-of-destination mode (i.e., national treatment) applied to the exercise of service activities (Article 50 ECT). The European Court of Justice (ECJ) rulings on indistinctively applicable measures has progressively strengthened the Treaty freedom,[18] while allowing justification of restrictive measures on grounds of reasons of mandatory requirements, necessary and proportionate to pursue an overriding public interest.[19] The literature on these well-known issues does not view such case law as legally overruling national treatment, however. The enforcement strategy of the Treaty provisions notably also includes elements of positive integration through adoption of secondary law in services markets.[20]

3.1. Posting of Workers

The origins and current configuration of worker posting rules in the EU provide a clear illustration of the Community's approach towards the interaction between free movement of services mandated by the ECT and national systems of social policy, and of the legal techniques and instruments used to implement it.

In the early 1990s, Single Market implementation was a source of stress for the German labour market and Welfare State.[21] German legislation mandating a minimum wage for any worker in its territory triggered a lengthy and heated controversy regarding the legitimacy of such essentially trade-preventing

18. Case C-244/04, *Commission* v. *Germany*, [2006] ECR I-885, para. 30.
19. Case C-76/90, *Manfred Säger*, [1991] ECR I-04221. On the debate on similarities and differences of the ECJ's jurisprudence on Arts 28 and 49 ECT, see Oliver, 'Goods and Services, Two freedoms compared' in *Mélanges en hommage à Michel Waelbroeck* (Brussels, Bruylant, 1999), 1365; Snell, *Goods and Services in EC Law. A Study of the Relationship Between the Freedoms* (Oxford, OUP, 2002).
20. Legislative harmonization stems from a triple source in the ECT: on mutual recognition, expressly provided upon the adoption of directives as far as professional qualifications are concerned (Arts 55 and 47); with regards to specific services (Art. 52); and horizontally, concerning the taking up and pursuit of services activities in another Member State (Arts 55 and 47, para. 2) through coordination of relevant provisions laid down by law, regulation or administrative action in Member States.
21. See Bertola and Mola, cited *supra*, n. 10, for a detailed discussion.

measures in the EU context.[22] From the economic point of view, a minimum wage for posted workers reduces incentives to exploit gains from trade in labour services, just like a minimum price for imports is equivalent to a trade quota. Accordingly, it has negative implications for aggregate welfare across the integrated economic area, and may in fact not suffice to reduce unemployment or to increase welfare in countries where the minimum wage is binding.[23] However, when foreign competitors cause the low wages of native low-skilled workers to fall below welfare benefit floors, substitution of the indigenous poor by foreigners is effectively subsidized by the taxpayers of more generous constituencies. Hence, harmonization of employment conditions may be necessary to support market integration through free movement.

The controversy was originally based on the contrast between two strands of legal developments at the Community level: that aimed at free service mobility (through posted workers, in this case), and that aimed at guaranteeing employees' rights (the terms of employment law applicable to the posting situation). Since the 1990s, The ECJ has held that worker posting is one of the possible modalities for an undertaking established in a Member State to provide services in another Member State.[24] National treatment would then apply, but under the Rome I Convention the parties could choose to apply the country-of-origin's employment law.[25] According to the ECJ, since Member States' labour law pursues national social and other public policy goals, Community law does not preclude Member States from applying their legislation, or collective labour agreements, to any person who is employed even temporarily within their territory, no matter in which country the employer is established. And as the ECJ views protection of workers as an overriding reason of general interest, Member States may enforce those rules by appropriate means when it is found that the protection thereby conferred is not guaranteed by identical or essentially similar

22. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?', CML Rev. 34 (1997): 571; Giesen, 'Posting: Social Protection of Workers vs. Fundamental Freedoms?', *CML Rev*. 43 (2003): 143.
23. Meier, 'Economic Consequences of the Posted Workers Directive', *Metroeconomica* 55 (2004): 409.
24. Case C-133/89, *Rush Portuguesa*, [1990] ECR I-1425, at para. 15. Until the 1990s 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, which is by definition based on temporary mobility (Art. 50, last sentence, ECT). See Houwerzijl, 'Towards a More Effective Posting Directive', in Blanpain (ed.), *Freedom of Services in the European Union. Labour and Social Security Law: The Bolkestein Initiative* (The Hague, Kluwer Law International, 2006), 180.
25. In the absence of a choice, the employment contract could be governed by the law of the country where the employee habitually carries out his work under that contract, i.e., the country-of-origin. Art. 6, para. 2 of the Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 Jun. 1980 (80/934/EEC), OJ 1980, L 266/19, which entered into force on 1 Apr. 1991 among EU Member States.

obligations by which the undertaking is already bound in the Member State where it is established (*Rush Portuguesa*[26] and *Vander Elst*[27]).

This intricate economic and legal situation was addressed by secondary EU legislation, implementing positive provisions through relative rules in Directive 96/71 on posting of workers for purposes of service provision.[28] The Directive imposes application of the Member State of destination's employment law.[29] Thus, the Directive turns into an obligation the option granted by Article 7 of the Rome I Convention, according to which the country with which the situation has a strong connection may impose more stringent or burdensome mandatory rules than those of the applicable law. The country of destination's regulations (i.e., national treatment) can be excepted, on the favour principle basis, when working conditions in the home country are better than in the host country.[30]

The Directive also delimits the set of relevant labor law aspects subject to the host country's rules, thus establishing a list of mandatory requirements on the terms and conditions of employment that are to apply to posted workers' situations, without however harmonizing their substantive content, and allowing Member States to impose other requirements for reasons of public policy.[31] Severely incomplete harmonization has generated much ECJ case law, mostly originating from construction sector controversies, on the applicability of provisions regarding minimum wages, social contribution, working conditions, and control systems.[32] Most recently, the ECJ also contributed to tighten the

26. Cited *supra*, n. 24.
27. Case C-43/93, *Raymond Vander Elst* v. *Office des Migrations Internationales*, [1994] ECR I-3803.
28. Directive 96/71/EC of the European Parliament and of the Council of 16 Dec. 1996 concerning the posting of workers in the framework of the provision of services, OJ 1997, L 18/1. The scope for this act was allowed by Art. 20 of the Rome I Convention, whereby the Convention was to be applied without prejudice of any Community legislation and implementing national measures taken in particular matters covered by the Convention. The German legislation was only mildly revised upon implementation of the Directive, see Deinert, 'Posting of Workers to Germany – Previous Evolutions and New Influences Throughout EU Legislation Proposals', International *Journal of Comparative Labour Law and Industrial Relations* 16 (2000): 217.
29. As the Directive's legal basis was set in the free movement of services the Council could approve the act by qualified majority vote, thus overriding the British Conservative government's veto to common legislation in the social field. On de jure and de facto pressures on national welfare systems through market integration, see Leibfried, 'Social Policy', in Wallace, Wallace and Pollack (eds), *Policy-Making in the European Union*, 5th edn (Oxford, OUP, 2005), 243.
30. Directive 96/71/EC, Art. 3, para. 7.
31. Ibid., Art. 3, para. 9. See Case C-490/04, *Commission* v. *Germany*, [2007] ECR I-6095.
32. The issue is always that of which law should be applied, and the decision is always based on a comparison between the posted workers' protection under the home State and the host State laws. See Case C-272/94, *Guiot*, [1996] ECR I-1915; Cases C-369 & 376/96, *Arblade and Others*, [1999] ECR I-08453; Case C-165/98, *Mazzoleni*, [2001] ECR I-2189; Cases C-49, 50, 52, 68 to 71/98, *Finalarte*, [2001] ECR I-7831; Case C-164/99, *Portugaia*, [2002] ECR I-787; Case C-60/03, *Wolff & Müller*, [2004] ECR I-9553; Case C-433/04, *Commission* v. *Belgium*, [2006] ECR I-10653. In the last three cases, for the first time, the comparison involved very different

definition of the 'public policy', notions which Member States may invoke in order to apply national regulatory requirements outside the coordinated fields.[33]

As in other contexts the Court's case law tends towards harmonization of national applicable measures, and the Commission has been working in the same direction by bringing national legislation deemed contrary to Community law before the ECJ, on the one hand, and by issuing guidelines on how to interpret Article 49 ECT's *acquis* and how to achieve Directive 96/71's objectives in an efficient manner, on the other hand.[34]

3.2. Cross-Border Provision of Services

In general, international liberalization is inconsistent with stringent internal regulation, whether meant to protect producers' income or the quality of available services.[35] In the international context, lack of harmonized regulation is a steep obstacle to effective integration when service providers' skills are difficult to ascertain and poor judgment can have direct consequences, as in the case of medical services. These tensions were all very apparent in the controversies surrounding efforts to liberalize trade in services within the EU.

In what follows we review briefly the evolution of legal techniques on recognition of diplomas and professional qualifications. Initially, directives covered qualifications in highly regulated services sectors, setting minimum common standards of training and education[36] and obliging Member States to 'passively recognize' specific qualifications that were declared as complying with these common standards by the Member State of issuance.[37] A stronger mutual recognition principle was then established through the two general systems for professions accessible with higher education diplomas[38] and lower

levels in wages, such as those prevailing in Germany and in Portugal. In Case C-341/02, *Commission* v. *Germany*, [2005] ECR I-02733, 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.

33. Case C-438/05, *Viking*, [2007] ECR I-00000, and Case C-341/05, *Laval*, [2007] ECR I-00000.
34. See Commission's Communication on Posting of workers in the framework of the provision of services: maximizing its benefits and potential while guaranteeing the protection of workers (COM(07)304fin), and the relative Commission staff working document (SEC(07)747).
35. See Paterson, Fink, Ogus, et al., *Economic Impact of Regulation in the Field of Liberal Professions in Different Member States*, I.H.S. Study for the European Commission (Vienna, 2003) for a review of professional services regulation and of its economic impact in EU member countries.
36. Namely, the professions of nurse responsible for general care and free movement of lawyers (1977), dentist and veterinary (1978), midwife (1980), architect and pharmacist (1985), doctor (1993) and establishment of lawyers (1998).
37. Craig, De Burca, *EU Law*, 4th edn (Oxford, OUP, 2007), 835, note 217.
38. Council Directive 89/48/EEC, OJ 1989, L 19/16.

levels of training,[39] consolidated in Directive 2005/36.[40] The Directive applies the mutual recognition principle to all regulations on entry and pursuit of a profession as regards professional qualification, while national treatment rule 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 of titles and serious professional malpractice linked to consumer protection and safety.[41] While stipulating a specific set of obligations and prohibitions, with significant exceptions and information duties,[42] the resulting mutual recognition framework is so broad as to imply application of country-of-origin regulation to a whole range of aspects regarding professional qualifications. As is the case whenever relative rules are used, there is room for efforts towards legislative harmonization.

Within the Commission's Internal Market Strategy for Services[43] and the Lisbon Strategy, positive integration in the form of a mix of relative and absolute rules was comprehensively sought by the Bolkestein Proposal of a Directive on services in the internal market.[44] To this end, the Proposal broadly 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 field' (Article 16, paragraph 1) and are prohibited from imposing on foreign service providers any of the requirements included in an absolute and comprehensive list. The State of origin would have been responsible for supervising the provider and its services, including services provided in another Member State (Article 16, paragraph 2).

Because the country-of-origin principle would have applied across the board to service activities, the proposed Service Directive would have differed from sector-specific directives on Television without frontiers,[45] postal services[46] and financial services.[47] Some of these harmonizing instruments do contain the home-country principle, although its use 'appears practical for reasons associated with the type of service'.[48] Unlike earlier applications of the mutual

39. Council Directive 92/51/EEC, OJ 1992, L 209/25.
40. Directive 2005/36/EC of the European Parliament and of the Council of 7 Sep. 2005 on the recognition of professional qualifications, OJ 2005, L 255/22.
41. Ibid., Art. 5, para. 3.
42. Ibid., Arts 6-9.
43. Commission's Communication on an Internal Market Strategy for Services, COM(00)888fin.
44. Cited *supra*, n. 5. See De Witte, 'Setting the Scene – How Did Services get to Bolkestein and Why?', European University Institute Working Paper of the Law Department (2007), for an insightful analysis on the genesis, the evolution and the final outcome of the Services Directive.
45. Council Directive 89/552/EEC, OJ 1989, L 298/23.
46. Directive 97/67/EC of the European Parliament and of the Council, OJ 1998, L 15/14.
47. In particular, Directive 2004/39/EC of the European Parliament and of the Council, OJ 2004, L 145/1.
48. Graham, 'Mutual Recognition and Country of Origin in the Case-law of the European Court of Justice', in Blanpain, cited *supra*, n. 24, 45.

recognition principle in the sectoral qualifications directives, which mandated it only with regard to specific rules singled out and notified by the home country on the basis of agreed criteria, the Proposal expressly provided for the recognition of the whole set of home-country rules within the coordinated field.

It is true, however, that the impact of this broad country-of-origin principle would have been buffered by a generous 'opt-out' approach, where 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 EU-level harmonization, the degree of administrative cooperation, or further Community instruments. Targeted harmonization was considered residually, only if necessary to ensure protection of the general interest in certain essential fields, notably that of consumer protection, where too wide a divergence in the level of protection would undermine the mutual trust that is vital to the acceptance of the country-of-origin principle.

Although it provided for such 'adjustments' vis-à-vis the country-of-origin principle, the Proposal was not well received. After a drawn-out co-decision process, Directive 2006/123/EC[49] was the result of a compromise between the Commission and the Council, on the one side, and the Parliament, on the other side. As regards the adopted text, the issue at stake is at least two-folded and still on the table for discussion and implementing evidence: on the one hand, whether the final compromise is actually much less far-reaching in liberalizing and integrating national service regulation; on the other hand, whether it has preserved EU (national) social models at the expenses of Internal Market promotion.[50]

First of all, the Services Directive's coverage is limited because it does not apply to whole categories of legislation, among which regulation of services of general interest, labour law and social security legislation (Article 1) and to whole sectors of the economy such as services of work temporary agencies, healthcare services, social services related to social housing, childcare and support of families and persons, and the field of taxation (Article 2). Moreover, it is provided that other EC law, including the above-mentioned Directives 96/71 on posted workers and 2005/36 on professional qualifications, should prevail.

Within its scope, the Directive relies mainly on an 'opt-out' approach, with flanking measures. As to the latter, indeed, the Directive sets EU-level standards and requirements in view of 'managing' the proper functioning of the Internal Market rather than of harmonizing the substantive conditions on the access

49. Cited *supra*, n. 5. For the threats to Community *acquis* in the field of freedom to provide services by the changes promoted by the European Parliament, see Editorial comment, *CML Rev*. 43 (2006): 307.

50. Davies, 'The Services Directive: Extending the Country of Origin Principle, and Reforming Public Administration', *ELR* 32 (2007): 232.

and exercise of the service activity.[51] To this end, the Directive targets administrative simplification and provides for facilitating measures such as the right of information. The seminal issue of the quality of services (see above Section 1) is considered 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 the possibility of multidisciplinary activities (while admitting application of certain requirements), to encourage voluntary adoption of quality policy instruments by service providers, and finally to take some measures for the settlement of disputes.[52]

As to the 'opt-out' technique for liberalizing provision of services, Chapter IV on free movement of services no longer mentions the country-of-origin principle. The statement that the Member States 'shall respect the right of providers to provide services in a Member State other than that in which they are established' (Article 16, paragraph 1, first sentence) appears to establish an absolute provision for market access and treatment, not contingent upon another set of norms, either in the form of national treatment as in Article 50 ECT or with reference to the home-country principle in the Proposal. Home-country regulations, of course, should be complied with by a service provider irrespective of the country where it moves to provide a service. Enforcement of such regulations may be problematic: in the event of the temporary movement of a provider to another Member State, the Directive appears to assign supervision to the Member State of establishment, but also tasks the host country's government with a duty to inform the Commission and other Member States in case of serious damage to health and safety of persons or to the environment.[53] And since even full compliance with home-country rules may conflict with a desire for more stringent regulation, the Directive allows limited and coordinated – but, in practice, very broad – means for Member States of destination to make access to, or exercise of, a service activity on their territory conditional on compliance with their own requirements.

As regards the freedom-of-provision principle, it is achieved using a 'negative' technique. On the one hand, imposition of some requirements is specifically forbidden by an 'absolute rule' (Article 16, paragraph 2), and may even result in positive discrimination where some or all of these requirements are imposed on national service suppliers.[54] On the other hand, by virtue of Article 16, paragraph 1, third sentence and Article 16, paragraph 3, Member States are generally prevented from applying requirements which do not comply with the principles of non-discrimination (i.e., supposedly, national treatment), of

51. A.S., cited *supra*, n. 15.
52. Directive 2006/123, cited *supra*, n. 5, Arts 22-27.
53. See more in Barnard, 'Unravelling the Services Directive', *CML Rev*. 45 (2008): 323, 363.
54. For a comparison between these forbidden requirements and the list provided by the multilateral regime of the GATS, Art. XVI, as well as for a discussion of the implications, see *infra* Section 4.

necessity (objective-based justifications are exhaustively listed in a limited way with respect to the ECJ case law on mandatory requirements, and concern public policy, public security, public health, and the protection of environment), and of proportionality. However, this implies that Member State may regulate service provision by other EU service providers, as long as they justify the breach according to these 'opting-out' conditions. It has been noted that these justifying elements could also apply to the specific forbidden derogations of Article 16, paragraph 2.[55] Moreover, and interestingly from the point of view of the economic analysis drawn in Sections 1 and 2.2 above, Member States may apply their own rules on employment conditions (Article 16, paragraph 3). In addition, fourteen fields of activity are explicitly excluded from the coverage of Article 16, such as Community legislation on posted workers and on administrative procedures for free movement of citizens and their family, and national legislation on third-country nationals according to the Schengen system. Finally, Article 18 provides for the possibility of case-by-case derogations. Overall, it appears that the freedom as expressed in Article 16, paragraph 1, first sentence, which would imply sole regulation by the home country, is to a large extent residual to the application of national treatment justified by the four objectives, and limited by employment conditions, in fourteen fields of activity, on case-by-case and by the Directive general scope. Thus the 'opt-out' formal approach is substantially blurred.

The right of 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, but it had to be limited and derogated in many and varied ways because the limited harmonization of Member States' regulations afforded by mutual recognition of some diplomas and qualifications on an 'opt-in' basis, and by the Services Directive's own quality of services provisions, could not support full liberalization. In the absence of suitably harmonized regulation of substantial conditions of service provision within the internal market, the Bolkestein Directive in its original formulation was doomed to fail, as the home-country principle would have resulted in a poorly harmonized and fragmented regulatory framework.

4. Third-Country Nationals and EU Trade in Services

As discussed in the previous section, when dealing with the internal aspects of services market integration the EU legal order employs both negative and positive instruments, resorting mainly to relative and 'opt-out' techniques. However, its far-reaching liberalization objectives are hindered by pervasive regulation of services provision, which is neither harmonized, nor subject to

55. Barnard, cited *supra*, n. 53, 364.

common regulation at the EC-level (except in limited fields). Thus, the sweeping liberalizing potential of the legal tools adopted is blunted by many exceptions and derogations introduced through secondary legislation as well as by ECJ case law.

In this section we analyze relationships between the resulting regulatory framework and that applicable to non-EU service providers, and between the legal tools adopted in the two contexts. Internal and external aspects of services provision access are obviously related in many ways, and their interaction is particularly evident as regards services provision by third-country nationals in the EU. If the internal market were complete, it would be futile to deny free movement to supply a service in another Member State to third-country nationals who have been allowed into the EU: common regulation or harmonized rules would have to be uniformly applicable both to third-country nationals who wish to establish themselves or reside in a Member State and provide a service, and to those service providers coming to the EU just to provide a service occasionally and temporarily.

Just because market integration in services is still imperfect, and regulation of a common legal migration policy is still in the making, the EU remains nationally fragmented towards third-country nationals who provide services. Recent legal developments have however tended to extend the freedom to provide services and harmonized rules of access to service providers from third countries or by third-country nationals already in the EU. Pressure towards such liberalization does not only reflect a desire to achieve internal market integration. It is also a result of the increasingly prevalent political view of the EU as an 'area of freedom' for long-term residents as well as for EU citizens, and of trade policy developments within WTO and regional negotiations placing increasing pressure on the EU and its Member States to adopt common rules vis-à-vis their partners.

In the following, we first outline how 'internal' market integration tensions have brought about harmonization of national laws regarding third-country nationals who, once allowed into the EU, wish to enter another Member State in order to provide services. Next we discuss 'external' aspects of the same set of issues, namely the conditions for access by third-country nationals to the services market(s) of the EU. Focusing in particular on the legal techniques employed in regulating conditions by Member States or at the EU level, we shall argue that dealing with 'external' issues can provide a technically and politically useful pathway towards 'internal' EU harmonization. Unlike the efforts to foster services market integration analyzed in the previous section, in fact, EU internal and international approaches towards third-country service providers, which supply a service in the EU, are not based upon negative integration complemented by relative rules. Rather, they seek to harmonize criteria among Member States. As we shall see, the resulting framework features elements of common rules, albeit mostly of the 'relative' type, along with residual national access barriers vis-à-vis foreigners.

4.1. Intra-EU Mobility

The issue of within-EU movement of third-country nationals for service provision is a peculiar example of the tensions generated by the Community fundamental freedom to provide services and the integration of differently regulated markets. Different rules apply depending on whether third-country nationals are independent service suppliers established in a Member State, or dependent workers employed by an EU service supplier.

According to Article 49, paragraphs 1 and 2 ECT, third-country nationals are not covered by EC rules on freedom to provide services. Limited opportunities for EU-wide access result from the combined provisions of Articles 55 and 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' (Article 48 ECT). Such third-country nationals are not entitled to rights of free movement as physical persons: provisions for free movement of services are applicable to them only through such companies. This certainly does not foster market integration,[56] and implies that branches of third-country companies in the EU are excluded from the freedom to provide services. Indeed, Article 49, paragraph 2 ECT also 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'. In 1999, the Commission issued a Proposal aimed to this goal.[57] To define the covered service providers, the proposed legislation relied both upon home (residence) country regulation and on conditions set at the E level: they had to lawfully have set up a main establishment in a Member State and have residence there, according to the laws of that State, and have exercised the provision of services from that establishment for at least twelve months. As to liberalization of their access to a Member State other than the one of establishment, a mixed technique of 'negative' prescriptions and harmonization of conditions was used. The Proposal prohibited Member States of destination from requiring entry or exit visas, residence permits, or authorizations to provide services from the service provider. In lieu of any such requirement, it envisaged an 'EC service provision card' to be obligatorily issued by the Member State of establishment upon confirmation of affiliation to the social security scheme of the competent Member State. The other Member States then could not deny access other than on public order, security or health grounds. The Proposal, however, focused mainly on access. Equal treatment of third-country nationals and citizens of the Union in their capacity as service providers was assured only as regards

56. Condinanzi, Lang and Nascimbene, *Cittadinanza dell'Unione e libera circolazione delle persone* (Milano, Giuffrè, 2006), 179.
57. Commission's Proposal for a Council Directive extending the freedom to provide cross-border services to third-country nationals established within the Community, COM(99)3 fin.

the recognition of diplomas and qualifications; beyond this, the prescribed treatment of the covered service providers did not go beyond 'more favourable treatment' by reference to self-employed persons established outside the Community. Although the Commission prevented Member States' fears by stressing that the proposed legislation would not affect the application of national provisions affording such service providers a social protection equivalent to that enjoyed by posted employed workers (see below), the Proposal was blocked by the Council, which could not find enough positive votes to form a qualified majority.[58] More recently, although Directive 2003/109[59] grants third-country nationals who under the terms of the Directive are long-term residents in a Member State the right to exercise an autonomous activity on a national-treatment basis as well as the right to reside for more than three months in another Member State, it expressly excludes from its coverage both posted workers and service providers for the purposes of cross-border provision of services.[60]

As third-country nationals employed in a Member State were not covered by Article 39 ECT on free movement of workers,[61] the Community *acquis* on the issue consists of case law on the freedom to supply services, and provides an example of how, when resolution is strongly necessary, a legislative standoff can be resolved by judicial power. Posting of third-country nationals by EU service providers was the matter of the well-known *Vander Elst* case.[62] At the time when posting of workers became a sensitive issue (see Section 3.1 above), third-country nationals posted into another Member State had to comply with the migration requirements of that Member State. Unless the person concerned was a citizen of a country, which had an international agreement providing for free movement either with the EC or with the Member State of posting, Community service providers employing third-country workers would suffer a competitive disadvantage because of the extra-costs imposed by these authorizations and procedures, and the freedom to provide services through national treatment would have been hampered. In *Vander Elst*, the Court held that EC law precludes Member States from requiring work permits issued by a national immigration authority for temporary posting of workers by undertakings that 'lawfully and habitually employ' (the '*Vander Elst*'s formula') nationals of non-member countries who do not in any way seek access to the labor market in the State where they are posted. The Court thus formulated Community-level

58. Since the Single European Act (1987), the Council decides by a majority vote in this area but such a decision has not been taken so far.
59. Council Directive 2003/109/EC of 25 Nov. 2003 concerning the status of third-country nationals who are long-term residents, OJ 2004, L 16/44.
60. Ibid., Art. 14, para. 5.
61. Article 39 ECT's reference to 'workers of the Member States' has generally been interpreted as applying, together with its derived legislation, to Member States' citizens only. See Case C-147/91, *Laderer*, [1992] ECR I-04097, paras 7-9; Regulation 1612/68 of the Council of 15 Oct. 1968 on freedom of movement for workers within the Community, OJ 1968, L 257/2, Art. 1.
62. Cited *supra*, n. 27.

criteria according to which the so-called 'Vander Elst's visa', i.e. free market access, had to be delivered to third-country posted workers.[63] Member States' authorizations were bound to these Community-based requirements, unless overriding reasons relating to the public interest capable of justifying restrictions on the freedom to provide services applied (e.g., prevention of abuses to access the employment market, the protection of workers and legal certainty).[64] Thanks to the ECJ's case law enhancing the ECT freedom to provide services, Community requirements were thus finally introduced as regards intra-E movement of third-country nationals under the posting of workers in the service sectors. This *enclave* in EU law is still in place.

4.2. External Access to EU Services Markets

The EU has no common internal rules on the access and exercise of services provision from firms and self-employed suppliers from outside the EU, either when these third-country service suppliers wish to migrate into a Member State for the purposes of an economic activity ('economic migration'), or when they provide their service on a temporary basis. In the latter situation, however, the EC and its Member States are internationally bound to their commitments made under the GATS and some bilateral agreements. As to the former situation, indeed, the Commission has sought twice to take legislative action under its recently established migration policy, based on Article 63, paragraph 3 ECT. These two subsequent attempts are an interesting example of the fine-tuning of approaches and techniques by the Commission in order to breach Member States' opposition to common rules. The legislative path of the newer proposals is far from complete and, while interestingly comparable to the early stages of its predecessor and of the ill-fated Bolkestein Directive in its original formulation, might yet be successful and incisive in the end.

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.[65] This may be viewed as an attempt to achieve 'positive integration' of Member States' markets

63. See Hedemann-Robinson, 'An Overview of Recent Legal Developments at Community Level in Relation to Third Country Nationals Resident Within the European Union, with Particular Reference to the Case Law of the European Court of Justice', *CML Rev*. 38 (2001): 525 and literature referred therein.

64. Cases C-369 & 376/96, *Arblade and Others*, cited *supra*, n. 32. In the recent Case 244/04, *Commission* v. *Germany*, cited *supra*, n. 18, 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, 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 found against Germany on both counts, because of the unnecessary and disproportionate character of the measures to pursue Germany's public interest objectives.

65. COM(01)386fin.

vis-à-vis external parties because of its broad coverage and intent to pursue extensive regulation of issues ranging from common criteria for admitting such third-country nationals (such as 'economic needs test' and 'beneficial effects test'); to a single national application procedure leading to one combined title, encompassing both residence and work permit within one administrative act; to the conferral of a right of entry whilst respecting Member States' discretion to limit economic migration: with an 'opt-out' technique, if third-country workers and self-employed persons fulfilled all the conditions set out in the proposed Directive they should be admitted, unless Member States imposed those limitations allowed by the Directive itself (e.g., national ceilings or limitations based on reasons of public policy, security or health). The Proposal did not go beyond the first reading in the Council, which had to decide by unanimity (Article 67 ECT).

The issue was once again dealt with by the Hague Programme[66] in late 2004 and by a Green Paper[67] in early 2005. At the end of 2005 the Commission published a Policy Paper on Legal Economic Migration,[68] and followed up with two directive proposals in October 2007.[69] Like the second version of the Services Directive, they are less ambitious than their predecessor, and adopt a different approach. The General Framework Directive Proposal does not address admission conditions and procedures for economic immigrants with the exception of the single application for a joint work/residence permit. It also does not affect the application of the Community preference principle. Formulation of conditions of entry and stay are envisioned to be set by specific directives regarding, in 'opt-in' fashion, only four categories of third-country nationals. The other Proposal, too, only aims at regulating access of highly skilled workers on the grounds of alarming skill-shortages and demographic gaps. Still, as regards post-entry treatment, both the Proposals do intend to guarantee an EU-wide framework of rights to all third-country nationals in legal employment already admitted in a Member State, but not yet entitled to the long-term residence status to whom Directive 2003/109[70] applies.

Therefore, the Proposals do not fully address 'external' access to the EU services market(s), in that they mainly aim at regulating third-country nationals' status once admitted into the EU. In fact, they explicitly exclude overlap with Community or EC and Member States ('mixed') agreements that have

66. The Hague Programme: strengthening freedom, security and justice in the European Union, adopted by the European Council on 5 Nov. 2004, PRES 14292/1/04 REV 1.
67. Green Paper on an EU approach to managing economic migration, COM(04)811fin.
68. Communication from the Commission – Policy Plan on Legal Migration, COM(05)669fin.
69. Commission's proposals for a Council Directive on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (COM(07)638fin) and for a Council Directive on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment (COM(07)637fin).
70. Cited *supra*, n. 59.

been or are to be concluded with third countries to govern the legal situation of third-country service providers and workers. Indeed, they arguably build upon the experience that the EU together with its Member States already gathered in formulating their international commitments: in this and other instances, previous experience vis-à-vis third parties may inspire and facilitate internal harmonization efforts.

In this regard, WTO membership offers the EC and its Member States the opportunity to be confronted by third-country service providers within the GATS framework on international trade in services. The fourth modality of supplying a service covered by GATS definitions, 'Mode 4', through temporary movement of physical persons supplying a service, is akin to the traditional concept of service provision in EC law.[71] The approach and techniques adopted by the GATS, however, are very different from those enshrined in the ECT. This may well be rooted in the fact that the GATS does not pursue economic integration but provides for a negotiating framework for progressive liberalization. For the purposes of our analysis, and in terms of the relevant techniques, the GATS is a typical example of an 'opt-in' approach. Like tariff concessions made under the GATT for trade in goods, Members' commitments are the result of bilateral bargains, which are then 'multilateralized' once inscribed in the schedules of concessions. However, as regulatory barriers to market access rather than simpler tariffs are the object of negotiations, the GATS allows for many elements of detail along several dimensions. True, in 'out-out' fashion, the GATS provides overarching MFN treatment among WTO Members (Article II), but an Annex allows for Members' lists of MFN-exemptions in order to balance reciprocity of concessions. Furthermore, the Agreement allows Members to negotiate and choose which sectors and modes of supply to bind into their own schedules of specific commitments. Once a WTO Member has opted-in sectors and/or modes, it is subject to two different obligations in their regards vis-à-vis all other Members. An absolute, negative obligation on Market Access prohibits application of certain content-based limitations, for example on numbers of services suppliers (Article XVI). Moreover, the relative, non-discriminatory rule of National Treatment applies (Article XVII). However, these liberalizing obligations are undermined by the optional and voluntary bargaining nature of Members' specific commitments, which are allowed to include a mode or a sector only under explicitly specified conditions and limitations (Article XX). And flexibility is enhanced by the possibility to insert either horizontal qualified commitments which cover all sectors included in the schedule, or sector-specific conditions and limitations to market access and national treatment, or both.

71. For a general overview of services trade developments and issues, Hufbauer and Stephenson, 'Services Trade: Past Liberalization and Future Challenges', *JIEL* 10 (2007): 605. On Mode 4 specifically, Chaudhuri, Mattoo and Self, 'Moving People to Deliver Services: How Can the WTO Help?', *JWT* 38 (2004): 363.

Internal EU negotiations on the detailed dimensions of GATS commitments provide an interesting setting for resolutions of tensions between international economic liberalization and national regulatory and social policies.[72] Currently, under the amended Nice version of Article 133 ECT, on some aspects of international negotiations and agreements on trade in services the EU has exclusive competence, to be implemented by qualified majority vote or unanimity according to whether internal harmonization has already been exercised. But it must share competence with the Member States in fields where internal harmonization is excluded or in specifically listed fields, such as cultural services.[73]

Accordingly, the EC and the Member States still share competence under the GATS. If the EU were a perfectly integrated market in services, it would be impossible to enforce different entry and exercise conditions across Member States. As the EU market from services is still segmented, the EU does not necessarily express a single position in GATS negotiations, and scheduled commitments still present variations by Member States. Indeed, as GATS commitments typically include detailed lists of conditions, limitations and qualifications, these can differ widely across Member States when they fall within the shared competence, or unanimity could not be found for expressing a common position.

Arguably, the structure of negotiations (internally, within the EU, and externally, with WTO partners) on the schedule of commitments exercises pressure towards formulation of a set of minimum common rules. From the perspective of EU Member States, having to specify and negotiate internally a detailed list of exceptions and limitations to a common position when a commitment is undertaken may prove too bothersome in light of their domestic regulation purposes or their Community objectives. From the perspective of WTO partners, negotiations are obviously more convenient on a common commitment, and put pressure on the EU to provide for legal certainty and access to its EU-wide services market, i.e., for a common position reflecting common or harmonized discipline, in place of national variations and limitations on regulatory barriers.[74]

72. Currently, trade in services is being discussed in the context of the second round of services negotiation, 'GATS 2000', which began in Jan. 2000 and is part of the Doha Development Round's Single Undertaking, still underway.

73. ECJ's Opinion 1/94, *Competence of the Community to conclude international agreements concerning services and the protection of intellectual property - Article 228 (6) of the EC Treaty*, [1994] ECR I-05267. On the issue of competence, and for a broader discussion of EU policies in the WTO, see among others Cremona, 'Rhetoric and Reticence: EU External Commercial Policy in a Multilateral Context', *CML Rev*. 38 (2001): 359; and Id., 'A Policy of Bits and Pieces? The Common Commercial Policy After Nice', *Cambridge Yearbook of European Legal Studies* 4 (2002): 61. See also Leal-Arcas, 'Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice', *LIEI* 30 (2003): 3.

74. As regards investment, see Financial Times, 'Brussels seeks greater power in foreign deals' by A. Beattlie, 11 Mar. 2008.

The Commission efforts to present single concessions to the other WTO members, typically under the form 'all Member States ...', goes hand in hand with its efforts internally to provide for harmonization of requirements on entry, stay and exercise of the service activity within the EU by third-country national service suppliers. Such a tendency towards 'opted-in' common commitments, stemming from the character of legal instruments used in the GATS context, differs sharply from the resistance encountered by internal EU paths of the freedom to provide services.

The extent to which the desired uniformity of commitments is realized is, in practice, limited. The EU GATS schedule in force, dating back to 1995, includes in almost all of its parts a long list of country-specific restrictions. These may reflect the same specificities of each EU Member State's regulatory framework that correspond internally to exceptions, on an 'opt-out' basis, to the principle of freedom to provide services within the EU in the absence of positive harmonization – a principle that, as we argued, would be applicable to third-country providers if it were suitably supported by harmonized regulation. During the 'GATS 2000' round of negotiations, the EU presented its initial offers on improved market access and national treatment (April 2003)[75] and a conditional revised services offer (July 2005).[76] The 2005 offer makes progress mainly in two directions: horizontal commitments on Mode 4 (i.e., categories of persons covered across all sectors) apply through almost all Member States, with very few national exceptions; new categories of service suppliers have been scheduled, entering the EU to provide a service on a contractual basis. The EC and its Member States offer to commit the same categories of service providers, namely: intra-corporate transferees; business visitors (both categories consist mainly of persons working in a senior position moving to the EU in the context of a commercial presence); 'contractual service suppliers' (CSS) independently from commercial presence, encompassing 'employees of a juridical person' (EJP) and 'independent professionals'. CSS, which are *de-linked* from any investments established into a Member State, are indeed granted market access only in specific sectors. In addition, the EC and the Member States' offered schedule imposes conditions and requirements in order to grant access to overseas service suppliers, which are common to all Member States except for those giving up the right to apply these limitations. Common position concerns 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, according to national regulations; numerical ceilings, replacing economic need tests; and maximum periods of stay.

75. WTO, Council for Trade in Services – Communication from the European Communities and its Member States – Conditional Initial Offer, 10/06/2003, TN/S/O/EEC.
76. Id., 29/06/2005, TN/S/O/EEC/Rev.1.

This mixed picture does suggest that the pattern of negotiations on commitments under GATS Mode 4 does feature pressure towards common or harmonized rules. As argued above, the Commission does try to convince Member States to present a common position. This pattern is driven by the internal and external considerations discussed above, and also by other factors. First, negotiations and lobbying at the Commission also involve Europe-wide (rather than country-specific) services providers, whose interests mainly lie with stronger protection against and access to non-EU competitors and markets. Moreover, and equally interesting, there is an obvious de facto tension with internal matters, as a common position requires (and less liberalized Member States often resist) some harmonization and some removal of internal (intra-EU) barriers, as Community services providers cannot face less favorable conditions than non-EU nationals falling under GATS Mode 4. Finally, an external common position backed by internal harmonization serves the interests of the Commission as the institution in charge of external EC representation and the motor of integration vis-à-vis Member States.[77]

5. Concluding Comments

Economic integration is always problematic in areas where regulation is important, and further problems generally arise when an integrated area needs to formulate a common external position. In the case of the EU, the Single Market Program readily implies a common external position as regards trade in goods. At the opposite extreme, the absence of harmonized immigration and citizenship rules obviously prevents EU-level negotiations with third countries as regards migration flows. The field of trade in services and temporary supplier 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.

77. According to Billiet - who analyzes the role of the WTO in enhancing the Commission's powers and the EC's competences in the fields of trade-related intellectual property rights and multilateral dispute settlement – 'From GATT to the WTO: The Internal Struggle for External Competences in the EU', 4 *JCMS* (2006), 899, '[t]he participation of the Commission in the strongly institutionalized setting of the WTO reinforces the powers of the Commission, both internally – vis-à-vis the Member States – as well as internationally', 901.

Internally, legal developments on worker posting and related issues were based on fundamental 'freedom' principles heavily delimited by Member States, acting both internationally and through the Council of Ministers jointly with the European Parliament. In these and other dimensions of the EU's legal evolution, the ECJ's case law inspired by application of fundamental 'freedom' principles plays a crucial role in fostering internal market and policy.[78] In the services market, the attempt by the draft Bolkestein proposal to implement freedom of provision on the basis of a blanket country-of-origin principle was so heavily qualified by 'opt-out' exceptions in the Services Directive as to preserve extensive segmentation of services markets and service regulation.

Along the external dimension of trade in services, access by third-country providers within the EU has been liberalized, albeit to a very limited extent, by a very different legal approach. Rather than extending fundamental freedoms to non-EU persons, secondary legislation has pursued an 'opt-in' harmonization technique, through specification of absolute requirements and prohibitions. Interactions and contrasts between different legal techniques at the internal and external levels are also apparent in the GATS context, where EU countries need to participate (through Commission representation) in external negotiations of 'opted-in' commitments. Pressure towards harmonization of country-specific regulation within the EU results from desirability of a common position on the external front in the field of trade in services.

As regards the aspects of services provision that entail personal mobility, the recent Commission's Proposals for two Council Directives regarding third-country nationals (on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member States and a common set of rights for third-country nationals legally residing in a Member State, and on conditions of entry and residence of third-country nationals for the purposes of highly qualified employment)[79] are consistent with the Commission's earlier role in the legal processes analyzed in this article. They are firmly and sensibly motivated by the need to simplify the currently very intricate regulatory framework discussed in this article. Their adoption could be a first step along a path, motivated by simplification of EU regulation vis-à-vis external parties, which may be conducive to the legislative and jurisprudential harmonization needed for internal market integration to be viable, and to supranational exclusive competence in external negotiations.

78. While we focus on services provision, the issues are of course even more important in the social policy field. See for example Moore, 'Freedom of Movement and Migrant Workers' Social Security: An Overview of the Court's Jurisprudence 1992–1997', *CML Rev.* 35 (1998): 409 and Id., 'Freedom of Movement and Migrant Workers' Social Security: An Overview of the Case Law of the Court of Justice, 1997–2001', *CML Rev.* 30 (2002): 807.

79. Cited *supra*, n. 69.

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